

Enforcement of the arbitration award and the international public policy

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Abstract: Arbitration is an alternative tool to settle disputes far from the justice in accordance with the arbitration condition or the arbitration agreement. It has many positives because it guarantees speed and efficiency in solving the disputes. However, its importance manifests in its effects, i.e., the possibility of its implementation compulsorily inside the state. Nevertheless, accepting the arbitration amid the domestic laws and enforcing it may raise problematic about the extent of the compliance of the arbitral award with the domestic or international public policy.

Keywords: international public policy; arbitration award; enforcement of the arbitration award; the domestic public policy.

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Introduction:

Most of the domestic laws include special rules known as the public policy rules that aim at achieving the general interest of the society and protect it against the violations that may result from the arbitral tribunal during the resolution of the disputes¹. Moreover, in seeking the establishment of justice and equality, the domestic laws exercise control over the arbitration awards². However, they differ in the extent of the judge's control before the enforcement. Some judges limit the control to ensuring the validity of the arbitration award regarding the procedural side and the meeting of all the formal conditions. On the other hands, some judges audit the arbitration award regarding the topic³.

The truth is that the public policy is marked with much vagueness because it is flexible and differs from one state to another; and even in the one state it differs from one era to another. Thus, the concept of the public policy is relative. This makes it difficult to determine the general frame of this concept at the domestic or international levels⁴. If the rules of the domestic public policy aim at the achievement of the general interest and protecting the economic, social, and religious interest against the violations that may be committed by the arbitral tribunal, what is the goal of the international public policy?

The reality proved that the international commercial arbitration is one of the most effective modern tools in solving the international commercial disputes⁵ thanks to the easiness of the procedures and the speed of the decision making. The importance of the topic lies within the fact that the concept of the policy is one of the obstacles that hinder the start of arbitration as a mechanism to solve disputes. In this line, when the national judge does not find a cause to exclude the arbitration award, he resorts to this tool which is coercive most of the time. Therefore, it is necessary to set this concept in its legal frame to give trust for the investor who resorts to arbitration as an alternative tool to solve issues in accordance with the arbitration agreements or arbitration condition and to enable the domestic judge to determine the concept of the public policy and accept the awards of the arbitrators unless they violate the public policy because the protection of the state's legal bases is a core issue.

In return, leaving the notion of the public policy to the judge to refuse the enforcement of any arbitration award that contradicts with the domestic public policy, and subjecting this concept to his absolute power, is a violation of the rights and legal positions acquired in accordance with the arbitration award⁶; all this is related to the domestic public policy contrary to the international public policy. Based on what has been said, we find ourselves obliged to grapple with a paramount problematic that says "what are the rules of the public policy that must be respected by the arbitral tribunal when solving disputes? And to what extent does the judge have authority in refusing the arbitration awards that contradict with the concept of the domestic or international public policy?"

¹ See: Jared, Mohamed & Mohtal, Amna : 'the comprehensive in the international commercial arbitration, the international arbitration award, methods of appeal, and mechanisms of enforcement', New University House, 2021, p. 317.

² See: Al Maamari, Mohamed Hassan Jacem, 'the commercial arbitration and the interventions of the domestic justice', national documents and books house, 2013, p. 153.

³ See: Faouzi, Mohamed Sami, 'the international commercial arbitration, house of culture for publication and distribution', 2012, p. 369.

⁴ See : Ben Torkia, Lynda Adiba, 'the control over the awards of the arbitrators in the international disputes', PhD thesis, University of Jilali Liabes of Sidi Belabas, p. 417 and what follows.

⁵ Kamel, Samia (2019), enforcement of the public policy in the judicial control over the international commercial arbitration awards, *journal of the legal and political sciences*, 10 (2). P. 1129.

⁶ Kamel, Samia, op. cit., p. 1131.

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We shall answer the problematic through the following axes:

- Axis one: the nature of the international public policy and its difference from the domestic public policy.
- Axis two: the authority of the Algerian judge to raise objection to the violation of the public policy.

