

NEAR EAST UNIVERSITY
GRADUATE SCHOOL OF SOCIAL SCIENCE
MASTER OF LAW IN INTERNATIONAL LAW LL. M

**INTERNATIONAL ARBITRATION LAW AND THE SALE OF
GAS AND OIL IN THE CASE OF IRAQ**

Snoor Mohammed Amin Najmaldin

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PREPARED BY
Snoor Mohammed Amin Najamaldin
20166541

SUPERVISOR
ASSOC. PROF. DR. DERYA AYDIN OKUR

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Prepared by
Snoor Mohammed Amin Najamaldin

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Examining Committee in charge

Assoc. Prof. Derya Aydin Okur

Near East University
International Law Program

Assoc. Prof. Resat Volkan Gunel

Near East University
Department of International Law

Assist. Prof. Tutku Tugyan

Near East University
Department of International Law

Approval of the graduate School of Social Sciences

Prof. Dr. Mustafa SAGSAN
Acting Director



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I am Snor Mohammed Amin, hereby declare that the dissertation entitled
"International Arbitration Law and the Sale
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ABSTRACT

A variety of issues arise and the concern carries on to be rapidly growing as some issues in the region of Middle East (especially Iraq) seem to be clearly neglected by the Western powers. This however, has contradictory views from an array of theories (e.g. conspiracy theories, supportive theories, neutral theories). The main objective of this study is to contribute to the literature regarding the law cases for Iraq and more specifically in regard to the Arbitration Law on an international and global scale with hindsight on the matter of gas and oil. This comprehension carries out the aspects of international considerations as well as regional and domestic.

The enormous resources of gas and oil within the Iraqi borders call for a comprehensive review on the matter due to its vitality on a global scope. The resource allocation, surveillance, laws and regulations must be solid and issues with consent of the majority of people at first, arbitrators, and other parties involved globally. This study tends to investigate through the ocean of arbitration law within a global aspect and subsequently, relate and highlight the links of those laws to the region of Middle East via a comparison method of descriptive means and furthermore to the extent of Iraqi borders.

The new regulations have made the path clearer and more sustained for processing the buy and sale of gas and oil by the international corporations. Some of which, have now internal contracts with the current government of Iraq and are working in many different levels of the production, development, supply, and knowledge-transfer of gas and oil to the level of sales and shipments.

Keywords: International Arbitration Law, Iraqi Law, Civil Law, Gas and Oil, International Trade Law

ÖZ

Ortadoğu'da (özellikle Irak'ta) bazı konular Batılı güçler tarafından ihmal edildiği için çeşitli olaylar ortaya çıkarak endişe yaratmaktadır. Bu durum bir dizi teori (örneğin ikna edici kuramlar, destekleyici teoriler, tarafsız kuramlar) arasında çelişkili görüşler içermektedir. Bu çalışmanın temel amacı, Irak'la ilgili hukuk davaları ve bilhassa uluslararası ve küresel ölçekte gaz ve petrol konusunda geriye dönük Tahkim Yasası ile ilgili olarak literatüre katkı sağlamaktır. Çalışma, ayrıca, hem bölgesel hem de evrensel konuların yanı sıra uluslararası değerlendirme özelliğini de yerine getirmektedir. Irak sınırları içinde bulunan muazzam gaz ve petrol kaynakları, küresel kapsamdaki değeri ve önemi nedeniyle kapsamlı bir incelemeyi gerektirmektedir. Kaynak tahsisi, inceleme, kanun ve yönetmelikler sağlam olmalı ve başta insanların çoğunluğunun, hakemlerin ve taraf olan diğer birimlerin küresel olarak rızası alınarak yayınlanmalıdır. Bu çalışma, tahkim hukukunun küresel bakış açısıyla incelenmesinin ardından yasaların tanımlayıcı araçlarla karşılaştırma metodu ile Ortadoğu bölgesi ile ve daha sonra Irak sınırları ile bağlantılarının altını çizmeyi amaçlamaktadır. Yeni düzenlemeler, uluslararası şirketler tarafından gaz ve petrol alım satımını gerçekleştirmek için uygulanan sistemi daha net ve sürdürülebilir hale getirdi. Bazı şirketler ise şu anda Irak'ın mevcut hükümetiyle sözleşmeler yapmakta ve gaz ve petrolün satış ve sevkiyat seviyesine kadar üretim, geliştirme, tedarik ve bilgi aktarımında birçok farklı düzeyde çalışmaktadır.

Anahtar kelimeler: Uluslararası Tahkim Hukuku, Irak Hukuku, Medeni Hukuk, Gaz ve

Petrol, Uluslararası Ticaret Hukuku

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Dedication

I dedicate my dissertation work to my family and many friends. A special feeling of gratitude to my loving parents, Awaz and Mohammed Amin whose words of encouragement and push for tenacity ring in my ears. I also dedicate this to my supervisor ASSOC. PROF. DR. Derya Aydin Okur, S.Hamza Ruso, and all the lecturers, and to my many friends and family who have supported me throughout the process.

CHAPTER ONE

Introduction

1. Chapter Overview

This chapter introduces the main topic and subject of this study. In addition, this chapter provides basic information of the main areas of the research for more clearance. Moreover, this chapter gives a brief description on the findings and implementations of the study as well as raising the questions of the study.

1.1. Research Relevance and Approach

This study tends to investigate through the ocean of arbitration law within a global aspect and subsequently, relate and highlight the links of those laws to the region of Middle East via a comparison method of descriptive means and furthermore to the extent of Iraqi borders.

This study tends to provide a better understanding of the arbitration law in the case of Iraq and more specifically how it can be related to the sales of gas and oil. The enormous resources of gas and oil within the Iraqi borders call for a comprehensive review on the matter due to its vitality on a global scope. The resource allocation, surveillance, laws and regulations must be solid and issues with consent of the majority of people at first, arbitrators, and other parties involved globally.

The literature lacks regarding information on this case and as far as science is concerned, there are no limitations nor borders. Hence, the study recognizes the issue whether within the literature and lack of cases and studies for Iraq, or the real, current, and existing problems in the country for the aforementioned lack and/or misunderstanding on the phenomenon of sales of gas and oil

as well as the consideration and taking into the action of the concept of arbitration and the arbitration law. This is due to its international extend and is necessary for a resourceful country such as Iraq in the very sensitive and “on the line” territory of Middle East.

A variety of issues arise and the concern carries on to be rapidly growing as some issues in the region seem to be clearly neglected by the powers of the West. This however, has contradictory views from an array of theories (e.g. conspiracy theories, supportive theories, neutral theories). The main objective of this study is to contribute to the literature regarding the law cases for Iraq and more specifically in regard to the arbitration law and the sales of gas and oil. This comprehension carries out the aspects of international considerations as well as regional and domestic.

Due to the access of the researcher on the first handed information and personal visitations of several offices and authorities during the research, this study endeavors to collect a reliable set of information on the topic at hand. To better understand the Iraqi laws from a global aspect, and linkage between the sale of gas and oil, this study tends to cover some of the many perspectives, approaches, and methods on the phenomenon.

1.2. A Brief Overview on the Subject

The new regulations have made the path clearer and more sustained for processing the buy and sale of gas and oil by the international corporations. Some of which, have now internal contracts with the current government of Iraq and are working in many different levels of the production ¹ of gas and oil and to the level of sales and shipments. As noted earlier in this chapter, Iraq has a

¹ This was in contradiction to the policies of the sovereignty (Zartman, I. W. 2017).

futuristic and long-term plan for the resources of gas and oil and tends to take the rank of second largest producer of gas and oil after Russia within the next 20 years. This justifies the means and transformations that are currently taking place in the body of Iraqi laws and more specifically the Arbitration Laws of Iraqi Government.

The international arbitration acts and agreements are not restricted nor prohibited by the laws of Iraq Arbitration System and the newly modernized body of Law and the transformed regulations and new legislation. However, as mentioned earlier during the past decades (1970-1980) was not as easy as it is in the recent years and Iraq system of Arbitration Law had the approach of not accepting or resisting to the highest level with the conduction of an arbitration clause in the governmental projects and contracts. This was extended to the supplies of materials and had the basis of the jurisdiction of the Iraqi courts being neglected or violated.

1.3. Implementation of the Study

Increasing the foreign capitals into the Iraqi market will directly affect the economy market as well as the growth rate. This can lead to advancement in many industries in the country. Industries such as, tourism, banking, insurance, trading, export, and import as well as agricultural advancement, which is a vital industry for the country can reach to higher standard levels with the flow of foreign investments. This will yield in the increase of the satisfaction of the locals as well as the foreigners with an effective and progressive market with flexible attitude towards change. It can further increase the quality of life of the country and lead the OECD to further increase their database in Middle East with Iraq also being among the developing countries in regard to increasing the quality of life according to the OECD index. Governmental entities can

also benefit from such flexibility and further conduct huge projects and invite foreign investors to cooperate and settle agreements to develop the country on a national scale. This can lead to a further unity and peace offering to the locals as the opportunities of growth will relatively and subsequently increase in the country as a whole. The foreign investors and those entrepreneurs who look into developing their market into the region of Middle East are now being more attracted to invest their capital in Iraq as the fast-paced changing body of Law allows for future windows of opportunities. Not to mention that the current laws are fairly for the benefit of a foreign investor to make and settle an agreement in the borders of Iraq. This will create more job opportunities for the Iraqi youth.

As for conduction of an effective and subsequently successful arbitration claim or case, requires a thorough understanding of the involved parties and how cautiously the case and the contracts are being reviewed as well as in many cases it is necessary to use the consultation of an expert in the area (whether regional or international, due to the complexity of international cases of law especially when financial benefits are involved as mentioned before in this chapter, it is recommended to consult with experts in a holistic methodology, from which various consultants are met and received advices from). Following the constant changes within the body of law in Iraq, the results are towards the enhancement of Foreign Direct Investment (FDI) and its growth on an annual basis in regard to the sustainable plan of next 20 years. ²

As the Iraqi resources of gas and oil are vast and cannot be neglected by the international market, the previously mentioned problems did not held the international investors and companies to

² The current system of law within the Iraqi borders is Civil Law System. The laws of which have been under an extremely significant turn of change within the past decade and more specifically after the 9/11 incident and the US invasion of Iraq in 2003.

engage in making agreements with the governing rules of Iraq in the time. This has taken a great shift towards the enhancement of foreign investment processes and arbitration agreements among the Iraqi and foreigner parties in the recent years as mentioned in chapter two of this study.

