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The under the Provisions of the Algerian Code of Civil and Legal Effects of the International Commercial Arbitral Award Administrative Procedure

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Abstract

The global movement towards alternative justice has become inescapable, and arbitration is among the principal mechanisms through which the idea of alternative justice has been entrenched. Its importance is heightened in the sphere of international trade, where it constitutes the legal safeguard on which international commercial contracts rely in order to escape national courts and the difficulties they entail, and to secure the application of the law and the forum chosen by the contracting parties. Our particular concern in the present study, however, is the decision rendered by the arbitrator once the arbitral proceedings have run their course, and the manner in which that decision may attain the standing enjoyed by a judgment issued by domestic courts, in terms of its binding authority (*res judicata*) and its enforceability, as well as the extent to which it may be challenged.

Keywords: international commercial arbitration; alternative dispute resolution; challenge of arbitral awards; effects of the arbitral award

Introduction

Arbitration has become one of the most important alternatives for resolving disputes, existing or potential, between the parties to international commercial contracts. This is a development dictated by economic evolution, particularly in the field of trade between States, and by the divergence of international commercial contracts from contracts governing purely domestic dealings, above all the insufficiency of domestic laws, and at times their unsuitability, for regulating relationships involving a foreign element. Anxious to preserve guarantees that domestic law may not afford, and wary of its instability, the parties to an international commercial contract resort, in the great majority of cases, to arbitration as an alternative means of resolving the disputes that may arise from the performance or interpretation of the contract, rather than submitting them to national courts.

Interest in arbitration as a means of settling commercial disputes, at the international and national levels alike, has been accompanied by the emergence of international arbitral institutions, which have been warmly received by the international community on account of the advantages that arbitration offers as a special form of adjudication in the commercial field.

States have accordingly moved to conclude numerous international conventions concerned chiefly with arbitration, and arbitral tribunals have emerged at the international level.

In this regard, the United Nations Commission on International Trade Law (UNCITRAL) adopted a Model Law on International Commercial Arbitration [1], which in turn influenced national legislation. Many legislatures incorporated arbitration regimes into their legal arsenals, as Algeria did through the amendment of the Code of Civil and Administrative Procedure [2]. This reflects the economic and commercial transformations occurring on the international scene, which exert a pressure imposed by the commercial imperatives of the State: the conclusion of international commercial contracts frequently depends on an arbitration clause dictated by foreign institutions. The foreign investor hesitates considerably before risking his investments if he is not permitted to stipulate an arbitration clause and to conclude an arbitration agreement to meet whatever disputes may arise. Hence most investment laws in developing countries expressly adopt arbitration as a means of settling disputes with investors, in order to instil confidence and to encourage them to invest their capital. This is especially so with respect to multinational corporations, which are ever keen to avoid having existing or potential disputes resolved through the application of domestic laws under the conflict-of-laws methodology of private international law. In order to escape domestic mandatory rules, such corporations agree in advance to submit the dispute to an arbitral tribunal, which in turn rules on the controversy by an international commercial arbitral award. Before that final determination, events and developments may arise that require the tribunal to take decisions which are not dispositive of the dispute.

Our particular concern here, however, is the decision rendered by the arbitrator once the arbitral proceedings have run their course, and the manner in which it may attain the standing enjoyed by a judgment issued by domestic courts, in terms of its binding authority and its enforceability.

The nature of the subject has required that it be examined by more than one method. We begin with the descriptive method, which enables us to set out the concept of the international commercial arbitral award, its legal nature, and the conditions it must satisfy. We then rely principally on the comparative analytical method, owing to the distinctiveness of arbitration as a system, in order to establish the effect that arbitration produces as an alternative means of resolving disputes and the effectiveness of awards rendered in proceedings that the arbitrator is charged with determining. This is all the more necessary since Algeria has ratified a number of bilateral agreements on the settlement of international trade disputes. We accordingly compare the approach of Algerian legislation with that of other legislation and, in particular, with the international conventions on arbitration, in respect of certain concepts germane to the subject under discussion.

The importance of the subject of international commercial arbitral awards impelled us to take it up. It assists all those concerned with arbitration to understand the functions of the arbitrator and the decisions that emanate from him, and to determine whether arbitral awards are conclusive and dispositive of the dispute or merely incidental procedural decisions that facilitate the conduct of the arbitral process and nothing more.

Awards in international commercial arbitration have attracted considerable attention in Western legal scholarship, and in Arab scholarship as well, albeit not to the same degree, a difference attributable to the recency with which Arab States have embraced arbitration. Specialised, in-depth studies of the subject are therefore relatively scarce.

