CHAPTER - II

ORIGIN AND DEVELOPMENT OF COMMERCIAL ARBITRATION

2.1. Arbitration in Islam

2.1.1. Introduction

Islam has recognized the principle of arbitration in familial, religious or political issues in order to resolve conflicts by a third party. Arbitration is a peaceful mechanism to resolve disputes. It is in consistency with the spirit, principles and goals of Islam and strengthens the foundations of this religion among Muslims because Islamic jurisprudence has imposed its rules.

2.1.2. The reasons for legitimacy of arbitration in Islamic Sharia

2.1.2.1. In the Holy Quran

The Holy Qur'an discusses about arbitration and recommended it to his followers in political issues.\(^1\) For example, this word of God: “But nay, by thy Lord, they will not believe (in truth) until they make the judge of what is in dispute between them and find within themselves no dislike of that which thou decides, and submit with full submission”\(^2\) has stipulated the arbitration in religious matters.\(^3\) Similarly this word of God Almighty: “Whoso of you killed it of set purpose he shall pay its forfeit in the equivalent of that which he hath killed, of domestic animals, the judge to be two men among you known for justice, (the forfeit) to be brought as an offering to the Ka'bah.”\(^4\) The Holy Quran has stressed the legitimacy of arbitration in family and social issues.\(^5\) Similarly the words of God: “And if ye fear a breach between them twain (the man and wife), appoint an arbiter from his folk and an arbiter from her folk. If they desire amendment Allah will make them of one mind. Lo! Allah is ever

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\(^4\) Supra note (1).
\(^5\) The Quran, trans. by Pickthall, Surat Al Ma'idah 95, (visited at 2/2/2016)

Supra note 1.
Knower, Aware.”6 This verse not only explicitly refers to the legitimacy of arbitration, but also goes further and considers it desirable to reconcile the couple; even in the case where there is also a fear of separation and divorce. This verse is one of the main verses on the matter.7 We can also argue about this verse: "Allah commands you to give back trusts to their owners, and when you want to judge people, judge with justice”. This verse is the general foundation of arbitration in Islam and addresses all Muslims, not just the judge. It notices anyone who witnessed the fights and quarrel among people. There is also another verse of the Holy Quran that emphasizes on the principle of arbitration.” So no, swear to your God, they have not faith, unless make you the arbiter in their dispute. And then they would have no boredom in their hearts by your decision and will surrender unquestioningly.8” We can accept the legitimacy of arbitration from these verses. So, in the first verse about reconciliation between the couple, two arbiters must be chosen from both parties to comment about their differences. Almighty Allah says: "And if you fear of discord between men and women, determine an arbiter from men's family and one of woman's family, if they intend to agree, God will reconcile them. Indeed, Allah is Aware”. Both parties must be agreed and choose an arbiter from their position, so that the two arbiters consult and then judge the couple's issue. The order issued is for both arbiters. If both of them agree on a comment, it seems to be effective. What seems a bit far-fetched is that this verse is only about the judges. If so, all the conditions of judge should be noted including: faith, justice and jurisprudence. As is obvious, if the conditions are met, the issue of arbitration in family matters will be abolished.9

2.1.2.2. In the tradition Sunna for Prophet

It should be said about prophetic tradition that Prophet Muhammad said: "anyone who arbitrate among two people and attempts to satisfy them while not considering

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6 The Quran, trans. by Pickthall, Surat An-nisa 35. (Visited at 2/2/2016).

7 www.library.islamweb.net. (2/2/2016).


justice will be damned by God.”

Prophet Muhammad was satisfied with the arbitration of Saad bin Maaz in the case of the Jewish of Banu Qurayza, when people consented to arbitrate. In this way, the issue was settled. When the Quraish army retreated and the Jewish of Kheybar left Medina and released their allies in Medina, Banu Qurayza was those who violated their treaty with the Muslims in Ahzab war. The Prophet surrounded them for twenty five night and then broke their resistance and God put fear into their hearts. So, Banu Qurayza surrendered to the decision of Saad bin Maaz and the prophet also accepted this and he decision.

The Jews were satisfied with the decision. Saad also ordered to kill the men and capture the women and children and divide their property. Some researchers believe that Saad bin Maaz ruled over according to Jewish law (Deuteronomy). According to this law, when a non-Jewish city is occupied, the order is killing men and capturing women and children. The tribal conflicts of Quraysh to rebuild Ka'bah also can be noted in this context when they disputed for installing Hajar al-Aswad in its place; each tribe wanted to put the stone in place by itself and not another. As far as they were ready to fight until the Prophet consented to arbitration. At this time of the Prophet was 35 years old. Prophet Mohammad consented to arbitration. Ibn Shorayh says: "I said, O Prophet of Allah, the people refer to me at the disputes and I arbitrate between them. Both parties are satisfied." The Prophet said: "what a good thing." The Prophet himself had advised one of the tribes that to resolve their conflicts by arbitration. Perhaps, it is why Imam Ali and Muawiyah consented to arbitrate according to a series of conditions. It actually led to the

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biggest problem of arbitration that was followed by the Siffin war between Imam Ali and Muawiyah bin Abi Sufyan. The war took place in the year 37 AH / 657 AD. Both sides agreed to accept the verdict of Allah and the Quran and declared their arbiters' name and then retreated for a full year. So that the troops and civilians were in safety and both arbiters could make their decisions. The arbiters met each other in an area called Davamh Aljandal. Abu Musa al-Ash'ari declared that he has dismissed Imam Ali from Caliphate, at this time Amribn Aas refused and said: "you heard what he said. He dismissed his friend and I also dismiss his friend and appoint my friend (Mu'awiya) to the caliphate."

2.1.2.3. Consensus

It should be said about consensus that it has been proven in many ways at the time of Prophet, but some people disputed in one case and resorted to arbitration. For example, there was a dispute between Omar and Abi bin Ka'b about a palm where Zaydibn Thabit arbitrated between them. In other examples, Omar disputed with a man and elected Shorayh as the arbiter; Othman and Talha also disputed and then Jubair Bin Note'm was chosen as their arbiter. It was considered that these arbiters were not judge at that time. It has been proven that immigrants (Mohajerin) and Ansar had conflict on the necessity of ablution from the foreskin without having to pour water. They elected Imam Ali as the arbiter, and the Prophet decreed the necessity of ablution. These legal evidence implies the legitimacy of arbitration and stands on the principle that the legitimacy of arbitration is agreed by the majority of the four religions' jurists and no one stand against them. In all the above, there is almost consensus that arbitration is a legitimate issue and there is not only one sentence about its permissibility in the books of the four religions. Every

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scientist who protests on the legitimacy of arbitration, his claim is definitely not true. But there are some conditions for its permissibility, such as the arbiter's competency and absence of the judge in place, to prevent the judge or arbiter from confusion in the arbitration.24

2.1.2.4. Reasons

Those who are attached to the legitimacy of arbitration argue a series of rational arguments such as:

First-

Arbitration causes the people's conflicts to be resolved in minimum time by the arbiters. Arbitration creates a desire to eliminate hostility. With arbitration, there is no need for judicial arbitration and presence in the court. Arbitration would also facilitate the responsibility of judges; because arbiters just investigate the dispute, but the judge must investigate various matters.

Second-

If the two elected arbiters have dominance on the two parties, they can resolve the dispute easier. As a result, it is permitted to select those to whom people refer in the disputes; because arbitration is a kind of guardianship that all people can take it.

Third-

It is permissible for both parties to come to a jurist for resolving their dispute, so their arbitration to others is allowed.25

2.1.2.5. In the views of jurists

There is consensus on the permissibility of arbitration (with or without the presence of judge) among the majority of Hanafi, Maliki, Shafi'I, Zaidi and some Imamia

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jurists. It is quoted by Shabi, Ibn Sirin and Abdullah ibn Utbah, and the detailed form is as follows:

**The first view:**

Most jurists believe that arbitration is permissible. It can be inferred from the appearance of Hanafiyyah religion, so it is correct in their view. Shafi and Hanbali jurists also have the same opinion, while Malekis believe that it must be taken after the conflict.

