

## Between Alternative Justice and National Judiciary: A Legal Approach.

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### Abstract:

Experience has shown that the intention to completely eliminate the judge's role in arbitration proceedings does not necessarily enhance the effectiveness of arbitration. Arbitration is not an entirely autonomous mechanism. In fact, if one party refuses to comply with the arbitration agreement, the process itself may collapse. In such instances, turning to the judiciary becomes essential to safeguard the integrity of arbitration.

The judge can intervene at various stages—as a supporter or procedural regulator—to overcome obstacles that hinder the arbitration process. This may include issuing interim or protective measures, or addressing matters related to enforcement and compliance. Therefore, arbitration often relies on judicial assistance to ensure it functions properly and fulfills its intended purpose.

**Keywords:** Judicial intervention, Arbitration, Interim measures, Protective measures, Recognition and enforcement, Legal assistance.

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### Introduction:

Among the most recognized legal methods for resolving international disputes are judicial litigation and arbitration. Judicial proceedings are initiated when parties bring a dispute before a national court composed of official judges, with the aim of obtaining a binding legal ruling. Arbitration, by contrast, is a consensual mechanism whereby a dispute between two or more subjects of international law—particularly in the context of international arbitration—is settled by an arbitral award rendered by an arbitrator or a panel of arbitrators chosen by the disputing states.

The 1907 Hague Convention defines arbitration as a procedure aimed at settling disputes between states through judges selected on the basis of their commitment to upholding the law. Arbitration thus shares similarities with judicial adjudication, yet differs in one essential aspect:

while judicial courts are established independently of the parties and apply procedures rooted in public international law, arbitration exists and operates solely through the will of the parties involved, who not only agree to submit their dispute to arbitration but also determine the composition of the arbitral tribunal.

Historically, arbitration is one of the oldest formal mechanisms for dispute resolution, with its origins tracing back to the Middle Ages. It involves the examination of a conflict by a neutral third party or a panel, with the disputing parties having previously agreed to abide by the decision rendered. This binding nature distinguishes arbitration from other alternative dispute resolution methods such as mediation or conciliation.<sup>1</sup>

Moreover, arbitration requires a high level of legal rigor. The arbitral award resolves the dispute through the application of pre-established legal rules, much like a court judgment. In this sense, the arbitral award shares the same *res judicata* effect as a judicial ruling, and the arbitrator, like the judge, exercises jurisdictional authority rooted in the rule of law.<sup>2</sup>

However, the authority granted to the arbitrator, though comparable to that of a judge, is not absolute. In support of the principle of the subsidiary judicial competence of national courts, and once the arbitral tribunal has been properly constituted, Algerian civil and administrative procedural law — specifically its provisions relating to arbitration — recognizes the arbitral tribunal's power to order any interim or factual measures it deems necessary. Similarly, French law acknowledges this, albeit with the exception of protective and security measures.

This exception is rooted in the very nature of arbitration: the arbitrator, as a private judge, does not exercise justice on behalf of the State. Consequently, the arbitrator does not possess the coercive power necessary to enforce interim or protective measures.<sup>3</sup>

### **Section One: The Effective Overlap Between Ordinary Judiciary and Arbitration**

In recent times, arbitration has become the preferred and most commonly used method for resolving disputes, particularly those arising within the context of private international relations. Undoubtedly, the recourse of parties to this mechanism stems from the numerous advantages that arbitration, as a form of private justice, offers—advantages that national courts often struggle to provide.<sup>4</sup>

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<sup>1</sup> **Houcine Kadri**, *International Disputes: Study and Analysis*, Khairdjil Publications, 2007, p. 125.

<sup>2</sup> **Wardia kichou**, *Judicial Assistance to Arbitration in Interim and Protective Procedures*, Khayal Publishing House, 2024, p. 1.

<sup>3</sup> Wardia kichou, *op. cit.*

<sup>4</sup> See **Philippe Fonchard's article**, published in *J.C.I. Dr. Inter.*, titled: "International Commercial Arbitration: Notion", *Faç* 585-1, Special Issue No. 107.

