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# International Commercial Arbitration and the Possible Application Thereof in Iraq

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## :Introduction

International commercial arbitration is a special judicial system based primarily on an agreement, be it an arbitration clause or an arbitration agreement (compromise), between parties to a dispute. It is therefore a system aiming at settling commercial disputes by submitting them to a single arbitrator, or an arbitral panel, or an arbitral tribunal (e. g. , the International Court of Arbitration). It is therefore also a means for settling an existing or future dispute that entails refraining from resorting to the competent judiciary. It is also an extra – judicial action aiming at establishing justice between people. The aim of arbitration is to bring justice to parties in conflict, but it is also designed to preserve peace among them, by providing solutions that are deemed satisfactory by each party, and

through direct confrontation. It is a technical means for peaceful cooperation between countries with different systems. Resorting to international commercial arbitration is intended to solve a dispute based on a desire for reconciliation, to thereby avoid private retribution, without waiving the protection of the law, although it does entail waiver of state judges' jurisdiction to rule over the dispute, since the parties choose their own judge.

This type of Arbitration is called "international" if it relates to international commercial interests. Arbitration is also used in other areas, e. g. , personal status and tribal arbitration in Iraq. However, our study concentrates on international commercial arbitration and the possible application thereof in Iraq.

#### Commercial Arbitration in Iraqi Law

Articles 251 – 276 of the amended Civil Procedures Code No. 83/1969 [hereinafter called the CPC] are dedicated to arbitration in general and not commercial arbitration per se. The principle is to allow an arbitration agreement. Arbitration, as stated by the Court of Cassation in its Judgment No 363, First/974 of April 5th, 1975, is of only one type, and the only condition for the existence and effectiveness of arbitration is that it be fixed in writing, pursuant to Article 252 of the CPC. (1) Therefore the agreement can be

made at the time when the contract is concluded, or in a separate agreement, or during court proceedings...

Furthermore, an arbitral ruling cannot be enforced, whether the arbitrators were

appointed by the judiciary or under an agreement between the parties, unless the ruling is

approved by the competent court, on one of the two parties' request. Under Article 274 of

(1) [Article 252: An agreement to arbitrate may be established only in writing. The agreement shall

specify the subject of the dispute. This agreement may be used as proof in a pleading in court. If the court

acknowledges the parties' agreement, it shall decide to consider the action suspended until an arbitral ruling

is issued.

the CPC, the court may approve or nullify all or part of an arbitral ruling. The court,

when nullifying all or part of the ruling, may return it to the arbitrators for adjustment, or

may rule itself, if it has jurisdiction to do so.

It should be noted that the provisions of the CPC, are limited to arbitration in Iraq either

between Iraqi parties, or between Iraqi and foreign parties. As aforementioned, the CPC

makes no reference to international commercial arbitration.

Also Iraqi law considers arbitration to be domestic as long as it is conducted in Iraq, even

if one of the parties is foreign. Hence, such arbitration is subject to the CPC with respect

to procedures, the competent court's review, and means of appeal.

Article 69 of the General Requirements for Civil Engineering Contracts issued by the

Iraqi Ministry of Planning in 1988 makes arbitration compulsory in the case of a dispute

between an employer and an executing engineer. Article 17 of the General Requirements

for Electrical Mechanical Engineering Works stipulates similarly. Both articles make

arbitration subject to Iraqi law and to the jurisdiction of the Iraqi judiciary system.

Finally, a committee of commercial law experts from the Baghdad University's Law

School, the State Consultative Council, and the Council of Ministers completed a

separate draft commercial arbitration law in early 2010, which is now before the

Parliament for consideration.

#### Iraqi Courts Jurisdiction over an Arbitration Ruling

The question is to know if the court's role in reviewing and approving arbitration rulings

is limited to the procedural aspect, or if it does extend to the subject matter of the dispute.

Legislators give the judiciary the authority to determine the conformity of arbitral rulings

in terms of both merits and form. The judiciary's review of an arbitral ruling is thus

similar to the Court of Cassation's review. Such review consists of the following:

1–Ensuring the validity of the procedures followed in the arbitration, particularly the

compliance with the principle of confrontation in litigation.