And they cite to this verse:

The Almighty Allah says: "And if you fear of discord between men and women, determine an arbiter from men's family and one of woman's." Thus, the responsibility of arbiters begins in the dispute and separation. The same is true about the rest of disputes. This means that both sides should be satisfied with the presence of a third party to settle their dispute. Al-Qurtubi said: "This verse implies proving the arbitration and is against the Khawarij’s belief. They believed that arbitration is only for Allah. This statement was correct but they had wrong interpretation.

**The second view:**

Arbitration is not permitted at all. If the arbiter decrees, even if he is jurist, his decision is not applicable. This the idea of the Shafei and Imamia. Khawarij–according to what is famous about their beliefs – also believe in this idea. Their reason to accept this view is that the decision of arbiter is a Fatwa in the opposition of Imam’s view. So it will cause disorder for the governor and disvalue his statements and ideas. They believe that the decision cannot do anything, because ruling would eliminate the governor’s grandeur.

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28 Al-Qurtubi, Abi Abdullah Mohammed bin Ahmed bin AbiBakr , the investigation of Dr. Abdullah bin Abdul-Rahman Al-Turki. the entirety of the provisions of the Koran.(1st.ed). (s.l), Foundation letter.2006.vol. 6, p 297.
(Alaftyat: this term means to declare a decision by the arbiter about a case he is asked for and he also advises the order of God in this respect). 29

The third view:

Arbitration is permissible provided that there is no judge in the city. If there was a judge, then arbitration will not be permitted. Some Shafi’I jurists believe in this view and argue that the status of arbiter among people is like the place of Imam and his representative. In arbitration, making decision contrary to Imam’s view is not allowed. If a judge is not found, sometimes arbitration is permitted because of the necessity. 30 In general, Muslim jurists have no conflict about the legitimacy of arbitration. But their conflict is in the nature of arbitration and the time and place to execute it. In this regard, there are two opinions:

The first opinion, the proponents of this view argue that arbitration is a kind of peace and cited to Surah Al Nisaa this case - about the resolution of conflict between spouses. In this case, it is necessary for both arbiters to agree on a decision. The proponents of this view argue that if the decision of arbitration is binding, it may do the job of official judges and therefore governor's dominance. In Surah. It is believed that the arbitration decision cannot be enforced unless both sides accept that decision. As a result of the idea, arbitration is not legal, but also is closer to peace.

Second Opinion, the proponents of this idea - including Hanbali jurisprudence - believe that the decision taken by the arbiter is binding and exactly same as the judge's ruling. Therefore, abiding to the arbitration decision is obligatory. 31

The jurists’ preferred comment is that arbitration is permissible, whether or not a judge is found in the city; because arbitration is permissible due to a quotation from the Qur'an and the Sunnah of the Prophet and the consensus of companions on it. It

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is also permissible due to the reason that arbitration would resolve the conflict and reconcile between people.\textsuperscript{32}

\textbf{2.1.3. The fundamentals of arbitration}

\textbf{First-}

Arbitration is the consensus of both sides who delegate an arbiter to their dispute. The arbiter decrees according to Islamic \textit{Sharia}. Arbitration is legitimate, either in individual fights or international disputes.

\textbf{Second-}

Enforcement of the arbitration decision is not binding on both sides and the arbiter. Both sides can withdraw the decision until it is not made. The arbiter can withdraw from the arbitration, even if he has accepted to arbitrate. Until no decision is made, the arbiter is not allowed to put someone in his place without the permission of the both sides; because consent should be based on his own view.

\textbf{Third-}

Arbitration is not permissible in cases related to the right of God; like religious limits (hududs), and also the case where proving the decision requires negation or proof by both sides who have no guardianship to the arbiter such as \textit{li'an}. When the arbiter decrees in such cases– in cases that he is not permitted to be arbiter, the decision is void null and non-applicable.

\textbf{Fourth-}

Basically the arbiter should have the requirements of judiciary.

\textbf{Fifth-}

The principle is that the arbitration decision must be enforced. If one of the two sides refuse to accept the decision, the case should be judged. The judge cannot overturn this decision, even if it has not injustice or opposition or religious ruling.

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The principle is that the arbitration decision must be enforced. If one of the two sides refuse to accept the decision, the case should be judged. The judge cannot overturn this decision, even if it has not injustice or opposition or religious ruling.

Seventh-

If there was no Islamic court, the complaint can be referred to non-Muslim judicial institutions. It is based on Sharia.33

Eighth-

One or more of the decisions is permitted. The law provided that in the case of a high number of parties, the arbiters should be three or five. At this time, the verdict is issued by the majority of the arbiters. Islamic jurisprudence has not provided such a thing, but it doesn’t prohibit such consensus arisen from the two sides or the government. Also, respecting such consensus is mandatory.34

2.1.4. The consensus on arbitration in Islamic Sharia

As mentioned earlier, most of jurists admitted to the arbitration and the people’s right for consensus on it. They have not implied to a certain form of arbitration, but there are many conditions for the arbiters to ensure the correctness of arbitration, enforceability of decision, the judge’ position, and other rules associated with the arbitration.

We can refer to the arbitration by two ways: either through the text in the decision or through the consensus in the future and the government-specific contract. Each of these two ways has their own conditions in Islamic jurisprudence.

2.1.4.1. The arbitration provision in the contract:

As noted earlier, arbitration is a contract like other contracts in which both parties’ the conditions must be respected. Islamic jurisprudence doesn’t imply to the arbitration conditions in the contract directly, but we can categorize these conditions based on the theories presented in Islamic jurisprudence corresponding to contract. Islamic scholars distinguish two categories of provisions coincided with the contract. These two categories are:

First Category

Correct provision is legitimate and should be:

a. The provision on which the contract is concluded

b. The provision that is the basis of contract and determines its correctness. But the location of the contract is unknown so that there is not much benefit in it. The provision should not be latent, because in this case the provision would be corrupt.

c. The provision in which people were treated.

Second Category

The second category is corrupt provision. Islamic jurisprudence distinguishes the two types of corrupt provisions as follows:

A) A corrupt provision that is canceled and then the contract remain valid. It is a provision that does not meet the interests of one party.

B) A corrupt provision that completely corrupted the contract. By adapting the principles generally listed in Islamic jurisprudence about the provision related to contract, we can investigate the validity of arbitration provision so that this arbitration is not included in the corrupted provisions related to contract and considered as a correct provision. Because it is consistent with the contract and specifically the global trade agreement; in a way that the arbitration provision is among the most important and the most common
provisions. The arbitration provision is consistent with the contract that is the correct provision.35

When the main contract—such as a building convention or sales contract and is concluded, it is provided in one of the clauses of the contract that in the case of dispute between the contracting parties, it shall be resolved amicably. If it was not resolved amicably, they must resolve their dispute in arbitration. One of the articles of the contract deals with this issue that remains by the contract and also finishes by the end of contract. Because both parties consented to remain on the dispute and an arbiter make decision on their dispute and also do not refer to the normal judge.

