NEAR EAST UNIVERSITY

GRADUATE SCHOOL OF SOCIAL SCIENCES

MASTER OF LAWS IN INTERNATIONAL LAW PROGRAMME (LL.M)

MASTER'S THESIS

ARBITRATION AS AN ALTERNATIVE METHOD OF SETTLING INTERNATIONAL BUSINESS DISPUTES

Walid Taha Akram

NICOSIA

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ABSTRACT

Chapter one of the thesis is a general introduction about international commercial arbitration; in which are defined the definition of the international arbitration, the advantages and disadvantages of arbitration. The chapter deals with meaning of the arbitration and its fundamental characteristics. It defines international commercial arbitration as a specially established mechanism for the final and binding determination of disputes, concerning a contractual with an international element, by independent arbitrators, in accordance with procedures, structures and substantive legal or non-legal standards chosen directly or indirectly by the parties to a dispute.

Chapter two examines an arbitration agreement, addressing topics such as the duties and rights of arbitrators, the parties to a dispute and arbitration institutions. The arguments made in the research are based on some international and national rules of arbitration

Chapter three is about the arbitration proceedings and enforcement of the arbitral award, in which law shall apply to the arbitration proceedings and how the parties to a dispute can appoint arbitrators and determine the place of arbitration.

Key Words: International Commercial Arbitration, Arbitration Agreement, Iraqi Arbitration Law, Model Law, New York Convention

ÖZ

Tezin birinci bölümü uluslararası ticari tahkim hakkında genel bir giriştir; burada uluslararası tahkimin tanımı yapılmakta ve avantajları ile dezavantajlarından bahsedilmektedir. Bölüm tahkimin anlamı ve temel özelliklerini ele almaktadır. Prosedürlere, yapılara ve bir uyuşmazlığın tarafları tarafından doğrudan veya dolaylı olarak seçilmiş maddi yasal veya yasal olmayan standartlara uygun olarak bağımsız hakemler tarafından uluslararası bir elemanla bir sözleşme ile ilgili olarak uyuşmazlıkların kesin ve bağlayıcı tayini için özel olarak kurulmuş bir mekanizma olarak uluslararası ticari tahkimi tanımlamaktadır.

İkinci bölüm, hakemlerin görevleri ve hakları, bir anlaşmazlığın tarafları ve tahkim kuruluşları gibi konuları ele alan bir tahkim anlaşması inceler. Araştırmadaki tartışmalar ulusal ve uluslararası tahkim kanunlarına dayanmaktadır.

Üçüncü bölüm, hukukun tahkim işlemlerine uygulanacağı ve bir anlaşmazlığın taraflarının hakemleri nasıl tayin edeceği ve tahkim yerini nasıl belirleyeceğini bildiren tahkim kararının tahkim işlemleri ve uygulaması hakkındadır.

Anahtar Kelimeler: Uluslararası Ticari Tahkim, Tahkim Anlaşması, Irak Tahkim Kanunu, Model Kanunu, New York Konvansiyonu

DEDICATION

I dedicate this thesis to my parents, my brothers (Kani, Nali, Ali, Omer, Hani and Mohamed) and my two lovely sisters (Ask and Nask). Without their patience, understanding, support, the completion of this work would not have been possible.

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The completion of my master thesis ends a very important time of my live. Studying law at near East University has not only given me a grate education, but has although given me a fantastic group of friends and family. I offer my regards and blessings to all of those whom supported me in any respect during the completion all the thesis.

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ABBREVIATIONS

AAA	American Arbitration Association
ADR	Alternative Dispute Resolution
Arb	Arbitration
ICC	Iraqi Civil Cod
ICCP	Iraqi Code o Civil Procedure
ICC	International Chamber of Commerce
ICSID	International Centre for the Settlement of Investment
ICDR	International Centre for Dispute Resolution
	Disputes
GAFTA	Grain and Feed Trade Association
LCIA	London Court of International Arbitration
LEX ARBITRI	Deals with the Formal Validity of the Arbitration Agreement, Governs the Arbitral Proceedings
LEX MERCATORIA	General Principles of Law, Transnational Rules, a Method of Decision Making, Customary Commercial Law
NYC	New York Convention, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)
UK	United Kingdom
U. S	United States
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nation Conference on Trade and Development

Introduction

Given the cost and difficulties raised by taking a case through the courts, a better or more functional outcome may be achieved through using an alternative method of dispute resolution. The parties voluntarily submit their dispute to arbitration and agree to be bound by the resulting decision. Arbitration has been the most favored method for settlement of international Business disputes for hundreds of years. Its value is recognized by the courts and it is governed by statute, which empowers arbitrators and regulates the process. Arbitration is not a national court procedure, when the parties to arbitration decided or agree to arbitration they remove their relationships and problems from the jurisdiction of national court. International Commercial Arbitration has become the established method of determining international business Disputes. All over the world, states have modernized their laws of arbitration to take account of this fact. New Arbitral Institutions have established and the rapidly evolving law and practice of international commercial arbitration is a subject for study in law schools alike. The modern period marked by the rise of arbitration's phenomenon as a process for settlement of disputes as offering advantages which don't provided by judicatory of the state. As well as it provides the advantages of contractors from different countries, which help them to avoid the dispute of unknowing of the rules of substantive and Procedural foreign law. When the enormous development on made on investment level which doubles it's important which may be possess innate tendencies towards representation it. And even has been fall due accepted by the majority of countries in their economic and social system. Thus in this way arbitration came to be envisaged not only as appositive impatient for settlement disputes within internal and external relationships but also as to be incentive which is necessary as result of these relationships.

Objective of the Thesis:

I have decided to choose (International Commercial Arbitration) as the topic of my thesis because of that this field of law is very limited in my country and there is no any (International Commercial Arbitration Centre) in my country until now, I would like to open it in the future. Therefore the knowledge and specialization in this area will benefit my country and all its institutions. Therefore I believe this subject will be more important in my country in future. This subject will service my country in both legally and commercial side. The research tries to finding out the best way to resolve international commercial disputes.

The Research Questions

What reasons account for the increasing use of arbitration as an alternative to litigation of international business disputes?

Where should the arbitration take place?

What law governs the arbitration process if it is not specified in the arbitration agreement?

CHAPTER ONE

INTERNATIONAL COMMERCIAL ARBITRATION

1.1 Definition of Arbitration

The International Law Commission has defined arbitration as ‘a procedure for the settlement of disputes between states by a binding award on the basis of law and as a result of an undertaking voluntarily accepted (Dixon, 2013). Arbitration is a private process of adjudication. Parties to arbitration who arbitrate have decided to resolve their problem outside any judicial system. In most instances, arbitration involves a final and binding decision, producing an award that is enforceable in a national court (Moses, 2012). In addition Article 1 of the draft of the Iraqi international commercial arbitration act defined arbitration as (it’s a method chosen by the parties to the dispute to resolve their disputes by an arbitrator or more, rather than resort to the judiciary) (Art 1, 2011).

Arbitration has also been defined as a mechanism for the settlement of disputes between parties, either by a person appointed by themselves or by relying upon procedures or institutions chosen by the parties to a dispute. From the above definitions it is possible to outline certain essential characteristics of arbitration. One of the cornerstones of arbitration is its consensual nature. The power and jurisdiction of arbitrators are determined by the intention of the parties to a dispute as reflected in their contractual agreement. Thus, the scope of an arbitrator’s power is circumscribed by the wording of the arbitration agreement.