The significance of the subject also emerges from the need to demonstrate its practical efficacy at a time when arbitration has reached its fullest extent in international commercial dealings, under the sway of the economically powerful States and of arbitral tribunals operating within a system of private adjudication. It was incumbent upon researchers to study international commercial arbitral awards, on the one hand, in order to distinguish them from other decisions and to dispel the obscurity that surrounds them so that they may be given effect, and, on the other, to distinguish them from the decisions issued by arbitral tribunals that do not dispose of the dispute.

Among the considerations that led us to study international commercial arbitral awards is the degree to which modern legislation keeps pace with the legal provisions of the international conventions on arbitration, including those ratified by Algeria. A further reason for choosing the topic is the need to consider the effectiveness of the award once the arbitrator's mandate has been exhausted by its rendering: the fate of the award carries it from a contractual character grounded purely in the will of the parties to a legal character, since in its procedure and enforcement it is governed by the rule of law.

Among the most prominent reasons for choosing the subject, too, is the need to determine whether the authority that the national judge exercises subsequent to the arbitrator's work and over the award, through recognition and the grant of leave for enforcement, constitutes an essential guarantee for verifying the arbitrator's work and his respect for the law, or whether it is an authority capable of obstructing that work and thereby frustrating the interests of parties who agreed to choose arbitration as an alternative means of resolving their dispute.

The development of international relations and Algeria's need to promote and develop its investment have made recourse to arbitration necessary as an alternative means of resolving disputes that may arise between the parties. Although most scholarship has been directed to the general and fundamental concepts of arbitration, such as its essence and its distinction from the other alternatives and intermediary mechanisms used for settling disputes, the question of the effect of arbitration and its efficacy has not been treated exhaustively by Algerian legal scholarship, particularly following the enactment of the Code of Civil and Administrative Procedure and in light of the conventions on the same subject that Algeria has ratified subject to reservations.

The subject raises numerous problems, the most prominent of which are the fate of the arbitral award after it is rendered, how it may attain the rank of a judicial judgment bearing the enforcement formula that obliges the losing party to comply with its content, and whether the parties to the award may challenge it.

We shall confine our research to these two questions and divide it into two sections, in which we examine the conditions and procedures required for the recognition of the arbitral award, and the means of challenging it, under the Code of Civil and Administrative Procedure and the New York Convention ratified by Algeria.

First Section: The Effects of the International Arbitral Award

This section addresses the effects that an arbitral award produces, both as against its parties and as against the judicial authority charged with recognising and enforcing it.

The Effects of the International Commercial Arbitral Award as against the Parties to the Dispute

Arbitration rests on the will of its two parties and their desire to resolve the dispute that exists, or may arise, between them outside the courts. Once the arbitral award is rendered, it produces the same effects as a judicial judgment. The parties are accordingly precluded from submitting to the courts a dispute in respect of which an award has been made, since the award has acquired the authority of *res judicata*; this is the first effect. From it follows the second effect, namely the necessity of performing the award voluntarily; failing voluntary performance, recourse may be had to the courts and the award enforced by compulsion. Both effects are examined in turn.

First Sub-section: The Authority of the Arbitral Award (Res Judicata)

By submitting their dispute to an arbitral tribunal, the parties signify their will to waive the jurisdiction of the ordinary courts, which would otherwise be competent to resolve their disputes. Each party is therefore bound to respect this reciprocal will, which derives from the rule laid down in Article 106 of the Civil Code [3]. Consequently, no party may, whether before or after the award is rendered, bring the dispute before a court in breach of the arbitration agreement concluded between the parties.

The judicial nature of arbitration is the foundation of the authority of *res judicata* [4]. That authority is tied to the theory of the objective declaratory judicial act, which takes the form of a judgment rendered in the exercise of judicial power, whether by a State judge or by an arbitrator, and whatever the subject matter in which the judgment is given [5]. The authority of the judgment serves to benefit and to fortify the position of the party in whose favour it was rendered, a point the Algerian legislature has affirmed [6]: "**Arbitral awards shall acquire the authority of *res judicata* as soon as they are rendered, with respect to the dispute determined therein.**" This authority is not, however, a matter of public policy; the judge therefore does not raise it of his own motion, and it falls to the party with an interest in relying on it to invoke it.

In this connection, a distinction must be drawn between the *res judicata* effect of the arbitral award, by which the arbitral tribunal exhausts its jurisdiction, and its enforceability. These are two distinct stages, each independent of the other: an arbitral award carries the authority of *res judicata* even where no order for its enforcement has been issued, and even where it remains open to challenge [7].

