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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 operating in the field of oil and gas invest large amounts of 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 fields of oil and gas, from the beginning of the deal, to manage these risks clearly. Accordingly, the parties to the contract are keen when formulating its terms 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 due to lack of confidence in the impartiality of the national judiciary. 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 subject of stubbornness is the sharing of production between them. And between the host country or an extraction contract or a service provision contract.

Introduction

Companies operating 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 consideration in any project related to international energy (oil), as it is necessary for the parties to the investment relationship in the fields of oil and gas, and since At the beginning of the deal, these risks must be managed clearly, and accordingly, when drafting its terms, the parties to the contract are keen to establish a dispute settlement mechanism, whether these parties are companies, individuals, or governments, especially since foreign companies do not have the desire to resort to national courts due to 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 fulfills the investment (concession) granted to one of the companies, whether the subject of the contract is sharing production between it and the host country, an extraction contract, or a service provision 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 beginning to develop a plan to address future disputes, and to choose and choose dispute settlement mechanisms in the way they desire. Arbitration is considered one of the most important of these mechanisms. There is

no doubt that precise 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 in resolving disputes facing investment in the field of oil and gas, but will resorting to arbitration in disputes related to oil investment contracts achieve the desired success? Answering this question requires examining the subject in two sections: in the first we examine the definition of arbitration, and we devote the second to examining the arbitration agreement in oil investment agreements and contracts.

Definition of Arbitration

Arbitration has become the most widespread means of settling investment disputes, especially in the international energy sector. Arbitration is a type of judiciary alternative to state judiciary. The Iraqi Civil Code did not define arbitration, but Article (1790) of the Code of Judicial Judgments defined it by stipulating that arbitration is the two adversaries taking a ruling with their consent to decide their dispute and claim.

Arbitration is known as the agreement of the opponents to refer the dispute to a neutral third person or an independent body to decide on it with a decision binding on them (), and in general there are dozens of other definitions of arbitration, all of which agree that arbitration is a consensual agreement whose purpose is to distance the contractual relationship from the supervision and control of the national courts by choosing the individual or The body that decides disputes that arise in connection with this contractual relationship. Defining arbitration requires explaining the justifications for resorting to it, identifying its types, and explaining the position of Iraqi law on arbitration in the field of oil investment. This is what we are discussing in the following three demands:

Justifications for Resorting to Arbitration

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

1- The desire of investing companies to settle disputes in a simple manner away from the high costs and slowness of litigation procedures and issuance of final rulings that characterize the national judiciary, 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 party represented by the arbitration panel.

3- The multiple levels of litigation (beginning of appeal, cassation) are long-term, and this prolongation 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 () .

4- Settlement of investment disputes related to oil and gas requires technical expertise and knowledge of the foreign language (English) in which the contract was drawn up, which is available in arbitration bodies, as these bodies do not need to seek the assistance of technical experts or translators to translate huge dispute documents that require a long time to translate. And exorbitant expenses, compared to a judge who may be well-versed and proficient in the law, but has little experience in oil and gas affairs, so he is unable to decide on disputes between the conflicting parties, and for this reason resorting to arbitration was the appropriate solution ().

5- The immunity of the country hosting the investment and its institutions prevents it from being disputed before the national judiciary, and thus the investor is 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 except disputes submitted to it by states in accordance with the conditions stipulated in the court's statute (). Therefore, the country whose nationality the investor holds sometimes intends to waive its immunity in order to guarantee the rights of the investor when the second party to the dispute is a body or institution affiliated with the country hosting the investment.

Types of Arbitration

Arbitration varies according to the foreign status of the disputing parties and according to the arbitration procedures and the authority supervising it. In terms of its foreign status, arbitration is divided into national arbitration and foreign (international) arbitration, and in terms of arbitration procedures and the authority supervising it, it is divided into private (free) arbitration and institutional arbitration.

First: National arbitration, foreign and international arbitration:

Arbitration is considered national if the dispute is national in all its elements, and it is decided by national arbitrators who issue their ruling within the territory of the state in accordance with its national laws. Arbitration is considered prophetic if one of its elements is linked to external or foreign factors, whether this element is related to the subject of the dispute, its parties, the applicable law, or the place. Arbitration procedure. International arbitration is the arbitration that takes place at the level of international commercial transactions. The Iraqi law () did not include any details on foreign or international arbitration, whether in the laws or in the judicial agreements that Iraq ratified from the 1930s until now. Likewise, the Iraqi Implementation Law () did not stipulate the rulings of foreign arbitrators, nor even the national arbitration rulings related to With international obligations and contracts, to give legitimacy to foreign commercial arbitration it is not sufficient to recognize foreign arbitration awards and implement them within the country. Rather, it requires more than that, as special legislation must be issued that permits it or accession to an international agreement obligating it ().

Second: Private (free) arbitration and institutional arbitration: Private arbitration, called consensual arbitration, is what the parties agree upon outside the framework of any institution or

arbitration centre, whether nationally or internationally connected. Rather, it is conducted in accordance with the will of the adversaries in determining all the rules that regulate it. The various stages, starting from selecting the arbitrators, passing through the location of the arbitration panel, how to conduct the arbitration procedures, and the law governing the dispute. More precisely, free arbitration is arbitration that is not subject to any of the systems of national or international arbitration centers ().

