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Arbitration of oil contracts in oil-producing Arab countries

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Abstract :

In this article, the principles of governing arbitration in Arab oil contracts are investigated. It focused on the independent nature of arbitration and the distinguished characteristics that make an arbitration the most preferable means to settle international economic disputes. As well as it sheds light on the arbitration agreement which included in the oil contracts in a way that excludes this agreement from the legal rules that usually prevent such agreements from developing in scope and content on the one hand, whereas, on the other hand, the article takes a look on the arbitration tribunal (An arbitral tribunal) that resulted from the arbitration agreement that included in the oil contracts which have a special characteristics that distinguishes them from any other contracts in other economical and trading ventures.

The article concluded it is better for the disputes resulting from the oil contracts to be resolved via arbitration thus, arbitration remains the most popular method for resolving international trade disputes. Additionally, settlement of disputes for issuing the arbitration decision should be acceptability by both parties in conflict, if arbitration is established by agreement, it is more flexible there is a greater chance of implementation. Finally, the researcher recommends arbitration as the only viable tool in settling conflicts/disputes of oil contracts in oil-producing Arab countries because it is generally faster and less expensive than going to court, most reliable, less expensive and save a lot of time by allowing resolution in weeks or months.

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Keywords:

Arbitration, Oil contracts, Oil-producing Arab countries, Oil Contract Disputes

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Introduction

"Arbitration of oil contracts in oil-producing Arab countries". The two things i.e. 'arbitration and oil contracts' in the article are important issues for major economic relations. The scope of arbitration as a means of resolving dispute is very wide but it is highly concentrated. For nearly half a century since the beginning of the revolution on economic disputes which transcends across state geographical borders was up for the arbitration. The advantages, features of arbitration and the experience of arbitrators to carry out such projects attract huge capitalists for the consideration of large financial dispute projects. Since the neutrality and complete independence, in addition to protecting secrets of disputes before resolution processthat would sow confidence in the arbitral process.

Arbitration remains the primary dispute resolution mechanism in international trade with the rapid growth of its rules in line with remarkable economic development, it includes substantive rules that confer the special autonomous nature on arbitration from any other means that parties use to resolve the conflict at national or international level barrier-free.

The international commercial arbitration is subject to international systems arising under international commercial contracts. It is used as an alternative to litigation by the terms previously agreed upon by the contracting parties, rather than by national legislation or procedural rules at the level which exceed the Geographical borders of states. Thus, at the local level, oil provides many services for the state, thus it can evolve and grow steadily and rapidly if oil utilized appropriately; and this is what led to the development and growth of the so-called developing countries.

Although oil was discovered in foreign countries (non-Arab countries), however, the continuous consumption of oil which led to the development of these countries became a necessity for continuous development. Oil exploration during the colonization of Arab countries led to the discovery of vast oil deposits in the region, while the colonialist shared their experience in oil management with such countries. Arab oil production constitutes more than half of the world's oil production, oil companies flocked to the rulers of Arab countries in order to sign

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contracts with them, whether financial allurements or political and military coercion. The foreign oil companies in such an investment find great ease, especially with a continuous increase in the cost of extracting and exporting oil directly to their countries for refining and distribution.

Background of the study

The field of international arbitration has in recent times, experienced numerous changes, including in terms of legislation, jurisprudence and practice. Arbitration in experts' opinions, it is the simplest, effective and realistic method to dispute settlement especially in oil-producing Arab countries, where disputes in oil contracts are rampant. Oil-producing Arab nations are supported by a common source of natural and economic resource: oil. Unfortunately, many these countries have been unable to utilize this resource to its full potential due to tensions, conflict and crises over contracts. The increase of these obstacles has resulted in the region being flooded with many conflicts, as other legal paradigms such as the Court of Law have been actively involved in dispute settlement.

The article seeks to recommend the use of arbitration as the only viable and pragmatic method for resolving oil conflicts in oil-producing Arab Nations, in contrast, there are other legal methods that are costly and time consuming.

Problem Statement

The high amount of disputes in oil-producing Arab nations negatively impact on the global oil market. Most of these disputes are settled in court, that are costly and time consuming which ultimately slows down negotiations processes or terminates meaningful contracts. The absence of arbitration in resolving disputes resulted to many oil conflicts between contractors and governments which is unproductive to the region. In this study, the most important legal matters of arbitration in Arab oil contracts are investigated. It focused on the independent nature of arbitration and the distinguished characteristics that make an arbitration the most preferable means to settle international economic disputes.