2.1.4.2. The arbitration provision independent of the contract

In the case there is no article in the contract stating that the parties shall refer to arbitration in disputes; if the parties disputed, they shall agree and refer the case to an arbiter. The agreement comes later in the contract and called arbitration stipulation.36

2.1.4.3. The arbitration agreement independent of the contract

The arbitration conditions are mentioned in contract between the parties. However, no obstacle is later entered to the contract before the dispute. After-arbitration agreement or after-dispute agreement is an issue apart from the previous contract that is related to the validity provisions of a contract. The terms and conditions of the first contract or dispute do not impose any damages to the arbitration agreement. If the dispute is correct and after-arbitration agreement is considered as a flaw, the correct is nullified in spite of correctness. The vice versa is true. Even when entering arbitration agreement as a provision into the first contract, its validity or invalidity must be investigated separate from the contract. Arbitration agreement is among correct agreements on the basis of Islamic law. And this is in accordance with the provisions of the Qur'an, Sunnah and Ijtihad in Fiqh. Arbitration Contract is binding

for the parties; except when the contract is about something that God has forbidden or disrupt the public order.\textsuperscript{37}

The parties refer to arbitration not because they have agreed in the former or current contract, but also because the government requires them to refer to arbitration; just as it is stipulated in the Law on the Securities Market Board or the issue of currency. Here, the obligation is by the law. So that, there are committees to investigate these disputes and end them by issuing the final decision.

In addition to these forms, it is possible that an ordinary court sends the dispute between two sides to the Arbitration Committee and creates this committee by itself and also elects one of the judges as chairman. Then, each of the parties choose an arbiter and the court will also approve these choices. Such a thing is possible.\textsuperscript{38}

Jurists believe that even if the contract or agreement on arbitration is true, it is not binding for the parties and each of them can ignore it. The reason is that Islamic jurisprudence considers arbitration agreement as a civil-trade matter with a nature that provides the benefits and doesn’t consider the matter judicial. Arbitration in Islamic jurisprudence is an optional issue that can be done on the basis of agreement between the parties. If the two sides agree on it, they can refer to it until the decision is not issued; because the arbiter was chosen by them as a helper. So the parties could dismiss the arbiter, before making a decision. If the arbiter issued the decision, the decision is binding, and his decision would not be annulled even if he was dismissed later. The above view is preferred. There is another view that says the durability of consent before decision is not a condition. When the two parties go to arbitration and declare their reasons, then if the parties change their option and do not want to solve their problem by arbitration before the sentence is specified for one of them; the dispute could be settled and the ruling is correct. It is said that none of the parties are allowed for referral after the outbreak of dispute. It is also said that there are two opinions on this issue. The preferred one is that the durability of consent before decision is not a condition. But if they both referred and were not satisfied with the decision, their opinion will be the condition and the arbiter shall

\textsuperscript{37} Supra note 31.

not make any decision. And yet, his decision will not be applicable. The arbiter, like the judge, investigates the dispute, hears the reasons and tries to destroy the difficulties. He should not force the person to confess. The arbiter’s decision is binding for both sides without the need to execute it. This is the view of Ahmad ibn Hanbal and Abu Hanifa and Shafi’i. Another tradition of the Shafi’i stated that: The arbiter’s decision is binding only when both parties are satisfied.

Islamic jurisprudence also believes that the arbitration agreement is a valid provision in the original contract. So, the next deal in the contract or the dispute in the original contract is mentioned. The judge cannot shirk his core expertise. The relationship between the arbiter and the parties in the arbitration contract is focused on delegation of the ruling to the arbiter. As a result, each of the parties can retreat before the claim. Accordingly, if one of the parties referred to the judge, the judge examines the dispute and does not consider the arbitration agreement.

Arbitration agreement, either wants to be provided in the contract or agreement entered into the contract later, is suspended from the perspective of the theories presented in Islamic jurisprudence. It has no binding effect except when the arbiter investigates the dispute.  

2.1.5. The pillars of arbitration

Islamic jurisprudence believes that the arbitration agreement is a contract based on consent that does not have certain form and shape to be included in the same format. Like what we see today on the proof of arbitration agreement, it is written according to its importance.  

Since the arbitration means that the two sides elect a person as the arbiter to arbitrate between them, so this means mutual consent, accepting the arbiter’s decision, and abiding to the decision, signatories of the contract and its subject. If these three issues are met, the contract is valid. Jurists disagree on the correctness of these three matters, which are the pillars of contract. The Hanafi believe that only consent and


40 As in the Iraqi Procedures Act No. 83 of 1969 its said (Does not prove the agreement to arbitrate just by writing).
acceptance are the pillars, but most scholars believe that all three matters would be the pillars of contract. Because arbitration is something like other agreements in which the parties must accept the terms of the contract and abide to them, the signatories and its location should be also known.\footnote{Al-Douri, Dr. Qahtan Abdul Rahman. Op .cit. p 118-119.}

In all the matters related to the parties’ demand, accepting and abiding the contract must be taken before the agreement. If accepting and abiding led to dispute in any case, the arbitration agreement will not be signed.

**Now consider the arbitration pillars as follows:**

2.1.5.1. **The satisfaction**

The satisfaction is necessary for validity of the arbitration contract; and consent is adherence and abides to the decision based on the parties’ will. This will should be far from Dissatisfaction. (These defects include: mistake, misrepresentation, duress and abuse). Valid consent of the parties in the arbitration agreement is essential for the consensus of the parties, which is concerned with its presence or absence.\footnote{Mohamed Shaaban Imam Sayed. Arbitration as a means of settling disputes in international contracts. (N.edt). (s.l).Dar Al-Mihaj, 2014.p 99.}

The consent of the signatories of the contract is their attention to sign properly. This involves signing a contract based on the will. The Hanafi believe that the will doesn’t reach to consent, unless its impacts are shown with certain expression. Selecting the phrases alone is not enough. They make distinction between the will to say (authority) and the will of effect which is consent. But the Shafi’I would disagree in an important matter with Maliki and Hanbali. The Shafei knows the authority of expressions as a reason to consent and this is not but only through words.

Although the Maliki and Hanbali believe in the consistency of authority and consent, they allowed the proof of expression’s defiant by evidences and reasons independent from the expression itself. It indicates that expression may sometimes be in contrary to the speaker’s will.
The Malik and Hanbali believe that the intention is dominant on the expression and this dominance has no impact on the interaction between authority and consent. Each is a single thing. So, if the intention dominates on the expression, it means that he speaker is not convenient and has not selected the phrases correctly.43

2.1.5.2. Qualification of the signatories of the contract

Qualification for the establishment of an arbitration agreement is, in fact, the ability to capture the right, subject of arbitration and compliance with it. Someone who is not qualified or his qualification has defect, legal guardian or executor cannot establish arbitration agreement.44

The purpose of qualification is a person who understands what he says and is aware of the implications. The objective and will should be met. Such a thing cannot be achieved unless by a person who is qualified to perform. Scholars consider qualified to perform include: competency of the responsible. Because his statements and actions are divided into three forms based on the Shari'a:

1. person are who not qualified to perform, such as children or unsound persons.
2. person are who not completely qualified to perform; someone who is still a minor or has not been disturbed his mind.
3. person are who completely qualified to perform; someone who has reached the legal age.45

2.1.5.3. Object of Arbitration

The purpose of arbitration object is the disputes came into the arbitration contract and the disputes are resolved by issuing verdict. Only the disputes between the

parties have been referred in the arbitration with respect to the ability of the arbiter.\textsuperscript{46}

There should be a provision in the law that allows a series of disputes to be resolved through arbitration. The arbitration must be in accordance with contractual or non-contractual, public or private, and civil or commercial relations. But arbitration is not correct in the cases where compromise is not allowed; such as issues related to public order or personal mode.

We also note that according to the Islamic arbitration, arbitration is not permitted in the contracts opposed to Islamic law; either the subject or that thing is forbidden such as alcohol, pork or other forbidden matters like buying gold for men, making gold watches and silk clothes for men, because these things are for women.\textsuperscript{47}

\textbf{2.1.6. The context in which arbitration of executed}

Jurists disagree regarding contract of execution arbitration. For instance:

1. The author of the book “KashfAl-Isam” is attached to the permissibility of arbitration in all the commandments. The author of the book “Al-Jawahir” also believes in the legitimacy of arbitration in all cases.

