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The Role of International Commercial Arbitration in Resolving Disputes Arising from the DBOT Contract

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Abstract

The International Federation of Consulting Engineers (FIDIC) is a prominent contributor to activating the role of arbitration in resolving disputes as one of the means resorted to instead of the judiciary and what arbitration is characterized by characteristics that facilitate the parties to resolve the dispute presented to them after exhausting all friendly means from the Dispute Resolution Council and other friendly means, which made resorting to inevitable arbitration in investment contracts and the DBOT contract represents one of the contractual models issued by (FIDIC) and the most appropriate for investment contracts, especially if the investor is foreign in his contract with the state or one of its public institutions, as the investor seeks to Preserving his rights by stipulating certain conditions that protect him from being subject to the law or national judiciary of the state party to the contract. Perhaps the FIDIC model (DBOT) has taken this issue into account by including a condition requiring the parties to resort to arbitration to settle disputes between them if other amicable methods fail to resolve the dispute, which requires research into the subject to clarify the definition of Arbitration, its types, and the procedures included in the Golden Contract Model (DBO) in considering the dispute until the issuance of the arbitration decision, compared to what is included in the standard documents issued by the Iraqi Ministry of Planning based on Circular No (4/7/4185) dated (24/2/2016) and other legislation related to the research topic.

Keywords: *FIDIC Contracts, International Commercial Arbitration, International Chamber of Commerce, Investment, Standard Documents.*

Introduction

First: Introduction to the topic:The contract is(DBO is of great importance in the field of construction and building, as are other contractual models issued by FIDIC, and what it requires in terms of a relatively long period of time and huge capital, so it is difficult to say that it is possible to complete its tasks within days, weeks or months. The contract under study represents one of the most important contractual models in its form ((DBOKnown as the (Golden Book), with the researcher adding the formula related to the transfer of ownership of the project upon the end of the operating period, which gives the contractor a guarantee that contributes to increasing investment activity, so that its title becomes (DBOT), and this long period and the disputes that may arise between the contractor and the employer may push the parties to try to find alternative solutions to settle disputes away from resorting to the judiciary and what is described as complexity and wasting time and effort, in addition to defamation, which may be a reason for severing relations in the future. The unwillingness of the parties to appear before the judiciary has shown the need to find other methods represented by arbitration, which has received a great deal of attention from FIDIC in terms of stating the procedures followed and the periods that must be observed when considering the dispute until the issuance of the arbitration decision.

Second: Research objectives:The research aims to clarify the concept of arbitration and the procedures followed in resolving disputes for the contract under study by following up on the rulings and clarifying any amendments thereto and the mechanism of the arbitration body's work in a way that ensures achieving stability for the existing contractual relationship.

Third: The research problem:The problem of the research is represented in the failure of the Iraqi legislator to give importance to this method and to show its role in resolving disputes arising from international engineering construction contracts, as the judiciary is still the body that looks into disputes that occur between the parties to these contracts in most cases, and the resulting complexity is likely to be a major

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reason for expelling investments of both national and foreign types due to fears of not guaranteeing their rights.

Fourth: Research methodologyIn our approach to the research topic, we will rely on the descriptive approach, using the analytical study of the contract clauses as one of the models issued by FIDIC, in addition to the comparison with the Iraqi trend related to the topic, including standard documents, as they represent Iraq's endeavor to unify the models used in contracts, similar to the models issued by FIDIC.

Fifth: Research plan:The research plan is divided into two requirements, as follows:

The first requirement: The concept of arbitration in a contract (DBOT)

The second requirement: The mechanism followed for arbitration in a contract ((DBOT

The first requirement

The concept of arbitration in a contractDBOT)

Arbitration is an alternative way to settle disputes, but it is not an amicable way because the arbitrator imposes the final solution to resolve the dispute. This is in contrast to amicable methods such as conciliation, mediation, etc., since the parties themselves are the ones who grant the issued decision the ability to resolve the dispute. Therefore, it can be said that arbitration is one of the mandatory settlement methods, along with the judiciary.( ).

The issue of granting the investor guarantees is a necessary and essential matter to encourage him to invest, given that it is a safety valve from all the risks and concerns that he may face and that surround his investment project.))All these reasons and more call for the necessity of clarifying the nature of arbitration, its types and forms, along with clarifying the legal nature of this system due to the overlap of its provisions with the provisions of the judiciary on the one hand, and considering it an alternative to resorting to the judiciary on the other hand. This is what will be clarified in the following sections:

(First branch)

Definition of arbitration in a contractDBOT)

The FIDIC contract models in general and the contract (DBOT) In particular, a definition of arbitration, despite the stipulation that the settlement of a dispute that has not been resolved amicably or in which the decision of the Dispute Resolution Board has not become final and binding must be resolved by resorting to international arbitration, which shall be carried out in accordance with the rules of the International Chamber of Commerce, unless otherwise agreed.( )The last phrase means that the parties have the right to choose a free arbitration system instead of the ICC arbitration system stipulated in the General Conditions.( )Perhaps the reason for not adopting a specific definition is due to the difference in opinions of jurisprudence in establishing a specific definition for this type of system, leaving the matter to researchers to prefer any of those opinions by researching the jurisprudential viewpoints in this regard.