The consensual nature of arbitration has led one writer to contend that arbitration is private process of adjudication and that it is the parties, not the state,

that control the powers and duties of arbitrators. This view is accurate to the extent that it underlines the private character of arbitration. However, it is misleading in suggesting that parties to a dispute have exclusive right to assign powers and duties to the arbitrators. Although arbitration is essentially a private process, the assistance of national legal system is in some cases sought to assist the effectiveness of the arbitration process is guaranteed by the assistance of national courts. The fact that the process of arbitration at certain point draws assistance from national legal system suggests that the latter could demand and ensure that the arbitration system meets minimum standards of fairness and justice. One way of ensuring this is by imposing on arbitrators a positive duty to maintain due process in the conduct of arbitrations, a duty that is indirectly enforced by national courts refusing to enforce awards made by international commercial arbitration court that do not follow due process in the conduct of arbitration. It is therefore misleading to suggest that parties to a dispute have exclusive right to assign the powers and duties of arbitrators. However, the point should be made that, unlike litigation before a national court that have very little control over the judge's power and duties, parties to a dispute, together with the relevant national legal systems, regulate the powers and duties of arbitrators.

Arbitrations are also characterized by the fact that the arbitrators are appointed by the parties to a dispute. The parties to arbitration may delegate this responsibility to an arbitration institution. Equally, they may appoint a few arbitrators and mandate them to select choose other arbitrators. The parties to a dispute also determine the procedure to be followed in the conduct of the arbitration. They may do this by enumerating detailed procedural rules as part of their arbitration agreement or by adopting the in-house rules of an established arbitration institution, such as the ICC (International Chamber of Commerce). It is disputed to what extent they can exclude

some procedural rules of the place of arbitration, especially those that are considered mandatory (Chukwumerije, 1994).

International commercial arbitration is a means of resolving disputes arising under international business contracts. It is used as an alternative to litigation and is controlled primarily by the terms previously agreed upon by the parties to a dispute, rather than by national legislation or procedural rules. Most contracts contain a dispute resolution clause specifying that any problem arising under the contract will be handled through arbitration rather than litigation. The parties to a dispute can specify the forum, procedural rules, and governing law at the time of the contract. Arbitration can be either "institutional" or "ad hoc" The terms of the contract will dictate the type of arbitration. If the parties have agreed to have an arbitral institution administer the dispute, it is an institutional arbitration. If the parties have set up their own rules for arbitration, it is an ad hoc arbitration. Ad hoc arbitrations are conducted independently by the parties, who are responsible for deciding on the forum, the number of arbitrators, the procedure that will be followed, and all other aspects of administering the arbitration (Susan).

The types of law that are applied in arbitration include international treaties and national laws, both procedural and substantive, as well as the procedural rules of the relevant arbitral institution. Previous arbitral awards carry persuasive authority, but are not binding. Scholarly commentary, or "doctrine," may also be applied.

1.2 Advantages of Arbitration

The main benefits of the tribunal system as compared with the courts are perceived to be:

a. Cheapness. Legal representation is not essential at a tribunal and the specialist knowledge of panel members makes it unnecessary to call specialist witnesses. The parties do not generally have to travel far to the hearing.
b. Informality. Procedures are usually less formal and adversarial than those of the ordinary courts; therefore a tribunal hearing is less intimidating.
c. Speed' a case may take years to come to court. Cases should reach tribunals within weeks or months of proceedings being started (Adams, 2010).
d. Save and continuation of friendly relations between the parties of a dispute after resolving the dispute (Rashid, 2015).
e. An Arbitration Award is generally easier to enforce internationally than a national Court Judgment. For Example according to the New York Convention, Courts are required to enforce an award unless there are serious procedural irregularities, or disputes that go to the integrity of the process.
f. International Commercial Arbitration includes the ability to keep the procedure and the resulting award confidential. Confidentiality is provided in some institutional rules, and can be expanded for instance (to cover witnesses and experts...) by the parties' agreement to require those parties to be bound by a confidentiality agreement. Many parties to a dispute want confidential procedures because they do not want information disclosed about the them and its business operations, or the types of problems in which it is engaged, nor do they want a potentially negative outcome of a problem to become public(Moses, 2012).

g. International Commercial arbitration include the reduction of uncertainties and complexities that accompany foreign litigation and the provision of a more neutral, convenient and certain forum of dispute resolution (Craig, 1991).

1.3 Disadvantages of Arbitration

Not everyone agrees that tribunals are as effective as they should be. There are a number of disadvantages that can be raised regarding the operation of the tribunal system:

a. Proceedings have become legalistic and tend to be bound by the tribunals' own previous decisions. Some tribunals have not maintained an informal and flexible approach and therefore may not be user-friendly to the average complainant. Employment tribunals have been particularly criticized on this ground.
b. Urgent cases are not resolved sufficiently quickly. Some tribunals, particularly Social Security and Immigration Appeals Tribunals, have very heavy caseloads. They try issues of great economic and personal concern to complainants. A delay of several weeks, or sometimes months, before a case is heard is not uncommon, and is clearly unacceptable.
c. Inconsistency of appeals rights. Although appeal to the courts against a tribunal decision may be possible, there is no universal rule, and rights vary according to which tribunal is involved. The final appeal from some (like immigration appeals) may be to the relevant government minister. It is clearly undesirable that the person who makes the relevant rules and policy is also the final judge of the application (Adam, 2010).

To do reforms of the tribunal system needs more user-friendly approach should be adopted. In addition needs a coherent and more independent system should be developed, with a centralized entry point for claims which would be allocated to

the appropriate tribunal. And needs more state funding should be provided to ensure quality advice for claimants and access to funded legal representation via the Community Legal Service on a case-by-case basis.

1.4 The Role of Arbitration in International Business Disputes

International business arbitration is a fundamentally consensual means of dispute resolution unless the parties to a dispute have agreed to arbitrate there can be no valid arbitral determination of their right. In turn an agreement to arbitrate has binding effect only by virtue of complex national court. In addition, an arbitral award has binding effect, and can be recognized and enforced, only by virtue of this legal framework (Born, 2014).

Through the new flood of globalization in international trade, economics and investment, there happened an advanced change in the legal area. Law is a fundamental tool for the emerging economies. In the international marketplace,, the alternative dispute resolution mechanism in global trade has demonstrated it's popularity over time. As such, many states have surveyed the UNCITRAL Model Law, which aims to globally harmonise the law and practice in the area. Therefore, there has been an accumulative tendency regarding the transformation the laws of arbitration in international commercial conflicts across boundaries. Lately, in many states, traditional arbitration laws have been restructured and new arbitration laws have been endorsed to counter to the current requirements of the international business society in these days. Since financial globalization purposes at cross-border transactions with nominal intervention from the government, the liberalization of the alternative legal and justice organism within rationalized international commercial arbitration is deemed to be vital for the resolution. That is the purpose of the Model Law in the progression of synchronization and globalization of the alternative justice

system in worldwide commercial transactions. International arbitration has verified the efficiency in the global marketplace for the settlement of international commercial disputes,. Consequently, arbitration in international commercial disputes is considered to subsidize to market integration by protection and refining the productivity of international alternative transactions (Durosaro, 2014).

1.5 Difference between a domestic arbitration and an "international" arbitration

The contemporary vision is that arbitration is managed by the law of the state in which it takes place. Hence, every arbitration takes place within a state is a internal arbitration in that State. Yet, many States demonstrates a difference among arbitrations that are thought to be internal and those that are cogitated to be international. One of the importance's of this situation may be that the kinds of conflicts that may be succumbed to arbitration are dissimilar in an international arbitration. For instance, claims of anti-trust violation in some states may be presented in an international commercial arbitration but not in a internal arbitration. Likewise, some countries allow state entities to become involved in authorized arbitration covenants as long as the arbitration would be international. Lastly, succeeding the lead of the Model Law, lots of countries have special acts leading national and international arbitrations. For example UNCITRAL Model Law offers that:

> "(3) *An arbitration is international if:*
> *(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or*
> *(b) one of the following places is situated outside the State in which the parties have their places of business:*

> *(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or*
> *(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country"* (ART 1, 1985).

