

RESOLVING MARINE DISPUTES BY ARBITRATION ANALYTICAL STUDY IN JORDAN MARINE LAW AND HAMBURG CONVENTION

**Mohammed Ibrahim, Middle East University
Abu El-Haija, Middle East University**

ABSTRACT

This paper focuses on the violation between Jordan marine trade law and united nation convention for the international carriage of goods (Hamburg) in giving the contract parties the right to settle their international carriage of goods dispute through arbitration. This is the main problem that this research was written to solve. The research recommended that the Jordan legislator should insert an amendment in the marine trade law to lift said violation.

Keywords: Marine Law, Hamburg convention, Arbitration, Alternative Dispute Resolution.

INTRODUCTION

Arbitration is an alternative means to settle civil and commercial disputes outside the court by referring it to one or more persons, whose decision (Award) to be bound¹. Due to several advantages of arbitration, such as selecting the arbitrator with practical experience, confidentiality, time limit of litigation process, flexibility and less formal than court, limited avenues of appeal of award and easier to enforce than national court judgment². The Jordan legislator issued arbitration code in the year 1952 which were modified two times, in the year 2001 and 2018. It was implemented so that any disputes that arise relating to civil or commercial dispute can be settled by arbitration (Harshal, 2017). This situation of Jordan legislator changed in 1972 when the marine trade law was issued, where said law deprived the parties from this right where Jordan legislator situation contradict with him from one side, and to violate united nation convention for the international carriage of good wholly or partly by sea (Law, 1972; Güner & Meltem, 2011) form another side. The study will focus on two different situations of Hamburg convention and Jordan marine trade law.

Concept of Arbitration

To avoid formal court system and to keep on amicable relations between dispute's parties they can resolve their dispute through Arbitration. Moreover, the advantages of this integrated system; through this part we will take the definition and advantages of arbitration in study.

Definition of Arbitration

Needless to say arbitration is one of several kinds of alternative disputes settlement (Beside Arbitration alternative dispute resolution include: Mediation, which means: an impartial

person tries to help two sides to end disagreement to talk about and agree on solution. And Direct negotiation, which means: a dispute resolution process that involves an exchange offer and counteroffers by the parties to the dispute to discuss conflicts issues without the use of 3rd party³. (Mohammed, 2009), where the parties of a controversy can settle their disputes out of court, by select impartial third party, known as arbitrator. This choice can be made before disputes arise by embodying the contract clause of arbitration, or after dispute raised by Submission clause (Brairi, 2004). In both ways they agreed to comply with the arbitrator's award, and to join in a hearing to present proofs and evidences and testimony. The award usually final and courts reexamine it.

Regarding to former process arbitration can be defined as: a substituted of litigation way to resolve commercial conflicts through third independent and imperial party. All tempts of defining arbitration went to same direction, such as:

A form of alternative dispute resolution by which of the determination of a dispute is entrusted to one or more independent third parties rather than the court⁴.

And other definition: The hearing and determination of a dispute by an impartial referee agreed to by both parties⁵.

Another definition: is a form of alternative dispute resolution (ADR), is a way to resolve disputes outside the courts. The dispute will be decided by one or more persons (the arbitrators, arbirer or arbitral tribunal), which renders the arbitration award which is legally binding on both sides and enforceable in the courts (O'Sullivan & Shiffrin, 2003). Economics: Principles in action. Upper Saddle River, New Jersey: Pearson Prentice Hall. P324.

Noted all definitions ensured the impartiality and independently of the third party who is chosen by dispute parties to resolve their dispute a way of known and traditional litigation.

Advantages of Arbitration

There are a numerous and several advantages to arbitration as a method to resolve case:

1. Impartiality and dependence of arbitrator: this advantage is coming from the power of parties to the dispute to choose the arbitrator in both kind of arbitration adhoc and institutional, were the parties to the dispute usually agree on the arbitrator, and in case they didn't agree to the arbitrator the court or the center of arbitration in institutional arbitration will appoint an arbitrator, were both parties to the dispute can challenge of arbitrator, which ensure the impartiality and dependence of arbitrator.
2. Substantive and procedure law: the parties to dispute can agree on applicable substantive and procedural laws governing the arbitration process.
3. Saving time: mostly the dispute will normally be resolved much sooner, in Jordan and Virginia and Egypt a trial date is normally about twelve months from the date of tribunal appointed. Moreover once an arbitrator is selected, the case can be heard immediately (Jean, 2020).
4. Confidentiality: Unlike litigation, arbitration is essentially some private procedures unless they agreed to be not confidential.
5. Informal process: since the selection of arbitrator is based on the choice of the parties to dispute the process of arbitration and the setting during the time of procedure is informal and is suitable for discussion, where arbitration allows the friendly exchange of words without much mannerisms to be followed.
6. Saving money: Arbitration is often a lot less expensive than trial, this advantage can be clear in many cases, for example in arbitration the fee paid for arbitrator is a lot less than the expense of paying expert witnesses to come and testify at trial. There are also lower costs in preparing for arbitration than there are in preparing for a trial. These due to the rules of evidence are often more relaxed than in a trial. Finally, often the parties to the arbitration split the arbitrator's fee equally.

