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The Independence of Arbitration Clause from the Contract

Dr. Muhanned Farhan Al Taani

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*Corresponding author :
mu.altaani@ju.edu.jo

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Abstract

The independence of the arbitration clause from the main contract is widely recognized in arbitration, so this study aims to discuss the legal issues that constitute the justification so that the arbitration clause does not become canceled even if the main contract is canceled.

Thus, the arbitration clause is distinguished from other contracts as it is regarded as an autonomous contract dependent on the main contract; this study has shown that Jordanian arbitration law (2010), international legislation, international agreements, and judicial rulings established and adopted the legal precept that the arbitration clause is separate and apart from the main contract and any ancillary contracts. Consequently, the arbitration clause is a valid and independent condition concerning the principle of autonomy of the will. Significant results arose from that, among which that the arbitration clause enjoys legal independence and that the fate of the arbitration clause is not linked to the fate of the main contract, whether its invalidity, annulment, or termination, so that its invalidity does not lead to the invalidity of the main contract and no defect in a contract should entail of itself the invalidity of the arbitration clause.

In the case of coercion, which necessarily lays on the personality of the other contracting party and aims to intimidate him and influence his will, the coercion that nullifies the main contract necessarily leads to the annulment of the arbitration clause, and therefore this is considered a departure from the principle of independence unless the arbitration clause has been agreed upon after the conclusion of the main contract and after the cessation of the coercion.

Finally, the study employs descriptive and analytical approaches to reach its purposes. In conclusion, it opens the door to appeal against arbitral awards by requesting reconsideration and appeal against arbitral awards because of the violation of the law and the error in its application.

Keywords: arbitration clause; independence principle, main contract, invalidity

مبدأ استقلال شرط التحكيم عن العقد الأصلي

د.مهند فرحان الطعاني*

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الباحث المراسل:
mu.altaani@ju.edu.jo

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جميع الحقوق محفوظة، فلا يسمح بإعادة طباعة هذه المادة أو النقل منها أو تخزينها، سواء أكان ذلك عن طريق النسخ أم التصوير أم التسجيل أم غيره، وبأية وسيلة كانت: إلكترونية، أو ميكانيكية، إلا بإذن خطي من الناشر نفسه

الملخّص

يعد مبدأ استقلال شرط التحكيم عن العقد الأصلي معترفا به على نطاق واسع، لذا تستهدف هذه الدراسة المسائل القانونية التي تبرر عدم إلغاء شرط التحكيم حتى لو ألغي العقد الأصلي؛ وبذلك يتميز شرط التحكيم عن باقي العقود الأخرى، في استقلاله عن العقد المرتبط به ؛ إذا اختل أي ركن من أركان شرط التحكيم أو شابه عيب من عيوب التراضي، فإن ذلك لا يؤدي إلى التأثير على العقد الأصلي، وقد أظهرت هذه الدراسة استقرار قانون التحكيم الأردني لسنة 2010 والتشريعات الدولية والاتفاقيات الدولية وأحكام القضاء على هذا المبدأ، وتقرر مبدأ قانوني وهو استقلال شرط التحكيم عن العقد الأصلي أو الملحق به، وهو شرط صحيح مستقل في ذاته احتراماً لمبدأ سلطان الإرادة. ونشأ عن ذلك نتائج هامة منها أن شرط التحكيم يتمتع باستقلال قانوني، وأن مصير شرط التحكيم لا يرتبط بمصير ما يلحق العقد الأصلي من بطلان أو فسخ أو إنهاء بحيث لا يؤدي بطلانه إلى بطلان العقد الأصلي، كما أن أي عيب في العقد لا ينبغي أن يؤدي بذاته إلى بطلان شرط التحكيم.

