

Settlement of Investment Disputes through Arbitration in Algerian Legislation

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Abstract

Commercial arbitration constitutes an alternative to litigation for the resolution of disputes. The Algerian legislature has adopted this mechanism through the provisions of Part Two of the Code of Civil and Administrative Procedure (Law No. 08/09 of 2008, as amended by Law No. 22/13 of 2022). Among the disputes subject to arbitration are investment disputes, whether domestic or foreign in nature, where the parties have elected this mechanism in preference to judicial proceedings. Against this background, the present study aims to elucidate the role of commercial arbitration in resolving investment disputes in Algeria, to assess its effectiveness in bringing such disputes to conclusion and safeguarding the rights of the parties, and to examine its impact on the preservation of investment activity within the state. The central research question may be formulated as follows: how does the legal framework of commercial arbitration contribute to the resolution of investment disputes? The study employs an analytical methodology, grounded in the systematic analysis of the legal texts governing commercial arbitration.

Keywords: *Disputes; Investment; Judiciary; Commercial Arbitration; Algerian Legislation.*

Introduction

Commercial arbitration is a mechanism available to both domestic and foreign investors for the settlement of disputes aimed at establishing or repudiating legal liability, as an alternative to the national judiciary which ordinarily holds jurisdiction. This preference is attributable to the advantages the arbitral system affords the parties: expedition of proceedings and the guarantee of confidentiality — features that are highly compatible with the nature of investment contracts, whose parties prefer to preserve the confidentiality of their terms to the greatest extent possible.

The Algerian legislature has not provided a direct definition of commercial arbitration as a dispute resolution system. It has, however, established the substantive and procedural legal foundations upon which disputing parties may rely when they elect arbitration as their chosen mechanism. Article 1006 of the Code of Civil and Administrative Procedure constitutes the general framework authorizing parties to investment contracts to submit their disputes to a neutral forum, provided that the subject-matter of the dispute — namely the establishment of the legal liability of one or both parties — falls within the scope delimited by that article, given that the rights arising from the determination of legal liability are personal rights of each party as against the other, and each party accordingly enjoys full discretionary power over them.

The significance of this study lies in the role that arbitration is expected to play as an alternative to litigation: the amicable resolution of disputes, removed from the procedural complexities that accompany judicial proceedings across the various levels of the court system. This is compounded by the growing preference of

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investors for arbitration as a dispute resolution mechanism. The study accordingly seeks to shed light on the legal framework of commercial arbitration, to elucidate its various legal dimensions, and to assess its role and impact in the resolution of disputes.

Since investment constitutes the lifeblood of economic activity, its protection at every stage is a matter of paramount importance. Such protection reassures investors that their investments are secure, particularly in the event of a legal dispute. Recourse to arbitration affords the parties confidence in the neutrality of the arbitrators and, consequently, in the resolution of the dispute. The central research question of this study may accordingly be stated as follows: what is the effectiveness of commercial arbitration in resolving investment disputes in Algeria?

In order to answer this question, the study employs an analytical methodology, through the analysis of legal texts pertaining to commercial arbitration, supplemented by reference to certain judicial decisions that have affirmed those texts. A partially descriptive approach is also employed when presenting the general concepts surrounding the term arbitration. The study is structured around two principal sections: the first examines the concept of commercial arbitration; the second addresses the procedures that accompany the arbitral process.

Section One: The Concept of Commercial Arbitration as a Dispute Resolution Mechanism

In order to arrive at a comprehensive understanding of commercial arbitration as a dispute resolution mechanism, it is necessary to examine, first, its definition, and second, its legal nature.

1.1 Definition of Commercial Arbitration

In legal usage, arbitration denotes an agreement between the parties to a specific legal relationship — whether contractual or non-contractual in nature — to submit their existing or potential disputes to persons of their choosing acting as arbitrators.²

Arbitration has also been defined as *“a system whose purpose is to prevent the submission of disputes to judges for adjudication, and instead to submit them, by mutual agreement of the parties, to persons not formally empowered by public authority. By virtue of arbitration, the parties forgo recourse to the courts and submit their dispute to one or more arbitrators for resolution by a binding decision.”*³

Building on these formulations, arbitration may be described as *“a complex legal process premised on the agreement of the disputing parties to submit their dispute to one or more arbitrators for resolution in accordance with the rules of law and the general principles governing judicial proceedings, or in accordance with equitable principles as specified in the agreement, with the parties undertaking to accept the award issued by the arbitrators once it has acquired the authority of res judicata.”*⁴

On this basis, commercial arbitration as an alternative to the Algerian judiciary for the settlement of investment disputes may be defined as an agreement between the supplier and the recipient, as the two parties to an investment contract, to submit to one or more arbitrators any disputes that have arisen or may arise between them in connection with the legal liability of either or both parties, rather than resorting to the courts. Such an agreement may also be concluded between one or both of these parties and a third party harmed as a consequence of the formation or performance of the investment contract.