Research design and methodology

In this article, the researcher collected both his primary and secondary sources of data from documented materials, which makes the research a quantitative research work. A quantitative research "is a method of finding and collecting data via documented and researched materials. This method is best used by comparing, contrasting, reviewing, extracting and analysing such data with an aim to arriving at a specific conclusions and proffering solutions to a desired

research problem”¹ while a qualitative research is research work that is carried out by actual field participation on the part of the researcher. Here; observation, questioners, Interviews, etc. are key methodologies via which the researcher goes about collecting raw data. Such data are called primary sources of data because they are accessed first hand by the researcher².

In this research work, the researcher used to the quantitative method to collect data. Thus, both primary and secondary data sources in this work were collected from documented materials. We cannot talk accurately talk about arbitration and legal issues without analysing and comparing a wide range of materials written by experts in this peculiar field.

Data Collection methods employed in the research

Primary data

Primary data will be analysed not necessarily with statistics of the arbitration process in oil producing Arab states, as the research work focuses on the conflicts in oil-producing Arab nations over oil contracts to provide solutions that will help resolve such conflicts via the legally recognized method of arbitration. This indicates that the costing and other field statistical analysis will not be relevant to this study.

Important information will be collected with feedbacks from experts in the field of oil/energy and contractors who have been participated in actual contracts in the region, though books and online sources but not through interviews, participation, questioners or other known qualitative methods.

Secondary data

Secondary data collected in the form of other lesser documented materials. This could be as a result of the authenticity of the information contained in such materials, i.e data collected from books written over years ago. Some of this secondary sources could be books, oil journals, internet and from other online sources and newsletters which may be less reliable in terms of information. This does not mean that such information arse not useful, but it only means that the primary or otherwise recent materials employed in this study, are more reliable.

These research data were collected via the following methodologies

JOURNALS/ARTICLES: Several journals written by experts in the field of oil, especially those concerning the oil-producing Arab countries.

BOOKS: Books written by experts in the field of oil.

¹Uwe Flick, AnIntroduction to qualitative Research (6th ed, SAGE, London 2018).

²Uwe Flick, Introducing Research Methodology: A beginner’s Guide to Doing a Research Project(2nd ed, SAGE, London 2015).

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INTERNET SOURCES: Vital and current information will also be taken from internet sources as pertaining the structure of the industry in Arab countries and information's regarding oil disputes.

Review of related study

Arbitration in oil contracts

The nature of arbitration

Definition of "arbitration"

There are many definitions of "arbitration" provided in legal, judicial and jurisprudential texts.

Jordanian jurisprudence defined arbitration as an agreement where the parties refer their existing or future dispute to one or more persons for the decision without going to the competent court, that made the arbitration at the present time of the features that make it more acceptable by individuals to settle their disputes from resorting to the jurisdiction of the state³. Egyptian legislation defined the arbitration agreement in arbitration law for civil and commercial matters as *"Agreement by which the two parties agree to submit to arbitration in order to resolve all or certain disputes which have arisen or which may arise between them in connection with a defined legal relationship, whether contractual or not"*⁴

Judicial definition of arbitration is the willingness of the parties not to submit their dispute to the competent courts and their desire to establish a special court of their own choosing and to determine between them the merits of the dispute and the law they wish to apply⁵.

Arbitration is a legal technique in which a dispute is submitted, by agreement of the parties to arbitration all or certain disputes to one or more arbitrators who make a binding decision on the dispute. The main advantage of arbitration is the possibility to have a tailored made dispute resolution because it allows the parties to resolve their dispute outside of State courts, i.e., without litigation. It is clear from these definitions that arbitration must be an agreement referring the

³ Al-Khazaleh Shams & Momani Sayel. (2018). The Jordanian Legal Regulation for Implementing the Arbitral Award as an Executive Bond in accordance with the Jordanian Execution Law No. 25 of 2007. *Journal of Politics and Law*. 11. 109. 10.5539/jpl.v11n4p109.

⁴Article 10 of the Egyptian law of arbitration for the civil and commercial matters No. 27 of 1994 Available at: < <https://www.wipo.int/edocs/lexdocs/laws/en/eg/eg020en.pdf>>

⁵ Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International, Alphen aan den Rijn 2014).

dispute to arbitration. There must be or is likely to be a dispute, and there must be one or more arbitrators competent to settle the dispute⁶.

The legal nature of arbitration

The legal nature of the arbitration award has always been the subject of jurisprudential controversy. Four different theories have been advanced forward in this field. These theories describe arbitration as having the nature of agreement, judicial theory, a mixture that combines the previous two theories with a private or independent theory. In fact, disagreement to determine the nature of arbitration, especially whether a contractual or judicial nature directly affects the award⁷.

The agreement theory:

The agreement theory describes arbitration as an agreement based on the principle of willpower, in other words arbitration is based on the will of the parties, expressed in the agreement or contract, whereas according to an agreement to refer the dispute to the arbitral tribunal, the parties waive many of the guarantees that the judicial system achieves. The award that ends this dispute is binding on them because it is one of the effects of the arbitration agreement. The agreement is the basis for determining arbitration and the awards to be issued⁸.

