

The Requirements for the Enforcement of Foreign Arbitral Award According to Bahrain and Jordan Laws

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Abstract

At present, arbitration is the most common process in the world; for being a disputes resolution method, in particular in the area of international and local trade, and that it concerns many international transactions; with a view to achieving confidentiality and speed. Such a goal can never be satisfied by bringing disputes that arise or may arise between people in this field before national courts. Arbitration enables arbitrating parties to agree on the applicable law to the dispute and the procedures during arbitration process, and to choose the arbitral tribunal that they trust because they are experts in their own disputes field.

The matter of the enforcement of arbitral awards takes a significant part of international private law jurisprudence. States vary in dealing with foreign arbitral awards in terms of considering them arbitral awards rather than national judgments, or the state in which they were issued. Jordan Law deals with the enforcement of foreign arbitral awards in the same way, by granting them slightly different rules than national arbitral awards and judgments. Its treatment with these foreign arbitral awards can also vary from one to another; depending on the state in which they were issued in whether it had a mutual, regional or international convention with Jordan concerning the enforcement of foreign arbitral awards. Jordan is a party to many international conventions made in this field including: the Riyadh Convention on Judicial Cooperation between States of the Arab League 1983, and the Amman Agreement on Commercial Arbitration 1987. These two agreements contain rules concerning the enforcement of foreign arbitral awards, given that, Jordan is a state member of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. Bahrain legislature has adopted the concept of enforcement order on the bases of formal control regime rather than involving in decision merit as the judge would ensure that the decision is free of any enforcement rejection causes.

This paper concern about the practical significance of the enforcement of foreign arbitral awards issue is underlined by the significant spread and success of arbitration, in particular in operating and facilitating international transactions, besides the challenges experienced by arbitrating parties in the enforcement of arbitral awards, and the necessity for guarantying facilitating decisions by foreign arbitral tribunals across states effectively.

The study follows an analytical approach; by analyzing domestic and international rules in relation to the requirements of the enforcement of foreign arbitral awards, with a focus on Jordan and Bahrain legislations, besides international rules; how does Jordan judiciary apply the requirements for the enforcement of foreign arbitral awards, with an attempt to extract some rules established by Jordan Cassation Court jurisprudence.

Keywords: Enforcement, Foreign, Arbitral, Award, Agreement, Recognition, Judgment.

I. Reciprocity Requirement

This requirement is provided by Article 7(2) of Jordan Enforcement of Foreign Decisions Act. It permitted the rejection of the enforcement of a foreign arbitral award if the law of the state in which the decision was made doesn't permit the enforcement of arbitral awards made in Jordan which is called by jurisprudence the principle of reciprocity.

This requirement is an important one, that the competent court in Jordan, in the absence of an international convention¹, is required to verify this requirement prior to verifying the rest of requirements.

Under this requirement, the cassation court held:

“The requirement of reciprocity under Article 7(2) of the Enforcement of Foreign Decisions Act is a core obligation of the court hearing the claim, the Appellant shall establish US law denial to the recognition of a financial decision of a foreign state. In contrast to the Appellant claim, the Appellee established that there nothing in the US State of Virginia which prevents the enforcement of financial decisions made by the courts of foreign states².”

As far as the Kingdom of Bahrain is concerned, given the fact that it adopts the enforcement order regime³, and uses control approach (formal review), the requirement of reciprocity is satisfied in this situation where the judge in Bahrain grants an enforcement order after verifying the requirements and external and formal conditions of foreign decisions, required by Article 252 of Bahrain Civil and Commercial Procedures Law, are met.

In this context, Article 1(3) of the New York Convention states:

“When signing, ratifying or acceding to this Convention, or notifying extension under article X thereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State.”

The Convention doesn't require, for the enforcement of an award, that the award is made in a contracting state, unless the state used its right to reservation which is provided in the same Article so that the awards are only implemented if made in the contracting states.

Jordan didn't make such reservation when acceding to the convention, thus, if an award is made in a state member, enforcement may not be denied in Jordan pursuant to the provisions of Article 7/2 of the Enforcement of Foreign Decisions Act, to enshrine the principle of the precedence of treaties over law, as what it says in the treaty is a priority in application and the most favored over what it provides in the domestic law⁴.

¹ Dr. Ghaleb Ali Al-Dawoodi, Jordan Private Law, *op. cit.*, p. 342, Dr. Hasan Al-Haddawi, the Conflict of Laws and Its Provisions in Jordan Private International Law, *op. cit.*, p.268. In jurisprudence, this requirement is satisfied once the foreign country recognizes Jordan decision despite the system of their courts, thus, it's not necessary that this is done through a legislative exchange between Jordan and the foreign country or by a convention. In this regard, refer to Dr. Mohammed Waleed Al-Massri, A Handbook on the Explanation of Private International Law, *op. cit.*, p.364.

² Cassation - Civil no. 344/2002, (A five-member panel) of 6/3/2002, ADALEH Center publications.

³ The application shall be filed with the High Court in accordance with the terms and conditions for filing court action after payment of the prescribed fees. This is what was contained in Article 252 of Bahrain Civil and Commercial Procedures Act 12/1971 of 22 June 1971.