غير أن هذه الدراسة قد بينت أن هنالك حالات قد تؤدي إلى عدم تطبيق هذا المبدأ، كمبدأ قانوني كالغلط الذي يقع على شخصية المتعاقد في العقد الأصلي أو على صفه من صفاته. فإن الغلط يمتد بالضرورة إلى شرط التحكيم .وتعد حالة الإكراه الذي ينصب بالضرورة على شخص المتعاقد الآخر ويستهدف إرهابه والتأثير على إرادته، فالإكراه الذي يبطل العقد الأصلي يؤدي بالضرورة إلى إبطال شرط التحكيم وبالتالي يعد ذلك خروجا على مبدأ الاستقلال مالم يكن شرط التحكيم قد تم الاتفاق عليه بعد ابرام العقد الاصلي وبعد زوال حالة الإكراه. وأخيرا، وللوصول للغاية المعنية من هذه الدراسة فقد جرى توظيف المنهج الوصفي والمنهج التحليلي والخلاصة بفتح باب الطعن في أحكام التحكيم بالتماس إعادة النظر والطعن في أحكام التحكيم بسبب مخالفة القانون والخطأ في تطبيقه.

الكلمات الدالة: شرط التحكيم، مبدأ الاستقلال، العقد الأصلي، بطلان.

Problem Statement:

The arbitration agreement is, in fact, no different from a standard contract signed by both parties with their permission and option, and this seems clear in the case of the arbitration compromise. The agreement is concluded after the dispute has arisen and its features become apparent, and it is no less clear in the case of the arbitration clause contained in the core of a specific contract. It is considered a contract within a contract, and this connection raises many questions that must be answered.

1) What is the principle of independence of the arbitration clause from the main contract, and to what extent is the arbitration clause related to the main contract? And is the arbitration clause considered a self-contained contract?

2) Is there an effect on the termination, annulment, or invalidity of the arbitration clause on the main contract?

3) Does the arbitration clause have a distinct and independent subjectivity from the main contract so that it is not affected by it or not?

4) What are the results of the principle of independence of the arbitration clause from the main contract?

5) In what cases does the arbitration clause's principle of independence deviate from the main contract?

Significance of research:

1) Addressing the problems in the provisions of the Jordanian Arbitration Law, which refers to the issue of the invalidity of the arbitration clause to the Jordanian judiciary.

2) The extent to which Jordan, Egypt, and other countries need to enact new legal legislation to address the Principle of the independence of the arbitration clause from the main contract.

3) Addressing the impact of the arbitration clause's invalidity on the main contract's invalidity.

4) Addressing the extent to which the arbitration clause's validity is assessed based on its existence and its terms, not on the provision of the contract, which may be null, void, terminated, or expired.

Purpose of study:

This study aims to achieve the following objectives:

1) Clarifying the Principle of independence of the arbitration clause

2) Study many existing legislations to address the Principle of the independence of the arbitration clause from the main contract and the need to enact new amendments.

3) State the results of the Principle of independence of the arbitration clause from the main contract by the theories of comparative jurisprudence and jurisprudence.

4) Indicate the cases of derogation from the Principle of the independence of the arbitration clause from the main contract.

Structure of Study:

This study requires identifying the meaning of the Principle of independence of the arbitration clause and monitoring the position of the Jordanian arbitration law (2001) and other laws and some international agreements and the position of jurisprudence and the judiciary and the results arising from that

Therefore, we will present this research as follows:

Section one. The substance of the doctrine of independence of arbitration clause.

Section two. Results of the Principle of independence of the arbitration clause from contract.

1. The Substance of the doctrine of the independence of the arbitration clause

Arbitration is "a private system of adjudication" (Moses), the arbitration contract requires all the formal and subjective conditions required for the validity of any other contract, such as valid consent, free of defects, and the subject–matter of the dispute must be capable of being subject to Arbitration. Therefore, it is not permissible for the trader to agree on Arbitration from the date of the judgment declaring bankruptcy except within the legally permissible limits (Younis, 2009).

Article 22 of the Jordanian Arbitration Law No. 31 of 2001 and its amendments stipulated that (the arbitration clause is an agreement independent of the other terms of the contract, and the invalidity, revocation, or termination of the contract shall not affect the Arbitration if such clause is valid by itself). This text corresponds to the text of Articles (23) of the Egyptian Arbitration Law and Article (13) of the Omani Civil and Commercial Disputes Arbitration Law.

Article (8) of the Moroccan Arbitration Law: "The arbitration clause is considered an agreement independent from other terms of the contract, and the invalidity, annulment, revocation, termination, revocation, or expiry of its effects for any reason whatsoever, does not affect the addendum arbitration clause if this agreement is valid by itself).