Res judicata is a conclusive presumption of the "truth" proclaimed by the judgment or decision that resolves the dispute, whether it be a judicial judgment or a decision of an arbitral tribunal. The presumption means that the facts are established and that the rights declared may not be contradicted anew. It entitles the party in whose favour the award was rendered to enjoy every attribute of that award; conversely, both parties are bound not to submit the adjudicated dispute afresh to any other judicial or arbitral body. This also explains why the tribunal's mandate ends as soon as it has ruled on the dispute before it, as the Algerian legislature has confirmed [8]: "... **the arbitrator shall be divested of the dispute as soon as he has decided it.**"

Furthermore, the authority of the award is confined to the parties to the proceedings. Only the party in whose favour the award was rendered, and who was a party to the dispute, may benefit from it; arbitral awards may accordingly not be invoked against third parties, as the Algerian legislature provides in Article 1038 of the Code of Civil and Administrative Procedure [9].

An arbitral award may contain clerical errors or suffer from some obscurity, a matter the Algerian legislature has addressed. Although the award carries the authority of *res judicata*, this does not preclude its correction where it contains a clerical error, or its interpretation so as to dispel the ambiguity that affects it, as provided in the second paragraph of Article 1030 of the Code: "**... However, the arbitrator may interpret the award, or correct the clerical errors and omissions affecting it, ...**"

Second Sub-section: The Parties' Obligation to Give Effect to the Award

An arbitral award is not enforceable of its own force; it must be invested with the enforcement formula by the competent court. The reason is that an arbitral award does not emanate from an official judicial authority but from a private body that has no power to compel the parties to perform its award and therefore requires the assistance of an official judicial authority. The Algerian legislature has confirmed this and has subjected the relevant procedure to Article 1054, which in turn refers to Articles 1035 to 1038 of the Code of Civil and Administrative Procedure.

The rule in the enforcement of arbitral awards is voluntary and amicable performance. The parties resorted to arbitration as an alternative means of resolving their dispute, voluntarily and amicably; it is accordingly to be expected that what the arbitral body has decreed will likewise be performed voluntarily and amicably. It may happen, however, that performance is frustrated by the refusal, procrastination or recalcitrance of the party against whom the award was rendered, obliging the successful party to seek compulsory enforcement through the courts.

The Algerian legislature has provided that awards "**... shall be enforceable in Algeria under the same conditions, by order of the President of the court within whose jurisdiction the arbitral awards were rendered, or of the court of the place of enforcement where the seat of the arbitral tribunal is situated outside the national territory**" [10]. Voluntary performance therefore dispenses with any need to apply to the court for an order of recognition.

The rule is that an arbitral award amenable to compulsory enforcement is one that terminates the arbitral proceedings. The sole exception is the case provided for in Article 1046 of the same Code, which empowers the arbitral tribunal, at the request of a party, to order interim or conservatory measures. Should the party concerned refuse to comply voluntarily with such orders, the tribunal may request the assistance of the competent judge, who lends support so that the order becomes enforceable. The upshot is that, although there is no award terminating the proceedings, such an order is amenable to compulsory enforcement where it falls within the said article.

It is, moreover, axiomatic that compulsory enforcement is available only for the vindication of a right. An award susceptible of compulsory enforcement must therefore be an award ordering performance in satisfaction of a right, such as an obligation to deliver a specified object, to pay a specified sum, to build or demolish a structure, or to restore a thing to its owner [11].

Second Section: The Effects of the International Commercial Arbitral Award as against the Court Competent to Enforce It

A judgment enjoys full respect and compulsory enforcement, through the competent judicial authorities, in the State in which it was rendered; thus a judgment rendered in Algeria is, under Algerian law, enforced by compulsion where necessary. Beyond the borders of the State that issued it, by contrast, the judgment is governed by the law of the State in which enforcement is sought.

Since the very purpose of an arbitral award is that it be enforced, the party in whose favour it was rendered may, should the other party refuse to comply voluntarily, apply to the competent court for its enforcement. That court does not, however, enforce the award automatically or mechanically; it acts subject to the procedures prescribed by the Code of Civil and Administrative Procedure. These are examined in two sub-sections: the first concerns the recognition of the arbitral award and the procedure for it, and the second concerns the enforcement of the award.

First Sub-section: The Recognition of the International Commercial Arbitral Award

The recognition of an arbitral award brings to light the effect of the entire arbitral process, from the agreement to arbitrate to the rendering of the award that terminates the dispute. It is well established that an international arbitral award acquires, from the moment it is rendered, the authority of *res judicata*; that authority, however, remains suspended until it is recognised in the country of enforcement. This is affirmed by Article III of the New York Convention and by Article 1031 of the Code of Civil and Administrative Procedure, neither of which distinguishes between domestic and international arbitration [12].

