دور المحاكم المحلية في التحكيم التجاري الدولي

The Role of Domestic Courts in International Commercial Arbitration

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المستخلص

بقيت المحاكم والنظام القضائي الوسيلة الوحيدة لحل الخلافات بين الأطراف المتنازعة لفترة طويلة لاسيما في الأزمان الأخيرة بحيث أنها أصبحت جزءاً لا يتجزء من الحياة العامة ونتيجة عنه اصبح دور المحاكم المحلية في التحكيم التجاري الدولي مهم للنظرة العامة للدولة ولمدى تطور تشريعاتها لتكون متوافقة ومتوائمة مع المجتمع الدولي التي تعتبر جزء منه ، فإن كان الأطراف قد فكروا بأن يكون للمحاكم دور أكبر وأوسع في خلافاتهم ، فإنه من المهم أن يثبتوا ذلك ويتوجهوا لحل نزاعاتهم في المحاكم وان التطورات الأخيرة في عالم التجارة أثبتت ان التحكيم التجاري هو الوسيلة الأفضل والأكثر فاعلية لحل النزاعات بين التجار ، وعلى الرغم من ذلك ، يبقى للمحكمة دور مهم ومركزي لضمان أن تكون إجراءات وعملية التحكيم تعمل بصورة جيدة لأن المحكمة هي جزء من الكثير من إجراءات التحكيم ، بل في بعض الأحيان، يكون لزاماً على المحكمة ان تلعب دوراً معيناً في إجراءات التحكيم فهذا البحث ينظر بصورة عامة في الدور الإجمالي للمحكمة وكيف أنه من المهم أن يكون هنالك طرف قوي محايد له سلطة اتخاذ القرارات الحاسمة بشأن الخلاف المتنازع فيه.

ان من أهم المحاولات التي يبتغيها البحث هو محاولة استكشاف الأماكن التي يمكن أن يكون فيها دور للمحاكم ، سواء كان سلبياً أو إيجابياً، وسأحاول ان أبين الإشكالات التي يتمخض عنها هذا الدور في القانون العراقي وما يتضمنه من ضمانات وحمايات للأطراف المتنازعة وكيف يمكن تطويره.

Abstract

In recent history, the Judicial system and courtrooms have almost always been the sole resolution mechanism for all disputes and it has developed to be central to the life of every citizen and almost all parts of life. The role of domestic courts in arbitration is very important in how each state is viewed and how its legislation has developed to be aligned with that of the international community it forms part of. If parties in a

dispute have envisioned a larger and a bigger role for the court in their dispute, then they should be better off with a regular litigation process inside court rooms. Recent developments in commerce have shown that resorting to arbitration is the most effective and best way for resolving disputes between traders and this mechanism is essential to their businesses where they have everything resolved on their own terms and requirements and through selecting the arbitrators themselves. Nonetheless, courts remain central to a well-functioning arbitration process as they are part of many aspects of arbitration and, in certain situations; it is a must to let the court play a certain role. This research paper intends to have a discussion on the overall role of courts and how important it is sometimes to have such a powerful neutral outsider to ensure the smooth progression and development of business nationally and internationally. This research paper attempts to explore certain areas in the Iraqi arbitration provisions and where we see a role for the court and I will try to identify any issues in that role so we can look into what Iraq's domestic arbitration legislation has to offer in terms of supervision and guarantees for the disputed parties and how it can be improved.

Introduction

Arbitration is defined as one of the main and most important Alternative Dispute Resolution tools between parties having differences and looking for settlement in another place other than court. The resolution of these disputes may be through one or several arbitrators appointed by disputed parties according to an arbitral agreement between them.

In most states, arbitration has gained general acceptance and the practice has increased in particular in the commercial field in the last decades. This increase is mainly due to the expensive, complex and slow process of dispute resolution by courts. In addition, in an international dispute, the foreign party may not have confidence in the court system of a particular state and would rather resolve their differences or problems by a neutral tribunal. Almost in every state, arbitration law is a tool that meant to provide a legal framework to settle disputes in a fair and sufficient method and when arbitration is characterized as fast, inexpensive and brief, it develops faster and

leads to more interest from the international community leading to more agreements and conventions to regulate it[1].

The process of having courts reviewing arbitration procedures and the awards issued by the arbitral tribunal is a reality that existed for a long time and potentially since arbitration existed. Courts, naturally, are the main route for disputers in any conflict or difference may occur between the parties to a contract because the court and the judiciary, as noted by some researchers[2], perform an oversight role rather than a function or a public service utility and, generally, those parties to the contract agree to refer their dispute using an alternative resolution mechanism (arbitration), based on an arbitral agreement, they actually agree to disregard the involvement of courts in the dispute. However, it is submitted that arbitration depends on the court's support, which may be the only source of power to save the process if any party tries to affect it. In *Coppie Levalin N.V. v Ken Ren Fertilizer & Chemicals*[3], Judge Mustill stated that: "on the one hand, the concept of arbitration as a consensual process reinforced by the ideas of transnationalism leans against the involvement of the mechanisms of state through the medium of a municipal court. On the other side, there is the plain fact, palatable or not, that it is only a court possessing coercive powers which could rescue the arbitration if it is in danger of foundering". It can be seen from this statement that the role of courts is crucial and important and could be needed at any stage of the arbitral process.

Nonetheless, it has been noted[4] that it is the role of the government to ensure the existence of courts to provide dispute settlement services for parties and that the arbitration process isn't a domestic court procedure. When disputed parties agree to arbitrate they agree to distance themselves and their disputes from the authority of domestic courts. However, courts may have the jurisdiction to get involved in arbitration in various situations either on its own or upon request from the tribunal or the parties. The court intervention

is and must, *inter alia*, be in assistance of achieving a just arbitral process and to protect the interest of parties.

This paper focuses upon the role played by courts throughout the arbitral process from the beginning of arbitration until the arbitral awards enforcement. It will not go through every single situation that the court may intervene or have a role in an arbitration, which may require further examination, but it will cover the main aspects of the court's role in arbitration.

