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The role of Arbitration in Trade Contracts in International Oil investment Law and its Problems

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Abstract

Companies working in the field of oil and gas invest large capital, and therefore the disputes that arise in this activity are among the most important risks that must be taken into account in any project related to international energy (oil). It is imperative for the parties to the investment relationship in the oil and gas fields, and from the beginning of the deal, to manage these risks clearly, and accordingly the parties to the contract are keen when drafting its clauses to put in place a mechanism for settling disputes, whether these parties are companies, individuals or governments, especially since foreign companies do not have The desire to resort to national courts for lack of confidence in the impartiality of the national judiciary, and disputes occur between the investing company and the host country when the host country makes major changes in the terms of the original deal or when it withdraws the investment (concession) granted to one of the companies, whether the issue is the sharing of production between them and between the host country, an extraction contract or a service provision contract.

Keywords: Oil investment; Trade Contracts; Law

1-Introduction

Companies working in the field of oil and gas invest large capitals, and therefore the disputes that arise in this activity are among the most important risks that must be taken into account in any project related to international energy (oil), as it is imperative for the parties to the investment relationship in the fields of oil and gas, and since The beginning of the deal, managing those risks clearly, and accordingly, the parties to the contract are keen when drafting its clauses to establish a mechanism for settling disputes, whether these parties are companies, individuals or governments, especially since foreign companies do not have the desire to resort to national courts for lack of confidence in the impartiality of the national judiciary .

Disputes occur between the investing company and the host country when the host country commits major events in the terms of the original deal or when it is based on the investment (concession) granted to a company, whether the subject of the contract is production sharing between it and the host country, an extraction contract or a service contract. Planning to settle disputes that may arise in oil investment contracts is essential to the success of these long-term contracts. If disputes are not managed properly, they may hinder or reduce the economic return of the project. Therefore, the parties need from the outset to develop a plan to address future disputes, and to choose and mechanisms for settling

disputes in the way they desire, and arbitration is one of the most important of these mechanisms, and there is no doubt that accurate knowledge of this method and agreement on it from the beginning means the crossroads between success and failure for any investment project in the field of investment oil and gas. There are many precedents and guidelines that can be used to achieve this success by resolving disputes facing investment in the oil and gas field, but does resorting to arbitration in disputes related to oil investment contracts achieve the desired success? The answer to this question requires examining the subject in two sections: we discuss in the first the definition of arbitration, and we dedicate the second to discussing the arbitration agreement in oil investment agreements and contracts.

2-Section one

2-1 Definition of arbitration

Arbitration has become the most common method for settling investment disputes, especially in the international energy sector. Arbitration is a kind of alternative judiciary to the state's judiciary. The Iraqi Civil Code did not define arbitration, but Article (1790) of the Code of Judicial Judgments defined it by its text on arbitration, which means that the two opponents take a judgment with their consent to settle their dispute and claim.

Arbitration is defined as the agreement of the litigants to refer the dispute to a neutral third person or an independent body for decision by a decision binding on them (Al-Zoubi ,2011,p32).

2-2 The first requirement

Justifications for resorting to arbitration

The main reason for the increase in the demand for arbitration to settle disputes between oil companies and the country hosting oil investment, is that arbitration dictates the parties' will in choosing the arbitrator or the arbitral tribunal, choosing the place and time in which the arbitration takes place, and sometimes choosing the law that applies to the arbitration procedures, which has an impact. Effective in accepting the arbitral award and implementing it. In general, among the most important considerations for resorting to arbitration in investment disputes in the field of oil and gas are:

1- The desire of the investing companies to settle disputes in a simplified manner, away from the high costs that characterize the national judiciary, the slow pace of litigation procedures and the issuance of final judgments, as arbitration is characterized by flexibility and speed in resolving disputes.

2 The Iraqi legal system may not be suitable for the foreign investor who seeks to apply flexible and appropriate legal rules to contract disputes through a neutral body represented by the arbitral tribunal.

3- The multiplicity of degrees of litigation (initiation of appeal, discrimination) is long-term and this lengthening does not suit the nature of investment in the field of oil and gas, as it is in the interest of the parties investing in this field to resolve their disputes quickly, and therefore the arbitration system becomes more appropriate than other litigation systems (Salih, 2012,p127).