The judicial theory:

The judicial theory describes arbitration as compulsory jurisdiction, which compels adversaries if they agree to resort to it as a means of resolving their disputes, also, arbitration is inherent to the jurisdiction of the state, but it is a special justice system that represents the parties who resorted to arbitration and not to the state, Likewise, the State recognizes arbitration through the legislation that governs it⁹. However, the difference between an arbitrator and a judge is that an arbitrator is a private judge who carries out private justice and a judge is a public judge who carries out public justice. The private judge does not enjoy the full powers of the public Judge.

⁶ International Trade Centre (ITC) Settling Business Disputes: Arbitration and Alternative Dispute Resolution - 2nd ed. Geneva: ITC, 2016. XI, Available at:<http://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/Arbitration_English_Full%20A4_Low-res.pdf>

⁷NayefAbdiljalilElhamaideh, Mohammed Mouse AwadAlsoeleminand MuradMhmoud Yousef Shanikat, IMPLEMENTATION OF THE PROVISIONS OF FOREIGN ARBITRAL AWARDS BETWEEN THE THEORY AND PRACTICE (European Scientific Journal November edition vol. 8, No.25).

⁸Ibrahim Ahmed Ibrahim, Private international arbitration (Ain Shams University 2000)

⁹ Ahmed Abu al wafa, Optional and compulsory arbitration (Knowledge Plant in Alexandria 2001)

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Combination of two previous theories:

This theory arose due to the failure of both the agreement and the judiciary theory, and its coverage of the arbitration procedures. Therefore, the content of this theory is that the arbitration process includes elements of agreement and another element of a judicial nature, in other words, arbitration is mixed or composite. Arbitration is a compromise between the agreement and the judiciary. It is a mixed system that begins with a contract and ends with an arbitration award. The nature of this system requires implementation of both the contract rules and the rules of the judicial system.

The private or independent theory:

The private or the Independent theory, which states that the arbitration award has a special nature that requires consideration of a mechanism independent of the agreement and the judiciary in light of traditional principles of trying to link the contract or the award that issued by the judiciary. Consequently, the legal nature of both or either of them cannot be determined.

The nature of the oil contracts

State sovereignty over oil wealth

Ownership of oil wealth

Ownership of oil wealth either for the state or individuals according to the legal system adopted by the State, before that, will take a quick look at the ownership of the oil wealth under Islamic law.

the trend of Islamic jurisprudence increases in three trends in order to determine the ownership of oil wealth, some recognize private ownership, others recognize public ownership, and another recognizes state ownership.

The trend that recognizes private ownership is based on two principles. First, ownership of the land surface extends just so far in each direction upwards or downwards vertically where the owner is able to bring and retain under their effective control, and includes all things growing on or affixed to the soil, such as trees, crops and buildings also included all the minerals in the soil. Second is that what there is in the ground is followed by the terms of the rule of property. Many scholars of Islamic jurisprudence have supported this trend views and interpretations. Thus, if the owner of the land found oil beneath of his land, in this case, he has the right to disposition, exploitation and use¹⁰.

¹⁰ Gary Flomenhoft, (2018). Historical and Empirical Basis for Communal Title in Minerals at the National Level: Does Ownership Matter for Human Development? Sustainability. 10. 1958. 10.3390/su10061958.

While the trend that recognizes public ownership of the oil wealth stems from giving the right to own something after possession, seizure or taking, this trend is supported by many opinions and interpretations of scholars of Islamic jurisprudence.

The third trend recognizes the state's ownership of oil wealth. It gives the President the right to dispose of, exploit and use oil wealth for the benefit of citizens. This trend is also supported by many opinion and interpretations of scholars of Islamic jurisprudence¹¹.

Ownership of oil wealth is limited according with man-made legislation in two trends, whether it is state ownership or the ownership of the land owner. The trend in which the legislation grants ownership of the state's oil wealth gives the state or its president the right to dispose, use, and exploit is the most widespread trend in Arab and foreign countries.

Hashemite Kingdom of Jordan is one of the Arab countries that have adopted this trend as well, where its Constitution laid a rule that the *"treaties and agreements which involve financial commitments to the Treasury or affect the public or private rights of Jordanians shall not be valid unless approved by the National Assembly. In no circumstances shall any secret terms contained in any treaty or agreement be contrary to their overt terms"*¹².

There's no doubt that the oil agreements concluded by the state or any of its authorities involve financial obligations for the treasury. According to the Kingdom of Saudi Arabia, it recognizes that the oil wealth belongs to the people thus, the State dispose of its wealth and resources on behalf of their peoples, whether by the president or by the public institutions that hold oil agreements with foreign companies, through granting these companies privileges to allow an investigation, exploration and drilling to the discovery of oil wealth and exploitation and use¹³.