⁴ It's recalled that the only reservation made by Jordan upon accession to the New York Convention that “the Government of Jordan shall not be bound by any awards which are made by Israel or to which an Israeli is a party”, in accordance with the letter of the Minister of Industry and Commerce no. 827/7/9532 on 20/8/1879 addressed to the Commissioner of

The benefits of requiring reciprocity for making an enforcement decision include:

- Should this requirement is met, the competent court in Jordan will verify the rest of requirements and if it doesn't, it will reject the enforcement of the foreign award, which would facilitate the work for the court and save time and effort for the applicant.
- Reciprocity induces other countries to respect decisions made in Jordan and enforce them in the territory of those countries⁵. It also implies emphasis on the importance of Jordan judiciary and its ability to make decisions and settle disputes⁶.

Despite this benefits of reciprocity, it has not been without criticism either, for reasons that include:

1. This principle is mainly based on political considerations, and it doesn't observe the individuals' needs in their transactions.
2. The principle will lead to a damage to and delay in enforcement process, with prejudice to the objectives of arbitrations based on speed and delay avoidance. The delay takes place when the judge looks into the legislations of various countries to find out its positions towards the enforcement of his national decisions⁷.
3. Employing such principle may damage the interest of the citizens of the state itself, e.g. if an award is made in Germany on a dispute between a German and Jordanian in favor of the Jordanian party, given that Germany denies the enforcement of awards made in Jordan, the Jordanian judge will refuse the enforcement on German party properties in Jordan in favor of the Jordanian party.

Needless to say, reciprocity requirement is not newly created, it's rather an old one, and recently, it becomes an established principle of public international law. Further, private international law is influenced by the same that we barely find a legislation without such requirement in most transactions that arise between states on international level in general, and with regard to decisions enforcement in particular.

Reciprocity may be established under agreement, i.e. by an international agreement, or legislation through a legislation in the foreign country admitting the enforcement of Jordan decisions. Further, reciprocity may be established *de facto*, that the foreign country, the courts of which made the decision to be enforced in Jordan, enforces the decisions of Jordan courts⁸.

Despite the importance of this requirement with regard to the decisions made by courts, in my opinion, for arbitration being of a private nature, it would be preferable not to mention such requirement by Jordan and Bahrain legislatures, ideally, the issue of whether the decisions, made by the arbitration tribunal of the country where the decision is intended to be enforced, may or may not be enforced should be left to what it deems to deliver justice regardless of the practice of other countries.

II. Requirements for the Award

For the enforcement of a foreign arbitral award before the competent court in Jordan, there are a number of requirements that include:

- i. The foreign arbitral award shall concern payment of a sum of money, or making order in respect of moveable property or settlement of an account:

Article 2 of the Enforcement of Foreign Decisions Act provides for the enforceable arbitral awards in Jordan by saying:

Jordan National Committee of the International Chamber of Commerce, mentioned in Muneer Hanna Khudrr, the Binding Force of Arbitral Award and its Enforcement in Jordan, unpublished LL.M thesis, Jordan University, College of Law, Amman, 1989, p.107, footnote (1).

⁵Dr. Ghaleb A-Dawoodi, Jordan Private Law, *op. cit.*, p.343.

⁶Dr. Hasan Al-Haddawi, the Conflict of Laws and Its provisions in Jordan Private International Law, *op. cit.*, p.286.

⁷Dr. Ezzat Mohammed Ali Al-Bhairi, the Enforcement of Foreign Arbitral Awards, *op. cit.*, p.224 et seq.

⁸Dr. Hasan Al-Haddawi, the Conflict of Laws and Its provisions in Jordan Private International Law, *op. cit.*, p.277.

“Every judgment given in civil proceedings and ordering the payment of a sum of money or giving judgment in respect of moveable property or for the settlement of an account”.

It's noted that these three cases provided in this article are restrictively listed saving for the cases provided by Riyadh Convention on Judicial Cooperation of 1983⁹.

Accordingly, the Court of Cassation deemed:

“The ongoing reconciliation between the Applicant and Defendant, as a decision for the purposes of the application of Article 25 of Riyadh Convention and Article 2 of the Enforcement of Foreign Decisions Act as long as it included ordering the payment of a sum of money that is enforceable before the proceeding chambers¹⁰.”

Our view in this regard that Jordan legislature has narrowed the cases of the enforcement of foreign decisions, so as to give the impression that enforcement is not feasible beyond these cases. Thus, arbitral awards made without these can be enforced only if there is an agreement between Jordan and other countries requiring the enforcement of such decisions between them.

Apparently, this requirement contradicts reciprocity requirement, so what if the foreign arbitral award to be enforced in Jordan concerns cases beyond those provided by this requirement, and the given country permits the enforcement of decisions made in Jordan on the basis of reciprocity?

Jordan legislature didn't explicitly provide for this issue for it to be settled, thus, this issue is subject to jurisprudences, that, if there was a convention to which Jordan is tied, the convention restricts the domestic law, and the mere existence of a provision on reciprocity requirement, it is restricted to the enforcement of the decisions made by the contracting states, but, the type and subject matter of the enforceable decision are determined by the law of the country to which the application is made unless expressly provided for the types of the decisions.

ii. The foreign arbitral award should become final

The Enforcement of Foreign Decisions Act required that the award should become final for a foreign decision to be enforced in Jordan. Such requirement was mentioned by Article 7(1) (E)¹¹ thereof by stating:

“If the judgment debtor established to the satisfaction of the Jordanian courts that the foreign judgment has not yet become final (and conclusive)”

Such requirement is important and its absence entitles Jordan court that is competent of granting enforcement order to reject the filed application to enforce the foreign arbitral award in its absence.