TITLE I: THE NATURE OF THE INTERNATIONAL PUBLIC POLICY AND ITS DIFFERENCE FROM THE DOMESTIC PUBLIC POLICY

Though the expression “public policy” is used a lot in the international conventions, it has no clear definition. Some jurisdiction considers it is a notion related to the social, economic, and ethical bases in a state to protect the supreme interest of the society⁷. Based on this, the concept of the public policy differs according to the criterion used to determine it. If the concept of the domestic public policy raises no problem for the judge, it differs regarding the public policy in the private international law and the international public policy because we speak about arbitration in the private international relations.

Even in the domestic law, the rules related to the public policy are not always binding as long as they do not violate the bases and principles related to the general ethics and the international general interest⁸. The jurisdiction worked hard to find a definition to the notion of the public policy, but to no avail because the notion of the public policy is flexible and changes with time and space. In this line, what is part of the public policy in a given state at a given time is not considered the same in another state. However, the legal rules related to the public policy are those that aim at a general interest that overcomes the individual interest; thus, any agreement against that is null and void⁹.

Because the notion of the public policy is flexible and fast changing, part of the jurisprudence subjected it to discretion of the judge who identifies the cases where the public policy applies to stop the enforcement of the arbitration award¹⁰. The main point that distinguishes the public policy is the outcomes of violating it which lead any agreement against it to be null and void. In this line, interested parts shall stick to it. Besides, the judge shall object to it without the need to object the litigants¹¹. The attitudes of the jurisprudence and Arabic laws regarding the concept of the international or domestic public policy differ as follows.

First Subtitle: The jurisprudent attempts to identify the concept of the public policy

There is no comprehensive definition for the principle of the public policy because it is relative and flexible¹² and differs from one state to another and from one time to another. On this basis, the jurisprudence failed to set a definition and just identified its bases. Therefore, it

⁷ See: Haddad, Ahmed Hamza, ‘the arbitration in the Arab laws’, house of culture for publication and distribution, (2014), p. 430.

⁸ See: Haddad, Ahmed Hamza, op. cit., p. 431.

⁹ Sanhoury, Abderrazak, ‘the median in the explanation of the civil code’, Arab Renaissance house, p. 399.

¹⁰ See: Bostani, Said Youcef, ‘the development and multiplicity of the methods of the international private problem solving : the particular international law, Halabi legal publications, p. 224.

¹¹ Rifai, Achref Abdul Alim, ‘the agreement on arbitration and the practical and legal problems in the private and international relations’, University thought house, (2006), p. 38.

¹² See: Batania, Amer Feteihi, ‘the role of the judge in the international commercial arbitration’, house of culture for publication and distribution, Amman, (2008), p. 187.

is a set of values and principles on which the legal policy is based in the political, economic, social, and ethical sides of the state with an insistence on the priority of the general interests over the individual interests of the litigants¹³.

The international public policy refers to the set of the general basic rules inferred from the international treaties, the established norms of the international trade, and the agreed-upon principles independently from the domestic law that is applicable in the disputes¹⁴. The international public policy is mainly related to the higher interest of the international society. It is a common policy between the states imposed by the international social values for the coexistence between the societies¹⁵. Violating the public policy by the arbitration award makes the award null and void in all the states and, thus, not enforced. This hinders the parts from reaching the target goals from the arbitration, i.e. the fast resolution of the dispute¹⁶.

Moreover, the notion of the international public policy is so wide that it includes the whole world with its various policies and interests that do not most of the time conform to the public policy of the state where the arbitration award is subject to enforcement. Moreover, the goals behind the international public policy are vague¹⁷. Among the effects of arbitration is the ability of its enforcement in the state where it was issued or in another. The enforcement takes two types:

- Optional enforcement: this type does not raise issues because the judge shall not intervene as the parts apply the decision voluntarily.

