



RESEARCH ARTICLE

Commercial Arbitration in the Provisions of the World Trade Organization and Iraqi LawItidal Abdulbaqi Yousef Aladhub^{1*}, Jabbar Ameen Jaber², Dhurgham Faghil Hussien³^{1,3} Private law Assist. Professor, faculty of Law, University of Basrah. Iraq² Private law Lecturer, University of Basrah. Iraq

ARTICLE INFO	ABSTRACT
Received: Apr 24, 2024 Accepted: June 13, 2024	Over the past years, commercial arbitration has become the magic solution that various countries, whether developed or developing, resort to to settle commercial disputes arising from trade agreements because of the advantages it enjoys, the most prominent of which is the freedom of the parties to choose the law, procedures, and arbitrators. Some developing countries consider their national laws to be deficient in keeping up with the process of arbitrators. commercial arbitration, Therefore, it resorts to joining international agreements, such as Iraq, which recently joined the New York Convention, while other countries tend to agree that their trade disputes should be settled through the Dispute Settlement Center in the World Trade Organization because of the advantages it provides for the benefit of developing countries, most notably the provision of technical aid in The field of arbitration and providing the service of introducing the organization's laws through the Legal Advisory Center, which entered into force in 2001.
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*Corresponding Author: itidal.yousef@uobasrah.edu.iq	

INTRODUCTION

It is customary for parties to resort to the judiciary to settle disputes arising from their commercial dealings, and in doing so we see them subject to the procedural rules stipulated in national laws. According to these texts, the case is heard before the national courts and the provisions contained in these laws are applied to the disputants. Some disputants may prefer Relying on other methods of resolving disputes in addition to the judiciary, and these methods include mediation, experience, conciliation, and arbitration, the last of which is the most widespread, especially in international disputes whose individuals do not want laws that are foreign and unknown to them to be applied to their disputes. Commercial arbitration, which is a special method of litigation that individuals resort to for settlement. International trade disputes that arise between them, and they prefer it because they choose the procedural rules and substantive laws that are followed and applied, in addition to their choice and of their own free will for the arbitration panel. In addition to that, it has many advantages, the most important of which are its speed, flexibility, and low cost, which makes it a special and unique system that the parties to the dispute prefer to resort to. In order to resort to arbitration, which gave it a special nature, the World Trade Organization established a dispute settlement body known as (B.S.D) that is competent to consider disputes that arise between member states¹.

Arising from the implementation of trade agreements, and its mission is to resolve disputes through appointing arbitrators, monitoring the actions taken and decisions issued, and ensuring their implementation in order not to prejudice the implementation of the agreements administered by the organization, as it was stated in the memorandum of understanding according to which this body was established in Article (2) of it that it “manages The rules, procedures, consultations, and dispute settlement provisions contained in the covered agreements have the authority to establish arbitration teams, approve appeal reports, monitor the implementation of decisions and recommendations, and authorize the suspension of waivers and other obligations imposed by those agreements.”

The Geneva Convention relating to the enforcement of foreign arbitration awards of 1927 was issued after the Geneva Protocol in 1923, and was replaced by the adoption of the New York Treaty of 1958. Iraq has officially joined the list of signatory countries to the Convention on the Recognition and Enforcement of Arbitral Awards, which is the 1958 New York Convention on Arbitration, thus bringing the number of countries acceding to the Convention to 168 countries. One of the most important goals of this agreement, which was first approved by the United Nations in 1958, is to facilitate and unify procedures for recognizing foreign arbitration awards between countries. The countries joining the agreement are obligated to recognize and implement arbitration awards issued in other countries whenever they meet the conditions specified in the agreement. Iraq joined the agreement in accordance with Law No. (14) of 2021 AD, which came into effect on the date of its publication in the Iraqi Official Gazette (Iraqi Gazette) in its issue issued on 5/31. / 2021 AD. Under this agreement, Iraq’s commitment to the Geneva Protocol of 1923 is considered terminated, as stated in Article 7 of it: “The Geneva Protocol Concerning Arbitration Conditions of 1923 and the Geneva Convention Concerning the Implementation of Foreign Arbitral Awards of 1927 shall terminate as soon as these contracting states become.” Committed This agreement to the extent of its commitment to it.” Iraq's accession to the provisions of the New York Arbitration Convention is considered a strong incentive for foreign investors and major international companies to conclude commercial and investment agreements with Iraqi institutions (private or public), considering that this agreement is considered a safety valve for foreign entities and provides them with reassurance of the possibility of obtaining their rights inside Iraq and under the supervision of Iraqi judicial institutions. However, the law on Iraq’s accession to the provisions of the New York Convention included three reservations:

The provisions of the Convention shall not apply to arbitration awards issued before the date of Iraq’s accession to the provisions of the Convention.