The distinction between national and international arbitrations is an issue of national law. There is no commonly recognized division and there is no need to be because of the New York Convention operates to "foreign" decisions. Together the parties are allowed to decide the location of arbitration and also they may select the applicable law of arbitration (UNCTAD, 2005). The New York Convention identifies the option that the law of arbitration could be another location in terms of arbitration. Article V of the New York Convention, provides that:

> *"Article V 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:*
> *(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or*
> *(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or*
> *(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the*

> *award which contains decisions on matters submitted to arbitration may be recognized and enforced; or (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. Modern arbitration laws do not accept that possibility"* (Art V, NYC, 1958).

The arbitration which takes place in Iraq, although between two foreign parties to a conflict, is considered as a national arbitration conditional on the provisions of the ICCP. There is no exact legislature related to international arbitration. There is also not any procedures in Iraq forbidding international arbitration. However the formal approach of Iraqi government was against recognition of international arbitration articles during 1970 to 1980 especially in contracts for public tasks and funds on the base that it is a abuse of the public order, specifically the jurisdiction of Iraqi courts. Generally speaking it is against the the principle of sovereignty based on Iraqi Constitution

Despite that so called adverse approach, the economic progress in Iraq during 1970-1980 and thereafter, caused the approval of international arbitration articles in many covenants signed among foreign firms and Iraqi government. That was accompanied the increase of oil prices as well.

In this regard, it is relevant to indicate that both Iraqi State standard circumstances of covenants, namely the *General Conditions for Contracts of Civil Engineering Works* and the *General Conditions of Contracts for Electrical and Mechanical Process* have positioned down alternative clauses for dispute resolution,

consistent with which conflicts among the parties are applied to national arbitration attached to the provisions of the ICCP.

Iraq is not a part to the 1958 New York Convention, however is a member of the Arab League and ratified the "Riyad Convention" for judicial cooperation, which enforcement of foreign arbitral awards and judgments.

Consequently, a new law of arbitration that governs the international arbitration and enforcement of foreign awards is needed in Iraq. Temporarily, as mentioned before, international investors are authorized by the new Investment Law[1], in order to decide international arbitration or any international jurisdiction for the settlement of disputes (Saleh, Majid). Article 27 (4) of the Iraqi Investment Law provided that:

> *"the parties to the dispute subject to the provisions of this law may be agree on a mechanism to resolve disputes including resort to arbitration in accordance with Iraqi law or any other internationally recognized entity"* (Art 27 (4), 2006).

Iraq is a party to a number of regional agreements within the context of the Arab League on the elevation and protection of investment in common and the further on solving specific alternative investment disputes of Arab countries. These Conventions are binding Iraq to apply to international commercial arbitration to undertake investment disputes. For instance, joined treaties to capitalize Arab funds in the Arab countries in Amman in 27/9/1981, Arab Convention on Commercial Arbitration in Amman in 14/4/1987, Statute Settlement of Investment Disputes between the Arab countries in 1974, Convention on Settlement of Investment Disputes in the Arab States in Cairo in 6/12/2002. Thus Arab investment disputes in Iraq covered with one or more of the treaties mentioned and it binds the Iraqi

[1] no. 13 of 2006

government to resort to international commercial arbitration to resolve investment disputes.

1.6 Forms of Arbitration

There are two kinds or forms of arbitration "ad hoc arbitration and institutional Arbitration. Both of these types are based on the parties' agreement: it is a choice that the parties to arbitration must make when selection arbitration. In comparing ad hoc to institutional arbitration, first of all need to determine what differentiates two categories from each other, and then consider the relevant angle for comparison from the perspective of the relevant participants in the procedure form time to time. Additionally, some main institutions need to be considered, finally, some thought should be given to the extent to which differences are ultimately relevant, and the degree of significance that can be attributed to the institution chosen, as determined mainly as a function of the identity of the user of the service (Cordero, 2013).

1.6.1 Ad hoc Arbitration

Ad hoc Arbitration is where the arbitration mechanism is established specifically for the particular agreement or dispute, where parties are silent and have not selected an institutional arbitration. The arbitration will be ad hoc. When agreeing on ad hoc arbitration the parties often also agree on the arrangements for initiating the procedure, choosing the arbitrators and selecting the procedural rules, when the parties to a dispute fail to agree on this issue.

1.6.2 Institutional Arbitration

Institutional Arbitrations where parties to a dispute submit their issue to an arbitration process, which is guided under the auspices of or administrated or

directed by the existing institution. There is large numbers of institutions in distinctive sorts. These institutions try to provide an arbitration service specifically, or within the context of their overall activities and objectives, and because of their infrastructure will in some cases assist with the running of the arbitration (Lew, 2003). As well as, ad hoc arbitration is arguably more flexible and potentially more confidential than institutional arbitration. Moreover, the growing size and sophistication of the international arbitration bar and the efficacy of legal regimes for arbitration arguably reduce the advantages of institutional arbitration. Nonetheless, most users prefer the more predictable character of institutional arbitration, the benefits of institutional rules and appointment mechanisms and the reduced roles of national courts, at least absent unusual circumstances.

From the point of view of the framework in which the arbitral proceedings are conducted, arbitration may be divided into two categories:

Institutional Arbitration is arbitration administrated by an arbitral institution while ad hoc arbitration is arbitration administrated by the arbitral tribunal itself. However, the situation is not always so neat, intermediary situation arise. For instance, the parties to arbitration may select the arbitrators, but appoint that the arbitrators must apply the rules of a given arbitral institution, without the institution having to discharge any other tasks. If so except for that, the arbitration rules of that body shall apply. A different Situation arises where the parties to arbitration choose an administrated arbitration, but exclude some of the arbitration rules of that body. A delicate problem then arises as to which of such rules an arbitration institution will accept to be waived by the parties to arbitration, in order to administer those arbitral proceedings.

On the other hand the parties to arbitration may designate even in ad hoc proceedings in which the arbitration is selected by an arbitral institute. A set of rules

for ad hoc arbitration was drawn up in 1992 by a group of practitioners, who established a center for Public Resources for Non Administrated of International Disputes; an initiative of which to this day little advantages has been taken (Rubino, 2001). For instance, The International Chamber of Commerce Court (ICCC) was founded in Paris in 1923. ICCC does not resolve problems itself but assigns arbitral tribunals to cope with them. The charges and costs of the ICCC and the arbitrators are estimated on the base of the quantity in conflict. Recently, on 1 January 2012, the ICCC announced new arbitration rules intended at creating arbitration procedure inexpensive, quicker and more effectual. The new ICCC rules lead fresh articles on matters such as multiparty arbitration, case management techniques and emergency arbitration. The ICCC is also identified in particular for two precise types, namely, terms of reference and its scrutiny of awards. ICCC terms of reference are pinched up at an early phase of the arbitration and embark on the names and addresses of the parties to a conflict and their representatives, a summary of their assertions, the seat of arbitration, and a list of issues to be decided. This helps to focus the attention of the parties to a dispute and the arbitrators on what is really at stake. When the arbitral tribunal is ready to deliver its award, the tribunal is required to submit it in draft form for "scrutiny" by the ICC "Court".

The Court does not intervene with the arbitrator's award however controls the formal exactness of the decision to confirm that it deals with all the issues needed. London Court of International Arbitration is another example of the institutional arbitration. The LCIA was established in 1892. The LCIA, such as ICCC, does not choose issues itself but assigns arbitral tribunals to do so. The charges of the LCIA and the arbitrators are estimated on the base of the time that they expen (Buruma, 2013).

There are some other organizations, which are especially planned for global commercial and investment conflicts such as:

a) International Chamber Of Commerce (ICC)

The ICC is placed in Paris. It has become one of the principal organizations that functions international commercial arbitration since the 1920s. The ICC has its own organized rules and principles such as the trustworthy personality of the courts. It has a secretariat, which obtains the applications and manages the documentation of the tribunal. The parties to a conflict are free to decide the arbitrators as well as the arbitration place. However when the ICC arbitration is selected by the parties of the arbitration, they permit all the processes and rules of ICC unlike ad hoc arbitration. One of the important characteristics of the ICC is that the ICC advises reconciliation to all the arbitration claimants before the arbitral tribunal unless the parties have agreed otherwise (Oncel, 2006). The ICC Rules allow the parties to decide the law to be carried out in the arbitral tribunal. Another item is connected with the compulsory validity of the ICC verdicts (Art 28 (6), 1998).

b) The International Centre for Settlement of Investment Disputes (ICSID)

ICSID is a public international organization founded by a multilateral treaty in 1965[2] . The ICSID was founded to gratify the demand for an apolitical instrument to offer services for the arbitration of investment disputes among states and international investors.