Commercial arbitration manifests as a mechanism well-suited to the particular nature of investment contracts, given the distinctive combination of rights and obligations that such contracts entail. Arbitration, by affording both expedition and flexibility of procedure on the one hand — attributes consonant with the pace required by domestic and international commercial operations alike — and confidentiality on the other, is highly compatible with the confidential character of those operations. This is especially pertinent given that investment contracts, in addition to intellectual property rights, incorporate technical and technological know-how that has not been publicly disclosed and whose transfer requires a significant degree of confidentiality, which must accordingly be respected in the context of dispute resolution.

While it is natural for private law persons, whether domestic or foreign, to resort in their contractual and non-contractual relations to the arbitral system for the settlement of existing or anticipated disputes, the Algerian

²Ridwan Abu Zayd. *General Principles of International Commercial Arbitration: A Study in the Law of International Trade*. Dar al-Nahda al-Arabiyya, Egypt, 1997, p. 13.

³Ahmad Abu al-Wafa. *Voluntary and Compulsory Arbitration*, 5th ed. Munsha'at al-Ma'arif, Alexandria, Egypt, 1988, p. 408.

⁴Khalid Muhammad al-Qadi. *Encyclopedia of Commercial Arbitration*, 1st ed. Dar al-Shuruq, Cairo, Egypt, pp. 110–111.

legislature has, pursuant to Article 1006(3), permitted public legal persons to request arbitration, on the condition that the dispute arises in connection with international economic relations or within the framework of public procurement. This reflects the legislature's recognition of the situation in which the Algerian party to an investment contract is a public legal person that has contracted under one of the forms of investment contracts with a view to meeting public needs, as well as the situation in which the Algerian state or one of its institutions announces its requirement to import technology, whether from domestic or foreign suppliers.

With respect to the state as a party to an investment contract, it may, by virtue of international agreements concluded in connection with its international economic relations, equally elect arbitration to settle disputes arising from the performance of those relations. Alternatively, the Algerian Agency for Investment Promotion may conclude an arbitration agreement with the investor on its behalf,⁵ acting in doing so purely as a representative of the Algerian state and not as a primary party or intervenor in the dispute.⁶ This reflects the Algerian legislature's efforts to accompany investments undertaken on Algerian territory at every stage and to remove the legal and administrative obstacles that may impede such projects.

1.2 The Legal Nature of Commercial Arbitration

Two competing views contend in the debate over the legal nature of commercial arbitration. The first holds that arbitration is contractual or consensual in character, while the second regards it as judicial in nature.

1.2.1 The Contractual Nature of Commercial Arbitration

The parties' willingness to submit their disputes to a forum other than the competent judiciary points unmistakably to the consensual nature of arbitration: the arbitral tribunal derives its jurisdiction from the will of the parties, which equally manifests in the choice of the procedural and substantive course of the arbitral proceedings. What further reinforces this consensual character is that judicial proceedings in all disputes aim at the protection of public interests, whereas arbitration, as a consensual arrangement, aims at the protection of private interests — specifically, the interests encapsulated in the arbitration agreement — which the parties have selected so as to preserve the legal positions arising from their particular legal relationship.⁷

The consensual nature of commercial arbitration is also evident in the parties' selection of the various substantive and procedural regimes that attend the conduct of proceedings before the arbitral tribunal: from the choice of the type of arbitration — ad hoc or institutional — to the appointment of the arbitrators individually or collectively, and through to the selection of the law applicable to both the substance of the dispute and its procedure. This position was affirmed by the French Court of Cassation, which held that: *"arbitral awards issued on the basis of an arbitration clause form a single unit with that clause and partake of its contractual character."*⁸

1.2.2 The Judicial Nature of Commercial Arbitration

Commercial arbitration is characterized as judicial in nature by reference to its purpose — the resolution of a subsisting dispute between specific parties — and to the function entrusted to the arbitrator or arbitrators by virtue of this procedure, which closely resembles the function of a judge adjudicating a dispute submitted to them. Since the arbitrator equally adjudicates a dispute, their activity is, on that account, of a judicial character.⁹