4- The settlement of oil and gas investment disputes requires technical expertise and familiarity with the foreign language (English) in which the contract was drawn up, which is available in arbitral tribunals, as these bodies do not need the assistance of technical experts or translators to translate documents of huge disputes that require a long time to be translated.

And exorbitant expenses, compared to the judge, who may be well versed and skilled in the law, but he has little experience in oil and gas affairs, so he is unable to adjudicate disputes between the conflicting parties, and for this reason resorting to arbitration was the appropriate solution (Khaled, 2006,p283).

5- The immunity of the host country for investment and its institutions prevents quarreling with the imam.

The national judiciary, and consequently, the investor will be harmed if he does not have another way to resolve the dispute with the investing country, and the best way is arbitration.

6- The foreign investor cannot resort to the International Court of Justice because this court does not accept to consider only disputes submitted to it by countries in accordance with the conditions stipulated in the court system Article (34/1) of the Statute of the International Court of Justice (United States have the right to be parties to the lawsuit brought by a court.)

Therefore, the state whose nationality the investor holds sometimes waives its immunity in order to guarantee the rights of the investor when the second party to the dispute is an entity or institution of the host state for the investment.

2-3 The second requirement

The position of Iraqi law on arbitration in the field of oil investment

Are there provisions in Iraqi law to rely on in resorting to arbitration to resolve oil investment disputes? There is no unified law regulating oil wealth in all its aspects, starting with its ownership(Article (111) 2005) and its management mechanism, that is, is it managed by the central government exclusively, or by provincial governments that are not connected to a region or the regional government and whose lands include oil fields, or is this authority distributed between the central government and these Governments in certain proportions, how they are invested and the types of contractual systems through which this investment is made, to other administrative and economic aspects related to this important wealth, and despite the fact that the Iraqi constitution(Article (112) ,2005) stipulates that a law must be issued regulating how to manage oil and gas extracted (from fields The current law also regulates the distribution of imports in an equitable manner that suits the population distribution and in a manner that ensures balanced development of the different regions in the country, but this law was not issued due to well-known political differences, especially between the central government and the Kurdistan Regional Government, and thus the oil wealth remained governed by separate laws, some of which Concerning the establishment of oil companies, while others concern some aspects of investment. Investing in oil wealth?

It is not mentioned in the law on the allocation of investment areas for the National Oil Company, No. 97 of 1967, any text regarding investment, but even the courts are not competent to look into

Claims related to oil operations stipulated in this law(No. 544 of 1983.), and the law establishing the Iraqi Oil Company (No. 123 of 1967) did not include any reference to arbitration, and the Law of Import and Sale of Petroleum Products (No. 9 of 2006) was devoid of any reference to arbitration.

The Crude Oil Refining Private Investment Law No. 64 of 2007 did not include any

provision for arbitration. But the oil and gas law of the Kurdistan region (No. 22 of 2007) explicitly stipulates arbitration, allowing resorting to arbitration if the dispute is not resolved through negotiations(20), and this arbitration is conducted with the agreement of the two parties who can subject arbitration to the rules of one of the international arbitration centers and as specified by this law, and Iraq has ratified in 2012 Convention on the Settlement of Investment Disputes between States and Nationals of Other Countries (Washington Agreement of 1965) (m.facebbok.com,2017)entered into force in 2015.

This agreement established the International Center for Settlement of Investment Disputes (ICSID) within the World Bank Group (Article 1/1), and the purpose From this center is to resolve disputes that arise between the contracting states and the nationals of the other contracting states (foreign investors) through Conciliation and arbitration (Article 1/2).

But is it possible to search for the legal basis for arbitration in laws other than those related to the oil industry and the text of arbitration was provided in laws other than those related to oil wealth, including the text of the Iraqi Investment Law (Iraqi Investment Law No. 13 of 2006.), on the permissibility of resorting to arbitration to resolve the dispute arising from the investment contract (Article 27) Is this law suitable as a basis for resorting to arbitration in oil and gas investment contract disputes?