2. The permissibility of arbitration in the cases of dispute. Arbitration is not permitted in the cases related to God and there is no certain party.

3. The arbitration is permitted in all but four cases: marriage, swearing, slander and retaliation.

4. The arbitration is correct only about the property.

The context of arbitration in Islamic Sharia is limited and not related to the rights of individuals. It can be inferred from the traditions that arbitration is permitted in a case that one of the parties ignores his right; so arbitration is not permitted about the


right of others and God. Arbitration is not permitted on the implementation of Hududs, retribution, swearing, guardianship, genealogy, divorce, growth, will, detention, the absent's and orphans’ property.\textsuperscript{48}

Anything that requires the presence of a third person other than the parties needs arbitration. If the arbiter hesitates, he cannot rule on that issue. The issue of individuals' privacy is the same, and such things are not the contexts of arbitration.\textsuperscript{49}

The majority of jurists agree that arbitration is not permissible on issues related to the God’s right; such as Hududs and retribution, and cases in which the arbiter has not dominance like the rights of others including Lean. In Lean, the problem is to prove or disprove the blood of father. However, in this case, there is no party that needs to be judged. It is among governing provisions, unlike arbitration that is related to judgment. On the contrary, the Hanbali give the same permissions to the arbiter as the judge based on a quote attributed to Imam Ahmad ibn Hanbal.\textsuperscript{50}

2.1.7. The binding effect of decision after issuing

Jurists disagree on determining the deadline for the arbiter to make the decision. So that the contract is binding for all parties and none of them can disobey the decision high handedly.\textsuperscript{51}

The parties’ bound to execute the decision is the result of arbitration, which is the purpose of arbitration to settle the conflicts and resolve the disputes. But the jurists disagree about the deadline by which the parties are not allowed to ignore the decision and dismiss the arbiter. So that after this time, both sides are obliged to implement the decision. The four orientations are as follows:


\textsuperscript{49} Ibid.


The first orientation

As far as the parties are required to execute the decision of the arbiter before examining the evidence and hearing the parties, the consent to withstand the decision is required. Accordingly, dismissal of the decision by one of the parties after agreement on the arbitration and even issuance of the decision is not permissible. Here, the jurists argue the natural nature of arbitration and the fact that arbitration is under the guardianship so the decision has guardianship on the parties. On the contrary, lawyer has guardianship on the client and cannot be with his client without his consent.

The second orientation

Most Maliki, some Shafi'i and Zaydi, and according to well-known comment, Hanbali when the arbiter begins the job and hears the reasons of both sides, the parties’ authority to dismiss the arbiter will be removed. None of the parties is allowed to ignore the arbitration. After that, the arbiter’s decision is binding and will take effect about the parties from legal point of view.

The third orientation

Most jurists believe that the arbiter’s ruling will not be binding on the parties until after the arbitration. But before the arbitration, the parties or one of them could return from arbitration, even if the arbiter began to rule and hear the reasons. But if the arbiter makes the ruling, both parties and one of them do not have the right to return from decision.

The fourth orientation

They believe that the arbiter’s decision shall not be binding for the parties unless the parties are accepting with the decision. This belief considers the binding effect of arbitration subject to the consent of the parties after the issuance of this ruling.52

2.2. Arbitration in International Law

2.2.1. Introduction

When international trade flourished in the middle ages through the establishment of exhibitions and markets, especially in Germany, Spain, Holland, France and Italy. The international trade arbitration law was established in the wake of its great development and rapid spread in the world of international trade. Although this has been achieved relatively recently. The term international commercial arbitration was first introduced legally in the Geneva Convention European Union Issued on 21 April 1961. As well as its development in international trade. This was after the First World War when power, as in the old societies, was no longer a means to demand, defend rights by intervening after long historical periods in social and economic life to eliminate what was known as the special justice system. Where individuals, groups resorted to force to demand their own rights.

2.2.2. The beginning of international commercial arbitration and its importance

International commercial arbitration appears in the form of a law written in the certain regulations of various treaties that explains their foundations and criteria. These foundations and criteria have become ruling from international aspect, either related to executive issues, or related to the rule that must be implemented.53

The main reason for the need to arbitrate goes back to the beginning of arbitration history; i.e. when two dealers had a dispute over the price or type of goods traded. It was then they referred to someone else to settle their claim. Or two merchants dispute on a corrupted commodity and then referred to another merchant to resolve their conflict.54

Arbitration provision has been widely recognized in industrial agreements and technology transfer agreements; either these agreements or contracts are signed

between governments, or between governments and ordinary people or only between ordinary people.

It must be said about ordinary people that they refer to commercial arbitration; because it ultimately relies on voluntary consensus among them.\(^{55}\)

**International arbitration commercial in Jay treaty 1794**

The new international arbitration evolution may be traced back to the treaty "Jay" (1794) between Great Britain and the United States of America. This contract was formed by a working group to response the request and demands of the US revolution. In the 19\(^{th}\) century, numerous arbitration agreements were conducted specifically. The Court of Arbitration was formed for cooperation with specific situations or several demands. The most important demand was Alabama.\(^{56}\) Under the Treaty of Washington (1871), the United States and Great Britain agreed to settle claims happened from Great Britain's failure to maintain upon neutrality during the American Civil War.\(^{57}\)

**Hague Convention and international commercial arbitration.**

In 1899, International arbitration became stable by the efforts of Hague Conference in 1899. The conference agreement was written based on the response to peaceful demands in global conflicts. In 1907, this conference revised the provisions of the agreement.\(^{58}\) So that the Congress (Congress 1899 and 1907 of Hague) reviewed the issue of settlements of international disputes through consolidation and then enacted general rules for consolidation under which the states can use them in case of need. This is what Article 37 of the 1907 Hague Convention stresses on it.\(^{59}\)

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\(^{56}\) The Alabama claims were a diplomatic dispute between the United States and Great Britain that arose out of the U.S. Civil War. The peaceful resolution of these claims 7 years after the war ended set an important precedent for solving serious international disputes through arbitration, and laid the foundation for greatly improved relations between Britain and the United States.


\(^{58}\) Supra note 57.

\(^{59}\) The Hague Convention of 1907.
International commercial arbitration after World War–I.

After World War I, the exchange of international goods and services spread among all countries. As these transactions will be also large-scale in the future, the number of disputes between sellers and buyers and brokers will be increasing too. Some buyers and sellers are also trying to avoid contractual obligations, because they still have not benefited. It will lead to the failure of shipment scheduling and also receiving the goods due to the low level of cargo. It will cause not to exchange goods with money, because there is no contract between the parties to reconcile. This is the result of global trade.\(^{60}\)

In this period (after World War I) as a result of the international community awakening towards the problem that resolving foreign trade disputes has become an impassable saddle preventing the dynamic growth of world trade, and reduce the penalty through arbitrate in the world trade disputes. The following items are among the most important steps to grow global trade and slow down the obstacles.\(^{61}\)

When the International Criminal Court was established in 1919, the International Criminal Court was the podium of the international labor community and had much force to strengthen the arbitration - as a means to resolve global trade disputes - and there was a need to international organizations for supporting and assisting the arbitration.\(^{62}\)

International Commercial Arbitration after World War–II.

