ARBITRATION IN CONTRACT CONSTRUCTION AND THEIR ARISING DISPUTE SETTLEMENT MECHANISMS: COMPARATIVE STUDY

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ABSTRACT

In general, most of the contracts and commercial ones in particular are agreed upon and executed without any difficulty. If some difficulties arise in implementing these contracts, they are often resolved by agreement between the parties, but the contracting parties may not reach a solution between them and thus a dispute arises in general. There are four types of dispute dissolutions that may arise between the contracting parties: It is resorting to one of the alternative dissolutions to resolve the dispute, such as mediation, expertise, arbitration, or resolving the dispute through national courts, since the legislature has permitted arbitration in commercial disputes and that the contracting contract is a commercial contract in which the parties can agree to a contract construction to resolve disputes related to it, whether they are disputes related to their interpretation, implementation, termination or end. Statistics have shown an increase in the percentage of these disputes, especially international ones, including referring many of them to arbitration. The study that was carried out in the most famous arbitration institutions in the world, the International Court of Arbitration of the International Chamber of Commerce, showed that 12.5 percent of the disputes submitted to it in 1982 by the ICC International Trade in Paris were related to construction contracts, and that this percentage increased gradually to reach the beginning of the nineties to 28%, which is higher. Proportion between other commercial disputes. It is imperative to know the nature of these contracts, fees and plans, the duration of the contract, the circumstances pertaining to it, in addition to arbitration, its origin, types, procedures for requesting adjudication, and what are the procedures followed to resolve this dispute, and this is what we will explain in this research.

Keywords: Arbitration, Contract Construction, Settlement, Dispute.

INTRODUCTION

Arbitration was known to ancient societies and Arabs knew it before Islam, as resorting to it was optional, and the arbitrator's judgment was implemented voluntarily. This leads in most cases to individuals quarreling and fighting between tribes with each other, and arbitration in the ancient laws was in place between individuals and groups, and it was resorting to him and the implementation of his judgments is left to the opponents because power was the decisive factor in resolving disputes between individuals and groups. The origins of arbitration go back to the ancient era, as the countries of the East knew it, including Babylon and Assyria as it was spread and also spread in the ancient Greek cities as trade, religious and border disputes were revolting between them (Mubarak, 2017). Arab tribes knew it, since the tribe's sheikh was playing an effective role in adjudicating disputes that arise between members of the same tribe or between tribes each other, and as it has been pointed out that arbitration has been known since ancient times and that it is the best way to solve disputes by peaceful means, whether they are internal or international and at the present time the interest in it has become great, as international agreements, treaties and conferences

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are allocated to it (Al-Hafiz, 1990). Since arbitration was the best way for the conflicting parties that resort to resolving disputes arose between them or that might arise, so we shed light on this issue in three sections and a conclusion (Al-Sayyed, n.d.:53).

RESEARCH METHODOLOGY

This study revolves around disputes that occur between two contracting parties in a contracting contract. These disputes are either resolved by agreement or resort to adjudication, and disputes may arise between the contractor and his workers on the one hand and the engineer and his workers on the other side about the nature of work and requirements, Which leads to delay in work, and this problem is explained by explaining the concept of adjudication and the contracting contract, and stating how to resolve these disputes through arbitration.

This study have adopted a way in accordance with achieving its desired goal through the analytical legal approach to clarify the concept of arbitration, how to resolve the dispute that arises between the parties and how to implement the judgment issued by the arbitrators, relying on public literature and some Internet sites.

This study is divided into three sections, the first is entitled The Concept of Arbitration which includes three subsections, and the first entitled The Origin of Arbitration, the second Definition of Arbitration, and the Third Types of Arbitration. The second section is entitled the Contracting Contract and is divided into four subsections: the first is the definition of a contracting contract, the second is the pillars of the contracting contract, the third is subcontracting, and the fourth is the termination of the contracting contract. Procedures for requesting arbitration, the second is the law that governs the dispute, and the third is the implementation of arbitrator's judgments. The study ends with a number of conclusions and recommendations related to this topic.