The Republic of Iraq recognises that oil wealth belongs to the government that operates and exploits through its public institutions¹⁴. The oil wealth in the State of Bahrain is owned by the state, even if it is found in the soil of the land with

¹¹Ibid

¹²Article33 (2) of the Constitution of Jordan, Available at:

<http://www.kinghussein.gov.jo/const_ch4.html>

¹³The first article of the Royal Decree which provides for the ratification of the concession agreement to extract oil signed between the Government of Saudi Arabia and the Arabian American Oil Company. U.S. (1933 No 1135)

¹⁴ Ministry of oil and minerals in Iraq.

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private ownership¹⁵. The state of Kuwait considers that the oil wealth belongs to the President, who works for the country's benefit¹⁶. France is one of the foreign countries adopted trend of ownership of the oil wealth, as the mining law returns the oil wealth to the State that is entitled to grant investments under a concession by the State¹⁷.

State sovereignty over oil wealth under the resolutions the General Assembly of the United Nations

Sovereignty is the full right and power of a governing body over itself to do everything necessary, sovereignty is the exercise of power by a state. State sovereignty over its territory includes people and money; such as making, executing, applying laws, imposing and collecting taxes; and forming treaties or engaging in commerce with foreign nations. It is also that a sovereign state is neither dependent on nor subjected to any other power or state.

The Charter of the United Nations, through its members, seeks to achieve several purposes. First, it is to stress the principle of the sovereign equality of all its Members¹⁸. In its internal form, sovereignty is defined as "the permanent and absolute authority of the political community, as well as the state has the right to exercise its legislative, executive and judicial powers in complete freedom as long as it does not go beyond the limitation of its international obligations¹⁹.

The principle of the sovereign equality of states has the following consequences:

- Equality before the law between states.
- Exercising sovereignty in light of the international commitment.
- Respect the personality of the state and its independence.
- States enjoy the rights to exercise full sovereignty without the slightest interference.

manifestations:

- A state that has the jurisdiction over its territory.
- The decision-making in their international relations.
- Political independence, as an aspect of sovereignty, means the right of people to self-determination without any interference in affairs.

¹⁵ Ministry of development and industry in Bahrain.

¹⁶From the concession agreement signed between Sheikh Ahmed Al-Jaber Al-Sabah and the American Independent Oil Company 1948.

¹⁷Articles L111-1, L131-1 of the Code Minier (the French Mining Code).

¹⁸Article 2 (1) of the Charter of the United Nations, Available at: <
<https://www.un.org/en/sections/un-charter/un-charter-full-text/>>

¹⁹Ahmed Abul-Ela, Principle of Discrimination Compensatory for Developing Countries in the International Law of Development (1st Ed Arab Renaissance house 1998).

- A sovereign state is not economically independent unless it is able to control wealth and nature resources²⁰.

The jurisprudence of modern international law focuses on the sovereignty, political and the economic aspects, including the natural wealth of countries²¹. Economic sovereignty under the Resolutions of the General Assembly of the United Nations was dealt with in the texts of the United Nations and its organs. The first thing that was discussed the issue of sovereignty in 1953, when the General Assembly of the UN issued Resolution No. (523 / 6) affirming the right of States to freely use natural wealth, and recommended to member states do so to facilitate the development of natural resources through trade agreements without attacking the rights of developing countries' sovereignty over their natural wealth or the development plans²².

As discussions continued between the developing countries that imported the natural wealth owned by foreign capital and the developed countries that exported the capital, several decisions were issued after that, in 1952 the General Assembly issued Resolution (No. 626) which states that *“that the right of peoples freely to use and exploit their natural wealth and resources is inherent in their sovereignty and is in accordance with the purposes and principles of the charter of the united nation”*.

1- Recommends all member states, in the exercise of their right freely to use and exploit their natural wealth and resources wherever deemed desirable by them for their own progress and economic development, to have due regard, consistently with their sovereignty, to the need for maintaining the flow of capital in conditions of security, mutual confidence and economic co-operation among nation.

2- Further recommends all states to refrain from acts, direct or indirect, designed to impede the exercise of the sovereignty of any state over its natural resources”²³.

Taking into account the importance of sovereignty in the economic sphere, as well as the need to encourage developing countries to make the proper use and exploitation of their natural wealth and resources that have always been

²⁰Ibid

²¹James N. Hyde, permanent sovereignty over natural wealth and resources (A.J.I.L, 50, 854,(1956).

