THE LEGAL FRAMEWORK OF ARBITRATION IN FOREIGN INVESTMENT CONTRACTS AND ITS AUTONOMY

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ABSTRACT

Arbitration is one of the most significant means of disputes settlement in general and the investment disputes particularly, because it is a strong guarantee to the contracting parties. It strengthens trade and investment relations and leads to increasing economic as well as commercial activity whether at local or international levels. Arbitration aimed at achieving fairness that is consistent with the nature of international trade. It has also become one of the most effective mechanisms in resolving disputes due to its most significant characteristics which are autonomy, neutrality, saving time and effort and its appropriateness to investment privacy which prompted most countries to include in their encouraging investment laws explicit provisions to accept the arbitration as a procedural means to resolve investment disputes. One of these States is Jordan which takes this procedure into its account to reassure the investor on his money because investors suppose that the judiciary in developing countries is not independent enough and most courts in these countries do not have enough knowledge of investment issues. Therefore, the investor is keen to manage the arbitration clause in the investment contracts. In response, the countries that attract the investment resorted to arbitration as a procedural guarantee to encourage foreign investments, including Jordan which realizes that any economic or investment growth must be accompanied by an evolution in the judicial organization, foremost of which is arbitration. This research has been divided into two major topics. The first topic: the nature of arbitration in foreign investment contracts, and in the second topic: the autonomy of the arbitration in foreign investments. The researcher has reached the conclusion that foreign investment is independent of other similar means in settling disputes in foreign investment contracts, despite its complex nature among economic and legal elements.

Keywords: Investment, Arbitration, Trade, Legislation, Jordan

JEL Classifications: J52, P33, P45.

1. INTRODUCTION

It is well known that arbitration occupies a noteworthy position in the field of foreign investment guarantees since it represents a major nerve for the economies of countries, especially the developing ones that aimed at providing the appropriate capabilities to attract and encourage these investments as the main goal of its policy because it is the main channel through which the
capital, scientific expertise and technical flows. Many States decide the guarantees that encourage investors to invest in their territories as they are linked to the movement of capital and its internal and external exploitation and Jordan is one of these countries as well.

What supports our opinion is the fact that, all countries strive to enact laws to encourage investment. These countries are keen to include in these laws a set of privileges and guarantees to attract foreign investors. For example, the Jordanian law grants foreign investors the right to obtain Jordanian nationality under certain conditions to encourage investment foreign nationals within Jordan. However, these advantages or guarantees provided by the law of the host countries become pure theory, mere promises by the state and hopes of the investor in the absence of a practical and effective means such as arbitration as the protection of foreign investments is not the only purpose, because it is just a means to achieve economic development policies of the country.

Arbitration is one of the prominent means that contractors seek in their agreements contracts, especially in contracts of foreign investments to resolve disputes that may arise, we can say that arbitration has become the natural judiciary in this field, due to the advantages that characterize it as well as the ability to fit with the nature of investment contracts, it also reduces the fears of investors from dealing with the jurisdiction of the host country and the consequent guarantee of neutrality of the decision taken to resolve the dispute with the host country and to ensure the protection of their rights and their investment on one hand, and the confidentiality it requires on the other hand which leads to avoiding compromising their status and reputation for economic activity.

Arbitration is also considered one of the most important means that foreign investors and international traders pursue to settle their disputes resulted from their treaties. The foreign investor maintains arbitration due to the confidential of the investment contracts in terms of the parties. Although the host country is only a contracting party, but it is, nevertheless, an extraordinary party in terms of the sovereign advantages it enjoys, and which enables it to disrupt the economic balance of the contract, and also violating the neutrality that must be available to the national judicial authority, In the case of its inception. On the one hand, the foreign investor adheres to the arbitration clause because of his fear of the state's inviolability of the judicial immunity. Since the State enjoys its independence and sovereignty on an equal footing with other States, with the jurisdictional immunity that the national jurisdiction of any other State may bring to the consideration of disputes to which the State is a party. Based on the above, we will divide this research into two topics: we deal in the first topic with, the nature of arbitration in foreign investments contracts and its forms, and in the second topic, the autonomy of arbitration in foreign investments.