2–Ensuring the validity of the arbitral panel’s decision and its conformity with the

general principles of the law and rules of public order and morals.

3–The court may not examine matters which the arbitrator is empowered to decide, e. g. ,

summation of facts, weighing of evidence, and the exercise of prerogatives granted by the

legislator to a judge (matters of merits).

Article 272 (1) of the CPC states: “An arbitral ruling, whether arbitrators were appointed

by the judiciary or under an agreement, may not be enforced, unless the competent court

approves the ruling based on one of the parties’ request after the established fees are

paid. ”

As mentioned in Article 274, the court may approve an arbitral ruling or nullify all or part

of it. The court, when nullifying all or part of the ruling, may return it to the arbitrators

for adjustment, or may rule itself, if it has jurisdiction to do so, and the ruling issued is

subject to appeal.

Foreign Arbitral Rulings’ Enforcement in Iraq

No provisions of the Iraq’s CPC provide for the enforcement of foreign arbitral rulings.

Also provisions of Law No. 30/1928 on the enforcement of Foreign Rulings do not help,

as they only apply to final judgments issued by competent foreign courts. It is therefore,

necessary in this regard to refer to international conventions and to Iraq's position on

such conventions, as follows:

I. Iraq's status in international conventions:

1—Under Law No. 24/1928, Iraq ratified the 1923 Geneva Protocol on Arbitration

Clauses, known as "The Protocol on Arbitration Matters" according to the Iraqi

translation. However, Iraq has not ratified the 1927 Geneva Convention on the

enforcement of Arbitral rulings.

2—Iraq has not ratified the 1958 New York Convention on the Recognition and

Enforcement of Foreign Arbitral rulings, nor has it ratified the 1965 Washington

Convention on the Settlement of Investment Disputes between States and Nationals of

Other States.

II. Iraq's status in regional conventions:

1—Iraq has ratified the 1952 Arab League Convention on the enforcement of rulings.

2—Iraq has ratified the 1981 Unified Agreement for the Investment of Arab Capital [in

the Arab States]. Arbitration under this convention is limited to the application and

interpretation of the clauses of the convention, and does not treat disputes arising from

investments. The convention does not refer to procedures for requesting enforcement in a

given state, hence submitting these procedures to domestic law. However three months

after an arbitral ruling is issued, the matter may be submitted to the Arab Investment

Court [for a decision] on what it deems appropriate to enforce.

3–Under Law No. 110/1983, Iraq ratified the 1983 Riyadh Convention on Judicial

Cooperation [between States of the Arab League] Article 37 of the convention [provides for] the enforcement of arbitral rulings when not in violation of the Islamic

Law (Shariah), the Constitution, public order, and morals.

4–Under Law No. 86/1988, Iraq ratified the 1987 Amman [Arab] Convention for

Commercial Arbitration. This convention is the first one covering international

commercial disputes [to be joined by Iraq]. It allows a state to refuse to enforce an

arbitral ruling if:

a. The law of the contracting party requested to enforce a ruling does not permit the

resolution of disputes by arbitration.

b. An arbitral ruling is issued to enforce an arbitration clause or contract that is

invalid or not final.

c. The arbitrators are incompetent according to the arbitration clause or contract.

d. The parties have not been properly served notice to appear.

e. The arbitral judgment contains that which violates the provisions of the Islamic

Law (Shariah) or the public order of the contracting party.

The 1983 Riyadh Arab Convention for Judicial Cooperation

The Convention was issued on 6 April 1983, signed by 21 Arab countries, and ratified by Iraq in

Law No. 110 of 1983. It comprises 72 articles treating primarily matters relating to judgments

issued by the judicial courts (judgments, letters rogatory, legal assistance, the publication of

judicial documents, and extradition of accused or convicted persons).

