



« INFORMATIVE NOTE: Measures carried out by the Algerian State and their impact on diplomatic relations with Spain»



Last June diplomatic relations between Spain and Algeria were affected by the recognition by the Spanish state of the autonomy plan for Western Sahara proposed by Morocco. As a result of this tension, on June 8th, the Algerian government announced the immediate suspension of the Treaty of friendship, good neighborliness and cooperation between the Kingdom of Spain and the Democratic Republic of Algeria, signed in Madrid on October 8th, 2002.

As a result of this decision taken by the Algerian government, on June 9th, the Professional Association of Banks and Financial Establishments (ABEF) of Algeria requested that all banks and other financial institutions freeze all operations related to the export and import of products and services from Spain.

As a consequence of the decisions adopted by Algeria, trade between the two countries has been completely paralyzed, affecting not only companies having commercial relations with Algeria but also Spanish companies with investments in the Algerian state.

What legal protection do the companies concerned have?

As warned by the European Commission, these measures carried out by Algeria are in violation of the Euro-Mediterranean Agreement between the European Community and its Member States and the Democratic Republic of Algeria, signed in Valencia on April 22nd, 2002, which guarantees the free movement of capital for direct investments in the Algerian state.

In case of conflict in its application or interpretation, the article 100 of the Euro-Mediterranean Agreement provides that the parties may refer the matter to the Association Council and, if it is not possible to resolve it, they may resort to an arbitration dispute settlement mechanism. However, this solution is addressed to the contracting parties, i.e. the States, and is therefore not a direct method of resolution to which the companies affected by Algeria's actions can resort.

On the other hand, these measures also imply a breach of the Agreement between the Kingdom of Spain and the People's Democratic Republic of



Algeria for the Promotion and Reciprocal Protection of Investments, signed in Madrid on December 23, 1994.

By means of this treaty, Spain and Algeria undertake to protect the investments made in their territory and not to hinder them by means of unjustified or discriminatory measures, so that their management, maintenance, use, enjoyment, extension, sale or liquidation are affected.

In this case, the article 11 of the Agreement provides that, in the event that investments in Algeria are affected and six months have elapsed without a solution having been reached, those affected may go to an independent arbitration tribunal and request compensation for damages for Algeria's breach.

The arbitral award, which shall be final and binding on both parties, shall be rendered in accordance with the provisions of the Agreement, the national law of the territory where the investment was made, in this case Algeria, and the rules and principles of international law.

What does Algerian law establish in contractual matters?

The Algerian Civil Code provides that contracts must be performed in accordance with their content and in good faith, so that the parties are bound, not only to what is expressed therein, but also to everything that the law, custom and equity consider a necessary consequence of such contractual relationship according to the nature of the obligation.

However, the Algerian legal system recognizes legislative changes as an event of force majeure, which would allow the parties to terminate the contractual relations acquired.

On the other hand, contrary to what happens in Spanish law with the legal figure "rebus sic stantibus" which is of doctrinal and case-law creation, the Algerian civil code expressly regulates those cases in which the contractual relations have been affected by an alteration of the supervening circumstances that break the initial economic equilibrium of the contracts.

Thus, the article 107 of the Algerian Civil Code provides that when, due to the occurrence of exceptional and unforeseeable events, the performance of the contractual obligation becomes excessively onerous, threatening the debtor to an exorbitant loss, the judge may, according to the circumstances and after having taken into account the interests of the parties, reduce to a reasonable extent the obligation that has become excessive.

Therefore, it seems clear that the measures carried out by Algeria allowed the contracting parties and, in this case, all companies with investments in the Algerian state, either to demand the termination by force majeure of the contractual relations acquired, or to opt for a modification of the performances by virtue of the alteration of the circumstances.

Recommendations

Firstly, the affected companies should proceed as soon as possible to notify the Algerian government of the breach of the Spain-Algeria Agreement, in order to start with the six-month negotiation period necessary to be able to subsequently resort to arbitration proceedings, as established in Article 11 of the Agreement.

On the other hand, it will be essential to keep documentary records, not only those related to the formalization of contracts or investments, but also all those that show the loss of commercial opportunities and the impossibility of carrying out banking operations, in order to support the claims against the Algerian State.

Finally, in order to minimize the possible risks arising from contracts affected by these measures, investors may request the delivery of force majeure notices.



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