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The Issues of Commercial Arbitration in Investment Disputes: A Comparative Study

[1]Raghad Fawzi Abed

Abstract- *The legislation places some restrictions on the entry of investment into the national territory, such as limiting vital areas of investment to the state only. Countries seek to attract these foreign investments by granting many advantages and legal guarantees. Commercial arbitration is one of these guarantees mentioned by the Iraqi legislator in the Investment Law No. 13 of 2006 amending, by allowing the investment dispute to be referred to a national or foreign arbitration body agreed upon by the parties. It is well known that arbitration is an optional judiciary, and it is a means of settling disputes or settling them without resorting to the national judiciary. The importance of the study lies in the fact that the continuous endeavor of the state after 2004 to attract the largest possible amount of foreign investment necessitates addressing one of the guarantees of the expansion of the investment area within it by stating the most important guarantees provided by the law, which are commercial arbitration. In addition, the research aims to clarify the obstacles that surround commercial arbitration in Iraq and the reasons that prevent the existence of reliable national arbitration bodies and resort to them when a dispute occurs between the investing party and the corresponding party in the investment contract. The results show that arbitration is a system of private litigation whereby the parties to the dispute agree to refer their dispute to the arbitrators in a dispute already or in the future to settle it outside the scope of the ordinary court. Commercial arbitration has many advantages that encourage investors to resort to it to settle their disputes. In addition, among the most important obstacles to commercial arbitration is the failure of the arbitrator to apply jus cogens if the arbitrator was a foreigner, not a national. Parties in a contractual relationship are afraid of resorting to arbitration, which is not an exceptional way to settle disputes. The position of the Iraqi legislator regarding neutralizing the nature of arbitration appears to have given the arbitration decision the judicial nature. Although there are similarities between commercial arbitration and commercial mediation as alternative means of settling disputes, they differ from each other in terms of the authority that the arbitrator enjoys without the commercial mediator. Moreover, in terms of the ability of the parties to the dispute to reverse the decision to refer to the mediator without the arbitrator, and with regard to the concessions to be made by the parties who resort to commercial mediation as a means of settling the dispute.*

Keywords*: Commercial Arbitration, Investment Disputes, Iraq Commercial Law*

1. Introduction

Countries seeking to attract investment have adopted the issuance of many legislations to regulate national and foreign investments, which have been reflected in serious coordination between attracting capital and encouraging investments and between controlling and controlling these investments and giving them national importance (Khaghaany, Kbelah, & Almagtome, 2019). Legislation can place some restrictions on the entry of investment into the national territory, such as limiting vital areas to the state only. Countries seek to attract these foreign investments by granting many advantages and legal guarantees (M. Ali, Hameedi, & Almagtome, 2019). Commercial arbitration is one of these guarantees mentioned by the Iraqi legislator in the Investment Law No. 13 of 2006 as amended. This is by allowing the investment dispute to be referred to a national or foreign arbitration body agreed upon by the parties. It is well known that arbitration is an optional judiciary, and it is a means of settling disputes or settling them without resorting to the national judiciary. The Iraqi investment law defines in the first article of it the investment project as any economic activity that benefits

[1] Faculty of Law, University of Kufa, Najaf, Iraq. Email: raghadf.altaai@uokufa.edu

the country (Almagtome & Abbas, 2020),(Al-Wattar, Almagtome, & AL-Shafeay, 2019). The study will be legal and analytical for the texts of Iraqi laws that dealt with arbitration in general and commercial arbitration in particular. In addition, the study will compare these provisions with Arab laws that have adopted the regulation of commercial arbitration in their laws, such as Egyptian and Jordanian law. The real problem with studying the subject of commercial arbitration is the scarcity of studies that have clarified this topic accurately. Although there are many studies that dealt with arbitration in general, commercial arbitration is a concept, constraints and advantages that were not covered in these studies in a focused manner. In addition, the provisions that dealt with arbitration in the investment law came briefly and did not clarify the mechanism or procedures and did not indicate the possibility of implementing the arbitration decision in investment disputes if the arbitration was done by a national arbitration body.

2. The Concept of International Commercial Arbitration

Recently, it has become imperative to find a way to settle investment disputes appropriate to the commercial environment. This is due to the inability of the ordinary judiciary to keep pace with technological development and to provide other means appropriate to this environment. It is logical for the practical reality to produce a new and quick mechanism for settling the disputes raised by the various commercial contracts, especially those that take place via electronic means by the same means in which the contracts are concluded and implemented (Bernstein, 1992). Moreover, there is a desire from merchants to find a new system that is faster and in line with their desires and aspirations. As a result, international efforts came together to organize arbitration rules and procedures so that the various investment laws included an important guarantee for the foreign investor represented in the possibility of resorting to arbitration by the parties to the dispute (Born, 2009). Arbitration provides its parties with many advantages that emerge mainly from the nature of the medium in which the arbitration takes place. Despite the many advantages offered by arbitration, there are some obstacles that are related to the law of each country. In order to take note of the nature of arbitration in investment disputes in electronic commerce contracts, we will divide this topic into three demands. We will deal in the first with the concept of commercial arbitration, while we devote the second to the legal description of commercial arbitration, and allocate the third to the sources of commercial arbitration provisions.