2. CONCEPTUAL FRAMEWORK

If the parties to the dispute resort to arbitration, they must agree on this. It is this agreement that transfers the dispute from the hands of ordinary judges to the hands of other persons of their choice who are called the arbitrators. The arbitration agreement defined as "the agreement to bring the dispute to parties to judge without submitting it to the competent court". It is “that contract in which the parties agree to present the dispute that is already in existence or the dispute that may arise in the future when the execution of a particular contract to an arbitrator of their choice." The arbitration clause in the UNCITRAL Model Law on International Commercial Arbitration was defined in Article 7 in its first paragraph as “arbitration agreement is an agreement between the parties to bring to arbitration all or some disputes that arise or may arise between them

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1 Abu Al-Wafa, Ahmad, Arbitration in Arabic Law F 1, Al-Ma'aref Establishment, Alexandria. No Publication Year, p11
in relation to a limited legal relationship, whether contractual or non-contractual. Contractual defined in Article 6 of Jordan Amended Arbitration Law No. 16 of 2018, defines it as: “(a) The agreement of the parties, whether legal or natural persons who have the legal capacity to contract, and who submitted all or some of the disputes that arise or may arise between them in accordance to a particular legal relation whether it is a contractual or non-contractual (b) Arbitration shall not be allowed in cases where conciliation is not permissible”.

In accordance to the previous definitions, we recognize that they were characterized by generality in clarifying the concept of arbitration agreement, without specifying it with regard to contracts of foreign investments, especially since most of the laws related to investment were limited in defining the concept of arbitration in relation to the disputes arising from investment through stipulating that arbitration may be resorted to in order to resolve the disputes, without going into the details leaving it to the general principles that govern it with taking into consideration the specificity of this contract on the one hand, and on the other hand, some other legislation did not consider the definition of the arbitration agreement taking the direction that the definitions are the work of jurisprudence and not the legislator. Most laws insist that the arbitration agreement should be in written forms, but they differed in term of the required written form whether it is a condition for the validity of the arbitration agreement or merely for evidence. This confirmed in Article 7 of the Jordanian amended Arbitration Law in 2018.

3. THE AUTONOMY OF ARBITRATION IN FOREIGN INVESTMENTS

The arbitration agreement in the foreign investment contracts takes two forms. The first is the arbitration submission agreement, which is the agreement of the parties to the investment relationship in the foreign investment contracts in a separate contract to present the disputes that have already arisen for arbitration to resolve them. The second form is the arbitration clause, which means that the agreement of the parties to the investment relationship are under the text of the contract, which stipulates that disputes that are likely to arise between them in the future must be submitted to arbitration if the arbitration agreement in foreign investment contracts takes one of the two previous forms, the expression in national laws and international treaties on arbitration for both forms is the expression (arbitration agreement), which combines these two forms without a minor distinction between them in legal treatment as done in the private international Swiss Law. The French law, Article (1442) the Code of Procedure in force, defined the arbitration clause as “an agreement under which parties to a contract undertake to subject disputes that may arise between them in the future to arbitration”. It did not clarify the concept of the arbitration submission, yet it was limited to stating the meaning of the arbitration clause. The arbitration agreement, which includes both forms in Article 1447, which states that “a contract which refers parties to dispute to the arbitration whether an individual or more than one person” shall be deemed to be the object of the arbitration clause.

It is noted that most of the international agreements that dealt with arbitration in respect of contracts of foreign investments have been keen to highlight the unit of legal treatment for both the clause and the submission of arbitration, the two forms have the same expression which is arbitration agreement and that because there is no justification for distinction between them since

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4 Article (6) of the Jordanian Amended Arbitration Act No. 16 of 2018.
7 Swiss Private International Law of 1978, combining the two images and collecting them under one expression, the arbitration agreement in 178.
8 Al-Gammal, Mustafa Mohammed and Mohammed, Okasha, 1998, Arbitration in Private International Relations, I, Al-Ma'arif Establishment, Alexandria,p343
international arbitration does not take into account any practical importance, whether it is the rules of conflict of laws or the substantive rules. The accurate solutions and the proper situations of international arbitration which make up its own legal system, do not differ depending on whether arbitration has resulted from the arbitration clause or its terms. The autonomy of the arbitration agreement means the independence of the agreement concluded in the form of the arbitration clause contained within the original contract texts from this contract and the effects that may affect its non-validity.