²² UNGA Res. 523(VI) (12 January 1952) Available at: <<http://www.worldlii.org/int/other/UNGA/1952/>>

²³UNGA Res.626 (VII) (21 December 1952) Available at: <<http://www.worldlii.org/int/other/UNGARsn/1952/171.pdf>>

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targeted by industrialized countries, the General Assembly issued a Resolution in 1958 (No. 1314) guaranteeing the formation of the Permanent Sovereignty Committee over Natural Wealth to specialize in conducting specialized studies regarding the sovereignty of States over their natural wealth and resources²⁴, on the basis that this sovereignty is one of the components of the fundamental right to self-determination.

In 1962 the General Assembly of the United Nations issued Resolution No.1803 in fact it is permanent sovereignty over natural resources, while this resolution referred to the decisions that preceded it, considering that any action in this regard must be based on the recognition the inalienable right of all countries to freely dispose of their natural wealth and resources in accordance with their national interests, while respecting the economic independence of countries. The Assembly considers that there is no prejudice to the position of any Member State on any aspect of the issue of the rights and obligations of States and Governments with respect of property acquired before the accession to complete sovereignty of countries formerly under colonial rule, In addition to emphasizing the necessity of economic and financial agreements between developed and developing countries without prejudice to the principle of equality and the right of peoples and nations to self-determination, moreover, with special attention given to promoting the economic development and independence of developing countries through the exercise by developing countries of sovereignty over their natural wealth²⁵.

In this resolution, The Assembly declares the rights of the member state to exercise permanent sovereignty over its natural resources for the benefit of its national development and the welfare of the people of the country concerned, it should also have right of explore, develop and dispose of these resources, In addition to importing the foreign capital required for these purposes, while it must be compatible with the rules and conditions that peoples and nations consider freely necessary or desirable. In cases where authorization is granted, imports and profits on this capital are subject to its terms, thereof, by applicable national legislation and international law. The profits achieved in the proportions agreed upon shall be freely shared between the investors and the recipient country, with due diligence to ensure that there is no weakness in the sovereignty of that country over its natural wealth and resources, establish nationalization, expropriation or confiscation on the basis of public utility, security, or the national interest recognized as overcoming individual or purely

²⁴UN Resolution, 1314 (XIII) 1958 Available at: <
<https://research.un.org/en/docs/ga/quick/regular/13>>

²⁵ UNGA Resolution, 1803(XVII)1962 Available at:
<<https://www.ohchr.org/Documents/ProfessionalInterest/resources.pdf>>

private interests, whether domestic or foreign. In such cases, the owner will be paid appropriate compensation, in accordance with the rules in force in the country that takes such measures in the exercise of its sovereignty and in accordance with international law. In any case where the issue of compensation arises controversy, the national jurisdiction of the State taking such measures is exhausted. However, when the sovereign states and other interested parties agree, the dispute should be settled by arbitration or international arbitration. The free and beneficial exercise of the sovereignty of peoples and nations over their natural resources must be promoted on the basis of sovereign equality. International co-operation for economic development in developing countries should enhance their independent national development and be based on respect for their sovereignty over their natural wealth and resources. Violation the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the principles of the Charter of the United Nations. In this resolution, the General Assembly took into account that foreign investment agreements freely entered into by or between sovereign States must be respected in good faith, States and international organizations strictly and sincerely respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter and the principles set forth in this resolution²⁶.

In 1966, the General Assembly affirmed by Resolution No. 2158 the role of foreign capital in the process of development that possesses natural resources and enjoys permanent sovereignty over their natural resources²⁷.

The General Assembly also identified in 1970 by Resolution No. 3016 the State's right to sovereignty over its natural wealth in their territories whether underground or above the water or in the continental shelf to its national legislation²⁸.

In 1974 The General Assembly recognized Resolution No. 3281 of the Charter of Economic Rights and Duties of States that every State has the right to exercise full permanent sovereignty over its natural wealth and economic activities and to exercise it freely. Every country has the right to regulate and exercise authority over foreign investment, and no country may be compelled to grant preferential treatment to foreign investment in order to regulate and oversee the activities of

²⁶ Ibid

²⁷Fatouros, A. A. (1968) Permanent Sovereignty Over Oil Resources, a Study of Middle East Oil Concessions and Legal Change, by Muhamad A. Mughraby; The Law of Oil Concessions in the Middle East and North Africa, by Henry Catton; The Evolution of Oil Concession in the Middle East and Africa, by Henry Catton," Indiana Law Journal: Vol. 43: Issue4, Article 8. Available at: <<https://www.repository.law.indiana.edu/ilj/vol43/iss4/8>>

²⁸ Ibid

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transnational corporations within its national jurisdiction and take measures to ensure that these activities comply with its provisions, the practice of nationalization, expropriation or transfer ownership of foreign property, in which case an appropriate compensation must be paid by the country that adopts such measures²⁹.