2.1. Definition of Commercial Arbitration

Commercial arbitration is effective in investment disputes as a result of the subject matter of the dispute through which these contracts are made. Also, as a result of the confidentiality enjoyed by this type of arbitration and the speed of data retrieval as well as other advantages. In addition, most of the legislations did not set appropriate and integrated rules for commercial arbitration due to the novelty of his era, which is the result of the secretions of the practical reality that the world is witnessing. Arbitration may be defined as "a contractual system whereby the litigants agree to resolve the dispute that arises between them by arbitrators in order to separate them from the procedures of the ordinary judiciary" (Stigall, 2004). It was also defined as "a term for the chosen judiciary" (Petsche, 2017). It has also been known as "a special litigation system that arises from the agreement between the parties involved in the custody of a person or persons from others with the task of adjudicating existing disputes between them by virtue of an authoritative ruling." (Brekoulakis, 2017). Arbitration was also defined as "a system of private judiciary in which a specific litigation is exempted from the jurisdiction of the ordinary judiciary and entrusted to ordinary persons who choose to adjudicate therein" (Moses, 2017).

Moreover, it has been known as "the parties agreeing to present their differences to natural persons of their choice" (El-Ahdab, 2011). Also, it is defined as "the establishment of a special jurisdiction, which is done by withdrawing disputes from the general jurisdiction to be given to individuals who are provided with powers to adjudicate these disputes" (Daradkeh, 2010). After referring to the definition of arbitration in its traditional sense, it becomes clear that arbitration is a system of litigation according to which the parties to the dispute agree to refer their dispute to the arbitrators in a dispute already or in the future to settle it outside the scope of the ordinary judiciary. As for the framework of Arab legislation, we find that the Egyptian legislator was exposed to defining what is meant by traditional arbitration (Najjar, 2018). Article (4/1) of the amended Egyptian Arbitration Law No. (27 of 1994) states the following: "*The term arbitration in the provisions of this law is deviated from arbitration agreed upon by the parties of the dispute of their own free will, whether the party undertaking the arbitration procedures according to the agreement of the two parties is an organization or a permanent center for arbitration or not*," in contrast to most of the legislations that content themselves with a statement that the parties resort to arbitration by agreement. The parties as a means to settle disputes arising or to be created between them, such as Iraqi law (Jalili, 1987) and Jordanian (Haddad, 2002). Regarding the

Model Law (UNCITRAL) for international commercial arbitration (Binder & Sekolec, 2005), it has not, in turn, been directly exposed to the definition of arbitration. Article (2 / a) of this law confines itself to saying, "The term arbitration means: every arbitration whether it is organized through a permanent arbitration institution or not." We note that the New York Convention of 1958 regarding recognition and implementation of foreign arbitrators' rulings also did not come up with a comprehensive definition of the vocabulary of arbitration, but rather we found it limited to defining the most important concepts that came to this agreement, as Article (1/2) stipulated the following: Not only the rulings of specific arbitrators to adjudicate in specific cases, but also the rulings of permanent arbitral tribunals to which the parties resort. "(Hoellering, 1986). As for the position of the judiciary (Madi, 2015), the Supreme Constitutional Court in Egypt went to the definition of arbitration as: "Presenting a specific dispute between two parties to an arbitrator who is appointed by a third party, appointed by their choice or by their authorization, or in light of conditions that they define" (Ungar, 1986). The Egyptian Court of Cassation has defined arbitration as "an exceptional way to settle disputes and it consist of exit from the regular litigation methods and guarantees that it guarantees, as it is inevitably limited to what the arbitrators will go to present it to the arbitration board" (Aboul-Enein, 1995). Meanwhile, the Jordanian Court of Cassation indicates that "an exceptional way to settle disputes is limited to the way the will of the parties to the arbitration went, and the court should not expand the interpretation of the contract containing the arbitration clause to determine the disputes subject to arbitration" (El-Sharkawi, 1999).

2.2. Commercial Arbitration Evaluation

If the parties to the dispute resort to conventional arbitration as one of the means of settling disputes in general, for the benefits it provides. There is no doubt that commercial arbitration in investment disputes provides these advantages in addition to other advantages that it carries, even though the latter faces many obstacles and negatives that may prevent the parties from resorting to it. In order to take note of this, it is necessary to clarify the advantages and disadvantages that characterize commercial arbitration of investment disputes as follows.