The ICSID arbitration is an organized arbitration center and suggests conciliation before captivating the conflict to the arbitral tribunal like ICC. ICSID has also exclusive qualities that distinguish the ICSID arbitration organism from the other organizational arbitration centers. Primarily, ICSID was founded by

[2] Convention on the Settlement of Investment Disputes between States and National of Other States

international convention that states signed. Furthermore it is not just an arbitration center, but it is also a body of the World Bank for the inspiration of the international investments. Thirdly, it is obligatory arbitration when the parties to a conflict agree on. In other words, after the permission is given to ICSID, it is unchangeable. Finally, the decision given by the ICSID arbitration is definite and none of the national laws and reservations such as sheltering the municipal concern can amend the decision and enforcement of the decision (Oncel, 2006).

1.7

The sources of international Arbitration laws

There are two types of sources of international commercial arbitration law at the international level and at the national level, at the national level means the national legal system of the state, at the international level such as international Conventions and arbitration institutions.

1.7.1

International Conventions

International Conventions on international commercial arbitration are divided into multilateral and bilateral conventions, multilateral conventions on international commercial arbitrations play the main role, the large number of bilateral conventions must not be disregarded, these may described as complementing the multilateral ones and intervening, for instance, where they are not applicable or are less favourable. One of the most important conventions related with International Commercial Arbitration, which govern the arbitration in international trade contracts is New York Convention of 1958 on the Recognition and enforcement foreign arbitration award

which approved by the United Nations in special International Commercial Arbitration Conference held in the same year (Karim, 2016).

1.7.2

Rules of Arbitral Institutions

Institutional arbitration rules are generally available on the relevant arbitral institution's website, such as ICSID, ICDR or the ICC arbitration rules.

1.7.3

National Legal Systems

Some national legal systems have made a difference in their arbitration rules between purely internal and international arbitration. However, this difference should not be misunderstood; it generally concerns arbitrations which remain national in both cases. For example one can distinguish between national French arbitration and international French arbitration, but they are both French Arbitrations (Rubino, 2001).

1.8

Reasons for the Increasing Use of Arbitration:

After a second world war era has witnessed a considerable expansion in the level of international business and commerce. This process has been tremendously aided by the General Agreement on tariffs and trade, which led to a substantial reduction in tariff barriers to trade, with a resulting increase in the level of international commercial in goods. International business in services has also benefited from the globalization of economic activity. In relation to developing countries, there is a continuing, if often sporadic, inflow of foreign investments, such

as capital, joint ventures, turnkey projects, and technology transfer agreements. In a sizable number of these business relations, the parties to a dispute choose arbitration as a means of resolving any problems that may arise. In the words of one commentator, arbitration clauses "not only predominate but are nowadays almost universal in international business contracts. What reasons account for the increasing use of arbitration as an alternative to litigation of international business disputes? A variety of reasons have been suggested, dome plausible, other far-fetched. Advocates within the commercial community believe that international arbitration is preferable over litigation because arbitration is thought to be informal, faster, less costly, equitable, a way to avoid unfavorable publicity, relatively conciliatory, absorbs less management time… Most importantly, international arbitration is seen as providing the best chance to save the underlying business relationship (Chukwumerije, 1994).

The high degree of uncertainty and risks associated with litigating international trade disputes in national courts have been contributing factors in the prominence of arbitration as the preferred method of resolving international commercial disputes. One of the essential characteristics of international business arbitration is the consensual nature of the arbitration process itself, the arbitrator's power and jurisdiction derive not from the authority of the state but rather from the intention of the parties as set out in their contractual agreement (Lynch, 2003). The reasons why parties choose international commercial arbitration to solvetheir disputes can be separated into reasons that are applicable to arbitration in general and those that are applicable specifically to international arbitrations (UNCTAD, 2005).

CHAPTER TWO

ARBITRATION AGREEMENT

2.1 Definition

The arbitration agreement requires the source for arbitration. It is described as a covenant to propose current or potential conflicts for arbitration. This broad perception encompasses two simple forms:

a) An article in a agreement by which the counterparties accept to propose to arbitration the conflicts that may occur with regard to that contract (arbitration clause); or

b) A contract that the counters to a conflict that has already ascended to present the conflict to arbitration (tender agreement). The arbitration clause thus denotes to conflicts not existing when the contract is accomplished. Such conflicts, it must be noticed, might never ascend. That is why the two counterparts may describe the topic of the arbitration by position to the correlation out of which it originates.

The tender contract insinuates to conflicts that have already ascended. Therefore, it can contain a precise depiction of the topics to be arbitrated. Some domestic laws necessitate the implementation of a tender contract irrespective of the presence of a preceding arbitration article. One of the goals of the tender contract is to accompaniment the extensive testimonial to conflicts by an analyzed definition of the matters to be resolved in these cases (UNCTAD, 2005).

For instance Article 7 (I) (II) of UNCITRAL Model Law of International Commercial Arbitration defines Arbitration agreement as:

> *"Option (I) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement"*
> *"Option (II) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or no" (Art 7 (I) (II), 1985).*

2.2 Forms of Arbitration Agreement

The arbitration agreement may be in the form of a clause in the main contract evidencing the transaction between the parties to a dispute or as a separate submission agreement. Arbitration clauses evidence the intention of the parties to submit future disputes arising out of the underlying main contract to resolution by means of arbitration, while the submission agreement is a separate document evidencing the intention of the parties to a dispute to submit existing problems that have arisen over a defined legal relationship to resolution by means of arbitration. Thus both forms of arbitration agreement have the same primary purpose that of resolving disputes by means of arbitration (Onyema, 2010).

Article 251 of the Iraqi Code of Civil Procedures provides that:

> *"An agreement on arbitration may be made in relation to a specific or existing dispute, as well as in relation to future disputes which may arise from a contract"* (Art 251, 1969)

According to Iraqi law an arbitration agreement may be made as a clause in the contract or as a separate contract, except in insurance policies where an arbitration agreement must be in a form of a separate contract. As well as Article 985 of the Civil Code renders invalid an arbitration clause printed together with other conditions of the insurance policy (Art 985, 1951).

An article or an agreement of an arbitration should be in writing including the essentials of a endorsed contract. Almost entire conflicts ascending from agreements can be submitted as arbitration. However conflicts or alterations of a virtual of a concession may be mentioned to arbitration (Saleh, Majid). Iraqi Civil Code Article 704 designates some issues that are qualified of being conceded as such, - proficient of being predisposed for appreciated contemplation, and they must be expressed or renowned.

Issues related to public policy or criminal acts may not be subject to arbitration in case of a dispute. However economic effects or damages result from criminal acts or from individual problems may be cause to experience arbitration.

A question arises as to whether an arbitration clause is valid or effective if the main contract is not valid. There are no rules in the Iraqi law related with this issue. But, it can be assumed that the arbitration clause is independent from the basic contract, and the invalidity of the main contract does not necessarily invalidate the arbitration clause. This assumption is based on article 139 of the Civil Code, which states that in case of an invalidity of a provision of a contract, such invalidity does not affect the rest of the contract, unless the invalid provision was the basis of the agreement (Art 704, 1951).

2.3 Arbitrability

Impartial arbitrability states the nature of the topic of the fundamental operation from which the conflicts to be arbitrated originate. Arbitrability is one of the problems where the contractual and jurisdictional matters of international commercial arbitration collide on. It contains the basic problem of what kind of matters can or cannot be presented to arbitration.

