

*The Invalidity of International Arbitral Awards
Due to Contravention of Public Policy*

بطلان حكم التحكيم الدولي لمخالفة النظام العام



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Abstract:

This article examines the annulment of international arbitral awards on the grounds of violation of public policy. It explores the concept of international public policy as a flexible yet fundamental safeguard in arbitration. The study highlights how its definition and application vary among jurisdictions, affecting the enforceability of awards. Relevant provisions from international conventions and comparative jurisprudence are analyzed. The discussion emphasizes the balance between party autonomy and the protection of fundamental legal principles. The paper concludes with insights on harmonizing public policy standards to enhance the predictability of arbitral outcomes.

key words: Invalidity ; Public Policy; Arbitral awards

الملخص:

تعد مسألة بطلان أحكام التحكيم الدولية لمخالفتها للنظام العام الدولي من أكثر القضايا تعقيداً وإثارة للجدل في مجال التحكيم الدولي. ويرجع ذلك إلى الطبيعة المرنة والمتغيرة لمفهوم النظام العام، واختلاف تفسيراته بين الأنظمة القانونية الوطنية، مما يؤدي إلى صعوبات في تنفيذ الأحكام التحكيمية. وتخلص الدراسة إلى ضرورة وضع معايير أوضح وأكثر توحيداً توازن بين حماية سيادة الدول وضمان استقرار نظام التحكيم الدولي.

الكلمات المفتاحية: بطلان ، نظام عام ، أحكام تحكيم

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Introduction:

Arbitration as a method of dispute resolution is not a product of the modern era. On the contrary, it represents one of the earliest and most enduring mechanisms devised by mankind to resolve disputes. From ancient times, individuals, communities, and later states, have turned to arbitration to settle disagreements, promote stability and peace, and replace the rule of force with the rule of law.

Despite its private and contractual nature, arbitration decisions particularly arbitral awards share certain fundamental features with judicial rulings. However, arbitral awards are not completely insulated from the control of national courts. Judicial oversight over arbitral awards forms an essential part of the justice system and serves to uphold legal guarantees granted to parties, most notably the right to challenge arbitral awards through annulment under specified conditions outlined in arbitration legislation.

Among the most significant mechanisms for contesting international arbitral awards is annulment, or setting aside the award. In line with comparative legal systems, the Algerian legislator has enumerated specific and limited grounds for annulment under Articles 1056 and 1058 of the Algerian Code of Civil and Administrative Procedure¹. One of the most important of these grounds is contravention of international public policy.

International public policy plays a central role in the realm of international arbitration. It serves both as a powerful legal ground for the annulment of arbitral awards and as a substantial obstacle to their enforcement. Despite the considerable academic and judicial attention this concept has attracted, public policy remains ambiguous, difficult to define, and constantly evolving across legal systems. It is a flexible concept, changing with time and jurisdiction, which further complicates its legal application.

The type of public policy relevant for annulment in the context of international arbitration is international public policy, a relatively new and distinct concept that emerged to protect the integrity and predictability of international commercial transactions. It is designed to shield cross-border dealings from abusive practices by parties seeking to evade enforcement of arbitral awards under the pretense of national interest.

¹ Law No. 08/09 dated 18 Safar 1429 corresponding to 25 February 2008, containing the Code of Civil and Administrative Procedures, Official Gazette No. 21, published on 23 April 2008.

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Accordingly, the central research question of this study is: To what extent does international public policy influence the judiciary's ability to annul international arbitral awards?

In addressing this problem, the study adopts an analytical legal methodology, examining relevant legal texts, case law, and doctrinal opinions, with the goal of identifying the scope, content, and practical effect of international public policy in the annulment of arbitral awards.

The research is structured as follows:

The first topic: The Concept of International Public Policy as a Legal Ground for the Annulment of International Arbitral Awards

The second topic: The Annulment of Arbitral Awards Due to Incompatibility with International Public Policy Norms

The article concludes with a synthesis of the main findings and insights derived from this legal inquiry.