The provisions of the agreement should only be applied in accordance with the principle of reciprocity.

The provisions of the agreement shall only apply to disputes arising from legal relationships that are considered commercial in nature in accordance with the provisions of Iraqi law.

In order to understand this unique system, we will shed light on what it means, its types, and its legal nature, in two sections, as follows:

The first requirement

What is meant by arbitration and its types?

Arbitration is an important tool for resolving disputes, and many opinions have been expressed about it, and its types have varied, depending on the entity that practices it, or according to its scope, or the procedures that it follows. We will explain all of these issues in turn.

First branch

Definition of commercial arbitration

Arbitration is defined as “an alternative agreement method for settling international trade disputes, including disputes that arise.”

When applying the agreements included in the field of international trade,² it is also known as “a special system of litigation regulated by law, under which opponents in certain disputes are allowed to agree to remove an existing or future dispute from the jurisdiction of the public judiciary in the country in order to resolve this dispute by a private person or persons they choose.” opponents and rely on it to decide the dispute.³ Arbitration was also defined as “a mechanism that aims to decide an issue related to the existing relations between two or more parties by means of one or more persons called the arbitrator or arbitrators, who derive their authority from a special agreement and decide the dispute based on this agreement.” Without being authorized to do this task by the state.⁴ As for the definition of arbitration in legislation, we find that the Iraqi legislator did not regulate commercial arbitration with an independent law, but rather regulated it by including articles in the Iraqi Procedure Law No. 83 of 1969, amended in Chapter Four, which are Articles (251-276). However, the Iraqi legislator adopted the definition of arbitration contained in the Geneva Protocol, which was signed in Geneva 1923, by ratifying it, as Article 1 of it stipulates that “the signatories accept the provisions contained therein that each of the contracting states recognizes the validity of any agreement, whether it is related to present or existing disputes.” There will be an agreement in the future between parties’ subject to the law of a different contracting state whereby the parties agree to refer to arbitration disputes arising from a contract relating to commercial matters or other matters that can be settled by arbitration, whether or not the arbitration takes place in a country not subject to the jurisdiction of one of the parties.”

It should be noted that the draft Iraqi arbitration law proposed in 2011 defined arbitration as “a method chosen by the parties to a dispute to resolve it by one or more arbitrators instead of resorting to the judiciary.⁵”

Second section

Types of arbitration

There are several types of arbitration, some of which are according to the will of individuals, or according to the type of arbitration body, or depending on whether it is external or internal, and therefore we will discuss these types in turn.

First: Optional arbitration and compulsory arbitration

Voluntary arbitration: The principle of the rule of will plays a major role in this type (6), as both parties agree that the dispute should be resolved through arbitration. The Iraqi legislator has adopted voluntary arbitration in Article 251, which established the general principle of the possibility of resorting to arbitration, as it stipulates: “It is permissible to Agreement to arbitrate a specific dispute, and it is also permissible to agree to arbitrate all disputes arising from the implementation of a specific contract.” Likewise, Article 253 F1 stipulates: “1 - If the opponents agree to arbitrate a dispute, it is not permissible to file a lawsuit against it before the court except after exhausting the method of arbitration.”

As for compulsory arbitration, it occurs when the parties to a dispute are forced to resort to arbitration to resolve the dispute. This type is criticized because it violates the principle of consent established by various laws. Despite this violation, it is still in effect until the present time. One of the most important applications of compulsory arbitration is what is regulated by Egyptian law. No. 95 of 1992 AD regarding the capital market in a number of its articles, such as Articles (10 and 52). As

for Iraq, the Iraqi legislator did not stipulate in the Code of Procedures among the texts that dealt with arbitration (7), nor in other laws, for compulsory arbitration. However, it should be noted that Iraq has ratified On the Washington Convention for the Settlement of Investment Disputes by Compulsory Arbitration.

