



Substantive Scope of Arbitrator Restitution as a guarantee of litigation in international trade contracts

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Stakeholders of international trade with its various patterns were keen on seeking further legal, financial, procedural, judicial and other guarantees, and managed to get guarantee of initiation of arbitration in the competent international arbitration centers which have become a reality for this type of contracts. As a result, legislation of countries in general, including Arab countries, were driven to enact laws of international commercial arbitration perception of their importance in attracting foreign investments and facilitating dealing with international trade contracts of various patterns.

This legislation contained within its provisions cases whereby arbitrators can recuse arbitrator and relieve him from consideration of the arbitration litigation in case of realization or appearance of some reasons that challenge its impartiality and independence. Those provisions- the provisions of arbitrators' restitution- constitute important guarantee for arbitrators to be granted professional neutral award away from defect or deficit that may mar it. This research handles the matter of arbitrators' restitution and the stance of legislation and arbitration centers of this important matter, in addition to reference to some decisions that were made by the competent authorities to consider the restitution requests based on legal grounds.

Keywords: arbitration, impartiality, independence, arbitral tribunal, dismissal, request for restitution



1- Introduction

Arbitration is an important means for resolution of international trade contracts disputes which stakeholders mutually agreed to basically approve to keep themselves away from the problems and negatives that may be created by approaching national judiciary, including slow procedures, high cost and lack of guarantee of impartiality as well as fear of approaching judicial immunity by the national party and its openness which prejudice the economic reputation of stakeholders. However, on the other hand, stakeholders in those contracts seek to find sufficient guarantees in arbitration to have fair and proportional judgments. Those guarantees include the guarantee of restitution of arbitrator in the cases where arbitrator may deviate from his supposed impartiality and independence. Legislation differently handled this matter since legislation regulated them by special provisions within the laws of international commercial arbitration.

Many Arab countries prepared their own laws in view of their feeling of the importance of those laws in attracting foreign investments and organizing international trade through the theoretical and procedural dimensions which regulates restitution of arbitrator in the cases that meet its conditions.

This study is concerned with the substantive scope of the research in terms of attention of jurisprudence and legislation to regulate and study them and to define the cases and conditions related to the research under study. There is juristic controversy on equality of the cases where arbitrator is restitute with the cases whereby judges are restituted or the so-called judge recusal in some procedural laws from consideration of the case. Some tended to equate the two cases and others refuse this equality because of difference of the field and function of arbitrator and judge in several aspects that will be demonstrated by this research. The study tries to respond to the following questions:

- a- What is the meaning of arbitrator restitution?
- b- What is the difference between arbitrator restitution and arbitrator dismissal?
- c- What is the difference between arbitrator restitution and judge recusal?
- d- What is the stance of the Iraqi law in the law of procedures and draft international commercial arbitration law in the matter of arbitrator restitution?

2- Concept and conditions of arbitrator restitution

Arbitrator restitution is to prevent him from consideration and adjudication of the arbitration case based on request of one of the litigants for reasons of fear that arbitrator deviates from impartiality. It is a guarantee safeguarded by legislation to litigants against arbitrators to secure their minimum impartiality and independence. It is appropriate to note that the arbitrator's duty may end by restitution of him, which was adopted by many Arab and comparative legislations.

Juristic definitions of arbitrator restitution varied. It was widely defined as "Expression by a party according to stipulated procedures of its refusal to appoint arbitrator because there is reason that raises doubt about his impartiality and independence."^(v) We can define arbitrator restitution as "The privilege granted by law to arbitrators to present petition to the arbitrator





tribunal or court of jurisdiction to reconstitute arbitrator in the cases where the conditions of this privilege are satisfied." Arbitrator restitution is a key guarantee in the hand of litigants. They have the right to use them against the impartial and non-independent arbitrator. Restitution is a right established for a party singly. This right is given to a party even if the parties stipulated in the arbitration contract that arbitrator shall not be reconstituted, the condition shall be nullified and shall not affect the will of a party to restitution^(١٧), even if this condition preceded composition of the arbitral tribunal.