By the historical development after World War II when the doors of the world opened to the property, services, goods and money, international commercial arbitration became a desirable need for world trade reality, especially among major industrial countries trying to enact international agreements to facilitate the movement of global trade. Due to the absence of an international tribunal that settles


special global trade disputes between the various national entities, or between a state and citizen of other state, serious efforts were taken to solve this problem using systematic methods. With regard to the arbitration, this has resulted in establishing systematic rules that go directly to the desired dispute without the need to refer to the law.\textsuperscript{63}

Especially after the founding of the United Nations, Article 2 of the United Nations Convention (6) states that: "All board members shall settle their international disputes through peaceful means." Article (33) of this Convention also states: "the parties shall settle their dispute by negotiation, investigation, and judicial review."\textsuperscript{64}

Hence, establishing procedures to resolve disputes in order to avoid the tragedy of war is essential. The need to peaceful solutions is inevitable, especially after linking foreign exploitation and growth of international trade. The emergence of multinational corporations and combined works was increasing - because it would lead to sell private institutions to the foreign beneficiaries. Many countries around the world, in particular developed countries utilize foreign capitals to innovate and upgrade production facilities and their national economy. Therefore, the international community took refuge in the arbitration; because arbitration leads to security.\textsuperscript{65}

Regarding the above, in addition to increased reference to arbitration for resolving global disputes, several judicial institutions have been established with the aim of inviting the parties to these institutions in the case of dispute. The most important of these institutions are:

1. International Court of Arbitration under the International Chamber of Commerce of France.\textsuperscript{66}


\textsuperscript{64} Charter of the United Nations.


\textsuperscript{66} ICC International Chamber of Commerce the International Chamber of Commerce (ICC) was established in 1919 with the aim of continuing to serve the international business sector by promoting trade and investment, opening up markets for goods and services, and free capital flows. The first impetus for the chamber's efforts is its first chief, Etienne Clementel, a former French trade minister. Thanks to its influence, the General Secretariat of the Chamber was
2. Arbitration Association of America.\(^{67}\)

3. Foreign Trade Arbitration Board of the former Soviet Union.\(^{68}\)

4. Court of Arbitration in London.\(^{69}\)

5. Arbitration Institute of India.\(^{70}\)

These are the institutions trying to play a role in the field of commercial arbitration.

In addition to these institutions, the countries have made much efforts to sign a global and regional agreement by which the state parties are required to refer to commercial arbitration in case of any disputes. The most important of these agreements, in chronological order, are:

1) The Geneva Protocol in 1923 on arbitration clauses that was signed by many countries.

2) The Geneva Conventions in 1927 that was special for the enforcement of foreign arbitration decisions.

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\(^{67}\) AAA American Arbitral Tribunal: The establishment of the American Arbitration Commission or Association dates back to 1926 and was established for the purpose of settling international trade disputes in general, i.e., it is not specialized in any kind of dispute, such as the Washington International Center for Settlement of Investment Disputes. This body is a permanent body that is concerned with international commercial arbitration. It is independent and not for profit. It has its headquarters in New York and has several branches in several states. It deals with disputes arising from internal trade as well as international trade. About 70 thousand cases.

\(^{68}\) In Soviet times, the rights of arbitration courts were exercised by arbitration commissions operating at commodity and stock exchanges established in 1922. Arbitration ideas were most consistently implemented in the Foreign Trade Arbitration Commission (FTAC) created legislatively in 1932 and placed under the National Chamber of Commerce. A directive was issued by the USSR Central Executive Committee and Council of People’s Commissars on June 17, 1932. (Visited at 30/4/2016). (https://mkas.tpprf.ru/en/lawstatus/historical_background).

\(^{69}\) LCIA the London Court of International Arbitration is an institution based in London, United Kingdom providing the service of international arbitration. The administrative headquarters of the LCIA are merely based in London. LCIA is an international institution, and is generally regarded as the leading global forum for dispute resolution proceedings for all parties, irrespective of their location or system of law. Although arbitration and the provisional of formal arbitration tribunals are the institution's main focus, the LCIA is also active in mediation, a form of alternative dispute resolution. (Visited at 30/4/2016). (https://en.wikipedia.org/wiki/London_Court_of_International_Arbitration).

\(^{70}\) Netherlands Arbitration Institute (NAI) Established as a foundation in 1949, the Netherlands Arbitration Institute operates on a non-profit basis and performs its duties entirely independently and impartially. The NAI aims to promote a number of different types of alternative dispute resolution: arbitration, binding advice and mediation, in particular by providing trade and industry with soundly regulated arbitral, binding advice and mediation procedures. The NAI is the largest general arbitration institute in the Netherlands, a solid and innovative organization with by far the most experience with and knowledge of different forms of ADR. The NAI is located in the Centre of Rotterdam, the vivacious trading centre of the Netherlands with one of the largest ports of the world. (Visited at 31/4/2016). (www.nai-nl.org/en).
3) New York Convention in 1958 on the implementation of foreign arbitration under the supervision of the United Nations.

4) European Convention on commercial arbitration that was signed in Geneva in 1961. The arrangements related to the implementation of the Convention were in 1962.

5) The Convention for the settlement of disputes through arbitration on the efficiency of governments and other nations’ citizens that was signed in 1965 by the efforts and support of the World Bank. For this purpose, a center was founded for arbitration called ICSID.

6) The Moscow Convention in 1972 on dispute resolution through arbitration among communist countries.

7) Convention of efficiency dispute settlement among Arabic countries and the citizens of other Arabic states that was signed in 1974.

8) Washington Convention (March 18, 1965) that led to the establishment of the International Center for dispute settlement.\(^{71}\)

### 2.2.3. The Geneva Protocol 1923

After the establishment of International Chamber in Paris and also Arbitration Court, the establishers of this distinct international institution have to lead the people all around the world to create a legal tool for accepting arbitration and agree to refer legitimate arbitration. Geneva Convention was signed in 1924, whereby the states parties were recognized.\(^{72}\)

By the agreement on the arbitration or the arbitration clause, the convention was formed in eight articles.\(^{73}\)

So that the 1923 Geneva Protocol is considered as one of the two international treaties on international commercial arbitration which was founded by the United Nations at that time and headquartered in Geneva. These two protocols include the 1923 Geneva Protocol on the international arbitration clauses and the 1927 Geneva Protocol on the recognition of arbitral awards.\(^{74}\)

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\(^{73}\) Ibid.
Convention on the enforcement of foreign arbitration decisions. These protocols represent the first step in history. About the entry of arbitration into the circle of international law and global treaties, it should be kept in mind that according to the 1923 Geneva Protocol, governments signing this protocol shall admit the arbitration contract; either this contract is the arbitration clause or agreement set after a dispute. These countries shall accept the arbitration contract due to the previous or next disputes when referring to the courts. And if one of the parties requests for arbitration contract, he should refer to the arbitration.\(^74\)

2.2.4. The Geneva Convention 1927

A few years after the enforcement of the Geneva Protocol, the international community, under the pressure of reality, found the gaps in the enforcement of arbitration decisions and decided to enforce The Foreign Arbitration Decisions Convention in 1927; including complementary principles of the former protocol set in 11 articles.\(^75\)

If the decision is concerned with the dispute, it shall not be included in the arbitration agreement.\(^76\)

Despite the critics to the Geneva Convention and the Geneva Protocol on the adoption and enforcement of foreign arbitration decision and a few countries that have accepted the decisions of this convention, especially the latter one, this action, which was performed under the supervision of the international community, can be considered as an attempt to the freedom of international commercial arbitration and evoking it again and movement of the international community to the United Nations, after the Second World War. In many international conventions, international commercial arbitration has been under considerable attention.\(^77\)

\(^{74}\) Ibid.
\(^{75}\) Ibid.
\(^{76}\) Ibid.
\(^{77}\) Ibid.
2.2.5. The New York Convention 1958

The 1958 New York Convention was about acceptance and enforcement of foreign arbitration decision.