- Compulsory enforcement: the role of the judge lies within controlling the arbitration award because the compulsory enforcement does not take place without the judge who gives it an operational term.

Consequently, we can say that the notion of the international public policy has not yet developed. This does not consider the discretion of the judge when considering the enforcement or annulment of the awards of the arbitrators related to the international trade. If the judge is committed to determining the general frame of the domestic public policy, how can he know the principle of the international public policy?

The necessity of getting an enforcement order from the states' courts does not happen a lot in the practice. Most of the time, the award is optionally enforced with the satisfaction of the parties without the need to justice due to the coercive enforcement nature of the arbitration award and the sanction resulting that may reach the suspension from making commercial transactions in the future because this touches the international commercial credibility¹⁸. To sum up what has been said, the independence of the arbitration from the justice is an exaggeration because the arbitration awards are subject to the judicial control in the phase that follows their issuance¹⁹. The Algerian judge is the one who has the discretion to give the operational term to the arbitration award or object to it if he sees it violates the public policy relying on the bases of the international society in the commercial field.

¹³ See: Rifai, Achref Abdul Alim, op. cit., p. 27.

¹⁴ Kamel, Samia, op. cit., p. 1133.

¹⁵ See: Jared, Mohamed & Mohtal, Amna, op. cit., p. 317

¹⁶ See: Jared, Mohamed & Mohtal, Amna, op. cit., p. 318.

¹⁷ See: Khattabi, Mohamed (2020), the public policy and the annulment of the arbitration award, *Journal of the legal and judicial professions*, (05) 06.

¹⁸ See: Ridwan, Abu Zayd, 'the general bases in the international commercial arbitration, Arab thought house, (1981), p. 48 and what follows.

¹⁹ See: Jared, Mohamed & Mohtal, Amna, op. cit., p. 269.

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Second Subtitle: The attitudes of some Arab laws

Algeria adopted the arbitration as a mechanism to settle the international commercial disputes in accordance with law 08/09 of 25 February 2008 about the law of the civil and administrative procedures. Moreover, Algeria ratified with reservation the Convention of New York 1985 on the recognition and enforcement of the foreign arbitral awards in accordance with the Decree 88-233²⁰. Article 1051 and paragraph 06 of Article 1056 of the law of the civil and administrative procedures²¹ show that the Legislator adopted the international public policy, not the domestic public policy, as a basis to determine the judge's power when controlling the arbitration award unlike some comparative laws that explicitly adopted the domestic public policy²².

The attitudes of the Arab laws show that there is a consensus²³ about the effect of the public policy on the enforcement of the arbitration award. In this line, Algeria, Tunisia, and Lebanon are the most influenced by the French law that explicitly adopted the concept of the international public policy and made it a cause for refusing the enforcement of the arbitration award and, thus, turned off the effect of the domestic public policy on the arbitration award. On the other hand, Egypt, Jordan, and Yemen refused this and explicitly provided for the necessity of the compliance of the arbitration award with the domestic public policy because attracting the foreign investors and granting them privileges must not touch the economic, political, social, and ethical bases of the society. This variance in the attitudes of the Arab laws indicates the importance of the international and domestic public policies when enforcing the arbitration award.

TITLE II: THE AUTHORITY OF THE ALGERIAN JUDGE TO RAISE OBJECTION TO THE VIOLATION OF THE PUBLIC POLICY

The intentional public policy, as a concept, has a core role in the annulment of the arbitration award because each violation of this policy makes the award null in the legal system of the state of enforcement. Therefore, what is the authority of the judge in evaluating the public policy and what are the bases he refers to?

First Subtitle: Evaluation of the notion of the international public policy in the annulment action

Paragraph 06 of Article 1056 of the administrative and penal procedures law explicitly provides that it is possible to appeal for annulment against the arbitration award or against the ruling that recognizes it if this award violates the public policy. This Article shows that the Legislator recognizes the international public policy as a basis to consider the annulment action in the international commercial disputes without considering the domestic public policy of the state where the award shall be applied. Thus, the judge who considers the annulment action refers to the requirements of the international public policy to decide the

²⁰ Algeria joined the Convention of New York 1958 in accordance with Decree 88/233 of 05 November 1988 about the joining with reservation.

