

THE ROLE OF THE JUDICIARY IN EXECUTION OF ARBITRATION AWARD IN THE ARABIAN MIDDLE EAST COUNTRIES

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Abstract

Arbitration has been known since ancient times, Arbitration is an ancient system known to the ancient Greeks and Romans, and the first origins of arbitration was in the ancient Roman era. Arbitration is a legal path that seeks to resolve disputes when parties choose to deal with it. The result of the arbitration is called an arbitration award. Where this judgment is issued as a decision of rights and it is binding for opponents subject to it, and when the opponent who has the right obtained an arbitration award for his benefit, this arbitration award does not pay off the purpose of it only after the implementation of the other opponent for what it says. The issue of Execution of arbitration award is very important, and the arbitration decision includes judgment on the parties to the dispute and giving the right to another party and may also include binding the parties as if the expenses were divided between them. As for the implementation of the arbitrators award, it is only if the arbitration award has reached a certain degree of strength, so that the objection to it does not have an impact on its executive power or its enforcement, and this is with the approval of the judiciary. The role of the observer of the arbitration procedures upon the issuance of the arbitration award, in addition to that he plays an important role through the arbitration procedures from bringing a witness or bringing papers from a government agency, and from that we reach the research point where the judiciary and arbitration are connected through oversight of the arbitration award after its issuance as The judiciary determines the fate of the entire arbitration process, as it can nullify this ruling or make it enforceable

I. Introduction

But no, by your Lord, they will not (truly) believe until they make you, (Muhammad), judge concerning that over which they dispute among themselves and then find within themselves no discomfort from what you have judged and (submit in (full, willing) submission (Surah An Nisa: 65).

Al-Faruq Umar ibn Al-Khattab outlined this matter, in his famous letter to Abu Musa Al-Ash'ari, in which he recommended him, by saying, "it is of no use. Speak with a right that has no effect".

Arbitration has been known from the earliest times, even it can be said that Arbitration has evolved before the laws and courts in history. Arbitration is an ancient system known to the ancient Greeks and Romans Then, Arab and others. Arbitration was known before Islam, as arbitration is a high-level stage reached by human community. (Al-Khazaleh, 2017)

The execution order can be defined as the procedure issued by the legally competent judge to give an executive force to the arbitration award, as it represents the meeting point between the private arbitration and public courts. (Al-Sirhan & Dradke, 2009) As for the request for implementation, it is an application submitted by the party sentenced to it, aiming to grant the arbitration award the force of enforcement if the debtor (the convicted) refuses to perform the provisions of the arbitration award. (Obeidat ,2008). According to this introduction, article will analysis three problems namely the extent of the appeals court's oversight of the arbitration award, the ability of the appeals court to annul the arbitration awards, and explain the extent of the appeals court's oversight of the nullity suit

How can the arbitration awards be implemented and what is the position of legislation on this important process and what is the position of the Arabian middle east countries legislator? and what is the role of the New York Agreement in implementing the provisions of the arbitrators are all questions we will answer in this research and for this we will discuss the implementation of arbitration awards and how to gain the executive capacity starting from the definition Arbitration, its characteristics and types, and when it is international, then talking about the implementation of arbitration provisions from the national point of view to the provisions of foreign arbitration and indicating the reasons for refusing to implement the arbitration award.

II. Research Methods

This study is juridical-normative with descriptive analysis. The data collection was through library and field research. The library research was conducted to seek relevant information by collecting secondary data and valid info that can assist researcher answer the research question. All collected data has been analyzed using qualitative method. In addition, data collection has been gathered through library research in public and private universities in Arabian middle east countries. The secondary resources from which data will be collected are mainly include reports issued by some institutions, textbooks and journal articles by scholars. In addition, a large volume of Arabian middle east countries acts, and cases will be used to constitute the legal basis of this work by critically analyzing and comparing the various opinions expressed in these materials. The objectives of the study are to determine and show the concept of arbitration, its characteristics and conditions, Explain the legal rules for arbitration in Arab countries and explain the concept invalidation suit and clarified its legal nature.