Answer: No, because Article (There is a draft Iraqi Commercial Arbitration Law for the year 2011) of this law excluded investment in the field of oil and gas extraction and production from being subject to its provisions. So, for the arbitration agreement to have its effects, it must be recognized by law first. Therefore, most countries have approved arbitration and organized its provisions. As the Iraqi legislator did, he organized the optional arbitration provisions in the Civil Procedures Law No. 83 of 1969 (26). Article (251) of the Iraqi Code of Procedure stipulates that (it is permissible to agree on arbitration in a specific dispute. It is also permissible to agree on arbitration in all disputes that arise from the implementation of a specific contract). This text is absolutely permissible to agree on arbitration in all disputes that arise from the implementation of a particular contract, regardless of the type and nature of this contract, whether it is a civil or commercial contract, and regardless of the nationality of its parties, whether both are nationals or one of them is a foreigner. Therefore, this text can be invoked to agree on arbitration in disputes arising from investment contracts in the field of oil and gas.

From the foregoing it becomes clear to us that the legal basis for the permissibility of agreeing to arbitration in oil investment disputes is the texts of the pleadings law for the organization of voluntary arbitration, and the Agreement on the Settlement of Investment Disputes of 1965 also serves as a legal basis for arbitration as it became, after its ratification, part of the Iraqi legal system, in Disputes arising from oil investment contracts concluded between the Iraqi government and a foreign investor belonging to a state party to this agreement.

(He holds her nationality(Investment Dispute Settlement Agreement of 1965).

As the Washington Agreement establishing the Center and its desire to provide a favorable climate for investment, granted foreign investors the right to resort directly to the arbitration of the International Center for Settlement of Investment Disputes, without the need for the intervention of their countries, in Article (25) of it, which specified the scope of the Center's jurisdiction in disputes that arise between a country of a Contracting State and between a national of another Contracting State

Hence, the other party to arbitration under the umbrella of the Center may not be another state, whether contracting or not, or one of its affiliate bodies or institutions. Arbitration constitutes the cornerstone of the jurisdiction of the center, and this was confirmed by the preamble to the agreement by stipulating the need for mutual consent between the two parties to present the dispute to the center, and the withdrawal of the host country or the country to which the foreign investor belongs does not affect the validity of the consent (Al-Tarawneh,2017, pp. 1474-1475, p. 1484). If the parties to the dispute agree to submit it to arbitration before the Centre, neither of them can withdraw his consent unilaterally. This is what is stipulated in Article (25/1) of the Convention

The second topic
Arbitration agreement in oil investment agreements and contracts

It is not sufficient to have a law approving arbitration and regulating its provisions. Rather, there must be an agreement on arbitration in order for the arbitration to arrange its effects. There are several types of oil investment contract, the most important of which are: Production sharing contract: It is a contract based on sharing the extracted oil between the foreign prospecting company and the producing country according to percentages determined by the contract, after deducting the costs incurred by the foreign company in the exploration process, which is called profit oil. This type of contract is characterized by high production costs per barrel, and risks are preserved, as the prospecting company bears the risks of exploration in the event that it fails to find oil. The government imposes income tax on the company excavating for profit oil, but the oil in the ground and the facilities remain the property of the state (29) (Abdul-Aali,2008, p 10). Oil service contracts: The oil service contract is defined as (a contract under which the oil-producing state or the national oil company undertakes to the foreign company the task of carrying out some oil operations for its account in a specific area and in return for a certain return, so that the state remains the owner of the fields and the oil produced, and the foreign company plays the role of the contractor that It carries out exploration and exploitation operations in the stipulated areas and for a specific time, for the account of the national company, and the foreign company is not considered a concessionaire or partner), and the service contract has several types according to the purpose for which the contract is mentioned, some of them are for exploration and production, as oil exploration is carried out in areas that have not been discovered There is oil after using modern geological methods and exploratory drilling to ensure the existence of an oil reservoir, and then oil is produced according to the terms, proportions and quantity specified in the contract concluded between the two parties, and some of them are service contracts for development and production, where the contract is given to the areas that have been discovered and it turns out that they are promising reservoirs. The business of the foreign company is the development and production of oil. Some of them are technical service contracts intended to increase the production capacity of the field(30) (Mirza, 2010, p 127). Refinery construction contracts: a refinery construction contract is concluded between the state or the national oil company and the investor (national or foreign) who bears

project and notify it in exchange for the price agreed upon in the contract (Saleh,2012, p 111). Despite the variety of types of oil investment contract, the arbitration clause contained therein does not differ in terms of form and content.