²¹ See Law 08-09 on the law of the civil and administrative procedures of 25 February 2008, the official gazette N° 21 of 2008, amended and supplemented.

²² See: Bachir, Salim, the arbitration award and the judicial control, PhD thesis in legal sciences, University of Batna, 2010/2011, p.47 and what follows.

²³ Kamel, Samia, op. cit., p. 05.

possibility of recognizing the arbitration award and enforcing it²⁴. On top of that, part of the jurisprudence considers the expression “public policy” as the international public policy that is applicable in the public international relations related to the concept of the private international law²⁵. The international public policy that is recognized in the general theory of the private international law is the most suitable because this description is required by the private international transactions. As for the domestic public policy, it is applicable just in the disputes inside the state²⁶.

The aim behind using the expressions “domestic public policy” and “international public policy” is to distinguish the role of each of the systems and the limits of application. The domestic public policy covers the relations inside the state with a pure national nature to protect the principles of the society and enforce the laws. The judge has the right to invoke it himself. On the other hand, the international public policy covers the private international relations where the judge relies on the core principles that govern the international society²⁷. Thus, based on what has been said, each public policy has a concept and limits of enforcement. However, we must point out that the concept of the public policy is relative and developing with various sources. It cannot be limited to fixed rules that are suitable for each era. Nevertheless, justice in France provides that the international public policy is a fixed principle that cannot be annulled²⁸.

The judge of investigation has the exclusive competency to determine the concept of the international public policy during the enforcement demand, not during the issuance of the award; this is known as the immediacy of the public policy. In this context, whenever the arbitration award violates the international public policy when its enforcement is demanded, even if it is not during its issuance, the judge considers the concept of the international public policy and rules the annulment if he makes sure of the violation²⁹. The jurisprudence and justice provide that the arbitration award shall be annulled if it violates the international public policy in a dangerous and real way that affects the basic principles of the private international public policy. In this line, each violation that does not amount up to this concept shall not be considered as a reason for annulment³⁰.

On the other hand, part of the jurisprudence considered that the international public policy does not refer to rules with an international source; rather, rules of the public policy of the state of the enforcing judge. However, these rules have higher binding nature than the domestic public policy rules. On this basis, there are two levels of policy in the one state; the lowest is the rules of the domestic public policy while the highest is the rules of the

²⁴ See : BenTorkia, Linda, op. cit, p. 418.

²⁵ See, Abdul Hamid, Abdul Motalib & Dasoqi, Inaam Assayd, the effect of the public policy on the arbitration award and its enforcement, Journal of the legal security, Dubai Police Academy, 02 (2008), p. 25.

²⁶ C. Seraglini, Le contrôle de la sentence au regard de l'ordre public international par le juge étatique, Les cahier de l'arbitrage, 2010 , p.214.

²⁷ See : BenTorkia, Linda, op. cit, p. 420.

²⁸ See: J. Jourdan-Marques, La cour de cassation crève l'abcès sur l'ordre public international, chronique d'arbitrage, D. actualité le 20 mai 2022

²⁹ See: Ben Torkia, Linda, the conformity of the awards of the international commercial arbitration to the international public policy on the Algerian law and the comparative law, Journal of the Algerian general and comparative laws, (08) 02, 2022, p. 724.

³⁰ See : BenTorkia, Linda, op. cit, p. 156.

D. Vidal, Vers la prise en compte d'une contrariété sinificatif a l'ordre public, hote sous cass.civ. 12 février 2014, rev.de l'arbitrage 2014, p.390.

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international public policy which the judge can rely on to rule the annulment of the arbitration award. Nevertheless, this concept may stay vague³¹.