III. Research Result and Discussion

A. Arbitration Concept

Arbitration is defined in the introduction of Ibn Khaldun and in the Ottoman Journal of Justice as " when the two rivals take a decision with their consent to accept Another person judgment in the dispute. (Tahar,2019)

The arbitration has also been defined as an agreement of the parties with a specific legal relationship, contractual or non-contractual, to settle the dispute that has already arisen between them or that may arise, by persons chosen as arbitrators. (Hassan, 2008)

Another group of jurisprudence tends to define arbitration as "a special judicial system, in which the parties choose their judges and entrust them according to a written agreement, with the task of settling disputes that may arise or have already arisen between them regarding their contractual or non-contractual relations, which may be resolved by arbitration .(Al-Sirhan & Dradke, 2009)

In another context, arbitration is generally defined as an agreement to settle disputes in which a non-litigant person issues a final ruling on the dispute binding on the litigants by following legally defined procedures or agreements as permitted by law. (Turkman, 2013)

Article 1492 of the French Civil Procedure Code defined arbitration as "arbitration is international when its subject matter is related to the interests of international trade".

A.1. Characteristics of Arbitration

Arbitration is a tool for justice between people, and it is a judicial action that takes place outside the courts. It is a special judiciary based on the parties 'consent and acceptance of the arbitrators' judgment. Furthermore, Arbitration is an exceptional road specified in the agreement, so it does not withdraw from other contracts that were not covered by arbitration. In addition, Arbitration is a comfortable atmosphere for litigants, as it is not public. Also, Arbitration is also characterized by the speedy resolution of the dispute, as it takes less time than it does before ordinary courts. And finally, arbitration reduces the problems of conflict of laws. The arbitration clause is not subject to private international law. (Hassan, 2008)

Arbitration differs from experience (subject Matter Expert) , as the expert expresses only an opinion, while the arbitrator, on the contrary, takes a decision that imposes it on those concerned with it. (Mansoor, 2010).

Arbitration is distinguished from mediation, as mediation is a means of resolving disputes that the parties resort to in an optional manner in order to reach a solution that obtains the consent of all parties, while arbitration in it has binding force and is imposed on the contestants regardless of their satisfaction, and this fundamental difference between the two means makes each of them have advantages over the other. (Mahmud, 2017).

A.2. Types of Arbitration

The arbitration agreement has two forms: the arbitration clause and the arbitration stipulation. As for the arbitration clause, it is a text contained in the texts of the investment contract, which decides to resort to arbitration as a way to resolve disputes that arise in the future between the contractors about the contract and its implementation ..As for the arbitration stipulation, it is any agreement between the parties of the investment relationship in a separate contract according to which it is decided to submit the disputes that have already arisen between them to arbitration to resolve it. (Al-Rubaie and Al-Khanki, 2011).

It is clear from the previous definitions that the arbitration clause is provided for the purpose of resolving a potential dispute, but the arbitration stipulation represents an independent contract to settle a dispute that has already arisen and is to be resolved by arbitration.

B. Implementing National and International Arbitration Awards In Arabian Middle East Countries

Arbitration consider national if it relates to a conflict that affects one country only, whether it is a civil or commercial dispute, also, it is considered national if it is issued in the country in which the judgment is to be implemented. (Bani Miqdad, 2011)

As for the common method used by Arab laws, it can be summarized as a judicial body granting the executive power to the arbitration award. (Bani Miqdad, 2011) For example Article (53) of the Jordanian arbitration law and Palestinian arbitration law stated that: "it is not permissible to acquire the executive power of the arbitration award except after the expiry of the deadline to rise the nullity claim which is 30 days from the date the arbitration award is announced to the convict. (Article (53) of the Jordanian arbitration law No.31 of 2001 and Palestinian Arbitration Law No. (3) of 2000).

The Jordanian and Palestinian legislator in the Arbitration Law used the term "the competent court", for which it decided jurisdiction in all arbitration matters as a general principle. This court was defined in Article Two of the Arbitration Law as the Court of Appeal. The Competent Court: The Court of Appeal, which is within the jurisdiction of arbitration, unless the parties agree to the jurisdiction of another appeals court. (Article (2) of the Jordanian arbitration law No.31 of 2001 and Palestinian Arbitration Law No. (3) of 2000).

In Iraqi law, the authorized body to give the arbitration award the executive power is the competent court. Competent court is the authorized body that approves the arbitration award at the request of the litigants. it is noteworthy to mention that it is necessary in the arbitration taking place in Iraq that the arbitration award should be deposited with the arbitration agreement in the Registry of the competent court within 3 Days from the issuance of the decision.(Al-Ajeeli, 2012)

In another direction, it was adopted by some Arab countries, such as Syria, Lebanon, Bahrain, is that the Chief Judge of the Court of First Instance is the one who give the arbitration awards the executive power at the request of the litigants and that after deposited arbitration award with the arbitration agreement by the court or the parties in the Registry of the competent court. (Article (795) of the Lebanese Obligations and Contracts Law No. 0 of 1932. Article (241) Bahrain Civil Code No. 19 of 2001. Article (534) Syrian Civil Code No. 84 of 1949).