The first topic : The Concept of International Public Policy as a Legal Basis for the Annulment of International Arbitral Awards

The concept of public policy is one of relativity and great flexibility. What falls within public policy at a particular time may not necessarily be considered as such in a different era. Similarly, what constitutes public policy in one country may not be the same in another. This inherent variability and subjectivity have rendered it difficult to establish a clear, precise, and universally accepted definition.

Public policy is a multifaceted concept, and its meaning may vary depending on the perspective adopted. From a domestic perspective, we speak of internal public policy; from an international outlook, we refer to international public policy. Algerian legislation has recognized this distinction between internal and international public policy. Therefore, to accurately grasp the notion of international public policy, it is first essential to examine the internal concept. Accordingly, this topic is divided into two **requirements**: the first addresses internal public policy, and the second focuses on international public policy.

The first requirement: The Concept of Internal Public Policy

Internal public policy is primarily a national concept, aimed at protecting the domestic legal order from any disturbances or threats. This **requirement**

will examine how internal public policy is addressed both in Algerian legislation and in legal doctrine.

First section: Internal Public Policy in Algerian Legislation

Like other legal systems, Algerian legislation refers to internal public policy in several legal provisions, yet without providing a precise definition. Despite the long-standing presence of the concept, most legal texts refrain from defining it explicitly.

For instance, Article 605 of the Algerian Code of Civil and Administrative Procedure states:

“Orders, judgments, and decisions rendered by foreign judicial authorities may not be enforced in Algeria unless granted exequatur by an Algerian court, provided that the following conditions are met: [...] 4. That the decision does not contravene public policy and morals in Algeria.”¹

Similarly, Article 24(1) of the Algerian Civil Code provides:

“Foreign law shall not be applied under the previous provisions if its content is contrary to public policy or morality in Algeria, or if the application of foreign law has been obtained through fraud.”²

These references highlight that the Algerian legislator like many others has chosen not to define public policy due to its variable nature, influenced by political, economic, moral, and religious considerations. Consequently, defining its content has been left to judicial interpretation and legal scholarship, instead of being rigidly codified.³

Second section: Internal Public Policy in Legal Doctrine

Legal scholars have also faced difficulties in defining internal public policy and have instead proposed approximations and conceptual outlines. The term is

¹ Law No. 08/09 dated 18 Safar 1429 corresponding to 25 February 2008, containing the Code of Civil and Administrative Procedures, Official Gazette No. 21, published on 23 April 2008.

² Ordinance No. 75/58 dated 20 Ramadan 1395, corresponding to 26 September 1975, as amended and supplemented by Law No. 07/05 dated 13 May 2007, containing the Civil Code, Official Gazette No. 31, published on 27 May 2007.

³ Mamdouh Abdel Karim Hafidh Armosh, *Private International Law, Vol. I: Conflict of Laws, International Jurisdiction, and Enforcement of Foreign Judgments*, Dar Al-Thaqafa Publishing and Distribution, Jordan, 1998, p195.

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generally used to denote the fundamental values and interests upon which a society is based.¹

For instance, Professor Mamdouh Abdel Karim Hafiz defines internal public policy as:

“The sum of fundamental principles of the national legal order upon which the political, economic, religious, legal, and moral structure of the society is built, and which are primarily enshrined in the Constitution.”²

Similarly, Professor Ahmed Muslim describes it as:

“The internal public policy of a state represents its political, social, and economic system, which is based on core values such as security, liberty, democracy, legal equality, religious belief systems, and economic ideologies such as socialism, capitalism, social justice, and equal opportunity.”³

Another doctrinal perspective characterizes internal public policy as:

“A body of legal rules aimed at preserving the political, economic, and ethical identity of the state, where the general interest prevails over private interests, albeit without completely disregarding the latter.”⁴

These definitions reveal the dynamic and ever-changing nature of public policy, making it inherently elusive and subject to continuous evolution.⁵

The second requirement: The Concept of International Public Policy

The concept of international public policy must be defined with greater precision and restraint to ensure the effectiveness of international commercial arbitration. While domestic public policy operates to prevent violations of mandatory internal norms, international public policy plays a narrower role, mainly by annulling international arbitral awards or preventing their enforcement.