It can be said that, based on the above, it is reasonable that the original contract is void but the clause is true, in the case of invalidity of the original contract for the inability to deal with it or because of its illegitimacy, then the validity of the original contract or the invalidity can be presented to the arbitrators pursuant to the condition contained therein if the arbitrators decide that the original contract is null and void, then such invalidity does not extend to the arbitration clause and does not lead to invalidation of the judgment issued by the board.

The autonomy of arbitration is one of the significant issues sought by investors in all the States of the world, because it is the best solution to protect their investments. Comparative jurisprudence has tried to explain the concept of the autonomy of investment arbitration, but jurisprudence differed in determining the nature of arbitration. Therefore, we will clarify and prove the autonomy of arbitration in foreign investments through dividing this topic into two sections: The first section deals with the nature of legal arbitration in foreign investment contracts. The second Section deals with the differences between foreign investment arbitration and the means similar to it.

4. THE NATURE OF LEGAL ARBITRATION IN FOREIGN INVESTMENT CONTRACTS

Jurisprudence has debated about the definition of a clear concept of the legal nature of arbitration in foreign investment contracts, and there are several trends discussed this subject. Some have described it as a kind of agreement (contractual), while others described it as judicial in nature a third trend defined it as multilateral in its nature. In addition, a new trend has emerged describing it as an independent and a special nature. To determine the nature of legal arbitration in foreign investment contracts, we must clarify this nature by dividing this section into several subsections. The first subsection clarifies the convention nature of arbitration in foreign investment contracts. The second subsection deals with the judicial nature of arbitration in foreign investment contracts. Subsection three illustrates the multilateral nature of arbitration. In section four, the special nature of arbitration will be clarified.

4.1 The convention nature of arbitration in foreign investment contracts

The convention nature of the arbitration according to some jurisprudence means the result of their belief that the will of the contractors is the legal basis on which this agreement derives its binding force. In other words, the agreement of the parties to the arbitration waives some of the guarantees provided by the judicial system and are satisfied with the advantages provided by the arbitration parties. The arbitration as seen by the parties to this opinion is based on the will of the parties to the agreement, which includes all the details, indicating that the parties

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12 Al-Shawarbi, Abdul Hameed, 2000, Arbitration and Reconciliation, Al-Ma’aref Establishment, Alexandria, p29
when they agree to arbitration for investment contracts implicitly agree to waive the appearance before the court and the resulting case, and vest the arbitrator authority to resolve the dispute, thus the authority of the arbitrator is their will. Therefore, this authority cannot be a judicial authority, because it is the result of the will of the conflicting parties, which is the source of the executive power of the arbitration award in the dispute of the contracting parties.\textsuperscript{14} As a result, arbitration procedures in foreign investment contracts do not apply to the rules of civil and commercial proceedings. Investment arbitrators act only as agents or commissioners of the parties. Arbitration in investment contracts is also diverse from the judiciary because it does not comply with the rules of law as in judiciary it seeks to achieve a private interest, and this is contrary to the judiciary, which seeks to achieve the public interest first. The supporters of this opinion\textsuperscript{15} believe that the investment laws did not specify the nature of arbitration when recourse to it, as it provided only that it is permissible to resort to it to resolve investment disputes without specifying the nature of the arbitration.

The researcher can say that this trend contradicts with the reality, because the arbitration in investment contracts and especially in arbitration in contracts of foreign investment is optional as the parties are entitled to cancel the arbitration agreement for investment and bring the case before the original competent courts\textsuperscript{16} additionally, the duty of the investment arbitrator is to disclose the will law in the particular case, not disclose of the will of the parties\textsuperscript{17}.

4.2 Judicial nature of arbitration in foreign investment contracts

The legal nature of arbitration in foreign investment contracts is based on the primacy of the task performed by the investment arbitrator, as the investment arbitrator makes a statement and how to resolve the dispute according to the nature of the task entrusted to him, and in this case the arbitrator who is considered a judge chosen by the parties impose the rule of law. In addition, arbitration in investment contracts would summon the three elements of the judicial work. Some States have taken this view, as in France, article 1471 of the French Code of Procedure of 1981 (and without reservation on the need to cause arbitration clauses in the field of investment in the area of financial Investments) and article 1472 stipulates the data that must be included in the arbitration clause in the investment contracts, or it would be considered invalid. This proves that the French judiciary has taken on the judicial nature in some of its judgments.\textsuperscript{18} In this case, the investment arbitrator shall be considered a judge of this act by virtue of his position, that is the settlement of disputes, since he does not derive his power from the arbitration contract alone, but from the will of the legislator which recognizes it, since the will of the individuals is not sufficient to create arbitration if the legislator is not granted such status\textsuperscript{19}.

