CHAPTER - III

ARBITRATION AGREEMENT

3.1. Arbitration Agreement

3.1.1. The Meaning of Arbitration Agreement

Article (7) of (UNCITRAL) model law on international commercial arbitration 1985 (with amendments adopted in 2006) stated the following:

1-Arbitration Agreement

"It is an agreement between the parties to refer to arbitration all or some disputes that arose or may arise between them on a specific legal relationship whether contractual or non contractual. The arbitration agreement may be in the form of an item in the contract or in the form of a separate from agreement."

There are many definitions of jurisprudence for arbitration, there are those who define it as that the method was chosen by the parties to resolve disputes arising from the contract, which is decided before one or more people, is called the name of the arbitrator or arbitrators without recourse to the judiciary.\(^1\) And arbitration agreement also can be defined as" The agreement under which the parties undertake to settle disputes arising between them or are likely to arise in the course of the arbitral process, rather than offering it to the jurisdiction of the State, by bringing the dispute to relevant persons named arbitrators to settle it without calling upon the competent court originally to achieve it.\(^2\) In general, there are many definitions of arbitration, all of them do not consider merely as an agreement between parties to solve existing dispute or may be done by a person or some people shall be chosen for this purpose.\(^3\) The arbitration agreement in this perspective comes after the occurrence of the dispute and not before it and the essence of which is the


\(^3\) Al-Qasrawi, Mohamed MagdySubhi, Arbitration in International Banking Transactions, Thesis for the Graduate Diploma in Advanced Studies, Hassan I. University, Faculty of Legal, Economic and Social Sciences, 2009-2010, p. 3.
presentation of a particular dispute that arose between both parties to the arbitrator or the arbitrators.

It is clear from these definitions or other that the arbitration agreement includes two types of agreement forms on arbitration, which they are: the arbitration contract and the arbitration condition. The first is that the parties agree to present the current dispute between them to be settled before the arbitrators; the second is that parties commit to assign task of settlement possible disputes are mayarisen between them in the future before arbitrators.

Thus, the arbitration contract concerns a certain dispute that has already occurred, while the arbitration provision relates to possible future differences rather than to existing disagreements.4

For parties under agreement possibly present previously conflict was arisen between them before arbitration. 5 The arbitration agreement is the agreement of the contracted parties to waive about not to call upon common courts or refer to arbitrator or more than one arbitrator to settle expected dispute or current difference between them. Concord of both parties' will is the basis of arbitration and the source of the arbitrators' authority, alike whether the matter is related to proceedings or the obligatory applicable law.6

The arbitration agreement7 is settlement of all or a part of disputes that have arisen or may arise between them, on the occasion of a particular legal relationship, if it

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4 Mohamed Boucheibeh "Formulation of arbitration clause in investment contracts Traditional rules and modern rules" Intervention at the 4th Regional Seminar of the Supreme Council of the Supreme Court of the Court of Appeal Casablanca 18 and 19 April 2007 Published by the Supreme Councils on the occasion of the fiftieth anniversary under the title "Investment and arbitration issues through the jurisprudence of the Council Top .Edition 204 p70.

5 Arbitration: The parties to the dispute freely agree to resort to an arbitral tribunal to decide whether or not the party conducting such proceedings is a permanent arbitrator or arbitrator. Article (1) First of the Draft Draft Arbitration Law of Iraq.The draft Iraqi arbitration law is published on the website of the draft Iraqi Arbitration Law on the following link.(visited on 15/7/2016). http://icacn.org/index.php/rules/3095.html.


7 The arbitration agreement, as defined in Article (7) of the UNCITRAL Arbitration Law, is: An agreement between the parties to refer to arbitration all or some of the limited disputes that have arisen or may arise between a limited legal relationship, contractual or non-contractual.

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was contractual or non-contractual. The arbitration agreement may be found at the core of the original contract, alike before happening dispute or after it. The arbitration agreement plays an essential role in the arbitration process, without which the International Commercial dispute cannot be settled out of Public Judiciary and subject it to arbitration.

The conflict originates on the one hand, and the actual conflict may be done between both parties, and the conflict is still ongoing, and it is not sufficient for the dispute to be arisen merely as an objection or disagreement. Rather, it requires a different appearance in specific claims, that the arbitrator should solve them.

The agreement basis of the arbitration derives its existence or strength from the "principle of the power of the will" where it considers that the agreement on arbitration is a contract shall be made by agree of the parties of the dispute, and it is regarded as a form of their will power. Based on the abovementioned, it is obviously that the arbitration agreement is based on the will of the parties.

3.1.2. The Nature of Agreement about Arbitration

As the agreement on an arbitration is a contract made by agreement between the parties and is regarded as statement of their will power as an agreed concept, the specialists of agreement nature of judgment of arbitration considers that the arbitrative rule has concord nature not judiciary, so arbitration generally created by will of parties or by their choice. They can appoint arbitrators, specify their powersonspcialities to issue rules. Contractors may choose another law other than the law governing this relationship. If there is no agreement on the law applicable to the arbitration agreement, the arbitrator shall resort to the enforcement of the legal

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controls provided for in the attribution rules such as the law of the State in which the contract was made or the law of the place of enforcement.  