CHAPTER TWO

Literature Review

2.1 Arbitration Law

To open the topic of arbitration law, there has to be a distinction made upon the arbitrability in the means of subjective arbitration. Subjective arbitrability is due to the reasoning of the qualitative approach of the involved parties in times of that the party is a state, or a public collectivity and/or a public body. The next distinction is the objective arbitrability, which is by the reason of the subject at hand is the dispute that is or has to be replaced from the domain through national and local applicable laws. Notwithstanding the subjective arbitration, it is a rule of thumb and is vastly accepted, that an enterprise state or entity may not invoke the incapability, incapacity, and being unable to enter or take place in an arbitration agreement, in which they may refuse to take place for it has been consented by them prior to the matter of arbitration.

This is while, the objective aspect of arbitration can be a determinant of the laws, which are applicable and are more delicate in nature for the issue and its subsequent solution, which may change based on the fact that is tribunal by a state court (one that parties have submitted dispute or to set aside) for the application and implication of the procedure. If the laws of forum “Lex Fori” is accepted and generally applied to the problems or the issues at hand due to the time as it is to be made decision upon by a court, the enforcement procedure simultaneously stopped by one of the parties involved, the dispute will/is not arbitrable. The response to this case is not as clear due to the tribunal arbitral; the applicable law, for the arbitration agreement that is to be the prevailing and sufficient answer. However, in some cases the law of the seat can be implied.

Judicial power is a vital prerogative for states and the parties involved can hand the jurisdiction to the arbitrators for settlements of the disputes upon their request. Although, the state may retain the power for prohibition of specific disputes and their settlement outside of the courts. It is in this case, which the arbitration for the dispute is claimed not applicable. In this matter, if an arbitration agreement enters, it will not be valid nor will be applied. Arbitrability is a condition of validity, which is in fact related to arbitration agreement, and is a result of the jurisdiction of the arbitrator that is inclined.

To determine the applicable and valid law for the issues of arbitrability as its definition, a specific dispute can be made decision upon via arbitration itself, and subsequently, if the arbitration agreement is in fact valid, as the clause can cover contractual means. The applicable law is not under question regarding the scopes of the arbitration agreements and subsequently their interpretation. The process is usually in the context of common sense. Additionally, if there are questions rising regarding the rule of interpretation within a specific care, it can be solved based on the governing law of the arbitration clause.

Arbitrability issues can rise from different aspects and a number of points within a procedure, which can be as follow:

- a) It may invoke initially prior to the tribunal arbitration, form which the decision can be made upon itself according to the principles of Kompetenz-Kompetenz
- b) The party who would reckon the non arbitrability of the dispute can submit the deem to the court, which leads the court to making the decision upon the base of the arbitration agreement as the defendant objects.

c) In addition, procedure of setting-aside may also be applied to the non arbitrability objected to the court.

d) Moreover, the defendant can/may object for non arbitrability to the court based on the deeming and reward fulfillment.

These questions may arise on each and every single step of the questioning. Hence, each may require and/or bring about their particular issue of arbitrability.

2.1.1 Subjective Arbitrability

In some of the cases that a state or state entity acts as a party, the national statutes may arise obstacles, limitations or even exclusion of the dispute to the arbitration. This can extent to the prohibition of the recourse to the arbitration as in whole. Similarly, there has been cases, in which the national statutes have subordinated the entire validity of the arbitration agreement, which was conducted by a state or state (public) entity of an existing authorization.

One of the main issues of subjective arbitrability surfaces in cases where the state or state-public entity holding a pre-signed arbitration agreement uses the advantage of itself as for to escaper, avoid, or neglect the arbitration. Singapore stands within an extremely liberal law system. This yields in the extent, in which the state can enter the arbitration agreement and its binding is no difference than those of other parties involved in the agreement in terms of manner (either Act may apply).³

The conflict among the law rules was an initiative cause on the issue of subjective arbitrability and the subsequent decision-making process on the basis of the law determination. The capacity governance or disputed agreement governance laws can be direct examples of the

³ The Act 3 and the International Arbitration Act 4 simultaneously, bind the governmental system of Singapore.

aforementioned conflicts. However, this approach has been abandoned on a gradual basis and nowadays the issues are being reckoned by the substantive rule of international law and its relevant application on the case at hand.

Accordingly, and more specifically, impacts of the subjective arbitrability of international disputes (those of which a state or a public entity/body acts as a party) on the contents of domestic law, that are from or for a state or an entity involved as a principle of the international public policy of the International Arbitration Law. The abovementioned issue has had a long consistency over decades on the arbitral case. An example of such could be the ICC Case No 1939 of 1971, in which the objection of the state was dismissed by the tribunal arbitral (the defendant of the ongoing case). Due to this claim, those agreements that are administrative could not be valid for submission to the arbitration on the basis of its laws. This led to the point of declaration by the arbitrators that in the case of French inspiration and the numerous legislations, the state or entity would be prohibited to enter the arbitration agreement. This however, cannot be implied within the scope of international contracts and agreements. The position, which the French case law holds, is now undisputed and has been comprehensively established since. Based on the concerns of the Art X of the civil procedure code of the State, the interpretation of the aforementioned law cannot be differently as explained.

However, the arbitrators have additionally mentioned that: A state entity can and would highly be in a opposed position by the international public policy, in case of dealing with a foreigner (from different country), and can enter the arbitration agreement with those parties that are within the scope of contracting knowingly, aware, openly, and willingly, with confidence. This leads to the fact that the arbitration procedure or even further to the enforcement level, in which it can use its advantage of nullity upon the undertaking that is done by itself. In the April 1982,

there was a reward presented within the *Framatome v Atomic Energy Organization of Iran*, in which the nullity of the arbitration clause, that was invoked by the Iranian organization was rejected by the tribunal arbitral. The argument was on the basis of the Art 139 of the Iranian constitution. The reasoning of the tribunal arbitral was as follow:

As a rule of thumb in the principle, which is globally practiced and accepted whether internationally or inter-state private agreements, would cause the prohibition of the Iranian state (regardless of the intention) from the undertaking of the arbitration, which was signed by a public or state entity, such as AEOI. These principles, may be international public policy or a principle pertaining the international trade laws and recognizable uses by the *iuscgentium* just as it would be for the *lex mercatoria* international arbitration law). ⁴

2.1.2 Objective Arbitrability

The answer to the issue of arbitrability law and how it is governed is not simple and is dependent on the tribunal or court, within the practices of the international arbitration law. This may arise before the court or tribunal is raised. To further explain, resolving the mentioned issues can differ from being decided via an arbitral tribunal or a state court. In these cases, one of the parties involved has a dispute submitted to, or simultaneously, has had a setting-aside and/or enforcement procedure ongoing. The aforementioned issue is complex in nature. Hence, to comprehend the various aspects of interrelated and correlated factors, a further review in the literature is required.

⁴ The Institute of the International Law utilized a resolution for the states and state entities, one which may have not invoked the incapability and/or lack of capacity for entering the agreement of arbitration, which can be refused if it has been a subject of consent prior to the case (Art 5).

Considering a case, in which two companies from Italy and France are entered into the agreement of a trademark license. After the appointment of the arbitrators and the entrance of the dispute into the case for the validity of the trademark license, the tribunal arbitral is place in Geneva. The governing rule of the license agreement accords to the issue of validity for the trademark of the case at hand, in which the case is not considered arbitrable. Regarding the aforementioned act, the above case is accordingly arbitrable within the border of Switzerland.

To deal with and comply with the fact of that which law can or is applicable to the case at hand, the arbitral tribunal can and will decide whether by implementing the governing law of the arbitration agreement among the involved parties, or through an autonomous law, which is chosen by it. The aforementioned method of dealing with such issues is vividly expressed and is provided within the Art 11(1) and Art V(1) of the Foreign Arbitral Awards and Convention on the Recognition and Enforcement 11 (New York Convention). Moreover, it is also provided and expresses by the Art VI (2) of the International Commercial Arbitration of the European Convention of 1961 (21st April).⁵

As it is apparent, each case requires its own individualized care and consideration regarding the domestic and international laws that are or can be applicable to the case. This expands to the case of our research for the case of Iraq and as the international conventions and some of the international acts are not implied within Middle Eastern borders and regional aspects are somewhat neglected. This case and the explanation of it requires further investigation and the collection of more cases to be compared and extended to the case of Iraq. Hence, we gathered more cases to compare and explain the details of each act more comprehensively to create a better understanding of how these could be related to the sales of oil and gas in Iraq and also the

⁵ In contrast, based on the Art 177 of the act of Swiss Private International law, any dispute consisting of a matter of pecuniary, is/can be a subject to submit for the arbitration.

arbitration laws and the international laws, in which, and from which, Iraqi laws can be adjusted and further progress into a global extent.

Following the above mentioned case of arbitrability, it is noteworthy that mainly such cases are not easy to be determined the applicable and proper law for, in regard to arbitration agreements. This is due to the fact that the parties involved within an agreement are or have not expressed their full indication in regard of the arbitration laws and the agreements itself. General consideration is that the involved parties have submission to the arbitration agreement that is laid among them within a domestic applicable law as the basis of their agreement. This is while, the other possible solutions for the case are retained (e.g. law of the seat of the arbitration). The arbitrators can freely determine and chose an applicable law for the case, if the parties involved have not fully expresses their willingness towards an arbitration agreement law. This becomes emphasized as the arbitration agreement is considered as being autonomous from the actual main agreement, which is among the involved parties.

However, there are outlier cases, in which the consideration of arbitrator is that of the arbitration agreement is/was not controlled or surveilled by the governing domestic law and it was under the international trade agreements. For instance, the case of ICC Award No 4131 of 1982, whereas the arbitrators provided the determination of the law that is applicable to the arbitration agreement at hand, and based and dependent on the substance of the mentioned law, they can decide or make conclusion on the dispute and whether or not the dispute is/is not, or can/cannot be submitted to the arbitration, which is for the case at hand.

For the case of Singapore, the country has no solid list of the matters that are or cannot be non-arbitrable. This is with regard to the case of arbitrability. As a rule of thumb, it is known that such issues, which may include elements of public interest (i.e. citizenship, marriage legitimacy,

trade union disputes, intellectual property rights validity, winding-up firms, bankruptcies of debtors, antitrust regulatory means, consumer protection issues, environmental protection means and planning) cannot be considered as arbitrable.

As for the applicable law to the arbitration agreement, the state of the law that is under the question of being curtailed, can be described as below:

Whether the arbitration agreement is valid for the arbitration agreement or not, is determined by the applicable law of the arbitration. Due to this fact, the level of arbitrators' flow and the authority of the arbitrator is extracted. In addition, the questions regarding the dispute and if the agreement and its scope are in fact within the dispute and are agreed by the qualifications or the constitution of the tribunal may also be applicable for such matters. Issues can arise regarding the law of the arbitration law that require a thorough determination of the arbitration law (one that is related and is due to the lack of proper and sound law that is agreed among the parties for the arbitration agreement) in prior to the arbitral proceeding and its commence (e.g. meanwhile the proceeding of the application). The approach to be undertaken for such case has to be in regard to, and subjected to the clause of arbitration with the exact same law governing the parties' rights (substantive). The arbitration law that is chosen if otherwise not same, must be closest and the most linked to the case.