2.2.1. Advantages of Commercial Arbitration

Commercial arbitration provides its parties with many advantages, such as speedy settlement of disputes, where arbitration is characterized by speedy settlement of disputes. This advantage greatly outperforms routine and complex court procedures, as well as increased investment contracts. Arbitration far exceeds the courts in expediting the settlement of disputes before it. The question may arise about the period during which the arbitrator or the arbitral tribunal must issue a decision, and is it incompatible with the speed in settling disputes that characterize normal arbitration?

We note that Iraqi law indicated that if the award did not take place within the agreed period or the period specified in the law of six months. It gives the right to the court competent to hear the dispute at the request of one of the litigants to add a new term (Stigall, 2006). As for Egyptian law, the arbitral tribunal must issue the award within the agreed period (El-Sharkawi, 1999). In the absence of the agreement, it must be issued within (12) months from the date of commencement of the arbitration procedures, and the arbitral tribunal may extend the period for a period not exceeding six months unless the parties agree otherwise. As for Jordanian law, it came the same position with the Egyptian legislator (Madi, 2015). In addition, commercial arbitration contributes to reducing litigation expenses because it leads to a speedy separation of litigation and shortening of procedures, and then leads to reduced expenses (Kwilinski, Volynets, Berdnik, Holovko, & Berzin, 2019). In addition, the arbitrator that adjudicates the dispute is a person who has technical and practical experience in a manner that reduces the costs necessary to seek the assistance of experts specializing in the subject of the dispute. This advantage is essential and of great value in commercial arbitration; It makes no sense to resort to the judiciary to settle disputes arising from it in which litigation procedures are lengthy and expensive. In addition to the advantages, there is also the desire to present the dispute to persons with technical expertise, specialists and trustworthy, keeping pace with the developments in the field of investment disputes, especially in the technical and legal field. All disputes that arise from the conclusion and implementation of investment contracts require a person with expertise in this field, which is not often available in the national judge (Jaroslav Valerievich, 2017b). Often the parties to the dispute resort to selecting arbitrators with a high degree of competence and experience in the subject matter of the dispute, and are usually chosen by international bodies specialized in commercial arbitration. This

avoids what is directed at judges from lack of experience and specialization in various disputes, especially investment disputes that have established many commercial contracts. In this case, the judges depend on what the appointed expert concludes. In summary, commercial arbitration has many advantages that encourage investors to resort to it to settle their disputes. Therefore, we suggest that Iraq join the New York Agreement of 1958 in order to encourage investment in Iraq.

2.2.2. Obstacles of Commercial Arbitration

These constraints are the inadequacy of national legislation for commercial arbitration, as national laws required that the arbitrator or the parties to a legal civil dispute be available. For example, we find that the Iraqi Civil Procedure Law stipulated in Article (255) that "the arbitrator may not be from the judiciary except with the permission of the Judicial Council and it may not be a minor, interdicted, or deprived of his civil rights. It is noted from this article that it was stipulated in the arbitrator Not to be a minor. A minor is a person who has not yet reached the age of majority, and therefore the legislator stipulated in the arbitrator that he be fully qualified (Kassinger & Williams, 2004). As for the Egyptian Arbitration Law, it stipulates in Article (16/1) that "the arbitrator may not be a minor, be prohibited from him, or deprived of his civil rights…" We find that the Egyptian legislator stipulated in the arbitrator that he be fully qualified by not being permitted A minor or an interdict may be an arbitrator (El-Awa, 2016). The Jordanian Arbitration Law refers to the same meaning through Article (15 / A), which in turn requires the arbitrator to be fully qualified by noting that the minor, the interdictor, or the deprived of his civil rights shall not assume the task of arbitration (Al-Hawamdeh & Alhusban, 2019). We note from the foregoing that the laws stipulated in the arbitrator the perfection of eligibility because the arbitration system is based on the confidence of the parties to the dispute as one of the alternative and important means in settling international trade disputes. In order for this system to have its prestige, the arbitration process must be conducted in all transparency and fairness through the assumption of this arbitration task by the people who are able and within the age of majority. In addition, one of the obstacles to commercial arbitration is the failure of the arbitrator to apply jus cogens if the arbitrator was a foreigner, not a national. Parties in the contractual relationship are afraid to resort to arbitration, which is not an exceptional way to settle disputes, due to the fear that the peremptory rules and the protection stipulated in national laws will not be applied. Therefore, some oppose resorting to arbitration because the protection of the weak party is always through jus cogens. This feature is called (denial of justice) that the legislator sets to protect the weaker party (Al-Shibli, 2018). The arbitrator, when the award is issued, does not look at this relationship because it does not look at the high political and legislative features of the state. Therefore, the arbitrator must not lose sight of the following:

1- The arbitrator does not neglect the supreme and public interest: it takes into consideration the peremptory norms stipulated in the national legislation. It may apply rules that achieve interests greater than those found in its national law, which are found in the law of the other party or from the nature of commercial customs (Kiernan, 2017).
2- Achieving the interests and goals of the international community: when the arbitrator settles disputes, he must respect the interests of the weak party. The arbitrator must have several options in applying the best law in the event that the applicable law is not chosen and this option is not available to the national judge (Singh, 2019).