Consequently, this paper will discuss the role played by a court of law when the arbitration is commenced and will focus on the main parts of it such as the agreement's enforcement, its binding effect, formation of tribunal and any objections to the tribunal's jurisdiction. It will also discuss the role of courts throughout arbitration and when courts may interfere in terms of issuing orders of interim measures or issuing orders to ensure witnesses are in attendance or taking evidence. Finally, this paper will examine the process of recognizing and enforcing arbitral awards and any situation may lead to setting aside or refusal of enforcement of an award.

As for Iraqi legislation, and although it's related to domestic arbitration, the understanding of such legislation would enable us to understand the thought process and the current conception of court intervention. We will review and analyze Iraqi rules as stated in the Iraqi Civil Proceedings Law (ICPL) No (83) of 1969, but we will not explore any other legislation containing certain rules on arbitration and that is due to the fact that these other legislations including Investment Law No (13) of 2006[5] and the General Conditions of Contracts of Civil Engineering of (1988)[6] did not expand on the rules of arbitration, but rather kept it to either allowing parties to agree on arbitration, if they elect to or compelling them to arbitrate[7].

1. Role of Courts in the Commencement of Arbitration

Generally, powers of court are much the same in every state that has adopted modern arbitral regime, however, depending on the

national laws of each state, the role of courts regarding arbitration may vary from state to another. In any arbitration process there are certain situations where the courts intervene either because they are required to do so by a statute or upon a request from one of the parties. Although the courts' intervention may not be wanted by the parties, it is unavoidable in many situations, but this intervention must be minimal and only where it is absolutely important to ensure that parties, their rights and privileges are protected and to ensure the accurate application of the law. In this section, we will review the role played by court of law in enforcing the arbitration agreement, formation of the tribunal and any objections to the arbitral tribunal's authority in arbitrating disputes.

a. Enforcement of the Arbitral Agreement

In states where the United Nations Commission's Model Law is adopted, it is stated as a requirement in article 8 (2) of the law, that the "written arbitration agreements" should be enforced by courts. Although not all domestic arbitration laws require the arbitral agreement or arbitration contract[8] to be in writing, all these systems are in accord that it should be enforceable. The basic principle is that arbitration is agreed upon by the parties and they declared their desire to arbitrate, which if they do adhere to the provisions of the agreement, there is no need to resort to court, by any party, to enforce it. The role of courts here is to hold the parties to their agreement, if circumstances require the court to do so. It is an essential role for courts to ensure that the arbitral agreement has been followed as and how the parties agreed to it.

In many situations, enforcing an arbitral agreement may require raising the issue before court. One of the main reasons enforcement of arbitral agreement or clause may be raised before a domestic court is when one party ignores the agreement, or in their opinion that the arbitral agreement does not apply in the respective situation. Moreover, this party would rather to resort to court to assert his rights as indicated in the contract. On the other hand, the opposing party seeks the enforcement of the arbitral agreement or

clause and he would request from court not to entertain the request of the first party.

In this scenario, if court finds there was an arbitral agreement between the parties, it should decline jurisdiction on the merits. The court's decision would be referring parties to arbitration according to the abovementioned article 8 (2).

Another reason for enforcing the arbitral agreement through court is when a party asks the court to compel the opposing party to arbitration. The US Arbitration Act states that: "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court, for an order directing that such arbitration proceed in the manner provided for in such agreement...".[9] This section of the US federal arbitration law permits any party to seek court to compel and direct other party or parties to arbitrate. On the other hand, the (Model Law) in addition to some other modern laws don't have a similar provision in this respect. Accordingly, pursuant to the (Model Law), courts don't have such the power of issuing an order to compel any party to arbitrate. Article 5 of the (Model Law) is clear that any domestic court should not intervene in any matter subject to arbitration law, except where the law provides so. It is a must for the court to dismiss such a request, if the matter is governed or subject to an arbitration clause. It has been noted[10] that it is unlikely, in practice, to have many cases in which courts order a party to arbitrate. If parties decided to apply institutional arbitration rules to govern their arbitration, then almost all of these rules provide that when a party wishes to commence arbitration, they only need to file a claim with that other party or with the agreed upon institution. These rules do not require any party to ask for court permission for the commencement of arbitration[11].

Moreover, questioning the validity of the arbitral agreement is another way of bringing actions before the court in arbitration. In *Fiona Trusst & Holding Corporation & others v Yurii Privalov & ors*[12], Fiona Trusst (FT) and Yurii Privalov (YP) both were parties

to several contracts and arbitration was commenced to resolve a dispute between the two parties. (FT) submitted a request to an English court to stay the arbitration procedures claiming that contracts between these two parties and the arbitral agreements in these contracts are void on the ground of bribery. On the other hand, (YP) applied to court to stay the rescission claims in favour of arbitration according to article (9) of the US Act on Arbitration of (1996). Court in that case granted interlocutory injunctions to restrain the arbitration. (YP) appealed the judgment. The Appeal Court allowed their appeal and ordered stay of court proceedings. This shows how important it is for the court to have a positive role in favour of arbitration and ensure any attempts to disregard the arbitral agreement or clause are ceased.

However, in case one party refuses to arbitrate, the arbitral tribunal should continue its proceedings unless otherwise ordered by a court. Article 25 (b) of the (Model Law) clearly states that when one party agrees to arbitrate, the award will be binding to them, hence why proceedings is continued.

In addition, Iraq's Civil Proceedings Law No. 83 of 1969 (ICPL), provides for a similar provision in Article 253 where paragraph (1) states: "The dispute may not be heard by the court if it was subject to an arbitration agreement between the parties", which in itself a declaration that the priority is for arbitration and there should be no intervention of the court in this matter as the court is obliged to stay its proceedings until all arbitration proceedings are concluded[13]. Furthermore, the same article[14] goes to decide that if one party resorts to court instead of the arbitral agreement and the opposing party doesn't object; the court shall assume jurisdiction and the arbitral clause or agreement will be considered null and void. This article[15] continues further to declare that if the other party challenges the court's jurisdiction and wanted to adhere to the arbitration agreement, the court shall stay its proceedings until an award is made.