What further reinforces the judicial character of arbitration is the legal framework through which the dispute before the tribunal passes, which does not differ substantially from the procedural framework governing litigation before the courts.¹⁰ The parties and the arbitral tribunal are alike bound by the fundamental procedural principles governing judicial proceedings, including the adversarial principle, adjudication within a reasonable time, the preservation of confidentiality, and the principle of equality. The arbitrator or arbitrators equally possess such powers as allow them to verify the seriousness of the claims, to examine and test the

⁵See Article 12 of Law No. 22/18 comprising the Investment Law.

⁶Amina Kussam. "The Algerian Agency for Investment Promotion under the New Investment Law No. 22/18." *Tabna Journal of Scientific and Academic Studies*, Vol. 5, No. 2, 2022, p. 106.

⁷Ridwan Abu Zayd. *General Principles of International Commercial Arbitration*. Dar al-Fikr al-Jami'i, Cairo, Egypt, 1981, p. 24.

⁸Khalid Muhammad al-Qadi. *Op. cit.*, p. 143.

⁹Huda Muhammad Magdi Abd al-Rahman. *The Role of the Arbitrator in Arbitration Proceedings and the Limits of Their Authority*. Dar al-Nahda al-Arabiyya, Egypt, 1999, p. 21.

¹⁰Ahmad Abd al-Karim Salama. *Arbitration in Domestic and International Financial Transactions*. Dar al-Nahda al-Arabiyya, Egypt, 2006, p. 11.

evidence adduced in their support, and to satisfy themselves as to its legality — in addition to ensuring respect for the rights and guarantees accorded to each party in the proceedings.

The arbitral process concludes with the issuance of an award that finally determines the dispute, complete in its formal requirements in the same manner as a judicial decision issued by any of the competent courts. Once it satisfies those requirements and all avenues of challenge have been exhausted, it acquires the authority of *res judicata* and accordingly becomes enforceable through the established enforcement procedures.

1.2.3 The Position of the Algerian Legislature on the Legal Nature of Commercial Arbitration

Arbitration, as an alternative to litigation for the resolution of disputes, comes into existence when the parties choose it as their mechanism for settling the dispute. The scope of their autonomy extends, pursuant to the principle of party autonomy, to the choice of the arbitral procedure, the appointment of the arbitrators, and the selection of the law applicable to the arbitral proceedings. This principle carries particular weight in international economic relations, as reflected in investment contracts of various forms, making this consensual procedure one of the most significant legal guarantees enshrined by investment law for investors, particularly those of foreign nationality.

This autonomy is, however, exhausted once the jurisdiction of the chosen arbitral tribunal is established, at which point the judicial character of arbitration becomes apparent: the arbitrators exercise their jurisdictional authority derived from the arbitration agreement and adjudicate, on that basis, the dispute concerning the civil liability of one or both of the investment contract parties. Commercial arbitration is accordingly a judicial act whose source is the agreement of the parties; neither of these two natures can be negated or subordinated to the exclusion of the other.

Article 1011 of the Code of Civil and Administrative Procedure, in the course of defining the arbitration agreement, provides that it is an agreement by which the parties consent to submit to arbitration a dispute that has already arisen. This approach signals the Algerian legislature's orientation toward a synthesis of the consensual and judicial dimensions of commercial arbitration.

Returning to the arbitration agreement, it may take the form of a clause embedded by the parties in the principal contract from which the dispute arose, or be contained in a separate instrument. The parties to investment contracts typically incorporate an arbitration clause into the contract document as a provision governing the anticipated resolution of any future disputes. The parties may also elect to submit to arbitration on the basis of bilateral or multilateral treaties concluded by the Algerian state,¹¹ whose provisions address arbitral procedure — particularly where the state is the domestic party to one of these contracts.

The parties to investment contracts may, at the time of drafting the terms of the contract, agree to submit any future dispute to arbitration rather than to the courts — a provision termed the arbitration clause, defined as: ***“an agreement by which the parties to a contract connected with rights accessible within the meaning of Article 1006 undertake to submit to arbitration any disputes that may arise in relation to that contract.”***¹² The parties may also elect arbitration after the dispute has arisen, in which case the arbitration agreement is termed a submission agreement. Nor is there any impediment to the parties submitting their dispute to arbitration while judicial proceedings are already underway before the competent court; however, the establishment of arbitral jurisdiction in this case suspends the jurisdiction of the courts, in accordance with Article 1013 of the Code of Civil and Administrative Procedure.