Arbitration in the language: "It means delegation in judgment. It is taken from hakama and ahakkama, so he became an arbitrator in his money by arbitration. And they judged him between them, meaning they ordered him to judge between them. It is said that we judged so-and-so among us, meaning we approved his judgment between us."( ).

In terminology, "it is a procedure whereby the parties to a particular dispute agree to submit their differences to an arbitrator of their choice, and they determine his powers to settle them, while pledging to accept the arbitration ruling he issues and consider it binding."( ).

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In the opinion of jurisprudence, there have been many attempts to establish a comprehensive and exhaustive definition of this term. Some of them defined it as "the process of the litigants voluntarily agreeing, whether individually or as a group, to appoint another neutral party (one or more persons) as a special judge for that dispute, to rule on what happened between them instead of the judge by the state away from the public courts pursuant to a written or implicit agreement by any of the known methods that includes examining any dispute that arises or has arisen between them before a specific arbitration body or authority and a system agreed upon in advance, out of their desire for confidentiality, not referring the dispute, making it easier for judges, saving time, effort and money, and preserving what remains of the social ties and relationships between them."( )The observer in the aforementioned definition finds an immersion in details that is not consistent with the purpose of determining the nature of the thing, as the definition should be brief and include terms that carry deep meanings that clarify the purpose of arbitration without going into too much detail in explaining its meaning.

In another definition, arbitration is "a system for settling disputes through ordinary individuals chosen by the opponents directly or through another means they accept, or it is an opportunity for the parties to the dispute to resolve their disputes away from being subject to the jurisdiction of the courts authorized by the laws to resolve them through persons they choose."( )It is also known as: "A private justice institution, thanks to which disputes are exempted from the authority of public law and are resolved by individuals granted a judicial mission."( ).

Arbitration is also defined according to the Model Law on International Commercial Arbitration (UNCITRAL) as "an arbitration agreement: is an agreement between the parties to refer to arbitration all or some of the specific disputes that have arisen or may arise between them in respect of a specific legal relationship, whether contractual or non-contractual. The arbitration agreement may be in the form of an arbitration clause contained in a contract or in the form of a separate agreement."( )In Iraq, arbitration is conducted by referring the dispute to a body formed in accordance with the provisions of the Iraqi Civil Procedure Law No. (83) of 1969, as amended in Articles (251-276).( )The investor is very keen to resort to arbitration, especially in his contract with the state, for the following reasons:

Simplifying the procedures for resolving disputes and eliminating formalities, in addition to the confidentiality of the sessions and the prohibition of publishing the names of the parties, which preserves the reputation of the parties in contractual relations.( )Confidentiality is one of the most important reasons that led to the success of arbitration and its consistency with the parties' aim of not wanting to publicize the difficulties they face during the course of projects, which preserves their commercial reputation.)).

Not publishing arbitration awards except with the consent of the parties and the expertise that the parties seek when choosing arbitrators, which instills confidence in the arbitrator's good judgment and fairness, which prompted jurisprudence to say that arbitration is the natural judge of international construction contracts and their disputes, as it has been proven that it resolves 90% of the disputes in those contracts despite their complexity from the technical and legal aspects.( ).

The foreign investor fears that the national judge will not be neutral, thinking that he will side with the state's interests at the expense of his own interests.))For this reason, the foreign investor may resort to including a condition in the contract stating that he is not subject to the judiciary of the other contracting party and choose another alternative method such as arbitration or conciliation.( ).

Given the suitability of FIDIC contracts for vital projects, especially those between the state and foreign investors, due to the need to benefit from their expertise in completing important projects, we note that they have made arbitration the best and most appropriate way to resolve disputes arising from these contracts when the severity of the dispute increases and it transforms from being a mere claim to be considered by the engineer or the employer's representative to a dispute within the jurisdiction of arbitration or judicial bodies.( )We should not forget that contracting with the state makes the investor anxious when the state insists on judicial immunity that prevents the judiciary from considering disputes, although the modern trend restricts adherence to this immunity except in cases where the disposition is from public law, but it remains a basic principle that cannot be denied, and this is likely to lead to the waste of the interests

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and rights of investors and thus their reluctance to adopt such types of projects. Therefore, the investor is keen to include an arbitration clause to ward off the risks arising from the idea of state sovereignty on the one hand, and on the other hand, the state accepts the contracting procedure with an arbitration clause as a procedural guarantee to encourage investment in its territory.( ).

(Second branch)

Types of arbitration and its forms in a contract (DBOT)

There are several types of arbitration, including:

Free arbitration and institutional arbitration:This type finds its basis in the arbitration agreement itself. When the arbitration agreement indicates that the dispute will be settled by arbitration through a specific arbitration institution, we are dealing here with institutional arbitration, as if they agreed to conduct arbitration by referring the dispute to the Cairo Regional Center for Commercial Arbitration or the International Chamber of Commerce (as stipulated in the FIDIC contract models in the Golden and Red Books), as each of these centers has its own arbitration rules related to the selection of arbitrators, their rejection, arbitration procedures, expenses, etc. This type has been criticized due to the high costs required by this system to manage the arbitration process, in addition to the lack of the required degree of confidentiality, which is one of the important issues that ensures the preservation of the parties' reputations.( ).