3. Nature of Commercial Arbitration

The tremendous progress in technology and trade has led to the creation of alternative dispute settlement methods to the national judiciary because of its ease, time savings and commercial arbitration is one of these means. Dispute settlement means are defined as non-judicial ways to resolve a dispute in which the dispute is filed and settled outside the court (Khasanova & Abdullin, 2018). In addition to arbitration, what is known as mediation has emerged, and this requires distinguishing from it. Also, jurisprudence differed in determining the legal nature of arbitration. In order to take note of all these issues, we decided to divide this topic into two parts, the first is the legal nature of commercial arbitration, and the second is to distinguish it from commercial mediation.

3.1. The Legal Nature of Commercial Arbitration

Arbitration is an exceptional court and a departure from the general rule (Ryan, 2017). It is one of the most important alternative means of settling disputes. At the beginning, the arbitration is based on an agreement between the parties to the dispute, and the last of which is a judicial ruling that is subject to the Civil Procedure Law in terms of procedures.

We will explain what is the nature of commercial arbitration and whether it has a contractual nature, or a judicial nature, or whether it has a mixed nature through the following branches.

3.1.1. The Contractual Nature of Commercial Arbitration

Proponents of this trend see that commercial arbitration is of a contractual nature, so what relies on arbitration is the agreement of the parties to the dispute as it is subject to the principle of willpower. The arbitration contract is the same as all other contracts conducted affirmatively and acceptably, whether this agreement is a condition or an arbitration clause. Individuals, by agreeing to arbitrate, implicitly agree to waive the lawsuit and give the arbitrator the authority of their own. This authority cannot be judicial, because it is based on the will of the parties, and those who do not have public authority, it is natural that the authority of the arbitrators is not a public authority. Hence, the proponents of this trend see that the source of the executive force for arbitration decisions that are notified to the parties to the dispute is the agreement of the parties to the dispute. It is he who earns the arbitral awards the power of the judiciary, and the inability to challenge it on the basis of their compatibility with the will of the parties (Amin, 2018). Moreover, this trend is based on an argument that the goal of arbitration differs from the goal of the judiciary, the aim of arbitration is to achieve the interests of private parties, while the judiciary aims to achieve the general interest of society (Reiner, 2017). In addition, the purpose and aim of arbitration is the willingness of the parties to resolve their dispute in an amicable manner by removing the dispute from the judiciary and assigning it to the arbitrators (Duplat, Coeurderoy, & Hagedoorn, 2018). In terms of the position of national laws in this approach, it appears from the text of Article (265/2) of the Iraqi Civil Procedure Law. In the aforementioned paragraph, the legislator took the agreement nature of arbitration, which stipulates the following: “2 - If the arbitrators are authorized to conciliate, they are exempted from adhering to the procedures of pleadings and the rules of law, except those related to public order.” We note that if the arbitrators are authorized to conciliate, they are free to choose the appropriate means to settle the dispute without being bound by the procedures of the law of arguments, except for matters relating to public order. Otherwise, they are obligated to abide by the procedures mentioned in the Civil Procedure Code. However, we find that the text of the second paragraph of the said article is not the general course taken by the Iraqi legislator. We find that the Egyptian Arbitration Law took into account the agreement nature of arbitration awards, given that the legislator does not allow appealing arbitration awards that have the authority to order it. This appears in the text of Article (25) of the Arbitration Law: "Arbitration rulings issued in accordance with the provisions of this law do not accept any appeal of any of the methods of appeal stipulated in the Civil and Commercial Procedures Law."

Likewise, we find this trend in the ruling of the Egyptian Court of Cassation, which shows that the competence of the arbitration board and that it is based on the basis of the rule of law, except that it authorized an exception that robbed the jurisdiction of the judicial authorities on the basis that the parties to the dispute agree on the arbitrators according to certain conditions, and choose the rules that apply to Lawsuit procedures. Also, the parties to the dispute choose the law applicable to the subject of the dispute and designate the place of arbitration (Awad & Ahmed, 2018). Regarding the position of the Jordanian arbitration law in Article (18), it does not differ from the position of the Egyptian law, which took the agreement nature, as it is not acceptable to appeal the arbitration decisions issued in accordance with this law.