However, the aforesaid Convention devotes only one article to arbitration provisions [Article

37]. The key points of this article are as follows:

I. [Article 37 of the Convention] treats recognition and execution of arbitral awards. It contains

no provisions on arbitral agreements or procedures or the law that must be applied. Under this

article, the judicial authority may not examine any subject of arbitration.

II. When recognition and execution of an arbitral award is requested, the requesting party must

submit a certified copy of the award accompanied by a certificate issued by the judicial authority

(the judicial authority where the arbitral award is issued) stating that the award is enforceable.

The requester must also provide a certified copy of any written agreement (arbitration

agreement). If there is an agreement to resort to arbitration based on a clause stated in the

original contract, a copy of the contract must be provided.



III. [Article 37 of] the Convention enumerates the cases in which execution of an arbitral award

may be denied:

1–The law of the requested state does not permit settlement of the subject of the dispute

through arbitration.

2–The arbitrators issue an award in execution of an invalid arbitration clause or agreement.

3–The parties have not been given proper notice [to appear].

4–The arbitral award violates the provisions of the Islamic Law, public order, or morality.

IV. Article 37 [of the Convention], which concerns arbitration, refers to Article 30 [of the

Convention]. Article 30 enumerates the cases in which a state that is requested to execute an

arbitral award may refuse to recognize and execute the award. These cases are as follows:

1–The award violates the provisions of the Islamic Law, the provisions of the constitution,

public order, or morality of the requested contracting party.

2–The award is made in absentia, and the award debtor has not been properly notified so as

to allow him to defend himself.

3–The rules of law of the requested contracting party (provisions on legal execution against

incompetent persons or persons with diminished competence) are not observed.

4–The dispute in which the award was made was the object of a judgment issued in the

same matter between the same parties having the force of res judicata before the

requested contracting party or a third contracting party recognized by the requested party.

Article 37 of the 1983 Riyadh Arab Convention for Judicial Cooperation stipulates the following

under “Arbitral Awards”:

“Without prejudice to Articles 28 and 30 of this Convention, arbitral awards shall be

recognized and executed by any of the contracting parties in the same manner as

stipulated in this chapter, subject to the rules of law of the requested contracting party.

The competent judicial authority of the requested party may not examine an arbitration

subject and may refuse to execute an award in the following cases alone:

“a. The law of the requested contracting party does not permit settlement of the

subject of the dispute through arbitration.

“b. The arbitral award is issued in implementation of an arbitration clause or

contract that is invalid or has not become final.

“c. The arbitrators are not competent under the arbitration contract or clause or

law under which the arbitrators issued the award.

“d. The parties have not been given proper notice to appear.

“e. The arbitral award violates the provisions of Islamic law, the public order, or

the morality of the requested contracting party.

“The party requesting [recognition] and execution of an arbitral award must submit a

certified copy of the award accompanied by a certificate issued by the judicial authority

stating that the award is enforceable.

“In the event of a proper, written agreement by the parties [obliging themselves] to

submit to the authority of arbitrators to decide a specific dispute or disputes that may

arise between the parties in a specific legal relationship, a certified copy of the aforesaid

agreement must be submitted. ”

Article 28 concerns cases of the jurisdiction of the courts of the contracting party in which a

judicial judgment is issued, because the execution of court judgments in the states that signed the

Convention is a primary concern of the Convention. Article 37 above is the only article of the

Convention concerning the execution of arbitral awards.

Article 30 concerns the cases in which recognition of a judicial judgment issued by a state that

has signed the convention is to be denied.