¹ Fayrouz Hout, *Judicial Review of International Commercial Arbitration Awards under Algerian Law and International Conventions: A Comparative Analytical Study*, Academic Publishing Center, Algeria, 2019, p124.

² Mamdouh Abdel Karim Hafidh Armosh, *op cit*, p197.

³ Ahmed Muslim, *Comparative Private International Law in Egypt and Lebanon*, Maktabat Al-Nahda Al-Misriya, Egypt, 1956, p203.

⁴ Ashraf Abdel Alim Al-Rifai, *The Arbitration Agreement and Practical and Legal Issues in Private International Relations*, Dar Al-Fikr Al-Jamii, Alexandria, 2006, p69.

⁵ . Amer Fathi Al-Bataineh, *The Role of the Judge in International Commercial Arbitration: A Comparative Study*, Dar Al-Thaqafa Publishing and Distribution, Amman, 2008, p189.

First section: International Public Policy in Algerian Legislation

Algerian legislation explicitly refers to international public policy in Articles 1051, 1056, and 1058 of the Code of Civil and Administrative Procedure:

Article 1051 provides:

“Recognition of international arbitral awards in Algeria shall be granted if the party invoking the award proves its existence and provided that such recognition does not violate international public policy.”

Article 1056 states:

“The order granting recognition or enforcement of an arbitral award may only be appealed in the following cases: [...] 6. If the arbitral award contravenes international public policy.”

Article 1058 adds:

“An international arbitral award rendered in Algeria may be subject to annulment under the grounds listed in Article 1056 above.”

These articles demonstrate that Algerian judges have discretionary authority to determine whether an arbitral award violates international public policy. Notably, the Algerian legislator refers specifically to international public policy, in contrast to the New York Convention of 1958, which only refers to "public policy" without differentiating between its domestic and international dimensions.¹

The UNCITRAL Model Law on International Commercial Arbitration similarly refers to domestic public policy in Articles 34(2)(b)(ii) and 36(1)(b)(ii)², which further highlights the more specific and restrictive approach adopted by Algerian law.³

This specific mention of international public policy is generally regarded as more favorable to arbitration, since the concept is narrower and thus allows for broader recognition and enforcement of arbitral awards. Some scholars even

¹ Hocine Farida, *L'influence de l'accueil de la sentence arbitrale par le juge algérien sur l'efficacité de l'arbitrage commercial international*, Doctoral Thesis in Law, Faculty of Law and Political Science, University of Mouloud Mammeri, Tizi-Ouzou, 2012, p217.

² Muzafar Jaber Ibrahim Al-Rawi, *Enforcement of Foreign Arbitral Awards: A Study in Light of Jordanian and Algerian Legislation*, Proceedings of the International Conference on "Regulating Private International Relations for International Judicial Cooperation", 3rd Edition, Faculty of Law and Political Science, Kasdi Merbah University, Ouargla, 24–25 April 2013, p17.

³ Haroun Mahdi, *Le régime investissement en Algérie à la lumière des conventions bilatérales Franco-Algériennes*, Éditions LITEC, Paris, 2000, p697.

argue that Algerian law is more advanced in this regard than the New York Convention, which leaves it to each state to interpret "public policy" according to its legal culture thus potentially allowing for broader grounds of refusal in some jurisdictions.¹

Second section: International Public Policy in Legal Doctrine

Some Algerian jurists have proposed definitions of international public policy that reflect its international scope and flexibility. According to one perspective, international public policy represents:

“A mitigated form of domestic public policy adapted to the flexible nature of international trade, whether regarding substantive or procedural rules.”²

Another definition views it as:

“A set of essential principles and values necessary for the functioning of the international legal order, including rules of justice and procedural fairness, which international arbitrators must respect irrespective of the national law governing the dispute.”³

From a comparative perspective, international public policy is seen as:

“A collection of legal norms and ethical standards that govern international relations and transactions, preserving the coherence of international commerce and ensuring effective international cooperation.”⁴

The second topic : Annulment of the Arbitral Award Due to Contradiction with International Public Policy

International public policy is an inherently flexible and evolving concept, making it difficult to define with precision. Its content is not fixed and varies across jurisdictions, especially in the field of international arbitration⁵. Each

¹ Issaoui Mohamed, *The Effectiveness of Arbitration in Protecting Foreign Investment in Algeria in Light of Its International Agreements*, PhD Thesis in Law, Faculty of Law and Political Science, University of Mouloud Mammeri, Tizi-Ouzou, 2012,p284.

² Mostefa Terari El-Thani, "International Commercial Arbitration in Algeria Following the Issuance of Legislative Decree No. 09/93 dated 25/04/1993 Amending the Code of Civil Procedure", *Journal of Legal Studies*,Algeria, Issue No. 1, June 2002,p53.

³Terki Nour Eddine, *L'arbitrage commercial international en Algérie*, Office des Publications Universitaires, Algiers, 1999,p46.

⁴ Ashour Mabrouk, *The Mediator in the Legal System for the Enforcement of Arbitral Awards: An Analytical Study According to Contemporary Legislations and Systems*, 1st Edition, Dar Al-Fikr wal Qanoun, Mansoura, Egypt, 2011,p290.

⁵ Terki Nour Eddine,op cit,p46.

state seeks to preserve a certain degree of control over disputes that touch upon its fundamental interests by excluding certain matters from the scope of arbitration, considering them to fall within the domain of public policy¹.

Given this diversity, applying a rigid standard to determine what constitutes international public policy may undermine the objectives and effectiveness of international arbitration. Therefore, it is crucial to strike a balance between respect for state sovereignty and the integrity of the arbitral process.

This topic is structured into two main **requirements**:

The first requirement explores the grounds for annulment of arbitral awards based on their conflict with international public policy.

The second requirement addresses the necessary limitation of public policy's role in annulment proceedings in order to enhance the efficiency and finality of international arbitration.

The first requirement: Grounds for Annulment of Arbitral Awards for Violation of International Public Policy

Public policy, when invoked as a justification for setting aside an arbitral award, can be founded on a wide range of grounds. These grounds may be codified in domestic legislation or recognized under international instruments governing arbitration.²

On one hand, procedural violations that contravene the principles of international public policy can form the basis for annulment. On the other hand, substantive outcomes of arbitral decisions may also be challenged if they are fundamentally inconsistent with the core values and principles upheld by the international legal order.

Accordingly, two main aspects are examined: Procedural irregularities in the arbitration process that violate international public policy.

And Substantive content of the award that contradicts the essential principles of international public policy.

¹ Abd El-Nour Ahmed, Issues in the Enforcement of Foreign Judgments: A Comparative Study, Master's Thesis in Private International Law, Faculty of Law and Political Science, University of Abou Bekr Belkaid, Tlemcen, 2009,p213.

² Abu Zeid Radwan, Foundations of International Commercial Arbitration, Dar Al-Fikr Al-Arabi, Egypt, 1981,p120.

First section: Procedural Irregularities Contravening International Public Policy

The procedural dimensions of arbitration represent a significant area where international public policy may be invoked. The influence of public policy depends on the phase of the arbitral process in which the violation occurs¹.

During the pre-award phase, arbitrators enjoy wide discretion to determine procedural rules, especially when parties fail to agree on such rules. Nevertheless, international public policy imposes minimum standards of due process, fairness, and equality that cannot be waived. Arbitrators must refrain from applying procedural frameworks that fail to meet these basic standards.