Section Two: Procedures for the Settlement of Disputes through Arbitration

A distinction must be drawn between the procedures applicable to domestic or national arbitration and those applicable to international commercial arbitration.

2.1 Procedures of Domestic Commercial Arbitration

Domestic arbitration refers to arbitration agreed upon by parties who are Algerian nationals, in connection with legal relationships formed and performed in Algeria, and governed by Algerian law. It constitutes an

¹¹Examples of such treaties include the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, ratified by Algeria in 1989; the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), ratified by Algeria by Order No. 95/04; and the bilateral agreement on mutual promotion and protection of investments concluded between Algeria and France, ratified by Presidential Decree No. 94/01.

¹²See Article 1007 of Law No. 08/09 comprising the Code of Civil and Administrative Procedure.

appropriate mechanism, particularly for the resolution of disputes arising from domestic investment. The following sets out the legal framework governing the conduct of arbitration proceedings, from the appointment of the arbitrators through to the issuance of the award, and finally its enforcement and challenge.

2.1.1 Constitution of the Arbitral Tribunal

The arbitral tribunal is constituted pursuant to the parties' agreement to resort to arbitration. It is composed of a defined number of arbitrators, which must be an odd number, whether the tribunal consists of a sole arbitrator or a panel, as stipulated in Article 1017 of the Code of Civil and Administrative Procedure, which provides: **"The arbitral tribunal shall be composed of one or several arbitrators in an odd number."**

An arbitrator is defined as the person chosen by the disputing parties, or by the judge where the parties are unable to agree on an appointment, whose task is to work toward a resolution of the dispute submitted to them by the parties, on account of their confidence in the arbitrator's competence and ability.¹³ The arbitrator is not a party to the dispute. In addition to their skills and capacity to resolve disputes, it is required that the arbitrator have no family relationship with, or direct or indirect economic interest in the position of, any of the parties.

Article 1014 of the Code defines the conditions that a prospective arbitrator must satisfy. It stipulates that arbitration may not be entrusted to a natural person unless they are in full possession of their civil rights; by necessary implication, any person who has been deprived of one or more civil rights as a result of a criminal conviction or other legal infringement that entails the loss of civil rights is disqualified. The tribunal may also be constituted of legal persons, in which case the legal person appoints one or more of its members as representatives.

In order for the arbitral tribunal to be validly constituted, the arbitrators proposed for appointment must express their acceptance of the duties to be entrusted to them.¹⁴ Accordingly, an arbitrator who becomes aware of a ground for their recusal is under an obligation to inform the parties of that circumstance. Their continued service as arbitrator thereafter is subject to the parties' consent after being informed of the ground. An arbitrator is liable to recusal in the following circumstances:

- Where they do not possess the qualifications agreed upon by the parties.
- Where a ground for recusal is provided for in the arbitral rules accepted by the parties.
- Where circumstances give rise to a legitimate doubt as to their independence, in particular by reason of an economic or family relationship with one of the parties, whether direct or through an intermediary.

An arbitrator may accordingly be recused where any of these grounds is established. It is settled that this right may not be exercised by the party that appointed the arbitrator, or participated in their appointment, unless the ground for recusal came to light after the appointment. In such circumstances, the party seeking recusal is obliged to notify the arbitral tribunal and the other party of the ground for recusal at the earliest opportunity. Where a dispute arises in connection with the recusal and the chosen arbitral rules do not specify the means of resolving it, the court resolves the dispute upon the application of any interested party by way of an order that is not subject to appeal, pursuant to Article 1016 of the Code of Civil and Administrative Procedure.

Where the constitution of the arbitral tribunal proves impossible, whether by reason of the conduct of one of the parties or in the course of implementing the appointment procedures, the President of the court within whose territorial jurisdiction the place of conclusion or performance of the contract falls shall appoint the arbitrator or arbitrators. However, where the arbitration clause is null and void or insufficient to enable the constitution of an arbitral tribunal, the President of the court shall so determine and shall declare that there are no grounds for making the appointment.¹⁵

2.1.2 Conduct of Proceedings before the Arbitral Tribunal

The arbitral proceedings are governed by the time limits and conditions prescribed by the applicable law designated in the arbitration agreement, for the purposes of adjudicating the dispute submitted to the tribunal.