However, if a specific institution is not specified to conduct the arbitration, then the arbitration is then free, and an agreement is reached on forming the arbitration panel and preparing its procedures, and this is the principle, or what is stipulated by the applicable law is followed. This means that the criterion for distinction is formal according to the presence of that indication or not.( )This type of arbitration has several advantages, starting with the confidentiality it provides to the parties, which makes it the most suitable for disputes related to private facilities such as military or nuclear facilities. Most companies that contract in the FIDIC format have their own commercial status, and therefore the lack of confidentiality in arbitration causes them damages that no compensation can satisfactorily erase.( ).

National (domestic) arbitration and international (external) arbitration:Domestic arbitration is that which relates to national relations in all their inherent elements in terms of the parties, the subject of the contract and its cause, regardless of whether the dispute is civil or commercial, which requires that arbitrators be chosen from the nationality of the country in which the arbitration is taking place.))As for international arbitration, its subject is to resolve a dispute that includes a foreign element, i.e. it affects more than one country, which makes the international arbitration body a private, neutral body that does not belong to a specific nationality, which instills confidence in the rulings issued, as it is the only judicial system that is unique in performing the judicial function in international commercial transactions.( )The Model Law on International Commercial Arbitration (UNCITRAL) issued by the United Nations in 1994 is considered one of the laws that clarified the meaning of international arbitration in its first article. After the first paragraph of it specified the scope of application of this law, which is international commercial arbitration, the third paragraph clarified that arbitration is international in certain cases, which are:

If the place of work of the two parties to the arbitration agreement at the time of the agreement is located in two different countries, and (paragraph four) of the same article clarifies that if one of the parties has more than one place of work, the place of work that is most closely related to the arbitration agreement shall be the one that is most closely related to the arbitration agreement, and if one of the parties does not have a place of work, the place of his usual residence shall be the one that is the one that is most closely related to the arbitration agreement.

If one of the following places is located outside the country in which the two parties' place of business is located (the place of arbitration if specified in the agreement or in accordance with it, any place where a significant part of the obligations arising from the commercial relationship are implemented or the place with which the subject of the dispute has the closest connection).

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If the two parties expressly agree that the subject of the arbitration agreement relates to more than one country.

Optional arbitration and compulsory arbitration:The principle of arbitration is that it should be optional, where the principle of the will of the parties prevails, as the parties choose the arbitrators and the law applicable to the procedures and subject of arbitration. However, the will of the parties alone is not sufficient to conduct arbitration, as the legislator must acknowledge this by organizing it in internal legislation. As for compulsory arbitration, it means that the legislator imposes on the opponents to resort to arbitration.( )Compulsory arbitration is of two types. The legislator may determine the obligation to resort to arbitration, leaving the parties free to choose arbitrators and determine the procedures and the law applicable to arbitration, or the legislator may require resorting to arbitration to resolve disputes and undertake to determine the arbitration body and draw up the procedures according to a specific mandatory system.

The last type seems closer to being a judicial body than an arbitration body, which led jurisprudence to deny that it is arbitration in the exact sense, and it no longer has practical applications due to its nature in the availability of the element of obligation, in addition to the disappearance of the Moscow Convention on Compulsory Arbitration between Economic Institutions of Member States (1972). In Iraq, resorting to arbitration( )It is mandatory in personal status matters, specifically judicial separation matters.( ).

The images that determine arbitration are of two types:

The first image is the earliest to appear and the most recognized and is known as (arbitration agreement), which means the agreement of the parties to the commercial relationship under an independent contract to submit disputes that actually arise to arbitration. This entails the occurrence of the dispute and then an agreement is made to submit it to the arbitration panel. This agreement is concluded between the two parties in three cases:

First case:If the contract includes an arbitration clause, but in a brief form.

The second case:If a dispute arises between the two parties regarding a transaction and the contract does not include or exist an agreement regarding arbitration.

The third case:There is a dispute that is considered by the competent court, and then the parties agree to resort to arbitration.( ).

The second form is the (arbitration clause), which is the most recent in appearance and the most widespread, given the parties to the contractual relationship's prior recognition of the importance of arbitration and its role in avoiding and resolving disputes. Therefore, the parties agree, pursuant to a provision in the contract concluded between them or in an independent agreement subsequent to the contract, that disputes that may arise between them will be referred to arbitration. The point is that the arbitration agreement precedes the emergence of the dispute, regardless of whether it is included in the original contract or in an appendix to it.)).

Regardless of the form in which the arbitration agreement is concluded, the completion of this agreement requires the availability of a set of formal and substantive conditions in terms of consent, subject matter, reason, and the writing required to conclude this agreement if it is to be concluded or proven, even if it is in the form of a clause mentioned in the original contract, it is considered an agreement independent of the contract, which is known as the principle of (independence of the arbitration clause), noting that the Iraqi legislator has stipulated writing in the arbitration agreement for proof in Article (252) of the Civil Procedure Law No. (83) of 1969 as amended, and therefore it may be proven by admission or a decisive oath. ( ).