The New York Convention of 1958 [13] does not define “recognition”. It obliges the Contracting States to recognise international arbitral awards and sets out the procedure for their enforcement, Article III dealing with the subject of recognition [14]. The Convention established the principle of national treatment, that is, the obligation of each signatory State to recognise and enforce international arbitral awards in accordance with the rules of procedure in force, without discrimination and without subjecting foreign awards to more onerous conditions. The Washington Convention [15], for its part, likewise offers no definition of “recognition”, but gives concrete expression to the international effectiveness of international arbitral awards in Articles 53 and 54. The former provides that the award is binding on the parties and may not be appealed by any means save those provided for in the Convention, and that each party must comply with the award in accordance with its terms, except to the extent that enforcement is stayed pursuant to the Convention. To secure the recognition of the international arbitral award, Article 54 requires each signatory State to recognise an award rendered under the auspices of the International Centre for Settlement of Investment Disputes, and to enforce the pecuniary obligations imposed by the award as if it were a final judgment of a court of that State [16].

The Algerian legislature likewise has not defined “recognition of an international arbitral award”. It has addressed the matter in the Code of Civil and Administrative Procedure by devoting a section to the recognition of international arbitral awards, and has set out the principal conditions to be met. Algeria recognises international arbitral awards where the party relying on them establishes their existence and recognition is not contrary to international public policy. This gives effect to Algeria’s accession to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. International arbitral awards may be enforced where these conditions are met and an order is issued by the President of the court within whose jurisdiction the award was rendered, or by the court of the place of enforcement where the seat of arbitration is outside Algeria [17].

It should be observed that recognition of the arbitral award takes place whether a party refuses or agrees to comply with it: the object of recognition is to acknowledge the authenticity of the arbitral decision in accordance with the requirements of the laws and international conventions. Nor does recognition necessarily entail enforcement. A State may recognise an arbitral award yet refuse to enforce it because it conflicts with its legal order, or because it terminated a dispute that is not arbitrable [18], as in matters touching public policy, the status and capacity of persons, or recourse to arbitration by public legal persons outside international economic relations or public procurement.

First: Conditions of Recognition

The recognition of an arbitral award is subject to the conditions laid down by the legislature in Articles 1051 to 1053, which, on analysis, are as follows.

1. Proof of the existence of the international arbitral award. Under Article 1051 of the Code of Civil and Administrative Procedure, an application for an order of recognition requires that the international arbitral award be produced before the competent court; an order of recognition cannot issue in the absence of the award. Article 1052 of the same Code accordingly prescribes the means by which the existence of an international arbitral award is to be proved, providing that it is established by the production of the original award together with the arbitration agreement, or of copies thereof that satisfy the conditions required for their authenticity [19].

2. Conformity of the international arbitral award with public policy. International public policy may be defined as the body of principles necessary to the organisation of the international community: the common rules whose violation the international arbitrator must sanction, irrespective of the national legislation governing the substance of the dispute [20].

The existence of an international public policy presupposes the existence of an international legal order, whereas the rules of private international law are characteristically national. A distinction can nonetheless be drawn between domestic and international public policy. The former has effect only within the State, in national relations; the latter arises in relations that

contain a foreign element. The function of domestic public policy is to ensure that there is no voluntary departure from mandatory rules of law, whereas the notion is employed in the international sphere to exclude the application of a foreign law. The Algerian legislature affirmed the necessity of respecting international public policy in Article 1051 of the aforementioned Code [21].

In this regard, the jurist Tayeb Zerrouti observes: "**The plea of public policy must be grounded in logic and necessity; its use must take account of the particular features and needs of private international dealings; and the judge or arbitrator must be open to foreign law and appreciative of the role of the national conflict-of-laws rule and of the plea of public policy.**" Recourse to it should be had only to the extent required, where what is at stake are essential interests of the law of the forum that deserve protection and are endangered [22].

Second: Procedures for the Recognition of the International Commercial Arbitral Award

Once the international arbitral award has been rendered, the interested party lodges the application for recognition with the competent court. This is the party for whom expedition matters, in accordance with Article 1053 of the Code of Civil and Administrative Procedure. The application is made by the ordinary modes of instituting proceedings; it is not required that the application for an enforcement order be submitted by a lawyer, nor that it be signed by one. The legislature has required that the application be accompanied by a set of documents, with due regard for the competent court with which it is filed.

1. Deposit of the original award together with the arbitration agreement, or of copies of both. The party concerned with expedition must deposit the original award, accompanied of necessity by the arbitration agreement, with the registry of the competent court, for the purpose of its validation or the issuance of an order for its enforcement, pursuant to Articles 1052 and 1053 of the aforementioned Code. The Algerian legislature has fixed no time limit for deposit. Where deposit of the originals is impossible, copies of both must be deposited, provided that these documents satisfy the conditions required for their validity, among them that they be produced in Arabic.

2. The court competent to receive the award and the arbitration agreement. The determination of the court with which the award and the arbitration agreement are to be deposited differs according to whether the arbitral tribunal is seated within or outside Algeria, a matter the Algerian legislature addressed in Article 1051 of the aforementioned Code.