National, Arab and international legislations addressed the matter of arbitrator restitution differently. Some of them adopted it and dedicated provisions for its regulation and abandonment or referral to the laws of procedures or disregard of this case and leaving it to the bylaws of competent arbitration centers in the field of arbitration.

Iraqi legislation in the law of procedures and draft law of international commercial arbitration handled the matter of arbitrator restitution in the law of procedures that refers in article 261 to this matter by stipulating that:

1. Arbitrator may be reconstituted for the same reasons whereby judge is recused only for reasons that appear after appointment of arbitrator.
2. Request for restitution shall be presented to the court which has original jurisdiction to consider the dispute, and its decision in this respect may be appealed in accordance with the rules set forth in article (216) of this law.

The provision indicates that Iraqi legislation in the law of procedures equated arbitrator restitution and judge recusal. The above text shows that the provisions of this article include equality between the cases whereby arbitrator is reconstituted with the cases where judge is recused in the cases that satisfy the reasons for restitution or recusal, in addition to another judgment that binds the party that seeks restitution to present it to the court that has original jurisdiction to consider the dispute. We will handle in the second topic of this research the procedural side of arbitrator's restitution which was noted by this article.

The cases wherein judge is reconstituted were highlighted in article 93 of the law of procedures No 83 of 1969^(١٨):

This provision indicates that Iraqi legislation equated the cases of judge recusal and arbitrator restitution. Attitude of Iraqi legislator in our perspective is the best and most favorable one because it imposes type of judicial control on the arbitration decision and on arbitrator himself before the latter, arbitrator, adjudicates the arbitration litigation by assurance that there is reason for arbitrator restitution, in addition the fact that assigning jurisdiction of determination of arbitrator restitution to the arbitral tribunal makes it litigant and arbitrator in the meantime, particularly in the arbitral tribunals that sometimes consist of one person.

Provisions of the articles of draft commercial arbitration law in the articles which handles in chapter four thereof composition of arbitral tribunal and restitution of arbitrators in articles 18/first and article 19 as follows: Article (18) states that:



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First: Arbitrator may be restituted if there are conditions that give rise to doubts on seriousness with justification of his impartiality and independence.

Second: No party to arbitration may reconstitute the arbitrator chosen by him or that he participated in his choice except for reasons that affect his impartiality or independence or that appeared to him after he has been chosen.

The provisions of this article include the possible restitution of arbitrator in the cases where a party feels deviation from his impartiality and independence. However, those conditions may be serious and justified. In addition, the provision bans the party that appointed arbitrator from reconstituting him, except for the realistic and justified reasons that appeared after his choice of arbitrator.

3- Attitude of comparative legislation

Legislations under comparison include the Egyptian legislation in the commercial arbitration law No 27 of 1994, as amended, which didn't refer to the rules established in recusal of judges or their incapacity in the law of procedures. It stipulates procedures for seeking arbitrator restitution in the cases where he may be restituted. The Egyptian law was affected by the rule contained in the modal law⁽¹⁷⁾, whereby the arbitrator may be restituted only if there are conditions that raise serious doubts on his impartiality or independence, in contrast to some laws such as the Kuwaiti law which incorporated by reference in connection with recusal of arbitrator to the provisions of judge recusal, and applied the rules of judge recusal to arbitrators (Articles 105/2, 178/4)⁽¹⁸⁾.

Egyptian legislation handled in this law the matter of arbitrator recusal as a guarantee of the parties to arbitration in international trade contracts in articles 18 and 19, which is widely considered as guarantee given to litigants against the arbitrator. Egyptian legislation indicated in the provision of articles 18 and 19 of the Egyptian arbitration law the context of this right which stipulates that:

- 1- Arbitrator may be restituted only if there are conditions that raise doubt on his impartiality or independence.
- 2- No party to arbitration may reconstitute arbitrator who is appointed by that party, except for reason that appears after that appoint...."

The provision of article 18 refers to the reasons for arbitrator restitution, which is everything that comprises the arbitrator's impartiality and questions his independence. The Egyptian legislation appears to have been clearly affected by the provision of article twelve of UNCITRAL rules which stipulates:

- 1- When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay





disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by him or her of these circumstances.