At the international level, Declaration on the Granting of Independence to Colonial Countries and Peoples Adopted by the United Nations General Assembly Resolution No.1514 in 1960, also affirmed that peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising from international economic co-operation, on the basis of the principle of mutual benefit and international law³⁰.

The International Covenant on Economic, Social and Cultural Rights which was adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) in 1966 entry into force on January 3, 1976, in accordance with article 27" *that all peoples, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means*"³¹.

Legal nature of oil contracts and their legal protection

The legal nature of oil contracts

Before discussing the legal nature of oil contracts, it will be helpful to distinguish between an oil contract such as concession contracts, participation contracts and entrepreneurship contracts.

Concession contracts (old): These contracts were concluded between oil producing countries and foreign oil companies, which gave the right to use oil for investment and private assets in exchange for paying money to producing countries. Often, these contracts are extended for a period of 75-82 years³². The entire oil-producing country is on the ground, giving oil companies the right to

²⁹ Ibid

³⁰ UNGA Res. 1514 (XV) 1960 Available

at:<http://en.wikisource.org/wiki/United_Nations_General_Assembly_Resolution_1514>

³¹UN General Assembly, International Covenant on Economic, Social and Cultural Rights adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27.

³²Ali Kadhim Jawad Al- Fanahrah, Dr. Noor Farihah Binti Mohd Noor and Dr. Ahmad Bashawir Bin Haji Abdul Ghani, (2015) The Legal Natural of Oil Contracts. 9. 43-49.

set prices unilaterally. The entire comprehensive land oil-producing state, giving the oil companies the right to fix the prices unilaterally. These companies dominated the stages of the oil industry as a whole. The oil-producing countries that were a party to these contracts are Saudi Arabia, Iraq, Bahrain, Qatar and Kuwait³³.

Modern oil contracts such as a participation contracts and entrepreneurship contracts, are very different from the old oil contracts (concession contracts). Participation contracts are defined as agreement concluded between the oil-producing countries represented in one of their institutions or bodies affiliated with national and foreign oil companies that obtain the right to concession and the exploitation of oil wealth in limited areas in the territory of the host country. So that government oil producers can control the work of foreign oil companies, as well as the benefits of large agreements for the benefit of host oil-producing countries³⁴. More importantly, these oil companies do not recoup total spending on research and exploration in case of failure³⁵. The oil-producing countries that signed the participation contracts are Iran, Iraq, Libya, Venezuela, the United Arab Emirates and Saudi Arabia³⁶.

Piece-work contracts are the latest legal method to invest in an oil- producing state for oil wealth. Piece-work contract is executed by the foreign oil company on behalf of national company of oil-producing countries for oil operations, detection and extraction, preparation of production, without any privilege to foreign oil company on oil so that the state retains full control in terms of oil ownership without contractor³⁷. The contractor alone bears the burden of loss and the risks of research when it does not succeed, in contrast to the discovery of oil to which the host country is obligated to pay all costs and expenses³⁸. Therefore, the countries that concluded these oil agreements are Mexico, Argentina, Indonesia, Venezuela, Iran, Iraq, Egypt, Syria, Qatar and the Emirate of Abu Dhabi³⁹.

³³ Mana Saeed AL Otaiba, *Petroleum and the Economics of the United Arab Emirates* (Otaiba, 1990).

³⁴ Khaled Mansour Ismail, *Problems Arbitration in Oil Contract Disputes* (Al Manhal, 2015).

³⁵ *Ibid*

³⁶ *Ibid*

³⁷ Harraz, Hassan, (2016). *PETROLEUM LAWS: TYPES OF INTERNATIONAL PETROLEUM CONTRACTS*. 10.13140/RG.2.1.1357.4007.

³⁸ *Ibid*

³⁹ Mansour Al-Saeed, *Legal Protection of Economic Development Agreements*, *Arab Law Quarterly* Vol. 17, No. 2 (2002), pp. 150-176.

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Characterization of the oil contracts

There are characterizations of oil contracts, in accordance with legal regulations of States.

Under the legal regulations there are international nature, administrative nature, nature that combines the previous two natures, nature that describes the oil as a single work and finally the subjective nature (the most correct opinion).

International theory: Where the supporters of this theory aim to remove oil contracts from the control of the domestic legal system of the oil-producing countries to be subject to the international legal system as international treaties, as well as to increase the position of oil companies from the rank of a legal person of an international legal person to an international legal person itself on the one hand, on the other hand, in order to assume international responsibility of the host countries if evacuated in the implementation of any obligation under the oil contract⁴⁰. Indeed, the arrows of criticism to this theory, and the most important thing is that the foreign investor who contracted with the host countries is not considered a subjects of international law as it is considered a party to an international treaty and then subject to the international legal system. This was the position of the International Court of Justice in the Anglo–Iranian Oil Company case, the ruling in 1952, in which the Iranian government and Anglo - Iranian Oil Company signed a deal in 1933. This Agreement was applied to nationalization in Iran in 1951, and accordingly, the UK adopted the case of this company and set up a case against Iran, including its right to diplomatic protection and that the court claims that the agreement is a concession contract, while the Court held that the United Kingdom was not a party to it, even if a concession contract - contrary to what the United Kingdom demanded - was negotiated by Council of the League of Nations⁴¹.