Following the above, Singapore case, set of questions may arise in the court of Singapore, referring to the award in Singapore. The award is set aside if it is sought and/or by the time that another award, which is foreigner is implied and enforced to the case within Singapore and is resisted due to the claim of being invalid for the arbitration agreement at hand. If a proper agreed law is lacking, the court may determine the questions of being under the jurisdiction of the state law, which in this case is Singapore. The law of Singapore would be considered as Lex

Fori, if the governing law for the arbitration agreement is in absence. The court then will consider the issue of being valid as Lex fori under the Singapore law and its accordance.

On the other hand, in the case, where a foreign award is considered invalid for the arbitration agreement and is resisted to be enforced, the court may consider this issues under the law of which the arbitration agreement was first taken place. This is when the proper law that is agreed among the involved parties is in absence or lacking. On a general basis, all the parties involved with an arbitration agreement are advised and told to have and specify a governing law of the arbitration agreement among them; negligence of this can yield in arguments in regard to the law that can be applicable on the case (e.g. one law that may be considered applicable can recognize the arbitration agreement as a void one). ⁶

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Notwithstanding, it should be noted that the judicial law system within the body of Singapore system is based on the traditional English common law. This is while the system of English ⁷

decision making is not bound in the Singapore system strictly. These common laws are considered to be persuasive. Traditionally, English common law takes the view that the law, which is chosen to be the governing law for the main contract is also governing the arbitration agreement among the parties involved. However, in some cases the English court system held the law of the seat for solving the issues and arisen questions. This is while the view and approach of

⁶ Similarly, and in regard to the aforementioned cases above, the High court of Singapore seemingly accepted the governing law (when the parties involved in the arbitration agreement lack to express the choice of the law agreed among them) that is substantive to the parties involved and obligations of it, to be applied as agreement to arbitrate (Court in Piallo GmbH v Yafriro International Pte Ltd. 1).

⁷ Lim Wei Lee and Alvin Yeo (SC:16) note that the general rule for arbitration agreement in regard to the governing law follows the substantive law that is for the main contract, which is signed among the parties.

the English court on the issues and questions the like, has taken a reformation on a fundamental basis in the recent years.

English court of Appeal has a test for determination of the proper law of the arbitration agreement that is threefold and has been established in *Sulam & ica CIA Nacional De Seguros SA v Enesa Engenharia SA* 2 1 ("Sulam & ica"), which is as follow:

- If the parties involved have made an expression of choice regarding the governing law over the arbitration agreement?
- If there is no agreed choice of governing law, have the parties made a choice that is implied?
- If the second condition is also not applied, which law is mostly related to the arbitration agreement as is close to it?

According to the *Sulam & ica* decision, the substantive law that is for the contract can be the indicator of the governing law based on the parties' choice for the arbitration agreement with the establishment of the deniable presumption. However, merely changing the seat of the arbitration cannot suffice for the refusal of the presumption.

Using other terminology, the second stage of the true problem at hand would be whether or not the outlier or external factors are involved with the refusal of the presumption, which is under the substantive law that is for the main contract and can be applied to the arbitration agreement simultaneously (this is an additional contradiction to the alternative choice of the seat). In the case that there is no choice of agreed law, the third part of the test may be implied in that level where the seat will be the determinant body for the most relevant and connected law test. The

Sulam & ica test has been also undertaken by the English High Court in *Arsamo via Ltd v Cruz City Mauritius Holdings*.

⁸Accordingly, the arbitral award on the basis of tribunal, had no substantive jurisdiction and was toppled. The court had to choose to follow the contract that was underlying (the Indian law) or the law of the seat, which was the England law for resolving the issue with regard and respect to the law that is governing the arbitration agreement. It was found to the court that the parties involved have had expressed the exclusion of the India and interim relief of it and have had the Pt I of the Indian Arbitration and Conciliation Act of 1996 excluded, which states that the obvious deduction on the case would be the understanding of the parties and their intention to that law of which would be applied.

Accordingly, the decision of the court was that the involved parties has implied their choice of selection on the law that governs the arbitration agreement to be based on the Indian laws. It was also noted that the court would have chosen the English law if it were to decide upon the most relevant and linked law to the case of arbitration agreement.

However, another problem may arise when considering the dispute of arbitrability from which the specific criteria of the State for the seat the ¹⁶ would be substantive rule of a private international law for dealing and resolving the cases of arbitration for the seat of the arbitration that is included with consideration of the arbitrability. ⁹

⁸ Based on this, the English court has reinforced the challenge of S 67 of the UK Arbitration Act of 1963.

⁹ The aforementioned case was for the Art 5 of the Swiss Concordat. By this day, this case is Art 177(1) of the Private International Law Act of Swiss. Based on the Art 177, the arbitrability has to be made decision upon with regard to the arbitration agreements' law of the seat, and therefore any other provision given by foreign law that is governing the arbitration is considered irrelevant.

There is the exception of the case of the law being not compatible with the public policies (e.g. the foreign law that is applicable to the case, has given exclusivity in regard to the jurisdiction to other foreign courts for making decision upon the dispute). Subsequently, the Switzerland arbitral tribunal sitting will make the decision upon the case of arbitrability with regard to the Swiss laws. Hence, the conclusion of the subject matter at hand is considered arbitrable if it consists of any economic interest or even in the case that the dispute is considered a non-arbitrable case due the governing law of the arbitration agreement and is or will be subjected to the aforementioned conditions.

2.2. Arbitration and Investment Treaties

Prior to the year 1995, the number of arbitrations that were involved and dealing with the investment treaties were considerably low. This has taken a growing shift within the past years. The number of arbitrations that are involved with the investment treaties is now over sixty.

¹⁰This arbitration involvement consist of extreme amount of money, from 120 million USD and to billions .¹¹

A number of international rights (laws and regulations) were articulated for the investment treaties as initiatives. An example would be the “fair and equitable treatment” alongside the Sovereign’s obligation for commitment observation of self. The tribunals have taken another scope of the standards to be applied with a diverse conclusions on the liability. The definition of the rights and public international law can be taken as ambiguous in regard to resolving the arisen issues of foreign investors and Sovereigns as the arbitration can cause uncertainty.¹²

¹⁰ Matthew Saunders, *Bilateral Investment Treaties Oil the Wheels of Commerce*, 2004.

¹¹ Michael D. Goldhaber, *Big Arbitrations*, Focus Eur., 2003.

¹² British Inst. of Int'l & Comparative Law, *Appeals and Challenges to Investment Treaty Awards*, 2004.

Due to the fact that the investment arbitration is merely growing on its early stages of development, to aid the jurisprudence for improvement and acknowledging the obstacles and the dim path of the existing solution frameworks while endeavoring to reduce the crisis of being legitimate, seems appropriate and on the spot. Hence, the international arbitration law can get distance from the proverbial and strictly maintain its track on the progress and development path for the promotion of the justice on an international scale.¹³ The subject has been investigated in the literature in regard to legal frameworks for the investment treaties, the arbitration law and the investment treaties, the current remedies that are available for addressing the decisions, which have been made and can be considered inconsistent, the meaning of rights, the legitimacy issues, implementation of the preventative and/or corrective measures (e.g. Susan D. Franck, 2005).

Accordingly, the consideration of legitimacy, clearance, vividness, determination, and coherence may have to be redefined to the new movements of investment treaties, while taking the concerns of all parties involved (i.e. citizens, investors, and sovereigns) into account. The investors have gained more treats, from which they are able to hold Sovereigns liable and/or sue them. This is due to the proliferation of investment treaties. With the advancements of investment arbitration, the benefits, which flow towards the investors, are considered as contradictory to the sovereigns.

¹⁴Despite the fact that the development of international arbitration has faced many bumps throughout its progress and evolution towards and into an independent discipline. ¹⁵The arbitration law is more preferable than other means such as force or those solutions that are not substantially formal (e.g. diplomatic negotiations behind closed doors).

¹³ Contemporary Issues of International Law on International Institutional Reform, 2005.

¹⁴ The arbitration laws have been in use for the enhancement of foreign investments and for the provision of solving the international disputes on a neutral basis since 1794 (Kenneth S. Carlston, 1946).

¹⁵ whether by expertise decision making or partial and/or impartial), nowadays the arbitration agreement and laws are the superior and most common methods of dealing and solving the international disputes, and more specifically the complex one (Joanne K. Lelewer, 1989).

Prior to the advancement of the arbitration of investment disputes, the investors could not have any stands on the actions against the sovereigns in case that their investments were violated by the effects of international law.¹⁶ The investors had to use lobbies from their country of origin for a claim in the International Court of Justice (also known as the ICJ). However, these claims were mainly unsuccessful or have had results on an episodic basis.¹⁷

However, there were two obligations in cases, in which the ICJ would find the investors' investment being violated by the international laws. The sovereign with illegal conduction would not necessarily compensate the illegal act to the investor. When an investor who seeks to receive financial compensation for the illegal conduction of investments by the sovereign, the mere method for enforcing the claim, which is available to the ICJ is the Security Council Resolution (U.S.-Central American Free Trade Agreement, June 1, 2004).¹⁸

The aforementioned obligations led the investor to claim and initiate the litigation from and in the courts that are national.¹⁹ Not surprisingly, this method and pathway to litigate against the sovereigns were not favorable to the investors and it did not attract their attention. The investment treaties have had to make basic and nexus-wise shifts to resolve the disputes of investment based claims and issues. The first movement was that the investors were to be given a direct cause for the claim against the Sovereign in regard to the harm or damages that were done the investors' investment. This issues that the investors were facing, had also connections to the sovereign country and that if the case seemed political, which would not be brought to the

¹⁶ Statute of the International Court of Justice, June 26, 1946, art. 34(1), 59 Stat. 1055, 8 U.N.T.S. 993).

¹⁷ U.N. Conference on Trade and Dev. ("UNCTAD"), Bilateral Investment Treaties in the Mid-1990s; U.N. Doc. UNCTAD/ITE/IIT/7, U.N. Sales No. E.98.II.D.8, 1998).

¹⁸ This enactment is not considered as an effective method as it has not commercial use in the case that the investor is seeking compensations that are financially due (Marian Nash, 1993).

¹⁹ Sacerdoti, *supra* note 18, at 413-14..

International Court of Justice. The complex nature of some cases that were international would add to the difficulties (e.g. an investment treaty with freedom could free the Belgian investors in Spain from being forced to sign a petition in Canada, which would make the ICJ to make adverse decisions regarding the jurisdiction based on the nationality of the investor.²⁰

That statement means that the mercy of international and governmental policies as well as the bureaucratic systems would not consist the investors for initiation of solving the issue of the dispute and the more powerful foreign relations may tend to avoid the litigation of the investors.²¹

On the other hand, in regard to the resolution of the disputes and the mechanism of a separate contract (if needed), the treaty for investment would give the investor the right and option to select their preferred neutral setting for the issue of grief and resolving the problem of claims or any of the aforementioned concerns.²² Subsequently, the above mentioned shifts have made a new private cause for the investors to claim against the sovereigns.

