Scope
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The effectiveness of arbitration in settling investment disputes in renewable energy contracts

Ghasan obaid Mohammed
Nisreen Hasan Koni

Abstract

Arbitration is one of the main means in settling renewable energy contract investment disputes due to the adherence of multinational companies to it, as it is the best way for them to be able to resolve the dispute in confidentiality and speed commensurate with their commercial purpose, and because of the freedom that arbitration gives them by choosing the most appropriate procedures and laws to resolve disputes that may occur in These contracts, however, the state, on the other hand, may stand in the way of the means of arbitration because of its belief that it affects its sovereignty and judicial immunity and exposes it to danger or threat first, and because of the fear of violating the supreme rules that it sets for the environment in which it enters, i.e. the rules of public order. Second, and the best evidence of the validity of the state's concerns about the conflict of arbitration for the public system in it is the decision that it may issue not to allow the state to expropriate the foreign investor's ownership of the lands of the investing state and cancel such a decision in the event Imposing its issuance and obligating it to compensate as a result of its arbitrariness by issuing such decisions.

Keywords: 1. Arbitration, 2.Investment Dispute Resolution, 3.Renewable Energy Contracts.

Elements of settling investment disputes of renewable energy contracts through arbitration

One of the expected results of concluding renewable energy investment contracts, like any other contracts, is the occurrence of disputes between its parties, and since arbitration has become one of the most important means in settling commercial disputes, it has had the best luck in the acceptance of the parties to this contract represented by multinational companies and the state. It encourages and guarantees it in its legislation, and sometimes we find multinational companies adhering to it, we will try to show in this section the most important elements that make arbitration acceptable to the parties to renewable energy investment contracts through two paragraphs, as follows:

Firstly, multinational companies adhere to arbitration

The reason for the multinational companies' adherence to arbitration to settle disputes that may occur between them and the state in order to implement the terms of renewable energy investment contracts is due to a set of factors summarized as follows:

A - Fear of the impartiality of the judiciary of the country hosting the investment

In light of the prevailing belief that the judicial organs in developing countries are not sufficiently independent in the face of political authority, and the lack of sufficient knowledge of investment matters among these bodies, international arbitration has become a convincing means from the foreign investor's point of view to settle his disputes with the host country to protect him [(1)].

We find that the will of the foreign investor usually tends to activate arbitration because he is not fully convinced of the judiciary of the investing country and for his fear that the state will bring about judicial amendments or changes that affect his interests, and because many countries do not have a special system for prosecuting governments, and because of the lack of expectation of the state's neutrality [(2)], so We find that multinational companies prefer arbitration, and arbitration is preferred by the parties to the dispute in commercial projects in general and in renewable energy contracts in particular, this is because it is considered as a special, impartial court that does not belong in particular to a particular nationality, and this is what gives rise to confidence in its performance and in its rulings, and because arbitration has the ability to maintain relations between individuals, because the arbiting parties resort to arbitration by agreement, as they grant the arbitrator or arbitrators chosen by them- According to their intentions - the possibility of playing the role of mediator, or conciliator, so the arbitration is close to reconciliation or conciliation, which maintains good relations between the adjudicating parties[(3)].

B - The speed provided by the arbitration award compared to the ordinary judiciary.

Also, multinational companies that deal in millions of dollars are primarily concerned with the time factor, so we find that they want to resolve the disputes between them as soon as possible, rather than waiting for a long time if the dispute is resolved before the ordinary judiciary, and this is what the judiciary provides for them. Arbitration, therefore, we find that it usually adheres to it, as it is characterized by the ability to settle disputes before it in a shorter time. It is known that all judicial systems in the world - regardless of the degree of their progress - suffer from slow procedures and inaction in the settlement of cases in a way that led to an increase in the number of cases The disputes presented to the judicial system in the country and their accumulation in a huge amount, which in turn was reflected in the reluctance of many litigants to resort to their disputes before the ordinary judiciary on the realization of quick justice or the so-called prompt justice [(4)], which is due to two factors: The first factor: the arbitrator's obligation to settle the dispute presented to him at a specific time determined by the parties as a general principle, and the second factor relates to the fact that arbitration is a system of litigation of one degree [(5)].