### **Arbitration is characterized by flexibility, specialization, and freedom from strict legal rules**

whether substantive or procedural except where these rules pertain to matters of international public policy in the seat of arbitration or in the state where the award is to be enforced. Arbitration also stands out for its deep respect for the will of the parties, from which this form of private justice originates.

As is widely acknowledged, **arbitration is a structured mechanism with a dual nature**: it is contractual in its source, since the arbitrator derives their authority and jurisdiction from the will of the parties, and judicial in its function, as the arbitrator, although not a judge in the traditional sense, exercises a judicial role by settling the dispute through a binding decision.<sup>5</sup>

Furthermore, the characterization of certain arbitral rulings as “**awards**” implies that these decisions may, under certain legal conditions, be subject to appeal or challenge—much like judgments rendered by international courts.<sup>6</sup>

Since arbitral justice is distinct from state judicial systems, it is characterized by its swiftness in initiating procedures related to the arbitration process—particularly in regard to interim and precautionary measures.

#### **I- The Nature of Precautionary and Interim Protection in Arbitration**

The purpose of interim justice is to provide temporary protection for a substantive right, based on the apparent circumstances of the case. In this sense, interim protection serves as a tool to ensure that the final substantive protection can be effectively achieved.<sup>7</sup>

Interim measures are thus defined as actions taken during the course of a legal proceeding to temporarily address a specific situation, pending the issuance of a final ruling. This definition appears to be the most suitable, especially in the absence of a legislative definition of interim and precautionary measures.

Legal scholars have noted, in principle, the lack of clarity in the concept of "interim measures" and its wide variation, which makes it difficult to provide a precise definition. Furthermore, the concept cannot be strictly confined to a single legal decision. Other authors have also observed

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<sup>5</sup> **Antoine Kassis**, *Basic Problems of Arbitration in Comparative and International Law, Volume I: International Arbitration and Contractual Arbitration*, Paris, L.G.D.J., 1987.

<sup>6</sup> **Hafiza El-Sayyed Al-Haddad**, *Annulment Appeals Against Arbitral Awards in Private International Disputes*, Dar Al-Fikr Al-Jami'i, 1999, p. 8.

<sup>7</sup> **Ali Salem Ibrahim**, *Judicial Authority over Arbitration*, Dar Al-Nahda Al-Arabiya, Cairo, 1997, p. 179.

that the terminology generally used in this context does not aid in clarity, as terms such as "interim measure" and "precautionary measure" are often used interchangeably.<sup>8</sup>

### **Concepts Surrounding Precautionary and Protective Measures:**

Undoubtedly, precautionary decisions generally have a temporary nature; however, this is not always the case. Interim and protective measures may either take effect immediately upon issuance or be considered from the outset as final and binding rulings. For example, a decision to place a site under the supervision of a security company can be deemed definitive.<sup>9</sup>

Conversely, an interim or temporary decision does not necessarily possess a protective nature. This is evident in the case of the payment order provided for under French law, which aims to satisfy, either fully or partially, the creditor whose rights are undisputed. This is achieved by issuing an urgent procedure decision, without prejudice to the final ruling that will be issued on the merits of the case.

In general, interim and precautionary measures are decisions that do not resolve the substance of the dispute but rule on one or more requests that require urgent resolution.<sup>10</sup>

### **First : Definition of Precautionary and Protective Measures:**

The issue of precautionary and protective measures in arbitration holds great importance, as parties may face difficulties obtaining such measures even before the arbitral tribunal is constituted. To address this problem, it is stipulated that even when an arbitration agreement exists between the parties, the arbitral tribunal may resort to national courts if the arbitral justice system is unable to take the necessary actions.

A precautionary measure is defined by its legal nature rather than by urgency, simplicity of danger, or its temporary nature. It is proposed to define it as: "an act aimed at protecting property against the risk of loss while preserving its current condition."