3.1.2. The Judicial Nature of Commercial Arbitration

Contrary to the contractual nature of commercial arbitration, which some believe, proponents of this trend see that commercial arbitration is of a judicial nature. This is clear from the authority of the state and its function in running the country's facilities as a basis for the decision analysis. It is nothing more than a means permitted by the state to resolve and settle the conflict between the parties to the conflict (A. Ali & Al Karyouti, 2018). This trend adds that arbitration is a judiciary with the origin of an agreement and when the arbitrator issues his ruling, he performs a judicial function delegated to him by the parties in order to resolve the dispute arising between them (Gómez-Fröde, 2018). The decisions of the arbitrators notified to the parties to the dispute are based on the commercial arbitration agreement. But the legislator is the one who recognizes it, explaining what the arbitrator must observe and the parties will not be able to create arbitration without the legislator who granted it this capacity. The nature of the arbitration award has the same binding as the judge's decision. Moreover, consideration of the dispute may be by ordinary or optional courts (commercial arbitration) (Almutawa & Maniruzzaman, 2015). Besides, both the arbitrator and the judge resolve the dispute by virtue of a decision that has the authority to order it, as the decision meets all the characteristics of the judicial work (Jaroslav Valerievich, 2017a). According to the judicial definition of commercial arbitration, which is defined as “a special type judicial system whereby the parties agree to refer the dispute and optionally to a neutral third party for

the appointment of one or several persons (the arbitration board) to settle the dispute using according to organizational rules appropriate to the subject with the intention of issuing a binding ruling to the parties" (What the proponents of this trend rely on is that "the arbitrators' decision is challenged in some of the legislations, as well as judicial rulings and implemented as one of them (Torremans & Fawcett, 2017). Likewise, the arbitrator responds with the same reasons that the judge responds"(Svantesson, 2016). Acceptance of the judicial nature of the arbitration should raise the question about the time for the award to acquire the judicial capacity, so does it acquire it as soon as it is issued or after ordering its implementation? The first trend believes that the judicial character of the arbitration award will not be considered except by issuing the execution order. As for the second trend, he sees that the enforcement order is not required to attain judicial status on the award.

The arbitration award has the power and authority of the order issued since its issuance, and the fact that the order to execute does not prevent the authentic decision, but rather makes it enforceable. This is what was decided by the Egyptian Court of Cassation, as it appeared in one of the reasons for its ruling, "and its eligibility will be from the strength of the ruling order to the arbitration decision and from the authority before it" (De Donno, 2017). As for the position of the Iraqi legislator, the arbitration decision gave the judicial nature in terms of implementing the decision, which must be approved by the competent court, as well as the arbitrator responds with the same reasons that the judge replies (Amin, 2018). It appears that the text of the first paragraph of Article (265) gives the arbitration the judicial nature, considering the arbitrator's commitment to the procedures set forth in the Civil Procedure Law, in contrast to what was stated in the second paragraph of the same article that gave the arbitrator's decision to authorize the agreement in an agreement. However, he notes that the nature of the arbitrator's decision in Iraqi law is of a judicial nature, given that the arbitrator's decision can only be implemented after it is ratified by the competent court (Amin, 2018). Besides, the Iraqi legislator has given the competent court wide authority to ratify or nullify the award. It was better for the Iraqi legislator not to take this approach because it is a waste of the will of the parties to the conflict, and it is contrary to what most Arab legislation that gave the arbitration decision went, the authority of the ruling. Therefore, we propose to the Iraqi legislator not to give the competent court broad authority over the award and to limit only the cases of nullity stipulated in Article (273) of the Iraqi Procedures Law. Despite the justifications for following this trend, they differed on the basis of the arbitrator's judicial function. There are those who hold that the basis for it is (delegation of state sovereignty) so the arbitrators derive their authority to exercise the judicial function from the legal system of the state, so it is they who give them this power temporarily. Thus, arbitration is an exception to the authority of the state. It is also taken on this above-mentioned tendency to rely on the judicial aspect of arbitration (Amin, 2018).

3.1.3. The Mixed Nature of Commercial Arbitration

The proponents of this theory see in commercial arbitration a mixed nature that starts from the arbitration agreement and then acquires its procedural effect on the basis of internal law, either through procedural laws or arbitration laws. Therefore, proponents of this trend believe that commercial arbitration passes through two stages because the introduction of one nature, whether contractual or judicial, raises many problems in implementation. Arbitration is both contractual and judicial in nature. The voluntary element is the dominant aspect of the arbitration agreement stage as a method for resolving disputes arising from investment contracts and defining the law applicable to the procedures and subject of the dispute. The second stage begins with the intervention of the state's judiciary when the parties to the dispute resort to it by implementing the arbitration award (Abdallah, 2017). The adoption of this capacity results in important results, especially with regard to defining the applicable law and also with regard to the implementation of decisions. For example, the law applicable to agreements and contracts is determined. In the second stage, it prepares the issuance of the order for the implementation of the commercial arbitration award as the judicial ruling. The applicable law is applied to matters of a judicial nature (Hoellering, 1986). However, the question arises: What is the time limit within which commercial arbitration changes from the contractual to the judicial nature?