We find that the legislation regulating arbitration usually specifies a short period of time in which the arbitral tribunal must issue this decision unless the contracting parties provide for another period, for example what was stipulated in the Egyptian Arbitration Law No. 27 of 1994 in Article (45) which states the following: (1) - The arbitral tribunal shall issue the judgment that terminates the entire dispute within the date agreed upon by the two parties. Unless the parties agree for a period longer than that).

C- The confidentiality provided by the arbitration award when resolving disputes regarding the investment of renewable energy contracts.

The advantage of confidentiality enjoyed by arbitration and its ability to maintain the confidentiality of disputes often plays an important role in the parties' decision to agree on arbitration, as the dispute file between the two parties remains exclusively under the knowledge of the arbitrators, while the litigation sessions in the courts are public, Moreover, the arbitrators usually take an oath in every case they arbitrate in order to maintain impartiality and confidentiality, as the two parties to the dispute, especially multinational companies, often take precautionary measures in maintaining the confidentiality of information, especially when it is the losing party because the most important thing is the commercial reputation[(6)].

Second: The guarantees and benefits provided by arbitration in general

It seems that one of the most important real reasons behind settling the investment disputes of renewable energy contracts through arbitration is the guarantees it provides in general, which are as follows:-

a- The freedom offered by arbitration to choose procedures for resolving disputes.

The freedom that arbitration enjoys, as it is not pre-determined with the procedures to be followed, which allows the disputing parties to choose it according to the requirements of the contract in question and their needs, is somewhat far from the judiciary, so it allows the disputing parties in arbitration to abandon some of the unnecessary formal litigation procedures in order to save time and cost on them, which is that push the parties to adhere to arbitration in energy contract investment disputes [(7)].

b - The ability of arbitration to absorb and keep pace with international commercial development.

The other reason for resorting to arbitration lies in that it is almost directly related to international trade and investment, as the need for arbitration increases with the increase in international trade movement and declines with its decline [(8)], because it is an essential means to protect and encourage investment in investment disputes of renewable energy contracts that may arise between the investing country and the Multinational companies when concluding this contract, as in order for multinational companies to trust the host country to invest their resources, it must provide them with adequate protection to secure their investments, as the capital needs security and this is what the state is seeking, because these contracts link the state with multinational companies, which they usually do not trust, as it is easy for the national judge to be influenced by motives that do not take into account the interests of the investor as long as they are in line with the interests of his state [(9)].

C - The supremacy of the principle of consensual and conciliation in arbitration.

Another advantage that may encourage arbitration is to establish it on the principle of consensual and agreement, and therefore we see that the arbitrator enjoys more freedom than the judge, especially in determining the law that applies to the subject of the dispute and is bound only by the basic guarantees of litigation and the jus cogens rules in the country in which the arbitration takes place. To choose the most appropriate law for arbitration in a case, and arbitration is often close to reconciliation and not an offensive path, and it is closer to understanding between the two disputing parties on the basis decided by arbitration [(10)].

Arbitration Obstacles as a Means of Resolving Investment Disputes in Renewable Energy Contracts

In fact, the presence of the state as a genuine party to renewable energy investment contracts has imposed some caveats or obstacles that could hinder or paralyze to some extent arbitration in settling disputes in these contracts. What are these obstacles and are they real or apparent obstacles and to what extent they can contribute In obstructing arbitration, we will try through this topic to identify that through two paragraphs:-

First: Public order as an obstacle to arbitration in the settlement of investment disputes in renewable energy contracts

A - The concept of public order

It is well known that each of the countries has a set of moral, economic, social and political principles that do not allow them to be violated in any way, and it is called by the term "public order", as it is, according to some people, the window through which the supreme values of society in any country enter into the law and have supremacy over all Contracts and agreements that are concluded, whether between individuals themselves or between the state and individuals or companies, and among these contracts are renewable energy contracts whose disputes are intended to be settled through arbitration [(11)].

B - The extent of the impact of the general system on renewable energy contracts

The important question that can be posed in this regard is, can the rules of public order act as an obstacle to arbitration in settling disputes of renewable energy contracts?