Also, the contract must be treated as an agreement independent of the other terms of the contract. By the provisions of the UNCITRAL Rules of 2010, Article 23/1 stipulates that (an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null shall not entail automatically the invalidity of the arbitration clause).

Similarly, Article 23(2) of the LCIA Rules stipulates that 6(9), for a ruling on jurisdiction:

Any arbitration clause included in, or intended to be included in, another agreement shall be interpreted as a separate arbitration agreement from that other agreement. The arbitration clause's non-existence, invalidity, or ineffectiveness will not be implied by the Arbitral Tribunal's ruling that the other agreement is nonexistent, invalid, or ineffective (Redfern & Hunter).

In the Gosset case,) dalloz, 1963,545(the French Cour de Cassation recognized the doctrine of independence in very broad terms, as follows:

The agreement to arbitrate in International Arbitration is entirely autonomous in law, meaning that the potential invalidity of the main contract cannot impact it. This is true whether the agreement is concluded separately or is included in the contract to which it relates, except for extraordinary circumstances.

The idea is supported by current arbitration laws (Redfern & Hunter). For instance, according to Swiss law (Swisspil, s.178(3)), "[t]he validity of an arbitration agreement cannot be contested on the ground that the main contract may not be valid."

Jurisprudence defines what is meant by the independence of the arbitration agreement (the agreement concluded in the form of the arbitration clause included in the texts of the main contract is independent by itself of this contract) (Al Fiqi, 2004).

In light of the abovementioned texts, we find that The importance of the Principle of independence of the arbitration clause (as a first sub-section) and the affiliation of the arbitration clause with the existence or non-existence of the contract (as a second sub-section) according to the following:

1.1. The importance of the Principle of independence of arbitration clause

The importance of this Principle appears at the time of considering a claim of the invalidity of the arbitral award, an example of this is when one of the litigants argues that the arbitral tribunal does not have jurisdiction to hear the dispute because of the forfeiture of the arbitration clause as the contract has been annulled for example - then the tribunal will inevitably rule to reject this plea- due to the independence of the arbitration clause, even if the contract was actually annulled and then the judgment will not be voidable on grounds of the absence of an arbitration clause, or that adjudicating issues are not included in the arbitration clause, or exceeding its limits; Unless the arbitration award has deviated from the subject matter of the dispute, and this is contrary to the opinion that the termination of the contract includes the arbitration clause, as in this case it is voidable for the absence of an arbitration agreement, as long as it is included in the annulment (Abd Al Wasea, 2014). The Jordanian judiciary has stated in one of its rulings that (it should be emphasized that the symptoms that defect the arbitration agreement and affect the outcome of the arbitral award issued pursuant thereto are the symptoms that affect the arbitration agreement itself and not the main contract, given that the arbitration agreement constitutes an independent agreement from the main contract based on the Principle of the independence of the arbitration clause, which is adopted by most contemporary legislation, including the Jordanian Arbitration Law, as well as the Jordanian judiciary) (Judgment No. 3861 of 2020, Court of Cassation, Rights, dated 4/11/2020).

Therefore, Whether the arbitration clause is independent or part of a particular contract, it always exists before the dispute emerges. The arbitration clause (Hindi (2013), P4) is considered a binding action for both sides. It is based on the parties' will to produce a specific legal effect to exclude the dispute that may arise from the main contract from the state's judiciary. The dispute will be subject to Arbitration; it results from the fact that the arbitration clause is binding to both parties and that it is not permissible for one of its parties to withdraw from it by his own will. (Makhlouf, 2005)

Some jurists have held that the arbitration clause is a self-contained contract, as its subject matter differs from the subject matter of the main contract. Therefore, the arbitration clause is not affected by the symptoms that affect the main contract that leads to its invalidity, annulment, or termination. This means that the existence of the arbitration agreement is necessary to bring a lawsuit before the arbitral tribunal so that if there is no arbitration agreement or if this agreement is void, then the arbitration case is not accepted (Al Nidani, 2011). The Jordanian judiciary went in its judgment ((Judicial jurisprudence and arbitration jurisprudence settled on the Principle of the independence of the arbitration agreement from the main contract so that it constitutes a contract equivalent to the primary contract)) (Judgment No. 3198 of 2022 Court of Cassation of Rights, 11/22/2022).