This view has been criticized for several reasons, the most important of which is that there is a difference between the judge and the arbitrator in the field of investment, because the judge's task is not only to settle the dispute but the power of imposing, unlike the investment arbitrator whose task is to resolve the particular dispute, granting the investment arbitrator the task of the judge for a limited period and for a particular dispute. Another point is that, the rules governing the judiciary are not applied to arbitration in the field of foreign investment\textsuperscript{20}.

\textsuperscript{14} Mhaisen, Ibrahim Harb, 1991, The Nature of the Situation in Civil Law, Dar Al-Thaiqafa, Jordan.p31
\textsuperscript{17} Omar, Nabeel Ismail, 2004, Arbitration in Civil and Commercial Materials, Dar Al-Nahda Al-Arabiya Al-Nahda Al-Arabiya, Cairo.p32
\textsuperscript{18} Al-Gammal, Mustafa Mohammed and Mohammed, Okasha, op.ct. p43
\textsuperscript{19} Abu Al-Wafa, Ahmad, Arbitration in Arabic Law, op.ct. p20
\textsuperscript{20} Al-Darsi, Abdul Basit Abdul Wasea, 2005, The Legal System of the Arbitration Agreement, I 1, The Modern University Office, Egypt, p.36
4.3 The multilateral nature of arbitration in foreign investment contracts

This trend argues\(^{21}\) that the nature of arbitration in foreign investment contracts is of a mixed nature between the contractual nature and the judicial nature. They considered that investment arbitration had two stages. The first stage is the contractual stage, which appears clear in the choice of the latter and the applicable law on the proceedings and the subject matter of the dispute. The second stage is judicial, which illustrates the interference of judiciary, especially when the parties to the investment dispute resort to give the arbitration decision in the investment contracts the executive force through the execution order, shifting from an investment arbitration decision to a judgment.\(^{22}\)

The arbitral award in foreign investment contracts in accordance with this direction shall not be considered a judicial decision except after it has been granted to the execution order in the country where it is required to be executed \(^{23}\). Despite this attempt, this view is no more than a compromise that does not end with the problem \(^{24}\), it's not sufficient to specify the legal nature of investment arbitration to say that it begins in agreement and ends with a judgment through setting a time limit that would diminish the treaty-based nature of the latter and allowing its judiciary nature to arise, in addition to the consequences of this trend that are contrary to reality, for the possibility of the emergence of both the convention and the Judiciary, since the agreement on arbitration in foreign investment contracts until it completion by the execution of the arbitrator's ruling. At this level, the disagreement over the point at which the contractual character ends and the judicial nature begins.

4.4 The special nature of Arbitration

As a result of the criticisms against the previous three trends, a trend of jurisprudence determined the legal nature of arbitration in foreign investment contracts which was considered to be of a self-autonomous nature and entity in dispute resolution, it differs from the contract and the judiciary, and brings justice in different ways than the judiciary, as the contract is not at the core of arbitration in foreign investment contracts, as evidenced by the fact that there is no arbitration in the compulsory foreign investment contracts, the arbitration in foreign investment contracts consists of two elements, namely, the investment arbitration agreement and the investment arbitrator's jurisdiction.

It should be noted that the arbitration agreement in foreign investment contracts is relevant to the same contract, but has subjective characteristics that distinguishes it from other contracts\(^{25}\). The purpose of the arbitration agreement in foreign investment contracts is not to establish an initial relationship between the parties but rather to settle the effects arising from a previous relationship already in place, and its object is not to resolve the dispute directly and conclusively, but rather to create an organic individual or entity to which the claims are submitted and where decisions are taken independently. The arbitrator's work in the field of investment, in resolving the dispute, is done in accordance with the general principles of the legal system of the State, which applies to all judicial bodies, and after the arbitration agreement of foreign investment contract is concluded, the party that is responsible for resolving the disputes is appointed and exercises its jurisdiction power independently from the will of the parties. Arbitration in foreign


\(^{22}\)Radwan, Abu Zaid, op. cit. p33

\(^{23}\)Radwan, Abu Zaid, op. cit. p33


\(^{25}\)Rashed, Samia, 1984, Arbitration in Private International Relations, Arbitration Agreement, Dar Al-Nahda Al-Arabiya, Cairo.p71
investment contracts is, therefore, an agreement and decisions that give rise to judicial decisions but are of a special nature\textsuperscript{26}.