This convention was made to face up to the 1923 Geneva Protocol and the 1927 Geneva Convention – that was specific for international arbitration and founded by the United Nations Community. A World Congress was held in New York in 1958 and the convention was approved.\(^78\)

It was approved while the 1923 Geneva Protocol and the 1927 Geneva Convention have lost their effectiveness on the arbitration in the United Nations Community.\(^79\)

After the end of the World War II and the rise of global trade and also increasing pressure of international trade actors, creating a solution to overcome the problems of enforcing arbitration decision seemed inevitable. In spite of using the Geneva Protocol and the Geneva Convention in this regard, the pervasive problem was the difficulty of applying these decisions due to many conditions made it distinct ;in particular, the convention on the adoption and enforcement of arbitration rulings in 1927.\(^80\)

Also, many of the countries are significant in the field of international trade - such as the United States of America and the former Soviet Union –didn’t care this convention.\(^81\) The efforts of the International Chamber of Commerce and the United Nations Economic and Social Chamber were increased to enact new rules to the adoption and enforcement of arbitration decisions. So that an international conference was held in New York and from which, an agreement known as the New York Convention came out on the adoption and enforcement of foreign arbitration decisions which came into force at the end of 1959.


So that New York City could lay the groundwork for universal acceptance and enforcement of arbitration agreements and decisions taken by the national courts. Since the adoption of the convention, New York City became a springboard for foreign arbitration by which the world was able to take a big step towards international arbitration. Mr. Must ill described New York City because of this convention in this way: "You can consider this city as the largest sample of global legitimate activity in all history of the commercial arbitration."  

With regard to this issue, a World Conference was held in New York aimed at the adoption of a convention on the enforcement of the foreign arbiters’ decisions. The convention included several legal texts; including: adoption of foreign arbitration rulings, accepting the permanent arbitration panel in accordance with Article 2 of the Section (2, 1), accepting the authority of the arbitration decision and its enforcement. In this way, this convention established several global laws. For example, proving the objection to decision based on the arbitration is placed on the executed decree or against it. The principle of priority law dominance before the enforcement should be based on the two parties’ authority and cannot refer to other. The law of the country where the arbitration is carried out will not be considered, except when there is no consensus on a certain law.

Because of the flexibility of New York Convention provisions, the decisions were adopted widely by some of the countries and all the continents. This convention is composed of 16 articles that addressed the issue of adoption and enforcement of foreign arbitration in signatory countries.

2.2.6. European Convention in Geneva 1961

1961 European Convention in Geneva was formed under the supervision of Trade Expansion Committee that was a member of the Europe Economic Forum in the

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United Nations. The objective\(^85\) (33) of signing this convention was facilitating the expansion of trade among liberal and Communist states.\(^86\) (34) so that enters into all arbitration stages and the convention is effective for the disputes formed due to world trade among natural or legal persons.\(^87\)

International commercial arbitration European Convention was held in 1961 to study the issue of arbitration. While it was agreed in this convention to refer to arbitration for disputes settlement. To implement or not implement the arbitration decision as defined in Article 1/1/A of this convention, we read that: "the application scope of this convention includes the signed conventions of arbitration to resolve current disputes or conflicts occurred by world trade operation among natural or legal persons. Each of the parties has the opportunity to submit the dispute to arbitration in different signatory countries."

It should be considered that the provisions of this convention are applicable only for global trade operation. This form of arbitration agreement (arbitration clause or arbitration stipulation) must also be written. But there is an exception to this clause that explicitly verifies the validity of arbitration agreement; i.e. the arbitration that is not written. The arbitration must be between governments that arbitration agreement is not provided in their rules in writing.

It is also possible in the case of legal entities. Under this convention, it is agreed that the conflict must be resolved by arbitration. So that Article II of the first part is valid for public and legal entities.

One of the most important cases of dispute that is discussed in Article 7 of the convention is the legal problem that should be executed in the case of dispute. Agreement on the freedom of the parties emphasizes on determining law that must be implemented. But when the above law is not specified by the parties, the arbiters pass a law in accordance with the theme and law of the parties’ nations. The decisions in both cases must consider what is stipulated in the contract and what is


\(^87\) Supra note 85.
followed in trade practices. This is mentioned in the first part of Article VII. The second part of the above article emphasizes on the permissibility to end the disputes by the arbiters that leads to peace. Because it shows two sides demands. Because the law that stresses on arbitration has allowed such thing.\textsuperscript{88}

\textbf{2.2.7. Convention 1965}

World Bank Convention on the settlement of efficiency disputes between governments and citizens of other governments ’citizens underlies the convention in 1965. The purpose of this convention is to resolve the efficiency disputes between governments and citizens of other states. The intention is to encourage productivity in developed countries. The convention paves the way for resolving disputes through arbitration and possibility of executing arbitration decision voluntarily without reference to arbiter.\textsuperscript{89}

So that this convention was formed by the World Bank. The purpose of this convention is to encourage productivity in developing countries and the adoption of the provisions of the convention by the capitalists in developed countries.

As mentioned earlier, these countries have the fear that the property might be under national privileges; the problem that even developed countries refer to it. This convention investigates the amount of conflicts between the governments and foreign investors by the domestic judiciary in the countries associated with productivity. So that convention investigates the differences between the capitalists and the signatory governments. The convention attaches to the freedom of parties to choose the law which should be executed without adherence to the law of signatory countries. One of the provisions of this convention is that one of the parties should be the government signed the convention and the other party should be a citizen or a group of another country’s citizens signed the convention.\textsuperscript{90}


\textsuperscript{89} Supra note 86.

\textsuperscript{90} Supra note 85.
2.2.8. Convention in Moscow 1972

1972 Convention was signed with the aim of arbitration between the related states. These states were the states of Economic Cooperation meeting joined to these countries according to the Court of Arbitration in each of the countries in the meeting. These countries referred to arbitration in disputes created because of particular relations. Arbitration in such disputes was mandatory and shall submit their complaint to the Court of Arbitration and their complaints shouldn’t be reviewed as normal judicial affairs. The foundation of arbitration in this convention is not the arbitration clause or arbitration stipulation, but also the law on which the disputes should be referred to the Court of Arbitration; while both parties have not freedom in determining the arbiters or enforcement of arbitration.91

2.2.9. Convention of efficiency dispute settlement between the Arabic governments and Arabic citizens of other states which was signed in 1974.

In 1974 and in the context of the Arabic Economic Unity meeting, a convention was held to resolve efficiency disputes between the guest Arabic governments and Arabic citizens of other states. Out of this meeting, the plan of efficiency dispute settlement between the signatory government and productive person who is a citizen of another signatory state was achieved. This issue will be resolved through agreements and then arbitration. It is worth noting that this convention is like Washington Convention with respect to the rules and content. But its purpose is limited to attract investor from member states in Arabic Economic Unity meeting.

The purpose of reference to this meeting was the parties’ consensus. This is not organized by approving the convention by the government and requiring the necessity of exploitative dispute settlement. But the government and investors must agree together. To enter the arbitration, one of the parties should declare the dispute and do not request the other to agree. Then, a working group is formed to agree the parties within Forty five days from the date of registration of the application. But it

91 Supra note 86.
should be said that this period Forty five days is a personal issue and there is the possibility of change.

It should be said about the working group created to satisfy the parties that the responsibility of this group is limited to encouraging the parties to resolve the dispute. When the working group is not able to do this job, they should give a report to the Secretary of the meeting which is about completing the meeting. After completing the task of the working group, the Board of Arbitration is responsible to settle the conflict on the basis of the legal rules agreed by the two sides. If the parties do not agree upon the law, the laws of the efficient guest country as well as the relevant legal rules are considered.92

2.2.10. Washington Convention 1965

This convention was signed on March 18, 1965 in Washington with the support and cooperation of the World Bank. As the name implies, this convention addresses the efficiency dispute settlement between governments and citizens of other country. And this is done by the Global Center that is called the International Center for Efficiency Dispute Resolution.93 The aim of this center is attracting the agreement and arbitration in the efficiency dispute among the signatory states and the citizens of other states. This is done in accordance with the provisions of this convention.94

The center of this convention is located in the World Bank’s headquarters. Transferring the head quarter of this convention to elsewhere should be reviewed in the office and obtain more than one-third of the votes.95 Over the years, the way to join this convention were developed; so that in 2002, the number of members

92 Al-Mesbahi, Abdul Rahman. The role of the judiciary in the application and enforcement of international conventions in investment disputes. Was held on the occasion of the Fourth Conference of Heads of Supreme Courts in the Arab States, held in Doha, Qatar from 24 to 26 September 2013,pp 13-14.