Besides, we must point out that the jurisprudence disagreed about the authority of the annulment judge or the appeal judge regarding the award of the arbitrators; is the authority a formal or objective control? It is likely that the authority of the judge stays formal and is figured out by having a look on the arbitration award without need to look for the events of the dispute or to tackle the arbitration award from the objective side³². In the end, we must notice that appealing the arbitration award is related to the public policy and that the judge may do it himself when the disputing parts rely on other causes for annulment.

Second Subtitle: the bases the judge relies on to annul the arbitration award due to violating the public policy

Arbitration is an alternative tool to settle disputes far from the justice either in accordance with the condition of arbitration if the agreement is prior to the emergence of a dispute or the agreement of arbitration after the emergence of the dispute. In this line, arbitration has many benefits as it guarantees to the litigants the speed and efficiency because the arbitrators have a specialized technical training and the arbitral tribunal is a special court selected by the parts who grant it the power of considering the cases after the cases are out of the competency of the justice³³.

Nevertheless, the enforcement of the arbitration award requires the intervention of the judge of the enforcing state who can stick to the refusal of the arbitration award if it violates the public policy. In this line, we may distinguish three bases the judge can base on namely:

- The Convention of New York 1958: Article 05 of this Convention listed the causes where the arbitration award may be objected. Paragraph 2/b provided that the state where the award is invoked may refuse it if it violates its public policy³⁴. Thus, the Convention considers the concept of the domestic public order, not the international. In this context, the arbitration award may be null and void and not enforced by the state automatically even if the litigants do not stick to it because it violates the public policy³⁵.
- Article 605 of the law of the civil and administrative procedures is about the determination of the legal frames to grant the operational term to the foreign provisions and resolution if they do not violate the public policy and ethics in Algeria. Hence, the Legislator explicitly provided that granting the operational term to the rulings of the foreign courts requires them not to violate the public policy in Algeria, not the international public policy. Hence, what is the difference between the arbitration award and the ruling issued by a foreign state regarding a commercial dispute? Do not both of them adjudicate a dispute by litigants?

³¹ See : BenTorkia, Linda, op. cit, p. 729..

³² See : BenTorkia, Linda, op. cit, p. 725.

³³ See: Jared, Mohamed & Mohtal, Amna: 'the comprehensive in the international commercial arbitration, the international arbitration court and methods of forming, New University house, 2012, p. 13 and what follows.

³⁴ See: Suleiman, Abdul Majid, 'the arbitration award in the Conventions of New York', (2010) p. 12 and what follows.

³⁵ See: Jared, Mohamed & Mohtal, Amna : op. cit., p. 324

- Articles 1051, 1056, and 1058 of the law of the civil and administrative procedures explicitly provided that the recognition of the arbitration awards requires them not to deviate from the international public policy. This is criticized because it might allow for turning down the bases of the legal policy in Algeria.

The points mentioned by the legislator are limited. Thus, the judge shall not raise objection to the violation of the domestic public policy unless he manages to evidence that the domestic public policy conforms to the international. The concept of the international public policy differs from the domestic public policy and the public policy in the private international law because it is a new concept that overcomes the domestic law. If we admit that there is an international public policy that includes the principles and bases of a number of states, the judge's enforcement of the public policy is based, in fact, on the domestic public policy of the law of his state.

The negative consequences of the legal globalization include the imposition of new concepts that do not comply with the bases and principles of the societies mainly the developing ones because admitting the new concept of the international public policy and suspension of the principle of the domestic public policy may harm the public interest protected by the domestic public policy. Thus, the question that raises itself is "how can the national judge enforce the international public policy?" In this line, there are two hypotheses:

- If the domestic public policy conforms to the international public policy, the judge relies on the domestic public policy in the causation of the award because he is most aware about its provisions.
- If there is a contradiction between the international public policy and the domestic, it is not logical that the judge excludes his public policy for a public policy that he does not master.