The Concept of Arbitration

Arbitration is a special way to settle disputes between individuals and groups, whether they are civil, commercial, contractual or non-contractual. Arbitration is based on deviating from the usual methods of litigation and it mainly depends on the parties to the dispute themselves who choose their judges instead of relying on the judicial organization of the country and this requires us to clarify the concept of Adjudication and its importance through its emergence, definition and types.

The Origin of Arbitration

Arbitration went through several stages that can be briefly touched upon:

The Pre-Islamic Stage

The Arabs lived a tribal life characterized by movement and wandering, running after food and water, and each tribe had a sheikh who managed its internal and external affairs with other tribes. And the Arabs in pre-Islamic era did not have an organized judicial system that would settle their disputes. Rather, they were resolved by referring to the sheikh of the clan or the tribe, and the tribe's sheikh was not the only form of arbitration among the Arabs in the pre-Islamic era. Rather, there was appeal to people famous for the quality of opinion. And the authenticity of judgment from members of the tribe or other tribes, such as Aktham bin Safi bin Rabah, who used to say to his people: If you see good from me, accept him, and if you see otherwise, then my righteousness is righteous, just as the Arabs knew resorting to

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priests, for the Arabs in Jahiliyya used to rule over priests. One of them is that the priest differentiates between the oppressed from the oppressor. Abdul Muttalib, the grandfather of the Prophet (may God bless him and grant him peace), and Quraysh were prosecuted when they disputed him in determining the drilling of the Zamzam well to the priests of Bani Saad under the supervision of the Levant, and the Quraysh ruler when she tried to prevent him from carrying out his vow to slaughter his son Abdullah to divination Hijaz (Al-Hahidh, 1990).

Arbitration in the Islamic era

Islam was keen in its legislations on the importance of solving problems that fragment the group uniformity and the serenity of their lives. Islam aimed at replacing dissonance and disagreement with harmony. It seemed to the most important problems that occupy society and the most delicate of these problems are the ones that occur between the spouses. So Allah Almighty said: "*If you fear a breach between them twain, appoint (two) arbiters, one from his family, and the other from hers; if they wish for peace, Allah will cause their reconciliation: For Allah hath full knowledge, and is acquainted with all things*" (Al-Nisaa, 35). And adjudication between the rivalries and disputes the book of God Project Almighty and Sunnah of the Holy Messenger, Allah Al-Mighty says: "*But no, by the Lord, they can have no (real) Faith, until they make thee judge in all disputes between them, and find in their souls no resistance against Thy decisions, but accept them with the fullest conviction*" (Al-Nisaa, 65). That verse clearly defines the field of adjudication between the rivalries and disputes that occur inside and outside Islamic societies. The Prophet (peace and blessing be upon Him) said: (If the ruler rules, then strive hard and then hit, then he has two reward, so if he rules and works hard and then makes a mistake, then he will be rewarded) (Sahih Al-Bukhari and Muslim).

Arbitration in the Iraqi Law

According to the current civil procedural law No. (83) for 1969 (It is permissible to agree on arbitration in all disputes that arise from the implementation of a certain contract)) (Al-Mahmoud, 2011). Individuals can, by agreement, resolve their disputes with reconciliation among themselves, so they can present these disputes to a person or persons of their choice or determine the method of their choice in order to deal with settling the dispute. Arbitration is important in resolving the dispute in a short period of time and with less effort. The agreement on adjudication is not proven except in writing, and it is not permissible to agree on it during the pleading. Arbitration is not valid except in matters in which reconciliation is permissible, and it is only valid for someone who has the capacity to dispose of his rights. Arbitration between spouses is permissible according to the Personal Status Law and the provisions of Islamic Sharia (Article 1, 1969:83).

Arbitration: Definition

Arbitration linguistically is judging which means executing an order. It is said to be a verdict. Allah Al-Might said "*But no, by the Lord, they can have no (real) Faith, until they make thee judge in all disputes between them*" (Al-Nisaa, 65). Lifting their rivalry to the judge, whom is chosen to settle the conflicting parties. Arbitration in language: is choosing a person to settle the dispute, or may be the arbitration license is called after that, it is said: so and so judging; That is, we have fulfilled his judgment (Al-Alfi, 2016).