From the previous discussion, It is obvious that the Jordanian, Palestinian, Syrian, Lebanese, and Bahraini legislator all decided that the arbitration award issued by the Arbitration tribunal have a compulsory nature, as a general rule, this compulsory nature to be enforced only by an authorized body. This compulsory nature is obtained from a court which the legislator has termed the "competent court" or from the Chief Judge of the Court of First Instance through an application submitted specifically for this purpose by the prevailing party, unless the Judgment creditor voluntarily implemented the arbitration award. (Al-Sirhan & Dradke, 2009)

The application submitted by the prevailing party to the competent court contains this data:

1. The name of the court to which the application is submitted.
2. The name and address of the applicant, and the name and address of its representative, if any.
3. Name of the Judgment creditor (convict), his address, and the name of his representative, if any, and his address.
4. The subject of the request
5. A summary of the subject matter in which the arbitration award was awarded.
6. the date of the arbitration award, and the date it was notified to the Judgment creditor (convict). (Article (56)- Jordan Civil Procedure Law No. 24 of 1988).
7. A lawyer signature on the application, unless the applicant himself is a lawyer. (Jordanian Bar Association Law No. (11) of 1972).

As for the Jordanian and Palestinian arbitration law, Article (53) stipulates:

1. The request to implement the arbitration award shall not be accepted if the date for nullity claim of the arbitration award has not passed.
2. The request for execution of arbitration award shall be submitted to the competent court attached with the following:
 - a- A copy of the arbitration agreement
 - b- The original arbitration award or a signed copy of it.
 - c- A translation of the arbitration award certified by an official body into Arabic if that arbitration award was not issued in Arabic. (Jordanian Arbitration Law No. (31) of 2001, Palestinian Arbitration Law No. (3) of 2000).

With regard to the competent court position towards the request submitted to give the arbitration award the executive power, the legislator has

decided that there are two cases that prevent the issuance of a judicial decision that gives the arbitration award the executive power. This cases as follow:

The first case: a case that includes the arbitration award in contravention of the public order. The Jordanian, Palestinian, Syrian, Lebanese, and Bahraini legislator stated that if the arbitration award contains anything that contradicts the public order, the competent court is obligated to issue a decision rejecting the implementation of the arbitration awards. (Al-Khazaleh, 2017)

The second case: The case of failure to notify the convict correctly. the Jordanian, Palestinian, Syrian, Lebanese, Bahraini, Algerian and Saudi legislator decided that the competent court will not to give the arbitration award the executive power, if it was found that the arbitration award was notify to the convict in a way that is incorrect or mistaken. (Bani Miqdad, 2011)

C. The Competent Court To Hear The Nullity Clam And The Extent Of Its Authority

The Jordanian and Palestinian arbitration law has identify the court that has jurisdiction to hear the nullity clam for the arbitration award and also indicated the extent of the court authority in the nullity clam, the researchers in this part of the research will identify the competent court to hear the nullity clam for the arbitration award and the extent of its authority.

C.1. Court of Appeal

The Jordanian and Palestinian legislator in the Arbitration Law used the term "the competent court", for which it decided jurisdiction in all arbitration matters as a general principle. This court was defined in Article Two of the Arbitration Law as the Court of Appeal. The Competent Court: The Court of Appeal, which is within the jurisdiction of arbitration, unless the parties agree to the jurisdiction of another appeals court. (Article (2) of the Jordanian arbitration law No.31 of 2001 and Palestinian Arbitration Law No. (3) of 2000).