3.1.3. Organize Arbitration Agreement

The arbitration agreement in the old times was represented by the independent arbitration provisions, in which the parties of the contract to undertake to resolve existing dispute between parties by arbitration. But in the 19th century, with the development of commercial transactions, and in the context of the dispute and the jurisprudential dispute between the supporters of the arbitration provision and the opposition. The arbitration agreement took a new trend where arbitration could be expected before any dispute may be arose. However, this idea has not been popularized within the domestic laws of various states which did not recognize only in the arbitration agreement.

The arbitration agreement, regardless of its form (condition or partnership) is considered to be a contract between the parties, should be subjected to the general rules of contracts. Where it has to be available objective general provisions of the contract of satisfaction, position or reason and other conditions of arbitration such as eligibility.

3.1.4. Content of Arbitration Agreement

The most important thing for the parties of arbitration is to agree on the possibility of resorting to the judiciary to review the arbitral award and the agreement that includes the selection of the arbitral tribunal or how to elect them. This is what we deal in turn:

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13 Abdul Majid Munir, op cit, p144.
17 The substantive conditions set forth from Article 59 of the Iraqi Civil Code No40 in 1951
19 The age of majority is 18 years as per the Iraqi Civil Code No. (40) for the year 1951 and its amendments. The Iraqi facts - Issue number: 3015 |p 243. Date: 9/8/1951 Collection of Laws and Regulations Date: 1951.
3.1.4.1. Agreement on Possibility to Resort to Judicial Offices to Review judgment of Arbitration committee

The choice of the parties to arbitrate to settle disputes arising between them, presupposes to the empowerment of concerned arbitral committee to accord or adjudicate the authority to settle the dispute alone. And the parties have acceptance of its judgment. But does decision Arbitration affect negatively on the concept of the arbitration agreement. Both parties have the right to resort to the judiciary in the case of rejection of the arbitral tribunal's ruling. The matter here is not related to arbitration agreement in the right sense, but is reconcile mediation. 20

3.1.4.2. Agreement includes Choice Arbitration Committee

When the parties are willing to resort to arbitration to settle disputes arising out of a particular relationship. They do not merely express the removal of the dispute from the jurisdiction of the judiciary. But must disclose their intention to subject it to the authority of a special judiciary to be judged at it. The arbitral agreement shall be referred to the arbitral committee. Which shall have the task of adjudicating the dispute, whether by assigning the arbitrator or arbitrators by names or how to appoint them. 21

3.1.5. Necessity of Arbitration Agreement

The jurisdiction committee specialization to deal with the dispute, although it is based primarily on the rule of law, which allowed an exception to deprive specialization of the jurisdiction office, but it is based directly in each case in single on the agreement of the parties, consequently thus necessitates the existence of an arbitration agreement. New York's convention in 1958 stressed on necessity of achieving agreement arbitration in accordance with the fundamental principles of contractual obligations. As well as the consent of the parties' will to resort to arbitration on a particular legal relationship. Without the need to express explicitly the will to exclude state courts or to authorize arbitrators with judicial powers. And

also without indicating the manner in which such arbitration shall be taken place. So both parties have no necessity to enunciate their will on the nature of the arbitral committee to be considered by the dispute, or the procedures followed by the arbitral committee in the review or determination of the dispute.22

3.1.6. Waiver from Arbitration Agreement

The arbitration agreement become cancelled or does not affect the parties if parties are disconnected from the agreement. This renunciation may be express or implied. The frank waiver shall be done that parties shall enter into a new agreement expressly stating that they shall withdraw from the arbitration agreement. The agreement must be in writing. The agreement on arbitration shall be in writing and it shall not be proven contrary to what is stated in writing except in writing. Such an agreement may be concluded, prior to the occurrence of any dispute between the parties which is subject to this condition. In all cases, the withdrawal from the parties to the arbitration agreement shall not be sufficient for single party without the other. The parties must express frankly and clearly about will of disqualify from arbitration. The implied agreement to cede from the conduct of both parties to be interested from the fact that they have waived the arbitration agreement. It is usually the implicit agreement that one of the parties may go to resort to the jurisdiction of the state. And behavior of the other party in a way to express its satisfaction in this way and also its waiving through arbitration.

The arbitration agreement shall result in the disqualification of the adversary of not resorting to the judiciary, it means to recourse to the competent court actually in preview of the dispute. At any time the adversaries have disobeyed the right of recourse to the judiciary the casenonone of the conditions of its acceptance that to make the court refuses to accept it.23

3.1.7. Positive Effect of Arbitration Agreement

The parties must respect their undertakings so that the agreed disputes are referred to the arbitration judicial court. This means that the arbitration agreement is interesting with commited power. This means that any arbitration agreement must be executed specifically for referral the subject of the dispute to the arbitral committeeto resolve and settle dispute subject of arbitration agreement. Pursuant to the rule that the contract is a law of contracted parties. It is prevented to deny arbitration agreement just by satisfaction of both parties.24

**Responsibilities of Arbitration Committee to resolve the conflict** The principle of specialization in jurisdiction is one of the most important legal principles on which international commercial arbitration is based on. In contrast to the various other legal principles that the researcher or man of law can to know its intention through declare the term of principle. The principle of specialization is ambiguous. This principle stirred more of controversy. Although it is almost fully recognized in contemporary legal systems are related to arbitration.25

3.1.8. Negative Impact of Arbitration Agreement

If the arbitration agreement is held properlyIt has legal effectsthat are represented by excluding the state judiciary from considering the dispute. The commonjudicial offices repeal the right of review on dispute subject of arbitration agreement. It will put forward in fact a group of matters that discussion were raged between philology and judiciary.