According to this judicial opinion, the arbitration clause is considered an agreement independent of the other terms of the contract. This is so that it is possible to avoid the effects of ruling the invalidity, annulment, or termination of the main contract. The legislator has adopted this Principle, which is similar to the general rules of civil law in what is known as the theory of transforming the contract.

The theory is summarized in that the invalid conduct may include, despite its invalidity, the elements of another act, so the behaviour that the contracting parties intended to, which is the invalid behaviour, may consist of, despite its invalidity, the aspects of another behaviour, so the behaviour that the two contracting parties intended, which is the invalid behaviour, turns into the behaviour whose elements are available, which is the correct behaviour, and thus the invalid behaviour It produced an accidental, not primary, legal effect (Al Sawafi (2017), p57).

1.2. The affiliation of an arbitration clause with the existence or non-existence of the contract

The idea of the independence of the arbitration clause is intriguing. It indicates that the arbitration provision in a contract is seen as existing independently of the main agreement to which it is a party and, as a result, does not expire with the main agreement. The arbitration provision is one of the scenarios in which it is most necessary, so it would be completely self-defeating if a breach of the contract or a claim that the contract is voidable were enough to terminate it as well (Paulsson, 2013).

Some of them believe that taking into account the connection of the arbitration clause, whether or not with the main contract that it includes or is referred to when the main contract is challenged for invalidity or is ruled null and void, or when one of the parties revokes it if he has that, or the two parties agree to annul it. If it is said in all these cases that the condition Arbitration is affiliated with the main contract, it remains and disappears with its demise, as it is not independent of it. It is impossible to implement it with the demise of the main contract, and the two parties have no choice but to resort to the judiciary (Al Awa, August 2003).

Part of the jurisprudence affirms that the parties may not agree to link the arbitration clause to the main contract; otherwise, this agreement will be null. The Principle of the independence of the arbitration clause from the main contract is one of the established principles in international and domestic arbitration legislation in most legal systems, in addition to what was decided by the Egyptian arbitration law, where he permitted filing a claim for the invalidity of the arbitral award if the arbitral award excluded the application of the law that the parties agreed to apply to the subject matter of the dispute (Article 53/1/d) arbitration (Abd El Qader, Arbitration

Agreement According to the Arbitration Law in Civil and Commercial Matters No. 27 of 1994 and its Amendments, 2016)..

Therefore, it can be said that the main contract may be invalid, but the arbitration clause is valid in the case of the invalidity of the main contract due to the vulnerability of the object to be dealt with, the lack of reason, or illegality. Then, the validity or invalidity of the main contract can be presented to the arbitrators by the condition contained in it as valid by itself. Suppose the arbitral tribunal ruled to nullify the main contract. In that case, this invalidity does not extend to the arbitration clause and does not lead to the invalidity of the arbitral tribunal award. Applying this principle in this form assumes that the defect in the main contract is not attached to the arbitration clause, but the defect may be attached to the main contract and the arbitration clause (Wali, Arbitration procedures and rules in the Arab world compared to modern arbitration trends, lectures on arbitration, the Arab Arbitration Centers Conference- held under the supervision of the Faculty of Law- Beirut University, prepared by lawyer Walid Anani, 2003).

A decision of the Jordanian Court of Cassation stated that (As it results from the Principle of the independence of the arbitration clause, which is contained in Article (22) of the Arbitration Law No. 31 of 2001, this condition remains valid, losing the duty of the parties to respect, even if it is decided to invalidate the contract that includes the clause remains valid and enforceable among the two parties, even if the contract was dependent on the approval of another party, such as the Telecommunications Regulatory Authority) (Judgment No. 4472 of 2019, Court of Cassation on Rights, 1/12/2019).

We conclude from the preceding that the subject matter of the arbitration clause is independent and separate from the object or subject matter of the main contract. The difference in the object or subject matter of the two contracts makes each an independent and separate contract from the other, even if they are included in one document (Matar, 2009).