**Iraqi Case Law on Arbitration**

It must be stated first that prior to April 9th 2003, the decisions of the Iraqi courts on

commercial arbitration were greatly influenced by the position of the then government

that did not at that time encourage arbitration, which it viewed as infringing on its

sovereignty. This is evident in Letter No. 920 of December 9, 1973 of the Council of

Ministers to the Iraqi Ministry of planning. The letter states: “The international

arbitration clause violates the principle of Iraq’s sovereignty and diminishes the value of

the Iraqi courts”. Nonetheless, the Iraqi government was compelled to accept an

arbitration clause in late 1999 in commercial contracts under the oil – for – food and

medicine memorandum of understanding. Based on our personal knowledge, it was the

case in two such contracts. Thus, we see that the Iraqi judiciary’s position wavered

between approval and rejection of commercial arbitration. Below are several rulings in

this regard:

1–Decision No. 262/Civil [Court] First/974 of December 14, 1974,

The decision states: “An agreement between an Iraqi citizen and a foreign company

operating in Iraq to resolve their disputes through an arbitral panel in a foreign chamber

of commerce does not conflict with the provisions of Article 15 of Iraqi Civil Code [No.

40– of 1951]• 2. Decision No. 132/987 of August 28, 1978 of the Legal Codification Chamber, relating to Iraq’s joining of the 1958 New York Convention on the

Recognition and Enforcement of Foreign Arbitral rulings. The decision states:

“The director – general of the International Textile Manufactures Federation in

Zurich Switzerland requests the Ministry of Justice to see that Iraq undertakes to

join and enforce the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral rulings”.

International commercial arbitration includes a foreign element, inasmuch as it may be

conducted abroad and it is assigned to foreign arbitrators who may apply a foreign law

with respect to the merits or procedures. Accordingly, the enforcement of foreign

arbitration rulings in the Republic of Iraq faces obstacles relating to law and sovereignty.

The competent Iraqi court must approve arbitration rulings rendered in Iraq, and therefore

the problem remains when arbitration rulings are issued outside Iraq. The Law on the

Enforcement of the Foreign Court Judgments in Iraq, Article 1, requires that a foreign

ruling whose enforcement in Iraq is sought must have been issued by a competent foreign

court constituted outside Iraq. Additional provisions of this law include the requirement

to submit such rulings to the competent Iraqi court, so that it may order enforcement of

the ruling in Iraq...

Accordingly, international commercial arbitration may be useful in settling certain

commercial disputes, provided that such arbitration is used with utmost caution and

vigilance. It is further necessary to first solicit the opinion of the supreme authorities and

to get their approval regarding such arbitrations, which are an exception to the rule. For

the rule is the implementation of domestic laws pertaining to such disputes, and the

competence of the international judiciary system to examine such disputes. Resort to

international commercial arbitration should be made only after domestic efforts are

exhausted, provided that utmost care is exercised in wording contracts concerning such

arbitration, that the arbitration panel is carefully selected, and that there is agreement on

the law that must be applied with respect to merits and procedure. ”

In view of the preceding, we have to state that there are no cases of enforcement of

foreign arbitral rulings in Iraq. The situation in Iraq is that Iraq enforces arbitration

rulings issued in countries that have joined the conventions to which Iraq is a party, on

b.If the litigation concerns a right pertaining to real estate or moveable property located in

Iraq at the time the action is brought.

c.If the subject of the litigation is a contract that was concluded or must be implemented in

Iraq, or the litigation concerns an incident that occurred in Iraq.

the terms stated by these conventions. Therefore for instance, an arbitration ruling issued

in Jordan about a dispute between a French national and an Iraqi national can be enforced

in Iraq, because it is issued by an Arab country that is party to the Riyadh Convention on

Judicial Cooperation, unless the matter involves one of the cases in which it is permitted

to refuse to enforce the ruling under Article 3 of the convention, which are the same

above – mentioned cases under the 1987 Amman Convention for Commercial Arbitration

As for commercial arbitration with respect to amendments made to Iraq's Investment

Law, we can note that:

Investment Law No. 13/2006 (amended), Article 27, Paragraph 5, adopts commercial

arbitration as a means of resolving investment disputes, stating: “In commercial disputes,

the parties may resort to arbitration if so stipulated in the contract governing the

relationship between them. ” However, the problem is that there is currently no law that

regulates commercial arbitration matters, save for the general rules in the CPC. Those

rules place commercial arbitration under the authority and review of the Iraqi judiciary.

The fact that the judiciary can reject an arbitration judgment thus remains an impediment

to the current investment law.