Administrative theory:

The administrative contract is one of the most important commercial and legal means used by administrative bodies to obtain the construction, goods or services needed to meet the needs of public utilities.

This theory adapts the oil contract as an administrative contract and is the origin of the administrative concession contracts.

⁴⁰LukiBayuasiNammei&AbubakarNusrat. (2016). Dispute Settlement in the Oil and Gas Industry: Why is International Arbitration Important? Journal of Energy Technologies and Policy. Vol.6, No.4, 2016. 30.

⁴¹ United Nations, a summary judgment, advisory opinions and orders issued by the International Court of Justice 1948 -1991, Case No. 16.

In order to adapt the oil contract as an administrative contract, three conditions must be met⁴²:

1. Both parties to the contract must have legal personality.
2. That the contract be linked to the management of a public facility.
3. The contract must include exceptional conditions that are unfamiliar with private law contracts.

With regard to the first condition, the State or one of its institutions must be a party in the oil contract with other Contracting.

With regard to the second condition in which the owners of this theory believe that the oil contract is an administrative concession contract and not a private law contract, on the basis that the purpose of the contract is to achieve a public benefit⁴³. In addition to that the oil contract represents the oil sector, so it is considered a public establishment even if it is not managed by the state that has the right to supervise, control and confiscate when necessary⁴⁴.

The third and final condition for manifestations of the public authority is exceptional and uncommon to private law contracts included in the administrative contract⁴⁵. This theory found the existence of these aspects in oil contracts. These aspects control the legislative power of the state to conclude the oil contract as an executive body by issuing a law granting monetary concession⁴⁶.

This theory did not escape criticism and the most important criticism is that the oil contract does not provide a service to the public as it is the case in the administrative concession contracts. Where the oil contract required the company to mainly produce and export oil abroad after its discovery⁴⁷.

Mixed theory (that combines the previous two theories)

This theory states that the concession has a mixed or composite nature that follows both public and private law because it incorporates elements of public

⁴²Sararu, Catalin-Silviu. (2014). The interpretation of administrative contracts. Juridical Tribune - TribunaJuridica. 4. 152-156.

⁴³GhassanRabah, International commercial contract (house of Arab ideology, Beirut 2007)

⁴⁴Ibid

⁴⁵Mohamed A.M. Ismail, International Investment Arbitration: Lessons from Developments in the MENA Region (Routledge, 2016)

⁴⁶Ali Kadhim Jawad Al- Fanahrah, Dr. Noor FarihahBintiMohd Noor and Dr. Ahmad Bashawir Bin Haji Abdul Ghani, (2015) The Legal Natural of Oil Contracts. 9. 43-49.

⁴⁷Mansour Al-Saeed, Legal Protection of Economic Development Agreements, Arab Law Quarterly Vol. 17, No. 2 (2002), pp. 150-176.

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authority into administrative contracts and known elements of private law contracts, and the agreements here; they are procedures of a dual legal nature⁴⁸ where the administrative organizational elements are mixed with contractual elements; the administrative elements are a form of common law while the contractual elements are a form of private law⁴⁹. Elements derived from the common law in contracts are exceptional methods enjoyed by the public legal person as a party to the contract that is not unfamiliar with private law contracts must bypass the oversight authority, supervision and guidance that should include a broader authority than that. The power to amend a contract is included in the will of the individual and the authority to terminate the contract for the public benefit and authority to the method of punishment by the will of the individual⁵⁰.

This theory has been rejected by oil-producing countries that want to keep oil contracts under the umbrella of common rather than private law. In addition, the mixed theory is only a partial solution to the contractor's adjustment problem as a contract for oil investments and oil development⁵¹.

Theory of unilateral action⁵²:

This theory aims to bridge the rift between state contracts and its individual procedures, in light of the legislation that encourage the investment of foreign capital. The first application of this theory is the mining concession in France on the basis of the will of the state granting a mandate including the mining concession in accordance with the law that regulates this process.

However, this practice deprives the foreign contractor of some of the main benefits that it should obtain while the ratification of oil contracts often precedes negotiations on many terms of these biased contracts either with the government directly through its representatives or by a public institution by the state in order to negotiations and conclusion of contract.

Theory of the subjective nature: (the most correct opinion).

This theory argues about the legal nature of oil contracts and suggests that the issue of oil contracts should be approached from a subjective perspective.