There are those who confirm that arbitration is a mixed system that begins with an agreement, and after that, its judicial procedures begin and ends with the issuance of the arbitration decision (Moses, 2017). There are those who believe that, according to this intermediate theory, the arbitration decisions, even if they are considered a contract before the execution order, but in this matter, they become a judicial ruling (Brekoulakis, 2017). It seems that as long as commercial arbitration gives it the contractual and sometimes judicial character, it is not possible to take into account the contractual nature of the arbitration, because the arbitrators are separated according to the evidence and documents they have, even if they were chosen by the parties to the dispute. In addition, the judicial nature of arbitration cannot be taken because the decisions of the arbitrator are not issued by a judicial authority and do not follow the judicial

procedures regarding it before the courts, especially in the case of arbitration with conciliation. Moreover, the mixed nature cannot be taken because it tries to find a time lag between the contractual nature and the judicial nature of arbitration. This cannot be taken because the nature of the arbitration must continue with it from the beginning of the agreement to arbitration and until the implementation of the arbitration award. Therefore, the arbitration must have autonomy and independence and has its own nature, because it is based on special considerations that must be taken into account as much as possible to achieve the interests of the parties to the conflict, which are considerations related to speed and effectiveness in resolving the dispute (Martinez, 1990). Therefore, we agree with the view that (commercial arbitration) is not considered a voluntary act as purely as conciliation, nor is it considered a judicial act like the ordinary judiciary whose provisions are implemented by the parties to the conflict by law in a dispute before it. It is considered an autonomous work independently because it stems from the possibility of achieving justice between the parties to the conflict, taking into account the speed in the implementation of its provisions without obstacles in pursuance of the stability and continuity of transactions and the preservation of their confidentiality whenever necessary.

3.2. Distinguishing Commercial Arbitration from Commercial Mediation

Mediation is the basis for settling international trade disputes, as a desire of the parties to the dispute to find a rapid settlement method out of the ordinary court (Binder & Sekolec, 2005). It has an active importance in resolving many commercial disputes with a foreign party, especially electronic commercial contracts. To distinguish it from commercial arbitration, the topic was divided into two branches. We explain in the first the definition of commercial mediation, and in the second section we explain its distinction from commercial arbitration.

3.2.1. Definition of Commercial Mediation

Mediation is defined as "a voluntary process through which the parties to the conflict agree to work with a neutral person to resolve the dispute between them, while granting all the authority to the contestants to accept or reject the mediation, while the mediator's work is abandoned and his efforts are made on points of disagreement and suggesting ways to resolve" (Born, 2009). Mediation is synonymous with another term, namely conciliation, which is defined as "an amicable way to settle disputes through which the parties to the dispute can seek the assistance of a person from others or a committee to assist them in an impartial and independent manner and without imposing any binding opinion or decision in reaching an amicable settlement of the dispute between them" (Jaroslav Valerievich, 2017b). However, there are those who see a difference between them. Conciliation means the process of bringing the conflicting parties together and helping them reconcile the differences between them and reconcile. Whereas, mediation is a process in which the mediator proposes the conditions for settling the dispute (Jaroslav Valerievich, 2017a). Mediation takes several forms, including (advisory mediation), in which it is imperative for the parties to the dispute to consult a lawyer or expert, and (arbitration mediation), in which the parties to the dispute agree that the mediator undertakes the task of arbitration if the mediation mission fails. Judicial mediation is the practice in countries that follow the Anglo-Saxon system. Before settling a dispute, the courts suggest that the parties submit the matter to mediation before starting the formal hearing. Therefore, mediation takes many forms, it is more flexible than conciliation, because the mediator may interfere if the conciliation mission fails. Likewise, what distinguishes the effectiveness of commercial mediation is that the settlement centers stipulate in their regulations in the event that the dispute between the two parties is not settled through mediation, then the dispute is referred to arbitration for adjudication. The mediation parties can involve their attorneys in meetings and the aim is to give greater effectiveness to mediation by involving persons of competence and experience (Lee, 1996).

3.2.2. Distinguishing Commercial Mediation from Commercial Arbitration

Usually mediation differs from arbitration as follows:

1) The arbitrator has jurisdiction that gives him the power to make decisions and his decisions are binding on both parties. Unlike a mediator who does not have such authority, but has the power to propose solutions to both parties (Born, 2009).
2) The resort of the parties to the dispute to arbitration prevents them from retracting it and withdrawing from it before the end of the arbitration procedures and a decision in it. Unlike mediation, the parties to a conflict have the right to withdraw at any stage of it (Katz, 2016).
3) Mediation includes concessions between the two parties so that the mediator can find solutions and issue a decision appropriate to both parties. Whereas, the arbitration may issue a decision that may meet the

requests of one of the parties without the other party or reject part or all of the requests of the other party. Commercial arbitration is not looking for a compromise (Nyarko, 2019).