¹³Muhannad Ahmad al-Sanuri. *The Role of the Arbitrator in International Private Arbitration Proceedings*. Dar al-Thaqafa, Amman, Jordan, p. 57.

¹⁴See Article 1015 of Law No. 08/09 comprising the Code of Civil and Administrative Procedure.

¹⁵See Article 1009 of Law No. 08/09 comprising the Code of Civil and Administrative Procedure.

Once appointed, and upon the submission of the dispute, the arbitrators shall proceed in their attempt to resolve it. Having commenced their functions and entered upon the arbitral process, the arbitrators may not withdraw from their duties unless a ground for recusal arises after their appointment, in order to safeguard the parties' rights — particularly those of an urgent character, since the withdrawal of the arbitrators without proper justification would have an adverse effect on the interests of the contract parties.

The arbitral function may, however, be temporarily suspended where the facts disclose a criminal incident or where forgery is alleged in relation to one of the documents submitted, in which case the arbitrators shall refer the parties to the competent judicial authority; the arbitral proceedings shall resume from the date of the decision on that incidental matter, pursuant to Article 1021(2) of the Code.¹⁶

Upon submitting their dispute to the arbitral tribunal, the parties are obliged to present all claims by which the claimant seeks to establish the civil liability of the opposing party,¹⁷ which necessarily presupposes the concurrence of its elements — fault, damage, and causal link. The claimant, as the party harmed by the formation or performance of the contract, bears the burden of establishing the facts of the breach and connecting them causally to the damage sustained, by adducing the relevant pleadings and documents. This must be done no later than fifteen days before the expiry of the arbitration period, so as to afford each party the opportunity to examine and respond to or contest them.

In the course of the proceedings, the arbitrators are bound to apply the rules of law. In the context of domestic arbitration, the applicable law is Algerian law, both as regards the substance of the dispute and the procedural rules of litigation, given that this is a domestic arbitration between domestic parties who concluded and performed the contract in Algeria. The arbitrator accordingly applies the civil liability provisions adopted by the Algerian legislature under the Civil Code and related legislation, as well as legislation relating to technology in all its material and immaterial elements.

The dispute before the arbitral tribunal is subject to the established legal procedures: the arbitrators, after their appointment, ensure compliance with the procedural principles of litigation, including equality and the adversarial principle, in addition to their obligation to adjudicate within a reasonable time, having regard to the particular requirements of investment activity and its need for expedition. The arbitrators equally enjoy broad powers in the context of adjudicating the dispute, including the conduct of investigative measures and other procedural acts incidental to the arbitral process. With regard to procedure, the enforcement of the award issued by the arbitrators is subject to the drafting requirements and the rules of enforcement and challenge established by the Code of Civil and Administrative Procedure.

Arbitral proceedings terminate in ordinary circumstances with the issuance of an award that finally resolves the dispute. They may, however, be cut short by events that bring the proceedings to a close before the award is issued. Article 1024 of the Code enumerates these events exhaustively:

- The death of an arbitrator, their refusal to perform the arbitral function with justification, their removal, or the occurrence of an impediment: these events affect the composition and numerical constitution of the tribunal, and consequently the conduct of the proceedings — particularly with regard to the issuance of the award and voting thereon — unless the arbitration agreement provides otherwise or the parties or the arbitral panel agree on a replacement. Replacement preserves the constitution of the tribunal, as the arbitrator is replaced by another, maintaining the odd number of arbitrators required. The replacement may be effected by the disputing parties or by the remaining arbitrators.
- The expiry of the period prescribed for arbitration: the parties, in the arbitration agreement, specify the period within which the arbitrators are bound to resolve the dispute. Where no period is specified, it is deemed to be four months.¹⁸
- The loss of the subject-matter of the dispute or the extinction of the debt in issue.
- The death of one of the contract parties.

¹⁶See Article 1021 of Law No. 08/09 comprising the Code of Civil and Administrative Procedure.

¹⁷Hafiza al-Sayyid al-Haddad. *Contemporary Trends Regarding Arbitration Agreements*. Dar al-Fikr al-Arabi, Alexandria, Egypt, 1996, p. 57.

¹⁸See also: Supreme Court of Algeria, Civil Chamber, Decision No. 13403662, issued 16 January 2020, Case (Sh.A.) v. Company KPk SPA. Decision available at: www.couresupreme.dz. Accessed: 23 October 2022.