Note that, Jordan legislature has adopted a good approach, placing the burden of proving a decision has not become final on judgment debtor because a decision intended to be enforced is initially final unless otherwise proven. Building on this, a decision of the Cassation Court stated:

“The mission of the court of first instance according to the Enforcement of Foreign Decisions Act and for the purposes of a foreign decision entering into force is to ensure requirements set by Article 7 of the Enforcement of Foreign Decisions Act are exist, given that the decision intended to enter into force made by Dubai Court of first

⁹ Article 25(b) of the Convention.

¹⁰ Cassation - Civil no. 2521/2003, (A five-member panel) of 4/12/2003, ADALEH Center publications.

¹¹ This provision corresponds Article 252(3) of Bahrain Civil and Commercial Procedures Act which contained “*that the court judgment or order has become final in accordance with the law of the court that passed it.*”

instance was made in presence and upheld by appeal by two decisions of Dubai Court of Appeal. Further the decision was certified by official authorities in both State of Arab Emirates and Hashemite Kingdom of Jordan, and it was established that the place of residency for the Appellant was on Amman, Zahran District, neighborhood.... street.... Opposite to house no. 35, thus, the burden of proving the decision is not enforceable being not final is placed on the part of judgment debtor according to Article 7(e) of the Enforcement of Foreign Decisions Act”¹².

A final decision means that it has become *res judicata* and irrevocable according to the foreign authority by which it was made¹³, either for it was time-barred or not challenged by the judgment debtor or for the purpose of challenge by the competent court.¹⁴ If the time to bring an action of annulment lapse, the application to enforce the decision shall be admissible in preparation to be examined.¹⁵ Note that, Jordan legislature didn't state a specific period of time during which the judgment debtor is required to make the application to enforce the award, risking it being rejected as to form, if submitted after the lapse of the period based on the stability of legal status.¹⁶

The foreign arbitral award possessed by a judgment creditor proves that it has become final, however, such evidence remains a rebuttable presumption, that, it is for the judgment debtor to prove the decision has not become final. Bahrain legislature considers it enforceable if it becomes irrevocable by the way of challenge or appeal, or if the law or award include a provision of immediate enforcement. However, what is held against Bahrain legislature is that it didn't include a provision to determine a specific period during which the judgment debtor is bound to submit the application to enforce the arbitral award.¹⁷

In this regard, a decision of Cassation court stated:

The court under Article 7(1)(e) of the Enforcement of Foreign Decisions Act may reject the filed application to enforce a foreign decision if the judgment debtor established that the decision has not become final yet”¹⁸.

Accordingly, that constitutes two presumptions: first, the judgment debtor being able to establish that the decision has not become final, in this case, the competent court in Jordan shall make the enforcement order once the rest of other requirements are met; secondly, the judgment debtor fails to establish the decision has not become final, in this case, the competent court of Jordan shall make the enforcement order once the rest of other requirements are met.

iii. Due process should be followed in making the arbitral award

In consideration of the provision of Article 7(1)(c)¹⁹ of the Enforcement of Foreign Decisions Act, it states that:

“If the judgment debtor was not served with a notice to attend before the tribunal that issued the foreign judgment and did not appear before the court although he was residing or carrying his/her business within its jurisdiction”.

¹² Cassation - Civil no. 1164/2009, (A five-member panel) of 10/6/2009, ADALEH Center publications; Cassation - Civil no. 2549/1999, (A five-member panel) of 30/3/2000, published on p.107 of Law Journal issue no. 3 on 1/1/2000.

¹³ Dr. AbdulKarim Salem Alwan, Dr. Muhanned Ahmed Al-Sanory, the Private International Law, first edition, University of Applied Science, Bahrain, 2018, p.286.

¹⁴ Dr. Hasan Al-Haddawi, the Conflict of Laws and Its provisions in Jordan Private International Law, *op. cit.*, p.272.

¹⁵ Dr. Aatef Mohammed Al-Feqqi, Arbitration on Maritime Disputes, a comparative study on maritime arbitration in London, New York, Paris with explanation of the provisions of Egyptian arbitration law in civil and commercial articles, DAR ALNAHDA, Cairo, 1996, p.740.

¹⁶ Dr. Aatef Mohammed Al-Feqqi, Arbitration on Maritime Disputes, *op. cit.*, p.750.

¹⁷ Dr. Muhanned Ahmed Al-Sanory, Dr. Ghaith Mustafa Al-Khasawneh, Arbitration in Civil and Commercial Articles, first edition, University of Applied Science, Bahrain, 2018, p.277.

¹⁸ Cassation – Civil no. 648/1999, (General Panel), of 27/6/2000, ADALEH Center publications.

¹⁹ This provision corresponds to Article 252(2) of Bahrain Civil and Commercial Procedures Law which contained “*that the litigants to the case in respect of which the judgment was issued were duly summoned and properly represented.*”

We find this case requires that due process should be followed by the arbitral tribunal to deliver the arbitral award in accordance with the due process of law established by its national law. Accordingly, the Cassation Court declared that:

“Article 7(1)(c) of the Enforcement of Foreign Decisions Act 8/1958 allows the court to reject the filed application to enforce a foreign decision if the judgment debtor was not served with a notice to attend, and did not appear before the court that made the decision. Whereas, the award reviewed by the Court of Appeal in substance established that the judgment debtor has left Kuwait after the invasion and has not returned, and the decision was made against him in absence, implying that he has no chance to exercise the right to defense in the case brought against him. Whereas Jordan jurisprudence concluded that a foreign decision made outside the Hashemite Kingdom of Jordan with the judgment debtors not able to exercise the right to defense is unenforceable decision in the Kingdom; depending on the provisions of Article 7(1)(c) mentioned above²⁰”.