Additionally, these measures serve to safeguard rights, such as precautionary seizure, which is applied whenever there is a fear that the creditor may lose their right. If the creditor does not possess an enforceable title or binding judgment, or if the debt amount is not precisely

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<sup>8</sup> **Rachdi Babil**, "Interim and Conservatory Measures in Arbitration," in *The Judge and the Arbitrator*, edited by Semi-Boustanji et al., Paris, A. Pedone Editions, 2014, pp. 70–71.

<sup>9</sup> **Hafiza El-Sayed El-Haddad**, *The Extent of National Courts' Jurisdiction to Take Interim and Precautionary Measures in International Private Disputes Agreed to Arbitration*, Dar Al-Fikr Al-Jami'i, Alexandria, 1996, p. 181.

<sup>10</sup> **Kenfach Douajni Goston**, "Interim and Conservatory Measures in OHADA Arbitration," *Cameroonian Arbitration Review*, No. 08, January-February-March 2000, p. 3.

determined, the seizure can only be ordered by the enforcement judge, who grants the seizure and estimates the amount provisionally.

Others define these measures in terms of jurisdiction and conditions as actions taken by the court in urgent situations, either at the request of the disputing parties or on its own initiative, to preserve the disputed rights and prevent harm to the legal positions of the parties until the dispute is finally resolved.<sup>11</sup>

### **Forms of Precautionary and Protective Measures**

Precautionary attachment (freezing order) is a measure that only a judge is authorized to grant. If a creditor has the right to obtain a precautionary attachment order on specific assets, it is conceivable that one party to an arbitration agreement may seek such an order against the assets of the opposing party.

Generally, attachment is considered an enforcement procedure aimed at placing the debtor's assets under judicial control through the creditor's intervention. This definition was established by the French Court of Cassation. Its broad concept encompasses all enforcement procedures, from the moment the enforcement officer (judicial bailiff) takes possession of the assets until their realization, public auction sale, and distribution of proceeds among creditors.<sup>12</sup>

### **2- Concepts Regarding Interim Measures:**

The arbitrator, as a private judge, does not have the authority to enforce decisions either against the parties or third parties. This limitation is inherent from the outset. The private nature of arbitration constitutes an intrinsic flaw that restricts the powers of the arbitrator, thereby reducing the effectiveness of arbitration and inevitably leading the arbitrator to rely on the enforcement mechanisms of state courts.

#### **A. Definition of Interim Measures:**

The purpose of interim justice is to provide temporary protection of a substantive right based on the apparent situation. Provisional protection serves as a tool to ensure the realization of substantive protection of its objective. Accordingly, interim measures are defined as **“measures taken during the course of the lawsuit to temporarily address a certain situation pending the final decision.”**

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<sup>11</sup> **Ghania Mamoud**, "Procedures for Requesting Precautionary Measures in International Jurisdiction," *Journal of Legal and Political Sciences*, Vol. 9, No. 2, 2018, p. 840.

<sup>12</sup> **Hussein Al-Eisawi**, *Judicial Immunity and Enforcement Immunity Before the Judge and the Arbitrator*, Doctoral Thesis in Law, University of Algiers 1, 2014/2015, p. 148.

## 2. Types of Interim Protection:

There are three types of interim protection: modifiable protection, protective orders, and urgent interim measures.

- **Modifiable Protection:**

The Algerian legislator, in the Code of Civil and Administrative Procedure, provides that after submitting the request by the interested party, the judge may retract or amend the issued order, as stipulated in Article 312.

- **Protective Orders:**

Unlike final rulings issued by judicial courts, arbitration courts issue protective measures in the form of orders that are not final on the merits of the dispute. These orders are procedural rather than substantive and aim to ensure the smooth conduct of the case, such as orders for investigations, expert evaluations, or the specification of pleadings documents and their deadlines.

- **Urgent Interim Measures:**

Urgent measures constitute one of the most important circumstances justifying the adoption of interim measures to limit the consequences of delay and prevent irreparable harm or damage that cannot be remedied later.