The first requirement
How to draft an arbitration agreement (condition)

Arbitration is based on the parties' agreement to include a text in the oil investment

contract stipulating the settlement of disputes arising from the contract in the future or those related to it by resorting to arbitration, and this clause is called the arbitration clause.

But if the dispute occurred between the parties and there was no prior agreement between them on arbitration, and then they agreed after that to resolve it through arbitration, the agreement is called joint arbitration or the arbitration contract. In general, contemporary jurisprudence transcends this distinction as the two forms are expressed by the term arbitration agreement (Al-Saadi,2015, p 542).

But the following question arises: If the arbitration clause is mentioned as a clause in the contract, is there a necessity for concluding the arbitration agreement? The answer depends on the wording of the arbitration clause. If it is limited to the principle of arbitration without a statement of details, the conclusion of an arbitration agreement after the dispute has arisen is necessary. As for the formulation of the arbitration clause with provisions that specify all the necessary details for the convening of an arbitration court despite the procrastination and procrastination of one of the parties in implementing the undertaking By resorting to arbitration or working to prevent it, the conclusion of an arbitration agreement is not necessary.

Whatever form the arbitration agreement takes, its legal force is the same, which is the argument of the jurisdiction of the national court over the consideration of the dispute and the establishment of the jurisdiction of the arbitral tribunal. This was confirmed by the Federal Court of Cassation, where it ruled in one of its decisions (It is not permissible to file a case before the judiciary except after the arbitration methods have been exhausted, so the defendant's objection in the first session to his legal presence and his objection to the establishment obliges the court to delay the case until the arbitrators' decision is issued) (Court of Cassation Decision ,2014). So the arbitration agreement or the arbitration clause is the legal basis for arbitration because contracts are based on the principle of the authority of the will, and based on this principle it is an art for the parties to decide how and where they wish to resolve their disputes. The parties to the oil investment contract cannot predict what the disputes arising from the contract will end up with in the future, and in which part of the contract the dispute will occur. It is also unpredictable against whom

The dispute will be because there may be changes in the interests of companies and governments during the period of implementation of the contract, which is usually long-term in this type of investment. Therefore, it is important to be simple and clear when drafting the arbitration clause in the clause on settling disputes so that it is clear whether resorting to arbitration is mandatory or optional. Ambiguity and repetition in the wording should also be avoided, such as specifying the applicable law twice: once in the arbitration clause and again in the applicable law part of the contract. Also, trying to formulate the arbitration clause in a way that suits a particular type of dispute may lead to counterproductive results at the time of the dispute. When drafting an arbitration clause, it is necessary to take into account the coordination of provisions on issues related to this clause, including the selection of arbitrators, the place of arbitration, the applicable law, and how the arbitral award is implemented. If the ambiguity of the wording of the arbitration clause or the addition of any extra paragraph in it by the inexperienced may prevent the resolution of the future dispute, and therefore it is necessary that the drafting be handled by those with expertise and competence in the legal and linguistic aspects so that the arbitration is more useful and brings positive results (Al-Baqami, 1457).

In addition to the fact that the language used in drafting the agreement (the arbitration

clause) should be clear, easy to understand and simple, the broad method of drafting must also be followed in the sense that the arbitration clause must be formulated in general terms to cover all disputes that may arise from the oil investment contract, for example the use of the phrase "any Dispute arising from the contract)). A broad method of drafting is to define disputes that are subject to arbitration (such as (disputes any dispute, controversy or claim relating to this contract including but not limited to any dispute regarding the interpretation, implementation, breach or termination of the contract), But the parties should specify the meaning of the disputes (only once in the contract to avoid the inclusion of contradictory definitions that may raise problems when the dispute arises (Al-Baqami,pp 1455-1456).