Based on such decisions, the absence of this requirement allows the competent court in Jordan to reject the application to enforce the foreign arbitral award; because failure to meet such requirement deprives the judgment debtor from exercising the right to defense.

Therefore, the legal existence of the decision in the country of the arbitral tribunal that made it requires that parties are duly served with a notice to attend and to enable them to attend and defend. Further, it's not sufficient that the judgment debtor resides carries his business within the jurisdiction of the arbitral tribunal. All that is not sufficient for the validity of the decision; that the important and necessary point is the voluntary presence of the respondent or serving him with a notice to attend and any service of notice shall not be considered unless was duly made.

In accordance with that, the Cassation Court stated that:

“The foreign decision made outside the Kingdom without enabling the judgment debtor to exercise the right to defense is unenforceable in the Kingdom. If the case was brought before the District Court of Karkh, the Appellant shall establish that he was not residing in Iraq on that date”²¹.

Guaranteeing the right to defence requires to duly serve the notice to attend upon the respondent; according to the law of the court made the decision, and due process should be followed in trail whether in terms of notification or consideration of law articles prescribed by law for attendance and hearing, that, due process should be followed in litigation according to the legal rules provided by the law of the country where the decision was delivered²².

It is also required for the enforcement of the foreign arbitral award that it should not have been obtained by fraudulent means as provided in Article 7(d) that states:

“If the decision was obtained by fraudulent means”.

If this requirement is satisfied, the competent court in Jordan may reject the application to enforce the foreign arbitral award. The burden of proving that the decision was obtained by fraudulent means shall be placed on the respondent/judgment debtor as stated in a decision of the Cassation Court:

²⁰ Cassation - Civil no. 3549/2005, (A five-member panel) of 26/2/2006, ADALEH Center publications; Cassation – Civil no. 1258/90, of 29/6/1991 by the General Panel of Cassation Court published on p.2329 of Bar Association Journal of 1991; Cassation – Civil no. 2338/2002, General Panel, of 22/10/2002, ADALEH Center publications.

²¹ Cassation - Civil no. 102/2010, (A five-member panel) of 14/7/2010, ADALEH Center publications.

²² Dr. Ghaleb A-Dawoodi, Jordan Private Law, *op. cit.*, p.353.

“Final decisions are authentic to its adjudications pursuant to the provisions of Article 41 of Evidence Act and courts of first instance shall have the right to make a foreign decision self-enforceable and to assess whether the requirements for making a decision self-enforceable mentioned in Articles 6,7 of the Enforcement of Foreign Decisions Act 8/1952 are exist. As a result is shall have the right to assess what are included and not included within the scope of public order or public administration, and whether the court made the decision is competent. Whereas the decision intended to be made self-enforceable included the rationales and court proceedings; and the Appellant was represented by a lawyer, thus, her claim that the decision was made through fraudulent is incompatible with reality and remains a mere claim lacks the legal evidence”²³.

Apparently, the meaning of fraudulent is deception in Jordan law as defined by the legislature in Article 143 of Civil Code 43/1976²⁴. Fraudulent in Jordan law is a requirement to request a repetition of the trial in the Civil Procedures Act²⁵.

According to the provisions of the said Paragraphs (c,d), it is evident that they relate to proceedings conducted during the examination of the dispute by the arbitral tribunal, that we find Paragraph (c) addresses service of notice and (d) relates to fraudulent.

The fact that an enforcement applicant is not aware of the address of the judgment debtor at the time of filing the case is not considered an evidence for fraudulent and the judgment debtor shall have to prove malfeasance or fraudulent claimed²⁶.

Apparently, Jordan Law same as other comparative laws, requires that due process shall have been followed in the delivery of a foreign arbitral award, and that the decision shall not have been obtained by fraud²⁷. Further, Jordan legislature placed the burden of proof on judgment debtor, and in case that the two requirements are individually satisfied, the competent court shall have the right to reject the submitted application to enforce the foreign arbitral award.

iv. Incompatibility of arbitral award with public order or morality in Jordan:

Article (7)(f)²⁸ permits the court, to which the application to enforce the foreign arbitral award was submitted, to reject it “if the decision was obtained because of a lawsuit that would not be heard by Hashemite Kingdom of Jordan whether for incompatibility with public order or morality”.

It’s noted that this Paragraph expressly restricted incompatibility with public order on the cause of the lawsuit, but, it doesn’t prevent the adoption of the concept of public order²⁹.

²³ Cassation - Civil no. 1133/2007, (A five-member panel) of 16/10/2007, ADALEH Center publications.

²⁴ Published on p. 2 of the Official Gazette issue no. 2645 of 1/8/1976 which became a permanent law under declaration published on p.829 of the Official Gazette issue no. 16/3/1996. This Article defined deception as that: “when one of the two contracting parties deceives the other by means of trickery of word or deed which leads the other to consent to what he would not otherwise have consented to.”

²⁵ The provision of Article 213(1) of Civil Procedure Law no. 26/2001 published on p.735 of the Official Gazette no. 3545 of 2/4/1988 and its Amendment no. 16/2006 published on the Official Gazette no. 4751 of 16/3/2006, p.752.

²⁶ Dr. Ahmed Alfudli, A Handbook on the Private International Law, the Conflict of Laws and International Judicial Jurisdiction, the Enforcement of Foreign Decisions, an analytical study, first edition, Qindeel Printing, Publishing and Distribution, Amman, 2004, p.200.