Second: Free arbitration and institutional arbitration

Free arbitration gives the parties complete freedom to determine the rules and procedures to be followed by the arbitrator they choose in order to decide the dispute before him in accordance with these rules, whether procedural or substantive. This type of arbitration is also the least expensive, most flexible and quick, especially for state contracts, as arbitration sessions are held confidentially without It must be disclosed, and free arbitration is older than institutional arbitration (8).

The Iraqi legislator has indicated in the Code of Procedures the possibility of resorting to free arbitration, and this is what is understood from the text of Article 265 / F 1, which stipulates that: "1 - ... unless the agreement on arbitration or any subsequent agreement includes the arbitrators being explicitly exempted from it or Certain procedures followed by arbitrators."

As for institutional arbitration, it is arbitration undertaken by international or national bodies or organizations in accordance with the rules and procedures previously prepared in international agreements or the decisions establishing these agreements (9). Examples of these centers include: The International Chamber of Commerce in Paris (I CC), the American Arbitration Association (AAA).

The arbitration that takes place through the dispute settlement body in the World Trade Organization is considered institutional arbitration, as the member states of the organization are forced to resort to the body for settling disputes arising from the application of all trade agreements sponsored by the organization. In order for the organization to facilitate the adoption of the arbitration route by the members, it announced its commitment to the countries. Developing members offered assistance by providing technical aid in the field of arbitration 10, but it was not at the required level because the technical aid provided proved inadequate in the face of the large numbers of cases filed by these countries.

Although commercial arbitration through the settlement body established by the organization is an effective means of resolving commercial disputes, there are several drawbacks to this matter, the most important of which is that developing countries cannot always bear the high and exorbitant costs required by the procedures taken by the body. The process of litigation through arbitration requires exorbitant sums, which developing countries cannot afford as their budgets are characterized by poverty and lack of material resources. In addition, developing countries lack arbitration expertise, which makes them the losing party in the arbitration process and thus finds themselves forced to seek the assistance of an expert, which adds a new burden. It is represented by the fee of the expert foreign arbitrator, especially if the dispute is prolonged 11.

Third: absolute arbitration and arbitration by law

Absolute arbitration: in which the arbitrator is not obligated to apply procedural and substantive rules, but rather rules according to the rules of justice and fairness, in addition to the rules of law 12. The Iraqi legislator referred to this type of arbitration in Article 265/F2, saying: "2 - If the arbitrators are authorized to conciliate They are exempted from complying with pleading procedures and the rules of the law, except those related to public order."

As for arbitration by law, it is also called ordinary arbitration, as the arbitrator must apply the rules of substantive law, and the Iraqi legislator stipulated this type of arbitration in Article 265/F1, which stipulates: "1 - Arbitrators must follow the conditions and procedures stipulated in the Code of

Procedure unless it includes The agreement on arbitration or any subsequent agreement explicitly exempts the arbitrators from it or sets specific procedures for the arbitrators to follow.”

We find, within the framework of commercial arbitration through the Dispute Settlement Body established by the World Trade Organization, that the organization has established its own procedural laws that the member parties of the organization must adhere to, and based on its pioneering role in resolving commercial disputes and achieving equality among all members in a way that ensures non-discrimination between States and to achieve adequate and fair knowledge of the systems and laws applied by the organization 13 . The organization has established a consultative center whose goal is to provide legal services and technical assistance in the field of dispute resolution and to familiarize non-advanced countries that are members of the organization or those that have been nominated to join it with the laws of the organization within the framework of implementing Article (27) of Memorandum of understanding regarding the settlement of disputes within the organization 14.

Fourth: National arbitration and international arbitration

National arbitration is to resolve an existing dispute between individuals within the country, and is not related to international trade, as the arbitrator decides the dispute by applying normal litigation procedures 15. The Iraqi legislator referred to national arbitration in the Code of Civil Procedure in Article (251), as it permitted resorting to national arbitration. In disputes arising from the implementation of some agreements, the Iraqi Civil Code also stipulates that “the law of the state in which the common domicile of the contracting parties is located shall apply to the contracting parties if they share a domicile. If they differ, the law of the state in which the contract was concluded shall apply unless the two contracting parties agree or it becomes clear from the circumstances.” Another law is to be applied.”

While international arbitration relates to a dispute of an international nature 16, Iraq joined the protocol on the terms of arbitration signed in Geneva on 9/24/1923, which included recognition of the validity of agreements between contracting states regarding resolving disputes related to commercial and other issues through arbitration.