While one of the parties' independence embraces the right to the conflict to apply any issue to arbitration, domestic laws often enforce limitations on what substances can be denoted to the arbitration. Some conflicts may contain such sympathetic governmental policy problems that it is handled as; they should only be cope with the judicial power of a state. A clear example is criminal cases which are commonly the realm of the internal courts; it is undoubted that the permitting of criminal movement is in the authority of the court. Globally, arbitral ability insinuates to whether alternative modules of conflicts are banded from arbitration either because of public policy or they are outside the scope of the arbitration covenant. Arbitral a ability mentions whether the alternative allegations elevated in the last phase (Brekoulakis, 2009).

The determination of arbitrability may well be a matter for national law or matter of international law, depending on where the basis of sanction for a particular conduct is to be found. It may also be based on international standards, rather than specific violation of statutory provisions. The law governing the arbitrability of a dispute may depend on where and at what stage of the proceedings the question arises. Tribunals may apply different criteria than courts in determining this law, and the criteria applied by courts at the post-award stage may differ from those at the pre-award stage. Most national arbitration laws do not regulate which law governs question of arbitrability; rather they determine directly which disputes are arbitrable or inarbitrable. Indeed, every national law determines which types of disputes are reserved for the exclusive domain of national courts and which can by referred to arbitration. This differs from state to state, reflecting the political, social and economic prerogatives of the state, as well as its general attitude towards arbitration. This is a balancing act between the largely domestic the more general public interest

of promoting trade and commerce through an effective means of dispute settlement (Brekoulakis, 2009).

The UNCITRAL Model Law on International Commercial Arbitration does not contain any determine of which disputes are arbitrable. For example, Article 1 (5) provides that:

> *"This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law"* (Art 1 (5), 1985)

International conventions may also directly or indirectly address the issue of arbitrability. For example, Article II of the New York Convention on the recognition and enforcement of foreign arbitral awards provides that:

1. *Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.*
2. *The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.*
3. *The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed (Art. II, NY, 1958).*

Indirectly and unambiguously these provisions generally regulate which law governs arbitrability, and in this sense is choice of law provisions. If a dispute is arbitable according to this law, courts may not rely on the inarbitrability of the dispute under a different law refuse enforcement of the arbitration agreement or award. The New York Conventions clearly and pertinently distinguishes between the

law applicable to the issue of arbitrability and the law governing the validity of the arbitration agreement. While the latter is primarily submitted to the choice of the parties to a dispute and in the absence of such a choice to the law of the place of arbitration, each national court determines the arbitrability of a dispute according its own law.

There is no restriction of time during which the parties may submit to the bench for consent or invalidation of an arbitral decision. Article 273 of the ICCP has placed down a number of grounds upon which the parties may appeal the bench for termination or consistent with the court which set aside the award:

The purposes for termination are wide-ranging, and are reviewed as follows:

a. *Invalidity of the arbitration agreement.*
b. *The arbitrators have acted beyond the scope of their jurisdiction.*
c. *Lack of certain documentary evidence.*
d. *The award is contrary to Public Order or public morality. There is no comprehensive definition of Public Order, but article 130 (2) of the Iraqi Civil Code refers to certain matters by way of example as matters of public orders. Also, Iraqi Law does not distinguish between national and international public order.*
e. *If there is an essential error in the award or in the proceedings which effects the validity of the award.*
f. *If the arbitrators did not observe certain compulsory rules of CCP procedures.*
g. *If there is any reason to justify re-hearing of the case, such as the presence of forged evidence, and*

h. *If there is a reason for one of the parties to challenge the competence of the arbitrators such as lack of impartiality, as stated before* (Majid, Saleh).

The problem in international commercial arbitration, as to whether a conflict is arbitrable results from antitrust, securities exchange or issues connecting to other statutes articulating a stout public policy. Disputes concerning those problems had conventionally been measured to recline outside the extent of arbitration.

However, there have been awards in dissimilar benches that have reigned in favor of arbitrability during the last 15 years. The Supreme Court of the United States indicated that while arbitration emphases on alternative conflicts among the parties convoluted, so does judicial determination of claims, yet both can further larger social drives. In regard to antitrust matters, there is now a consistent case law acknowledging its arbitrability. For Example:

CASE LAW: "*Appeal Court of Paris, May 19, 1993, Labinal v. Mors, Revue de l'arbitrage, 1993. The case involved two parties (a French and a British corporation) related by a joint venture agreement that included an arbitration agreement. The French party alleged that the counterparty entered into an agreement with its main competitor and filed a suit asking for damages. Taking into account the existence of an arbitration agreement, the Appeal Court of Paris ruled that the arbitrators should decide on their own jurisdiction and on the arbitrability of the matter subjected to them, even though their decision might be subject to judicial control in a subsequent setting aside procedure"* (UNCTAD, 2005).

2.3.1 Applicable Law to the Problem of Non-Arbitrability

The New York Convention insinuates to the fact that the title of the alteration is not qualified of settlement by arbitration under the law where the country enforcement is sought. Both the Arab League and Riyadh Conventions also require that the problem should be examined "*under the law of the state where recognition and enforcement of award is sought.*"

Therefore, the opinion that the law of the country where enforcement of the award is sought must be applied to govern the question of non-arbitrability seems indisputable. Hence, the law of the location of where execution is required will be appropriate to the determination of enforceability only if its courts originally had jurisdiction over the conflict determined by the arbitrators. Otherwise there is no reason for the court to apply its own law and refuse the enforcement of the foreign arbitral award.

Furthermore, if an arbitral decision cope with an administrative covenant, there would be no purpose for a domestic court to reject execution on the base that this type of conflict cannot be resolved by arbitration under domestic law. This would be far from of the intent of national law which is concerned with the determination of the domain of national arbitration, rather than intending to sanctuary the exclusive jurisdiction of national courts on specific disputes. Hence this interpretation seems to be reasonable, it may lead to undesirable applied effects in cases where the law of the country of enforcement covers a larger perception of non-arbitrability. In this case, an enforcing court, having proved that it has exclusive jurisdiction over a conflict that cannot be settled by its own concept, would then reject execution, regardless of any other facets, such as an international component, hence tapering the conception of non-arbitrability (Alenezi, 2010).

2.4 International Enforcement of Arbitration Agreement

Enforcement of arbitration agreements means that a party begins court proceedings and the opposing party contests that court's jurisdiction on the basis of the arbitration agreement, the court must stay its own proceedings and refer the parties to arbitration unless it finds that the arbitration agreement is null and void, inoperative of being performed. It does not matter where the chosen seat of arbitration is, it can be within the same country or abroad. This mechanism greatly reduces the chances of court proceedings taking place in parallel to arbitration proceedings (Kee, 2010).

2.5 The Law Applicable to the Arbitration agreement

An arbitration agreement, although included a contract, has be seen as a separate agreement. Therefore the law governing the arbitration agreement can be different to the one relevant for the principal contract between the parties to a dispute. This issue can result out of an express agreement between the parties to a dispute bum may arise of operation of law. Though, the law governing the arbitration agreement is normally the same as the rules applicable to the establishment of the principal contract. Arbitration agreements are specifically excluded from the application of the Rome convention on the law applicable to contractual obligations 1980.

A problem arises, if the content of the dispute afflicts a public policy of the state, where the award will have to be enforced. The dispute will not be arbitable and, hence, not enforceable in such a country, for example (Art V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards). Therefore, a dispute, which is not arbitrable under the law governing the arbitration

agreement, cannot efficiently be settled by arbitration. The same is true for the *lexarbitri* and also for parts of the law applicable to the substantive issues and shall therefore be discussed together with the enforceability of awards (Lohnert, 2000).

What law governs the arbitration agreement if it is not specified in the arbitration agreement? This is a difficult question and will depend upon the circumstances of the case and the approach taken by the arbitral tribunal or national court considering the issue. This lack of clarity can lead to expensive satellite proceedings which would be unnecessary if the law governing the arbitration agreement were specified in the arbitration agreement (Sherina, 2014).

