

**Commercial Arbitration and its Importance in the
Settlement of Commercial Disputes in Iraq**

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The transfer of foreign capital to the host country depends on two main factors:

- 1– The legal center for the investor in this country.**
- 2. The stability of the investment climate.**

First: The date of arbitration

– The arbitration is the former of the judiciary is a system very old and its foot rooted in the depths of history as the first picture of litigation known to humanity as an alternative to force.

– Known in ancient civilizations both eastern and western as a mechanism for resolving disputes in the field of internal and international, as defined by the Babylonians and Assyrians as well as ancient Egyptians, Greeks and Romans.

– Known by the Arabs in the Arabian Peninsula before Islam and when the emergence of Islam and Sharia approved the system of arbitration relying on legitimacy by evidence from the Koran and Sunnah.

Second: Definition of Arbitration

Arbitration is defined as a special legal regime for the resolution of commercial disputes outside the jurisdiction, whereby the parties undertake to subject disputes that may arise between them or that have arisen to arbitration. It is a special jurisdiction whose jurisdiction is outside the jurisdiction of the State.

Article 7 of the UNCITRAL Model Law 1985 (UNCITRAL) which prepared by international Commercial Arbitration Commission and defined the arbitration agreement as (an agreement between the parties to bring to arbitration all or some of the limited disputes that arose or might arise between them on a specific contractual legal relationship Was or is not contractual, and the arbitration agreement may be in the form of an arbitration clause contained in a contract, or separate agreement).

Third: Characteristics and Advantages of Arbitration: Helped to flourish of commercial arbitration and its success in the international trade markets has helped as a legal system for resolving disputes and its preference for the judiciary, among others:

- 1. Flexibility and speed in resolving disputes.**
- 2. A neutral and effective means of settling commercial disputes.**
- 3. Non-compliance with the application of a particular law or procedures where the law is chosen Which will be applied and does not impose the law of a particular state to settle the dispute.**
- 4. The judgment of experts in specialized fields on the subject of the dispute.**
- 5. Greater opportunities for resolving disputes through reconciliation.**

- 6. The dispute shall be dealt with in a manner that ensures confidentiality, which shall preserve the parties' non-disclosure of the trade secrets that they declare only may pose a danger to their intellectual property rights.**
- 7. Arbitration provides parties with the freedom to choose who they will by adjudicating the dispute, which would lead to reassurance for their judgments .**
- 8. Implementation of arbitral awards, which are issued easily and easily due to the international interest in arbitration and the conclusion of international conventions thereon.**

Fourth: The relationship of arbitration to the judiciary: The recourse to arbitration is an implicit waiver of judicial immunity

- 1. Selection of arbitrators.**
- 2. Isolation of arbitrators.**
- 3. Judicial control over arbitral awards (nullification of arbitral award).**
- 4. Temporary or precautionary measures.**
- 5. Recognition and implementation of the arbitral award.**

Fifth: The most important legislation that organized arbitration in Iraq:

1. Civil Procedure Code No. 83 of 1969 The second part of the third book is devoted to articles (251) to (286).

- Behave its rules to arbitration in general.**
- Behave its rules to internal arbitration.**
- Do not find a text authorizing the implementation of foreign arbitration judgments.**
- Do not implement the arbitration award only after ratification.**

2. Investment Law No. (13) of 2006 Item (1) of Article (27) stipulates that disputes arising from the application of this law shall be subject to Iraqi law and jurisdiction And it is possible to agree with the investor to resort to commercial arbitration (national or international) in accordance with an agreement to determine the arbitration procedures and the applicable law).

3. Instructions for the implementation of government contracts No. (1) in 2014 item (2) Article (8) , distinguishes between national arbitration and foreign arbitration.

- National arbitration shall be in accordance with the procedures of the – Civil Procedure Law.**
- International arbitration (be in cases of necessity, projects the strategy is great and important, when it is one of parties is foreign).**
- Selection of an international arbitral tribunal.**
- Determining the location and language of arbitration.**
- Adoption of applicable Iraqi law.**
- Provide qualifications for dispute settlement workers Style.**

4. Law for the Implementation of Foreign Judgments in Iraq No. (30) in 1928.

5. Draft Commercial Arbitration Law of Iraq .. Principles contained:

- Independence of the arbitration clause: The arbitration clause remains valid even if revoked the original contract has been terminated or terminated unless it is the cause of invalidity the arbitration clause also applies as if the location of the contract is non-eligibility.**
- The arbitration clause and Sharing the arbitration.**
- Jurisdiction of Jurisdiction: The arbitral tribunal is competent by adjudicating all defenses relating to its non-competence.**