2.1.3 Issuance of the Domestic Arbitration Award

The arbitration award is issued after the conduct of proceedings in accordance with the legally prescribed conditions and time limits. Following examination of the dispute, identification of the breach and the party responsible for it, and determination of liability accordingly, the arbitral tribunal issues its award after deliberations conducted in private,¹⁹ in which the arbitrators have determined the dispute by a majority vote pursuant to Article 1026 of the Code. The significance of the odd number of arbitrators is apparent here: it prevents a tie and the consequent impossibility of issuing an award.

The arbitration award is issued in writing and must contain a brief account of the parties' claims and their respective arguments. The awards must also be reasoned,²⁰ by setting out the legal and factual grounds that led the arbitrators to issue the award in the terms in which it is expressed. All arbitrators are required to sign the award. Where the minority refuses to sign, the remaining arbitrators shall note that fact; however, such refusal does not affect the validity of the award, which produces its effects as though signed by all the arbitrators.²¹

Pursuant to Article 1028, the arbitration award must contain the following particulars:

- The full name of the arbitrator or arbitrators.
- The date of issue of the award.
- The place of issue.
- The full names of the parties, their domicile, and, in the case of legal persons, their denomination and registered office.
- The full names of counsel and any persons who assisted the parties, where applicable.

The jurisdiction of the arbitral tribunal to examine the dispute is exhausted immediately upon adjudication and the issuance of the award.²² The Algerian legislature has, however, allowed the arbitrators to remedy material errors and omissions that have affected the award after its issuance, as well as to interpret an award issued by them or by the full arbitral tribunal, pursuant to Article 1030 of the Code. Once issued and satisfying all its substantive and formal requirements, the arbitration award acquires the authority of *res judicata* with respect to the dispute adjudicated, in accordance with Article 1031.

2.2 Procedures of International Commercial Arbitration

In the view of the Algerian legislature, commercial arbitration is international where it concerns disputes relating to the economic interests of at least two states.²³ It is accordingly one form of commercial arbitration that, by its nature as an alternative to litigation, aims at the settlement of disputes.

2.2.1 Constitution of the Arbitral Tribunal

The arbitral tribunal is constituted pursuant to the arbitration agreement, whether by the disputing parties directly in that agreement — whether free-standing or incorporated in the principal investment contract — or by reference to the arbitral rules. The latter refers to the body of international rules established by international institutions specifically to govern entities tasked with conducting international commercial arbitration, such as the International Centre for Settlement of Investment Disputes (ICSID) and the rules established by the International Chamber of Commerce in Paris.²⁴

Where the parties fail to appoint the arbitrators, or where difficulties arise in connection with their appointment, removal, or replacement, the party with an interest in expediting the matter may:

- Submit the matter to the President of the court within whose territorial jurisdiction the seat of arbitration falls, where the arbitration takes place in Algeria.

¹⁹See Article 1025 of Law No. 08/09 comprising the Code of Civil and Administrative Procedure.

²⁰See Article 1027 of Law No. 08/09 comprising the Code of Civil and Administrative Procedure.

²¹See Article 1029 of Law No. 08/09 comprising the Code of Civil and Administrative Procedure.

²²Muhammad Dammana and Mu'ansari Maryam. "Procedures for the Enforcement of Commercial Arbitration Awards in Algeria." *Journal of Legal and Political Studies*, No. 4, 2016, p. 135.

²³See Article 1039 of Law No. 08/09 comprising the Code of Civil and Administrative Procedure.

²⁴Rabi'a Farrah and Ilham Fadil. "The Authority of the Algerian Judge in the Recognition and Enforcement of International Commercial Arbitration Awards." *Journal of Judicial Ijtihad*, Vol. 13, No. 2, 2021, p. 688.

– Submit the matter to the President of the Algiers court, where the arbitration takes place abroad and the parties have chosen to apply the procedural rules in force in Algeria.

2.2.2 Conduct of International Commercial Arbitration Proceedings

Once the international arbitration agreement is validly established as to form and substance, and the arbitral tribunal charged with adjudicating the dispute has been constituted, the tribunal proceeds to discharge its mandate. Of particular importance in the context of the conduct of these proceedings is the question of the law applicable to the procedure and substance of the dispute, as well as the powers of the arbitral tribunal in the course of the proceedings.