The arbitration agreement is a common feature of international commercial contracts and constitutes the bedrock of international arbitration. Form a practical standpoint, a well drafted arbitration agreement enables the parties to rely on a number of important effects, including the parties' rights and duties to commence the arbitration proceedings, the competence of the arbitral tribunal to decide the controversy; the national course duties to refer the parties to a dispute; and the parties' rights to seek enforcement of an arbitral award based on their agreement to arbitrate. In some cases, the parties to an international arbitration will resort to model clauses recommended by leading international arbitral institutions, such as the LCIA or the ICC which provide for rather concise, but well tested wording, frequently, arbitration agreements are drafted by corporate lawyers or business people with no practical experience in the field of the international business arbitration. So if a dispute arises in connection with performance of the contract, the arbitrators must establish whether the arbitration agreement possesses at least the minimum legal requirements to be capable of enforcement. This when the validity of the arbitration

agreement become problem, since a recalcitrant parties to a dispute is likely the enforceability of the arbitration agreement as a tactic to avoid arbitration process.

If the contract does not provide for a choice of law clause, conflict of laws issues may arise in the interpretation of the validity of the arbitration agreement, on the other hand, if the contract does not include a choice of law clause pursuant to which the parties have chosen the governing law of their rights and obligations, this fact alone will not necessarily and automatically imply a choice of the law applicable to the arbitration agreement itself. This, while conflict of laws issues often perceived by business people as mere academic exercise conventional wisdom suggests that their resolution often becomes crucial to determine the outcome of a dispute over the validity of the arbitration clause. Aside from submission agreements, which are separate contracts entered into by the parties to a dispute following the execution of their contract, the vast majority of arbitration agreements are embodied in the main contract. This is where the autonomy of the arbitration agreement from the main contract gives rise to significant practical consequences. Assuming that the main contract is deemed to be null and void or illegal (Ferrari, 2011).

CHAPTER THREE:

ARBITRATION PROCEEDINGS and IRAQ

3.1 Appointment of Arbitrators

There are no requirements needed for the arbitrators, however they must hold full legal capacity and should be impartial. Also, there is no rule eliminating the appointment of foreign arbitrators, therefore it is doable to employ foreign arbitrators and experts in arbitration proceedings in Iraq. For instance, in a conflict ascending from a agreement between the Iraqi Construction Company and the dissolved Reconstruction Council of Iraq, the conflict is submitted to a single international arbitrator elected by the parties to that conflict. The verdict of the arbitrator may conditional on an appeal on other grounds. In that example, the Court of Cassation as correct and binding in the past approved the decision.

The number of the arbitrators and the method of their appointment are subject to the agreement of the parties to arbitration, but the number of arbitrators must be uneven. If a party to a dispute fails to appoint his arbitrator, the other party may refer the matter to the court to appoint arbitrator for this party.

The decision of the court to appoint an arbitrator is final and not subject to appeal. But a party may challenge before the same court the appointment of an arbitrator on the grounds of certain disqualifying reasons and request the court to disqualify an arbitrator, which the court had appointed before. These disqualifying grounds are the same as those applicable to judges (Majid, Salih). For instance, article 93 of the ICCP provides that: "*an arbitrator can be disqualified by the court for reasons such as existence of an employment relationship, or if there is a*

friendship or enmity between the arbitrator/judge and the party concerned, or if the arbitrator/judge has already rendered an opinion on the case, or has accepted presents or payment" (Art 93, 1969).

In addition article 91 of the ICCP has laid down other reasons for disqualification of a judge or arbitrator, such as blood or marriage relationship. Also, the arbitrator must not have any interest in the dispute, and he should not be an agent of either party. The decision of the court to disqualify an arbitrator is subject to an appeal as stated in article 261 of the ICCP (Art 261, 1969). Furthermore, the presence of such reasons (of disqualification) can be held as a reason for repealing any arbitral decision taken by such disqualified arbitrator or arbitrators. According to article 260 of the ICCP, an arbitrator may not resign, unless he has justified reasons, and cannot be dismissed unilaterally by one party (Art 260, 1969).

A choice of law may also regulate the procedures used in arbitration proceedings. An agreement to arbitrate usually makes reference to an institution's rules of arbitration and provides for their governance over the hearings' procedures. These rules, however, often refer to "the governing law" regarding whether an arbitrator may institute certain procedures. Even if the arbitration agreement contains no reference to an established set of rules, other applicable law may require the implementation of particular procedures by the arbitrator." Again, a reference to United States and German laws concerning arbitration procedures demonstrates that the choice of law can have a significant effect on the procedures used in arbitration process (Craig, 1991).

3.2 Place of Arbitration

If the decision of the location of arbitration is not already agreed upon by the parties, rules of arbitration commonly permit the parties to settle on the arbitration

place, depend to the necessity of particular arbitral institutions in which regularly the center of the institution. If the place has not been so agreed upon, the rules governing the arbitration naturally deliver that it is in the authority of the arbitral tribunal.

If the arbitral tribunal asks to make that determination, it may wish to hear the views of the parties before doing so (UNCITRAL Notes, 2012). For example, Article 20 of UNCITRAL Model Law on International Commercial Arbitration provided that:

"1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

2) Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents. The purpose of this discretion is to permit arbitral proceedings to be carried out in a manner that is most efficient and economical" (Art 20, 1985).

When one says that Iraq, Turkey or TRNC is the place of arbitration, one does not mention merely to a geographical location. One means that the arbitration is conducted within the framework of the law of arbitration of Iraq, Turkey or England, under the curial law of the related country. The geographical place of arbitration is the factual connecting factor between that arbitration law and the arbitration proper, considered as a nexus of contractual and procedural rights and obligations between the parties and the arbitrators.

3.3 Language of Arbitration

Arbitral procedure laws authorize the arbitral tribunal to govern the language or languages to be used in the proceedings. If the parties do not decide an agreement thereon. Possible necessity for translation of texts in full or partly, some documents annexed to the declarations of assertion and defense or tendered later may not be in the language of the proceedings. Bearing in mind the needs of the proceedings and economy, it may be considered whether the arbitral tribunal should order that any of those documents or parts thereof should be accompanied by a translation into the language of the proceedings. In an arbitration governed by an institution, explanation as well as translation facilities are often decided by the arbitral institution. In taking rulings about translation or interpretation, it is suitable to adopt whether any or all of the charges are to be paid directly by a party or whether they will be paid out of the deposits and apportioned between the parties along with the other arbitration costs (UNCITRAL Notes, 2012). For instance, Article 22 of UNCITRAL Model Law on International Commercial Arbitration provided that:

> "*(1) The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.*
> *(2) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribuna"l* (Art 22, 1985).

3.4 The Applicable Law to the Arbitral Procedure

Occasionally parties who have not comprised in their arbitration agreement a requirement that a set of arbitration rules will manage their arbitral proceedings might wish to do so after the arbitration has begun. If that happens, the UNCITRAL Arbitration Rules may be used either without adjustment or with such modifications as the parties might wish to agree upon.

However, attention is counseled as deliberation of a set of arbitration rules might suspend the proceedings or give rise to excessive disagreement. It should be noticed that agreement on arbitration rules is not a requirement and that, if the parties do not decide on a set of arbitration rules, the arbitral tribunal has the authority to endure the proceedings and decide how the case will be accompanied (UNCITRAL Notes, 2012). For instance, Article 19 of UNCITRAL Model Law on International Commercial Arbitration provided that:

> *"1- Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.*
>
> *2- Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence"* (Art 19, 1985).

According to article 265 of the ICCP which takes place in Iraq, should apply the rules of procedure laid down in the ICCP, unless otherwise agreed by the parties. In other words, the parties to an arbitration agreement are free to choose other sets of procedural rules, such as the UNCITRAL Arbitration Rules. The parties may also agree to exclude the procedural rules of ICCP, which are not of a compulsory nature,

and apply other rules as long as such rules are not contrary to Public Order and morals (Art 265, 1969).