Regardless of the pattern that the oil investment contracts take, whether they take the form of concession, technical service or production participation, they are not devoid of an arbitration clause, and the general formula of the arbitration clause in oil investment contract disputes is to include the contract itself or a subsequent agreement (the text arbitration agreement). Provided that each party chooses one arbitrator, then the two arbitrators choose the third arbitrator (the weighted or the final arbitrator).

In the event of disagreement over the third arbitrator, he entrusts his choice to one of the agreed-upon bodies, whether it is a national or foreign body. One of the development and production contracts, concluded with the Ministry of Oil, included the following formula (in the event of a dispute between the two parties, the ministry and the contractor) the two parties try to resolve the dispute by mutual consent, and when a solution is not reached, any of them has the right to resort to arbitration, so each party appoints an arbitrator and appoints the two arbitrators. The third arbitrator, and in case of disagreement, shall be appointed by the Arbitration Court of the International Chamber of Commerce(Al-Alawi).

The second requirement
The seat of arbitration:

Choosing the place of arbitration is one of the most important issues that arise when negotiating the item on settling disputes, as the arbitration headquarters have an effective role in the success of the arbitration process, and the arbitration headquarters will determine the law of procedures to be followed in arbitration. When choosing a specific place for arbitration, it must be taken into consideration that the arbitrators can easily attend the hearings at this place

The third requirement
Law Applicable to Arbitration Proceedings

A distinction should be made from the outset between the law applicable to the subject matter of the contract and the law applicable to arbitration procedures(Article 33), as the substantive law is the law that defines the rights and obligations of the parties to the contract, and when choosing a specific law to govern the subject matter of the contract

This choice must not be established in the clause on disputes, but rather it must be in a separate clause to confirm that this choice is objective and not procedural. (Substantive law) The law of a neutral country, not the law of the host country for investment, but rather it is keen that this neutral country is one of the developed countries whose legislation provides a legally safe environment for investment. On the other hand, the host country for investment is keen that its national law is applicable in the event of a conflict related to the investor's contract (Al-Baqsi,p 1493). Even if the foreign investing company agreed that the national law of the host country for the investment would be applicable to the subject matter of the contract, in order to ensure that the country did not make amendments to its national law that

harm the interests of the foreign companies contracting with it, it is keen to include in the contract what is called Subject to contractual stability.

It means the condition under which the state undertakes not to apply any new legislation or new regulations to the contract to conclude with the foreign investor, because the state, with its legislative authority, can amend or change its legislation in a way that may lead to a breach of the contractual balance that existed when the contract was concluded The condition of stability also takes a clause that is included in the contract concluded between the host country and the foreign investor and is called the condition of contractual stability, it also takes the form of a pledge.

Issued by the state and stipulated in its national law, and when it is called the legislative stability condition. In general, the objective of the time-freezing of the contract law, whether on the condition of contractual or legislative stability, is to achieve stability of contractual ties by freezing legislative amendments. On the applicable law, for example what was stipulated in the contract concluded in 1978 between Tunisia and an American oil company that it shall be applicable to the contract (Tunisian law in force on the date of signing the contract... The arbitrator shall decide the dispute on the basis of justice and the applicable Tunisian law in The date of the current agreement (Salama, 1987, p 82).

Sometimes the parties do not agree on the law governing the dispute that may arise from the contract, but rather agree that the arbitral tribunal is left to choose the substantive law governing the dispute, and in this case this must be clearly stated in the contract.

As for the procedural law, it means the law that is applied to the arbitration procedures, which start from the announcement by one of the parties to the dispute of his desire to settle the dispute through arbitration and continue until the arbitral tribunal issues its final decision. These procedures include: the claim statement, the rules of attendance, the hearing system, the hearing of the case, the defenses and the requests The interlocutory, the intervention of the third person, the interrogation of the litigants, the suspension of the litigation, its interruption, its forfeiture, the expiry of the case by the lapse of time, Turkey, and the rulings in terms of the method of issuance, notification and methods of appeal (Al-Saadi,2015, p 256).

The question arises as to how to determine the law applicable to the procedures?