The second requirement

The practical and legal nature of arbitration

Arbitration is used to resolve commercial disputes and is preferred over all other means due to the advantages it enjoys that distinguish it in terms of application from other means of resolving disputes, despite the defects that accompany this application. Arbitration also has a special legal nature that was a fertile field for the interpretations of jurists. We will discuss all of them. The above in the following two sections.

First branch

Advantages and disadvantages of arbitration

Arbitration is used as an independent system in commercial disputes because it has a large number of advantages that make it ahead of many similar means and systems for resolving disputes. It also has defects that may put it in an embarrassing position compared to other means of resolving disputes. Accordingly, we will discuss this section in two paragraphs. The advantages of resorting to arbitration in the first, and in the second we discuss the disadvantages of applying arbitration in resolving judicial disputes.

First: Advantages of arbitration

Speed of procedures, as complexity and slowness are among the characteristics that accompany ordinary judiciary, which makes many who conclude contracts resort to taking a path other than the means of ordinary litigation. Perhaps speed, which is the most prominent characteristic that arbitration possesses, was a factor that attracted these people 17.

The flexibility and simplicity enjoyed by arbitration procedures has a positive impact, as the parties have wide freedom to choose arbitrators, and the choice is based on the complete agreement between the parties and in accordance with the law, so arbitrators are chosen whose opinions, actions and decisions they trust.

Commercial arbitration decisions are more accurate and fairer than those issued by the ordinary judiciary. The reason for this is that arbitration decisions are usually issued by experienced and multidisciplinary persons, and they do not necessarily have to be legal professionals, such as bankers, merchants, transporters, accountants, and farmers, each of them. The dispute is considered in terms of its jurisdiction and according to the type of dispute and the place of arbitration 18.

Arbitration reduces conflicts of laws. For example, when investors sign contracts with developing countries and stipulate that disputes be resolved through arbitration, their goal is to get rid of the legal provisions of these countries that may conflict with the laws of their countries.

Parties usually prefer to use institutional arbitration systems because of the prior and detailed organization they provide for most arbitration matters, which enables them to avoid the issue of lack of experience in setting arbitration rules and procedures and consuming more time in agreeing on these rules, as is the case in the free arbitration system. This is in addition to the administrative, financial and executive capabilities that these bodies enjoy and place in the hands of individuals, as well as the experience that these bodies enjoy due to the presence of practical and realistic rules that have been tried and proven successful in many of the disputes in which they have been decided.

The agreement of the parties to the dispute to resort to arbitration and all its details, such as the law that governs the dispute from the procedural and substantive aspects, works to preserve and maintain the continuity of relations between the parties because they agreed to resort to arbitration of their free will and accepted in advance the decisions issued by the arbitrator and they implement them voluntarily and by choice, and this What results in replacing conflict with harmony.

Second: Disadvantages of arbitration

Despite the advantages enjoyed by arbitration, it is not without some disadvantages, which are:

Arbitration requires more costs than regular judiciary in terms of the fees paid to the arbitrator when compared to what is paid to the judge, as the latter is satisfied with the salary he receives from the government, as the parties bear the arbitration expenses along with the fees of the arbitrators who receive them 19.

It is difficult to consider multi-party disputes through arbitration, while when there are multiple disputes, it is easy to consider them before one judge, as they are combined and concentrated before one court.

Arbitral rulings are not implemented directly once they are issued, as is the case in judicial rulings that derive their force from the law and add binding to the decision issued by the court. Judicial rulings are issued in public and are issued in front of everyone, meaning that they have the authority of *res judicata*.

It may happen in some cases that the parties, or one of them, do not choose the arbitrators to represent them, which leads to a lack of judicial guarantees. This situation also occurs when the parties deliberately choose arbitrators for special motives, as this leads to depriving them of some of the judicial guarantees that are protected by the principle of the rule of law. Among these guarantees

is that if the arbitrator makes a mistake or transgresses the general principles of the law that must be applied, there is no guarantee for the arbitrator to guarantee 20 his right to prove his mistake.

Second section

The legal nature of arbitration

We said above that jurisprudence has differed in determining the legal nature of arbitration, and the trends in this regard have varied into four directions, as we will show below.

First: The contractual nature of arbitration

Supporters of this trend argue that the arbitration system is of a contractual nature, and they base this on the fact that arbitration is a system that arises from the work of the parties, whether it is an agreement or a contract, and this is the role of the principle of the authority of will, and the action issued by the arbitrator derives its legitimacy from the agreement and all parties must abide by it. With its content 21.