Arbitration in the terminology of the jurists: Some jurists have defined Arbitration as (a contract whereby the parties agree to submit the dispute to an adjudicator they choose to

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settle the dispute without resorting to the specialized court) and the Hanafi jurists defined Arbitration as (when the appointment of the two opponents assign a judge between them) (Al-Najjar, 2018).

Defining Arbitration Legally: Most modern promulgated ordinances did not set a specific definition for the term adjudication. As for domestic legislation, we find that the Iraqi Procedural Law No. (83) of 1969 did not provide a definition of Arbitration, but it allowed the agreement to Arbitrate in a specific dispute (Article 251, 19699:83), as for the Egyptian legislation, the Egyptian Arbitration Law No. (27) of 1994 defined in Article (10), the first paragraph, the Arbitration Agreement (It is an agreement between two parties to resort to adjudication to resolve some disputes that arise or may arise between them due to a specific legal relationship, whether contractual or non-contractual) (Abu Ghaya, n.d.:7). The French Council of State went on to say that (Arbitration is the authority of the decision that you recognize to a third party and the delivery in a judicial capacity of the court's decision) (Farrah, n.d.:19).

Arbitration Types

Arbitration is divided into many types according to the criteria used to differentiate between them. The first important ones are as the following:

International and National Arbitration

Arbitration is national if it is concerned with the relations or transactions that took place within inside the country with all its subjective and objective elements not to include any foreign element. As for international Arbitration, it is that one of its elements is linked to a foreign country, such as the matter of the dispute, the place of Arbitration, or the nationality of the parties (Al-Faqi, n.d.:34).

Mandatory and Optional Arbitration

Arbitration in principle is optional because it is subject to the agreement of the parties to the conflict and their free will. The parties explicitly express their choice of adjudication instead of the judiciary to settle their existing or potential disputes that may arise between them in connection with a specific legal relationship, whether contractual or non-contractual. As for mandatory Arbitration, it is that which is imposed on the parties to the dispute by a legal text or according to a bilateral or international agreement ratified by the country to which they belong to the obligation to resort to Arbitration being subjected to its provisions in some disputes. Therefore, mandatory Arbitration is considered incompatible with the original, because Arbitration is only generated from free will for the parties. It is not envisaged that this procedure is coercive or coercive, in fact that this type of Arbitration is not valid or remembered now (Hassan, n.d.:20).

Institutional and Private Arbitration

Private Arbitration is the traditional form of Arbitration where the disputed parties organize Arbitration procedures and choose the adjudicators themselves to settle the dispute. As for institutional adjudication, it is that adjudication that is entrusted to a body, organization or center that is carried out according to pre-established procedures and rules determined by international conventions or decisions establishing these organizations (Al-Sanouri, 2005).

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The Contracting Contract

The contracting contract are one of the named contracts organized by the Iraqi civil law in the first section of the first chapter of the third chapter on the work contracts. The Iraqi legislator has allocated 27 items for contract and for the industry article No. 864-890. The study is limited to definition of the contracting contract, their pillars, subcontracting and the termination of the contracting contract.

Contracting Contract: Definition

The Iraqi legislator has defined the contract in article (864) of the Civil Law as (a contract by which one of the parties undertakes to do something or perform a work in return for a wage pledged by the other party) (Al-Anbari, 2004). The definition clarifies a contracting contract that it has several characteristics that can be summarized as follows:

1. The contracting contract is a consensual contract that does not require a specific form to be held.
2. It is a binding contract for both sides. The contractor is obligated to complete the work and the employer is obligated to hand over the work.
3. It is a netting contract.
4. In contracting, mutual consent has two sides: the required matter to be made and the wage that the employer undertakes.
5. It is a contract contained in work.

Elements of the Contracting Contract

The elements of the contracting contract have no differences relating the other contracts:

Consent

Consensus in the contracting contract is achieved if the meeting terms and validity conditions are met.