This will yield in the investors' role of private attorney, which will lead to the enforcement of the applicable international law and rights to the investors as private parties (i.e. individual or corporation). This has encouraged and motivated the investors and has given them the confidence they need for dealing with the problems of disputes with their sovereigns. As a result,

²⁰ Barcelona Traction, Light & Power Co. (Belg. v. Spain), Second Phase I.C.J. 3, 1970.

²¹ U.S.-Central American Free Trade Agreement, June 1, 2004; United States-Chile Free Trade Agreement, June 6, 2003; United States-Singapore Free Trade Agreement, May 6, 2003; U.S. Dep't of State, Update of U.S. Model Bilateral Investment Treaty, at annex D, 2004; Trade Representative, 2003; The U.S. Trade Act of 2002, in Annulment of ICSID Awards 289, 295; Emmanuel Gaillard & Yas Banifatemi eds., 2004)

²² Kenneth J. Vandewelde, The Economics of Bilateral Investment Treaties, 41 Harv. Int'l L.J. 469, 469, 489, 498, 2000; Kenneth J. Vandewelde, 1998; Joel C. Beauvais, Regulatory Expropriations Under NAFTA: Emerging Principles & Lingerin Doubts, 10 N.Y.U. Envtl. L.J. 245, 253, 2002; Mary Hallward-Driemeier, 2003; K. Scott Gudgeon, 1986.

this has led to a major reduction of the persistent and involving risks with the investment as well as the improvement and enhancement of the foreign investment incentives.²³

2.3. Arbitration Law Movements and Trends

The People's Republic of China made the republics' first arbitration law on the August of 1994 and in September 1995 it was in commence (Gjerde KM, 2012). The new movements and shifts of the arbitration law includes over a number of 80 acts and articles in regard to the disputes and international laws and methodologies. This is a comprehensive frame for either domestic or international procedures and arbitration acts and agreements.

The international laws on the arbitration law has extremely exceeded the borders of Chinese domestic laws in regard to arbitral proceedings and procedures that governs the laws of arbitration within the Chinese borders to modernize and shift the governing laws and apply them. There are two fundamental institutions in the Republic of China for arbitration laws and implementing them, namely, the China International Economic and Trade Arbitration Commission (CIETAC) and the China Maritime Arbitration Commission (CMAC). The aforementioned institutions of arbitration are autonomous and they act independently. The amount of cases these two institutions deal with is extremely high and the arbitration rules and laws governing within these institutions are fully developed.

In contradiction, the above mentioned arbitration involved parties within the domestic border of People's Republic of China are organizations, which act in administration and commissioning

²³ E.I. Nwogugu, The Legal Problems of Foreign Investment in Developing Countries 119-22, 1965; Todd S. Shenkin, 1994; UNCTAD, Lessons from the MAI, U.N. Doc. No. UNCTAD/ITE/ITT/Misc.22, U.N. Sales No. E.99.II.D.26, 1999; David A. Gantz, 2001; Directorate for Fin. and Enterprise Affairs, OECD, Relationships between International Investment Agreements, 2004.

the variety of groups or individuals who are related to the arbitration law and its subsequent activities (e.g. commissions such as, economic contract arbitration, labor dispute arbitration, and the technological contract arbitration) (Marmier, F., Deniaud, I. F., & Gourc, D., 2014).

Studies have shown that the topic of arbitration law in general and due its complex and vital nature requires a more extensive studies to be conducted upon the matter and with the advancement of countries, the vast number of involved and /or influential aspects must be also known and looked into (i.e. Franck, S. D., Freda, J., Lavin, K., Lehmann, T. A., & van Aaken, A. 2015; Smith, K. W. 2017; Kube, V., & Petersmann, E. U. 2016); Wolkewitz, M. 2016; Gilles, M. 2016; Kidane, W. 2017).

The re-organization of the independent arbitration commissions for the region is to be shifted away from the centric arbitration law system that governs and allows the municipal governments and/or capital cities to administer the regions regardless of the shift, is the results of the revision of the domestic arbitration law system and the ²² emphasis of the New Arbitration Law. Moreover, this legislation is consistent with the covering provisions and their limitations.²⁴. In addition to the aforementioned movements, there is another aspect of improvement towards the progression of liberalization within the body of CIETAC Arbitration Rules and Regulations is the comprehensive and fundamental revision of the June 1994.

2.4. Legislative Intention

Art 1 in contradiction to other laws of arbitration, clearly identifies the policy of arbitration. This is as in to the assurance of the economic disputes and the impartial and punctual proceeding of such cases. To further cover and increase the protection level of the interests and rights of all the

²⁴ Those of which that are related to the foreign means and/or international arbitrations) (Baamir, A. Y. 2016; Bedrosyan, A. S. 2015; Ware, S. J., 2016)

parties involved. Moreover, to further guarantee the growth and improvement of the socialist market economy in a healthy way and a sustainable basis. This is while the Art 1 tends to restrict the arbitration extension towards the non-economic transaction disputes that may arise. The utilization of the term economic is not clearly or vividly stated within the new arbitration law. However, the interpretation of the term could be used for covering the economic disputes or those of which are not economic (Pinkham, B. C., & Peng, M. W., 2017; Resnik, J., 2014; Potter, P. B., 2017; Menkel-Meadow, C., 2015).

In addition to the aforementioned statement, the “assurance of the healthy growth and improvement of the socialist market economy” is not vividly stated in the Arbitration Law (the new law after the revision), and/or within the instruments and legal tools of the People’s Republic of China. This requires more attention and comprehension in regard to the arbitration and its relevant laws of governance (Muldrew, C. 2016; Kornelakis, A., & Voskeritsian, H. 2014; Perulli, A. 2014; Borrás, S., & Seabrooke, L. (Eds.). 2015).

2.5. Association and Commissions of Arbitration

The new Arbitration Law tends to rearrange and reorganize the current bodies of arbitration within the system. This effort can positively lead to the decrease of the interference that is caused or may be caused by the governments (local or not) and also by the local protectionism that is in fact with the arbitration law system of the Chinese Republic of People. This is regardless to that systems of arbitration and institutions prior to the revision and are established via regional administrative bodies within the hierarchical system and degree and their restrictions and jurisdictions on the territory)²⁵. Articles 10-15 comply with the initiation of the commissions for

²⁵ Coffee Jr, J. C., Sale, H., & Henderson, M. T. 2015; Smith, K. W. 2017; Newman, L. W., & Hill, R. D. 2014; Dong, A. X. 2015

the arbitration on a more extensive level that is the provincial level. According to the above mentioned articles, the seat of power is entitled to the Beijing municipal government alongside with Shanghai and Tianjin and other major cities.

This extends to the autonomous regions for contacting and receiving advice from the locally allocated chambers of commerce in regard to the reorganization of the arbitration institutions independently.²⁶ The need and requirement for conduction of a commission in regard to a dispute is not stated by the Arbitration law as to or from whom this need is to be established.²⁷

In addition, Art 14 states clearly that that the commissions for arbitration are considered as independent bodies from those of which that are administrative organizations. These independent bodies are also not subjected to each other and has not affiliation with one another. Nowadays, the CIETAC and CMAC function parallel to each other and are acting as autonomous and independent arbitration parties of foreign. This is regardless of the fact that to initiate and conduct commissions that are domestic for the arbitration remains an ambiguous, yet challenging aspect (Yong, H. U., & Xiaowen, X. I. A. O. 2014²⁴ ng, W. 2013; Kang, C. 2016).

²⁸That each commission has its own individual name, each have their domicile and associations with the articles each possess and are equipped with necessary means and assets for this regard; the number of staff and personnel can suffice for conducting a commission; and they have arbitrators professionally assigned and appointed.

²⁶ This in return will yield in the registration of the regional administration departments' judicial ; Whish, R., & Bailey, D. 2015; Frade, C. 2017, Kaczorowska-Ireland, A. 2015.

²⁷ As a major and emphasized section of Art 10, the commissions for the domestic arbitration disputes are of no subjection the jurisdiction of level ; Wilson, T. 2016

²⁸ In the Art 11, it is among the requirements that each and single commission (Law on the Enforcement of Foreign Judgments (Law No. 30), 1928.

2.6. Arbitration Commission of Chinese Republic of People

Within the Article number 15 of the China Arbitration Law it is described that a new organization (which is CAA) that is implied on a national basis and it allows the provisions of all the commissions of arbitration and their membership to the CAA. The functionality of CAA is as of a non-governmental party working independently to any other of the administrative authorities. This also gives the opportunity to CAA to supervise and surveil the Arbitration Commissions of the Chinese Republic and its arbitrator's²⁹. The CAA authority and the regulated laws and rules shall be in compliance with the arbitration law as well as the Civil Procedure Law (CPL).

The mentioned rules of arbitration can be considered for the current and those of to come in future commissions of arbitration. The level of involvement of the CAA within the programs of training and development of the current arbitrators is as unclear as for those prospective arbitrators. The CAA can further be the main body for providing such courses and trainings to the arbitrators and set high standards and appropriate approaches for organizing the means of education in this subject.³⁰

2.7. Arbitrations and Independency

According to the Article 8, the interference of any type of institutions (i.e. administrative) for the arbitration is restricted and the arbitration can be merely conducted as an independent body for the arbitral. This furthermore includes the social organizations, individuals and any other such parties. The mentioned effect is yet to be vividly known as an influential factor on the administrative bodies. This is while currently, the aforementioned commissions are withheld to

²⁹ Restrepo Amariles, 2013.

³⁰ Contini, P. 1959.

the point of receiving financial aids and funds by the governmental body until they claim their independent function on a future date.³¹

2.8. The Agreements of Arbitration (Arbitrability)

Within the Article 2, the disputes of the arbitration within Chinese borders are consistent with the arbitration commissions and the provision of the contracts and the properties that are in the concern of the contractors' rights or interests are considered as arbitrable (including among the subjects of civil subjects of equal status, citizens, legal parties, organizations, and their rights). Based on the 3rd Article, the following list are considered being exempted from arbitration and the governing law related to it:

- a). Support, succession, marital, adoption, and guardianship disputes.
- b). The administrative disputes (those of which are required to be handled by the administrative bodies of authorization within the law) (188 Cal. App. 2d 690, 10 Cal. Rptr. 781, 1961).

The context of Article 3 holds those disputes, which consist of the Chinese governmental departments to be considered outside the boundaries of arbitration or in another words, to be exempted from it.

³².The non-arbitration or to extent the definition of this term is taken into action through the statements of Art 17, from which the arbitration agreement that is being recognized as a non-

³¹ Ayangbah, S., & Sun, L. 2016.