- Disqualification of judicial courts : in the event that the defendant upholds the arbitration clause before any application is made.**
- The arbitration is permissible only in matters which may be settled.**
- Arbitration in administrative courts.**
- implementation and reorganization of arbitral awards.**
- Establishing commercial arbitration center**
- .**

Sixth: The most important conventions on arbitration:

- 1. The Unified Convention for the Investment of Arab Capital in the Arab States in 1980, Iraq ratified this Convention under Law No. (44) of 1981, published in the Iraqi facts newspaper in issue No. (2832) of 1/6/1981.
(Especially for investment protection and flow).**
- 2. Riyadh Arab Agreement for Judicial Cooperation 1983. Iraq ratified this Convention under Law No. (110) Of 1983 published in the Iraqi facts newspaper No (2976) On 16 March 1984.**

3. Amman Convention for Commercial Arbitration of 1987. Iraq ratified it by Law No. 86 of 1988.

- Under article (4) of which established the Arab Center for Arbitration Commercial.**

4. Geneva Protocol on the Conditions of Arbitration of 1923. Iraq ratified it by Law No. 24 of 1928.

5. The Geneva Convention for the Implementation of Foreign Arbitral Awards of 1927.

Iraq did not ratify it.

6. New York Convention on the Recognition and Enforcement of Arbitration Provisions Foreign Affairs of 1958.

Iraq did not ratify it.

7. Washington Agreement on Settlement of Investment Disputes between States and Citizens of Other States of 1965 (ICSID).

- Joined by more than (160) countries.**
- The law of accession to the Convention was issued by law No. (64) for the year 2012 Published by facts newspaper No. (4283) on 26/7/2013.**
- officially joined and became a force on 17/12/2015 based on to article (68 / paragraph 2) of the Convention.**

-Terms of jurisdiction (to be party to existence an agreement on referral to ICSID, the dispute should arise for an investment, be a conflict between a state and other state citizen).

**- Its executive power (binding rule and not subject to any petition or Non-Conditional Treatment (53 / F1), each Contracting State shall recognize the decision as binding and as a final judgment of
of
the courts of States and a constitutional provision for its authors (Article 54 / F1).**

**8. United Nations Convention on Transparency In treaty–
arbitration between investors and the States signed by
Iraq in New York on 10/2/2017.**

- Application of the UNCITRAL rules**
- Information is available to the general public**

Seventh: Bilateral agreements in the field of investment promotion and protection Dispute Resolution by Oxid Center, Transaction and Protection Types (Fair, non-discriminatory, protection against expropriation and expropriation, MFN treatment).

- With France number (4241) in 6/4/2012, entered into force.**
- With Japan No. (4296) on 4/11/2013 ,entered into force.**
- With Armenia number (4309) on 10/2/2014 entered into force.**
- With Kuwait number (4346) on 20/12/2014 entered into force.**

- With Jordan number (4353) on 23/2/2013, entered into force.**
- With Germany number (4254) on 15/10/2012 , did not enter into force.**
- with Belarus number (4397) in 15/2/2016 did not enter into force.**
- Investment Incentives Agreement with the United States of America (4276) On 13 May 2013 , entered into force.**

Eighth: The most important investment contracts: (PPP contracts) (M / (32 / a) and contracts (B.O.T).

- Contract (B.O.T) / Build, Operate and Transfer (Transfer of Ownership).**
- A contract signed by the State to the investor or a national or foreign company to establish, manage and exploit a necessary public utility for a period of time at his own expense, and obtains a profit covering the costs of the project with to achieve a percentage of his profits, and be under the supervision and control of the state or one**
 - The investor shall undertake to transfer the project's possession to the State at the end of the contract free of charge .**

*** Its importance :**

– Helps to attract domestic and foreign investment and improve and develop utilities and economic development.

– Relieves the burden of limited government resources where the sector is responsible finance the establishment and operation of these facilities and assume financing risks Where the project company is an investor foreign investment and improving the balance of payments and to relieve deficit of the general budget.

- Establishing new projects and facilities, and injecting new funds into the market and to create new employment opportunities for national manpower overcoming unemployment and increasing national income.**
- Provide the appropriate environment for economic development through the transfer modern technological methods and technical means to the state especially when they are developing countries.**
- Governments can benefit from the expertise of the private sector in the delivery of the public service, because the private administration has greater efficiency and effectiveness than public administration, which improves the performance of these services.**

–An investor in (POT) contracts can make substantial profits compared to projects the other by entering into high–yielding investment areas, as it is can open doors to small investors by buying shares and project bonds.

– Opens the door to financing institutions by moving their stagnant funds by offering loans and credit facilities to the contracted investor according to B.O.T contracts.



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