Although the (ICPL) is similar to the (Model Law) as it relates to the intervention of the court in enforcing arbitration agreements, however, it is evident that the Iraqi arbitration provisions in Article 253 require further enhancements and improvements as it relates to this matter and we recommend the addition of a more positive role where the court may intervene to assume jurisdiction, if the court finds that the arbitral clause or agreement is "null and void, inoperative or incapable of being performed", which will bring Iraqi law more in line with the wording used in the international rules on arbitration and with article (8) of the (Model Law).

b. Establishment of the Arbitral Tribunal

Critical to the entire arbitration process that the establishment of the arbitral tribunal is formed without any intervention of the court, however there are certain situations this intervention may be required. It is also important for the process that the arbitrators chosen to arbitrate are themselves independent from the parties, impartial and qualified to perform at the highest levels based on qualifications related to the nature of the dispute. We discuss the role of courts in these two aspects as follows:

i. Appointment of Arbitrators

Unlike the court where the judges are already appointed, in arbitration, parties are free to appoint the arbitrators they wish them to hear their case. The arbitral tribunals normally consist of three arbitrators, two of them selected by the parties and a third selected independently as a chairman. However, the tribunal may consist of one person and this normally is the practice in institutional arbitrations.

It is imperative to note that even parties, who may be acting *bona fide*, may find it difficult to agree amongst them[16] and they must cooperate in order to achieve this goal. Article 11 (2) of the Model Law provides for this free will for parties to appoint and constitute the arbitral tribunal. In case the parties fail to appoint the arbitrators or even when the two arbitrators fail to appoint a chairman for the

tribunal, the court may intervene upon a request from one of the parties to appoint the arbitrators or the chairman[17]. If the court makes such a decision, its decision shall be subject to no appeal[18].
In *National Iran Oil Company v State of Israel*[19], the Paris Court of Appeal made the decision to appoint an arbitrator on behalf of Israel. The court refused the request to do so at first for jurisdictional reasons. However, it found that Iran is unable to apply at Israeli courts since Iran is considered an enemy of Israel and it took the decision to appoint the arbitrator to avoid any denial of justice. Although the court in this case had refused the request in the first place, it took the decision again for a higher purpose and that is to achieve justice and to support the arbitral process.
Moreover, The (ICPL) provided scenarios where the court may intervene in the establishment of the arbitral tribunal and it indicates in article 256 that if a dispute arises or one of the arbitrators refuses to assume their duties or they were discharged of their duties, the court may intervene to appoint arbitrators for the tribunal; the decision of which shall be final, unless the court declines the request to appoint arbitrators, then the former decision can be appealed. The (ICPL) added an additional condition for establishing the tribunal, whether through the agreement or through court, where it required the number of tribunal members to be an odd number[20]. It is imperative that the court refrain from interfering in the establishment of the arbitral tribunal and, instead, there should be mechanisms for the court to facilitate the independent establishment of the tribunal.

ii. Independence, impartiality and qualification

It is submitted that the arbitrators in any arbitration must be independent, impartial and hold the required qualification to perform their duties on behalf of both parties[21]. For the benefit of the entire arbitration process and the dispute, it is vital for justice and fairness that the parties trust the tribunal's impartiality and capability of acting independently. An arbitrator may fail this test for many reasons for example having relationships with one of the

parties whether it is professional, social, or financial, which might show a personal interest for the arbitrator. The arbitrator must declare such an interest as it is critically important that arbitrators be free of any personal interest, which may lead to the arbitrators being recused.

According to Article 12 (2) of the Model Law, a party to arbitration may challenge an arbitrator "…only if circumstances exist, which give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties..." and Article 13 of the Model Law provides the procedure for this challenge by which a party is required to submit the challenge to the arbitral tribunal. If the challenge is not successful, the challenging party may request the court intervention, which decision shall be subject to no appeal. This position gives the court the authority to remove an arbitrator from the arbitral tribunal.

Having any social, professional or financial relationship between the arbitrator and one of the parties is considered as one of the grounds for challenging the appointment of the arbitrator on the basis of lacking independency or impartiality. In this case, a consideration should be given to whether the relationship in concern, which arbitrators are required to disclose if existed, is in fact affecting the arbitrator's independency or impartiality.

In *AT&T Corporation Lucent Technologies Inc. v. Saudi Cable Company*[22], the English Court of Appeal ruled upon a challenge against the existence of a previous relationship between an arbitrator and one of the parties. AT&T is an international telecommunications company that won a contract in Saudi Arabia, and that contract contained a condition under which the cable required for work was to be purchased from Saudi Cable. Many disputes occurred between AT&T and Saudi Cable and several arbitrations organized by the ICC commenced in London. In these arbitrations, awards made in favour of Saudi Cable. AT&T then discovered that the tribunal's chairman had a non-executive directorship of Nortel, a competitor to AT&T in bidding for the

project. AT&T requested the removal of the chairman on the grounds of lacking independency and impartiality and requested setting aside the awards. However, the Court held that there should be a ‘‘real danger’’ of impartiality, and the ‘‘real danger’’ did not exist in this case. It can be seen from this case that the matter of involvement in a previous relationship with one of the parties could affect the arbitrator’s impartiality or independency. However, the matter is circumstantial and the court intervention is important to protect the parties from any impartial arbitrators.

Although such a requirement is common and should be an agreed upon concept, Iraqi (ICPL) has no such provision requiring independence and impartiality of arbitrators. However, Article 261 of the (ICPL) provided that an arbitrator may be recused or challenged in the same manner as a judge[23]. Additionally, article 255 of the (ICPL) provides for a unique rule whereby it does not allow judges to be arbitrators unless it is approved by the Supreme Judicial Council[24]. This in itself is a unique approach as the law permits judges to act as arbitrators with no consideration to their daily duties as judges and the law does not specify any additional conditions and requirements in the role of the judge as an arbitrator and these judges may be required to arbitrate in a case being considered by their colleague judges to enforce the award or any other potential conflict or difference between the parties regarding the tribunal that may require the court’s intervention. We recommend amending this article to prevent judges from acting as arbitrators while they are in duty as well as provide for a structure to support the education on arbitration in Iraq, there need to be more domestic private sector players who can push the government and the legislature in Iraq to help with improving the environment for arbitration. There is plenty of room to work on and more to improve.

c. Challenges to Jurisdiction of the Arbitral Tribunal

The jurisdiction of the tribunal could come into questioning and the matter may be raised with the court to ascertain if the tribunal has

jurisdiction and whether they are qualified to hear the particular dispute in question. The jurisdiction of the arbitral tribunal may be discussed in two parts:

i. Seperability of the Arbitral Clause

The doctrine of separability establishes that an arbitration clause or agreement is separate and not dependent on the main underlying contractual agreement that contains or relates to the arbitral clause. The separability doctrine can be given some justification based on many reasons. Considering that the arbitration clause deals with the procedures of resolving any dispute that may rise between the parties, and the contract itself deals with the rights and the obligations of each party, this can be considered as a justification for separating those two agreements on the basis that they are two different types of agreements.