### **Second: The Jurisdiction of National Courts to Issue Interim and Protective Measures**

The intervention of the judge during arbitration proceedings consists of issuing urgent decisions with a temporary nature to protect a right or property from harm before it is too late and before a decision is made on the merits of the case. These measures are executed immediately<sup>13</sup> and represent the first form of protection.

The second form of protection is provided through interim and protective orders that are issued in the context of obligations and procedural matters, without being restricted by the principle of adversarial proceedings.

#### **1. Waiver of the Arbitration Agreement**

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<sup>13</sup> **Fawzi, M. S.** (2008). *International Commercial Arbitration: A Comparative Study of the Rules of International Commercial Arbitration as Stated in Western and Arab Regional and International Agreements*. Dar Al-Thaqafa Publishing and Distribution, Jordan, p. 282.

A second consequence of the principle of concurrent jurisdiction between state courts and arbitral tribunals in issuing interim and precautionary measures is that **requesting such measures does not constitute a waiver of the arbitration agreement** concerning the subject matter of the dispute. This non-contradiction is expressly affirmed in the UNCITRAL Model Law on International Commercial Arbitration, which states:

*"It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure."<sup>14</sup>*

## 2. Jurisdiction of Arbitrators Themselves

What if the parties agree that only the arbitral tribunal shall have the authority to issue such interim or precautionary measures? To answer this, one must examine whether granting such authority exclusively to the arbitral tribunal is legally justified. Some argue that if the arbitration agreement explicitly states that it covers both substantive and urgent disputes, and grants exclusive jurisdiction to the arbitral tribunal over urgent matters, then this condition must be respected.

However, even when the agreement clearly assigns such jurisdiction to the arbitral tribunal, state courts may still intervene if the arbitral tribunal is not readily available. In this case, preventing the emergency judge from issuing urgent measures and limiting such power to the arbitral tribunal does not negate the court's authority to take action. If there is an imminent risk that cannot be averted in time by recourse to the arbitral tribunal, or if access to the tribunal is impractical, then intervention by the emergency court is justified. In such situations, urgent judicial relief becomes an essential safeguard for protecting the interests of the parties.

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<sup>14</sup> Article 9 of the UNCITRAL Model Law on International Commercial Arbitration.

### 3. Conditions for Judicial Intervention

Judicial intervention to issue interim or precautionary measures is subject to several key conditions. The most important of these are:

- The existence of urgency,
- Non-interference with the merits of the case, and
- Enforceability of the requested measure in the jurisdiction of the court.
- **Existence of Urgency:** While jurisprudence and doctrine generally agree that urgency is a necessary condition for judicial intervention, there is no universally accepted definition of what constitutes a state of urgency.
- **Verification of Urgency:** Interim and precautionary measures aim to preserve a factual or legal situation from change. In some cases, urgency may require actions to maintain the current state of affairs or to prevent serious harm that demands immediate intervention.
- **Non-Interference with the Merits:** "The merits of the case" refer to the core substance of the legal dispute. If a claim brought before the court touches on the existence, validity, or legal effects of the right in dispute—matters that are within the scope of arbitration—then the judge must reject the request. Only the arbitral tribunal has the competence to decide on such substantive issues.

#### Section Two: The Post-Award Overlap Between Ordinary Courts and Arbitration

Discussing the judicial oversight of arbitral tribunal decisions may seem somewhat unusual, especially given that arbitration is theoretically and practically distinct from the judiciary. However, it is clear that the supervision exercised by the national courts over arbitrators is not only logical but also essential and necessary.

This is because the uniqueness of arbitration does not end with the issuance of the arbitral award alone; it extends to subsequent stages, including the recognition, enforcement, and annulment of the award. All these stages involve interaction with the judicial authority, which plays an active role in supervision and control.<sup>15</sup>

Although judicial intervention is incidental and indirect during the pre-award phase, after the issuance of the arbitral award, the court's role is no longer limited to providing assistance. Rather, it intervenes to ensure that the party in whose favor the award was rendered obtains

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<sup>15</sup> **Wardia Kichou**, *The Role of the Judge in Arbitration According to the Algerian Code of Civil and Administrative Procedure*, PhD thesis in Law, Faculty of Law, University of Abdel Rahman Mira, Algeria, 2022, p. 173.

what the international arbitral award confirms, through enforcement measures. Such enforcement can only be ordered by the competent judge of the court where the original award is deposited.