- 2- Arbitrator may be restituted if there are circumstances that give rise to justifiable doubts about his impartiality or independence, or if he doesn't have qualifications that were agreed by the parties. No party to dispute may reconstitute arbitrator who was appointed by him or participated in his appointment, except for reasons that may appear after appointment of this arbitrator."

Therefore, Egyptian legislature changed its previous approach in the Egyptian law of procedures which sets forth in articles 501 and 513 rules for arbitrator restitution, and equated in them arbitrator restitution and judge restitution, which is marred by flaw. Legislature did well when it deviated from this in the provision of arbitration law as it made the cases of arbitrator restitution more comprehensive and general than the cases of judge restitution. They include restitution and incapacitation in addition to other cases.

The party to dispute notes that he may not reconstitute arbitrator who has been appointed by him unless this is made for reasons subsequent to his appointment because it is illogical that he knew those reasons and accepted them and appointed the arbitrator then he desires to reconstitute him. In addition, request of restitution may not be admitted from the same person twice for the same arbitrator by the same reasons.

However, a question of the research is whether there is necessity for distinction between arbitrator impartiality and independence and the meaning of them? The answer is yes. Arbitrator independence means that there is no relation between arbitrator or relation or affiliation with a party. He shall be financially, socially and professionally independent from them^(١٧). Impartiality means that arbitrator is not biased for or against a party for special or personal reasons. Impartiality is mental and psychological tendency which is difficult to define by any person other than its holder because it is basically related to emotion^(١٨).

In addition, the requirement of satisfaction of impartiality and independence in arbitrator is a key principle in litigation. The importance of restitution of arbitrator reflects observation of authentic procedural principle which is the right to defense. Each party has the right to appear before impartial arbitrator or judge, in addition to the possible restitution of arbitrator, which is an important guarantee for the parties who may not waive it unless the party that chose arbitrator knows on choice the reason for his impartiality or independence^(١٩).

The last question of the research is what is the difference between dismissal and restitution of arbitrator? Arbitrator is not dismissed by sole will of the party who chose him. For arbitrator to be dismissed, all litigants shall agree on dismissal of him in the way which is not before the party who wants to dismiss the arbitrator chosen by him in case the other parties agree only on adoption of the means prescribed by legislature for restitution of him. It may appear at first sight that the parties' agreement on dismissal of arbitrator can be implicitly realized as when the parties mutually agree on the matter of arbitrator or resort in respect of arbitration to judiciary or dismiss the arbitration procedures. However, the matter is related in this assumption with expiry of the arbitration agreement itself more than being independent of the



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arbitrator. Article 20 of the Egyptian commercial arbitration law handled the matter of dismissal of arbitrator. Therefore, dismissal in the real meaning is not imagined to be implicit^(١١). Dismissal can be realized for a reason or another. However, its reason is often attributed to arbitrator's failure to complete his duty. Dismissal shall be explicit and through the means prescribed by the related laws. Dismissed arbitrator may resort to judiciary to claim compensation, if dismissal is based on invalid grounds that can give rise to liability^(١٢). Concerning recusal of arbitrator, we referred before to its concept and the cases where law allows the arbitrating parties to recuse arbitrator when conditions, doubts and cases are satisfied to complete it in terms of form and merits to reconstitute arbitrator.

Other reasons that lead to end of the arbitrator's duty include his death or incapacitation^(١٣).

3- Reasons for restitution of arbitrator

Due to some overlap and similarity between the duties of arbitrator and judge, and equality of some laws in certain legislative stage in the years of legislation of the laws of procedures, such as the Egyptian law No (13) of 1968 and Iraqi law No (83) of 1969, the matter of differentiation between the duty and job of arbitrator and judge's job is a requirement. However, the person assigned to adjudication of the case shall have full impartiality between the litigants and shall be away from affecting formation of his decision whether judge or arbitrator. Therefore, legislature focused on guaranteeing impartiality of each of them and independence in view of the dispute referred to him. However, the method of realizing this guarantee is different in case of arbitrator from that in case of judge in the way that stems from the fact that arbitrator assumes the duty of special judiciary between certain litigants, while judge assumes the duty of permanent general judiciary between all, not specifically^(١٤).