Certainly, the existence of public order rules can be an obstacle to the path of arbitration in settling disputes over investment in renewable energy contracts, which naturally leads to reluctance or even to prevent multinational companies from entering into contracts with countries, as these companies fear when contracting with a developing country , that the contracting state - after contracting with it - enact laws that render everything concluded with it, such as the contracting contract or the service supply contract provided by the investing company to the public, null and void. According to the provisions of a subsequent law enacted by the host country, and then making of its rules jus cogens, it is not permissible to agree to contradict them, and finally it is invoked that it is from public order [(12)].

C- Cases of perceiving a violation of the general system of renewable energy contracts

In fact, it is possible to imagine opposition to arbitration in renewable energy contracts to the rules of public order when its scope exceeds the jurisdiction of the state. It is known that the rules of jurisdiction in countries are from the public system , and certainly the jurisdiction intended here is the exclusive jurisdiction of the state, but the joint jurisdiction Or in which the state may allow arbitration to settle its disputes to foreign courts, and it is not considered public order in anything [(13)], but the problem lies here, despite the state's entry, either directly or indirectly, into these contracts, as the government contracts itself or authorizes the public company or public entity to sign the contract, or the competent minister may sign the contract as a representative of the government and its prior knowledge that it deals within the framework of commercial contracts. With another party represented here by the multinational companies, it remains the party that judges or decides whether or not the arbitration violates the rules of public order. It also leaves the national judge in the country in which the judgment is to be executed to assess whether the arbitration decision does not violate the rules of public order in that country. The discretion is to verify this, but the aforementioned judge does not have the right to discuss the subject of the dispute [(14)].

In addition to the aforementioned case, we believe that it is possible to imagine opposing the arbitration ruling in renewable energy contracts when a decision is issued prohibiting or preventing the expropriation of the foreign investor for the public benefit, as this right was stipulated by many bilateral international agreements that regulate the right to investment, for example, what was stipulated in the bilateral agreement Concerning the encouragement and mutual protection of investment between Iraq and Algeria for the year 1999 in Article (6), first paragraph (the two contracting parties shall not take measures of expropriation, nationalization, or any other measures that, directly or indirectly, result in the expropriation of the investors of the other party for their investments that they own on its territory, Unless it is for the public interest, provided that these measures have been taken in accordance with legal procedures and if they are not discriminatory[(15)].

D- Scope of application of public order rules as an obstacle to arbitration

However, despite the ambiguity of the legal situation, the dominance of foreign companies, especially the multinational ones, has rendered most of the provisions of the internal public order realistically invalid. Rather, it has made the call for the implementation of the familiar legal rules in the territory of the state in which the arbitration decision is required to be implemented or the provisions of the national courts related to It has some of the realistically crippling issues when confronting those foreign companies, especially in developing countries, for example, and they are permitted to work in them, as the idea of public order is in its

narrowest scope when it enters into international commercial relations and allows arbitration to settle disputes that it may not allow at all within the framework of internal commercial contracts [16].

D. The legal basis for preventing arbitration when it violates the public order in renewable energy contracts.

The legal basis that confirms the public system as a deterrent to arbitration in investment contracts for renewable energy when it conflicts with it, we find it stipulated in many international agreements and national legislation. The ruling violates public order, so it was stated in (Article 5, paragraph 2 / b) the following text(The competent authority in the country where the recognition and enforcement of the arbitral award is required may refuse recognition and enforcement if it finds that: A- The law of that country does not permit settlement of the dispute through arbitration. B- The recognition or enforcement of the arbitrators' award is contrary to the public order in this country), as well as what was stated in the Geneva Convention of 1927, where the first article, paragraph (f), stipulates that if recognition and enforcement of the award is to be obtained, it is necessary that the arbitral award should not be contrary to the public order or the principles of common law, of the country in which the award is to be executed and what was stated in The UNCITRAL Model Law on International Commercial Arbitration of 1985 in Article 36, paragraph 1/b, as it states that: (1- It is not permissible to refuse recognition or enforcement of any arbitral award, regardless of the country in which it was made, unless 2 - if the court decides that recognition and enforcement of the arbitral award is contrary to the general policy of this country).

On the Arab level, we find that the 1952 Arab Arbitration Agreement stipulates cases in which states can refuse to implement an arbitral award. Article two of it, paragraph (c), provides the following text (if the arbitrators' ruling violates public order or public morals in the state It is required to implement, as it has the authority to assess that it is so, and not to implement what is in conflict with public order or public morals in it), and Article 35 of the Amman Arab Convention on International Commercial Arbitration of 1987 also stated the following text (... Refusal of the execution order unless the decision is contrary to public order).