By presenting the mentioned trends on the legal nature of arbitration in foreign investments, we notice that, regardless to the role of the parties to the dispute in the conclusion of the arbitration agreement in the field of investment, the appointment of investment arbitrators and the choice of time, place and procedures for arbitration in investment contracts and the determination of the applicable law, arbitration in foreign investment contracts cannot be considered to be of a complete (contractual) nature, due to the fact that, the will has not exceeded the demand of the investment arbitrators to apply them without the application of the law, as the law remains the base in which it gives this will a certain space, but without exceeding it. For instance, it is not permitted to agree on the contravention of norms which are considered public order. It should be noted that the will of the parties loses their role once the investment arbitration contract is concluded, and the role of the investment arbitrator in the settlement of the dispute embarks on which is considered a key role in the whole process.

Accordingly, if it is possible to accredit the contractual form of the arbitration agreement in foreign investment contracts, whether in the form of a clause or a submission agreement, this cannot be taken in account in the arbitral award in the foreign investment contracts and that also applies in respect of the full judicial nature of arbitration in foreign investment contracts, for the possibility of withdrawal from the contract and recourse to court to resolve the existing dispute even in the circumstances in which the investment arbitrator makes its decision, as well as when the decision is submitted to the court for an order to be granted of execution, the parties to the dispute may invoke the order of nullity, which is not permissible for the judgment and decisions of the court\textsuperscript{27}. Arbitration in foreign investment contracts cannot be considered to be of a mixed nature, although this nature has shown the contractual and judicial nature of investment arbitration, but it has set a time-limit between them, which is considered to be the case because the contractual character is of a judicial nature since the beginning of the agreement on arbitration in foreign investment contracts until the decision was issued and implemented.

Based on the foregoing data, the researcher considers the trend which supports the idea of determining the nature of arbitration in foreign investment contracts as of a private, autonomous nature, based on the possibility to represent judicial but it is a convention, and the decisions it makes are of a special nature, it is the trend which is the closest to accuracy because it did not overlook the nature of the convention and judicial at each stage of the arbitration process in the field of investment as the privacy of these contracts make independent nature the best solution, because of the lack of specialized judiciary investment, which requires experience, skill and knowledge of enough investment issues to achieve justice. However, arbitration in foreign investment contracts can be considered a special type of international trade requirements. One of the main factors that encouraged investment is due to its speed of procedures, low expenditure and confidentiality. Therefore, it is necessary to establish an international arbitration system that is compatible with the advantages of these contracts which distinct them from others.

Accordingly, arbitration in foreign investment contracts autonomously establishes a special place between the rest of the existing legal systems as a special jurisdiction, and it is wrong to put it in accordance with existing legal systems, whether they are contractual or judicial, even if they are similar in some respects.

\textsuperscript{26} Kareem, Abdul Rasool, 2002, Recognition in Judgments and Arbitral Awards, Master Thesis Submitted to the Faculty of Law, University of Babylon, Iraq, p.78

\textsuperscript{27} Article 1502 and article 1503 of the new French civil procedure law on international arbitration.
5. THE DISTINCTIVENESS OF FOREIGN INVESTMENT ARBITRATION

There is no doubt that the settlement of disputes is fundamentally a jurisdiction matter, but it is not of public order, and it may be agreed to breach and recourse to other methods. The Judiciary means a binding statement by a public jurisdiction to judge in disputes in right and justice.\(^{28}\) The judiciary is also intended as a means of resolving disputes by a binding judgment of a permanent body comprising appointed independent judges.\(^{29}\)