The judge's assumption of public duty required legislature to make judge non-dismissible to guarantee his independent from the public authority that assumes appointment of him, and required afterwards guarantee of his impartiality against the litigants and independence from them by determination of the reasons and circumstances the availability of which shall affect him or make them reasons for his incapacity to determine the case so that the judge's adjudication of the case, in spite of lack of it, leads to nullity of judgment, and determination of the reasons of lowest effect on his impartiality and independence, and making them reasons that require judge to recuse consideration of the case- in spite of the judge's initial capacity to adjudicate it- and authorize the litigant who fears their effect to the right reconstitute him if judge recuses at his initiative, then it left freedom to judge afterwards to recuse at will and limited it to consideration of the case, and sensed type of fault to consider it for any reason.

- Concerning arbitrator, the matter varies in several aspects the first of which is failure to consider the arbitrator's kinship to one or both of the litigants or his friendship with one of them as a reason for restitution of him. As a result, Egyptian legislature didn't differentiate the reasons for incapacity of arbitrator and reasons for restitution of him, and made all of them reasons for restitution. In addition, it didn't consider those reasons to be reasons for restitution unless they are unknown for the other party at the time of choice of arbitrator^(١٥). In this respect, reasons for incapacity of judges or



restitution of them appear to be all reasons for restitution of arbitrator, although article 18 of the arbitration law didn't explicitly stipulate this, in contravention to the provision of article 503 of the repealed law of procedures.

On the other hand, adjudication of the case is not originally imposed on arbitrator. It depends on his acceptance of the duty chosen by the parties to assume. Therefore, he may, from the beginning, apologize for accepting the duty, if there is reason that can affect his impartiality and independence as kinship or friendship of a litigant or dispute between him or one of them. Therefore, legislature doesn't find justification for determination of certain cases as requirement recusal to only use the litigants' right to reconstitute him, if one or the other found justification for the request of restitution. Accordingly, recusal by judge usually happens during the progress of the case in the case when he may be required to be reconstituted, if he managed to recuse for avoidance of consideration of the restitution request.

On the other hand, whenever arbitrators are many, choice of umpire arbitrator is subject to agreement of the parties or by another person or by the court. Concerning other arbitrators, the parties share their appointment equally so that each of them independently chooses one or more arbitrators as the case may be so that arbitrator or arbitrators who are chosen are more similar to his representatives. Therefore, there is no default in choice of kin or agent of him even if his litigant doesn't know that relation at the time of choice. However, the practical importance of international commercial arbitration and desire of many countries to create climates which are suitable for international trade forced them to seriously consider finding sufficient guarantees for the litigants in the matters of dispute that happen and they agree on commencement of arbitration for resolution of those disputes. Egyptian legislature in arbitration law defined the reasons whereby arbitrator is reconstituted in article 18 in paragraphs "first" and "second" of the new commercial arbitration law which stipulate that:

- 1- Arbitrator may be reconstituted only if there are conditions that raise new doubts on his impartiality or independence^(٢٤). No party to arbitration may reconstitute the arbitrator who was appointed by him or that he participated in appointment except for reason that may appear after this appointment. The provision indicates that legislature didn't determine specific reasons for restitution of arbitrator. It caused all conditions to raise new doubts on his impartiality or independence as reason for restitution of him. However, it differentiated restitution after availability of new doubts on the arbitrator's impartiality or independence to determine whether the person who seeks restitution is the person who appointed the arbitrator in doubt of is impartiality or independence or that he participated in his appointment, and the case of whether he was appointed by a person of third parties or by the court. In the first case, no party to arbitrator may reconstitute arbitrator except for a reason to be defined after this appointment in the way that makes request of restitution unacceptable, if he knows the reason for restitution on appointment. What matters is knowledge of the reason at the time of appointment, not only its existence in this time. If the reason actually exists at the time of appointment, but he doesn't know it at this time, he may request restitution, however. In the second case, restitution is ready even if the petitioner of restitution knows that it is satisfied in the arbitrator appointed before



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appointment. In view of the fact that he can't know choice of this arbitrator which is satisfied for him as a result for restitution only from the time of knowledge of his choice. However, declaration of appointment of arbitrator afterwards enjoins the petition or restitution of him for this reason that was known before choice of him^(٧٩).