It has been noted by some scholars[25] that when the contract itself is considered null and void, arbitrators will not be able to decide whether they have that authority, however, other scholars[26] noted that: "When the parties to an agreement containing an arbitration clause enter into that agreement, they conclude not one but two agreements, the arbitral twin of which survives any birth defect or acquired disability of the principal agreement." It can be understood that the intention of the parties is clear to make that distinction and, in particular, when they choose some institutional rules to govern the arbitration process, which may specifically provide for the separability and independence of the arbitral agreement or clause from the main contract.

Moreover, this separability of the arbitral agreement establishes the autonomy and independence of the arbitration process in general. It would be much easier for any party, without the separability doctrine, to avoid arbitration by applying to court only challenging the validity of the contract itself. In this context, the existence of this doctrine helps avoiding the interference of the court in all matters that were intended to be subject to arbitration. In addition to that, international businesses and traders would never do business

without having an understanding among them and an expectation as well that all their disputes are to be decided in and by a neutral forum irrespective of any concerns around the main contract itself and its validity[27].

Furthermore, The NewYork Convention clearly provides in article II that: "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an arbitration agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said arbitration agreement is null and void, inoperative or incapable of being performed."

There is an obligation on courts when they receive disputes regarding contracts containing arbitral clauses, to refer parties to the arbitration process agreed upon except in the specified circumstances. This position of the convention fosters the doctrine of separability by which court intervention must be minimal and limited to the cases where the agreement itself is invalid, defective or incapable of being performed.

This position is more supported by article 8 (1) of the (Model Law), which requires courts to refer the issue to arbitration if the arbitral agreement itself is not null and void, inoperative or incapable of being performed. Courts are required to decline jurisdiction and refer parties to arbitration.

Although the English Arbitrat.ion Act of (1996) is not derived from the (Model Law) principles, The Ho.use of Lords permitted appeal in the case of *Fiona Trusst*. This appeal was accepted on the grounds of adopting the doctrine of sebarability by the Parliament in section (7) of the said Act. The House of Lords held that the arbitral clause must be interpreted according to a presumption that both parties, as rational businessmen, have the intention that their disputes are to be decided by the arbitral tribunal, unless it was clearly stated that certain issues are to be excluded from the jurisdiction of arbitrators. There was no such language. On the issue of separability, The Ho.use of Lords agreed again with what

the Court of Appeal provided and said that the arbitral agreement must be considered a different agreement and only treated as void or voidable for reasons directly related to it[28]. Although it was a reason for the court to intervene, the court itself refused to intervene and referred the matter to arbitration.

The (ICPL) has no provisions as it relates to the seperability of an arbitral agreement or clause in a contract and by default the issue is considered subject to the general rules stipulated in the Iraq Civil Code (40) of 1951 where article (139) stated "When a part of the contract is void, that part only will be void and the remaining part of the contract will remain valid and be considered as a separate contract unless it is revealed that the contract would not have been concluded without the part which has been considered void". This, in fact, supports the seperability of the arbitration clause although not explicitly stated. In recent developments, according to Law (14) of 2021[29] , Iraq joined the NewYork Convention, which enforces the concept of the seperability of the arbitral agreement or clause[30] and further enforces that Iraq is required to follow such an understanding[31].

We recommend the explicit inclusion of the seperability of the arbitral clause in any amendment or a future arbitration legislation to ensure the protection of disputed parties provided that the arbitral clause is in itself not invalid.

ii. The Competence - Competence of the Arbitral Tribunal

Article 16 of the (Model Law) provided that the jurisdiction of the arbitral tribunal may be challenged by any party to the agreement. This challenge may be raised after a court determines that the arbitral agreement, according to article (8) of the (Model Law), is valid and not null or void. The jurisdiction challenge usually arises when the arbitral proceedings commence before any other action in court. In addition, the challenge may arise at any stage through the arbitral proceedings when a party claiming that the tribunal exceeded the authority given to it. There could be some similarities between the justifications or grounds given on the issue of lack of

jurisdiction and between the grounds indicated in article (8) of the (Model Law). Nonetheless, this claim may be raised based on the grounds of exceeding the scope of the arbitral clause or agreement.
The main requirement for the challenge to be accepted is raising the challenge no later than submitting the defence statement. However, it could be raised throughout the arbitral process when the issue alleged to be out of the authority of the arbitral tribunal. Nevertheless, it has been noted[32] that, although the tribunal may deal with the challenge to jurisdiction *prima facie*, the final decision and the last word on the matter of jurisdiction rests with court. However, if no objection is raised before the court on the decision of the tribunal, recognizing its own jurisdiction, then the competent court has the authority to set aside the arbitral award.
Moreover, the court to which the enforcement of the arbitral award is submitted to, would be permitted pursuant to article V (1) (c) of the NewYork Convention to reject the enforcement of the award, which "…deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, ...". These two issues concern both parties who would spend a lot of money and time even before the court is in a position to decide the jurisdiction of the tribunal. Conversely, if the court is allowed to hear an appeal on the decision of the arbitral tribunal, there will be a risk of having one of the parties appealing the tribunal decision aiming only to delay the resolution of the dispute or delaying the arbitration itself.
In *Rio Algom Limited v. Sammi Steel*[33], two parties had agreed among themselves that one of them (The buyer) would buy part of steel manufacturing business from the other party (The seller). The agreement was that both parties should prepare what is called a "Closing Date Balance Sheet" immediately after closing. The agreement contained a clause providing for arbitration to resolve any dispute that may arise out of the Closing Date Balance Sheet. After the preparation of the Balance Sheet, there was a dispute.