93 This center has been establishing under Article (1) the first of this Agreement, which provides for (There is hereby established the International Centre for Settlement of Investment Disputes hereinafter called the Centre). (Visited at 5/6/2016). www.cil.nus.edu.sg.

94 Article (1) it is stipulates (The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention).

95 Article (2) it is stipulates (The seat of the Centre shall be at the principal office of the International Bank for Reconstruction and Development (hereinafter called the Bank). The seat may be moved to another place by decision of the Administrative Council adopted by a majority of two-thirds of its members).
increased to 135 countries and Seventeen countries have been invited to sign this convention that have not attempted to sign it so far.\(^{96}\)

All major industrial countries except Canada have joined this convention.\(^ {97}\)

This is true in the case of most African countries.\(^ {98}\)

As well as Arabic\(^ {99}\) and Asian\(^ {100}\) countries.

As well, many countries of the former Soviet Union, including the Russian Federation, have attempted to sign it without their approval.\(^ {101}\)

In the case of Latin American countries\(^ {102}\), it has to be said that they restraint to sign the convention at the beginning until 1980 when this restraint was vanished and Latin American countries, except of Brazil and Mexico joined to this convention.

The number of countries that have joined this convention until June 2003 was 154 that 139 of them had accepted the whole convention.\(^ {103}\)

Washington Convention has many advantages compared to private arbitration. Because arbitration can be implemented in way that is according to the rules of dispute settlement. On the other hand, the convention guarantees facilitation and execution of arbitration.

Since the main objective of the convention is to encourage productivity, the requirements of the convention are in a way that balances between the interests of the beneficiaries and the beneficiary states. In addition, this convention will allow both sides to examine arbitration to the extent they are permitted.\(^ {104}\)

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\(^{97}\) Industrialized countries that have signed the Convention, such as –USA- Britain-France-Germany-Italy-Japan-Sweden and other.

\(^ {98}\) African countries as Congo-Zambia-Ghana-Nigeria-Senegal-South Africa-Tanzania-Uganda-Zimbabwe

\(^ {99}\) Arab countries as Algeria - Bahrain - Egypt - Jordan - Kuwait - Lebanon - Morocco - Oman - Qatar - Saudi Arabia - Somalia - Sudan - Syria - Tunisia - United Arab Emirates – Yemen.

\(^ {100}\) Asian countries as Afghanistan - Armenia - Azerbaijan - Bangladesh- Cambodia- China-Malaysia-Nepal, Pakistan, Philippines-Singapore- Sir lanka- Thailand- Turkey.

\(^ {101}\) The republics of the former Soviet Union as Belarus - Ukraine - Georgia - Kazakhstan - Turkmenistan – Uzbekistan.

\(^ {102}\) Latin American countries as Argentina- Colombia- Costa Rica - Dominican - Haiti - Peru - Paraguay – Uruguay.


2.3. Arbitration in India

2.3.1. Introduction

In this topic we will talk by Detail and we will description history of arbitration law in India so we will talk about how Indian arbitration law was started and how it is developed during the past years so we discuss.

The role of the legislative authority in the legislation of the Indian Arbitration Act and what is the future of the law against the future cases that need to be new provisions.

2.3.2. Development stages the Arbitration Act in India

2.3.2.1. Panchayat Act

Arbitration in India was born in a system known as "panchayat". Indian civilization explicitly emphasized on conflict resolution through arbitration. That arbiter was chosen by the two sides. This option is only given to the parties. The arbitration was continued and transformed with the first system of Bengal issued in 1772. The victory of setting Bengal in 1781 was that the Bengal enacted rules that emphasized on arbitration.

People often optionally refer their differences to a series of arbiters (panchayat) which were called agreement community.

Arbitration is a matter determined by the executive bill of Bengal regulations in 1772 during the colonization of Great Britain. Bengal Bill has stipulated on arbitration and implied to conflict resolution by the Court of Arbitration that should be done with the agreement of the parties. The arbitration shall be done in the field of litigation of accounts, common tasks, disrupt in the contracts, and so on.

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107 Ibid, p.3.
The most important thing that distinguishes this system from others is that the judge cannot be forced to be chosen, but the judge should be selected with the consent of the both sides. The agreement should be done in a way that one goes to the arbiter, and both parties agree on that arbiter, then the arbiter will arbitrate their dispute. This arbitration is carried out only after the completion of the evidences and swearing by the two trusted witnesses selected by the arbiters. The arbiters should not be charged or convicted in corruption issues—either brief or minor—during a year of making decision.

As can be seen from the Arbitration Committee, they shall have the above condition and it shows continuous change in India.

Bengal Bill provides that the court of arbitration shall be held by mutual agreement and the claims of the parties should be heard as the litigations—including claims of accounts, documents of partnership, disturbing the contract and investigated in all these cases.¹⁰⁸

Bengal Adjustment Act of 1772 and 1781 approved in India allowed the parties to refer the dispute to an arbiter by themselves. When the two sides chose the arbiter, the arbitration is executed. This form of arbitration is still used everywhere in the world. Moreover, the decisions taken in the arbitration is binding for both sides. This shows that arbitration is as old as before colonization. And arbitration has been a common issue in India and the emergence of legal authority of arbitration dates back more than a hundred years ago.¹⁰⁹

2.3.2.2. The Act of 1899

A few years after the Bengal Adjustment Act, a law was specifically adopted about the arbitration or the arbitration law in 1899. This was very similar to the UK Arbitration Act in 1899. Perhaps this was the starting point for applying the arbitration law in India, but the arbitration was only mentioned at that time. It is possible for the courts to enter the arbitration implementation. The Act of 1899 was

executed in large and important cities and its application scope is limited to the arbitration agreed by the parties, without the intervention of the court. So that it can be implemented by the government. Over time, the Arbitration Act became disabled while it was increasingly needed, especially in commercial and business disputes.

In 1908 AD., The Civil Execution Law was revised and arbitration was included in Article 89 of the civil courts act. According to this paragraph, the interaction between the two sides should be done only and only through arbitration.\textsuperscript{110}

At the beginning of the eighteenth century and before the issuance of the 1899 Act mentioned earlier, arbitration had penetrated everywhere such a strong force to settle disputes. When the First Integrated Civil Executive Act was issued, there was arbitration as a part of law in the eighteenth century.

It should be noted that the provisions of Article 312-317 of the principles of civil courts law in 1859 are related to arbitration. These provisions include two types of arbitrations:

1) Arbitration with entering the court to dispute.

2) Arbitration without entering the court to dispute.

Apart from these two types of arbitration, there is a third type of arbitration which is related to the India's Makasib rights and called "legal arbitration".