**The exclusion of the judiciary system from the review of the dispute**

It is required when making arbitration agreement to be true under the applicable law in respect of a particular dispute. The parties may refrain from not resorting to the jurisdiction of the state and later one must refrain from considering the dispute and

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relinquish it, if it has already been put forward\textsuperscript{26} or in other words, to strip dispute from authority of governing of state judiciary system. And deprivation of parties of the contract for not resorting to judiciary in the respect of dispute that agreement has signed to be resolved by arbitration that means the arbitration agreement results in the parties having waived the ordinary courts and submitted the arbitration.\textsuperscript{27}

3.2. Form of Provisions of Arbitration Agreement

3.2.1. Form of Provisions of Arbitration Agreement in the Contract

Article 252 of the Iraqi Civil Procedure of Trials Act 83 in 1969 states that "the agreement to arbitration shall not be proved only by writing it. It may be agreed upon it during the pleading. If the court finds that there is an agreement on arbitration, or if the court recognized that parties agree to it during the pleadings. So it shall consider the claim delayed till issue decision of arbitration."\textsuperscript{28}

The writing shall be fulfilled in accordance with the law. If the arbitration agreement is agreed upon in letters or telegrams are exchanged between the parties of contract. And this extends to all means of written communication, provided that the satisfaction and acceptance shall be made of the arbitration specifically. As an example if one of parties sent a letter or telex includes submit of resort to arbitration in the respect of disputes are stirred in concern of this contract. So its acceptance shall be issued by other party. Such an acceptance shall be with the knowledge of the first party.\textsuperscript{29} Whereas silence shall be regarded as an acceptance, if there are ongoing proceedings between the parties. In this regard, article 81 F 2, of Iraqi Civil Act 10 in 1951, to be regarded that "Silence is considered as acceptance in particular, if there are previous deal between the contracted parties. And this positiveness has been contacted by such deal or if resulted in a benefit for intended people."\textsuperscript{30}

\textsuperscript{28} Iraqi Civil Procedure Law No. 83 of 1969.
\textsuperscript{30} Iraqi Civil Law No. 40 of 1951.
It may be added that in all cases to sign the arbitration agreement is a condition or provisioning, but the parties do not need to sign a special signature besides to the arbitration rule if any clause of the original contract clauses was received. It is enough to sign the contract, where this signature goes to all the contract's clauses. As the writing shall be fulfilled under law statement, an arbitration agreement can be made by letters or telegrams are exchanged between both parties. And this extends to all written means of communication. But it is necessary to investigate of agreement exchange and acceptance in the respect of arbitration. Accordingly, article 252 of the Iraqi Code of Procedure 83 of 1969 states that "the agreement on arbitration shall not be proved except by writing. It may be agreed upon it during the pleading. If the court finds that there is an arbitration agreement or if the parties agree to it during the pleadings. The case is regarded pending until issue arbitration's judgment."

As The Indian Arbitration Act of 1996 in Title II (7) of the Arbitration Agreement, paragraph 3. 4 provide that:

3) The arbitration agreement must be written

4) The arbitration agreement shall be in writing if it is stated in the following:
   (A) Document signed by both parties
   (B) Exchange of letters, telex, telegrams or other means

The required writing to be prepared specifically for the conduct. It is not necessarily obligatory to edit written conduct and signed by both parties. Any writing serves as a form even if not truly released for this purpose. As the matter to writing stated in a letter or cable or even in other written communications such as fax and telex. This form is intended to protect the will of the executive. And this objective necessarily requires that the writing is edited with the intention of concluding the action. In the sense that it is specially prepared for this purpose. It is intended to complete the the legal form that is necessary to express the will. If the writing has this provision and the conducter intends to be expressed about his will legally.

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32 Iraqi Civil Procedure Law No. 83 of 1969.
33 Indian Arbitration Act, 1996.
It is regarded as a form of behavior regardless of whether this writing came in or was brought by a letter. What is important is not the framework that contains this writing, affirmative behavior but the significance that the writing is intended at the conductor. And it is released as it is a form of expression of his will. There is no doubt that writing has this intrinsic characteristic when there is a proven behavior or an instrument was released especially for this purpose. Whereas the writing was included in a letter. So the availability of this attribute is doubtful. Since the letter is not normally assigned to such an order. The sender is not careful when writing the letter like he be careful when writing the action. Therefore, the assessment of whether or not the writing contained in a letter is a form or not. This should left its discretion at the subject judge. Thus, it is clear that the Indian legislator, although requiring the writing of the arbitration contract. He has made this writing flexible enough to accommodate all forms of writing are done in it. 