2.2.2.1 The Law Applicable to Arbitral Proceedings

Disputes arising from international investment contracts inevitably give rise to conflicts of laws seeking to govern them, both as regards the procedural rules governing their conduct before arbitral tribunals and as regards the substance of the dispute.²⁵ Article 1043 of the Code constitutes the legal basis expressing the Algerian legislature's position on the procedural rules applicable to the dispute in the context of international commercial arbitration.

2.2.2.2 The Law Applicable to the Substance of the Dispute

Article 1050 of the Code provides: **"The arbitral tribunal shall determine the dispute in accordance with the rules of law chosen by the parties; in the absence of such choice, it shall adjudicate according to the rules of law and trade usages that it considers appropriate."** The applicable law for the substance of the dispute is accordingly the law of the parties' autonomy – the law that the contract parties have agreed to apply to the subject-matter of their dispute. The arbitral tribunal may ascertain this chosen law by reference to the arbitration agreement, in which the parties set out in writing the law they wish to govern the existing or future dispute.

The reinforcement of the role of party autonomy in structuring international investment contracts, particularly at the dispute resolution stage, constitutes a legal guarantee of considerable importance, effectively aimed at attracting and encouraging investors to invest in Algeria, since this provision contributes to strengthening the concept of legal certainty. This freedom is not, however, unlimited: the chosen law must be consonant with the requirements of public policy and public morality in Algeria.²⁶ It is also required that the chosen law have a clear connection with the parties to the contract and its subject-matter; otherwise, it constitutes a case of evasion of the law, indicative of the parties' bad faith and their desire to circumvent the properly applicable law.

Article 1050 also addresses the situation in which the parties have failed to choose the law applicable to the substance of the dispute. Where the arbitral tribunal finds that no such choice has been made, it shall adjudicate the dispute in accordance with the rules of law and trade usages that it considers appropriate to the dispute. The legislature has clearly granted the tribunal a measure of discretion in the absence of a choice, so as to enable it to select the most appropriate law for determining the dispute without delay.

2.2.3 Powers of the Arbitral Tribunal during the Proceedings

In the exercise of its function of adjudicating disputes arising from investment contracts, the international commercial arbitral tribunal is vested with powers conferred upon it by the Algerian legislature, for the purposes of establishing the truth, determining the liability of the parties, identifying the various consequences that flow therefrom, and protecting the economic interests of the parties to the greatest extent possible.

The arbitral tribunal adjudicates its own jurisdiction by preliminary award, excluding from its purview any dispute that is not arbitrable and over which the courts have exclusive jurisdiction, such as disputes relating to immovable property and other matters that are non-arbitrable. Any objection to jurisdiction must be raised before any other substantive pleading.²⁷ The establishment of arbitral jurisdiction after its confirmation suspends judicial jurisdiction; the court has no authority to adjudicate the dispute thereafter where proceedings

²⁵Musa Bukriyya. "Commercial Arbitration as a Means of Settling Disputes Arising from International Trade Contracts." *Journal of Law and Political Science*, No. 8, June 2017, p. 1158.

²⁶See Article 24 of the Algerian Civil Code.

²⁷See Article 1044 of Law No. 08/09 comprising the Code of Civil and Administrative Procedure.

are already pending. Judicial jurisdiction is equally suspended where the existence of an arbitration agreement is brought to the attention of the court by one of the parties.²⁸

The arbitral tribunal may, during the proceedings, order provisional measures upon the application of the parties, pending the issuance of the award, for the preservation of the vested rights of the parties once the dispute has arisen — unless the arbitration agreement provides otherwise. Where the party concerned voluntarily refuses to comply with such a measure, the arbitral tribunal may seek judicial assistance and request the competent judge to compel compliance. The applicable law in this regard is the law of the country of the judge concerned, pursuant to Article 1046 of the Code.

With regard to the taking of evidence, the arbitral tribunal plays a proactive role: it is incumbent upon the tribunal to seek all lawful means by which to establish the elements of each investor's liability, in accordance with Article 1047 of the Code. Given the commercial nature of the contract, the rules of evidence in commercial transactions are characterized by a degree of breadth and flexibility compared with other evidentiary regimes, which will facilitate the tribunal's task of gathering the evidence on which the award will be grounded.

The international commercial arbitral tribunal exhausts its jurisdiction upon the issuance of a final award on the merits, whether that award is final, partial, or interlocutory, as a prelude to the commencement of enforcement proceedings. The award must satisfy the substantive conditions generally applicable to awards — most importantly, that it adjudicates the specific dispute designated in the arbitration agreement in accordance with the applicable law — as well as the formal requirements, including that the text of the award be in writing and that the essential particulars be set out therein, such as the names of the disputing parties and the names and signatures of the arbitrators.