4. Conclusion

Arbitration is a system of private litigation whereby the parties to a dispute agree to refer their dispute to the arbitrators in a dispute that already exists or in the future to settle it outside the ordinary jurisdiction. Moreover, commercial arbitration has many advantages that encourage investors to resort to it to settle their disputes. Among the most important obstacles to commercial arbitration is the arbitrator's failure to apply jus cogens if the arbitrator was a foreigner, not a national. Parties in a contractual relationship are afraid of resorting to arbitration, which is not an exceptional way to settle disputes. The position of the Iraqi legislator regarding the neutralization of the nature of arbitration appears to have given the arbitration decision the judicial nature. Although there are similarities between commercial arbitration and commercial mediation as alternative means of settling disputes, they differ from each other in terms of the authority that the arbitrator enjoys without the commercial mediator. They also differ in terms of the ability of the parties to the dispute to reverse the decision to refer to the mediator without the arbitrator, as well as with regard to the concessions that must be submitted by the parties who resort to commercial mediation as a means of settling the dispute. Accordingly, we propose to the Iraqi legislator in the first place the approval of the arbitration law, which is a basic pillar for the parties to the conflict, whether national or foreign, because it is a real guarantee to settle disputes in general and commercial in particular. Finally, since the commercial arbitration that was approved in the amended Iraqi investment law is considered one of the investment guarantees, the legislator must stand by explaining the provisions of this arbitration in detail because of the specificity of its provisions because it relates to a commercial dispute related to matters of great economic importance.

References

Abdallah, A. K. (2017). 1 The Impact of the CISG on the Domestic Law of Electronic Transactions in the Arab World. *The Electronic CISG (Book), Editors: Ingeborg Schwenzer and Lisa Spagnolo*.

Aboul-Enein, M. I. M. (1995). Reflections on the New Egyptian Law on Arbitration. *Arbitration International*, *11*(1), 75-84.

Al-Hawamdeh, A. M., & Alhusban, A. A. A. (2019). Undue Intrusion on Parties' Autonomy Finally Amended: An Observation of Article 51 of the Jordanian Arbitration Law. *Arab Law Quarterly*, *33*(2), 198-208.

Al-Shibli, F. S. (2018). The Disputes of Administrative Contracts: The Possibility of Using Arbitration According to the Jordanian Arbitration Act 2001. *Journal of Legal, Ethical and Regulatory Issues*.

Al-Wattar, Y. M. A., Almagtome, A. H., & AL-Shafeay, K. M. (2019). The role of integrating hotel sustainability reporting practices into an Accounting Information System to enhance Hotel Financial Performance: Evidence from Iraq. *African Journal of Hospitality, Tourism and Leisure*, *8*(5), 1-16.

Ali, A., & Al Karyouti, N. (2018). Enforcement of Arbitral Awards in Egypt: Between Theory and Practice. *Message from the New Section Chair*, *31*(2), 24.

Ali, M., Hameedi, K., & Almagtome, A. (2019). Does Sustainability Reporting Via Accounting Information System Influence the Investment Decisions in Iraq? *International Journal of Innovation, Creativity and Change*, *9*(9), 294-312.

Almagtome, A., & Abbas, Z. (2020). Value Relevance of Financial Performance Measures: An Empirical Study. *International Journal of Psychological Rehabilitation*, *24*(7), 6777-6791.

Almutawa, A., & Maniruzzaman, A. (2015). Problems of enforcement of foreign arbitral awards in the Gulf Cooperation Council States and the prospect of a uniform GCC arbitration law: an empirical study. *Available at SSRN 2559690*.

Amin, F. R. (2018). Leave the case for review in the Iraqi Civil Procedure Law. *Tikrit University Journal for Rights*, *2*(2), 197-230.

Awad, M., & Ahmed, M. (2018). Electronic Government Publication: Egyptian Court of Cassation as a Model. *International Journal of Library and Information Sciences*, *5*(2), 318-343.

Bernstein, L. (1992). Opting out of the legal system: Extralegal contractual relations in the diamond industry. *The Journal of Legal Studies*, *21*(1), 115-157.

Binder, P., & Sekolec, J. (2005). *International commercial arbitration and conciliation in UNCITRAL model law jurisdictions*: Sweet & Maxwell London.

Born, G. (2009). *International commercial arbitration* (Vol. 1): Kluwer Law International.

Brekoulakis, S. (2017). Rethinking Consent in International Commercial Arbitration: A General Theory for Non-signatories. *Journal of International Dispute Settlement, 8*(4), 610-643.

Daradkeh, L. M. (2010). International commercial arbitration in the Arab countries: an economic necessity or legal colonisation? *International Journal of Liability and Scientific Enquiry, 3*(1-2), 117-129.

De Donno, M. (2017). The French Code: Des Relations Entre le Public et L'Administration: A New European Era for Administrative Procedure. *Italian J. Pub. L., 9*, 220.

Duplat, V., Coeurderoy, R., & Hagedoorn, J. (2018). Contractual governance and the choice of dispute-resolution mechanisms: Evidence on technology licensing. *Research Policy, 47*(6), 1096-1110.

El-Ahdab, J. (2011). *Arbitration with the Arab countries*: Kluwer Law International BV.