2. Results of the Principle of independence of the arbitration clause from contract

The independence of the arbitration clause has become one of the recognized principles in many legislations and international agreements (Bani & Mohammed, 2022). This principle has several results that we can review through the following:

2.1. The nature of the dispute in the arbitration clause

As a result of the independence of the arbitration clause from the main contract, the dispute over validity or invalidity: This dispute is not a dispute about the main contract but rather a dispute about the arbitration clause. Therefore, the lawsuit for the invalidity of the arbitration clause included in an administrative contract (Wali, 2010) is outside the jurisdiction of the administrative judiciary, which is competent for administrative disputes only unless the law stipulates otherwise. There is no text in the law on the jurisdiction of the administrative judiciary in the main case for the invalidity of the arbitration clause in administrative contracts. Therefore, the appeal for the invalidity, annulment, or termination of the main contract does not affect the arbitration clause if the condition is valid by itself (Abu Al Enein, 2003). It is possible to imagine the invalidity of the main contract and the arbitration clause contained in the clauses of the main contract as if the contract containing the arbitration clause had been concluded by a person without or lacking capacity, and this is what the text of Article 1447 of the new French Arbitration Law No. 48/2011 on 13/1/2011 adopted that (if this agreement is null, the arbitration

clause is considered as an unwritten condition). There is no equivalent provision in the Egyptian Arbitration Law unless it is inferred from the text of Article 23 of the Arbitration Law that leads to the same result when it states that (the arbitration clause is considered an independent agreement of the other terms of the contract). Unless the parties to the contract disclose that they consider the arbitration clause an essential condition for their consent on the rest of the terms of the contract, i.e. for concluding the contract, the invalidity of the arbitration clause leads to the invalidity of the contract term, or if it is agreed between the parties to the contract that the right to terminate or rescind it applies to all of its terms, including the arbitration clause since the arbitration clause's independence concept is unrelated to public order (Wali, 2021).

2.2. Cases inapplicable to the independence of the arbitration clause

If there was an error in the contractor's personality in the main contract or on one of his traits, then the error extends to the arbitration clause as this contractor is necessarily a party to the arbitration clause. As for coercion that was necessarily on the personality of the other contracting party and aimed to intimidate them and influence their will, coercion that nullifies the main contract necessarily leads to nullifying the arbitration clause. Thus, this is considered a departure from the Principle of independence, unless the arbitration clause has been agreed upon after the conclusion of the main contract and after the clearance of the coercion. As for exploitation and injustice, the Principle of the independence of the arbitration clause finds absolute application in the field of nullifying the main contract for exploitation or injustice, so the arbitration clause remains valid despite the invalidation of the main contract for this reason (El Gamal & Abdel Aal , 1998). Also, suppose the main contract includes an arbitration clause, and the main contract has been voided between its parties due to force majeure. In that case, the rescission affects all contract provisions except the arbitration clause. This also applies if two parties annul a valid and enforceable contract that includes a valid arbitration clause; the contract is annulled, and the arbitration clause remains applicable to settle any dispute arising from that contract (Abd Almoaty, 2011) .

Also, it can be imagined that the main contract is valid and the clause is null, as the subject of the dispute is not arbitrable; if the arbitral tribunal adjudicates the dispute, its ruling will be null due to the invalidity of the arbitration clause (Wali, 2003). Suppose the main contract, which includes the arbitration clause in its clauses, is executed by the two parties to the contract by executing the mutual obligations between them. In that case, the arbitration clause expires as the main contract expires. However, when there is a dispute about the non-fulfilment of all the contractual obligations by one of the parties, then this dispute can be referred to Arbitration even if the arbitrators conclude that all obligations have been fulfilled and that the subject matter of the main contract has been depleted, in the application of the Principle of the independence of the arbitration agreement (Al Sharqawi, 2011).

The law governing the arbitration clause should typically not be in question because it is a fundamental component of the parties' main agreement. However, due to the independence principle, the arbitration clause may have a life separate from the main agreement. The arbitral tribunal to which a dispute is brought must assess whether the arbitration provision is legitimate and operable if the primary agreement (trust, contract, or other) is found to be inoperable, null, or void. A determination of the arbitration provision's legality must be made by the law that governs the clause itself. The same applies to the parties' ability to sign an arbitration agreement in the first dispute (Redfern & Hunter).