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(The third branch)

Legal Nature of Arbitration

The subject of arbitration raises a wide controversy and jurisprudential disagreement in knowing the legal nature in view of the overlap between it and the judiciary. On the one hand, it is initially carried out by the agreement of the disputing parties to resort to arbitration, and on the other hand, it exercises its role as a special judicial body in resolving the dispute. Therefore, there are those who see it as having a contractual nature, and another sees it as having a judicial nature, while a third opinion goes to it as having a mixed nature. We present these three trends according to the following:

The first trend: arbitration is of a contractual nature

The supporters of this trend believe that arbitration and the work of arbitrators find their basis in an act issued by the parties to the dispute (the arbitration agreement) so that the arbitrator issues a binding decision for both parties through his act, and the latter's act returns to the former's act, which makes the arbitration agreement absorb the entire arbitration process, as both represent a single whole and a pyramid whose base is the agreement and whose summit is the arbitration decision, and that the arbitration agreement is the element that removes the dispute from the authority of the judiciary, assigning it to a special arbitrator with the specification of procedural rules and the applicable law, which gives arbitration the contractual character.( )Among the arguments relied upon by the proponents of this trend:

The arbitrators are not judges and do not have the authority to rule. The work they do is based on the agreement of the parties. Arbitration decisions cannot be challenged except by a claim of nullity due to the agreement, which is the starting point of arbitration leading to the decision. Therefore, appeals are only brought against the decisions. This was supported by the decision of the French Court of Cassation in the ruling issued on (7/27/1937) "that arbitration decisions are subject to contractual character."( ).

The arbitration contract takes the work of the arbitrators from beginning to end, and the arbitrator's failure to resolve the dispute does not constitute a denial of justice, as is the case with the judiciary.

The arbitrator can be national or foreign, but the judge must be national only, and the arbitrator does not have to meet the conditions required for the judge.( ).

The arbitrator aims, in performing his duties, to achieve a private interest for the parties to the arbitration contract, while the judge aims in his work to achieve the public interest.)).

The arbitrator is not obligated to follow the procedures of litigation or the rules of substantive law if the parties exempt him from that, unlike the judge. Also, the arbitration award itself does not have executive force, but rather it must be ordered to be implemented by the state judiciary.( ).

This theory has been subjected to many criticisms, most of which are based on noting the extent of exaggeration that the supporters of this theory give to the will in determining the legal nature. If the basis of the arbitrator's work is represented by agreement, what is applied to the dispute is the law that must be applied to perform his function of resolving the dispute, and this agreement has no effect on that.

The role of the will also declines if we know that arbitration cannot take place unless the right to resort to it is recognized by the state. Arbitration only occurs in matters in which reconciliation is permissible, in addition to the will of the law when it stipulates resorting to compulsory arbitration. In these cases, we notice the lack of agreement between the parties and the rule of law to maintain public order and ensure the smooth running of the arbitration process. In addition, the failure to enforce the arbitration award by force only occurs with the issuance of an enforcement order, which does not cast doubt on its nature. Otherwise, foreign judgments remain judicial despite the impossibility of enforcing them except with the issuance of an order to do so from the judicial authority.( ).

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The second trend: arbitration of a judicial nature

This theory is based on the original function performed by the arbitrator, which is the same function performed by the judge, as he examines the dispute in the same way that it is examined before the judge. Among the arguments that the proponents of this theory rely on are:

The arbitrator is considered a judge by virtue of his position in resolving disputes. He does not derive his authority from the arbitration agreement, but rather from the will of the legislator, which recognizes him. If the law does not permit the parties to agree to arbitration, there will be no arbitration condition or stipulation.( ).

The agreement of the parties to resort to arbitration represents nothing but a waiver by the parties of the right to resort to the official judiciary of the state and their agreement to choose a special type of judiciary, which is arbitration.

The ruling issued by the arbitration panel has all the characteristics of a judicial ruling in terms of examining the dispute, listening to the parties, and applying legal rules. In addition, it has the force of res judicata, like a judicial ruling. It differs only in one matter, which is that the arbitration ruling is issued by a private body, while the judicial ruling is issued by a public body. This matter cannot affect the judicial nature of the arbitrator's work.( ).

The will intervenes in performing the same role with respect to arbitration and the judiciary, as it is relied upon through the parties' agreement to resort to arbitration, and the will of one of them is directed towards resorting to the judiciary, given that civil justice is a required and not a burdensome judiciary.

Arbitration appeared before the judiciary, and as soon as it developed and its centers spread in many countries, the general judiciary system in the country followed it, so that they became two parallel systems within the country.

The award issued by the arbitration panel is considered a judicial award that has the force of res judicata since its issuance, and the enforcement order issued in this regard by the court only makes it enforceable.

The frequent resort to arbitration to resolve disputes over international trade contracts and the spread of many bodies and centers specialized in this have made it a judiciary for international disputes.

This theory has been criticized for its denial of what the arbitrator does, as it is not enough to say that his work is judicial in nature. The function of the judge's work is to protect rights and legal positions regardless of whether there is a dispute or not. As for the arbitrator, his function in resolving the dispute does not arise until it occurs. The law does not permit the implementation of the arbitration award except by issuing an enforcement order, which distinguishes it from the judicial ruling, indicating the lack of equality between them. In addition, the fact that arbitration centers resolve disputes over international trade contracts does not give the arbitration a judicial nature, as these centers do not enjoy the immunity, stability, and authority enjoyed by the judge. The arbitrator's jurisdiction to resolve these disputes is imposed by the nature of disputes related to international trade contracts and the need to simplify procedures, speed up their resolution, and shorten time, effort, and expenses. This is what resorting to arbitration achieves. ( ).