Article (37) of the Riyadh Agreement for Judicial Cooperation of 1983 states that (the state requested to recognize and implement the arbitral award may refuse recognition and enforcement if it violates the provisions of Islamic Sharia, public order or public morals of the contracting party requested to implement).

On the Arab level, we find that the 1952 Agreement on the Execution of Arbitrations stipulates the cases in which states can refuse to implement the arbitral award in Article Three, Paragraph (e) by saying (if the arbitrators' ruling is contrary to public order or public morals in the requested state, It has the authority to assess its being so, and not to implement what contradicts public order or public morals in it) It was also stated in paragraph (2) of Article 35 of the Arab Convention on Commercial Arbitration that((..... The order to execute may not be refused unless the decision is contrary to public order), as well as what Article (37) paragraph (c) of the Riyadh Arab Agreement for Judicial Cooperation in 1983 states that (the requested state may recognize and implement a judgment Arbitration is to refuse recognition and enforcement if it violates the provisions of Islamic Sharia or the public order or morals of the contracting party requested to implement).[17].

Second: The state's judicial immunity as an obstacle to arbitration in settling renewable energy contracts investment disputes.

A - The concept of judicial immunity of the state

Despite the development that all countries of the world are witnessing today in the commercial and economic field and its facilitation of many complications that may stand in the way of concluding contracts with companies or major bodies that have leadership in the field of technological investments and others, countries

from time to time return to cling to their judicial immunity as the origin of the year In the contracts it concludes with foreign multinational companies or other bodies for the purpose of investment, here, the extreme danger began to appear for the foreign investor contracting with the state or one of its affiliated agencies benefiting from immunity like that of the state, because if this investor files a lawsuit against the state before the national judiciary of another state, he will face the main obstacle represented in the enjoyment of the state With judicial immunity, which ultimately leads to the waste of his private rights out of respect for the immunity of the state(18).

B - The legal basis for judicial immunity in renewable energy contracts.

It seems that the basis for the state's adherence to its judicial immunity to resolve disputes to which it is a party is that these contracts are considered state contracts. If the state does not, by its nature, allow its disputes of an administrative nature to be presented to the civil judiciary, it is a fortiori not to allow the presentation of its disputes which are As a party to it to others, the task of achieving truth and justice is one of the most special duties of the state that it exercises through its judiciary , so how can you allow it to be waived to the arbitral tribunal, especially since arbitration is usually less strict in terms of procedures and judgment and more lenient than the judge in applying his law, therefore, it is not permissible for the state and public legal persons to be represented except by the judiciary that it establishes and in accordance with its national laws. It is not permissible to judge the state and its bodies except by the national judge (19).

Frankly, one of the most persuasive reasons that drew our attention to the extent to which the state maintains its judicial immunity against arbitration in the issue of renewable energy contracts or other investment contracts is the unknown fate of the state when it resorts to arbitration, so it may not lose everything or lose everything in its concluded contract, and that Because it is ignorant of what will result from the arbitration decision that will be issued in the future, which leads to the lack of knowledge of the ruling that the arbitration decision can impose on the state, especially since the arbitrators are people chosen by the parties completely freely, and therefore any party can pressure the other party by choosing a cunning decision to serve his interest (20).

C- The position of states on judicial immunity

In fact, countries were previously strict in subjecting their disputes in which one of the parties to the contract was to non-judicial means, such as arbitration, or in other words to other than its competent judiciary, including France. The judgment issued in the (SNVS) case on December 13, 1975, where the State Council relied on its ruling that public institutions may not resort to arbitration except by explicit text, in accordance with the text of Articles (83-1004) of the French Code of Procedure No. 1123-75 of 1975 , no A public institution (the National Company for the Sale of Waste) and if it is a public institution of a commercial nature, it may resort to arbitration to settle its disputes: since there is no text in French law that tells it to do so. It is worth noting that the second party to the contract was an American company, meaning that this contract was international. The arbitration concluded between the two parties because one of the parties is a French public legal person, and the French Council of State issued an opinion that settled on March 6, 1986 denying the possibility of resorting to arbitration by the state or one of its public legal persons in their contracts, except in the presence of an express provision to that effect, and in the absence of this The text, whatever the nature of the contract, internationally or internally, the condition of resorting to arbitration in this contract is void (21).