According to this theory, arbitration is not a judiciary, but rather the implementation of a consensual contract binding on both sides. Therefore, the source of the executive force of the arbitration award is the arbitration agreement, which explains why these decisions acquire the force of *res judicata* and are not subject to appeal, because it is consistent with the will of the disputing parties.

Second: The judicial nature of arbitration

Arbitration is of a judicial nature as it is considered a compulsory judiciary. Once the parties agree on it, it becomes binding on them, and in this capacity it replaces the state's compulsory judiciary. Although the work of the arbitrators is based and based on an arbitration agreement, this agreement is not the only basis for the arbitrator's work. The work of the arbitrator is a judicial work of significance. As for the judicial work issued by the judicial authority in the state, the arbitrator's mission is a judicial mission and his ruling has the same effects as the judicial ruling²².

We find that the Iraqi legislator stipulated this opinion in the Code of Procedure in several articles, including Article 261: "1 - The arbitrator may be dismissed for the same reasons that the arbitrator dismisses, and this can only be for reasons that appear after the appointment of the arbitrator. 2 - The challenge request shall be submitted to the competent court in the first place. Considering the dispute, its decision in this regard shall be subject to discrimination in accordance with the rules set forth in Article (216) of this law."

Article 266: "The arbitrators shall decide the dispute on the basis of the arbitration contract or its condition, the documents, and what the opponents submit to them. The arbitrators must set a period for them to submit their lists and documents. They may decide the dispute based on the requests and documents submitted by one side if the other party fails to submit what it has." aspects of defense within the specified period."

Article 270: "1 - The arbitrators shall issue their decision by agreement or by a majority of opinions after deliberation among themselves collectively and in accordance with what is stated in this law, and it must be written in the same way as the award issued by the court. 2 - The decision must include in particular a summary of the arbitration agreement and statements The parties, their documents, the reasons for the decision, its text, the place where it was issued, the date of its issuance, and the signatures of the arbitrators."

Third: The mixed nature of arbitration

Arbitration has a legal nature that is a combination of the two previous things, because arbitration is considered a type of contract, when it comes to the origin of arbitration, that is, the agreement between the two parties ^{23,26}, and it is viewed as a judiciary when the ruling is looked at. It is

described as having a complex nature, both the contractual nature and the Judicial. The voluntary element is the one that prevails in the first stage of arbitration, which is the stage of agreeing to resort to it as a method of resolving the dispute that has arisen or will arise later. Then in another stage of arbitration, the judicial nature of it appears through the ruling issued by the arbitration panel.

Fourth: The independent nature of arbitration

There is a fourth trend that calls for arbitration to be independent - that is, of a special nature or a special judiciary - as the contract is not the essence of arbitration, and arbitrators are not always appointed by agreement of the parties, but rather they can be appointed by arbitration centers, and therefore the theory that says that arbitration is of a contractual nature is not. It finds a place in this hypothesis, as is the case with what was said about the judicial nature of arbitration. If we look at judicial arbitration, we find that the judiciary is responsible for appointing arbitrators, not the parties to the dispute, and the same is true in institutional arbitration, where the management of the arbitration institution usually chooses the arbitrators, and this opinion is accepted. According to jurists, it makes arbitration a distinct method from other means of resolving disputes, and that commercial disputes must be resolved in a way that does not place them under the authority of national legal systems 24,25.

CONCLUSION

After we have finished reviewing our research, we find it necessary to state the most important results and recommendations that we have reached, according to the following:

The commercial arbitration system is an effective system for resolving commercial disputes and is preferred by most countries as an international means of settling disputes arising from trade exchange and the application of international trade agreements.

The World Trade Organization established a special center for settling commercial disputes in accordance with a memorandum of understanding that helped resolve many commercial disputes.

Commercial arbitration is an effective means of settling commercial disputes, but it is described as being expensive and suitable for developed countries and not suitable for developing countries due to the lack of material and human resources.

The Iraqi legislator encouraged resorting to arbitration and placed provisions within the legal texts of the Code of Procedure. In addition, Iraq joined the international agreements that regulate the process of international commercial arbitration.

We found that arbitration has a number of advantages and some negatives. Despite this, it is preferred by disputants to resolve the commercial dispute at hand.

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