As for institutional arbitration, which is called systemic arbitration, it is arbitration managed and supervised by one of the competent arbitration bodies in accordance with its approved arbitration rules. Some of the institutional arbitration bodies actually conduct arbitration, and some of them simply facilitate the arbitration task. They are permanent arbitration centers in which there are lists of the names of their accredited arbitrators (). Parties to disputes arising from investment contracts in the field of oil can seek assistance from arbitrators to settle these disputes through arbitration.

Results

1 - Arbitration is one of the most important means to help attract foreign capital to invest in the oil field. Out of concern for their interests, the oil-producing countries have agreed to remove oil investment disputes from the jurisdiction of their national courts under investment laws, under laws regulating arbitration, or under investment contracts, regardless of Of its kind, as one of the guarantees it provides to foreign companies, as it is concerned about the bias of the national space toward its state and sees arbitration as a neutral means that calls for reassurance.

2 - The rulings of international arbitration bodies have established that a state that accepts an arbitration clause in oil contracts that it concludes with foreign companies cannot cling to its judicial immunity before the arbitration body, because by accepting the arbitration clause, it has implicitly waived its immunity, and because that is inconsistent with the principle of good faith in implementing Obligations are one of the stable principles in international transactions, and trying to waive the arbitration clause after agreeing to it 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 obligations. Rather, it has become clear to us that there is a stable rule in international jurisprudence and space, according to which the arbitration clause remains valid and enforceable even if the host country terminates the contract of its own volition. This rule was confirmed by the Washington Convention of 1965 regarding the settlement of investment disputes between the state and nationals of other countries. For all of 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 are linked to the adoption of it by national law. That the national law recognizes the obligations stipulated in arbitration agreements and treaties, and provides appropriate mechanisms to implement the decisions issued by the arbitrators, in addition to the national law filling the gaps and shortcomings in the arbitration agreements or in the arbitration clause contained in oil investment contracts. Therefore, we find that most countries have laws to deal with both local arbitration and international arbitration.

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

5- Many of the oil investment contracts that Iraq concluded with foreign companies included a provision for resorting to international arbitration to resolve disputes resulting from the interpretation or implementation of these contracts, but this introduction of international arbitration was not according to a studied philosophy and consistent with the overall Iraqi legal system, but rather it was a partial take. Incomplete, necessitated by the claims of foreign companies and in response to the rule of practical necessities, without entering into an explicit acknowledgment of international arbitration. Iraq is like most countries that have not ratified the New York Convention on the Recognition and Enforcement of Arbitration Awards of 1958 out of fear of compromising state sovereignty.

6 - It is permissible to agree in oil investment contracts that the arbitration shall take place outside Iraq or in accordance with a foreign law or foreign custom as long as the provisions of this foreign law or its customs do not contravene public order or public morals in Iraq, as Article (32) of the Iraqi Civil Code prohibited the application of The provisions of foreign law in one case are that they violate the system or morals in Iraq. The current arbitration centers in Iraq, such as the Iraqi Center for International Arbitration in Najaf Al-Ashraf, lack a law upon which to base their establishment and organize their work, which forced them to rely on the Non-Governmental Organizations Law No. 12 of 2010. And register itself as a civil society organization.

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18) See the National Points Company Investment Zones Allocation Law.
19) Iraqi Investment Law No. 13 of 2009.
20) Law of Establishment of the Iraqi Oil Company No. 123 of 1997.
21) Private Investment in Crude Oil Refining Law No. 14 of 2007.
22) Oil and Gas of the Kurdistan Region 1 No. 22 of 2007.
23) Article (111) of the Iraqi Constitution of 2005 stipulates (oil and gas are the property of all the Iraqi people in all regions and governorates).
24) Article (50/Second - 2) of this law stipulates (if the dispute is not resolved through negotiations, both parties may submit the dispute to arbitration).
25) Article (50 / Second - 3) of this law stipulates (any arbitration between the minister and the authorized person shall be conducted by agreement of both parties and in accordance with one of the following rules: - A - The Washington Convention of 1965).
26) Article (27/First) of this law stipulates: "Disputes arising from the application of this law are subject to Iraqi law and the jurisdiction of the Iraqi judiciary."
27) Article (25/1) stipulates: "The powers of the Center shall extend to any legal dispute arising directly from an investment between a Contracting State (or one of its constituent divisions which that State appoints to the Center or its agencies that it appoints)."
28) The agreements of the Iraq Oil Companies of 1920, Mosul Oil of 1932, and Basra Oil of 1938 were stipulated.

29) Article (4/37) of this contract stipulates: "Disputes arising from or relating to this contract must be settled finally..., in accordance with the arbitration rules of the International Chamber of Commerce by three arbitrators appointed as a layer according to the aforementioned rules."
30) Article (33) of the Arbitration Rules of the United Nations Committee stipulates international trade law.
31) A stipulation upon technical service with the Airab Company for the year 1968 in Iraq stipulates: "...the arbitration shall be conducted according to the rules and procedures set by the President.