3.5 The Applicable Law to the Substantive Issues

As to the substantive law, the arbitrator must apply the applicable law to the contract in question. In an Iraqi contract between two Iraqi parties, or in a contract subject to the Government Standard General Conditions of Contract, the Iraqi law will apply to the dispute. However, the question arises as to whether it is possible to apply a foreign law to an arbitration which takes place in Iraq. The answer to this question can be derived from the provisions of article 25 of the Civil Code, which states that:

> "*The contractual obligations shall be governed by the law of the state wherein lies the domicile of the contracting parties if they have a common domicile; where they have different domiciles the law of the state within which the contract was concluded will be applied unless the contracting parties have agreed otherwise or where it would be revealed from the circumstances that another law was intended to be applied.*"

From the above, it is comprehended that in an agreement in which the residence of one party at least is outside Iraq, the parties may select a law other than Iraqi law. (Art 25, 1951)

Choice of Applicable Law by the Parties: One of the advantages of a choice of law provision is that it prevents the application of conflict of laws rules. Because no party can be sure of which conflict rule will apply in the event of a dispute uncertainty can be great. As well as, the mere application of a nation's conflict of law provisions can be difficult and time consuming in a judicial or arbitral setting. A choice of law clause will eliminate these application expenses as long as it is accompanied by an agreement to arbitrate. A choice of law provision may be used in

its delineation of the legal rules and parameters of the transaction prior to the development of any dispute. With prior knowledge of the system or systems of applicable law, parties can more readily determine what rules will govern a dispute and what remedies may be available. As a result, the outcome of dispute resolution may be more certain and predictable, and parties may be more inclined to negotiate a settlement, thereby saving the expense of arbitration. In this way, the choice of law may eliminate the need to arbitrate altogether. Finally, a choice of law clause may allow parties to a dispute to choose the methods and remedies by which an arbitrator will resolve their disputes. For example, parties to a contract may foresee the value of maintaining good long-term relationships with each other. In order to minimize disruptions, they may wish to grant an arbitrator powers to reform a contract in light of changed circumstances instead of excusing parties' performance obligations (Craig, 1991).

Applicable law is one of the classic issues in international commercial arbitration. The parties to a dispute could originate from different countries, might have concluded the contract in a third country, have the place of performance in a fourth country and chosen the place of arbitration in a neutral fifth country. The international character of arbitration and its regulatory system imply that at least five different systems of law could be relevant to different parts of the same arbitration. Once this is done, the arbitral tribunal may be able to resolve the dispute by applying the facts to the terms of the contract. Contracts are often detailed, and disputes could thereby be resolved without having to consult the applicable substantive law. However, there are disputes in which the substantive law governing the merits of the case must be consulted. For example, the substantive law may have to be consulted when the main contract needs interpretation, when there is a question of the main

contract's validity or when the consequences of a breach of contract must be examined. In these instances, the important substantive law is the one governing the disputed contract. When the substantive law governing the merits of the case needs to be consulted; the choice of applicable law is often decisive for the outcome of the case. Therefore, it is important that the parties to a dispute can influence the choice of substantive law (Hakansson, 2013).

3.6 Recognition and Enforcement of Arbitral Awards

The arbitral tribunal must render its decision within a period, if such period is specified in the arbitration agreement. In the absence of a stipulated period, the arbitrators must issue the award within 6 months from the date of their acceptance to act as arbitrators.

Arbitrators have no power to order interim measures, and have no jurisdiction in matters of criminal nature such as forgery and other offences, nor have they jurisdiction to order an action against witnesses who fail to appear before them. In matters falling outside the jurisdiction of the arbitrators, including the aforesaid matters, arbitration proceeding is suspended, and the arbitrators should request the parties to apply to the competent court to order a specific action, or an interim measure, or render a decision.

Arbitration award must be by either majority or unanimous vote in case of more than one arbitrator. It must be in writing and in the form of a court judgment including a reference to the arbitration agreement, statement of the parties, documentary evidence, the place and date of the award together with the reasons and basis of the arbitral award. After the arbitrators have rendered the award, the parties may voluntarily enforce the award, and thus bring an end to the dispute. But, often

one party is not satisfied with the award or wishes to gain time. The arbitral award is not res judicata and cannot be enforced without a decision of the competent Iraqi court (Majid, Salih), for example according to article 272 of the Iraqi Code of Civil Procedures. The court would normally subject the award to thorough and detailed examination from the point of view of form and law (Art 272, 1969).

For the purpose of enforcement, one party must apply to the competent court to confirm the award. Once the award is confirmed by the court, it becomes final and enforceable "res judicata" judicial decision, provided that no further appeal is made by the parties.

The court, in accordance with the provisions of article 274 of the CCP, may either approve the arbitration award or reject it in whole or in part (Art 274, 1969). In the latter case, the court may refer the matter back to the arbitrator to rectify the rejected part of the award or issue a new decision. The court may also decide to adjudicate the case itself. The aforementioned decision of the court confirming or rejecting the arbitration award is subject to appeal to a higher court in accordance with the CCP rules of appeal. Obviously, this would delay the settlement of the dispute even longer, and this itself frustrates the intended purpose of arbitration as fast process for dispute resolution. International commercial arbitration awards are generally easier to enforce than foreign court judgments. In general, countries prefer to keep their legal independence; therefore, a national court usually resists accepting or enforcing foreign court judgments. It is a general rule that nations are not subject to the jurisdiction of any foreign court; but arbitration awards do not suffer the same limitation of foreign court judgments. A foreign court judgment follows the political and legislative system of that foreign country whereas arbitration has separate rules, seat and independent arbitrators.

In addition, foreign judgments are not protected by international conventions as international arbitration awards are. For these reasons, enforcement of foreign judgments is not as widespread as international arbitration awards. However, the strict theory of sovereign immunity has changed, to some extent, with time. The argument most commonly accepted now is that there is a distinction "between acts of a state in its sovereign capacity and acts of a state in its commercial capacity." This not only allows the national courts to have a broader view towards enforcement of foreign judgment, but also helps them to contain their public policy interpretation when it comes to enforcement of arbitration award. Although the majority of corporations fulfill the awards rendered by international arbitration tribunals, some of the losing parties are reluctant to comply. Therefore, it is understandable that, after the arbitration tribunal renders the award, the winning party wants to enforce the award in the shortest possible time. This can be executed in a variety of ways. First, the winning party can push the other party to comply with the order by using commercial pressures. The winning party will have more power in this respect if the losing party wishes to continue its relationship or if there is a more commercial benefit such as being involved in a business in a certain region or in a technical industry in which the players are limited (Hendizadeh, 2012).

In such situations, regional associations like the Grain and Feed Trade Association (GAFTA) can publicize the behavior of the losing party in order to pressure other members. For example, the Grain and Feed Trade Association (GAFTA) arbitration rules expressly mention that: In the event of any party to an arbitration or an appeal held under these Rules neglecting or refusing to carry out or abide by a final award of the tribunal or Board of appeal made under these Rules, the Council of the Association may post on the Association's Notice Board and/or

circulate amongst Members in anyway thought fit notification to the effect (Art 22 (1), 2006).

If the losing party is reluctant to perform the award, then the winner has to enforce the award by taking the case to the national court and get the court order for enforcing the award. This means that the winner has to go through the national court process for recognition and enforcement of the award. The finality of arbitral awards is helpful in commercial relations, and indeed the international arbitration tribunals consider the finality of the awards as the most important factor for the enforcement of awards. It is a general obligation that arbitration awards must be final and binding. For example, the Washington Convention and the NYC, absolutely abandon any recognition of the arbitration award if the award is not final. This means when the award is final, it is binding and enforceable. The NYC provides that, "the award has not yet become binding for the parties or has been set aside or suspended by a competent authority of the country in which or under the law of which the award was made" (Art V (e), 1958) The Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States provides that: the award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention(Art 53 (1), 1965).

Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention. As well as, in article 36 (1) (a) (v) of the UNCITRAL Model Law on international commercial arbitration offers that: "*the foreign awards must not be recognized if the awards are not final. The enforcement of arbitral awards is protected by various international conventions, most importantly the NYC. Before the NYC, parties of an arbitration generally had to proceed through the domestic*

courts and request the courts to confirm the awards "in order to have the award deemed final" and then request enforcement of the award a problematic, if not deceitful, procedure given that the losing party could take advantage of any delay in enforcement of the award or could bring it to the national court to be reviewed." Nevertheless, under the NYC, all the signatory countries have to enforce arbitration awards; in fact, the main purpose of the Convention was to make it easier for the parties to a dispute to enforce the award in other signatory countries. To understand the importance of this convention in the international commercial arbitration world, it is helpful to review its history and its effect. Because an arbitral award does not implement itself, there was early recognition that there should be a method to ensure the enforcement of foreign arbitral awards. The first international convention that dealt with the problem of international arbitral award enforcement was the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards, which created enforcement methods for 'all arbitral awards made pursuant to the Geneva Protocol on Arbitration Clause of 1923 (Hendizadeh, 2012)

3.7

Different meanings and Inseparable or Separable Terms of recognition and enforcement

The terms 'recognition' and 'enforcement' are usually used interchangeably. However, they have different meanings and each can be used for different purposes. When the winning party applies to enforce foreign arbitral awards, the terms 'recognition' and 'enforcement' are often used together. These terms are inextricably linked in the NYC and in the UNCITRAL Model Law (1985). Indeed, the reason these terms are normally used inseparably regarding foreign arbitral awards is that a

foreign arbitral award cannot be enforced without first being recognized. As well as recognition and enforcement cannot be separated." Therefore, the precise distinction is between 'recognition' on the one hand, and 'recognition and enforcement' on the other. However, these terms can be used separately because recognition of a foreign arbitral award may be sought alone without enforcement. “Thus, the terms 'recognition' and 'enforcement' may be used separately by providing special conditions for each one (Daradkeh, 2005).

Article (1) of the Geneva Convention on the execution of foreign arbitral awards distinguishes between recognition and enforcement which provides that:

In the territories of any High Contracting Party to which the present Convention applies, an arbitral award made in pursuance of an agreement, whether relating to existing or future differences (hereinafter called "a submission to arbitration") covered by the Protocol on Arbitration Clauses, opened at Geneva on September 24, 1923, shall be recognized as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting Parties to which the present Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties.

Obtain such recognition or enforcement, it shall, further, be necessary:

a)

That the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;

b)

That the subject-matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon;

c)

That the award has been made by the Arbitral Tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;

d)

hat the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition, appeal cassation (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending;

e)

That the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon (Art 1, 1927).

To force the losing party to enforce the arbitral award, the winning party applies to the competent court to take a positive action against the assets of the losing party. This action normally takes the form of different sanctions, the aim of which is to make the losing party enforce the arbitral award. To understand the concepts of recognition and enforcement, certain distinctions must be emphasized. Firstly, it is important to distinguish between recognition and enforcement of foreign arbitral awards at the seat of the arbitration and recognition and enforcement of foreign arbitral awards made outside the territory where recognition is sought. Secondly, there is fundamental distinction between recognition and enforcement arbitral award, as because apparent if one considers the matter in light of the objectives of any procedure and the parties' strategic options (Kronke, 2010).

3.8

Application for Recognition and Enforcement

As mentioned above the core provisions on the recognition and enforcement procedures itself are contained in NYC, For example, article IV of the NYC (1958) Involves simplifications of the formal enforcement proceedings by providing merely for a minimum standard of documentation proof to be produced by the party of the arbitration applying for enforcement warranting authenticity and content of both the award and the underlying arbitration agreement. As indicated above, a main achievement of the NYC in this context is redeploying the burden of proof from the pursuing party to the defining party. The NYC obliges the enforcement seeking party to furnish the authenticated original or a duly certified copy of both the award and the arbitration agreement, if necessary supplemented with official translation to the language of the enforcing state. As soon as these preconditions are supplied they constitute in favor of granting enforcement arbitral award. The court may only reject enforcement on its own motion, if one of the reasons for refusal examined. For example article v of the NYC states that:

"Article V 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the

arbitration proceedings or was otherwise unable to present his case; or (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country."

Unlike the former Geneva treaties the NYC thus does not burden the party applying for enforcement, but the respondent to prove relevant barriers in order to challenge the enforcement, which contributes to the major progress of the NYC and is even deemed to reflect a "radical change of attitude towards arbitral awards" recognition that "the award in itself constitutes a title capable of producing certain effects without the need for various extrinsic elements to be established. Basically, the losing party can only defend enforcement it proves the presence of at least one reason set out by article v (Alfons, 2010).

Conclusion

- The choice of law by the parties to a dispute has significant effect on the resolution of disputes through international commercial arbitration. Through their choice, parties have the potential to influence the outcome of their disputes, the types of procedures that arbitration utilizes, and even the type of institution that will eventually resolve the disputes.
- international commercial Arbitration as a means of alternative dispute resolution or arbitrator as an impartial body can be addressed and resolved many International or local Business disputes, all company or business man can start business in our country without any fear because of arbitration can start arbitrate procedure without any interference of court or government and they have knowledge and experience to resolve subject matter, the interests and goals of both parties can usually but not always solve them problem in the health care context.
- International Commercial arbitration awards are easier enforceable than enforcing a foreign court judgment abroad due to some of international conventions such as the NYC, The NYC on the Recognition and Enforcement of Arbitral Awards provides a regime for the enforcing an arbitral awards within Contracting States. More than 145 Contracting States have ratified the NYC. The Convention NYC provides only limited grounds to refuse enforcement.
- There are two forms of arbitration agreement; the arbitration agreement may be in the form of a clause in the main contract or as a separate submission agreement. Arbitration clauses evidence the intention of the parties to submit future disputes arising out of the underlying main contract to resolution by arbitrators, while the submission agreement is a separate document evidencing

the intention of the parties to a dispute to submit existing problems that have arisen over a defined legal relationship to resolution by arbitrators.

- Uncertainty and risks associated with litigating international trade disputes in national courts have been contributing factors in the prominence of arbitration as the preferred method of resolving international commercial disputes.
- There is no provision in Iraqi laws excluding the appointment of non-Iraqi arbitrators, so it is possible to appoint foreign arbitrators and foreign experts in arbitration proceedings in Iraq.
- The first consideration in the analysis to determine the law applicable to the arbitration agreement is to determine whether the parties have expressly chosen a law or set of legal rules to govern the interpretation and regulation of the arbitration agreement. In such situations the choice made by the parties (by virtue of the principle of party autonomy) will apply whether the arbitration agreement is a clause or a self-standing agreement.
- In accordance with the Iraqi Code of Civil Procedure, arbitration, which takes place in Iraq, should apply the rules of procedure laid down in the Iraqi Code of Civil Procedure, unless otherwise agreed by the parties.
- If the parties to a dispute are located in different parts of the country or of the world, the location of the arbitration proceedings may become an important drafting consideration. The parties to an arbitration agreement are free to agree on the place of arbitration. If the parties have failed to determine the place of the arbitration, some rules of arbitral institutions such as (AAA) allow the arbitrators to determine the situs based on the circumstances of the parties or the case

Recommendations

1- Iraq is not a member to the New York Convention on the recognition and enforcement of foreign arbitral awards so far. I recommend to Iraq to join the New York Convention to develop its investment.
2- We also recommend that the separation between domestic arbitration and the International arbitration in the Iraqi law
3- Work on the training of lawyers and businessmen in Iraq to be capable of drafting the arbitration clause in international trade and domestic agreements.
4- It is recommended for the Iraqi legislator to modify the law of implementation of foreign judgments No. 30 of 1928, to be able to enforce the foreign court judgments easily under the conditions required by the law.

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