3.2.2. The Nature of the Provision of Writing

If the agreement for arbitration if it was a condition or contract. It is considered an act of conducts that are held with two wills. It is necessary for the existence of this agreement. As already indicated, the availability of its points like satisfaction, eligibility, place and reason (Which we will discuss it in the next research). In addition to these conditions. There is a formal requirement for writing, which is established by most legislation governing of arbitration.

However, the question that arises here concerns the nature of the writing provision within the arbitration agreement. Is writing regarded as a cornerstone of the arbitration agreement or a condition for its validity or merely a means of proving that the legal systems differed among themselves regarding the requirement of writing in the arbitration agreement? There are legal systems, who considered the writing required in the arbitration agreement merely a means of proof. In the opinion of a part of the jurisprudence, to make the writing of arbitration agreement to prove, this writing and the case is to prove and not to convene. And who may


35 See Iraqi Evidence Law No. 107 of 1979 Chapter One (Written Evidence).
have been confirmed by writing or by his or her right of acknowledgment and right. This aspect of jurisprudence goes on to say that it is meaningless to recognize writing as a means of proof, and then to return afterwards, and we only allow this proof to be written. The decisive acknowledgment and right are to be proved by means of proof which can be proved either by writing.\(^{36}\) In the view of other jurisprudence, since the rules of objective proof are not related to public order, the parties' will to be respected in the arbitral procedure should be respected, so that if the parties agree that possibility of proof may be established, Public Order.\(^{37}\)

3.2.3. Writing the Arbitration Provision

The arbitration agreement must be in writing or might would have been null and void. The Iraqi Arbitration project in Part Two stipulated the arbitration agreement in Article 12. And this is different from what is stated in the Civil Litigation Act 83 of 1969. It is decided that the case shall be deemed to be pending until the arbitration rule is issued). Which it considered to be a means of proof only, in view of the nature of the special arbitration, which results from the existence of the arbitration provision as a result of the existence of the arbitration condition. given the accuracy of the details contained in the arbitration agreement or the arbitration partner and its importance in the conduct of the arbitration task. And set the applicable law and the date of arbitration and how to choose the arbitral committee and the headoffice of arbitration and other details that may not be possible or difficult to prove otherwise by non-writing. Therefore, we find that the draft Iraqi arbitration law has been reality in the writing requirement for the validity of the arbitration agreement. The arbitration agreement shall be in writing if it is contained in an editor signed by the parties or if it contains what the parties are exchanged letters and telegrams or other written means of communication.

In addition, writing is not a mean of proving arbitration, as some may consider, but it is a mean of hold the arbitration firstly. In accordance with the provision of article 12 of project draft of Iraqi Arbitration Act. Which stipulates that the arbitration


agreement must be in writing and if it is null. The writing may be required by the
legislator here to convene but not just to proveTherefore, it is necessary to respect
position of draft Iraqi arbitration when the new arbitration law was issued and
provided that the arbitration provision should be written clearly. Also when the
meaning of the writing to include all the following cases: within an editor signed by
both parties of the arbitration or including letters are exchanged between both parties
or telegrams or others of written communications. 38

3.2.4. Stance of National Regulations about Writing Arbitration Agreement:

Most national laws required that the arbitration agreement be in writing, differed
among themselves about the form of writing required, whether formal or customary.
And whether writing was a condition for the validity of the arbitration agreement or
merely a writing for proof. Arbitration, since the agreement constituted the legal
basis for arbitration, as in Costa Rica, Peru, Venezuela, Mexico and Portugal, while
the majority of other national laws did not require that the writing be formal and
confine itself to customary writing As in Britain, America, Russia and the rest. And
in some Latin American countries such as Argentina, Chile, Brazil and Bolivia for
commercial arbitration. There are some laws that did not require writing in the
arbitration agreement as in Germany and also in Colombia according to the Civil
Pleading Act 83 of 1969. On the other hand, most of the laws that stipulated
writing of the arbitration agreement provided for writing as a condition of proof and
not as a condition for the validity of the arbitration agreement as in the United States
of America. 39

3.2.5. Stance of International Conventions and Bases of

International Arbitration about Writing Arbitration Agreement

Article 7 of paragraph 2 of the Article 7 of (UNCITRAL) model law on international
commercial arbitration 1985 (with amendments adopted in 2006) stipulates that

38 Haddad, Mohamed "Arbitration Agreement - in light of the opinions of jurisprudence and the
39 Saeed, D. Khwaildi "The terms of the petroleum arbitration agreement and its effects on
sovereign immunity" (n.d).(n.n).(visited on 12/8/2016) https://revues.univ-
ouargla.dz/index.php/numero-.
The arbitration agreement shall be in writing. And the agreement shall be deemed to be written in a signed document by parties or in an exchange of letters, telegrams, telegrams or other means of electronic and wireless communication. Or in the exchange of a claim and defense in which one of the parties alleges the existence of an agreement and is not denied by the other party and the reference in a contract to a document containing the arbitration provision shall be deemed to be an arbitration agreement provided that the contract is in writing and that the reference has been made so as to make that clause part of the contract.