Consequently, the buyer requested for the dispute to be resolved via arbitration as required in the agreement. The seller submitted the matter to a Canadian court challenging the jurisdiction of the tribunal and requesting stay of proceedings. The judge determined that the tribunal's jurisdiction is a matter of threshold in a construction contract and should be determined by court. Once appealed, the decision was reversed. It was found that the decision contained errors related to the principles set in the domestic law on arbitration rather than the principles set in the (Model Law) as enacted by Ontario's arbitration regulations.

The court in this case referred to article (16) of the (Model Law), which empowers the arbitral tribunal to have the right to rule on its own jurisdiction. The court also referred to article (8) of the (Model Law), which limits the court's role to only decide on the validity of the arbitral agreement. It can be understood from these provisions that the (Model Law) is not obliging the tribunal to proceed with arbitration pending the decision of the court. The (Model Law) provides the option to the tribunal to continue the proceedings or not. In practice, arbitrators, in general, stay their proceedings pending the court's judgment in order to avoid any inconvenience or expenses may result from continuing the arbitration proceedings and then having the court reversing the tribunal's decision. However, in reality, many of the arbitral tribunals continue to arbitrate the case at hand; because they are certain about the soundness of their arbitral agreement.

However, there is an ambiguity in terms of deciding whether or not the (Model Law) allows courts to order the tribunal to stay its proceedings and requires further clarification. Nonetheless, an order for stay, assuming its validity, may contradict article (5) of the (Model Law), which limits the intervention of the court to the matter explicitly referred to in the (Model Law).

In Iraq, however, the (ICPL) has not provided for such a concept, but it can be understood that the decision on whether the tribunal has jurisdiction will be referred to the arbitral tribunal itself to

decide on their own jurisdiction and this is based on the principle stated in article (253). Furthermore, this can be understood from article (268) where it stated that:

"If a preliminary matter that is outside the jurisdiction of arbitrators is raised during arbitration or if there is an objection as it relates to the falsification of a paper or if a criminal procedure was taken related to this paper or any other criminal act, arbitrators shall stay their procedures and issue an order to the parties to submit their requests to the designated court, and in this case the period assigned to arbitration shall be suspended until this matter is resolved".

This provision is clear as to the jurisdiction of the tribunal and if the issue is outside the jurisdiction of the tribunal, it is required to refer parties to court, but who will decide whether it is or not, there should be a self-ruling by the tribunal to determine that and the tribunal will have to review the matter first and decide whether it falls under its jurisdiction.

We recommend the amendment of Iraqi laws to explicitly reflect this important principle and have the arbitral tribunal make the decision and rule whether it has the jurisdiction, which will further limit the intervention of court in arbitration.

2. Role of Courts during Arbitration

When arbitration commences, it would be reasonable to assume that the arbitral tribunal controls the entire process to ensure the resolution of the dispute between parties, which is under its consideration. In this case, there will be no need to the court's intervention. Many arbitration cases have started and ended by reaching an award without having any intervention of courts. However, there are many situations where the court's intervention is required to have a sound arbitration process[34] and here are some of them:

a. Ordering Interim Measures

The arbitral tribunal may be required to issue orders by which it aims to protect one of the parties. The aim of such an order could be to seize one party's assets or to keep evidences preserved. The

main objective of these orders, however, is to keep the status of both parties until the tribunal decides on the facts of the case. Under the (Model Law), such an order is known as an "interim measure", which allows the intervention and support of the court to the arbitration process.

Article (17/1) of the (Model Law) states: "unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures". This article continued onto the following paragraphs in describing the interim measures system and the potential the tribunal may need to resort to this measure to request the court's intervention when the tribunal powers are insufficient. However, the tribunal will resort to such an order upon a request from one of the parties. In addition, article (23/1) of the International Chamber of Commerce (ICC) Rules states: "the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate".

Furthermore, it has been noted[35] that the tribunal will resort to the issuance of such an interim measure and requesting the court intervention in certain circumstances. These circumstances include, but not limited to: when the tribunal has no power to impose an action; or when the tribunal does not have the ability to act before the establishment of the tribunal; or when the tribunal may face some difficulties in enforcing the order.

The powers given to the tribunal depends, in large, on the domestic legislation and the legal system of the state where the tribunal is sitting. In some states, certain powers are limited to the court system and the tribunal is not permitted to take such a measure for many reasons such as public policy reasons[36]. These limitations of powers of a tribunal makes the intervention of the court expected to assist in issuing interim measures. It is expected, in these situations, that the court should intervene with the intention of supporting the arbitral process. If one party fails to adhere to orders issued by the tribunal, the tribunal will request from the court to intervene to compel the party in default to enforce the order. On the other hand,

some states refrain from interfering in issuing any interim measures due to the fact that arbitral tribunals have that within their rules and this can be seen clearly in the United States where certain applications for interim measures were denied by courts due to the fact that it was within the remit of the arbitral tribunal[37] or another court[38].

In addition, in case the tribunal is not established and there is a need that requires taking an action to seize an asset or to preserve evidences before disappearance, it is important that the court consider such an order. Most institutions have amended their international arbitration procedural rules recognizing the significance of such interim measures[39].

Before amending the International Center for Dispute Resolution (ICDR) rules on arbitration, it contained a provision that gives the tribunal, after constitution, the authority to issue orders of interim measures "whatever interim measures it deems necessary, including injunctive relief and measures for the protection or conservation of property"[40]. However, after the amendment of these rules, article (37) provided certain procedures under which any party may obtain an interim reprieve prior to the start of formation of the tribunal.

On the other hand, such a provision cannot be found in the (Model Law). In this concern, it seems that the answer to the question or the request of such an order is available and need no explanation[41]. Although there is some abnormality in the rules providing for such an order prior to forming the tribunal, since the (ICDR) and few other institutions[42] have provided the same rule, the writer emphasizes the need for more consideration of these rules. It is imperative that parties find the solutions available at every stage of their dispute in case one of the parties intends to manipulate the tribunal or the other party.