Accordingly, Judiciary is nearly like arbitration in foreign investment contracts, as both result in the resolution of disputes and express the rule of justice, especially if the arbitration in foreign investment contracts represents a special jurisdiction for the investment area if it is considered the natural jurisdiction of such disputes. Because of this, the distinction is not easy between arbitration and Judiciary, especially in cases where the legislator imposes on litigants the recourse to arbitration (compulsory arbitration) because of the lack of will of the opponents in this regard, in addition to the fact that both regulars have the force of compulsion when implementing decisions made, whether on arbitration in foreign investment contracts or on the judiciary. However, there are some aspects in which arbitration differs from the judiciary in several respects, the most significant is that the judge's jurisdiction is a public jurisdiction and he is allowed to consider all cases brought before him, whereas the investment arbitrator's authority is limited to investment disputes, for those who have wisely accepted his decision without exceeding it to another issue.\(^{30}\)

In addition to the fact that the judge adjudicates the dispute in accordance to provisions of law, while the investment arbitrator has more powers than the judge because he does not abide by the provisions of law except in breaching public order and morality, as the sources he relied upon are the customary commercial conventions within the framework of investment disputes, as well as the case law of these disputes. The decisions of the courts are formal decisions that are legally binding and may be carried out by forcible means, while decisions of the arbitrator will not be implemented until after the executive statement has been issued by him.

The agreement on arbitration in foreign investment contracts does not mean a complete and absolute withdrawal from the protection of the law or the waiver of the right to resort to the judiciary, because the legislator neither takes this waiver nor decides it, since the right to resort to the judiciary is one of the fundamental rights relating to public order and the parties to the arbitration contract in the foreign investment contracts by their will delegate a limited power to the arbitrator to rule in the dispute rather than the competent court, so that if the latter did not execute for any reason, the power of the government returned to the court.

5.1 Differences between arbitration and reconciliation

The Jordanian Civil Code defines reconciliation in Article 647 (Reconciliation is a contract that raises the dispute and ends the quarrel between the reconciliators by mutual consent).\(^{32}\) Therefore, the reconciliation is a way that leads to the end of the lawsuit in informal ways. Arbitration in foreign investment contracts and reconciliation both are similar in terms of being an agreement in which is based on the will of the parties to resolve the dispute away from the jurisdiction of the State, and each of them performs its role on the case of a dispute occurred or it will take place in the future. Also, arbitration and reconciliation are considered alternatives to the general jurisdiction that is specialized in a certain area.\(^{33}\)

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\(^{28}\) Taher, Mohammed, Jamal, 2005, Dispute Resolution in Arbitration, Master Thesis Presented to the Faculty of Law, Mosul University, Iraq, p.19

\(^{29}\) Khaled, Hisham, 2004, International Commercial Arbitration Priorities, University of Cairo, Egypt, p.166

\(^{30}\) Al-Douri, Kahtan, 1985, Arbitration Contract in Islamic and Jurisprudence, F1, Al-Kholud Press, Iraq, p.26


\(^{32}\) Jordanian Civil Code No. 43 of 1976 (Article 647)

\(^{33}\) Al-Darsi, Abdul Basit Abdul Wasea, op, ct.p.30
Despite the similarity between arbitration and reconciliation, there is still a clear disagreement between them. The arbitration in foreign investment contracts is the obligation of the litigants to deprive jurisdiction of the courts concerned and to put it before an arbitrator or arbitral tribunal specialized in the field of investment to issue a ruling and terminate the dispute in question. There is a mutual dispute between the litigants in relation to each other's claims. In other words, the settlement is directly related to the dispute, in which each party waives part of his right in dispute that corresponds to part of the right claimed by the other. In this way, arbitration in foreign investment contracts differs from reconciliation.

Arbitration is not merely a subject and independent judicial arbitration which is decided as an exception to the general method. The reason for the foreign investor's recourse to arbitration is his fear of impartiality of the judiciary since the national judiciary of the host country, whatever it is neutral and independent, it remains associated to the economic interests of the State, but for the reason of the reconciliation, the dispute was resolved by consent agreement between the parties without a third-party involvement.  

It should be noted that the dispute does not end with the conclusion of the agreement on arbitration but ends with the exercise and judgement of the investment arbitrator who is selected for his mission, this judgement is enforceable or in kind in accordance with the procedures established in the general rules once the order for its execution has been obtained. As for reconciliation, the dispute ends with the mutual and satisfactory waiver of all litigants, and this agreement is not self-fulfilling unless it is made in the form of an official contract or before the court in which the dispute was submitted before a solution is reached. Moreover, the investment arbitrator is required to be a specialist in the field of investment and has experience in this field, but in the reconciliation there is no such condition.