The third trend: arbitration of a mixed nature

The supporters of this trend say that both previous theories hit part of the truth, so it is not possible to support one of them and deny the justifications of the other trend. Therefore, it is more appropriate to combine them so that arbitration has a dual nature, both contractual and judicial.( ).

One opinion goes to say that the defect that was achieved by both of the previous theories is that each of them wanted to give arbitration a single description while it is in reality a mixed system that begins with an

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agreement, then a procedure, and ends with a judgment whose essence is the arbitration decision, i.e. the two ideas of the contract and the judgment alternate in the nature of arbitration together.( ).

Accordingly, arbitration, according to this trend, represents a type of private judiciary with an agreed-upon source, or it is a system for settling disputes undertaken by a third party to adjudicate a dispute that arises between two or more parties. This person exercises the task of the judge that the parties have entrusted to him. What follows from this statement is that arbitration awards are considered a contract before the issuance of the order to implement them and are subject to the general rules to which all other contracts are subject in terms of the availability of the necessary elements and issues related to capacity and others. After the issuance of the order to implement them, they become a judgment and are subject to the rules for implementing foreign judgments.

This theory has been criticized because it carries the defects of the two aforementioned theories and the weaknesses that were said about them, although it was an attempt by the supporters of this theory to resolve the disputes about the legal nature of arbitration, motivated by not denying the basis of the arbitrator's work, which is the agreement, and not neglecting the procedures of his judicial work and the issuance of a ruling that resolves the dispute between the parties. However, the problem in this lies in not defining the dividing line between the contractual nature of arbitration and the judicial nature.( ).

In order to determine the legal nature of arbitration, we see in turn that the trend that determines the contractual nature of arbitration is the most likely due to the prominent role of the arbitration agreement in granting the arbitrator the right to consider the dispute. Even if it is legally recognized as a means of resolving disputes, it cannot intervene to exercise these tasks of original judicial jurisdiction unless the will of the parties is directed towards granting it this right to intervene. In addition, the trends of most legislations go towards granting the court competent to consider the dispute the right to supervise and direct the arbitration panel and what follows from that of issuing an arbitration award that requires an order for execution so that the right holder can obtain his established right. All of these justifications and more are more logical and are supported by practical reality in highlighting the role of will in the arbitration process.

(Second requirement)

The mechanism followed for arbitration in a contract ((DBOT

The purpose of the arbitration mechanism is to start the arbitration process due to the existence of a dispute that the arbitrators are charged with resolving until the final arbitration award is issued. Article (20/8) of the Golden Book and Article (20/6) of the Red Book have been allocated) (In addition to Article (46/5) of the standard document for the design, supply and installation of electromechanical works issued by the Iraqi Ministry of Planning, which is currently being implemented, stating the procedures for submitting the dispute to arbitration, as stated in the FIDIC Gold and Red Contract Model that the dispute that exhausts the amicable settlement methods without being resolved or there is a disagreement about the decision of the Dispute Settlement Council without it becoming final and binding, its settlement shall be done through international arbitration.

(First branch)

Arbitrators' work procedures in a contract ((DBOT

Unless the parties agree otherwise, the dispute shall be settled by arbitrators as follows:

The settlement shall be final in accordance with the arbitration rules issued by the International Chamber of Commerce (institutional international arbitration).

We note that the sub-clause did not specify the seat of the International Chamber of Commerce, which raised problems from a practical standpoint. In one of the cases, the defendant raised the ambiguity of the

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arbitration clause on the grounds that it did not refer to the seat of the International Chamber of Commerce, claiming that there are many chambers. However, the arbitration court rejected the argument, as there is only one International Chamber of Commerce known worldwide in the context of arbitration. In fact, the inclusion of the phrase (the seat is in Paris) may be a reason for raising doubts about the phrase. Is it intended to refer to the seat of the International Chamber of Commerce, or is it intended to refer to the International Chamber of Commerce and the seat of arbitration is Paris, i.e. the place of arbitration?( )?

The dispute shall be settled by an arbitration panel consisting of three members appointed in accordance with the aforementioned arbitration rules.

It is noteworthy here that the latest editions issued by FIDIC stipulate that the settlement of the dispute is done by appointing an arbitration panel consisting of three members in accordance with the arbitration rules of the International Chamber of Commerce, while the previous editions before the amendment stipulated that the settlement of the dispute is done either by one arbitrator or more, i.e. it gave the parties the freedom to choose, which is the best from a practical point of view for the contractor and the employer, as some disputes are of simple value and do not require a panel of three arbitrators to resolve them, which saves a lot of time, effort and expenses. However, according to the current amendment, it is possible to overcome this obstacle by relying on the principle of the authority of the will, which enables the parties to avoid these issues by stipulating them in the contract.).

The arbitration procedures shall be conducted in the communication language agreed upon in the tender offer annex to the contract.