³² Contradictory to what was noted in the last page; the Article 3 can be differently interpreted as in; if the dispute's resolution is not specified for having the provision of the administration party's legislation. If this is not the case, then the settlement of the dispute is under the capabilities of the arbitrator and subsequently the relevant arbitration law. Rose, A., & Blanchard, B. 2014; Pisacane, G., Murphy, L., & Zhang, C. 2016; Mincai, Y. 2014).

arbitrable case, it “null and void” (Srinivasan, D., Pathak, H., Panjwani, P., & Varma, P. 2014; Morrison, J., & Nottage, L. R. 2014; Aladaseen, M. A. 2015).

2.9. Arbitration Law in Iraq and Arabic World

Iraq has taken the international arbitration laws in regard to revising the foreign investment policies and the enhancement of foreign investment procedures. The draft has been made for addressing the International Commercial Arbitration Laws in Iraq after the revision was made in 2013.

2.9.1 Iraq and Arbitration

Within the past years and after 2008, an extremely large Initial Public Offering (also known as IPO) was conducted in the Middle East. Surprisingly, the IPO was held in the Iraqi borders rather than the usual UAE, Saudi Arabia or Qatar. More than 70% of the offered shares were invested and bought by the foreigner investors (Forbes, 2016).

³³The production of oil in the Iraqi borders has faced a constant growth in the past years. This has led the country to exceed the 3 million barrels production within a day, which is the country’s record over the past three decades. According to the reports of International Energy Agency, the mass production of oil in Iraq can’t ²⁷ remain competitor for the Russian production rate as the second largest producer of oil in the globe within the next two decades³⁴.

³³ It is presumed by the International Monetary Fund that the economics of Iraq has a faster growth potential within the region of Middle East than any other country by the year 2020 (M. Norri and Karrar-Lawsley, 2016; Iraqi Source.

³⁴ Miller, R. G. 2011.

In addition, Iraq benefits from the land and agricultural means with the flows of Tigris and Euphrates rivers in the land alongside the gas fields and resources and an extreme deposit of mineral sources. This allows the country to further develop various means of progress in the region of Middle East as well as being known for the sources worldwide. The vast resources of Iraq cannot be neglected from the perspective of which, these resources are beneficial (more financially than for means of environment and the use of alternative oils than the fossil fuels, which harms the planet and pollutes the earth with the high amount of CO₂ emissions.

This however is another topic of study) to the governments and therefore requires careful and thorough comprehension. This is regardless the current and existing governmental and political issues within the borders of Iraq. The parties who see the potential of the economy of Iraq and/or have acquired reliable reasons to do so, consider the start-up of their business and shareholding with the Iraqi government under the disputes and whether or not they are being implemented and fairly proceeded.

The importance and effectiveness of Arbitration Law is in this time for increasing the reassurance of the involved parties in regard to the contract and the settlements that are related closely, while making an effort for the satisfaction of the needs of the contractor. The concept of Arbitration Law and its associated actions and subsequent implementations are having a shift towards a more sustainable and enhanced method in the body of Iraqi Law System.

2.9.2. Iraqi Arbitration Law

It is noteworthy to consider the fact that a full, comprehensive and detailed overview of the Iraqi Arbitration Law is not within the boundaries of this research.

However, some highlights of the various aspects of the Arbitration Law in the Law System of Iraq seems relevant to the study. Some of the aspects of the Arbitration Law of Iraq is defined as the following:

- I. All the arbitration agreements are subject to be in written format (Article 252).
- II. The courts of Iraq have the role of authority in case of the existence of a clause in the arbitration. This is due the claiming party and the immediate action of objecting the clause (Article 253).
- III. The choice of arbitrator is not mandatory and is arbitrary. Hence, the restriction on the person as arbitrator is close to not existence.
- IV. The role of representative for the involved parties is also not restricted.
- V. For the measurements of the interim, a tribunal is not allowed not forbade from the provision.
- VI. For the award to be rendered from the tribunal, there is a six month span appointment, which can be changed if only the parties agree otherwise (Article 262). Parties can individually request an extension for the above mentioned period of six month span (Article, 263).
- VII. The Civil Actions Law and its procedures must be relevant and be based upon for the tribunal and the compliance to them, unless the involved parties have stated otherwise (Article 265). If the agreement is vivid and has no ambiguity, the parties may select the ICC rules or choose a different arbitration form according to their wish.
- VIII. The awards that are given by the tribunal must consist of sound and solid reasons (Article 270).

2.9.3. Centers of Arbitration

Although the involved parties within an arbitration case are not subjected to use the advice or assistance of an arbitration center, it is highly suggested from the experts to do so. As mentioned in section above, the parties are not restricted in regard to the use of arbitration centers. Hence, the choice is completely individual to select an international center (e.g. ICC, LCIA) or a local/regional center of arbitration, such as, DIFC-LCIA, BCDR-AAA, or CRCICA. In addition, there are national centers located in Iraq that are namely, Federation of the Chambers of Commerce Arbitration Center and The International Commercial Arbitration Center of Najaf. These centers handle both domestic and international disputes.³⁵ It can be interpreted that the aforementioned centers will likely not be used commonly for the foreign parties before they have acquired a high level of caseloads, which will create a track record of the functionality of the centers in regard to complex cases.

2.9.4. Iraq and Award Enforcement

The settlements of the awards and arbitral rewards to be more specific, are based on an amicable manner among the correlating partners and involved parties. This does not imply the fact that the enforcement of law as in actions is not necessary in some cases.³⁶ With the provisions given by the CCP Article 274, the court can make the decision upon whether to approve or annul the award by whole or partially. If the court finds the award partially approved or denied, it may refer the case to the arbitrator for rectification of the rejected aspects or sections of the award and subsequently issue a new revised version of the award. The rules of appeal of the CCP indicate

³⁵ This is while the centers have no ongoing case at this time (Calamita, N. J., & Al-Sarraf, A. 2015).

³⁶ The court, which is the supervisor of the case can be the sole source for the approval of the domestic award (Iraqi) and its enforcement (Article 272).

that the decisions made by the court relating to the annulment or the approval of the award can be subjected to the appeal to a higher court if it is compliant to the CCP rules. This is to extent another reason for the delay occurrence in the process of arbitration as well as the frustration caused by the time-consuming process, which will further delay the main initial purpose of the arbitration agreement or clause at hand.

There are cases that the supervisory court can make the decision upon the award to annul according to Article 273, if the following is known to have found:

- i. The invalidity of the arbitral agreement.
- ii. If the award was in a written format and/or the tribunal exceeded the limits of its jurisdictions.
- iii. If the award does not comply with the laws of Iraq and Iraqi Arbitration Law. To extent of which if it contradicts the policies of Iraq (which is not considered to be distinguished either national or international policies that are public).
- iv. There is a forged evidence that is solid to be considered as retrial.
- v. Award contains substantial problems or mistakes and/or within the procedures of any other kind, which may be influential on the award and its subsequent validity and/or credibility.

For making the decision of approval or denial of an award, the court is not to “reopen” the case and the issues that were stated above and all decisions that have been made by the court are subject to be appealed (Jalili, M. 1987).

2.9.5. Iraqi Award and Its Enforcement outside the Borders

There are few countries, which have not signed the Convention of New York and Iraq is among that list. This translated into the fact of which whether or not the country that the Iraqi award is being pursued for enforcement has treaties with Iraq on the basis of judicial means. Similarly, if the country has a special type of relationship in other kind and/or can comply with the fact that the foreign enforcement is and will be enforced regardless of the country of its origin.

As for the abroad awards of Iraq in the region of Middle East the means are considerably more enhanced. This is due to Iraq being among the countries which are signatory in the Cooperation of Riyadh Convention on Judicial held in 1983. Within this treaty, the arbitral awards and subsequently their enforcement on a reciprocal basis is provided in particular. The award at hand of the proceedings must be proven binding as final so the local authorities (judicial) can certify the statement that is sought to be enforced and only these conditions shall be current. This translates into Iraqi laws as if the ward is certainly approved by the courts of Iraq or not.³⁷

However, it has been reportedly noted that the Iraqi arbitration law has shortcomings on this aspect and requires further transformation and it has taken this shift towards the transformation for a better arbitration law and settlements and more specifically towards the sales of gas and oil as it noted the holistic plan of 20 years and that Iraq tends to take the place of Russia as the second largest producer of oil and it has plans to be among the feasible sellers of gas and oil for further progress in this track. Hence, a new draft of arbitration law is in its process.

³⁷ The Riyadh Convention will not interfere or provide aid for the case if one of the parties of involvement is an Iraqi government related party or body to have the award enforced against (El-Ahdab, A. H. 1995).

The implementation and finalization of this draft is not clear to the public. Moreover, it is not known if the new model of arbitration law will be in compliance with the Arbitration Law Model of UNCITRAL (Calamita, N. J., & Al-Sarraf, A. 2016; 2015). The solidity and the comprehensiveness of the revised draft is expected to be in consideration with the attraction of new and more international trades and foreign direct investments and therefore to be closer to the internationally and commonly used laws. The interest and skewness of the High Judicial Council of Iraq has been stated that is towards the joining of the New York Convention. This further implies that the Iraqi system of law and more specifically arbitration law in fact endeavors to comply with the internationally known and accepted laws of arbitration. This is even more vivid and clear in regard to the sales of gas and oil as this is the primary intention of the new revision of the Iraqi Arbitration Law. The foreign investments that are vastly in growth are the companies, which have the equipment or produce and manufacture and sell the tools required for a better quality oil and gas drilling and processing as well as shipping means. This transformation is not due to a date. However, upon its conduction and commence, it is expected that the foreign investors will be more encouraged and motivated to initiate in Iraq. This further adds to the vitality and significance of such step in the body of Iraqi law.

2.10. A Review on the Concepts and History of Iraqi Law

³⁸The new legislations has been replacing and changing the previous laws and old methods. Also, a considerable number of laws have been under amendments. These changes have been amended by the US Civil Administrator who first noted the statement, Paul Bremer, which his model was endorsed and taken into action by the Iraqi government as well.

³⁸ The laws and the law system of Iraq has been under reconstruction and constant change since the American invasion alongside the British on 9th of April, 2003 (Juhasz, A. 2014; Hook, S. W. and Spainer, J. 2015).

Paul Bremer was in authority to issue and regulate as well as modify and change the regulations, which he did over 100 laws in regard to the establishment of laws and new commercial and civil issues. Among the high number of issuances by Bremer, some have significant highlights. One of which can be the Civil Administration Authority Order number 17, in which those personnel who are not Iraqi, do not include the Iraqi jurisdiction as well as the penal laws and the Iraqi civil laws jurisdictions.