This means that the constitution has addressed the issue of arbitration; such as the Power Law of India in 1910 and the Law of A.P Communities of the companies listed in the 1964 law. In this regard, a few similar examples can be implied.\textsuperscript{111}

2.3.2.3. The Arbitration Act of 1940

In 1940, India passed the Arbitration Act of 1940 that was only for local arbitration. Under the 1940 law, arbitration demanded judicial intervention in all three stages of the arbitration. The steps are: before referring the dispute to the Arbitration Board, during investigation of the orders, and after the decision. So that the Court of Justice

\textsuperscript{110} Ibid. p 103
will be asked to determine for what the dispute has happened and whether it can be solved through arbitration? In addition, before the implementation of the arbitration, the court will be asked to issue the decision.\textsuperscript{112}

**According to the 1940 Act:**

a) By Agreement.

b) As per procedure in the agreement.

c) Failure to comply with the terms of the agreement, the aggrieved party had to approach the Jurisdictional Civil Courts under either Sec.8 or under Sec.20 to get an Arbitrator, Arbitrators or Umpire, appointed. Whereas under the present Act, the aggrieved party should approach of chief Justice of the concerned High Court or the person or institution designated by him under Sec.11 for getting the Arbitrator, Arbitrators appointed.\textsuperscript{113}

**2.3.2.4. The 1996 Act**

In 1996, Indian Legislature passed the arbitration law and executed at the same year that was like UNCITRAL law. Ashok Behan implied it in his speech at the conference on "Inhibition of disputes and Resolution of conflicts" in India in 2005. The main objective is to encourage arbitration as an active tool, because of the quick resolution of business disputes. Act 1996 is divided into two parts:

The first part is for local and international commercial arbitration executed in India. The second part is for foreign arbitration that takes place outside India. But this law

\textsuperscript{112} Krishna Sarma, op.cit. p.3

\textsuperscript{113} A Critical comparison of the 1996, Act with the 1940 Act in procedural requirements, enforcement and challenge with special reference to Construction contracts - Sri G. Subba Rao\textsuperscript{*}

Under 1940 Act, an Arbitrator was appointed:
a) By Agreement.
b) As per procedure in the agreement.
c) Failure to comply with the terms of the agreement, the aggrieved party had to approach the Jurisdictional Civil Courts under either Sec.8 or under Sec.20 to get an Arbitrator, Arbitrators or Umpire, appointed. Whereas under the present Act, the aggrieved party should approach of Chief Justice of the concerned High Court or the person or institution designated by him under Sec.11 for getting the Arbitrator, Arbitrators appointed. (Visited at 30/5/2016).www.icaindia.co.in.
is very much influenced by the New York Convention on the execution of foreign arbitration decisions in India.\textsuperscript{114}

Article 5 of 1996 Act, in particular, prohibits the entry of judiciary in Indian arbitration. Despite this law, the Indian courts have over and over interfered in the arbitration. This interference was to speed up either the sentencing or appeal. This type of cunning in sentence is legally prohibited and will prevent the rights of the parties in the future because of the authority of the court. The court must investigate and prepare the grounds for arbitration. However, since the court avoids issuing explicit sentence mentioned in the law, no one will refer to this type of arbitration in the future. Judicial interference in Indian arbitration is forbidden, and it causes a distinct branch of law that is called arbitration law. This trend, of course, destroys the fundamental goal of creating the conditions for arbitration; a goal that ensures the speed, sufficiency and conflict resolution in a commercial context. However, India has the power of international arbitration. Of course, if it can regulate such matters. In this way, probably India could be the superior face of international arbitration. India tries to meet the basic punishments for arbitration operation, and do this through creating new systems and new divisions of arbitration. There is a way to do this. India tried to do arbitration by the means of "shortcut method". The arbitration can be better performed by use of the shortcut method; except in the case of brands, real estate, intellectual, and construction and clearance contract issues. This arbitration will be more practical with the use of executive law and requires timeliness and active enforcement of the arbitration. Shortcut arbitration provides sufficient accuracy for the parties; an issue that, in some cases, lasts six months. India can enforce the rules of shortcut arbitration, and make the commercial arbitration normal in the country. Many litigants select the Indian Arbitration for sentencing.\textsuperscript{115}

Issuance of the 1996 Act repeals the 1940 Act. The main purpose of this law was paving the way for activity and determining a framework to resolve disputes quickly. This law was seeking trust in India. This law was also looking for foreign

\textsuperscript{114} Fali S. Nariman, India and International Arbitration. (N.ed). (s.l). (s.n), (n.d). p 372.
investment and giving trust to the international investors in the Indian trusted legal system as well as preparing a tool for dispute resolution faster. In addition, this law had two unusual features that made it different from the (UNCITRAL) model law on international commercial arbitration 1985 (with amendments adopted in 2006).

The first feature is that the UNCITRAL model law on international commercial arbitration 1985 (with amendments adopted in 2006) law only and only matches with the World Trade Arbitration. While the 1996 Act is in compliance with both international arbitration and local arbitration.

The second feature of the 1996 law emphasizes on the limited judicial intervention and strengthens this goal by guiding the parties to join the arbitration, particularly in the local arbitration.

According to Article 8 of the 1996 Law, judicial intervention in arbitration is limited and specified. However, the law has considered an exception to enter arbitration – based on the arbitration subject and assigning an arbitration board.

Act of 1996 performed fundamental changes; so that full judicial cases law much as 56 years had been accumulated.

Unfortunately, there is no extensive review and consideration to the past changes compared with current changes.

We can say that the Government of India passed the Act of 1996 as a must. Before the parliament refers this law to the Legislative Association, this law survived in another way.

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2.3.2.5. Objectives of the 1996 Act

This law based on its nature was unique and transformative and didn't include everything. However, it was widely effective compared to their former laws, such as the 1940 law, so that, this law led to the local arbitration and the enforcement of foreign arbitration decisions. This law had also new features in the field of effectiveness and success that was built based on the model of the United States Law. It caused this law to be consistent with the Law of the United Nations Association, which is now based on international trade law. The main objectives of this law are as follows:

1. Full coverage of global trade and arbitration, its convention and also local arbitration and agreements.
2. Taking the necessary decisions to implement the arbitration that should be fair, active and able to respond the needs identified in the arbitration.
3. Emphasizing that the arbitration board must pave the way for ruling by the arbiter.
4. Emphasizing that the arbitration board still operates within the limits of his authority.
5. Preventing the courts from censoring the arbitration process.
6. Allowing the arbitration board to apply mediation agreement or other executions at the time of arbitration in order to encourage dispute resolution.
7. This law stresses that all final decisions of the arbitration are binding, just as it is customary in court.
8. Emphasizing that the dispute resolution agreement by the parties is the result of arbitration and it is valid. It is also approved based on the conditions disagreed in the arbitration board.
9. Aimed at implementing international decisions, all decisions of the arbitration in one of the two countries related to international agreements on foreign arbitration is performed in India and foreign decisions matches with it.\textsuperscript{121}

Association of Indian Law prepared is part of the 1996 arbitration law enforcement experience and then proposed some revisions.\textsuperscript{122}

2.3.2.6. The period after 1996 Act

On the basis of the recommendations of the Association, Indian government proceeds to arbitration and agree with it in the 2003 law. It also recommended revising the 1996 law in Parliament, especially after all the recommendations of the Association were accepted.\textsuperscript{123}

In addition, more specialized sections of arbitration increased public interest to the arbitration that includes the activity of arbitration-specific sections in India; such as structural disputes, marine activities, goods, service trade also There are also more specialized branches in India including property, intellectual, company law and consumer protection law. Arbitration in India will be more dynamic and more attractive.

And in the latter case, India has to be careful about the Amendment Act of 1996 to be entirely dominating foreign and local arbitration. The 1996 law is an exemplar law which is consistent with foreign and local issues. "The use of legal model on local and international arbitration will lead to chaos and disorganization.\textsuperscript{124}

Moreover, "UNCITRAL model law on international commercial arbitration 1985 (with amendments adopted in 2006) is not determined about the issue of local...
arbitration in India, because dual systems call the jurisprudential mixture between the first and second sections of this law."

2.3.2.7. Act of 2015

If the Indian legislature allows the government to implement such changes - in terms of proposals, then we can say that India is able to have premier face of the international arbitration.

Review of the arbitration act (1996) of India is possible through compliance with the 2015 law that was issued by the President of India on 23/10/2015. This decision made several changes in the law that was about something like delay and debt payment. This decision is an attempt to consider arbitration as a means to resolve commercial disputes, and also make India as the global trade arbitration center. Indian arbitration seeks to be used easily by these reviews and also become active and dynamic in this area. The big changes made by this law are summarized in its emergence.126

125 Ibid.