The establishment of the International Chamber of Commerce Arbitration Center in Paris dates back many years, as the arbitration system regulations were issued in 1963, then amended in 1972 and 1977 to keep pace with the development in international relations. As for the International Chamber of Commerce, it was established in 1919 and was a pioneer in the field of international trade and played a prominent role in arbitration matters, as it gained the certain trust of businessmen. According to statistics, from 1981 to 1990, the percentage of arbitration cases involving Arab parties reached 14% of the total international cases.( )Although the above paragraphs specify the arbitration institution whose rules are followed to resolve the dispute, the number of arbitrators, and the language of arbitration, it is possible to stipulate in the special conditions of the contract the specifying of the appointing authority that manages the arbitration process.

FIDIC referred all matters relating to arbitration procedures to the ICC Rules, except for the matters mentioned in the three paragraphs above. However, the ICC Rules include a statement of the mechanism for appointing the arbitration authority, how to manage the body, and other rules relating to arbitration, which can be summarized as follows:

Arbitration condition:There must be a written and explicit agreement between the parties that includes the jurisdiction of the International Chamber of Commerce Arbitration Center to resolve disputes arising from the contract concluded between them. This condition is adapted in the FIDIC Gold Model as a text that falls within a legal contract concluded with a sound will between the parties to resort to arbitration after exhausting the stages of amicable resolution in addition to resorting to the Dispute Resolution Council.( ).

Submitting the arbitration request and responding to it:The arbitration request shall be submitted to the General Secretariat of the International Court of Arbitration, along with the documents supporting the request. The defendant shall be obligated to respond to the request within thirty days of receiving the request.

Drafting the arbitrator's mission document: This is the first duty assigned to the arbitration panel, as it undertakes to prepare the arbitration mission document as soon as it receives the request from the general secretariat, with the arbitrators and opponents signing the document (this document is similar to the lawsuit petitions), which is useful in verifying the issues to be arbitrated, the place of arbitration, and the data of the parties to the dispute, in addition to verifying the soundness of the selection of arbitrators, their

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nationalities, and their competence to consider the dispute.( )The Supreme Court of Arbitration assumes the role of supervision and investigation in this regard.

The period within which the arbitration award must be issued:The arbitration award must be issued within six months from the date of the last signature on the mission document, whether by the arbitrator or the parties, or from the date of the expiry of the period set by the court for the party that refused to sign the mission document. The Supreme Arbitration Court may extend the period or refuse the extension according to its conviction of the arbitrator's or the panel's justifications.

The law applicable to the substantive and procedural issues of arbitration:The principle is that the parties must determine that law, otherwise the arbitration panel shall determine it, such as a specific national law, or it may be possible to determine the rules of international commercial custom.

The nature of the disputes that the arbitration center specializes in:The arbitration panel only considers international commercial matters, i.e. disputes related to local civil or commercial matters are outside its jurisdiction. It has been established that the panel has jurisdiction over international commercial disputes even if the contracting parties belong to the same nationality.( ).

In addition, the contract model was not confirmed.(DBOTOn multilateral arbitration( )Between a plaintiff and defendants, or between plaintiffs and one defendant, or between both parties. However, this should be confirmed in the FIDIC forms and its importance should be stated, just as determining the number of arbitrators and stating the language used as stipulated in the above articles.

As long as this type of contract is linked to multiple contractual relationships, it is expected that such overlapping disputes will occur. In fact, the most important thing that distinguishes international construction contracts is that they are a complex and intricate process. This complexity may be realistic due to the participation of multiple parties to carry out various tasks, or it may be a legal complexity due to the conclusion of a single complex contract or complex contracts for the purpose of implementation. Consequently, this results in multiple disputes, some of which are of a technical nature and some of which are of a legal nature, which makes arbitration, when it intervenes in resolving disputes in this type of contract, a distinctive character from arbitrations in other contracts.( )The huge size of the projects implemented through the contract (DBOTIt must be implemented by a contracting company, usually a consortium.

The consortium is determined in two forms. If the consortium is horizontal, then the arbitration is not multiple because all members have signed the contract with the employer and their responsibility towards the employer is joint and several. However, if the consortium is vertical (i.e. the employer signs the contract with one project for this project to form the consortium with the rest of the members), then in this case we may face multi-party arbitration. If the project that signed the contract is able to bring the members into the arbitration, it can object to the ruling issued against them.( ).

The standard document distinguishes between two types of contracts according to the contractor. If the contracts are concluded with foreign contractors, international arbitration is applied by following the approved procedures managed by international arbitration institutions and specified in the special conditions of the contract. The place of arbitration must also be in the city where the main headquarters of the designated arbitration institution is located or any other place chosen in accordance with the applicable and relevant arbitration laws. As for the approved language, the language of communication specified in paragraph (3/5) of the general conditions of the contract is followed.

If the contracts are concluded with local contractors, arbitration shall be conducted according to the procedures adopted under the laws of the Republic of Iraq in force, which means applying the arbitration provisions contained in the Civil Procedures Law referred to above (i.e. domestic national arbitration), as the Civil Procedures Law requires arbitrators to follow the conditions and procedures stipulated in the law itself unless the arbitration agreement or any subsequent agreement explicitly exempts them from it or sets specific procedures to follow.( ).