This applies to all foreigner bodies including non-Iraqi personnel (from contractors as well as the subcontractors), those suppliers of services and/or goods, those who act on behalf of the Coalition Forces, those who act independently from the Authority, personnel of military, personnel of the civil authority, and the Foreign Liaison Missions (Majid, S. 2002).

Regarding the above mentioned Order number 17, some critical issues and problems may arise, from which the exemption of the aforementioned parties from the Laws of Iraq and jurisdiction is under the jurisdiction and power of authority of the occupying party or not. This can further extend to the extent of which the exemptions are in fact being in consensus with the governing

International Laws. ³⁹This can be neglected only in the case of holding and maintaining the governmental order and in regard to the safety of public order within the borders of the country that is occupied. There is a considerable number of laws issued by Bremer, which has exceeded this limit and have reached above and beyond these borders.

The commercial laws within the Iraqi borders have been liberalized and changed by the US Civil Administration Authority under the new legislation issuance for the foreign investment and the

³⁹ The provisions of the Geneva Conventions of 1929 (Vaughan, E. H. 2015), 1949 (Agus, F. 2017), and 1985 and subsequent articles of 64, 65, and 67 of the Geneva Convention (1949) (Kay, S. 2015; Maurer, P. 2016) are vivid and the authority which is occupying does not hold any power to change the laws by any means or issue new ones to that extent.

flow of it as well as the control of the environment of trades and businesses. This shift is extremely significant for the concept of Iraqi arbitration laws. The arbitration laws of Iraq did not allow the foreigners (with the exception of Arab nationalities) to establish a company in Iraq, to buy and hold a share from a corporation, and/or equities legally. The previous government under the rule of Saddam Hussain did not permit the foreigners to do or conduct any of the aforementioned means. Hence, the shift towards an enhanced foreign investment and the new liberalization and modernization of the arbitration laws in the body structure of Iraqi laws has been recognized as a positive shift towards the development of the country's economic situation and further to link the newly opened facilities and resources to new flows of capital and investments by the foreign parties.

Below are some examples of the new system of legislation in the Iraqi Law system and more specifically Arbitration law with the main regard being gas and oil resources:

- i). Based on the Company Law of Iraq number 21 (amended in 1997), the foreign companies and individuals are allowed to hold shares and to conduct businesses as well as establishment of firms in the Iraqi borders.
- ii). The market for the insurance and banks have also shifted to the new Banking and Insurance laws issued in Iraq for the enhancement of the foreign investment permissions as well as to increase the level of participation of foreign banks and insurance companies with the Iraqi colleagues.
- iii). Another example of a major change of legislation (new legislation) is the newly formed and modernized Investment Law no. 13 (commenced in 2006). This law tends to motivate and enhance the process of foreign investment inside the borders of Iraq. The rights and advantages

of owning shares or investing in the Iraqi soil is as the same privileges that are given to the foreign entities, which applies to all the foreign parties. These investors can get permission to conduct a business, be shareholders, and trade much easier in the market of Iraq. This has direct effects on the growth of the economy as well as opening new opportunities in different aspects, such as, tourism, quality of life, the absorption of external resources.⁴⁰ According to the previously mentioned Articles of Iraqi Arbitration Law and more specifically investment law, namely, Articles 12-17, there is a 10 year period tax free privilege for the investors in Iraqi projects, whether they are foreign or Iraqi nationality. This is among the list of other privileges for the investment in the Iraqi projects alongside other exemptions. In addition to the previous privilege, all imported materials and machinery for the purpose of conducting or further complete an Iraqi projects are duties and fees exempted.

Similarly to the notes mentioned above, there are additional treats, which can be given to the foreign investors who invest in Iraqi projects as their right for international agreements as well as the bilateral agreements in the borders of Iraq⁴¹. In case of the rise of any type dispute among the parties involved under the investment law of Iraq, the jurisdiction based on the Article 27 is implied and taken into action. This however, does not apply to foreign investors as they are free to choose the arbitration law or international jurisdiction or arbitration law according to their will. The results of this is the encouragement of the foreign investors even further to attract more capital in Iraq business related as well as maintaining the growth.

⁴⁰ It further can assure the process of capital transactions and its safety as well as the safety against confiscation .Majid, S. 2002.

⁴¹ Article 22 of the Law

There are codes within the Iraqi Civil law, which has not been under the influence of changes within the new legislation system that is currently functioning. Some of which can be the Iraqi Civil Code no. 40 (1951), the Code of Civil Procedures no. 83 (1969), which has been considered as the backbone within the Iraqi system of governance and law structure. The aforementioned codes are currently active and in force and have kept their structure unchanged regardless of the previously mentioned changes inside the body of Iraqi Law System.

The Arbitration law which governs is under the authority of the Code of Civil Procedures, which is also known as CCP. Within the Code of Civil Procedures are Articles (251 to 276), which surveil the arbitration agreements, arbitration cases, and arbitration procedures.

This paper tends to create a better understanding on the subject of arbitration. This goes above and beyond the literature around the topic from international cases and comparisons to the case of Middle Eastern Countries and Iraq in particular. The subject of this research which is Arbitration Law of Iraq and the relevance to Oil and gas. As the review of the literature shows the new changes that are being implied within the body of Iraqi law system is towards a more enhanced and easy foreign investment and changes in the arbitration law with accordance to the International Arbitration Law. In addition, this shift of transformation has made the transactions of money to the Iraqi banks easier, and from them vice versa.

2.11. Further Investigation on Iraqi Arbitration Law

Within the CCP's Article 251, it is stated that the arbitration agreement can be within the boundaries and linked to a specific dispute or in relation to one as well as an existing dispute. This extends to the future disputes from the contract of arbitration agreement as well. The compliance of the involved parties and their approval on the arbitration agreement as a clause

can be regarded as the contract or a distinguished one. However, this is due to the fact that if the insurance policies are involved, which the arbitration agreement will have to have been in another contract (separately). According to the Article 985 of the Civil Code, the arbitration agreement with insurance policy will be rendered as invalid from an arbitration clause with the conditions that are for the insurance policy⁴².

⁴³Any type of dispute or disagreement or difference, which may or may not arise among the involved parties of a contract are considered as being under the arbitration law and being arbitrable. However, the cases of disputes where the nexus of the difference can be compromised, the dispute will be referred for the clause of arbitration (Franck, S. D. 2006). It is stated within the Article 704 of the Iraqi Civil code (1951) that the compromised cases that are recognized are also subject of disposal if the value has been considered.

This is while the definition and identification as well as the knowing the matter must have been solidly approved. In opposite, there are cases, which cannot be considered and/or subjected to the arbitration law if the case of dispute is in regard to criminal acts and/or public policies. However, the subjection to the arbitration can take place if financial harm or damage has been caused in the clause of a criminal act or personal matter that has yielded in the financial loss (Akaddaf, F. 2001).

The Iraqi Arbitration law lacks to provide sufficient information regarding the case of an invalid contract and if the arbitration clause will be considered valid or it will be invalidated.

However, according the previously mentioned data, it can be presumed that that the arbitration clause will stand as a separate case and held independently from the original fundamental

⁴² (Article 985).

⁴³ All the elements of the arbitration agreement has to be valid and in a written format for the arbitration clause or contract (Lando, O. 1985; Gaillard, E. 2014)

contract.⁴⁴ This Article states that the arbitration clause is not affected by the main contract is found to be invalid. Although, the provision of the agreement and its basis if it were to be found invalid, then the provision of the contract will be considered as invalid subsequently.⁴⁵ As previously noted, the contractors are free of choice of selecting an arbitrator and there are no prior requirements or qualifications for the person as the arbitrator. However, the arbitrator is required to have the full capacity in regard to legal terms and authorities for the possession of the title of the arbitrator for the case. In addition, the arbitrator title can be appointed to a non-Iraqi individual as it is not stated in the law otherwise or if so.

Hence, the result of such provisions in existence is that a party or a contractor may select a foreigner arbitrator as an expert for handling the arbitration procedures and the proceeding of the case within the borders of Iraq. For instance, the case of the differences between the Reconstruction Council of Iraq (dissolved) and the Iraqi Construction company was held by a foreign arbitrator, whom was chosen by the involved parties in the contract of agreement. The decision of the arbitrator was found to be solid and correct and was bind by the Court of Cassation for the subjection of an appeal to be held in another soil than Iraq (Lew, J. D., Mistelis, L. A., & Kröll, S. 2003).

It is stated that the methodology and the approach undertaken by the arbitrator is based on the agreements among the involved parties of the contract. This extends to the selection of the number of the arbitrators as well. However, the sum of the number of the arbitrators have to be an uneven number (Jalili, M. 1987). In case of a failure from an involved party to appoint the

⁴⁴ This presumption can be held strong in regard to the Civil Code of Iraq Article 139.

⁴⁵ (Article 139 of Civil Code of Iraq).

arbitrators, the other parties may request from the court for the appointment of a number of arbitrators for the case as a referral (one or more) (Hadi, H. 2017; Khadim, B. K. and Adavi, P. 2013; Code, C. International Arbitration in Iraq. If this decision is made by the court, it is considered as final and is not subject of being appealed. However, a party may challenge the court by claiming that the arbitrator is not qualified for the grounding reasons that are recognized solid and the court has had appointed.⁴⁶

An arbitrator can be recognized as disqualified if the individual has been proven to have employment relationship, or any other type of relationship with the concerned party or the judge. This is according to the Article 93 of the CCP. The recognition of the arbitrator as disqualified can be dependent on the fact of which whether or not the arbitrator or the judge has rendered the opinion in regard to the current case or have received and/or accepted any financial payments (bribes) or presents (non-financial bribes). Furthermore, in the Article 91 of the CCP, it has been stated that there can be other reasons for disqualifying of an arbitrator or a judge. One of these reasons can be if the arbitrator or the judge has any type of blood or marriage relationship.

In addition, there must be no interest for the arbitrator or the judge in regard to the dispute at hand. The arbitrator or the judge cannot be a representative or agent for any of the involved parties of a dispute. The Article 261 of the CCP identifies that the decision of disqualification of an arbitrator and if it is made by the court can be subjected to the appeal.

This is while in case the arbitrator is found disqualified for any of the above mentioned reasons (or to extent of other reasons), the decisions which have been made by the arbitrator or by the arbitrators can be held for repeal. This is only in case of the reasons of the disqualification is

⁴⁶ The reasons of disqualifying are of the same notes as to a judge and for them to be considered as disqualified .Hadi, H. 2017.

found solid and the reasons of the disqualifications are present (Sayen, G. 2003). The dismissal of an arbitrator or the resignation of one or a number of arbitrators cannot take place unless justified and cannot be by one party. This is according to the Article 260 of the CCP.