7. Control: arbitration gives the party to dispute to control over the process than that any other dispute resolution process since the starting of the parties are in apposition of control⁶.
8. Award is final: in some legislation the party to the dispute can't appeal the arbitration award unless they agree in arbitration clause or submission clause to appeal the award. So the arbitration will be the end of the dispute.

Beside the numerous advantages of arbitration there are some disadvantages for arbitration as a means to dispute settlement:

1. No appeal: when the arbitration award is final and the parties to dispute can't appeal it, in this case there is any real opportunity to correct the mistakes in the award.
2. Ambiguity of arbitrator's standards: despite the arbitrator is required to follow the law, arbitrator sometimes may consider the apparent fairness of the parties' positions instead of strictly following the law, which may result in a favorable outcome to the party who is favored to by a strict reading of the law⁷.
3. High costs: sometime the arbitration costs are more than to try the case before a court.
4. Rules of evidence: sometimes the followed and applied rules of evidence may prevent some evidence to be considered by a court while it may consider as evidence before arbitration.
5. Cogency of award: in some countries, there is different legislation for international and national arbitration, which may make it difficult to ascertain the applicability of the laws relating to international arbitration.

Situation of United Nation Convention on Contract for the International Carriage of Good Wholly or Partly by Sea (Hamburg)

The Hamburg convention, which was issued in 1978 for the purpose of determining certain rules relating to the carriage of goods by sea, gave the parties of carriage of goods wholly or partly in order to settle any dispute that may arise relating to their contract by arbitration. This right to contract parties came from provision No. 1 of Article No. 22 when enact:

“In subject to the provisions of this article, parties may provide by agreement evidenced in writing that any dispute that arise relating to the carriage of goods under this Convention shall be referred to as arbitration”.

Hence, the parties either choose to institute an action in a court (Regarding to article 21 of Hamburg convention, when the plaintiff decided to institute an action in a court, in this case the jurisdiction will be according on the following places:

1. Business's Place of the principal or, in the absence thereof, the defendant habitual residence of;
2. The contract where was signed place, provided that the defendant has their business place of, branch or agency place;
3. The port of loading or port of discharge;
4. Any additional place designated for that purpose in the contract of carriage by sea.

The article gave the plaintiff the right to take his legal action before any specified courts) which is according to the law of the state where the court is situated to settle their dispute or through arbitration. (Regarding to paragraph no.3 of article no. 22, the claimant decision shall institute the arbitration proceeding at any of the following places:

1. A place in a state within whose territory is situated:

1. The defendant's principal place of business or, in the absence thereof, the defendant's habitual residence or
 2. The place where the contract was signed, provided that the place of business of the defendant, branch or agency through which the contract was signed;
 3. The port of loading or the port of discharge;
2. Any place designated for that purpose in the arbitration clause or agreement. When the claimant decided to institute an arbitration action, he has the right to choose any mentioned place).

This giving right to all parties relating to member countries, signed on the convention and the countries who signed the convention, does not have the right to violate the convention rules in their national laws. This result came from Article No. 2 of the convention (Scope of application) which enacts:

“The provisions of this convention are applicable to all contracts of carriage by sea between two different state if: (a) the port of loading as provided for in the contract of carriage by sea is located in a contracting state, or (b) The port of discharge as provided for in the contract of carriage by sea is located in a contracting state or (c) One of the optional ports of discharge provided for in the contract of carriage by sea is the actual port of discharge and such port is located in a contracting state or (d) The bill of leading or other document evidencing the contract of carriage by sea is issued in a contracting state or (e) The bill of leading or other document evidencing the contract of carriage by sea provides that the provisions of this convention or the legislation of any state giving effect to them are govern by the contract”.

Apparently the convention extended the scope of application when it decided in articles (A, B and C) to apply it rules when the actual or optional port of loading or port of discharge locating in contracting state in one hand, in second hand it relay on bill of leading and any documents issued by contracting state in articles (D and E) to apply the convention rules. The extended of application has come to achieve the main purpose the convention came for, which is creating an international rules applied to relating to the carriage of goods by sea.

Situation of Jordan Marine Trade Law

Regarding to the paragraph, Article No. 215 in the Jordan Marine Trade Law No. 12 of the year 1972 which was modified by Law No. 4 of the year 1978 and No. 35 of the year 1983 show that legislator gave the jurisdiction to settle any dispute that arises relating to the carriage of goods by sea to the Jordan courts. It enacts:

“Notwithstanding, the provisions of any other law to be void, each condition or agreement forbids the Jordanian courts to consider disputes arising from carriage of good by sea or shipping documents”.

This paragraph was inserted in the last amendment of the Jordan Marine Law (1983) despite Jordan joined the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea in the year 2002, the situation of Jordan legislator did not change.