Moreover, for an interim measure to be effective, it may need to be enforced by involving courts. The (Model Law)[43] stipulates that: "an interim measure issued by an arbitral tribunal shall be recognised as binding and, unless otherwise provided by the arbitral

tribunal, enforced upon application to the competent authority, irrespective of the state in which it was issued, subject to the provisions of article 17 I". This clearly provides for the potential of recognising and enforcing interim measures by courts. However, the NewYork Convention is silent and has no similar provision related to enforcing and recognising interim measure issued by the tribunal[44]. However, there are many difficulties for such an order to be recognised and enforced. These difficulties include, but not limited to, the requirement of finality in the order and foreign courts in international arbitration may not recognise these types of orders for procedural reasons and these difficulties would lead to these orders being disregarded or abandoned[45].

Nonetheless, it can be said that there should be more flexibility in facilitating such interim measures given by the tribunal in order to be recognised and enforced. The aim of the NewYork Convention of recognising and enforcing arbitration awards can easily be achieved if the interim measures are issued based on the rules and principles of NewYork convention itself.

In addition to courts involvement in enforcing interim measures the arbitral tribunal issued for a certain situation, courts may receive applications that request the issuance of a protective interim measure. The (Model Law)[46] stipulates that: "it is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure". This provision provides the option for parties to apply to court before or during arbitration in order to issue an order of protection and whether applications for these interim measures is made to the tribunal or to court depends entirely on the law governing arbitration and the legal system in the respective state. In some states[47], the matter is clearly defined in the law and whether a party's application is submitted to the arbitral tribunal or to court for such an order and also when the court is permitted to accept such an application.

b. Ordering the Submission of Documents and Attendance of Witnesses

Generally, arbitration proceedings are similar to court proceedings where each opponent is required to submit their evidence and any other form of documentation to support their claim in the dispute, however, there might be challenges as to obtaining some documentation and evidences and may require asking one of the parties or a third party to come forward with the evidence. In situations where one party suppresses evidence or refuses to cooperate or if there is a third party in possession of evidence or a document important to the case, there might be a need to have the court intervene. The (Model Law)[48] provides that: "The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this state assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence". The rules of courts in taking evidence are not specified in this article and, consequently, the court would apply its own rules applied to normal litigations. The 1996 Arbitration Act in England[49] clearly states that the arbitral tribunal may use the same court procedures to produce documents or to ensure witnesses are attending before the tribunal.

Additionally, a third party who is not part of the contract is not obliged to follow what the agreement states and the tribunal has no power to compel third parties to participate in an arbitration process, unless the applicable law provides the tribunal with such a power[50]. Consequently, the tribunal will resort to court requesting a binding order to compel third parties to attend arbitration, or ordering the submission of documents relevant to the case being arbitrated. It seems easier that parties or the tribunal asking the court to issue such an order when the arbitral process takes place in its state and within its jurisdiction. However, it has been noted[51] that similar to the interim measures when the court can issue an injunction to seize assets in its state for an arbitration commenced in another state to protect one of the parties, the availability of such

an order regarding witnesses and taking evidence depends entirely on the laws applied by the court in this regard.

Furthermore, the English Arbitration Act of (1996) provides the tribunal with the authority of using the court procedures regarding the attendance of witnesses to be used within the UK and only when the courts, in the case that the seat is outside England, find it appropriate to do so[52]. However, courts have been in support of arbitration and assisting in the issuance of such an order even internationally[53].

The (ICPL) does not contain any provision that delegates such powers to the arbitral tribunal and they are unable to issue any interim measures, but rather refers them directly to the competent court. Article (269) of the (ICPL) provided for specific situations where the tribunal may reach out to court to issue an interim measure or take action and these specific situations are any action may require a judicial delegation of power, requesting witnesses and, or, refusal to answer or respond to the tribunal by one party.

This is very inflexible for the arbitral tribunal to perform their duties and it is critically important for Iraq and Iraqi law to contain such a provision to allow for the tribunal to be able to protect the rights of any party or to ensure the independence of the tribunal to effectively and efficiently perform its duties in resolving the dispute. This is especially important since the NewYork Convention, which was recently adopted by Iraq, has no such provision and is silent as it relates to the abilities of the tribunal to take such measures. We recommend that arbitration law is amended to empower the arbitral tribunal to take certain measures independently without any requirement for court intervention, which will make arbitration more desirable in Iraq.

3. Role of Courts after Arbitration

a. Recognition and Enforcement of Arbitral Awards

In every (Model Law) state and in states that apply modern arbitration laws, an award is, with some exceptions, a binding award that must be enforced[54] after the party who won has asked

for enforcement. The latter party, in this case, would present the award issued by the arbitral tribunal to court for enforcement, and upon that submission, the court is required to recognise it and enforce it accordingly. However, in certain states, the arbitral award cannot be enforced, yet they may recognise it depending on the laws in the state where the court is sought for recognition and enforcement[55]. Recognition of awards, without enforcement, might be sought by one of the parties when it is submitted as a defence. When the award is issued in favour of the respondent, he or she may submit to a court that is examining another case, a relevant case potentially, to recognise that arbitral award as a valid and legal defence evidence. This may include a scenario where the claimant, possibly, intended to bring new proceedings against the respondent in court.

The NewYork convention contains very simple and efficient rules to help states in the process of recognising and enforcing international arbitral awards. The NewYork convention clearly stipulates that it "..shall apply to the recognition and enforcement of arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the state where their recognition and enforcement are sought"[56]. However, it further defines the basis and the qualification under which a contracting state would apply these rules. It is clear in the convention that the will of a state to recognise and enforce an arbitral award is based on the reciprocity principle in commercial matters and according to laws of the contracting state in question[57].

In general, the (Model Law) provides that the recognition and enforcement of arbitral awards should be accepted in international arbitral awards. Recognition and enforcement of arbitral awards in a domestic arbitration is, generally, much easier than an international arbitration. Nonetheless, it has been indicated[58] that

the domestic arbitration is of importance to international arbitration, in particular, when enforcing foreign awards. The laws and the regimes that govern domestic arbitration regulate the situations and circumstances that determine whether a foreign award is recognised and enforced.

For the purposes of recongising and enforcing an arbitral award, the conversion of an arbitral award to a judgment is an essential step performed by courts to ensure a complete and valid arbitration[59]. However, enforcement of the court's judgment depends entirely on the procedural rules applied in that state[60]. If the winning party was the claimant and he submitted the award to the competent court for enforcement, the court is required to recognise and enforce the award by issuing a judgment that gives the award the legal effect for enforcement in that state. On the other hand, if the winning party was the respondent and he submitted the arbitral award to court, the claimant would not be entitled to any relief and the court should dismiss any suit regarding the case.