An arbitration agreement is not considered as a segment of the Public Order laws and regulations regardless of being bind on the involved parties in the agreement. The jurisdiction and the authority of the Iraqi courts cannot be neglected by the parties of an agreement as the courts of Iraq have the comprehensive authority and jurisdiction over the disputes. However, the courts of Iraq do not enforce the arbitration agreement by themselves as the arbitration is considered as an exception to the courts' jurisdiction in the newly modernized body of the Arbitration Law of Iraq. This can change based on whether or not a party would challenge the court in regard of a current dispute in the first hearing of the court referring to the arbitration agreement. The court subsequently holds and suspends the authority of jurisdiction which is held by the court only during the first session of the appeal. ⁴⁷In case that a party has not been successful for challenging the jurisdiction of the court while the first session of the appeal is undertaken, their rights will be deemed as waived. Moreover, the arbitration agreement loses its validity and turns into a void or null arbitration agreement, which the proceeds can be continued only by the court (Sayen, G. 2003). As it is explained in this section, the Iraqi laws are under the surveillance and are signatory to a number of Conventions worldwide. ⁴⁸These international conventions are in consensus with the Article 253 of CCP. In this article, the aforementioned issues and problems are being proceeded with the similar conditions as explained.

⁴⁷ This continues to the point that the arbitration award has been rendered, which was noted earlier in this chapter ,Sayen, G. 2003.

⁴⁸ Some of which are namely, Arab League Conventions on Judicial Cooperation, and the Geneva Protocol on Arbitration Clauses ,1923.

Despite the mentioned highlights of the Arbitration laws and the Articles of the CCP, there are other aspects, which require further understanding and investigation especially in regard to the sales of gas and oil.

In this manner, the decisions that are to be made by the arbitration tribunal have a limited period. This is in the case that the specified period of time is stated in the arbitration agreement in a written format and is approved by all the involved authorized parties. If the aforementioned period is not identified in the body of the agreement, it is the responsibility of the arbitrator to issue the relevant award within a 6 month span from the appointed date as the arbitrator (Hadi, H. 2017).

It is noteworthy that the arbitrators do not have any authority on the matter of ordering an interim measure (Baamir, A. Y. 2016). The arbitrators also do not have the jurisdiction over the criminal activities (e.g. forging the documentations and/or other related criminal acts such as offense). If there are witnesses who fail to appeal before the arbitrators, the arbitrators do not have authority or jurisdiction to undertake any type of action against them. All the involved parties within an agreement of arbitration must apply to the court to show its competency and make a specific action according to the request of the parties or to take an interim measure.⁴⁹

The award of the arbitral is to be from the unanimous votes or of the majority if the case of the arbitration has a number of arbitrators and not one. The award of the arbitral should have the written format as it is stated in the law (mentioned in this chapter) and in a form that the court can make reference to as it is agreed among the parties that are involved with the arbitration

⁴⁹ Additionally, the court may even render the decision, which has been made by the arbitrator ,Carbonneau, T. E. 2015.

agreement. Place, dates, evidence, related information and materials, documentations and the statements of the parties are all reference for the court for the arbitration agreement and the award is with solid and sound reasons which are based on the award of the arbitral (Weston, M. 2015).

2.11.1. Annulment Reasons

For the arbitral award, there is no defined time period or limit of which the parties are entitled to apply to the court regardless of the approval or the annulment of the award. In the Article 273 of the CCP it is stated that the ground rules for the parties to conduct a request to the court in relation to the annulment of an awards is according to whether or not the court has made the award itself or not. Below some of the annulment reasons have been summarized as the full list of the annulment is extensively described and is outside of the boundaries of this study:

1. If the arbitration agreement is considered as being invalid.
2. If the jurisdiction of the arbitrators have exceeded from their normal jurisdictions and if they have acted beyond their authority limits.
3. If the sufficient documentations and evidence is lacking.
4. In case of which the award is contradictory to the Public order. This extends to the Public Morality as well. The term Public Order is not clearly defined. The Iraqi Civil Code of Article 130.2 refers to the term as matters of public orders. Accordingly, the Law System of Iraq has not distinctive distinguish measures for the national or international orders of Public.

5. The validity of the award is under the question due to the errors in the award or during the process of proceedings and the error in the award or proceedings has effect on its validity level.
6. In case if the arbitrator(s) have neglected the mandatory and compulsory laws and acts of the CCP and its procedure processes due to the lack of observation or other reasons.
7. In case that the clause or case at hand is deemed to be justified for a re-hearing. For instance, if there is evidence found on the forgery of documentations and/or evidence.
8. In case of which one of the involved parties in the arbitration agreement claims the incompetence of the arbitrator or arbitrators for the lack of impartiality or other reasons which have been noted earlier in this chapter.

2.11.2 Evaluation of the Situation

The court with its competencies is authorized and has the full power over the interference with the arbitration proceedings and procedures (Iraqi Source). No arbitration agreement or clause can be recognized as approved unless the courts provides the provisions. Due to the extensive authority of the court over the arbitration cases, the decisions of the court are the final and official for the recognition of the arbitration as a valid one.⁵⁰ The decisions of the court are subject to the appeal in regard to the awards and more specifically arbitration awards. Nevertheless, the process of arbitration agreement and its proceedings is not a fast-paced procedure and the dispute settlements can be considered as frustrating procedures for the arbitration to hold its validity and its efficiency.

⁵⁰ In case of oil and gas sales and shipments, the same procedures follow and take into action (Calamita, N. J., & Al-Sarraf, A. 2016).

For the international arbitration agreements (specially in regard to sales of Gas and oil and not merely to the sales of gas and oil but also the processes and other means from drilling and transportation and other means to the sales of gas and oil as national products), it is emphasized that any type of arbitration taking place in the borders of Iraq regardless of domestic or international (also among international parties) is considered as a domestic matter of arbitration in Iraq and has to be subjected to the Arbitration Laws of Iraq and CCP provisions.

The international arbitration acts and agreements are not restricted nor prohibited by the laws of Iraq Arbitration System and the newly modernized body of Law and the transformed regulations and new legislation. However, as mentioned earlier during the past decades (1970-1980) was not as easy as it is in the recent years and Iraq system of Arbitration Law had the approach of not accepting or resisting to the highest level with the conduction of an arbitration clause in the governmental projects and contracts. This was extended to the supplies of materials and had the basis of the jurisdiction of the Iraqi courts being neglected or violated.⁵¹⁵²

Despite the aforementioned issues and restriction on the arbitration agreements among the international parties and the Iraqi government during the 1970 to 1980s, which resulted in the increase in the price of gas and oil, the international parties and the international arbitration clauses were included in governmental projects⁴⁵ and from foreign companies. As the Iraqi resources of gas and oil are vast and cannot be neglected by the international market, the previously mentioned problems did not hold the international investors and companies to engage in making agreements with the governing rules of Iraq in the time. This has taken a great shift

⁵² This was in contradiction to the policies of the sovereignty (Zartman, I. W. 2017).

towards the enhancement of foreign investment processes and arbitration agreements among the Iraqi and foreigner parties in the recent years as mentioned earlier in this chapter.

The provisions of the CCP and new legislation transformation have made the resolutions of the disputes and the methodology for handling them to be referred as national arbitration subjects. The standards of the government and the set aside conditions for the contracts (i.e. General Conditions for Contracts of Civil Engineering Works, and the General Conditions of Contracts for Electrical and Mechanical Process) have resulted in an easier proceeding and procedures of arbitration in the recent years, which addresses all the involved entities with projects being conducted or existing projects in the Iraqi soil.

The new regulations have made the path clearer and more sustained for processing the buy and sale of gas and oil by the international corporations. Some of which, have now internal contracts with the current government of Iraq and are working in many different levels of the production of gas and oil and to the level of sales and shipments. As noted earlier in this chapter, Iraq has a futuristic and long-term plan for the resources of gas and oil and tends to take the rank of second largest producer of gas and oil after Russia within the next 20 years. This justifies the means and transformations that are currently taking place in the body of Iraqi laws and more specifically the Arbitration Laws of Iraqi Government (Iraqi Source)

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The awards and the arbitration agreements, which are recognized and enforced by the members of Riyadh Convention for Judicial Cooperation of the Arab League are also recognized by the Iraq arbitration laws.⁵³ The new legislation laws and the new Investment Law (revised in 2006) allows the international parties and foreign investment bodies to select their arbitrator and

⁵³ This is regardless of the fact that Iraq is not a signatory of the New York Convention of 1958.

foreign jurisdiction according to their will (Investment Law of Iraq, no. 13) to settle their disputes.

CHAPTER 3

Conclusion

3. Chapter Overview

This chapter tends to cultivate the summary of the thesis. A conclusion based on the previous chapters' information that has been provided is consistent in the context of this chapter. As concluding the means of the paper, this chapter endeavors to create a thorough understanding on the shifts within the arbitration law of Iraq and its relationship to the sales of gas and oil in the early future. This has been the main objective of the research, which in this chapter will be conclusively described. However, the questions and numerous aspects of such complicated topic by nature on a global scale requires obvious further investigations in different contextual frameworks.

3.1. Iraqi Law System and Arbitration

The current system of law within the Iraqi borders is Civil Law System. The laws of which have been under an extremely significant turn of change within the past decade and more specifically after the 9/11 incident and the US invasion of Iraq in 2003. Following the constant changes within the body of law in Iraq, the results are towards the enhancement of Foreign Direct Investment (FDI) and its growth on an annual basis in regard to the sustainable plan of next 20 years. The current construct and structure of the law and relatively arbitration law in Iraq is considerably easier than the past from the aspect of the environment (whether internal or external) as well as the legal and trade environments to extend.

The aforementioned shift has received endorsement of the Iraqi civil law since the 2006 Investment Law of Iraq (See Article 27 of Investment Law, 2006). In addition to the above

mentioned shifting and transformation, the arbitration law and its implementation has been considered as the law being used for the governmental related contracts⁵⁴.

This shows the skewness of the body of law and the Iraqi system towards a more effective and sustainable system of contracting as well as the regulations and restriction to conduct transactions with the worldwide banks and organizations. Despite the notwithstanding statements above, the arbitration law and its related laws have been remaining in their ambiguity on a considerable amount. Those laws have not been changed or modified by any means and the existence of the arbitration law is dim and not as a 'free-standing' applicable law.

However, the arbitration law is defined and noted in the Code of Civil and Commercial Procedure of 1969 (Articles 251 – 276). The International Commercial Arbitration Law under the model of United Nations Commission on International Trade Law (UNCITRAL) is distinguished from the arbitration law that governs in the Iraqi arbitration system ((M. Norri and Karrar-Lawsley, 2016). The UNCITRAL Model of Law (See <http://www.uncitral.org/>) for the International Commercial Arbitration is widely accepted and used around the world and to an extensive number of countries. As for conduction of an effective and subsequently successful arbitration claim or case, requires a thorough understanding of the involved parties and how cautiously the case and the contracts are being reviewed as well as in many cases it is necessary to use the consultation of an expert in the area (whether regional or international, due to the complexity of international cases of law especially when financial benefits are involved as mentioned before in this chapter, it is recommended to consult with experts in a holistic methodology, from which various consultants are met and received advices from).