The first paragraph of article 2 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards states in 1958 "Each Contracting State shall recognize the written agreement under which the parties undertake to submit to arbitration all or some disputes that have arisen or may arise between them ... ". And in the second paragraph of the same article explained the meaning of the agreement written in its text: "The written agreement means the arbitration provision included in the contract or the arbitration agreement signed by parties or the agreement contained in the letters or correspondence exchanged between them". And has gone from the opinion of the jurisprudence to say that Writing is an essential pillar should be available in the arbitration agreement in the concept of the New York Convention, while another opinion thinks to say that the writing.  

3.2.6. The Effect Resulted from Writing Arbitration Provision

The jurisprudence and the judiciary system have many opinions about what are related to arbitration agreement into two directions as following:

First trend

It thinks that the arbitration provision should be written. And this trend should be taken in the form of contracts, that is, it is a formal condition for the existence of the agreement on the arbitration itself. Which is not for the sake of proof but rather a condition for the validity of the contract and proof such as the Jordanian law. Some

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40 Ibid.
states went beyond the formal requirement, where provided that signed by all parties to the agreement and signature should be by the full name and this trend represents countries with Latin traditions.41

The second trend

Is that it is not necessary to write the arbitration provision and to take the principle of consensual contracts. Since the writing of a condition for proof only, the contract is held as soon as the positive relationship is accepted without the need to write because the contract of arbitration is not a formal contract.42

The researcher goes on to support the first trend of not recognizing the existence of an unwritten arbitration agreement. These legislation differed in the form of the necessary writing whether formal or customary. Some States require that writing be formal as in Mexico, Portugal and Venezuela.43 There are also some countries that do not require official writing, and are limited to customary writing, as in Britain and the United States of America.44

Some laws have tended to be exempt from writing, as in Germany. Where arbitration is allowed orally for commercial transactions.

I say that if the evidence does not show that the written affirmation has not been accepted in writing. It is not considered that there is an agreement on arbitration, and the judiciary has decided that in many positions and considered that this arbitration does not exist. Where it requires that the declaration of the will of both parties in writing and thus support my book, on the one hand is not sufficient, while some courts have expanded the concept of exchange and have taken the view that the

41 Countries with Latin traditions such as Britain, America, Canada, Australia and New Zealand. There are countries under British occupation such as South Africa, India, Malaysia, Singapore and Hong Kong.
44 That the jurisprudence has been distributed between a supporter and a delegate in regard to the consideration of customary writing form of legal action, there are those who said that this writing is a form of formal image, and there are those who deny that, but the controversy that raged in it has spread to include the nature and whether it That such writing should be prepared in advance for legal action or that any writing would be a form of conduct Taghrid Abdel Qader, the principle of separation of powers, (no date). The electronic reference for informatics.(visited on 13/8/2016)http://almerja.net/reading.php.
absence of any objection to the arbitration provision after receiving the terms of the proposed contract is tantamount to acceptance of it in accordance with the circumstances surrounding it. Where there is an arbitration provision, the rule here is the need for a text that indicates a clear and explicit reference to the parties’ adoption of the arbitration provision considering that this requirement is part of the contract.

3.2.7. The effect of not writing the arbitration clause

Since the arbitration agreement, whether in terms of condition or partnership is the constitution of arbitration and the source of powers of the arbitrators, and because of this condition of great importance. It requires taking into account some formal and objective conditions, including the writing of the arbitration provision. The (UNCITRAL) model law on international commercial arbitration 1985 (with amendments adopted in 2006) has identified cases of invalidity of the arbitration agreement and mentioned them exclusively- not to increase or expand their interpretation- and provided for the invalidity of arbitration "if there is no arbitration agreement”.

Fulfillment of non- available of an arbitration agreement in the absence of any form of agreement that may achieves mutual consent between the dispute parties. And conciliation as defined in the definition of the contract in the civil code to link postiveness issued from one of contracted parties with accept other and concord to make legal impact. This contract shall be held merely linking consent links to acceptance and taking into consideration rules of Act to be assembled.

45 SamiaRashed, op. Cit., P. 300, p. 303.
46 Abdelkader, Arbitration Agreement. (N.edt). (s.l),(s.n),(n.d) p. 222.
47 See Iraqi Civil Code No. 40 of 1951 Chapter I– Contract Article 73 The contract is the relationship of the affirmation issued by one of the two parties to accept the other in a manner that proves its effect in the contract.
3.3. Substantive Terms of Arbitration Agreement

3.3.1. Introduction

In this section the researcher discussed the formal conditions of the validity of the arbitration and he will deal with the substantive conditions with the knowledge that the arbitration is held as the rest of the other contracts and is based on the pillars of other contracts and substantive terms of arbitration agreement such as satisfaction, eligibility, object of Arbitration, that will be discussed in what follows.