²⁷ Fraud takes place either by one arbitrating party obtaining an award by using fraudulent means that lead to depriving the opposing party of the right to defense for example, or a party changing the point of attachment to defraud the initially applicable law on the dispute, also known as the pleading of fraud or deceit against the law. See in this regard in details, Dr. Muhannad Ahmed Al-Sanory, the Private International Law, a comparative study on the conflict of law, first edition, Dar Wael For Publishing and Distribution, Amman, 2011, p.120-126.

²⁸ Dr. Ghaleb A-Dawoodi, Jordan Private Law, *op. cit.*, p.352-353.

²⁹ For more details, see: Dr. Ezzuldeen Abdulla, the Private International Law, Part I, edition 10, Dar Alnahda Alarabia, Cairo, 1977, p.516 et seq.; Dr. Hesham Ali Sadeq, Lessons on the Private International Law, *op. cit.*, section 68, p.147; Dr. Ebrahim Ahmed Ebrahim, the Private International Law, the Conflict of Laws, no publisher, Cairo, 1997, p.247.

Thus, a foreign arbitral award is incompatible with public order or morality if it entails violation of fundamental principles underlying political, economic, and social life of the country to which the application is made, e.g. an arbitral award ordering payment of an amount in consideration of stolen items, drugs, gambling debt, or compensation for illegal sexual relationship.

In view of the broad concept of public order, and the difficulty of defining it because it associates with the customs, traditions, circumstances and environment of the individual society, which vary across the society, thus, defining what considers and not considers public order is subject to the discretion of the trial judge to whom the application on the enforcement was submitted. Therefore, if a foreign arbitral award had been presented to Jordan courts requiring the payment of gambling debt for example, and it had been requested to be enforced in Jordan, in this case the decision may not be enforced; for incompatibility with an express law provision. Based on that, it becomes a right of the competent court of first instance to assess what is included and not included in the scope of public order or public morals.

It should be noted that domestic public order is distinguished from international public order by that domestic public order includes a set of domestic law rules which individuals may not agree to violate, but, international public order means the common system between all nations including recognized rules by these nations and it considers as rules of international public law³⁰.

What could be raised in this regard as to what if an arbitral award includes a compatible part with public order or morality, and other incompatible part?

To explain that the following example is provided, if there was a foreign arbitral award includes obligation to pay a sum of money half of which resulted from an interest-free loan and the other half from gambling debt, shall we consider whether the decision is or isn't divisible? Or shall we reject enforcing the decision as a whole? Or shall we enforce the valid part and reject the invalid, if the decision is divisible? Or whether divisibility would result in amending the decision or changing its merit?

The Enforcement of Foreign Decisions Act doesn't set aside a provision for this case, thus, it must be referred to the general rules in civil law, as they permit the enforcement of the obligation if one part is valid and consider the invalid part unenforceable, provided that the requested obligation to be enforced is divisible.

In our view, according to general rules of contractual responsibility, there is a possibility to enforce the valid part of a foreign arbitral award intended to be enforced in Jordan, or Bahrain and reject the enforcement of the invalid part for the following considerations:

- 1- The general rules of contractual responsibility permit the enforcement of the valid part of an obligation and the rejection of the invalid part if such obligation was divisible. Given the absence of an explicit provision, nothing prevents the application and consideration of such rules in the enforcement of foreign arbitral awards.
- 2- General rules of civil law require that the enforcement of the valid part shall not lead to an amendment to or change the decision; on the basis that, the foreign arbitral award is partially valid and shall be enforced.
- 3- Such solution is adopted by other legislations such as Lebanon Law; which stipulates that:

*"The court shall have to make a decision self-enforcing in whole or in part if that part could be separated from other parts, and it may not make any amendment that would broaden its scope whether in terms of the merit or parties"*³¹.

- 4- Such solution was adopted by New York Convention, as it permitted partial enforcement; so that the decision which is already subject to arbitration, may be

³⁰ Article 1018 of Lebanon Civil Procedures Law.

³¹ Article 5 (1) (c) of this Convention and Article 9(1) (c) of the European Convention on International Commercial Arbitration 1961.

recognized and enforced partially if it could be separated from other parts of the decision³².

A scholar may note that the provision provided by Paragraph (f) was absolutely provided about determination of a specific time to consider a foreign arbitral award is incompatible with public order in Jordan. Thus, what is the relevant time for considering a given decision intended to be enforced in Jordan is incompatible with its public order or morality?

Jordan legislature had not explicitly so provided, and in my opinion, a foreign arbitral award shall not be incompatible with public order or morality in Jordan at the time of enforcement. What matters is the time of the enforcement of foreign arbitral award to indicate whether it was incompatible with public order or morality. The competent court, to which the application to make the enforcement order was made, shall have the authority to assess this. Such assessment shall be done on the day the enforcement order is made, thus, the cassation court would not verify the assessment of the court. Bahrain legislature has done well to state this explicitly that I wish Jordan legislature had done so³³.

Applying the same requirement, the Cassation Court in Jordan stated:

“Article 1 of “Auctioneers and Brokers Statute” defined the auctioneer and broker as the person who engages in brokerage ... acts as an intermediary between seller and buyer. Article 2 of “Commercial Agents and Mediators Act” defined the commercial mediation as the act of mediation by a person between two parties, for a purpose of concluding contracts or facilitating the conclusion of commercial transactions and its ramifications against a consideration, without bearing their consequences. If the decision which is the subject of enforcement, and the appeal decision, imply that since there are business interests of the Appellee in Jordan and London, who and the Appellant made arrangements between them under which the Appellant shall facilitate the conclusion of commercial transactions for its interests against a consideration, thus, characterized by the characteristic of the commercial mediator rather than the characteristic of the auctioneer and broker. Therefore, trial courts concluded that the services provided by the Appellant for the interest of the Appellee are incompatible with public order, and the decision, which is the subject of the enforcement, derived from a case that the courts of Hashemite Kingdom of Jordan would not entertain, is incompatible with law”³⁴.