Reconciliation is also different from investment arbitration in terms of appeal and methods, if the reconciliation is done, it is not permissible for any reconcilers to retract, and the plaintiff's claim is dismissed because it is a contract that raises the dispute and breaks the litigation by mutual consent, and therefore does not accept the contract of reconciliation and the verdict issued by the ratification of an appeal. The arbitral award may be ratified or revoked by the court, and in the case of avoidance or otherwise, it may return the case to the arbitrators to fix the award from the defect in case of deficiency or error or to adjudicate the dispute itself if the case is valid for adjudication, and the judgement rendered by the Court in this regard, does not accept the objection, but accepts the appeal by the other legally prescribed methods.

5.2 Arbitration and experience

In some cases, some may agree to use one or more experts to express an opinion and a report on topics where disagreement or controversy has arisen, and often issues of a technical nature requiring expertise that varies according to the type of dispute. Experience refers to people who specialize in a field and regardless of the type of the field, and who are asked some questions to obtain their answers. Experience though is divided into two types, judicial experiences and experiences of the convention. Judicial experience is done by a court judgment, whether by the opponents’ request or without it, the experience of the convention is under an agreement between two persons for a third person to perform a certain task.

34 Al-Kasabi, Essam Al-Din, 1994, The Privatization of Arbitration in the Field of Investment Disputes, Al-Ma‘aref Establishment, Alexandria, p177  
36 Article 553 of the Egyptian Civil Code in force.  
38 Omar, Nabeel Ismail, op.ct. p9
Experience and arbitration in foreign investment contracts may be similar to the interference of a third party between the parties to the dispute in its dissolution, who in the exercise of their work, are subject to almost the same conditions, requiring objectivity, impartiality and neutrality in each of them\(^{40}\), as well as both are specialized in a particular field, the expert is specialized in the field in which he was agreed to show his knowledge, as well as the investment arbitrator who is required to be a specialist in the field of investment, but they differ in this, the responsibility of the investment arbitrator is closest to the responsibility of Judge which is to issue a decisive decision on the dispute before it, and it is binding on the parties. The expert's duty is merely to express an opinion to any person since the expert's information provided to the judiciary is within the discretion of the judge, he has the freedom to adopt it or not. While experience is to give advice on a matter of particular jurisdiction, as well as the fact that the expert may be one of the parties themselves, from the arbitrators or from the arbitral tribunal and may be through the courts, whereas arbitration will be by agreement between the parties to the dispute themselves, and the parties shall not have the right to return and submit the dispute to other arbitrators or bring a new lawsuit except by their agreement again\(^{41}\). The investment arbitrator shall also issue his decision based on the documents submitted by the parties to the foreign investment contract. But as for the expert, he shall rely on his own information and experience and shall not require to be appointed by name, whereas the arbitrator shall be appointed by name in the arbitration agreement\(^{42}\).

5.3 Arbitration and conciliation

Conciliation is an amicable way to resolve disputes between the parties and through which the opposing sides themselves or by the intermediary of a third party meet and consult in order to reach a solution that ends the dispute and satisfies the parties, if the conciliation ends with a solution, it is edited and signed by the person who has reconciled it\(^{43}\), arbitration in foreign investment contracts is similar to the conciliation that they require the intervention of other persons to resolve the dispute between the parties, in both systems the parties agree to settle their disputes through consent by delegating other persons to this task\(^{44}\).

In spite of these similarities, however, there are differences in several respects, conciliation is done by selecting or appointing one or more persons to attempt to limit and identify the points of disagreement between the parties and to maintain contact with them until they meet at a consensual solution, in addition to the fact that the conciliator does not hold hearings, as in arbitration, but by holding special meetings of all parties, presenting their arguments and documents, limiting their role to bridging views, proposing a specific solution to the dispute, easing the discord between the disputing parties and reaching compromises acceptable to them, all contrary to the arbitrator\(^{45}\).