### **First: Extending Legal Protection Related to Recognition and Enforcement**

The judge now enjoys broad authority in exercising supervisory control over arbitral awards, particularly regarding their power to grant recognition and enforcement of arbitral decisions. This authority is granted by the Algerian legislator in the Algerian Code of Civil and Administrative Procedure.

If the arbitral award is voluntarily executed by the party against whom it is rendered, no issues arise. However, if only part of the award is complied with, this partial acceptance does not amount to full approval of the award. In such cases, an enforceable order must be issued to initiate compulsory enforcement.

This is because the arbitral award alone does not carry enforceable force; it lacks the executive power that enables the award-holder to enforce it directly. This power is embodied in what is called an enforcement order.<sup>16</sup>

The national judiciary plays an active role in the post-award phase by granting recognition before ordering enforcement. This role becomes even more significant when arbitration risks losing its advantages due to the lengthy procedures involved in recognizing and enforcing arbitral awards, especially given their frequency and complexity.<sup>17</sup>

This situation affects private international relations established by the state with both nationals and foreigners, as well as those related to international trade and investment. Such disputes cannot be effectively resolved outside the arbitration framework, given the respect accorded to the parties' choice of arbitrator and applicable law.<sup>18</sup>

### **1. Definition of Recognition:**

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<sup>16</sup> It is worth noting that arbitral awards subject to compulsory enforcement are those that, on the merits, establish an enforceable obligation. For a more detailed discussion, see:

**Ahmed Mohamed Hashish**, *The Enforceability of the Arbitral Award: Its Distinctive Features, Conditions, Elements, Suspension, and Termination*, Dar Al-Fikr Al-Jami'i, Alexandria, 2001, p. 73.

<sup>17</sup> **Ashraf Abdelalim Al-Rifai**, *The Arbitration Agreement and Its Scientific and Legal Issues in Private International Relations: A Comparative Jurisprudential and Judicial Study*, Dar Al-Fikr Al-Jami'i, Alexandria, 2003, p. 1.

<sup>18</sup> **Jean Pierre Ancel**, "The Review of French Jurisprudence in International Arbitration," in *Domestic and International Commercial Arbitration*, conference organized by the Ministry of Justice of CGEM, in collaboration with the Supreme Court of Matoc, March 3-4, 2004, Cahier de Cour, No. 06, 2005, p. 182.

The international community has given priority to the recognition of arbitral awards and has built a robust legal infrastructure around it. Dr. Abd al-Hamid al-Ahadab defines recognition as follows:

*"The request for recognition of an arbitral award is a defensive procedure resorted to when a court is asked to review a case that has previously been submitted to arbitration. The party in whose favor the arbitral award was rendered invokes the res judicata effect of the award. To prove this, the award is submitted again to the arbitral tribunal before which the dispute was originally heard, requesting it to reaffirm the validity of the award and its binding nature regarding the points it decided. The purpose of recognition is to prevent the filing of a new lawsuit on a matter that has already been resolved by arbitration through an arbitral award."*

## **2. Definition of Enforcement:**

Enforcement is considered the final stage for the matters in dispute. Since the arbitrator, as a natural person, does not possess the authority enjoyed by the judicial system, the award lacks enforceability on its own and would be incomplete without it. Therefore, it is the role of the national judiciary to confer the enforceable status upon the award.<sup>19</sup>

**Professor Fouchard** defines enforcement as: *"the act that places the arbitrator's decision within the legal system, regardless of the consequences that may follow."* Others have added that the effect of enforcement (l'exequatur) is the procedure aimed at enabling the execution of the award in a given country.