1. **The Contract Terms**: Conditions of the meeting are fulfilled by mutual consent between the employer and the contractor on all essential issues, namely: the nature of the contract to be concluded, the work performed by the contractor, the wage that the contractor receives from the employer. As for the wage, a distinction must be made between the case of disagreement on the wage or the difference in its determination, with which the contract is void, and the case of non-determination of the wage, which Article 880 handled with the text: ((If the wage was not determined in advance or determined in approximate terms, reference must be made to The value of the work and the expenses of the contractor)).
2. **Validity Terms**: the conditions for the validity of the contracting are the conditions for the validity of any other contract, which requires the availability of the necessary competence and the safety of compromise from the defects of the will. The contract would be authorized or revoked within a period of three months from the time when the coercion rises, the mistake becomes evident, or the unfairness is revealed with the deception.
3. **The Replacement:** For every commitment that arises from a contract, there must be a place to be added to it that is subject to judgment. The subject matter of the contracting contract is double, as it is with respect to the contractor’s obligations for the work contracted to be performed, and it is with respect to the employer's obligations of the wage he pledged to pay to the contractor.
4. **The Cause:** The cause is the motive behind the contract, and the reason is required to be legitimate and not contrary to the public order and public morals. The contract is void if the reason is unlawful or if it is contrary to public order and public morals (Article 132, 1951:40).

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The Contracting from the Inside

Most of the huge contracts require a cooperation of several technical skills for the purpose of carrying out and completing the work to be completed on time. Therefore, in the first paragraph of Article 882 of the Iraqi Civil Law, the legislator authorized the contractor to entrust the implementation of the work in its entirety or in part to another contractor (Article 882, 1951:40). If he is not prevented from doing so by a condition in the contract, or if the nature of the work does not impose him on the contractor's personal sufficiency The prohibition from subcontracting may be explicit or implicit, and whether this prohibition is explicit or implicit, it does not mean preventing the contractor from seeking assistance from other persons, whether technical or non-technical, to complete the work as long as these are not subcontractors. Whenever the prohibition of subcontracting is found, the contractor must observe it, otherwise he will be subject to the penalty imposed by the general rules.

The Contracting Contract Termination

The contracting contract ends with the reasons that the contracts generally agreed upon. The contracting ends with the contractor completing the work contracted on him and delivering it in accordance with the provisions of Articles (873) and (875) of the Iraqi Civil Law. The business owner has the right to revoke the contract and suspend the implementation at any time before its completion, provided that the contractor is indemnified for all the expenses he spent, the work he accomplished, and what he could have earned had he completed the work, and this is what was stipulated in Article (885) first of the Iraqi Civil Code. The contracting contract ends in general with death and with the impossibility of carrying out the work contracted on him, but if the implementation has been impossible due to a compelling reason, the contractor is not compensated except to the extent that the employer has benefited from it, and the contracting ends with the death of the contractor if his personal qualifications are considered in the contract. Contract of its own accord (Article 888, 1951:40).

Resolving the Legal Disputes of Contracting Contracts via Arbitration

Intractable or persistent disagreements occur between the contractor and his workers on the one hand and the engineer and his workers on the other about the nature of work and requirements, which leads to delay in work (Ghalib, 2015). These legal disputes are resolved by agreement between the parties, and if they do not communicate a solution between them, they resort to adjudication. This requires those who is interested in this to know the procedures for requesting Arbitration, and to know the law governing the dispute, and how to implement the adjudicators' decisions.

Arbitration Request Procedures

To move the dispute in adjudication, one of the parties must submit a request to adjudication that determines the defendant or the requested against him. The General Secretariat of the Arbitration Center undertakes the study of the application, and if it finds the application complete, it shall inform it of the requested adjudication against him in preparation for referring the case to the adjudication panel (Al-Sayyed, n.d.:54). The Secretary-General undertakes the task of verifying the completion of the adjudication request for the elements specified by Article (9) of the adjudication procedures regulations, which are: the name of the applicant for Arbitration, the name of the person against whom

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adjudication is sought, and his title, capacity, nationality and address, a statement of the dispute, its facts and evidence, with specifying the requests.