The fundamental difference between conciliation and arbitration in foreign investment contracts is that the conciliator's decision is not considered a binding order on the litigants but mere proposals or draft solutions to bring the points of view to a conclusion. If it succeeds, it ends with an agreement ending the conflict and signed by both sides and retained, whereas arbitration in investment contracts ends with a decisive decision by which the dispute shall be determined and binding on the parties and shall have the authority of jurisdiction, and be enforceable after the decision of the Court of enforcement\(^{46}\). In addition, conciliation is based on concessions between

\(^{40}\) Al-Gammal, Mustafa Mohammed and Mohammed, Okasha, op. cit. p28

\(^{41}\) Khaled, Hisham, International Commercial Arbitration Priorities, op. cit. p101

\(^{42}\) Al-Tahiwy, Mahmoud Al-Sayed Omar, 2002, Arbitration and experience in commercial materials, Dar al Fiker, Alexandria, Egypt, p31

\(^{43}\) Taher, Mohammed Jamal, op. ct. p18

\(^{44}\) Omar, Nabeel Ismail, op. cit. p8

\(^{45}\) Al-Darsi, Abdul Basit Abdul Wasea, op. cit. p33

\(^{46}\) Khaled, Hisham, International Commercial Arbitration Priorities, op. Cit., P. 15
the parties so that a compromise can be reached, while the arbitration in foreign investment contracts is based on a judgment in which all requests by a Party may be met and all the other's requests are rejected, as the arbitrator does not seek compromise or conciliation, and if he does that and fails, he has to persist and make a decisive decision on the dispute, whereas the conciliator only has to terminate the proceedings and the parties have the freedom to resort to the courts or not, which is not possible for them in the case of an arbitration agreement that ended with an arbitral award separating on a particular subject. The researcher concludes by distinguishing between arbitration in foreign investments and similarities, that arbitration is characterized by its independent and distinct from all similar means.

6. CONCLUSIONS

Arbitration in foreign investment contracts is one of the most significant modern means of resolving investment disputes between investors and countries hosting investment, especially with recent developments towards globalization, which provides investors from different States of the world with the economic environment and the encouraging advantages that made most countries enacting legal legislation on foreign investment including legal provisions to provide the investor with the needed security in arbitration laws for the settlement of investment disputes, whether they relate to the arbitration clause or to the arbitration submission agreements, with the result that, arbitration became autonomous and differs from other forms that is similar with it, both in terms of its legal nature and its advantages. In view of the above analyses, we conclude as follows:

- Jurisprudence did not agree to find a comprehensive definition that prevents investment arbitration in foreign contracts.
- Foreign investment contracts have several sections and may take several forms, but the most significant divisions that have attracted the attention of jurists and economics alike is the division of contracts on foreign direct investment and foreign indirect investment contracts, because of the role played by this type in the economic policy of both parties.
- Resolution of disputes in foreign investment contracts is an important issue that the foreign investor seeks and focuses on at all stages to ensure his right in the host country to invest and not to try to use its immunity.
- Arbitration in a foreign investment contract is considered an optional and international arbitration according to the rules of law.
- The most important feature of investment arbitration is its independent nature. Arbitration in contracts of foreign investments is a judgment, but it is an agreement, the decisions issued by it have binding force, but it is of a special nature issued by ordinary people.
- The parties to the legal relationship are often the same as determining the selection of arbitrators in contracts of foreign investments because of the requirement of specialization and experience for the investment arbitrator and often resort to specialized investment centres because they are effective in the judge this type of conflict.

7. RECOMMENDATIONS

We recommend that the government of Jordan should:

(a) Work on the unification of national legislation governing the reception and protection of foreign investment.

(b) Develop new procedures related to the settlement of investment disputes by arbitration to be clear and far from the complexity.

47 Burberry, Mahmoud Mokhtar, p. 20.
(c) Issue precise legislations to balance the rights and guarantees of foreign investors on the one hand and the requirements of economic development plans on the other.

(d) In view of the importance of the principle of the independence of the arbitration agreement in foreign investment contracts, the texts of the laws should be more detailed, as the French legislator did, as it has become a principle of established arbitration.

(e) Highlight the role of arbitration through seminars in universities and public and private institutions and the dissemination of legal awareness and practical regarding the issue of arbitration of foreign investment and highlight the independence of arbitration and different from other similar means with him in the settlement of investment disputes such as judiciary and experience and reconciliation and conciliation.

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