Note that, Jordan law has considered the aforementioned requirements as requirements for the enforcement and has not used the term “requirements of recognition” that they are indispensable requirements.

Jordan legislature equates in treatment the enforcement of foreign arbitral award in Jordan and the enforcement of foreign decision; in terms of formal and substantive requirements, reciprocity and becoming final³⁵.

Jordan law also requires for the enforcement of foreign arbitrators award in Jordan that the award shall become enforceable by the applicable law of the country where arbitration was conducted; the same as decisions made by the court in the said country³⁶.

³² Cassation – Civil no. 648/1999, General Panel, 27/6/2000, ADALEH Center publications; Cassation – Civil no. 852/1989, Jordan Bar Association Journal, issue 12, p.2729.

³³ This provision corresponds Article 252(4) of Bahrain Civil and Commercial Procedures Act which contained: “that the court judgment is in no way inconsistent with any judgment or order previously passed by the Bahrain courts and does not provide for anything which constitutes a breach of public order or ethics.”

³⁴ Dr. Mefleh Awwad Al-Qudat, Enforcement Procedures according to Jordan Procedures Act, second edition, Dar Al Thaqa for Publishing & Distributing, Amman, 1992, p.87; Dr. Hasan Al-Haddawi, the Conflict of Laws, *op. cit.*, p.286287; Cassation – Civil no. 38/1991, Jordan Bar Association Journal, issue 10,11 p.2737.

³⁵ Article 2 of the Enforcement of Foreign Decisions Act; Cassation – Civil no. 2923/2004, a five-member panel, 30/11/2004, ADALEH Center publications.

Jordan law also has not addressed the case where two foreign arbitral awards to be enforced in Jordan, concern the same subject matter of the dispute, requiring the application of the general rules. Therefore, what matters in application, is the earlier date of made on the basis that it reveals the right, that is the subject matter of the dispute, before the other; it also the first to acquire the force of *res judicata*. That provision was adopted by other legislations such as Swiss law in Article 27(3) and German Law Article 328(2)³⁷. Jordan legislature may otherwise adopts the rule stating that the judge shall enforce the most compatible law and relevance to the dispute, same as Lebanon Legislature in Article 1014(a) of Lebanon Civil Procedures Act.

- v. The foreign arbitral award to be enforced in Jordan shall not be a contravention of a decision previously made in Jordan:

The enforcement of foreign decisions Act made no explicit provision on this requirement, and it could be extracted from the provision of Articles 27, 28 of Civil Procedures Act, which established the jurisdiction of Jordan courts. On such basis, we find that if a foreign arbitral award to be enforced in Jordan is incompatible with a decision or an order previously made by Jordanian courts under its jurisdiction, the Jordanian court in this case shall refrain from making the enforcement order of the foreign arbitral award; that is because the national decision prevails over the former decision in terms of authenticity and effectiveness based on the doctrine of state sovereignty as it is a manifestation of sovereignty.

We consider in particular the necessity to apply this principle even in case that the foreign arbitral award was made earlier than a Jordanian decision on same subject matter; because the authenticity of national decision prevails over a foreign decision, in addition to that, Jordan courts initially enforce national decisions and would enforce other than national decisions only as exception. If the Jordanian court enforced an earlier foreign decision than Jordanian decision this would violates the law; because rules of attribution in Jordan law defines the jurisdiction of Jordan courts.

We can say on that basis that, the requirement of a foreign arbitral award to be enforced in Jordan shall not be a contravention of a decision previously made in Jordan on the same subject matter, is an obvious requirement; because a decision made by Jordan courts will be enforced there, thus, Jordan courts will enforce the former decision and reject the enforcement of the foreign decision made on the same dispute.

Bahrain legislator has taken a positive position in contrast to Jordan legislator which has taken a negative position in this regard, that Article 252(4) of Bahrain Civil and Commercial Procedurals Law states that, for a foreign decision to be enforced it shall not be a contravention of a decision previously made by Bahrain courts, here, Bahrain legislator left no wiggle room for conflict or jurisprudence, in contrast to the case of Jordan legislator.

Researcher opinion about the article above; I wish that Jordan legislator would take the same position of this point to avoid any conflict or jurisprudence.

III. Requirements for the Jurisdiction of the Arbitral Tribunal

Jordan legislature - in the enforcement of foreign decisions Act– besides, Bahrain legislature³⁸ require for the enforcement of foreign arbitral awards that it shall be made by an arbitrator or competent arbitration tribunal, on the contrary, if the arbitration tribunal has no competence to hear the dispute, the enforcement of the foreign decision may be rejected on that basis, in accordance with Article 7(a,b) of the enforcement of foreign decisions Act. Paragraph (a) states that:

“If the court by which the said decision was made had no jurisdiction”

³⁶ Dr. Abdulhameed Al-Ahdab, International Arbitration Encyclopedia, part II, Dar Almaref, Cairo, 1998, p.316.

³⁷ Cassation – Civil no. 2521/2003, a five-member panel, 4/12/2003, ADALEH Center publications.

³⁸ Article 252(4) of Bahrain Civil and Commercial Procedures Act aforementioned.