In contrast, during the post-award phase, the intervention of public policy takes on a negative form serving as a basis for setting aside an award. If the arbitral process was conducted under procedural rules that are fundamentally incompatible with the international public order particularly those of the enforcement forum the courts may annul the award or refuse its recognition and enforcement.

Thus, public policy functions as a safeguard mechanism, ensuring that arbitration remains consistent with the principles of procedural justice and transnational due process.

Second section: Substantive Incompatibility of the Award with International Public Policy

An arbitral award may be annulled if its outcome clearly contradicts the essential and universally accepted values of the relevant legal order especially those that govern cross-border transactions and international relations².

This occurs when the substantive rules applied by the arbitral tribunal produce a result that offends the foundational principles of justice, fairness, or

¹ Tharwat Habib, Lectures on International Commercial Law, Dar Al-Fikr Al-Arabi, Egypt, 1975,p100.

² Okasha Abdel Aal, Private International Law and International Judicial Jurisdiction, New University House, Egypt, 1996,p290.

morality as understood in the international context. Examples include the enforcement of contracts involving corruption, human trafficking, forced labor, or violations of environmental and human rights norms.

In such cases, the award cannot be upheld, regardless of party autonomy or finality, as it threatens the fundamental ethical and legal order shared by the international community.

The second requirement: Reducing the Role of Public Policy in the Annulment of International Arbitral Awards to Ensure Arbitration Effectiveness

The attempt to minimize the disruptive impact of public policy in annulment proceedings is closely linked to the desire to enhance the effectiveness and predictability of international arbitration. This endeavour rests on two interconnected foundations:

1. Restricting the concept of public policy to its international dimension, rather than its domestic application, as previously discussed in Chapter I.
2. Narrowing the scope of intervention by national courts under the banner of public policy, unless the legal order allegedly violated has a direct and significant connection with the arbitral award.

Accordingly, this **requirement** will focus on two key aspects: The discretionary power of the judge in limiting the invocation of international public policy. And The concept of partial annulment of an arbitral award that only partially violates international public policy.

First section: Judicial Discretion in Limiting the Application of International Public Policy

National judges hold a pivotal role in striking the appropriate balance between upholding public policy and maintaining the finality of arbitral awards. Judicial discretion allows courts to distinguish between essential violations of public policy and those that do not merit annulment.

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For example, suppose the applicable contract law leads to a result that, while legally valid under the governing law, appears manifestly unfair such as denying a creditor compensation despite gross negligence or willful misconduct by the debtor. Even if the legal rule permitting such a result is not in itself contrary to international public policy, the substantive outcome may still offend deeply held principles of justice.¹

In such cases, arbitrators are expected to seek a fair and equitable resolution, even before looking for legal justifications. The arbitrator's task is not merely to apply the law mechanically but to render an award that reflects a just and balanced solution, particularly in transnational disputes.²

This approach is well-established in arbitral practice. Even when the law appears rigid, arbitrators and judges may interpret it in a manner consistent with justice and international public policy. Failure to do so may result in annulment if the award is found to contradict fundamental values recognized globally.

Hence, judicial discretion serves as a filter, allowing courts to intervene only when the award offends core elements of public policy, not merely because it is imperfect or debatable³.

Another mechanism to mitigate the impact of public policy on arbitral finality is the concept of partial annulment. If only certain provisions or findings within the award contradict international public policy, courts may annul only the offending portion, while allowing the remainder of the award to stand.⁴

This principle has already been applied in the context of enforcement, where courts may refuse to enforce only the part of the award that is unenforceable under public policy, while enforcing the rest. There is no logical

¹ Mohamed Ibrahim, *Peremptory Norms of International Law*, Dar Al-Fikr Al-Jamii, Alexandria, Egypt, 2001, p30.

² Mohamed Ibrahim, *Judicial Adaptation of Legal Rules Applicable to International Commercial Contracts*, Safa Printing Center, Egypt, 2003, p122.

³ Mohamed Ibrahim, *Judicial Adaptation of Legal Rules Applicable to International Commercial Contracts*, op cit, 114.