If the tribunal that rendered the award is seated in Algeria, recognition falls to the same authority that is competent to order enforcement; that is, recognition is granted by the President of the court within whose territorial jurisdiction the arbitral award was rendered.

If, by contrast, the tribunal that rendered the award whose recognition is sought is located outside Algerian territory, recognition is granted by the court (through its President) within whose jurisdiction the place of enforcement lies.

Second Sub-section: The Enforcement of the International Commercial Arbitral Award

The true purpose of arbitration lies in the enforcement of its awards disposing of the dispute submitted to the arbitral tribunal; an award that cannot be enforced has no legal or practical value. The rule is that such awards are performed voluntarily and amicably by the parties bound by them. Where those parties default, however, this does not preclude an interested party from seeking enforcement once he has obtained an order for it. The enforcement order (*exequatur*) is the measure issued by the legally competent judge by which an arbitral award, whether domestic or foreign, is invested with enforceable force; it represents the point of convergence between private and public justice [23]. Upon the issuance of the enforcement order, the award becomes capable of being invested with the enforcement formula and is treated as an enforceable instrument under which compulsory enforcement proceeds [24].

The Algerian legislature has regarded arbitral awards ordered to be enforced by the presidents of courts and deposited with the registry as enforceable instruments, pursuant to Article 600 of the aforementioned Code. It follows that, for an arbitral award to be regarded as an enforceable instrument, the conditions and procedures prescribed by the Code of Civil and Administrative Procedure must be observed. We set them out as follows.

First: Conditions for the Enforcement of the Award

The 1958 New York Convention on the recognition and enforcement of arbitral awards, which has become part of national legislation, lays down a series of conditions for the issuance of an order enforcing an arbitral award, which may be summarised as follows.

1. Validity of the arbitration agreement. For an arbitration agreement to be validly concluded and to produce all its effects, both formal and substantive requirements must be met. Among the formal requirements is that the agreement be in writing; it is valid as to form if it is written in the manner required. The New York Convention prescribes the writing requirement in Article II, paragraphs 1 and 2. An agreement in writing means an arbitral clause inserted in a contract, or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams, as Article 1040 of the Code of Civil and Administrative Procedure provides [25].

Among the substantive conditions for the validity of the arbitration agreement is that laid down in Article V, paragraph 1, of the New York Convention. Under it, the authority before which recognition and enforcement of the arbitral award are sought may decline to grant them, that is, may refuse the enforcement order, if the party resisting the award furnishes proof that the parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or that the said

agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made. Recognition and enforcement of the arbitral award must accordingly be refused where the party against whom the award is invoked proves that the parties to the arbitration lacked capacity under the applicable law [26].

2. Regularity of the constitution of the arbitral tribunal. Before issuing the order for enforcement of the award, the enforcement judge must verify the regularity of the arbitral tribunal and of the arbitral procedure, and their conformity with the requirements of the arbitration agreement.

The legislature has treated the constitution of the arbitral tribunal, or the appointment of a sole arbitrator, in a manner contrary to law as a ground for the admissibility of an action to set aside the arbitral award, pursuant to Articles 1056 and 1058 of the aforementioned Code. It has likewise required that the arbitral proceedings be regular, which entails respect for the adversarial principle and for the rights of the defence, on pain of the same sanction.

In addition, the arbitral award itself must be valid, and to that end it must satisfy certain formal conditions. It must be in writing, pursuant to Article 1041 of the aforementioned Code, and must state the identity of the parties and the composition of the arbitral tribunal and, in the case of a legal person, its name and registered office. Where there are several arbitrators, it must be rendered by majority. It must set out the reasons on which the tribunal based its decision, and state the date and place at which it was rendered: the date enables the enforcing authority to verify that the tribunal observed the period prescribed for deciding the dispute, while the place serves to identify the court competent to order enforcement. The award must also contain its operative part, that is, the conclusion the arbitral tribunal reached in deciding the dispute.

The substantive conditions for the validity of the award are, first, that the subject matter of the dispute be capable of settlement by arbitration under the law of the country in which enforcement of the award is sought, in conformity with Article 1006, paragraphs 2 and 3, of the Code of Civil and Administrative Procedure; and, second, that the arbitral tribunal remain within the arbitration agreement, so that it may not entertain matters not contained in it, failing which it is regarded as having exceeded the authority conferred upon it, exposing its award to annulment under Articles 1056(3) and 1058 of the aforementioned Code. Finally, the scope of enforcement is confined to awards that contain an order for performance and that do not contravene international public policy, both of which were explained above in connection with recognition of the arbitral award.