Finally, about the possibility that the arbitration agreement can be subject to a law other than the one to which the main contract is subject: Adopting the Principle of the independence of the arbitration agreement leads to subjecting the main contract to a legal system different from that which governs the arbitration agreement, and the latter can also be subject from the perspective of the Principle of independence to a special attribution rule that refers to applying a legal regime different from the national law governing the main contract (Rashed, 1984) .

Results and conclusion:

We conclude from the overall work of the study, in which the focus was on a set of conclusions and results, which we present in the following:

1. An increasing number of countries have made their position clear by making the independence of the arbitration clause part of their laws on Arbitration (Redfern & Hunter).

2. The Principle of the independence of the arbitration clause is one of the basic principles in the Jordanian and Egyptian arbitration laws. The legislator did not leave it to the desire of the parties. The Principle of independence gives the arbitration agreement an advantage as a judicial means for the parties to the relationship that makes it possible to solve Disputes that may arise from contracts without being affected by the defects that may be caused to them; saying otherwise empties Arbitration of its content as a method for settling disputes that have arisen or may arise between the parties because of a contractual or non-contractual legal relationship (Abd El Qader, 2016) .

3. It can be said that the plea for the invalidity of the arbitration agreement may be related to public order if the invalidity is from the public order, as in the case of the invalidity of the arbitration agreement because the dispute is not permissible for Arbitration, the arbitration agreement is not written, or because the reason for Arbitration is illegal, in this case, the plea is related to the public order. Any party may adhere to it at any stage of the procedures, and it may not be waived explicitly or implicitly. Also, the court may raise it by itself, so when pleading arbitration, the court may reject this plea based on the invalidity of the agreement, which is related to public order, even if the other party does not adhere to this invalidity. But suppose the invalidity is not related to public order, as if it was due to the existence of a mistake or fraud. In that case, the plea is not related to public order, so the person who has this right waives it explicitly or implicitly, and the court may not raise this issue except based on a plea or request from the opponent's side. Suppose the interested party does not uphold the invalidity of the arbitration agreement or waives his right to uphold it explicitly or implicitly. In that case, the court may not raise or rule by it (Al Nidani, 2011). Nevertheless, the Principle of the independence of the arbitration agreement from the main contract remains unrelated to the public order (Wali, Mediator in National and Commercial Arbitration in Knowledge and Practice, 2021).

4. The arbitration clause has its subject matter or object. As a result, it can be said that the subject matter of the arbitration clause is independent and separate from the subject matter or object of the main contract. If they are included in one document, the subject matter of the arbitration clause is the settlement of all disputes that may arise regarding the contract. The subject matter of the contract varies according to the type of contract, which may be a supply contract, a contracting contract, a purchase contract, etc. Also, the reason for each of them is

different, as the reason for the arbitration clause is that each party undertaking the obligation not to resort to the state's judiciary regarding the dispute that arises between them over a specific contract, and the reason for the main contract is completely different. Therefore, the independence of the arbitration clause from the main contract results in the transfer of the arbitration clause to the successor according to the transfer of the main contract that includes this clause (Abd Al Sadiq, 2014). In the case of coercion, which necessarily lays on the personality of the other contracting party and aims to intimidate him and influence his will, the coercion that nullifies the main contract necessarily leads to the annulment of the arbitration clause, and therefore this is considered a departure from the Principle of independence unless the arbitration clause has been agreed upon after the conclusion of the main contract and after the cessation of the coercion (El Gamal & Abdel Aal , 1998).

Recommendations:

We agree with the jurisprudential trend (Abd El Qader, 2016); the grounds for challenging awards are relatively narrow and prescriptive by adopting the idea of seeking a reconsideration of the arbitral award, as arbitral awards may be issued with massive defects in the facts or the application of the law, especially the text of the two articles (22 of the Jordanian Arbitration, which and 23 of the Egyptian Arbitration) because the claim for the invalidity of arbitration rulings is often been sentenced by rejection. The proposal focuses on a lawsuit arising to revoke the arbitral award instead of its invalidity. Its reasons include the reasons for the current annulment lawsuit and the violation of the law, as well as the reasons for seeking reconsideration, opening to appeal against arbitral awards by requesting reconsideration and appeal against arbitral awards because of the violation of the law and the error in its application.

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