The name of the chosen Arbitrator, if any, a copy of the Arbitration agreement and the documents related to the dispute, and the request must be in writing, and Article (9) of the regulations for adjudication procedures does not indicate the language in which the request for arbitration is submitted. However, if the request for adjudication was submitted in a language other than the language in which the parties agreed to conduct the adjudication, the procedure can be corrected by submitting the claim list in the agreed language (ibid). If these elements are available in the request for arbitration, the Secretary General shall refer the dispute to the Arbitration tribunal to settle the dispute.

The Law that Governs the Dispute

The parties are free to choose the suitable law for the subject of the dispute according to the rule that states (the contract is the Sharia of the contractors) (Al-Qailoubi, 2012). The freedom of the parties to choose a specific law is not answered except that this choice does not violate the legal rules or choose a law specified in introducing fraud to the dimensions of the law that should or should have been concerned with the settling on the subject matter of the argument. It referred to the parties 'freedom to choose the law applicable to the subject of the dispute Article (39-1-2-3) of the Arbitration Law No. 27/1994 as it states:

1. The Arbitration panel will apply to the subject of the question the standards settled upon by the two gatherings, and on the off chance that they consent to apply the law of a specific country, the considerable principles will be continued in it without the guidelines for strife of laws except if in any case concurred (Al-Qailoubi, 2012).
2. If the two parties do not agree on the legal rules applicable to the subject of the dispute, the Arbitration tribunal shall apply the substantive rules in the law it deems most relevant to the dispute.
3. When deciding on the subject-matter of the dispute, the Arbitration tribunal must take into consideration the terms of the contract in dispute and the current norms of the type of transaction.

In case that the applicable procedural law is not stipulated, the (adjudication stipulation) system will solve this issue. For example, in the lawsuit (Shashoua v Sharma [2009] 2 Lloyd's Rep 376.) considered before the English courts, the court decided that in the absence of any agreement between the parties on the law applicable to the arbitration procedures and since the arbitration clause determined the place of Arbitration and the competent court to consider the nullity of the adjudication, the procedural law that is applicable is the procedural law in the country that has been identified as the place for Arbitration (Al-Nawaisa, 2020).

The Execution of the Arbitration Orders

The provisions and procedures for implementing the arbitration award differ according to whether these provisions are organized by collective or bilateral international agreements or national legislations (Al-Qailoubi, 2012).

We will refer to the provisions for the implementation of the arbitration award according to collective or bilateral international agreements, and then we refer to the implementation of the arbitration award in accordance with the Iraqi legislation.

Execution of the arbitration award according to collective or bilateral international agreements:

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The international community has been active in unifying the provisions for recognition and implementation of the foreign arbitration award, as several international agreements have been concluded explaining how to implement the arbitration award, and these agreements had an effective impact on national legislation in unifying the provisions in this regard, and we will refer to the most important of these agreements (ibid, 301).

1. **The Geneva Protocol of 9/24/1923:** The first attempt in this regard is what the League of Nations succeeded in concluding the Geneva Protocol regarding the Arbitration clause on 9/24/1923 and ratified by 53 states. This protocol is characterized by the recognition of the principle of the power of will in determining the law applicable to Arbitration procedures, and the Contracting States undertake. To implement the adjudication provisions as long as this arbitration is based on the adjudication agreement.
2. **The Geneva Agreement of 9/26/1927:** The League of Nations managed to conclude the Geneva Agreement regarding the implementation of international Arbitration provisions, concluded on 9/26/1927, and nearly 34 states ratified this agreement.
3. **Riyadh Agreement for International Cooperation on 6/4/1983:** The Riyadh Arab Agreement for Judicial Cooperation was concluded to replace the Agreement for Execution of Judgments on 9/14/1952, which was organized by the League of Arab States, for the signatory countries.