It is worth observing that the powers of the judge issuing the order are confined to verifying that the arbitral award is free of procedural defects; he has no right to inquire into the merits of the dispute or into the correctness of the tribunal's decision. He is competent only to supervise the form that the law requires for the rendering of an arbitral award, and if he detects any irregularity that would lead to nullity, he must refrain from issuing the enforcement order. The judge's role in issuing the order is thus confined to review, in accordance with the approach adopted by the Algerian legislature, which opted for the method of supervision and not for that of revision on the merits or of a fresh action when ordering the enforcement of a foreign arbitral award [27]. His powers are accordingly limited to granting or refusing enforcement, without going so far as to impair the arbitral award or to modify it. He may, however, order the enforcement of one part of the award and not the other. It follows that an arbitral award may not be enforced save by virtue of an enforcement order [28].

Second: Enforcement Procedure

The Algerian legislature set out the procedure for actions to enforce international arbitral awards in the Code of Civil and Administrative Procedure. Article 1054 refers to Articles 1035 to 1038, which concern the enforcement of domestic arbitral awards [29]; the legislature nevertheless laid down certain special rules required by the nature of international arbitral awards.

1. The court competent for enforcement. The position differs according to the source of the arbitral award. If the award was rendered in Algeria, the competent court is that within whose jurisdiction the award was rendered; if the award was rendered abroad, jurisdiction lies with the President of the court within whose district the place of enforcement is situated [30].

The determination of the court competent to grant the enforcement order is governed by Article 1051 of the Code of Civil and Administrative Procedure. An application for an enforcement order submitted to a court other than the one competent *ratione materiae* to decide it is therefore liable to be rejected for want of subject-matter jurisdiction, since, under the provisions of the Code, subject-matter jurisdiction is a matter of public policy that the judge raises of his own motion. Where the application for an enforcement order is submitted to the president of a court other than that within whose jurisdiction an award rendered in Algeria was made, the application will inevitably be held inadmissible, the court lacking subject-matter jurisdiction to decide it. On the other hand, it is apparent from the provisions of the aforementioned article that the legislature has also prescribed the rules governing the court competent *ratione loci* before which the application for an enforcement order is to be brought. That court is the one within whose jurisdiction the seat of the arbitral tribunal lies, if the international commercial arbitral award was rendered in Algeria, or the one within whose jurisdiction the place of enforcement of the award lies, if the award was rendered outside Algerian territory.

2. The enforcement action. The treatment of an arbitral award as an enforceable instrument is not undertaken by the judge of his own motion; it is incumbent on the interested party to submit an application, as the Algerian legislature indicated in Article 1035 of the Code of Civil and Administrative Procedure. That article is couched in general terms, speaking of "**... the party for whom expedition matters**". The legislature did not require that only the party in whose favour the award was rendered have an interest in making the application; the party against whom it was rendered may equally have an interest in doing so.

The applicant for enforcement must attach to his application the original of the arbitral award that is to be invested with the enforcement formula. He must be a party to the award and must possess the capacity, standing and interest that the law requires of anyone who brings an action or submits an application. As to the subject of the application, the applicant must confine himself to seeking enforcement of the arbitral award: an action for the enforcement of an arbitral award is not an originating action, its purpose being solely the enforcement of the award, and the applicant therefore may not submit claims that would modify what the award has decided.

Where the arbitral award or the arbitration agreement is in a language other than Arabic, both documents must be accompanied by a translation into Arabic, as required by Article II(4) of the New York Convention and Article 8 of the Code of Civil and Administrative Procedure, and the translation must be certified by the authorised body [31].

The law places the original and the copy on an equal footing: the interested party may deposit the original of the arbitral award and of the arbitration agreement, or may be content with depositing copies of both that satisfy the conditions of their validity [32].

The registrar must draw up a record of the deposit, a matter to which Article 1035 of the same Code refers, the parties bearing the costs of depositing the petitions and documents and the original of the arbitral award [33].

On the application of the party seeking enforcement, the president of the competent court issues an enforcement order in accordance with the general rules governing orders made on petition (*ordonnances sur requête*). The applicant submits the application for enforcement in the form of a petition, as required by Article 311 of the Code of Civil and Administrative Procedure, setting out the facts and grounds of the application and specifying an address for service within the jurisdiction of the court to which the application is made. The president of the court rules on the application submitted to him in the exercise of his non-contentious (*gracious*) jurisdiction. What confirms the non-contentious character of the president's jurisdiction is that his role is confined to removing the legal obstacle that the legislature placed in the path of the party in whose favour the award was rendered. That party alleges no infringement of his right or legal position; he faces, rather, the ineffectiveness of his will. He has obtained an arbitral award, yet he cannot be recognised as a creditor in the State of enforcement until he has obtained the visa of the competent authority. The successful party thus alleges no infringement, and the judge is accordingly not called upon to resolve a dispute; he is called upon to remove the legal obstacle by granting the arbitral award a visa so that it may enter the class of judicial decisions. The enforcement order is therefore, by every measure, a non-contentious act and not a judicial one, which accords with the judge's role, confined as it is to reviewing the award: if he finds it in conformity with the provisions of the law, he grants it the visa [34].