This article clearly indicates that the Court of Appeal within the jurisdiction of arbitration is the competent court to hear the nullity clam, and that in order to shorten the time and provide greater protection for arbitration, as this court is a court composed of three judges (K. Tejomurti, 2019: 510), and it is the same court that give the arbitration award the executive power and hears the nullity clam. (Turkman, 2013)

Through the arbitration law in the Arab countries, the legislator did not identify a specific procedure for the nullity clam, although it was identified that the Court of Appeal is the competent court to hear the nullity clam. Therefore, the general rules specified in Civil Procedure Law applied on the nullity clam according to the article (56), (57) of the Jordanian Civil Procedure Law. (Sherary, 2011)

C.2 The Authority of The Court of Appeal to Hear A Nullity Clam

The authority of the Court of Appeal is determined by looking at the reasons for nullity mentioned in Article (49) of the Palestinian and Jordanian Arbitration Law, as these reasons are exclusively. (Sherary, 2011) By studying these reasons,

we find that none of these reasons gives the Court of Appeal the authority to consider the subject of the dispute, which means that the Court of Appeal is not considered as a subject court to the arbitration dispute, as it has nothing to do with the subject matter of the dispute separated by the arbitration and has no substantive powers, but its authority is restricted to the specific reasons exclusively mention in article (49). (Turkman, 2013) This is confirmed by the decision of the Jordanian Court of Cassation No. (201/2006) dated (21/8/2006), as it stated that: "The competent judge does not have to review the arbitration award to assess its suitability and monitor the arbitrators good judgment and the correctness or error of their diligence in understanding the incident or its adaptation or interpretation of the law, This is because the oversight has a Superficial form so that it does not go to the root of the dispute or to supervise how the arbitration tribunal understands the law". (Decision of the Jordanian Court of Cassation No. (201/2006) dated (21/8/2006).

Based on the above, the Court of Appeal in accordance with the provisions of the Arbitration Law, its role is limited to Superficial form oversight without objectivity, as it has no consideration of the dispute, Court of Appeal control is limited to the arbitration award through the availability of one of the nullity reasons stipulated in Article (49) of the Jordanian Arbitration Law. (Obeidat & Hazboon, 2006)

It must be made clear that whoever has the right to ask for nullity clam must be one of the parties to the litigation in which the arbitration award was concluded, and the parties which asking for nullity clam must not have previously waived his right to object to the violation that occurred during the arbitration proceedings. (Sherary, 2011) according to Article (7) of the Jordanian and Palestinian Arbitration Law.

as for the appeal, Article (51) stipulates: "If the competent court decides to support the arbitration award, it must order its implementation, and its decision in that regard is final. If it decides that the arbitration award is null, then its decision is subject to discrimination within 30 days from the day following the notification. (Jordanian and Palestinian Arbitration Law).

And it appears from the text of the article that the Jordanian legislator approved the appeal against the judgment of the competent court before the Court of Cassation if the latter ruled invalidation of the arbitration award unlike if it ruled to support the arbitration award, it orders its implementation and its final decision is indiscriminate. (Obeidat & Hazboon, 2006) Some of the jurisprudence has commented on the unconstitutionality of this article, as it holds that there is a waste of the principles of equality and equal opportunities between the parties in dispute, as it gives the right to appeal to one of them without the other, and thus, it does not equal the parties to the lawsuit against the right to appeal, (Sherary, 2011) and commenting on that, the Constitutional Court issued Decision No. (2/2013) General Assembly Date (3/4/2013) where the esteemed court decided the unconstitutionality of Article (51) of the Arbitration Law based on its violation of the provisions of Article (6/1) and Article (128/1).

At the end of the research, the control of the Jordanian Court of Cassation is limited only to the violation by the Court of Appeal of its established authority under the Arbitration Law. It is a censorship of the actions of the Court of Appeal texts relating to the reasons for the nullity of the arbitration provision stipulated in Article (49) without extending to the subject of the dispute or the law applied by the arbitrator.

IV. Conclusion

So, after this long explanation, we reached how to implement the arbitrators awards in several ways. However, the aim of all these operations is to give the arbitration award the executive power, especially in the Arabian Middle East Countries law, which gave the Court of Appeal, which falls within its regional jurisdiction to give arbitrators awards executive power, although as we spoke, this is not the only way to do so. The Jordanian legislator did not permit the annulment of the arbitration award except through a nullity claim, and the reasons are strictly defined in accordance with the text of Article 49 of the Jordanian Arbitration Law. Arabian Middle East Countries law stipulated that it is not permissible to waive the nullity claim before the arbitration award is issued, but after its issuance, it is permissible to agree between the parties to waive the nullity claim.

The study found that the legislator did not specify the reasonable time within which an objection to the incorrect procedure in the arbitration process should be submitted. Where the legislator decided what is called a reasonable period. We recommend that the legislator specify the period by which the violation should be objected to. We also hope that the legislator will include a mistake in the application of the law or its interpretation or interpretation within the nullity cases stipulated in Article (49) of the Jordanian Arbitration Law.

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