3.3.2. Satisfaction

The arbitration agreement is a consensual contract sufficient for the parties to agree to resort to arbitration in order to settle the dispute between them. The Muslim jurists considered satisfaction as the most important pillars of the contract which is not valid without satisfaction.\textsuperscript{48} Consensual consent and acceptance of the parties to the dispute shall be agreed upon by the parties to the dispute.\textsuperscript{49} In other words, the affirmation is the offer issued by one of the two groups to establish the mandatory relationship. Acceptance is the approval of this offer issued by the other team. Acceptance and affirmation are two pillars, each of which is a condition of satisfaction and part of which is not satisfactory without them. The contract, and therefore the existence of the positive alone is not enough to establish the obligation. He must always have the option to withdraw from the positive before it is related to acceptance as well as who has a positive answer to accept or reject the offer. Based on the above, the arbitration shall be held as soon as the parties to the dispute have been given a positive and positive response to each other. And one of them is related to the other in a clear manner of ignorance. Therefore, the validity of the affirmation and acceptance is required to express the will and the corresponding person properly. The will is explicit if the expression taken by this expression is intended to reveal this will in a clear, clear and familiar way among the people. The explicit


\textsuperscript{49} Iraqi Civil Code No. 41 of 1951 in Article 73 The contract is the relationship of the affirmation issued by one of the litigants with the acceptance of the other in a manner that proves its effect in the contract.
expression may be through speech, and it is expressed in positive and acceptable, as may be done by writing.

The expression of will may also be implicit if the expression taken by that expression is not intended to reveal that will, but can not be interpreted without assuming its existence. Arbitration is one of the important issues that contractors should be aware of and the significance of which is their temporary waiver in general of their right to resort to ordinary courts that do not intervene in the dispute before arbitration except in cases specified by the regulator. The frank expression of will is required in this regard to alert the contractors of the importance, what they are going to do, and therefore do not make their decision only after a deep thought and thinking emanating from the will and clear and presumed when such a will to be free of defects that may and affect them and consequently affect the integrity of satisfaction and make it incorrect. And lead consequently to void the contract or relatively if there clings to its satisfaction with one of these defects such as mistake or fraud or coercion.50

Where the Iraqi Civil Code 40 for the year 1951 presented a field for mutual consent where its statement of the first section of the terms of the consensual contract (First - the existence of concurrence (contract formula)). 51

Arbitration is held as all contracts, based on satisfaction, and therefore it is inconceivable to talk about the contract of arbitration when satisfaction disappears and is replaced by coercion or coercion, arbitration is only optional, the so-called "compulsory arbitration" is not a legal sense of this system. Which is a substitute for Recourse to the judiciary. This is what was expressed by the Supreme Constitutional Court in Egypt, stating: In no case may the arbitration be compulsory to which one of the parties complies with the rule of peremptory law, which may not be agreed upon otherwise. Whether the subject of arbitration is an existing or potential dispute. Since the arbitration is the source of the agreement. The parties determine, in accordance with its provisions, the scope of the disputed rights between them or the contentious issues that may be brought before them. The arbitrator shall have the

50 Dr. Abdul-Razzaq al-Sanhuri .the mediator in explaining the civil law.(N.edt).(s.I).(s.n) .p 287.
51 Iraqi Civil Law No. (40) for the year 1951.
right to decide on an arbitral committee in order to settle a dispute in which a relationship of interest has been established by its parties and a special agreement shall be adopted by the arbitrators from which the arbitrators shall exercise their powers. In this way, arbitration is considered an alternative to the judiciary. It does not meet, since the agreement requires that all courts be excluded from the consideration of the issues on which they have been excluded from the subject of their jurisdiction. All of the above suggests that if the legislator forcibly imposes an arbitral judgment on a legal basis, he or she shall order. This is a violation of the right of litigation guaranteed by the Constitution.52

Arbitration is an independent legal act in the form of a written agreement in which the parties determine the subject matter of the dispute. The names of the arbitrators, the place and proceedings of the arbitration, and may also specify the law to be applied by the arbitrators. In the sense that the arbitration agreement is not provided for in the contract or agreement concluded at the beginning, but the parties agreed to resort to it after the outbreak of the dispute. The importance of this distinction is indicated in determining the type of disputes that can be implemented and the arbitration provision as a mean to settle international disputes.

Both parties agree pursuant to arbitration to offer conflict that was arisen between them before an arbitrator to settle them. This agreement has many of form provisions, objective provisions till results in its legal effects as it is regarded basic document in the respect of procedures of arbitration in concern to certain dispute. Whereas it is related to form provisions, so no doubt available provision of eligibility (That we study it in the future). And satisfaction, subject, whereas as related to objective provisions, so it is necessary to determine subject of dispute.

And names of arbitrators procedures are should be followed and bases that shall be applied by the arbitrator.53

52 Al.Khouly, Aktham Amin: Drafting the Arbitration Agreement. Conference of Arab Arbitration Centers.(Beirut Arab University) to Lebanon. 18 May 1999.p 17.
3.3.3. Eligibility

It means here necessary eligibility to settle dispute by arbitration. And no person has ability to make any agreement against it, just if it has powers of conduct in rights are related to dispute that it was settled by arbitration. To know the legal bases that governs eligibility matters shall be referred to personal status Act for parties of agreement. And personal law is determined by linking between person and state that this person subjects to its laws.\textsuperscript{54}

Article 18 of the Iraqi Civil Code 40 of 1951 stipulates as following:

1) Eligibility shall be governed by the law of the State to which the person belongs to it with his nationality.