The jurisprudence in answering this question was divided into two opinions: The first of them is that the law of the seat of arbitration is the one that is applied to arbitration procedures. As for the second opinion, it goes to the fact that the law that applies to arbitration procedures is related to the will of the parties. But the role of this will is different in free (private) arbitration than in institutional (organized) arbitration. In the case of free (private) arbitration, the will of the parties can choose a specific law to apply to the arbitration procedures, or choose separate rules taken from the well-known international rules in the field of international commercial arbitration, or the parties agree to authorize the third arbitrator or the arbitral tribunal to choose the legal rules to which the procedures are subject.

arbitration (47). In the case of institutional (organized) arbitration, the two parties mostly agree on the dispute by arbitration in accordance with the arbitration rules of one of the arbitration institutions or centers. But even if the two parties agree to refer the dispute arising from the oil contract to one of the arbitration centers or institutions, this does not preclude the selection of a specific legality to apply to the arbitration procedures (Basimah,

1972, p198), but if the parties remain silent regarding this issue, the rules that apply to the arbitration procedures shall be in accordance with For the arbitration rules adopted for that institution and regarding oil investment contracts in Iraq, it referred most of them regarding the rules that apply to arbitration procedures to the arbitration rules of the International Chamber of Commerce. For example, the contract for the development and production of the Ahdab field, concluded in June 1997, (49) stipulated that "the arbitration procedures shall be in accordance with the rules of conciliation and arbitration of the International Chamber of Commerce." Settlement of Disputes Arising from the Contract... Under the Arbitration Rules of the International Chamber of Commerce)).

Conclusion

First: the results

1 - Arbitration is one of the most important means to help attract foreign capital to invest in the oil field, and out of concern for the oil countries' interests, they have accepted the removal of oil investment disputes from the jurisdiction of their national courts under investment laws or under the laws regulating arbitration or under investment contracts regardless About its kind, as one of the guarantees it provides to foreign companies, as they are suspicious of the bias of the national space of their country and consider arbitration as a neutral means that calls for reassurance.

2 The rulings of the international arbitral tribunals have established that the state that accepts the arbitration clause in the oil contracts it concludes with foreign companies cannot uphold its judicial immunity before the arbitral tribunal because by accepting the arbitration clause it has implicitly waived its immunity, and because this contradicts the principle of good faith in the implementation of the arbitration clause. Obligations are among the stable principles in international transactions, and the attempt to deviate from the arbitration clause after it was agreed upon in the contract concluded with a foreign company under the pretext of judicial immunity would shake the confidence of those dealing with the government and make foreign investors refrain from investing in a country that does not respect its commitments. Rather, it turns out to us that there is a stable rule in international jurisprudence and space that the arbitration clause remains valid and enforceable even if the host country terminates the contract unilaterally. This rule was confirmed by the Washington Agreement of 1965 regarding the settlement of investment disputes between the state and nationals of other countries. For all this, arbitration has become the only court to resolve disputes arising from oil investment contracts.

3- The effectiveness of arbitration and achieving the desired benefit from it is linked to the adoption of it by national law. That the national law approve the obligations stipulated in the arbitration agreements and treaties, and provide the appropriate mechanisms for implementing the decisions issued by the arbitrators, as well as that the national law fills the gaps and deficiencies in the arbitration agreements or in the arbitration clause contained in the oil investment contracts. So we find most countries have laws to deal with both domestic arbitration and international arbitration.

4- There is a legislative deficiency represented in the failure of the Iraqi legislator to approve the law specialized in international commercial arbitration, as the legislative texts related to arbitration were limited to what was stated in Articles (251-276) of the effective Iraqi Code of Procedure No. 83 of 1969. These articles did not address the provisions of international commercial arbitration, but its texts are considered general and applied even in the field of arbitration in personal status cases.

5- Many of the oil investment contracts concluded by Iraq with foreign companies included a

provision for resorting to international arbitration to settle disputes arising from the interpretation or implementation of these contracts. incomplete as necessitated by the claims of foreign companies and in response to the rule of practical necessities, without entering into an express declaration of international arbitration. Iraq, like most of the countries that did not ratify the New York Convention on the Recognition and Implementation of Arbitral Decisions of 1958, out of fear of compromising the sovereignty of the state.

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