## **3. Conditions for Recognition and Enforcement of Arbitration Awards:**

First, it should be noted that the Algerian legislator has distinguished between the conditions and procedures for enforcing foreign judicial judgments and those for enforcing international commercial arbitration awards. Therefore, our study concerns the necessary conditions for the recognition and enforcement of international commercial arbitration awards.

The Algerian legislator stipulated in Article 1051/1 that the recognition of an arbitration award must be proven by the party benefiting from it, and that such recognition must not conflict with international public order. With these two conditions, it can be said that the legislator considered the conditions for recognition consistent with international public order.

### **Second: Procedural Protection Granted to the Judge in Matters of Supervision**

Once the arbitration award is issued, the judge is relieved from the dispute. The principle is that the arbitration award is intended to be executed automatically. However, the losing party may

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<sup>19</sup> **Hussein Mohamed**, Methods of Enforcement in the Algerian Code of Civil Procedure, Diwan of University Publications, Algiers, 2006, p. 173.

refuse execution for various reasons. The losing party may file a request with the state judge seeking annulment of the international arbitration award issued in Algeria, and may also object to the enforcement of a foreign arbitration award. Any party, even without a dispute, may request the recognition and enforcement of the arbitration award.<sup>20</sup>

### 1. The Judge's Authority to Grant Enforcement

An arbitrator, though considered a judge within the context of arbitration, does not form part of the national judiciary of the state where the award was rendered. Consequently, arbitral awards do not automatically possess enforceable power within the state's legal system. This observation helps reconcile differing legal opinions regarding the status of arbitral awards.

While an arbitral award has *res judicata* effect, it does not carry executory force unless a national court formally grants enforcement. Therefore, the party seeking to enforce the award must submit a request to the competent judge of the state, who alone has the authority to confer enforceability.

Despite the legal weight of arbitral awards, enforcement is not automatic. The judge must issue an enforcement order (*exequatur*) after examining whether any legal barriers exist that would prevent the award's execution.

### 2. The Competent Court

According to Article 1051 of the Algerian Code of Civil and Administrative Procedure, the court competent to recognize and enforce arbitral awards—whether rendered domestically or internationally—depends on the origin of the award:

- If the arbitral award was issued within Algerian territory, jurisdiction lies with the court in the judicial district where the award was rendered.
- If the award was rendered abroad, jurisdiction is assigned to the court located in the district where enforcement is sought.

The process of recognition and enforcement begins with filing the arbitral award with the competent court, followed by a request for an order of recognition and enforcement.

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<sup>20</sup> **Alliouch-Karboua Lamel**, "The Post-Arbitral Review of International Awards in Algerian Law," in *The Judge and the Arbitrator*, edited by Sami Bousratnji et al., Editions A. Pedone, Paris, 2014, p. 269.

International conventions often outline general principles governing enforcement but defer to the procedural rules of the state where enforcement is sought. This aligns with the principle that procedural matters are governed by the *lex fori*—the law of the forum state.<sup>21</sup>

### Conclusion:

It can therefore be said that the state judge, as the holder of authority over private justice, delegates and places his power at the service of arbitration. This happens when the arbitral award is granted enforcement authority. The enforcement procedure is often seen as a mechanism to oversee the arbitral award; however, in practice, this power is seldom exercised when recognition and enforcement are applied merely as forms of supervision over the arbitral award.

The international judge is regarded as a servant both to the parties involved in the dispute and to the arbitration process itself. Primarily, he serves the parties by safeguarding their will to resolve their dispute through arbitration. Moreover, the national judiciary acts as a servant to arbitration by ensuring the validity of the arbitration agreement and its enforcement. Judicial intervention occurs initially at the start of arbitration through interim and precautionary measures, and later through the enforcement of arbitral awards.

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<sup>21</sup> **Nail Malekia**, Procedures for the Enforcement of Foreign International Commercial Arbitration Awards in Algeria, *Journal of Law and Political Science*, No. 07, 2017, p. 129.

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