Moreover, it is imperative for the recognition and enforcement of arbitral awards to be submitted to a court of a competent jurisdiction. The determination of whether or not the court has jurisdiction depends on the laws of that state where court is sought to enforce the award. Existence of assets in that state, for instance, is a basis to establish jurisdiction for recognition and enforcement purposes. In case the award debtor has assets in different states, this would allow the award creditor to apply to one or more of these states based on the forum shopping principle. However, it has been noted that US courts, for example, have decided, at their discretion, not to enforce an award where they consider that they are a *forum non conveniens* due to lack of personal jurisdiction[61].

The NewYork convention[62] requires certain documents for a valid submission of an award to court. However, courts[63], in general, held that there should not be a strict formality in applying to court. In *R SA v A Ltd*[64], the Supreme Court of Switzerland held that the lack of authentication of a document may not be objected to unless

the authenticity of that document is also disputed. Flexibility of courts in recognising and enforcing arbitral awards is very critical to achieve a sound and easy arbitration system.

As for the (ICPL), it provided that an arbitral award shall not be enforced before it is ratified by court based on a request from one of the parties[65]. This in itself is a complication of the process whereby Iraqi law determines that an arbitral award will have no legal force whatsoever without the approval of a court[66]. We view this as an imposition of the court power to review all arbitrations and could lead to an unwanted interference especially if the parties have agreed to arbitration and accepted the arbitral award. Nonetheless, as Iraq has adopted the NewYork Convention of 1958[67], courts are required to recognise and enforce arbitral awards

In principle, courts should refrain from interfering in arbitration unless there is a breach or a strong suspicion of a breach by arbitrators or if evidence appeared against the validity of the arbitration agreement itself. Nonetheless, as Iraq adopted the NewYork Convention, this requirement of reviewing and approving awards should be repealed, amended or replaced with a more flexible provision to enable and accelerate the enforcement of arbitral awards.

b. Setting aside and Refusal of the Enforcement of Arbitral Awards

The award debtor is the party who was not satisfied with the outcome of arbitration and may object the arbitral award issued against them. If the award debtor is to challenge the award, they have several options to do so. They, for instance, may appeal to the tribunal against the award when arbitration rules permit them to do so[68]; or they may appeal to the competent court in the state where the award is issued; or he might seek to resist the enforcement of the award[69].

There are certain considerations to be taken into consideration when challenging an award in international arbitration. When a party challenges the award issuance by requesting to set aside the

award that party should apply to the competent court in the seat of arbitration and cannot apply to courts where the enforcement is sought[70]. Moreover, the (Model Law)[71] confirms that by stating that: "An arbitral award may be set aside by the court specified in article (6)…" and the court specified in article (6) is the court of the state or states where arbitration is taking place and its laws govern the process. However, when a court is sought to enforce the arbitral award accepted to entertain a challenge objecting the award issuance, it may decide not to recognise the award or enforce it, but it cannot set it aside unless there is a breach by one of the parties to the arbitral clause or agreement or if the agreement in itself is not valid.

Article (34/2) of the (Model Law) provided grounds under which one of the parties may request setting aside an arbitral award, or it could be raised by the court itself for reasons of, for example, violation of public policy. In addition, article (36) of the (Model Law) and article (V) of the NewYork convention provided the grounds under which a party may apply to court for refusal and rejection of enforcement. The grounds for requesting setting aside or rejecting and refusing the enforcement of the arbitral award are similar and can be broken down into two categories.

The first category provides the grounds for refusal of enforcement or setting aside an award where the concerned party initiates an application to the competent court respectively. The second category provides the grounds for refusal of enforcement or setting aside, which could be initiated not only by the concerned party, but also by the court itself, which may raise it with no need to any application or proof by the concerned party.

The grounds in the first category includes, but not limited to, the incapacity of one of the parties to conclude the agreement. In *Agrimpex SA v. JF Braun & Sons, Inc*[72], the Supreme Court of Greece refused the enforcement of an arbitral award due to the absence of a written power of attorney to complete the arbitration agreement. In addition, the fact that an arbitration agreement is

invalid under the applicable law chosen by the parties or the law of the forum, is another reason for refusal of enforcement or setting aside an award. In *Fugerolle SA v. Ministry of Defence of Syria*[73], the Administrative Tribunal refused the enforcement; because a preliminary advice on the referral of the case to arbitration was not made by the competent authority, which is the Committee of the Council of State.

Moreover, setting aside or annulling an arbitral award based on the grounds set in article (34) of the (Model Law), is one of the grounds under which an arbitral award might be refused[74]. In *Claude Clair v. Louis Berardi*[75], The Paris Court of Appeal decided not to enforce an arbitral award that was set aside by a Swiss court. However, there have been cases where the court has enforced an award even though it was set aside[76].

Furthermore, the court itself may refuse enforcement or set aside an award on its own initiative for two main reasons. The first reason is when the case in question is not capable of being settled through arbitration in accordance with the national law of the court setting the award aside or refusing it. In *SA Agima v Smith Industries*[77], the Commercial court in Brussels refused the enforcement of an award due to the fact that it determined that the compensation given to a terminated exclusive distributor is non-arbitrable and it should not be enforced.

In addition and more importantly, the second reason for setting aside or refusing an arbitral award on the initiative of the court is when the arbitral award is in contradiction with any public policy of the state of that court. It is submitted that each state has its own view on public policy and there are differences between many states regarding what act or transaction that may or may not be in contradiction with that state's public policy. For example, in many strict Islamic states, any transaction that involves trading of alcohol is not arbitrable because of illegality and it is in contradiction with their public policy. However, it has been indicated[78] that most developed jurisdictions have a similar public policy conception.

In Iraq, the (ICPL)[79] considers an arbitral award null, can be set aside and not enforced if one of the following occurs:

- When arbitral agreement or clause is not in writing, considered void or the award has exceeded its scope.
- When the award violates the public order or morals or if it violates arbitration rules set in the ICPL.
- When one of the grounds set in the (ICPL) for a retrial in a case in court[80] has occurred.
- When a material error occurs in the award itself or in proceedings that impact the validity of the award.