El-Awa, M. M. (2016). Privacy and Confidentiality in Egyptian Arbitration—Law and Practice. In *Confidentiality in Arbitration* (pp. 43-96): Springer.

El-Sharkawi, M. S. (1999). New Trends in Egyptian Arbitration Law. *Journal of International arbitration, 16*, 5-24.

Gómez-Fröde, C. X. (2018). The fulfillment of sentences issued by the federal judicial pon relation to the arbitral awards resolvedwer i by the National Commission of Medical Arbitration. *Revista CONAMED, 23*(3), 141-151.

Haddad, H. (2002). Jordan: Arbitration Law No. 31 of 2001. *Arab Law Quarterly, 17*(3), 287-303.

Hoellering, M. F. (1986). The uncitral model law on international commercial arbitration. *The International Lawyer*, 327-339.

Jalili, M. (1987). International arbitration in Iraq. *J. Int'l Arb., 4*, 109.

Jaroslav Valerievich, A. (2017a). Conduct of Electronic Arbitration. *CYArb-CZECH (& CENTRAL EUROPEAN) YEARBOOK OF ARBITRATION: Conduct of Arbitration*, 3-26.

Jaroslav Valerievich, A. (2017b). Electronic Arbitration: Legal Issues. *Revista Română de Arbitraj*(3), 43.

Kassinger, T. W., & Williams, D. J. (2004). Commercial Law Reform Issues in the Reconstruction of Iraq. *Ga. J. Int'l & Comp. L., 33*, 217.

Katz, R. L. (2016). Modeling an international investment court after the World Trade Organization dispute settlement body. *Harv. Negot. L. Rev., 22*, 163.

Khaghaany, M., Kbelah, S., & Almagtome, A. (2019). Value relevance of sustainability reporting under an accounting information system: Evidence from the tourism industry. *African Journal of Hospitality, Tourism and Leisure, 8*(Special Edition CUT), 1-12.

Khasanova, L., & Abdullin, A. (2018). Pacific means of dispute settlement in the WTO: challenges and perspectives. *National Academy of Managerial Staff of Culture and Arts Herald*(1).

Kiernan, B. (2017). *Genocide and resistance in Southeast Asia: Documentation, denial, and justice in Cambodia and East Timor*: Routledge.

Kwilinski, A., Volynets, R., Berdnik, I., Holovko, M., & Berzin, P. (2019). E-Commerce: Concept and Legal Regulation in Modern Economic Conditions. *Journal of Legal, Ethical and Regulatory Issues*.

Lee, H. G. (1996). *Electronic brokerage and electronic auction: the impact of IT on market structures.* Paper presented at the Proceedings of HICSS-29: 29th Hawaii International Conference on System Sciences.

Madi, R. (2015). Case Comment: The Unconstitutionality of Article 51 of the Jordanian Arbitration Law No. 31 of 2001. *Arab Law Quarterly, 29*(2), 190-197.

Martinez, R. (1990). Recognition and Enforcement of International Arbitral Awards Under the United Nations Convention of 1958: The" refusal" Provisions. *The International Lawyer*, 487-518.

Moses, M. L. (2017). *The principles and practice of international commercial arbitration*: Cambridge University Press.

Najjar, N. (2018). *Arbitration and International Trade in the Arab Countries*: Brill Nijhoff.

Nyarko, J. (2019). We'll See You in... Court! The lack of arbitration clauses in international commercial contracts. *International Review of Law and Economics, 58*, 6-24.

Petsche, M. A. (2017). Choice of Law in International Commercial Arbitration. In *Private International Law* (pp. 19-37): Springer.

Reiner, A. (2017). *International Commercial Arbitration: How International, How Commercial Is It? How Autonomous Is It and Should It Be?* Paper presented at the General Reports of the XIXth Congress of the International Academy of Comparative Law Rapports Généraux du XIXème Congrès de l'Académie Internationale de Droit Comparé.

Ryan, P. (2017). Smart contract relations in e-commerce: Legal implications of exchanges conducted on the blockchain. *Technology Innovation Management Review*.

Singh, G. (2019). Denial of Justice Enshrined in the Constitution to Indian Tribal Community. *Journal of the Gujarat Research Society, 21*(14), 214-216.

Stigall, D. E. (2004). From Baton Rouge to Baghdad: A Comparative Overview of the Iraqi Civil Code. *La. L. Rev.*, *65*, 131.

Stigall, D. E. (2006). Iraqi civil law: Its sources, substance, and sundering. *J. Transnat'l L. & Pol'y*, *16*, 1.

Svantesson, D. J. B. (2016). *Private international law and the internet*: Kluwer Law International BV.

Torremans, P., & Fawcett, J. (2017). *Cheshire, North & Fawcett: Private International Law*: Oxford University Press (OUP).

Ungar, K. T. (1986). The Enforcement of Arbitral Awards Under UNCITRAL's Model Law on International Commercial Arbitration. *Colum. J. Transnat'l L.*, *25*, 717.