Paragraph (b) states that:

“If the judgment debtor had not carried his/her business within the jurisdiction of the tribunal that issued the foreign judgment or if he/she was not residing within its jurisdiction and did not voluntarily appear before it and did not submit to its jurisdiction”

Based on these provisions, it's noted the following:

1. Jordan legislature has not provided for the nature of the law based on which we can say whether an arbitral tribunal has or hasn't jurisdiction? In my opinion, this issue shall initially be subject to the law of will, i.e. the law on which parties agrees, and to which arbitral process is subject. But, in the absence of such agreement, this matter shall be subject to the law of the country where arbitration was conducted according to what is stated in New York Convention in this regard.

In application of the matter of an arbitral award being made by the competent tribunal on which both parties agree, a decision of the Cassation Court stated:

“If the court which made the decision (High Court in Riyadh) has jurisdiction and competence, before which, parties attended and agreed on the ongoing reconciliation between them, and that the trial judge endorsed this reconciliation that the respondent shall pay the claimed amount at one on 7/8/1422 Hijri. Therefore, this reconciliation is considered a decision made by a competent court which is enforceable, effective from the specified date”³⁹.

2. Paragraph (a) addresses the case that an arbitral tribunal has no jurisdiction, this case may include the case of arbitrators exceeding their scope of competence; that if an arbitral tribunal ruled on matters outside the boundary of arbitration agreement, this will make it has no jurisdiction to hear such matters.
3. We could say that, in contrary to the provision of Paragraph (b), an arbitration tribunal shall have a jurisdiction if the respondent was residing or carrying his business within its jurisdiction, or he admitted its jurisdiction by voluntary submission to it. In order to define the respondent residency within the jurisdiction of the arbitral tribunal, it shall be referred to the law of the country to which the tribunal is affiliated, and on which territory he resides.

In application of that, the Cassation Court held:

“It's meant of the term, carrying his business within a jurisdiction that is covered by the competence of the court that made the foreign decision; is, that carrying in which the disputed rights rise”⁴⁰.

In another decision for the same court, it held:

“Article 7(b) of the Enforcement of Foreign Decision Act 8/1952 permits the court to reject the enforcement order if the judgment debtor was not residing within the jurisdiction of the tribunal that issued the foreign judgment or if he/she had not carried his/her business within its jurisdiction and did not appear before it and did not submit

³⁹ Cassation – Civil no. 3583/2004, (A five-member panel), 27/3/2005, ADALEH Center publications.

⁴⁰ Cassation – Civil no. 1133/2007, (A five-member panel), 16/10/2007, ADALEH Center publications; Cassation – Civil no. 221/99, Bar Association Journal, Issue of May/June of 2000, p.1665.

to its jurisdiction. Accordingly, if the judgment debtor had not entered Kuwait and wasn't residing there, it is established that he works with Ministry of Education in the Kingdom, it isn't established that he had carried any business in the State of Kuwait, thus, decision on denial of enforcement order is compatible with law provisions”⁴¹.

4. With regard to the voluntary submission provided by Paragraph (b) which states that:

“And did not appear before it and did not submit to its jurisdiction”

This may be satisfied by parties' agreement to submit the dispute to the jurisdiction of the arbitral tribunal that made the decision to be enforced. It may be satisfied implicitly by respondent voluntary attendance before the foreign arbitral tribunal without objection to its jurisdiction.

Whether the voluntary submission was explicit or implicit, the arbitral tribunal that made the decision is considered to have a jurisdiction according to Article 7(b).

5. Article 7(b) defines the judicial jurisdiction of foreign arbitral tribunal that made the decision, namely, residency, carrying business and voluntary submission. However, it hasn't mentioned all jurisdiction regulations; as the international jurisdiction of the foreign arbitral tribunal that made the decision to be enforced in Jordan, requires it to be defined by its national law.

For determination of international general jurisdiction of foreign courts in Jordan Law, it may be determined the cases in which a foreign court has international general jurisdiction⁴², by contrary to Articles (27,28) of Jordan Civil Procedures Law.

The question posed in this context concerns whether Jordan Law requires the foreign decision to be enforced, to concern a matter that may be settled by the way of arbitration according to the provisions of its law?⁴³.

The general rule in this regard that arbitration is permitted in matters on which compromise is allowed, saving for exceptions by the law provision that states that the jurisdiction over such matter shall be subject to the scope of regular national judiciary. Based on that, an application for (national or international) arbitral award enforcement order may be inadmissible in Jordan unless if a provision is provided by Jordan law that keeps jurisdiction with Jordan courts to hear it, and doesn't permit the specificity of resorting to arbitration. That the foreign arbitral award made on a matter concerns maritime transport would not be enforced in Jordan for that Jordan courts shall have the jurisdiction in accordance with Article 214 of Maritime Trade Law 12/1972.

This requirement is provided by many international conventions; such as New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards⁴⁴, European Convention on International Commercial Arbitration⁴⁵, the Convention on Judicial Cooperation between States of the Arab League⁴⁶, and Arab League Convention on the Enforcement of Foreign Decisions.

The rationale behind requiring such requirement might be understood by saying that there are matters rise above the level of private interests, to fall within the scope of public interests or public order, thus, the legislature would prefer to keep disputes on them within the jurisdiction of judiciary, and doesn't permit resorting to private justice, that is arbitration⁴⁷.

Another question may be raised, whether the validity of arbitral agreement is a requirement for the recognition and enforcement of the foreign arbitral award?

⁴¹ Dr. Ahmed Alfudli, A Handbook on the Private International Law, *op. cit.*, p.198.