The French appeal court explicitly adopted the concept of the international public policy in many of its provisions as a basis for the annulment of the international arbitration award and considered that the respect of the international public policy is not related to the behavior of any part. It relied on the last paragraph of Article 1520 of the French civil procedures code that limited the causes of annulment of the arbitration award in other 05 cases including the case when the recognition or enforcement of the arbitration award includes a violation of the general public policy³⁶. Thus, based on what has been said, we can say that the real international public policy must have an international source; not be related to a specific state. Moreover, it must draw its binding power from the international conventions, the principles of the law, and the norms of the international trade³⁷.

However, it is likely that the concept of the international public policy and its binding power are mainly related to the source of the rule relied on by the arbitrators because we cannot imagine the existence of the rule only in the following cases:

1. The international conventions: if the international conventions are a source for the concept of the international public policy, the problem does not arise because the point is the state's signature of the conventions regardless whether it is with reservation or

³⁶ See: the rule of the French appeal court, the civil body 07-09-2022.

Cour de cassation, pourvoi n°20-22.118, 07 septembre 2022, bulletin, ECLI : CCASS :2022 :C100610..

³⁷ See: Rifai, Achref Abdul Alim, op. cit., p. 140.

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not. Thus, the signing state commits to the provisions of the convention. Through following the special procedures provided for constitutionally, the international conventions become higher than the domestic laws as provided for in an explicit manner in Article 150 of the Algerian Constitution that considered that the conventions signed by the President of the Republic in accordance with the conditions provided for in the Constitution are higher than the law. These conditions are presenting the convention to the Parliament with its two chambers and its ratification by the President of the Republic after the ratification of the two chambers. In the end, we notice that the Legislator made the ratified conventions higher than the law and, thus, any contradiction between a law and a convention gives the priority to the convention. On the other hand, if the convention contradicts with the constitution, the convention is null. Even in the contraction of the domestic law with the ratified conventions, the provisions of the convention get the priority either by the arbitrators or by the judge when he intervenes during the enforcement phase. Therefore, the conventions, bilateral or multilateral, are a source of the real international public policy concerning the member state of the convention when it comes into force³⁸.

2. The norms of the international trade: this refers to the set of rules agreed upon by the traders and applied continuously and repetitively that they start believing in their binding force. Thus, the norm differs than the conventional habit that lacks the moral elements and is limited to the material one. Hence the international commercial norms are binding for the arbitrators and the judge while the conventional habit draws its biding force from the convention. In this line, if the parts agree on its biding force, it becomes so among them³⁹.

Back to the Convention of New York, we find that it established the duality of the judicial control over the arbitration award because it assigned the competency of considering the case of the annulment of the arbitration award to the state where the arbitration takes place and the competency of considering the case of the annulment of the arbitration award to the courts of the state asked to recognize and enforce the award in its territory⁴⁰. Thus, the judge of the state where the arbitration award shall be enforced shall control the conformity of the arbitration award to the public policy because this is among the most important bases of the legal policy of the state.

Conclusion:

The Algerian Legislator gave much importance to the public policy either regarding the foreign rules or the international commercial arbitration awards. However, his attitude differs between the domestic public policy and the international. The national judge has a discretion regarding the compulsory enforcement of the arbitration award. Thus, the arbitration award that deviates from the public policy of the state shall be subject to annulment due to the violation of the public policy of the state even if the award is enforceable in another state.

Back to the legal rules and the international conventions, we find a variance between the domestic public policy and the international one. In this context, the Algerian Legislator should have unified his attitude and adopted the domestic public policy as a basis for the

³⁸ Sadek, Hichem, 'the law binding enforcement on the international trade contracts, exhibitions facility, (1995), p. 90 and what follows.

³⁹ Sadek, Hichem, op. cit., p. 150, and what follows.

⁴⁰ Suleiman, Abdul Majid, op. cit., p. 12 and what follows.

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judge's control over the foreign rules and the arbitration award because this shall affect the general atmosphere of foreign investment in Algeria.