This situation was enhanced by Jordan cassation court in the year 2011 to ensure jurisdiction for any dispute related to carriage of goods. Also, there was no recognition with arbitration clause signed by parties to settle their dispute by arbitration.

In the year 2012, the situation of cassation court in Jordan was partly changed regarding to Article No. 24 of Civil Law No. 43 of the year 1976, which enacts:

“The provisions of the preceding articles do not apply if provision in a private law or international treaty in force, in Jordan, is contradicting.

Furthermore, to recognize and apply the Hamburg convention rules relating to carriage by sea and to give the contract parties the right to choose another court jurisdiction, which decided (Cassation court decision no. 2644/2012.) that:

“The arbitration law is a private law and it is a priority to apply the law of marine trade in the event of dispute concerning a contract of carriage. This is in agreement between the parties to the contract that the Court jurisdiction would be a court of other State Court.

The Convention is a law and is applicable in the event of a conflict between their provisions and the provisions of any other law”.

It is seen that the cassation court decision violated the situation of the Jordan marine law by giving the jurisdiction to another state court in order to settle the dispute regarding to the parties of contract. Thus, it still agreed with marine law provision when it did not indicate to give the parties of carriage of good by sea contract the right to go to arbitration. At the same time, it conflict with Jordan Arbitration Law No. 31 of the year 2001, modified in the law of year 2018 and did not distinguish between nature and source of commercial or civil dispute to be settled by arbitration (Law, 2018), which enacts in Article No. 3

“The provisions of this law.... And relates to a civil or commercial dispute between parties of public or private law persons in the legal relationship to which the dispute is connected, whether contractual or not”.

Finally, it is seen that both judicial and legislator authorities in Jordan still refuse court authority to settle disputes arising from carriage of goods by sea, and neither apply or recognition with Article No. 3 of Jordan Arbitration Law nor Articles No. 2 and 22 of Hamburg convention, although join to convention in the year 2002.

CONCLUSION

In our investigation, conclusion was made that the Jordan situation still violates the articles of Hamburg convention from one side and violates its national laws (Civil law and Arbitration law) on the other hand. This is represented to deprive the parties of carriage goods by sea contract from refusing arbitration to settle their dispute relating to carriage of goods by sea contract. The situation of the Jordan marine law and cassation court may cause several damages to claimant when decision is made to execute the Award in Jordan and that the Jordan court will reject this subpoena, regarding to Jordan marine law and Jordan cassation court.

In spite of 21 years between the dates of modifying the marine trade law in Jordan and joining the Hamburg convention, the Jordan legislator did not make any amendments to lift the violation with international obligations.

RECOMMENDATIONS

This study recommends the Jordan legislator to insert an amendment to Jordan Marine Trade law by permitting to settle any dispute that arises relating to the carriage of goods by sea through arbitration. The suggested amendment is:

“Notwithstanding, the provisions of any other law to be void, each condition or agreement forbids the Jordanian courts to consider disputes arising from carriage of goods by sea or shipping documents, except the disputes is related to rules of international conventions of which Jordan is a member”.

ACKNOWLEDGMENT

The author is grateful to the Middle East University Amman, Jordan, for the financial support granted to cover the publication fee of this research article.

ENDNOTE

1. <http://hg.org/arbitration-definition.html>
2. https://scottisharbitrationcentre.org/?page_id=200
3. <https://www.lawinsider.com/dictionary/direct-negotiation>
4. <https://legal-dictionary.thefreedictionary.com/arbitration>
5. <https://www.thefreedictionary.com/arbitration>
6. <https://www.legalbites.in/advantages-and-disadvantages-of-arbitration/>
7. <https://www.allenandallen.com/arbitration-advantages-and-disadvantages>

REFERENCES

- Brairi, M. (2004). *International commercial arbitration*. Dar Alnahdha, Cairo, Egypt.
- Güner, Ö., & Meltem, D. (2011). *United Nations convention on contracts for the international carriage of goods wholly or partly by sea*.
- Haija, A.E.M. (2009). *Electronic arbitration*. Dar Althaqafa, Amman, Jordan.
- Harshal, M. (2017). *The concept of arbitrability of arbitration agreements in India*. Retrieved from https://efilablog.org/2017/12/20/the-concept-of-arbitrability-of-arbitration-agreements-in-india/#_ftn1
- Jean, M. (2020). *The difference between arbitration and litigation*. Retrieved from <https://www.thebalancesmb.com/arbitration-vs-litigation-what-is-the-difference-398747>
- Law. (1972). *Jordanian marine trade law no. 12*.
- Law. (2018). *Jordanian arbitration law no. 16*.
- O’Sullivan, A., & Shiffren, S.M. (2003). *Economics: Principles in action*. Upper Saddle River, New Jersey: Pearson Prentice Hall.

This article was originally published in Special Issue, entitled: "Law, Politics, Economics and Human Rights: Global and National Perspectives", Edited by Dr. Ashgar Ali Bin Ali Mohamed