⁵⁴ Article 11. No 1. Of Regulation 'Regulations for Implementing Government Contracts', 2008.

This complexity is not merely for the Middle Eastern countries and such considerations should be taken into consideration from the early stages of a contract (even prior to some extent) regardless of the location. Negligence in such contracts and their features can lead a devastating and time consuming process of proceedings and sessions, which are not solely financially not beneficial, but waste the energy resources as well. Hence, for the case of Iraq and/or Middle East, it is advised as it is for any other area to have a thorough understanding on the mean of the contracts. Moreover, acquiring a knowledge on the International trade laws and regional laws of arbitration can lead to a better decision making for all the parties involved. The possession of this knowledge allows the parties to have a better flow in the process of transactions and other means and actions that each party is held liable for.

3.1. Current and Upcoming Situations

The importance of arbitration law is increasing simultaneously with the advancements and growth in the economy of Iraq, which results in the attraction of increasing international investors, corporations and subsequently new businesses. As mentioned earlier the laws of arbitration in Iraq has taken a flexible approach, in which the parties are free to choose their arbitral institutions as well as the representative and/or the arbitrator. The Iraqi courts can and will aid the procedures among the parties of an arbitral agreement and deal with them respectfully.

In addition, they have the authority to assist for the proceedings if it was found to be of necessity. This can be the appointment of an arbitrator when the party fails to meets the requirements of acquiring one. Moreover, it expands to the provision of time and extension of it in regard to the issuance of the award. It is noteworthy that the Iraqi courts in comparison to the international

ones have more power over the denial of an award (annul) and in regard to the most recent laws of arbitration (more specifically, as mentioned earlier the Law Model of UNICTRAL).

However, it has been reportedly noted that the Iraqi arbitration law has shortcomings on this aspect and requires further transformation and it has taken this shift towards the transformation for a better arbitration law and settlements and more specifically towards the sales of gas and oil as it noted the holistic plan of 20 years and that Iraq tends to take the place of Russia as the second largest producer of oil and it has plans to be among the feasible sellers of gas and oil for further progress in this track. Hence, a new draft of arbitration law is in its process.

The implementation and finalization of this draft is not clear to the public. Moreover, it is not known if the new model of arbitration law will be in compliance with the Arbitration Law Model of UNCITRAL. The solidity and the comprehensiveness of the revised draft is expected to be in consideration with the attraction of new and more international trades and foreign direct investments and therefore to be closer to the internationally and commonly used laws.

The interest and skewness of the High Judicial Council of Iraq has been stated that is towards the joining of the New York Convention. This further implies that the Iraqi system of law and more specifically arbitration law in fact endeavors to comply with the internationally known and accepted laws of arbitration. This is even more vivid and clear in regard to the sales of gas and oil as this is the primary intention of the new revision of the Iraqi Arbitration Law.

The foreign investments that are vastly in growth are the companies, which have the equipment or produce and manufacture and sell the tools required for a better quality oil and gas drilling and processing as well as shipping means. This transformation is not due to a date. However, upon its conduction and commence, it is expected that the foreign investors will be more encouraged and

motivated to initiate in Iraq. This further adds to the vitality and significance of such step in the body of Iraqi law.

In case of the rise of any type dispute among the parties involved under the investment law of Iraq, the jurisdiction based on the Article 27 is implied and taken into action. This however, does not apply to foreign investors as they are free to choose the arbitration law or international jurisdiction or arbitration law according to their will. The results of this is the encouragement of the foreign investors even further to attract more capital in Iraq business related as well as maintaining the growth. This paper tends to create a better understanding on the subject of arbitration. This goes above and beyond the literature around the topic from international cases and comparisons to the case of Middle Eastern Countries and Iraq in particular.

The subject of this research which is Arbitration Law of Iraq and the relevance to Oil and gas. As the review of the literature shows the new changes that are being implied within the body of Iraqi law system is towards a more enhanced and easy foreign investment and changes in the arbitration law with accordance to the International Arbitration Law. In addition, this shift of transformation has made the transactions of money to the Iraqi banks easier, and from them vice versa. The late transformation of the Iraqi Arbitration Law has created a safer image of the Iraqi market as well as the economic image of the country in the region of Middle East and to some extent on the Global scale. Many investors from the region are now interested or have already started capital injections into the projects within the Iraqi market. These countries can be namely, United Arab of Emirates, Iran, Jordan, Qatar, and Kuwait.

The parties involved with an arbitration dispute can bring the case to its end voluntarily with the enforcement of the awards, which have been rendered by the arbitrators.

It is noteworthy that in most cases of arbitration, there is a party who is not completely satisfied with the decisions made by the arbitrator or the judge and hence, to ask for an extension in the period of time or a revision as an appeal to the court. These decisions and all the awards must be under the surveillance of a competent Iraqi court and cannot be enforced without the presence of the Iraqi court. This is in accordance with the Article 272 of the CCP. In this case, the competent court of Iraq will make the subjection on the arbitration award to be thoroughly and comprehensively reviewed and examined through the perspectives of the Law and the formation of Law. This leads to a reassurance for the parties involved with the arbitration case that the disputes are being handled with competency, efficiency, in timely manner, and fairly.

Despite the aforementioned issues and restriction on the arbitration agreements among the international parties and the Iraqi government during the 1970 to 1980s, which resulted in the increase in the price of gas and oil, the international parties and the international arbitration clauses were included in governmental projects of Iraq from foreign companies. As the Iraqi resources of gas and oil are vast and cannot be neglected by the international market, the previously mentioned problems did not held the international investors and companies to engage in making agreements with the governing rules of Iraq in the time. This has taken a great shift towards the enhancement of foreign investment processes and arbitration agreements among the Iraqi and foreigner parties in the recent years as mentioned earlier in this chapter and more comprehensively in chapter 2 of this study.

The new regulations have made the path clearer and more sustained for processing the buy and sale of gas and oil by the international corporations. Some of which, have now internal contracts with the current government of Iraq and are working in many different levels of the production of gas and oil and to the level of sales and shipments. As noted earlier in this chapter, Iraq has a

futuristic and long-term plan for the resources of gas and oil and tends to take the rank of second largest producer of gas and oil after Russia within the next 20 years. This justifies the means and transformations that are currently taking place in the body of Iraqi laws and more specifically the Arbitration Laws of Iraqi Government.

⁵⁵This allows the foreign entities to enter the market of Iraq with much less hesitations and worry due to the fact that the new legislation and revisions on the Iraqi laws are merely looking into the matter of enhancing the means of trade and opening the market towards the foreign capital with hopes of maintaining a sustainable growth rate for the total economy of Iraq in the next years. It is noteworthy that some authorities, whom have been contacted directly by the researcher (names will remain anonymous due to the political reasons) have emphasized that the new shifts within the body of law in Iraq will lead to a much higher economy growth than expected within 5 years. However, the endeavor is to maintain and surpass the mentioned growth on a global basis for the next two decades. The sales of gas and oil is now much more feasible for the international parties.

This is while having noted the difficulties that may arise and are existing due to the presence of armed groups and rebels within the Iraqi borders. The main effort is to have solid arbitration laws in general and more specifically for the sales of gas and oil as these are the main resources of the country and are beneficial for the whole nation regardless of their ethnicity. The Iraqi petroleum company and all the SBUs and other related companies whether international or domestic are trying to have a higher quality gas and oil produced, extract the resources with

⁵⁵ The new legislation laws and the new Investment Law (revised in 2006) allows the international parties and foreign investment bodies to select their arbitrator and foreign jurisdiction according to their will (Investment Law of Iraq, no. 13) to settle their disputes.

higher quality machinery and materials and to have them sold with the right price in the international market.

The use of heavy machinery being imported from abroad to the Iraqi projects of gas and oil drilling and the subsequent materials that are needed (e.g. Fluids, compounds, tools, and equipment) is another window for foreign investors to conduct projects of transferring machines and/or supplying the materials needed for the huge projects of gas and oil drilling of Iraq.

3.2. Study Limitations

Due to the limits that were upon the path of this research, a number of studies in the literature could not be added to the study. This is the main limitations of the study that the nature of the arbitration law, relatively international arbitration law, and to mention some other aspects, namely, investment law, trade law, and their complexities. Furthermore, this study was limited by time restrictions due the deadlines for the project, which limited the time that the researcher dedicated conducting face to face and Skype question and answer sessions with the contacts and authorities for the purposes of this study.

In addition to the aforementioned restrictions, the political issues that could have arisen in regard to this subject should have been noted due to obvious reasons. Moreover, the study had limited access to some of the data sources, which were gathered in the recent years. However, the researcher pushed the boundaries of the research and made an effort into using merely updated articles being published after 2012 while maintaining the relevance of the issue at hand into consideration.

3.3. Recommendation for Further Studies and Implementations

As mentioned above, the complex nature of the arbitration law and the consideration of the fast-changing environment and structure of the body of Iraqi law requires thorough understanding from each party involved in the agreement. It is highly recommended to receive advice and consultant from an expert in the field for comprehending the means of a contract whether domestic or international. Different aspects of such phenomenon can be looked into more deeply and thoroughly. This research looks into the two subjects of International Arbitration Law and Iraqi Arbitration Law with having the effects of Arbitration Law and its shifts on the sales of Gas and Oil in Iraq. The aspect of gas and oil of Iraq and its relevant topics in regard to law are an area of further research. Due to the delicacy of the mentioned topic, a comprehensive study with mixed methods of qualitative and descriptive approaches can be a further aid for understanding as well as implementing the arbitration laws in the region of Middle East and more specifically Iraq.

The foreign investors and those entrepreneurs who look into developing their market into the region of Middle East are now being more attracted to invest their capital in Iraq as the fast-paced changing body of Law allows for future windows of opportunities. Not to mention that the current laws are fairly for the benefit of a foreign investor to make and settle an agreement in the borders of Iraq. This will create more job opportunities for the Iraqi youth.

Moreover, the flow of foreign capitals into the Iraqi market will directly affect the economy market as well as the growth rate. This can lead to advancement in many industries in the country. Industries such as, tourism, banking, insurance, trading, export, and import as well as agricultural advancement, which is a vital industry for the country can reach to higher standard levels with the flow of foreign investments. This will yield in the increase of the satisfaction of

the locals as well as the foreigners with an effective and progressive market with flexible attitude towards change. It can further increase the quality of life of the country and lead the OECD to further increase their database in Middle East with Iraq also being among the developing countries in regard to increasing the quality of life according to the OECD index. Governmental entities can also benefit from such flexibility and further conduct huge projects and invite foreign investors to cooperate and settle agreements to develop the country on a national scale. This can lead to a further unity and peace offering to the locals as the opportunities of growth will relatively and subsequently increase in the country as a whole.

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