These grounds are considered by the court based on a request of either one of the parties at any time[81] or the court itself may voluntarily decide to rule on such a ground that appeared before the court. Although these grounds are similar to a large extent to the grounds stated in the Model Law, there need to be some details to ensure that the arbitration is being independently and effectively managed by the tribunal leading to accurate results, hence why there should be less meddling by courts.

In addition, the provisions of arbitration in the (ICPL) go further than what we previously stated. Article 274 provides certain situations where the court may take charge of the arbitration process. It articulated how an arbitral award may be considered by the court. The court may ratify the award or set it aside, fully or partly. In case the award is set aside, the court may return the award to the tribunal to correct the erroneous part or, and here is the dangerous aspect, it may rule on the case under its authority, if the case is ready to be decided. The idea of the court taking control of the arbitration and adjudicating the matter goes against the will of the parties and these scenarios mostly fit the debtor of the award, because arbitration went against them and they will attempt to deviate from it, but the other party has no error on their part to be unjustly judged. To ensure justice and fairness, courts must refrain from interfering in arbitration, especially against the will of the parties.

Conclusion

The benefit of the role played by courts in international arbitration lies in several considerations. It can be said that the first consideration is the level that courts can exercise its powers in accordance with the NewYork Convention and the (Model Law) principles. In this context, it is important to refer in particular to the parties and the arbitral tribunal's autonomy; and in supporting the arbitral process and its objectives, which are derived from the NewYork Convention and the (Model law).

Secondly, courts should be aware of the commercial developments and the purposes and objectives of parties to international arbitration. Courts should be able to adapt to these purposes and objectives. It is imperative that courts appreciate the reason that the parties have resorted to arbitration.

Taking these two factors into consideration, there is a fear that courts are not supportive of several aspects of arbitration such as issuing interim measures. Courts must be more flexible in dealing with the interim measures issue by accepting injunctions received from international arbitral tribunals. It is imperative that parties find the solutions available at every stage of their dispute in case one of the parties has the intention to manipulate the tribunal or the other party.

Courts role is fundamental to the soundness of the arbitral proceedings and its aim is to protect the interest of all parties. Courts should only intervene when it is convenient and there is a valid case for its intervention. However, it should be to the level required and courts should not dictate its rules and procedures on the arbitral process, particularly, in countries like Iraq where there is history in which courts may abuse their powers and try to interfere in most if not all aspects of arbitration, which will lead to making Iraq a less desirable place for investments.

Additionally, as Iraq made progress in the right direction by joining the NewYork Convention, there is still more required from Iraq to bring the domestic rules on arbitration to be more in line with the

international rules, and this does not only require a legislative effort, but rather creating the environment and structure for both *ad hoc* and institutional arbitrations to ensure the highest levels of performance and administration of arbitrations. As Iraq aims to develop and improve on its laws to facilitate and attract foreign investments, there needs to be more support to the entire arbitration process whereby arbitration centers would be established and developed and Iraq should develop its own arbitration rules that adhere to the laws and regulations of Iraq and the international arbitration rules including, but not limited to, the NewYork Convention and the (Model Law).

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[14] **Paragraph (2)**

[15] **Paragraph (3)**

[16] **Lew, Mistelis, Kröll (n 4).**

[17] Article 11 (3) and (4) of the Model Law
[18] Ibid. Article 11 (5)
[19] Cour d'appel Paris, 29 March and 8 November 2001, *NIOC v State of Israel*, 17(6) Mealey's IAR B- 1 (2002)
[20] Article 257 of the ICPL
[21] Article 10 (1) of the UNCITRAL Arbitration Rules; article 5 (2) of the London Court of International Arbitration Rules (LCIA) clearly states that arbitrators shall ''remain at all times impartial and independent of the parties''; Article 7 (1) of the International Chamber of Commerce Rules (ICC) does not specifically state that arbitrators must be impartial, but, it states, instead, that they must ''be and remain independent of the parties involved in the arbitration''. However, under article 15 (2) of the ICC rules there is a duty on the tribunal to ''act fairly and impartially''.
[22] [2000] WL 571190 CA.
[23] Court of Cassation Decision No. (2517/Hayaa Istainafiya Manqool/2019) on August 8, 2019.
[24] The Supreme Judicial Council in Iraq is the highest authority managing all judges' affairs and appointments including the Federal Supreme Court of Iraq in accordance with the provision of the law of the Supreme Judicial Council No. (45) of 2017.
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[26] Stephen M. Schwebel, *International Arbitration: Three Salient Problems* (Cambridge: Grotius Publications, 1987).
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[28] [2007] UKHL 40.
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[35] Ibid (n 32).
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[37] *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716 (9th Cir. 1999)
[38] *China Nat. Metal Products Import/Export Co. v. Apex Digital, Inc.*, 141 F. Supp. 2d 1013 (C.D. Cal. 2001)
[39] American Arbitration Association, International Commercial Dispute Resolution Centre (ICDR) Rules and Procedures, Article 37; Arbitration Rules of the Netherlands Arbitration Institute, Article 42.

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[43] Article 17 H (1)
[44] Jason Fry, 'Interim Measures of Protection: Recent Development and The Way Ahead' (2003) I.A.L.R. 153. 27
[45] Redfern, Hunter (n 32).
[46] Article 9
[47] For example, section 2712.36 of Ohio Code of International Commercial Arbitration provides that: "A party may request an interim measure of protection directly from any court with jurisdiction. However, no measure of protection shall be granted by a court of this state unless the party shows that an application to the arbitral tribunal for the measure of protection would prejudice the party's rights and that an interim measure of protection from the court is necessary to protect those rights".
[48] Article 27
[49] Section 43
[50] Section 7 of the FAA states: "The arbitrators…may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case…"
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[52] Article 2 (3) (a).
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[55] *Mark Dallal v Bank Mellat* [1986] QB 411, (1986) XI YBCA 547, 553
[56] Article I (1)
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[76] *Chromalloy Aeroservices, Inc v Arab Republic of Egypt*, YB Com Arb XXII (1997) pp. 1001 – 1012 (US No. 230)
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[78] Redfran, Hunter (n 32).
[79] Article 273.
[80] Article 196 of the ICPL.
[81] Al-Lami, (n 28).