Conclusion

International commercial arbitration has become an effective instrument for resolving disputes relating to international trade. That instrument, however, is effective only where an arbitral award is rendered that decides the dispute and brings it to an end.

International commercial arbitration has undergone considerable development affecting its legislative framework, through the international conventions on the one hand and the domestic legislation of States on the other, as well as its practical side, in that the number of disputes submitted to arbitral tribunals has risen. This is attributable to the expertise of arbitrators, in particular their specialisation and the speed with which they decide disputes in accordance with the law chosen by the parties, whether it governs the substance or the procedure.

Algeria's opening to the international economy has made it necessary to provide adequate legislative guarantees to attract the investor, who prefers recourse to arbitration as an alternative means of resolving disputes relating to his contract, by reason of the advantages that the arbitral system enjoys.

The arbitral award owes its existence to the authorisation of the law and to the agreement of the parties, whether concluded before the dispute arises, in the form of an arbitration clause, or after it, in the form of an arbitration agreement. This distinguishes the arbitral system from the judicial system, in which the judge derives his authority from the sovereignty of the State, notwithstanding that the mission of both ends with a decision.

The arbitral award is the goal that the parties to the arbitration agreement seek to attain, since it disposes of the dispute between them. It nonetheless remains distinct from the judicial judgment, which carries its authority within itself from the moment it is rendered in the State of origin, and its enforceability from the moment it becomes final, whether through the exhaustion of the avenues of recourse by their exercise or through the lapse of the time limits. By contrast, the efficacy of an international commercial arbitral award remains impossible to achieve unless it is recognised and invested with the enforcement formula. This lends particular importance to the rules governing this aspect, all the more so since such awards may be rendered in a State other than the one that recognises and enforces them.

The Algerian legislature took an interest in international commercial arbitral awards through the Code of Civil and Administrative Procedure, in which it adopted many of the substantive rules found in the international conventions that Algeria has ratified. This concerns, in particular, the conditions that an arbitral award must satisfy, the provisions governing the recognition of the award and its compulsory enforcement, and the means of challenging it.

An analysis of the principal provisions of the Code of Civil and Administrative Procedure relating to international commercial arbitral awards shows that, although legal scholarship differs on the determination of their legal nature, the legislature tends to confer a judicial character upon them, even though their existence originally rests on the will of the parties. It has required that they possess the attributes of a judicial judgment: identification of the parties and of the arbitrators, the date and place of

rendering, signature, the claims and submissions of the parties, and reasons. It has also made them subject to avenues of challenge, having regard to their specificity and to the purpose for which they are rendered.

As regards the enforcement of the international commercial arbitral award, the Algerian legislature relied on negative conditions drawn from the 1958 New York Convention, concerning the grounds for refusing enforcement. These include the invalidity of the arbitration agreement; infringement of the rights of the defence; the arbitrator's exceeding his mandate by deciding matters not contained in the arbitration agreement; irregular constitution of the arbitral tribunal; irregularity of the arbitral procedure; the award's not having become binding; the non-arbitrability of the subject matter of the dispute; and the award's contravention of international public policy.

The Algerian legislature has remedied the deficiency that marred the rules governing arbitration under the former law with respect to the interpretation of awards and the correction of clerical errors, both of which it has expressly provided for in the Code now in force.

In drafting Article 1039 of the Code of Civil and Administrative Procedure, the Algerian legislature ought to have taken into account that international commercial arbitration may arise between public-law persons of at least two States, between private-law persons of at least two States, or between public-law and private-law persons of at least two different States, instead of confining international arbitration to disputes concerning the economic interests of at least two States.

Notes

[1] UNCITRAL Model Law on International Commercial Arbitration, adopted on 21 June 1985.

[2] Law No. 08-09 of 25 February 2008 on the Code of Civil and Administrative Procedure, *Journal Officiel* No. 21 of 22 April 2008.

[3] Article 106 of the Algerian Civil Code: "The contract is the law of the parties; it may be neither revoked nor modified except by agreement of the parties or on the grounds provided by law."

[4] Younes Mahmoud Moustafa, *Quwwat Ahkam al-Muhakkimin wa Qimatuha amam Qada' al-Dawla* [The Force of Arbitrators' Awards and Their Value before State Courts] (1st edn, Dar al-Nahda al-Arabiyya, Cairo, n.d.) 24.