In application of the idea of seriousness of complaint about arbitrator's impartiality and independence, it was ruled to restitute the arbitrator who ate with a party to litigation and at account of that party or arbitrator who is very intimate with a litigant or who wrote consult in the matter of dispute before referral to him or who wrote this consult in the period between agreement on arbitration and his choice or who has enmity with one of the litigants or who was and still is creditor of a litigant or who becomes indebted to him. On the contrary, it ruled that arbitrator who ate with a litigant at his own cost or who ate at the cost of litigants together upon their invitation or who worked on similar case^(٨٠). Application of the idea of a litigant on the relation of chosen arbitrator with the other litigant before choice of him required that appointment of an attorney of a litigant of arbitrator provided the other litigant knows this at the time of signature of charter that contains choice of him^(٨١).

This topic indicates that the substantive sides of restitution include the previous focus of procedural and substantive laws, respectively, on the matter of restitution of arbitrator to be certain and clear guarantee that litigants check in advance and become fully familiar with this important guarantee.

4- Conclusions

The study drew important conclusions represented in focus of large number of national legislations and international agreements such as UNCITRAL on the matter of granting arbitrating parties in international trade contracts important guarantee which is to grant them in accordance with international arbitration laws or laws of civil and procedural pleadings, the right to restitute the arbitrator who considers the arbitration agreement between the parties in the cases where arbitrator shows impartiality or lack of independence in the manner required by the purpose and objective of arbitration, with the difference of view of comparative laws to the matter of restitution of arbitrator since some of them equated restitution of arbitrator and restitution of judge with the same reasons such as the Syrian legislature with difference of the duty and job of arbitrator and judge. However, this gives assurance to the parties, in addition to imparting official status to the arbitration process, and minimize the attempt of some arbitrators to deviate from their impartiality and assumed independence. In addition, the Iraqi law adopted the same approach as the Syrian legislature. However, the Egyptian and French legislatures distinguished recusal of judges and restitution of arbitrators. At the meantime, Iraqi legislature is recommended to expedite voting on the draft international commercial arbitration law to be means and guarantee for a part to the international trade contracts of multiple and various patterns to create legal and judicial environment that attracts such type of contracts.

We recommend the appropriate judicial and academic authorities to seriously work on preparation of arbitrators who are proficient in the technical, legal and linguistic arbitration skills.



To establish arbitration centers of high and professional competence in the international trade contracts and media and academic attention to them to draw the legal limits between arbitrating litigants for achievement of the purpose of approaching the arbitration judiciary as optional judiciary which arbitrators adopt at their will.

Margins

1. Al Raad Chapter, verse 11
2. Ibn Manzour, Lessan Al Arab, part 7, p. 117
3. Ibrahim Chapter, verse 9
4. Taj Al Arous, p. 205
5. Al Anbeyaa Chapter, verse 40
6. Abu Obaida Al Tayeb Suleiman, Mohamed Al Alem Adam Abu Al Zayd, Maged Ibrahim Obaid, "Legal basis for judge restitution, comparative study, Al Naples University"
7. P. Bellet. Note sow TGJ panis, B janvier, quoting Talaat Youssef Taha, Dar Al Gameaa Al Gadid, 1986, 2008, p.145.
8. Dr. Talaat Youssef Khater, Arbitrator's impartiality and independence in theory and practice, Dar Al Gameaa Al Gadida, 2014, p. 154.
9. Dr. Mohamed Hajj Taleb, Reasons for restitution of court in Syrian law, Magazine of Damascus University for Economic and Legal Science, Vol. 29, No 2- 2013, p.37
10. Dr. Hamid Ali Al Lahiby, arbitrator in international arbitration, 1st edition, Dar Annahda Al Arabia, 2001, p. 63.
11. Dr. Ahmed Shawky Abu Khatwa, "Calling in Criminal Law", Dar Al Nahda Al Arabia, 5th edition, section 34 onwards.
12. For further details, see judge Medhat Al Mahmoud, Explanation of the law of civil procedures No (836) of 1993, and its practical applications, Law Library, 4th edition, 2020, pp. 159-161, article 93: Judge may be restituted for one of the following reasons:
 1. If a party is employee or used to cohabitate or feed a party, or if he receives from him gift before or after filing the case.
 2. If he has enmity or friendship with a party which makes it possible to adjudge it without inclination.
 3. If he prematurely expressed opinion in it.