On 14/4/1987, the Council of Arab Justice Ministers, in its fifth session, approved the Amman Agreement for Commercial Arbitration, according to which the Arab Center for Commercial Adjudication was established. The aforementioned Riyadh Agreement includes provisions for the implementation of arbitrators' judgments, as it stipulates that the arbitrators' decisions are perceived and actualized by any of the contracting parties in a similar way specified in this section, taking into account the legal rules of the contracting party required to be executed.

It must be noted that there is a difference between recognizing the judgment and implementing the judgment, as it may recognize the judgment, but it is not executed, but if it is implemented, then it has been recognized by the authority that granted it the executive power, so recognition of the Arbitration award does not mean that it has been issued correctly and is binding on the parties (Abu Talib, 2010).

Implementation of the Arbitration award in accordance with Iraqi legislation:

Article (271) of the Arbitration Law in Iraq stipulates: ((After the Arbitrators issue their choice in the previously mentioned way, a duplicate of it should be given to every one of the gatherings, and the choice will be conveyed with the first assertion consent to the equipped court inside the three days following its issuance by a receipt endorsed by the agent of the court)) (Khadraway, 2014). Article (272) of the Arbitration Law stipulates in its first and second paragraphs that the arbitrators' choice will not be actualized in the authorization offices, regardless of whether their arrangement is legal or by understanding except if affirmed by the skillful court in the question upon the solicitation of one of the gatherings and in the wake of paying the legitimately endorsed charges. Besides justified of the disputants who have managed them and in the matter for which the Arbitration was directed (ibid).

For the execution of foreign judicial rules inside Iraq, they are not executed until after the convicted person obtains a decision to execute them from an Iraqi court in accordance with the provisions of the Law for the Execution of Judgments of Foreign Courts in Iraq and the international agreements in force, as stipulated in Article 16 of the Iraqi Civil Code. (Decisions gave by foreign courts will not be enforceable in Iraq except if they are considered as such as per the principles set up by the law gave in such manner) (Article 16, 1951:40). Also, the methods of execution and guarantees established in the Iraqi law are those that are applied when executing the foreign judgment associated with the execution decision issued by the Iraqi court, whether or not the foreign law undertakes them (Mubarak, 2017).

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Notably, that some Arab countries, including Iraq, have approved a new cooperation agreement between them, which is (the Riyadh Agreement for Judicial Cooperation) (Iraqi Law 110, 1983) which allows recognition of judicial rules and other executive documents and Arbitrators' decisions issued in one of these countries from other countries in accordance with certain conditions. Article 37 has permitted from the agreement to recognize the Arbitrators 'judgments and executing them with any of the contracting parties in the same manner stipulated in Chapter Five of the agreement (ibid, article 36) and provided that there is no breach of the Articles (28-30) of the agreement. Taking into account the legal rules of the party required to execute thereof and the specialized judicial committee for the required-to-execute party may not be addressed to the subject of execution control or refusal to execute the judgment.

It must be noted that the litigants may, when the Arbitrators' decision is issued to the specialized court adhere to the invalidity of the verdict, and the court on may nullify it according to the below cases (Articles 273, 1969:83):

1. If it was issued based on a void agreement.
2. If the decision violates abuses a standard of public principles and public ethics.
3. If one of the reasons for which a retrial is permitted has been established.
4. If an essential error happened in the decision or in the techniques that influence the legitimacy of the decision.

CONCLUSION

It has concluded that the extent of the importance that this topic and the growing and increasing resort to adjudication whether between countries or international and national institutions and companies. The most important findings and recommendations are as follows:

1. Arbitration has the importance of resolving the dispute in a short period of time and with less effort. The agreement on Arbitration is not proven except in writing, and it is not permissible to agree on it during the pleading.
2. Arbitration is only generated from the free will of the parties, and it is not conceivable to conduct it as.
3. The principle is that the adjudicator is appointed by agreement of the litigants. The exception to this is that he is appointed by the specialized court in certain cases.
4. The Arbitration panel shall apply to the subject of the dispute the rules agreed upon by the two parties, and if they agree to apply the law of a particular country, the substantive rules will be followed in it without the rules for conflict of laws unless otherwise agreed.
5. The parties to the conflict themselves are the ones who choose their judges instead of relying on the judicial organization of the country.

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