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This means that the basic principle of arbitration procedures is that they are carried out by following the method of judicial notifications when a dispute occurs to indicate the start of arbitration procedures. At that time, the parties do not have the right to bring the dispute before the judiciary except after exhausting the arbitration path or agreeing explicitly or implicitly to refer it to the judiciary. As for the number of arbitrators, most legislations agree that their number should either be an odd number to achieve the possibility of issuing a decision by majority, and each party shall choose an arbitrator on its behalf so that these two arbitrators may choose the third member as their president. Otherwise, the court originally competent to consider the dispute shall appoint them to consider the dispute and issue a decision regarding it by agreement or by majority within six months from the date of their acceptance of arbitration, unless the parties specify a period for that to confirm the speed of adjudication in these matters.).

The arbitration texts included in the Iraqi Civil Procedure Law give the courts the authority to monitor the arbitration agreement as the public authority that has the power to oblige the opponents to implement the arbitration decisions and rulings, as the state's recognition of arbitration rulings does not mean giving its rulings the status of binding, but rather it is considered a delegation to it in an aspect of the state's sovereign powers. Therefore, it was said that "the effectiveness of arbitration is derived primarily from the role played by the national judiciary in supporting it and intervening to correct its course and ensure adherence to its legal limits."( )Therefore, if the parties are unable to agree on organizing any matter related to arbitration, the matter shall be referred to the court competent to consider the dispute to organize it.

(Second branch)

Conditions in which arbitration is permissible in a contract (DBOT)

The Golden Book specified the conditions in which the two parties to the FIDIC agreement may resort to arbitration, which are:

If one of the parties fails to comply with the decision issued by the Dispute Settlement Board.

In this case, the other party has the right to refer this failure to arbitration, without prejudice to any other rights it may have arising therefrom.

If one of the parties concludes a contract (DBOT) By notifying the other party of its dissatisfaction with the decision of the Dispute Settlement Board within (28) days from the date of receipt of the decision, taking into account that it is not permissible to resort to arbitration except after the expiry of (56) days from sending the notice of dissatisfaction with the decision of the Board.( ).

Some believe that the notification of dissatisfaction with the decision of the Dispute Settlement Board represents a condition for arbitration procedures, i.e. arbitration procedures may not be initiated unless this notification is issued, although there are judicial arbitration trends that have tried to adapt the text by accepting the arbitration suit despite not first submitting the dispute to the Dispute Settlement Board, the procedures of which are subject to the rules of the International Chamber of Commerce, which prompted the employer to file a lawsuit to invalidate the arbitration award issued before the Swiss Federal Court, which interpreted the arbitration agreement to determine whether the parties' will was directed towards observing the aforementioned gradualism in resolving the existing dispute, as it became clear to the Federal Court that this gradualism cannot be applied in this case because its purpose is negated, since the Dispute Settlement Board aims, in its existence, to settle the dispute amicably in a way that does not affect the implementation of the work subject to the contract, while it was not formed until after the completion of the work, which indicates its ineffectiveness and the lack of benefit from submitting the dispute before this board.

The arbitration court also mentioned other cases in which the dispute can be submitted to arbitration, thus bypassing the dispute settlement board, including the case in which one of the parties to the dispute refuses to participate in forming the board, in which case it is submitted directly to arbitration and the dispute is accepted, as well as in the case in which the conditions of impartiality and independence are not met in the

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sole member of the board. All of these reasons and more prompted the Swiss Federal Court to support the arbitration court in its position and reject the claim to invalidate the arbitration award, as it is not possible to adhere to the application of the literal texts in isolation from the purpose of determining their rulings.( ).

If one of the parties to the contract notifies the other party of dissatisfaction within (28) days from the date of expiry of the (84) day period during which the Council must decide on the dispute presented to it.

If a dispute arises between the two parties to a contract (DBOT) and it was related to the contract or arising from it or its implementation and the Dispute Resolution Council was not present, whether due to the expiration of its term or for any other reason, then either party to the contract has the right to resort to arbitration directly.( ).

As for the position of the Iraqi legislator, he specified in Article (254) of the Civil Procedure Law the issues in which arbitration is permissible, which are the issues in which reconciliation is permissible, i.e. those related to financial interests, and he also permitted arbitration between spouses in accordance with the Personal Status Law and the provisions of Islamic Sharia.

Among the rules established in the Iraqi Civil Law( )"Arbitration is permissible only in financial rights, such as rights arising from sales contracts, loans, work, contracting, rent, etc., and arbitration is not permissible in disputes related to purely personal status arising from personal status issues, such as cases related to lineage, the validity or invalidity of marriage, guardianship of minors, and trusteeship over them, as these are issues of public order and settlement is not permissible in them contrary to what the law stipulates. However, arbitration is permissible in personal status issues related to financial rights, such as the assessment of alimony, marital furniture, or dowry."( ).

(The third branch)

Powers of the arbitration panel in a contract ((DBOT

The texts have shown the extent of the powers enjoyed by the arbitration panel with regard to the disclosure, review and revision of any certificate, estimates, instructions, opinions or evaluation issued by the engineer or any decision issued by the Dispute Resolution Board with regard to the dispute. There is nothing that prevents the engineer from appearing as a witness and giving his testimony to the arbitrator or arbitrators in any matter as long as it is related to the dispute.