Article 94: Judge may, if he felt default in consideration of the case for whatever reason, refer the matter of his recusal to the court president to consider his declaration on recusal.

Article 95:

1. Request for restitution shall be subjected before entry in the basis of the case. Otherwise, right thereto shall be abated.
2. Request for restitution may be submitted afterwards, if its reasons appeared or the petitioner of restitution is proved to have not been aware of them.
13. Article 12 of the modal arbitration law states that arbitrator may be restituted only if there are circumstances that give rise to justifiable doubts on his impartiality or independence, or if he doesn't hold qualifications on which the parties agreed. No party to dispute may restitute the arbitrator whom he appointed or participated in his appointment without reasons to be defined after appointment of this arbitrator.



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14. Kuwaiti law of procedures
15. The provision of article 18 of the Syrian commercial arbitration law No 4 of 2008.
16. Huda Mohamed Magdy Abdulrahman, Arbitrator's rule in arbitration litigation and limits of his authorities, Dar Al-Nahda Al-Arabia, Cairo, 1997, p. 120.
17. Yehia Abdulaziz Al Gamal, Litigation and restitution- Comparative study between judges and arbitrators, publication in the Arab Arbitration Magazine published by the Arab International Arbitration Association, No 9, Cairo, August 2006, p. 73
18. Fathi Wali, Arbitration law in theory and practice, 1st edition, Al Maaref Establishment, 2007, p. 264.
19. 1- However, Implicit dismissal can be imagined in the case in which the parties intentionally choose another arbitrator than the arbitrator who has been previously chosen. See Yertran Mora, Daluz Encyclopedia, civil procedures, subject of arbitration, internal law, p. 250.
20. Jan Rober, Ibid, p. 124
21. However, a question is raised on the effect of death or incapacitation on the procedures of substantiation which the arbitral tribunal has taken or ordered before death or incapacitation of one of its members. Common jurisprudence appears to state that the arbitral tribunal's decisions in the field of substantiation are not considered judgments in the exact meaning or don't have argument, or because they are considered void on death or incapacitation of arbitral tribunal member that may not be invoked before the arbitral tribunal, after re-formation of it (in this context see Philip Khan, comment on Paris appeal dated 19/12/1991, arbitration clause, No 4, p. 583 onwards, and the mentioned references, p. 583. However, it is widely believed that such decisions are considered preparatory judgments, and death or incapacitation of a member of the arbitrary tribunal doesn't affect it. Paris Court of Appeal authorized the last approach in its aforementioned judgment and concluded that death of an arbitrator and end of arbitration litigation accordingly doesn't affect decision that has been previously adopted by the tribunal before death to expand the duty of the expert who took delegation measures.)
22. Dr. Mustafa Mohamed Al Gammal, Dr. Okasha Mohamed Abdelaal, Arbitration in private international and domestic relations, part 1, edition of 1998, p. 765.
23. From this standpoint, the Court of Cassation ruled that, "Legislature inclines to the rules prescribed in restitution or incapacitation of judges for arbitrator except for the reasons and that it required filing request for restitution of arbitrator whether in the cases in which arbitrator may be restituted or those because of which judge is considered to be unfit for judgment, even though the appellant didn't claim that the request for restitution of arbitrators because of their kinship to the respondent and their enmity to him, the contested judgment, having following this view, considers recusal to be baseless (Cassation dated 06/02/1986, Cassation No 1083 of 52nd judicial year, rulings of cassation, year 37, part 1, No 44, p. 85)"
24. See the rules of arbitrator restitution in the comparative law and international law, Dr. Mohamed Sami, International Commercial Arbitration, p. 248
25. For further details, see Dr. Mustafa Gamal and Okasha Abdelaal, ibid, p.768.
26. Dr. Ahmed Abulwafa, Optional and mandatory commercial arbitration, p. 164.
27. Dr. Abulwafa, ibid, p. 163