It seems that countries soon found themselves compelled to give up part of their judicial sovereignty under pressure from multinational companies that threatened to halt their investment operations in countries that put the only national judicial path to resolve investment disputes between them and the state, and it seems that the reason for this This is due to the fact that these multinational companies had doubts about the ability of the national judiciary to provide a just and appropriate solution, in light of the inability of the judicial systems in

the countries to pursue the rapid advances to the requirements of settling these growing and renewed trade disputes. Moreover, the state itself has become one of the main practitioners. International trade, although it is originally an element or a foreign party to it, so the (state) must respect and fit the regulations imposed by the reality of international trade.

Accordingly, the sovereignty and judicial immunity of the state is time for it to retreat or at least shrink to some extent in the field of commercial investments because it has become just a pretext or a means through which the state can get rid of the rights of the multinational companies contracting with it in the event that the contract concluded between them is breached. Therefore, it has become established and to some extent that international commercial arbitration (if it is agreed upon in the contract) is a limitation or restriction on the jurisdiction of the internal judiciary of any independent and sovereign country in the world, because it entered international commercial arbitration knowingly and convinced of its provisions. It may then not recognize it or refuse to implement it [(22)]. Especially since the arbitrator who issues his ruling is only carrying out a task entrusted to him by the parties, that is, the arbitration judiciary is a special judiciary because the international arbitrator does not derive his powers from the law of another country, but from the agreement of the two parties alone in a way that does not raise the issue of the state's immunity before the authority of another state Therefore, it does not represent an attack on the sovereignty of the state party to the dispute, in addition to the fact that the state's insistence on its judicial immunity before the arbitral tribunal after waiving it is inconsistent with the principle of good faith in the state's implementation of its obligation, in other words, the state, by accepting the arbitration, has willingly accepted the arbitral tribunal's ruling. She has to maintain her immunity[(23)].

Results

1- Multinational companies usually prefer arbitration in settling disputes of investment in renewable energy contracts because of its ability to resolve the dispute quickly as it is defined by procedures that compel the arbitrator to resolve the dispute for a period not exceeding in all cases for six months unless otherwise agreed upon.

2- The general system that can act as an obstacle to arbitration within the framework of renewable energy contracts will be according to the narrow concept that takes into account the requirements and interests of international trade, that is, it will move away from the concept of internal and national public order here.

3- Ensuring the impartiality of the state's judiciary is not natural or reasonable because even if the national judge looking into the dispute wishes to do so, we do not believe that its laws or judicial capacity allow him to issue a ruling against his state, so multinational companies prefer arbitration**.**

4- The parties enjoy wide freedom when resolving their disputes in renewable energy contracts through arbitration if they are able to choose the start date of the arbitration procedures, the procedures to be followed and the applicable law to resolve their disputes, while this freedom is not available within the framework of the usual judicial procedures.

5- The judicial immunity of the state finds its basis in that the state is more deserving than others in achieving justice and realizing the right, as one of the most important duties of the state is to adjudicate or judge disputes that occur in its territory, so why has it been entrusted to other bodies such as the arbitration panel, for example.

6- The state may stand as an obstacle to settling its investment disputes in renewable energy contracts with multinational companies because of the unknown fate of the arbitration decision when it resorts to arbitration. to whom the arbitration will be conducted.

Conclusions and Recommendation

1- The necessity of issuing a special law regulating arbitration issues within the framework of renewable energy contracts because it is one of the investment contracts whose existence depends on the need for the approval of multinational companies to enter into contracts with the state to invest its resources, which stipulates first and foremost the necessity of providing an arbitration guarantee in order to agree to that.

2- It is better for the state to evade the authority of judicial immunity to prevent the issuance of the arbitration law or the approval to join treaties and agreements that regulate the issue of recognition and direct enforcement of arbitral awards, such as the New York Convention for the Enforcement of Foreign Judgments.

3- The necessity of facilitating the arbitration procedures and reducing the complicated procedures that exist in Iraq in order for it to be issued and implemented.