[5] Nabil Ismail Omar, *al-Tahkim fi al-Mawadd al-Madaniyya wa al-Tijariyya al-Wataniyya wa al-Dawliyya (Ittifaq al-Tahkim – Khusuma al-Tahkim – Hukm al-Muhakkim wafqan li-Ahdath al-Ta'dilat al-Tashri'iyya wa al-Qada'iyya)* [Arbitration in National and International Civil and Commercial Matters (The Arbitration Agreement – The Arbitral Proceedings – The Arbitrator's Award in Light of the Latest Legislative and Judicial Amendments)] (1st edn, Dar al-Jami'a al-Jadida, Alexandria, 2004) 333.

[6] Article 1031 of the Code of Civil and Administrative Procedure.

[7] Abdelhamid al-Minshawi, *al-Tahkim al-Dawli wa al-Dakhili* [International and Domestic Arbitration] (Mansha'at al-Ma'arif, Alexandria, 1995) 78.

[8] Article 1030(1) of the Code of Civil and Administrative Procedure.

[9] Article 1038 of the Code of Civil and Administrative Procedure: "Arbitral awards may not be invoked against third parties."

[10] Article 1051, paragraph 2, of the Code of Civil and Administrative Procedure.

[11] Musleh Ahmad al-Tarawneh, *op. cit.*, 278.

[12] Mamdouh Abdelkarim, *al-Qanun al-Dawli al-Khass: Tanazu' al-Qawanin* [Private International Law: Conflict of Laws] (Dar al-Thaqafa, Amman, 2005) 345.

[13] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

[14] Article III of the New York Convention: "Each Contracting State shall recognize arbitral awards as binding ..."

[15] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Washington, or ICSID, Convention), signed at Washington on 18 March 1965 and ratified by Algeria on 12 January 1995.

[16] Dimana Mohamed and Mansouri Meriem, "Ijra'at Tanfidh Ahkam al-Tahkim al-Tijari al-Dawli fi al-Jaza'ir" [Procedures for the Enforcement of International Commercial Arbitral Awards in Algeria] (2016) 4 *Majallat al-Dirasat al-Qanuniyya wa al-Siyasiyya* [Journal of Legal and Political Studies] (Faculty of Law and Political Science, Amar Telidji University, Laghouat) 149.

[17] Lazhar Ben Said and Karam Mohamed Zidane al-Najjar, *al-Tahkim al-Tijari al-Dawli: Dirasa Muqarana bayna Qanun al-Tahkim al-Misri Raqm 27 li-'Am 1994 wa Qanun al-Ijra'at al-Madaniyya wa al-Idariyya al-Jaza'iri Raqm 08-09 li-'Am 2008* [International Commercial Arbitration: A Comparative Study of Egyptian Arbitration Law No. 27 of 1994 and the Algerian Code of Civil and Administrative Procedure, Law No. 08-09 of 2008] (Dar al-Fikr al-Jami'i, Alexandria, 2010) 318.

[18] Article 1006 of the Code of Civil and Administrative Procedure.

[19] Dimana and Mansouri (n 16) 150.

[20] Haddadine Tahar, *Dawr al-Qadi al-Watani fi Majal al-Tahkim al-Tijari al-Dawli* [The Role of the National Judge in International Commercial Arbitration] (Master's thesis in Law, National Development Law Branch, Faculty of Law, Mouloud Mammeri University, Tizi Ouzou, 2012) 116–117.

[21] Dimana and Mansouri (n 16) 150.

[22] Tayeb Zerrouti, *al-Qanun al-Dawli al-Khass al-Jaza'iri Muqaranan bi-al-Qawanin al-'Arabiyya* [Algerian Private International Law Compared with Arab Laws], vol 1 (Matba'at al-Kahina, 2000) 242.

[23] Amer Fathi al-Bataniyya, *Dawr al-Qadi fi al-Tahkim al-Tijari al-Dawli: Dirasa Muqarana* [The Role of the Judge in International Commercial Arbitration: A Comparative Study] (1st edn, Dar al-Thaqafa, Amman, 2008) 217.

[24] Omar (n 5) 215.

[25] Dimana and Mansouri (n 16) 151.

[26] *ibid* 151.

[27] Omar Zouda, "Ijra'at Tanfidh Ahkam al-Tahkim al-Ajnabiyya" [Procedures for the Enforcement of Foreign Arbitral Awards], *Majallat al-Mahkama al-'Ulya* [Supreme Court Review], special issue: *Alternative Means of Dispute Resolution: Conciliation, Mediation and Arbitration* (15–16 June 2008), part 1, Documentation Department (2009) 244.

[28] *ibid* 225.

[29] Dimana and Mansouri (n 16) 157.

[30] Ben Said and al-Najjar (n 17) 319.

[31] Zouda (n 27) 221.

[32] *ibid* 221.

[33] *ibid* 222.

[34] *ibid* 225–226.