No restrictions shall be imposed on either party in the proceedings before the arbitrator or arbitrators with respect to the evidence or defences that have previously been considered by the Dispute Resolution Board when issuing its decision, i.e. the evidence shall not be limited to that previously presented before the Board, nor shall the same apply with respect to the reasons for dissatisfaction stated in the notice of dissatisfaction. The arbitration panel may adopt any decision issued by the Board as evidence, and arbitration may commence before or after completion of the work related to the contract without the obligations of the parties, the engineer or the Dispute Resolution Board being affected by the arbitration procedures that take place during the execution of the work.( ).

Such powers enjoyed by the arbitrator or the panel require care and precision in his selection and emphasis on the extent of the latter's competence and complete knowledge of the dispute presented and the ability to devote a long time to scrutinising and examining a large number of technical and technical evidence rather than legal evidence and directing independent questions to the parties, witnesses and experts.( ).

After the arbitrator or the panel hears the parties' defence or arguments, investigates the defence and discusses the evidence, the final ruling must be issued within six months from the date of signing the mission document. The arbitrator or the arbitration panel may request an extension of this period from the International Court, which has the authority to accept or reject the request.( )Once the parties accept to submit their dispute to ICC arbitration, they are bound by the following two obligations:

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Accepting the arbitration award and implementing it without delay.

They waive all appeal methods that they may legally waive.

However, this does not prevent the parties to the dispute from appealing the arbitration award before their national courts and requesting its annulment or non-enforcement based on the provisions of their national law that regulate the issue of recognition of arbitration awards and their binding force. In this case, the waiver of the appeal contained in the above provisions shall not be taken into account.( ).

The Iraqi legislator has obliged arbitrators to follow the conditions and procedures stipulated in the Code of Civil Procedure unless the arbitration agreement or any other subsequent agreement explicitly exempts them from it or sets specific procedures to follow. The arbitrator is obligated to follow the procedures followed by the courts in terms of fulfilling the rights of the two parties in the claim and defense. If the arbitrators are authorized to reconcile, they are exempted from adhering to the procedures of litigation and the rules of law, except those related to public order.

If during the arbitration a preliminary issue is raised that is outside the arbitrators' jurisdiction, or a document is challenged for forgery, or penal measures are taken in this regard, the arbitrators shall stop their work and issue a decision for the parties to submit their requests to the competent court. Then the period specified for issuing the final arbitration decision shall be suspended until a ruling is issued on this issue.( ).

As stated in Article (266) of the Iraqi Civil Procedure Code regarding the settlement of the dispute, it shall be based on the arbitration contract or its condition, the documents and what the parties submit to them. The arbitrators shall specify a period for submitting the statements and documents. The dispute may be settled based on the requests and documents submitted by one party if the other party fails to submit its arguments within the specified period.

The issuance of the arbitration award represents the end of the arbitration procedures and the authority of the arbitrators, as it gives each party his right and puts an end to the existing dispute, provided that the award is issued by a majority of the votes of the arbitrators or is issued by the head of the panel if it is not possible to achieve a majority, with the necessity of providing reasons for it.( )In order for the ruling to be enforceable, the arbitrators must ensure that the rules of justice and equality between the two parties are observed with regard to their appearance before the panel, respect for the right to defence and confidentiality in the sessions, and take into account the period specified for issuing the ruling.( )The arbitrators must issue their decision unanimously or by majority, including the following:

Summary of the arbitration agreement.

Names of the arbitrators and the parties to the dispute.

Summary of the dispute.

Requests and arguments of the parties to the dispute and the reasons for accepting or rejecting any request.

The text of the decision, its reasons and justifications.

Arbitration costs and a statement of the party that bears them or the percentage of their distribution between the parties.

Date and place of issuance of the decision and the signatures of the arbitrators.( ).

After issuing the arbitration decision, we note that the Iraqi legislator has been unique in stipulating the necessity of giving a copy of the decision to each of the parties to the dispute, the purpose of which is to notify the opponents of the decision immediately after its issuance, in addition to announcing the decision

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to the competent court with the original arbitration agreement within three days following its issuance by a receipt signed by the court clerk. However, the arbitration award is not enforced by the enforcement departments unless it is ratified by the court originally competent to consider the dispute based on a request from one of the parties and after paying the prescribed fees.( ).

Despite the advantages of arbitration that make parties refrain from resorting to the judiciary, the matter is not without drawbacks or negatives that may detract from the status of arbitration as a method for resolving disputes. Appearing before a body such as the International Chamber of Commerce entails exorbitant expenses that may force the investor to give up part of his rights or follow another method.

Arbitration is also devoid of the established judicial guarantees, the most important of which is the right to litigation established in two stages or to appeal the ruling, since arbitration rulings are final. It is noted that the common preponderance reveals the weakness of the culture of following the arbitration method among contractors and employers and their ignorance of the advantages of this system and its procedures, on the one hand, and on the other hand, the selection of arbitrators by the parties, each from its side, is likely to cast doubt on the neutrality and independence of the arbitrator member who was selected.( ).

Despite the shortcomings noted in the arbitration system, they do not match the positives it has and the remarkable success it has achieved in international engineering construction contracts, which places a duty on us to direct the attention of the Iraqi legislator to expedite the enactment of the Iraqi arbitration law, while emphasizing the necessity of following the controls in application, which ensure the achievement of neutrality, transparency and justice among arbitrators in issuing the arbitration decision.

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