References

1) Dr. Ahmed Abdel Karim Salama, Origins in the International Conflict of Laws, Dar Al-Nahda Al-Arabiya, Cairo, 2008.
2) Dr. Ahmed Abdel Karim Salama, International and Internal Commercial Arbitration Law (Theorization and Comparative Application), Edition 1, Dar Al-Nahda Al-Arabiya, Cairo, 2004.
3) Dr. Akram Fadel Qasir, appointed in the study of the rules of resorting to commercial arbitration under the provisions of Iraqi law, Sabah Law Library, Baghdad, 2015.
4) Dr. Al-Hussein Al-Salami, Arbitration and the State's Judiciary (a comparative scientific study), i 1, Majd University Foundation, Beirut, 2008.
5) Dr. Hafida Al-Sayyid Haddad, Summary of the General Theory of International Commercial Arbitration, Al-Halabi Publications, Beirut, 2007
6) Dr. Khaled Abdel Azim Abu Ghaba, Arbitration and its Impact on Dispute Resolution, 1st Edition, Dar Al Fikr Al Jamia, Alexandria, 2011.
7) Dr. Khaled Kamal Okasha, The Role of Arbitration in Resolving Investment Contract Disputes (A Comparative Study of Some Legislation in Arab and Foreign Countries, International Conventions and the Privacy of the Washington Center (ISCID)), Culture House, 2014.
8) Dr. Saeed Youssef Al-Bustani, The Collector of Private International Law (the broad, multi-subject content), I 1, Al-Halabi Human Rights Publications, Beirut, 2009
9) Dr. Okasha Muhammad Abdel-Al, Conflict of Laws (Comparative Study), 1st Edition, Al-Halabi Human Rights Publications, Beirut, 2004.
10) Dr. Okasha Mohamed Abdel Aal, Legal Guarantees for the Protection of Foreign Investments, book guarantee research entitled Horizons and Guarantees of Arab and European Investments, 1st Edition, Center for Arab-European Studies, 2001.
11) Alaa Abarian, Alternative Means of Resolving Commercial Disputes (Comparative Study), 1st Edition, Al-Halabi Human Rights Publications, Beirut, 2008.
12) Dr. Fawzi Mohamed Sami, International Commercial Arbitration, House of Culture, Alexandria, 2010.
13) Dr. Kaveh Omar Muhammad, Arbitration in Oil Contract Disputes, 1st Edition, Zain Human Rights Publications, Beirut, 2015.
14) Dr. Muhammad Ibrahim Moussa, Arbitration in Disputes Arising from the Peaceful Use of Nuclear Energy (A Study in the Provisions of International Agreements (Brussels for the year 1962, and Vienna for the year 1963), New University House, Alexandria, 2010, p. 11.
15) . Mohamed Abdel-Khaleq Omar, Libyan private international law, Cairo 1971.

16) Dr. Mahmoud Al-Sayed Al-Tahwi, Arbitration in Civil and Commercial Matters and its Permission in Administrative Contract Disputes, New University House, Alexandria, 1999, p. 7.
17) Dr. Murad Mahmoud Al-Mawajdeh, Arbitration in State Contracts of International Character (Comparative Study), 1st Edition, House of Culture, Amman, 2001.
18) Dr. Mustafa Mohamed El-Gamal and d. Okasha Mohamed Abdel Aal, Arbitration in International and Internal Private Relations, (Egyptian Commercial Arbitration Law No. 27 of 1994 in the light of comparative law and international trade law, with reference to Arab arbitration laws), 1st Edition, Al-Halabi Human Rights Publications, Beirut, 1998.
19) Dr. Hesham Khaled, International Standard for Commercial Arbitration (a comparative study in Latin, Anglo-Saxon and Arabic legal systems - international conventions), Mansha'at al-Maaref, Alexandria, 2006.
20) Dar Karima, Belabassi Omar, The Public Order in Private International Law (a comparative study), Master's thesis, Belhadj Bouchaib University Center - Ain Tammou Chant, Algeria, 2019.
21) Ahmed Mohamed Abdel Aziz Ibrahim Burhan, Arbitration in Energy Contracts (Oil and Gas), Cairo University, Faculty of Law, 2017.
22) Omar Abdel Aziz, International Commercial Arbitration in Energy Contracts and its Impact on State Sovereignty, Menoufia University - Egypt, published research.