⁴ . Samia Rashed, *Arbitration in Private International Relations, Book One: The Arbitration Agreement*, Dar Al-Nahda Al-Arabiya, 1984, p393.

reason to exclude the application of this principle in annulment proceedings as well.¹

Accordingly, courts may partially set aside an arbitral award when the offending element can be clearly separated from the remainder. This ensures that parties are not deprived of the benefits of arbitration due to limited and identifiable defects².

However, if the award's components are interdependent and inseparable, partial annulment becomes impossible, and the entire award must be set aside. This highlights the importance of structuring arbitral decisions in a modular and severable fashion, allowing greater flexibility in judicial review.³

Conclusion :

The issue of setting aside international arbitral awards for contravening international public policy remains one of the most intricate and controversial challenges in the realm of international arbitration. As public policy continues to evolve and differ from one jurisdiction to another, the risk of unpredictability in the annulment or enforcement of arbitral awards increases. This complexity is particularly evident when attempting to reconcile the sovereign interests of states with the principles of party autonomy and finality of arbitral decisions.

Through this study, it has been demonstrated that while international public policy serves an essential role in safeguarding fundamental values shared by the international community, it must not be misused as a tool for judicial overreach or disguised protectionism. There is a growing consensus among comparative legal systems and international jurisprudence on the need to adopt a restrictive and clearly defined understanding of international public policy, especially in the context of setting aside arbitral awards.

Therefore, maintaining the delicate balance between protecting core public interests and preserving the effectiveness of international arbitration requires both conceptual clarity and judicial restraint.

¹ Azmi Abdel Fattah, *Kuwaiti Arbitration Law*, Kuwait University Publications, 1990, p379.

² Ahmed Sharaf Al-Din, *The Authority of the Egyptian Judge Regarding Arbitral Awards*, 2nd Edition, Al-Nisr Al-Dhahabi Press, Egypt, [No publication date], p100.

³ Mohamed Ibrahim, *op cit*, p221.

Results :

1. Dual nature of public policy : Algerian law distinguishes between domestic and international public policy. The former is rooted in the state's internal social, moral, and economic order, while the latter pertains to transnational legal principles recognized across legal systems.

2. International public policy is relative and evolving: Although it aspires to represent common values among nations, the definition and scope of international public policy are neither fixed nor universally identical. Its content may change over time depending on global legal and moral developments.

3. Procedural and substantive violations may justify annulment : Arbitral awards may be set aside if they involve procedural irregularities or substantive outcomes that violate fundamental principles of international public policy.

4. Judicial discretion plays a decisive role: National judges possess wide discretion in assessing whether an arbitral award truly violates international public policy. This discretion must be exercised carefully to avoid unjustified interference with arbitral autonomy.

5. Partial annulment is possible in theory and practice: Where only a part of the award contradicts international public policy, it is both feasible and advisable to annul that part alone provided it is severable from the rest of the award.

Recommendations :

1. Restrict the scope of public policy to its international dimension: Courts and arbitral institutions should refrain from applying domestic public policy standards when reviewing international arbitral awards. This ensures consistency and neutrality in cross-border disputes.

2. Invoke public policy only in extreme and manifest cases: The public policy exception should be applied restrictively and reserved for cases involving

egregious violations of universally accepted norms, such as human rights, fundamental fairness, or international criminal prohibitions.

3. Promote harmonization through comparative legal understanding: Greater convergence in how states interpret and apply international public policy will enhance legal certainty and predictability in arbitration.

4. Encourage arbitrators to adopt fairness-based reasoning: Arbitrators should not only adhere to the applicable law but also consider equitable solutions that reflect the balance of interests and minimize the risk of annulment on public policy grounds.

5. Safeguard the finality and enforceability of arbitral awards: Legal systems should prioritize the stability of international arbitration by adopting pro-enforcement policies and minimizing judicial intervention unless absolutely necessary.

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