⁴² This requirement is provided in Italian, Lebanon, Egyptian laws, Dr. Abdulhameed Al-Ahdab, *op. cit.*, part I, II.

⁴³ Article 5 of the Convention

⁴⁴ Article 6 of the Convention

⁴⁵ Article 32(a) of the Convention

⁴⁶ Article 3 (a) of the Convention

⁴⁷ Dr. Ezzuldeen Abdulla, the Private International Law, *op. cit.*, p.927.

In fact, Jordan Arbitration Law 31/2001 provided in Article 49 for cases in which an action for the nullity of arbitral award shall not be admitted; including the case provided in Paragraph (a)(1) that considers the absence of arbitral agreement is a ground for the admissibility of the action for the nullity of arbitral award. However, this provision is applied with regard to local arbitral awards made in Jordan. Building on the nature of these provisions that are considered public order, they are not peremptory provisions, that in our opinion it could not be invoked in application for the enforcement of foreign arbitral award in Jordan. Based on a fact that this provision is not a peremptory provision that Jordan judge on the enforcement order may uphold they may not be violated or they are of public order.

This requirement is provided in Arab League Convention on the Enforcement of Foreign Decisions⁴⁸, and the Convention on Judicial Cooperation between States of the Arab League⁴⁹. These two conventions require that arbitral award shall be made in the enforcement of a valid arbitration clause or contract, or otherwise, the competent judicial authority, of the party against whom the enforcement action is being taken, may reject the enforcement of the foreign decision. The reason for the application of such requirement is that the legal basis for arbitrators justice is the arbitration agreement, thus, if this agreement became invalid, based on this the decision made by the arbitral tribunal will become invalid.

Conclusion

The study addressed the requirements for the enforcement of a foreign arbitral award according to Jordan and Bahrain laws; broaching the methods of the enforcement of foreign arbitral award in international legal systems. However, enforcement order system is more common and widespread, and the dominant system in the enforcement of such award, since it came to balance between two main considerations, namely: consideration of the national interest to save state sovereignty through control and supervision over foreign decisions of arbitrators, and prevention of the expansion of revision by the authority responsible for the enforcement of such decisions in terms of substance, with a view to restricting its competence in conforming the formal requirements, with a view to deny the enforcement or recognize that decision.

With regard to the position of Jordan and Bahrain legislatures, the study concluded that the foreign arbitral award in Jordan is subject to the enforcement of foreign decision law 8/1952; in terms of the requirements that it shall satisfy in order to be recognized and enforced, that the action shall be brought before the competent court of first instance and the enforcement order will be made to become self-enforcing after conformity of the requirements provided in this Law. Regarding the enforcement procedures, they are addressed by Jordan Enforcement Law 36/2002 as amended in 2003, and for Bahrain, the Bahrain Procedures Law in Article 252.

Jordan Enforcement of Foreign Decisions Act which determines in Articles (2,7) the requirements for the enforcement of foreign arbitral awards, this requirements were exclusively listed and they are similar to the requirements of the recognition of foreign arbitral awards and their enforcement in comparative law and international conventions, as they include the requirement of reciprocity which is considers the most significant requirement. There are also requirements for the decision itself which shall exist in order to enforce that decision before the competent court in Jordan, in addition to that, an arbitral tribunal that made this arbitral award shall have jurisdiction; as the study explained the position of Cassation Court ruling and its constant jurisprudence towards these requirements.

⁴⁸ Article 3(b) of the Convention

⁴⁹ Article 32(a) of the Convention

In light of the above, the following recommendations can be made:

- The Enforcement of Foreign Decisions Act shall be amended to keep pace with international treaties and recent developments because it's old; that it has been followed by many conventions, such as Riyadh Convention on Judicial Cooperation and New York Convention. At the same time, this law doesn't explicitly determine, in the case of conflict between its provisions and the provisions of a subsequent international convention, which one is preferred in application in case of conflict? Jordan legislature didn't provide an explicit provision to solve such conflict; thus, it shall be referred to the general rules which provide for the application of the treaty for the considerations of the later supersedes the earlier, and the special derogates the general based on that the domestic law is a general provision and the treaty is special. Although Jordan Judiciary confirms the superiority of international convention over domestic laws, or building on the decisions of Cassation Court which its jurisprudence has been consistent on the superiority of the international treaty and that it shall be applied in conflict with domestic law, it would be better to expressly provide for this in Jordan Constitution.
- Provide an explicit law provision on whether, in the case where the foreign arbitral award to be enforced in Jordan and Bahrain includes a valid part and other invalid part, only the valid part shall be enforced or the whole decision shall be rejected? That in the absence of the explicit provision it shall be referred to the general rules of contractual responsibility permitting the enforcement of the valid part and reject the invalid. Same in the case where two decisions to be enforced in Jordan, whether both were made by two foreign courts, or one of them was made by a Jordan Court, which decision shall be enforced? In my opinion, in the case where two foreign decisions to be enforced in Jordan, the earlier in terms of the date of decision; as it reveals the right before the other, further, it is logical. This solution is adopted by Arab laws such as Lebanon legislation; but if one of the two decisions to be enforced in Jordan was made by a Jordan court and the other by a foreign court, it's recommended to enforce the closer decision to the facts and findings, and the more relevant to the subject matter of the decision.
- Set aside cases for foreign arbitral awards that are separated from judgments; that the enforcement of foreign arbitral award in Jordan and Bahrain is subject to the Enforcement of Foreign Decisions Act. This law was developed to enforce foreign decisions initially, and it merely provided for the application of its provisions on arbitral awards, which, from our perspective is undesirable attitude in legislations.

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