2) Nevertheless, in the case of financial transactions in Iraq and the consequences thereof, if one of the parties was a foreigner is not eligible. The reason for his incapacity is due to a reason of concealment which is not easy for the other party to identify. The foreigner considers such conduct to be fully qualified.\textsuperscript{55}

This law is valid at the time of the right or the act of disposition if eligibility is one of the conditions of the conduct of acts, either if the status in a person subjects to the law of the act of disposition takes the eligibility in the final status of the rule of duty.

It is worth mentioning that the performance is affected by the age where the person reaches the age of majority and the realization of the mind. Whether the person is unsound, he is immoral and if he is an adult and unsound or a quarantine is deficient eligibility, but if he is not mature, Distinctive or incomplete nationality if he is a minor or special minor who defines these conditions is the Nationality Law under the legislation that adopted the Latin trend. The laws differ on the age of puberty, while the age of majority is Eighteenyears in Iraq.\textsuperscript{56}


\textsuperscript{55} Iraqi Civil Law No. (40) For the year 1951.

\textsuperscript{56} Iraqi Civil Law No. (40) for the year 1951 Article 106: The age of puberty is complete eighteen years.
Since the arbitration agreement is a legal act. The will of both parties tends to make legal effect. Which is shown in the removal of jurisdiction over the judiciary in the consideration of the parties' disputes and its rule to the arbitral committee. It was necessary that all the required means of performance to be sufficient to produce a sufficient will to conclude the agreement. The right to dispose of rights, any person who has the right to dispose of his rights in the first place, with the permission of the court, or by virtue of law, and is entitled to conclude the arbitration agreement. A distinction may be made between two cases of eligibility as following:

1) Eligibility of arbitration fora natural person.

2) Eligibility of arbitration for morale person.

3.3.3.1. Eligibility of Arbitration for Natural Person

Therefore, arbitration may only be agreed upon the natural person who has the right to dispose of his rights. Any person who is proved to be entitled to performance. This eligibility is established by the age of the individual and has not suffered any of the symptoms of eligibility such as forgiveness, dementia or others. However, if an arbitral rule is made under an arbitration agreement entered into by the minor, he or his legal representative may request his annulment. However, the litigants may not uphold this nullity because this nullification is for the benefit of the minor and is relatively invalid. 

3.3.3.2. Eligibility of arbitration for Moral Person

What applies to a natural person applies to a moral person who has the capacity to dispose of any ability to dispose of the rights acquired, and therefore the legal person must meet the conditions required by the law to acquire the personal as a restriction in the trade. And for foreign companies, apply subject of the law of

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their county. Some of the Arbitration Law provided for arbitration between parties of public law or private law.\textsuperscript{59}

3.3.4. Object of an obligation of arbitration agreement

An object of an obligation can be defined in the contract as the thing that the debtor is obliged to do, and this obligation may be a transfer of an in-kind right or an act or abstention from work.\textsuperscript{60}

The philologists have defined the contract as being that the contract was not related to it, and the object of an obligation in this concept is no more than a certain money, such as a house or goods, or to be a benefit, such as living in the house and riding the animal or a benefit that is not money, such as the benefit resulting from the marriage contract or work such as the work of the engineer, teacher. And in any case the spot must legally be contracted.\textsuperscript{61} Accordingly, the place in the arbitration contract is the settlement of the dispute between the litigants by a specific person or persons chosen by the contractors without resorting to the competent court to settle the dispute. The temporary charge for the right to resort to ordinary courts to resolve the dispute between them, and to present this dispute to a person or two persons or specific persons and in this form a benefit not the money resulting from the contract of arbitration concluded between the parties to the dispute.

The place in the arbitration contract is always legitimate for arbitration in Islamic law.\textsuperscript{62} But this legitimacy is limited to the subject of the dispute between the parties. If the subject matter of the dispute is not arbitration, as we have seen, it is not possible to force one of the litigants on the implementation of the arbitral rule, even if the litigants executed the arbitration contract. This implementation is considered null and void. Any interested party may uphold the invalidity of the judgment rendered by the arbitrators in this case.