2.2.4 Enforcement of International Commercial Arbitration Awards

Following the issuance of the award, the interested party — whether a party to the investment contract — proceeds expeditiously to enforce the award issued by the arbitral tribunal. Any interested party equally has the right to challenge the award in accordance with clear procedural rules.

The role of commercial arbitration as a dispute resolution mechanism is not complete without the enforcement of the awards issued by the arbitrators following their examination of the dispute. International arbitration awards are subject to the same procedures that accompany the enforcement of domestic arbitration awards, in accordance with Article 1054 of the Code, which in turn refers to Articles 1035 to 1038. Accordingly, the arbitration award, whether final, partial, or preparatory, is enforced by order of the President of the court.

The legislature has not specified which court is competent to issue the enforcement order; it is generally considered to be the court within whose territorial jurisdiction the place of enforcement of the award falls. The award is deposited with the registry of that court by the party with an interest in expediting enforcement. Where the President of the court refuses to order enforcement, the parties may appeal that refusal within fifteen days of the date of refusal before the judicial council.²⁹ Once these procedures have been completed, the chief registrar shall issue a certified copy bearing the enforcement formula to whichever party requests it, in accordance with Article 1036 of the Code. Where the arbitration award contains grounds of urgency, it may be subject to immediate enforceability, in which case the rules relating to immediate enforceability in force under Algerian law shall apply.

As regards the binding force of international arbitration awards, it is not absolute: its scope is limited to the parties to the dispute and does not extend to third parties. It is similarly limited in subject-matter to the dispute specified in the arbitration agreement.³⁰

Conclusion

It is apparent that commercial arbitration as a mechanism for the resolution of investment disputes has demonstrated a substantive and procedural flexibility, whether as domestic or international arbitration. Following its adoption by the Algerian legislature through the Code of Civil and Administrative Procedure, it

²⁸See Article 1045 of Law No. 08/09 comprising the Code of Civil and Administrative Procedure.

²⁹See, regarding the enforcement order: Supreme Court of Algeria, Decision No. 1037542, issued 14 October 2015, Case of the Single-Person Company and the Western Maintenance Group (National) v. the Limited Liability Company Bazina Marine Services. Decision available at: www.couresupreme.dz. Accessed: 7 February 2023.

³⁰See Article 1038 of Law No. 08/09 comprising the Code of Civil and Administrative Procedure.

has become the most widely used mechanism for the resolution of disputes, owing to its distinctive legal nature — which combines both consensual and judicial dimensions — thereby affording the parties freedom in choosing the arbitral procedure, the arbitrators, and the law applicable to the substance of and procedure governing the dispute. This arbitral procedure is accompanied by a body of legal rules that reinforce the parties' freedom and ensure the legality of arbitral decisions from the moment of their issuance through to their enforcement.

The study has yielded the following conclusions:

- Commercial arbitration is a legal alternative to the national judiciary for the resolution of investment disputes.
- By reason of the flexibility of its rules, commercial arbitration is the most widely used procedural mechanism for the resolution of disputes.
- Arbitration combines two natures — consensual and judicial — which together render it a distinctive legal system for the resolution of investment disputes.
- The disputing parties enjoy freedom in the choice of arbitrators and in the selection of the law applicable to the dispute.
- For the enforcement of the arbitral award that determines an investment dispute, the conditions established by Algerian law must be observed, most importantly that the award does not contravene public policy or public morality.
- The courts exercise supervisory oversight over the arbitral process.

In light of the importance attaching to commercial arbitration, the following recommendations are advanced:

- The confidentiality characteristic inherent in the arbitral system must be balanced against the transparency requirements emphasized by investment law, so as to protect the rights of third parties connected with the dispute.
- The procedures for the enforcement of commercial arbitration awards and decisions, whether domestic or international, must be rendered compatible with the requirements of expedition and creditworthiness imposed by commercial transactions.
- The system of judicial challenge to commercial arbitration awards and decisions issued in the settlement of investment disputes — particularly foreign investment disputes — must be updated, and the matter should not be left to the general rules which may be unduly prolonged. In this regard, it is proposed that a dedicated section be added to the Code of Civil and Administrative Procedure, setting out specific statutory time limits for challenges to commercial arbitration awards.

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