\textsuperscript{59} Ibid.
\textsuperscript{60} Dr. Abdul-Razzaq al-Sanhuri. Op. cit. p 287.
\textsuperscript{61} Ibid. p 375.
The legality of the arbitration is related to the nature of the dispute and whether this dispute. The scope of the issues in which arbitration may taken place or not.63

Place as a condition of an arbitration agreement, the satisfaction of the parties to the arbitration agreement is through the presentation of a dispute that already exists or is likely to be done, a disputed right or a questionable fate.64 As an example is the types of administrative contracts, among which are to be an existing dispute, to be in conflict with the law, and the place of the public deal must already exist, such as the conflict of work, or the dispute over the provision of services, for example. In the future, the legislator permitted the use of arbitration for public moral persons, Confined to two areas: disputes arising from the application of an international convention, or disputes arising from the application of public transactions.65

The subject matter of the disputes in the arbitration agreement. Which is to be resolved by arbitration, or sometimes not detailed in the arbitration agreement as if only indicated that the disputes between the parties with respect to the quality of the goods are resolved by arbitration. This agreement is either the arbitration provision agreed before the outbreak the dispute may be entered into in the contract or in another document containing the arbitration provision referred to in66 the contract or in an independent agreement. The agreement may be an arbitration agreement entered into after the dispute has been established and agreement to refer the dispute to arbitration for adjudication. General or public morals must the arbitration agreement shall be subject to arbitration.67

Article 130 of the Iraqi Civil Code 40 year1951states the following:

1) The place of obligation shall not be prohibited by law and shall not be contrary to public order or morality, otherwise the contract shall be null and void.

63 Ibid. p 19.
64 AsadFadelMandil.The provisions and procedures of the arbitration contract.1st. Iraq: Dar Al Furqan for sharing and distributing, 2012. p 90.
67 Ibid.
2) The public order shall, in particular, include provisions relating to personal status such as eligibility, inheritance, provisions relating to transfer and the necessary procedures for the disposition of the stay, the property, the disposition of the property, the money of the stay, state money, forced pricing laws and other laws issued to consumers in exceptional circumstances.\(^68\)

And this is the criterion that determines the question here is whether there was a disturbance of public order or not? The provisions of the New York Convention provided for the right of a State to prevent the implementation of an arbitral rule if its implementation prejudiced public order. Which was available in cases of incompatibility with the legislator.\(^69\)

### 3.3.5. The Reason

Article 132 of the Iraqi Civil Code (40) of 1951 stipulates:

1) The contract shall be null and void. The contractors shall not be bound for no reason or for any reason that is legally prohibited and contrary to public order or morals.

2) Each obligation is presumed to have a legitimate cause, even if that reason is not mentioned in the contract unless otherwise indicated by the evidence.

3) If a reason is mentioned in the contract, it is considered the real reason for the evidence to prove otherwise.\(^70\)

The reason is that as a condition of the arbitration agreement, the contract is: the parties tend to exclude the dispute from being brought before the courts, and the matter is thus delegated to the arbitrators, and this is considered to be a non-violation of public order and public morals.\(^71\)

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\(^{68}\) Iraqi Civil Law No. (40) for the year 1951.


\(^{70}\) Iraqi Civil Law No. (40) for the year 1951.

Is the intended direct purpose of the contract, which is in other words the answer of asking why the debtor committed? The reason is legitimate when it exists, traditional jurisprudence makes both the shop and the reason in addition to the consensual elements of the contract, as well as the elements of the contract can be taken from the classification of civil law.

As the reason is a corner of the contract: satisfaction, place, reason, but when he talks about the place we see talking about the place of commitment, and when he talked about why he talked about the reason for commitment. Therefore, some went to say that the contract has a place, a reason, a commitment and a reason, and another aspect of the jurisprudence to say that the place and the reason of the elements of commitment. Therefore, if we consider the legal act will always, the place and reason elements in this will, because the will is legally considered to be going to contract and is aware of the place and aware of the reason, so if the place and the cause of the will, and the will is myself. Every element in the will must be psychologically like it, so the place and the reason can not be anything out of the will, and thus difficult to separate them, there is no point in distinguishing between the content of will between the place and the reason. We can not say that the arbitration agreement is the subject of the dispute, or that the dispute between the parties is referred to arbitration. Rather, the place in the arbitration agreement is to envisage a solution to the dispute or to be settled by the parties through resort to arbitrate, and to determine the place and reason of the arbitration agreement as such excludes the existence of reason and its validity as a condition in the cause and examples of the lack of reason: a person who is forced to conclude an arbitration agreement, this agreement is invalid not for lack of reason but because of coercion.

A person who entered into an arbitration agreement in the belief that there is a particular dispute between him and another person and then it turns out that there is no such dispute. The basis of the invalidity is not the incorrectness of the cause, but the mistake that occurred.

Therefore, there is no requirement for the content of the will (the place and the reason) except the condition of legality.

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The illegality of the content of the will be null and void, and the illegality means violating the legal conduct of ordering regulations. It can be said that the arbitration agreement is an illegal agreement, when it contravenes ordering, because the will of individuals is contrary to the will of the legislator, and then the legislator's will must be given priority.

The parties' agreement on arbitration is based on the will of the parties to exclude the dispute from being submitted to the courts and to delegate the matter to the arbitrators. This is always legitimate and can not be considered illegitimate unless it is proved that the arbitration is intended to evade the provisions of the law. It is intended to benefit from the freedom of the parties and the arbitrator's freedom to determine the applicable law, and the illegal reason is not mixed with the impossible or non-permissible. The project the first is to find the answer to the question why did the parties resort to arbitration? The second is to determine the subject to be settled by arbitration and is it possible and legitimate or not.

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