⁴⁸Ibid

⁴⁹Ali Kadhim Jawad Al- Fanahrah, Dr. Noor Farihah Binti Mohd Noor and Dr. Ahmad Bashawir Bin Haji Abdul Ghani, (2015) *The Legal Natural of Oil Contracts*. 9. 43-49.

⁵⁰Mohamed A.M. Ismail, *International Investment Arbitration: Lessons from Developments in the MENA Region* (Routledge, 2016)

⁵¹ Mansour Al-Saeed, *Legal Protection of Economic Development Agreements*, Arab Law Quarterly Vol. 17, No. 2 (2002), pp. 150-176.

⁵² Ibid

Clauses and conditions agreed upon by the country or any of its institutions on one side and the foreign oil company on the other hand. The oil contracts in general and its various forms are nothing but a group of economic development contracts concluded by oil-producing developing countries with foreign companies with huge capital, therefore these oil contracts are the first economic development contracts⁵³.

Oil contracts that actually led to the rapid development of oil-producing developing countries, in many cases, incorporated legal concepts, whether of national or international nature. At the national level, it includes provisions related to public law and the private sectors together. At the international level, provisions contain the full sovereignty of the state over wealth and natural resources in the event of misuse. The sovereignty of use must pay fair compensation for the damage.

The legal protection of oil contracts

The oil contract must include, as one of its clauses, legal guidelines that guarantee the continuation of this contract. These legally recognised guidelines must be applicable and cover all parties to the contract. This means that the legal document becomes a standard and tool for settling or resolving a dispute that may occur during negotiations other than introducing judicial procedures. Forms of these legal guidelines will be interpreted in clauses and should be easy to interpret by all parties.

Resorting to arbitration has been present in oil contracts for many years within the Arab countries, for example, in a dispute between the ruler of Qatar and the Petroleum Development Company Ltd in Qatar in 1950, and also in a dispute between the Sheikh of Abu Dhabi and the (Petroleum Development) company (Trucial Coast) Ltd in 1952. Another scenario is the dispute between the ruler of Qatar and the International Marine Oil Company Ltd in 1953. Another example is the dispute between the Government of the Kingdom of Saudi Arabia and Aramco in 1958⁵⁴.

Barriers to the procedures of arbitration agreements in oil contracts

It may happen that one of the parties resort criticisms in order to prevent the arbitration agreement from working, whether it is a clause or compromise. One

⁵³Hafiza Haddad, *Contracts concluded between States and foreign people* (3rd Ed, University publications house, Alexandria 2007)

⁵⁴Fatouros, A. A. (1968) "Permanent Sovereignty Over Oil Resources, a Study of Middle East Oil Concessions and Legal Change, by Muhamad A. Mughraby; The Law of Oil Concessions in the Middle East and North Africa, by Henry Catton; The Evolution of Oil Concession in the Middle East and Africa, by Henry Catton," *Indiana Law Journal*: Vol. 43: Issue4, Article 8. Available at: <<https://www.repository.law.indiana.edu/ilj/vol43/iss4/8>>

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of these rebuttals is the loss of legal capacity in one of the parties that entered into the arbitration agreement or loss of legal capacity of the arbitrator for any reason or lack of competence of the arbitral tribunal to consider the merits for the dispute. The most important cases of rebuttals that may constitute an obstacle to the work of the arbitration clause are the veto of the state, a request for the judiciary, to invoke the immunity granted by/ stipulated in the rules of public international law.

Some oil-producing countries have taken firm positions on the basis of not resorting to arbitration after agreeing to it, as was the case in Iran's nationalization of the Iran- English oil company. When the International Court of Justice issued a ruling on matters considered the local jurisdiction of states. This is Iran's position once again with the Canadian petroleum company Savor, as well as the Government of Iraq, the Government of Algeria with the tribal pipelines company and the Sinclair later, and the position of the Libyan government during the nationalization of the oil industry. Likewise, the position of the Chilean government after it nationalized an investment company in 1971⁵⁵.

The arbitral tribunal in oil contracts and the conditions to be met

The composition of an arbitral tribunal

Most arbitration terms for oil contracts formulas are based on the consensus principle of the arbitration agreement - which aimed to form the arbitral tribunal by the parties to this agreement, when disputes cannot be resolved by the parties.

Number of arbitrators

Most forms of oil contracts allow each party to choose an arbitrator and the parties to the dispute must choose a third arbitrator by agreement between them⁵⁶.

The number of arbitrators in the formation of the arbitral tribunal increases that with the third or final arbitrator in the oil contract reaches five members. So much so that each party to the dispute chooses two arbitrators so that the number becomes four, and therefore they choose the final arbitrator by the Petroleum Agreement⁵⁷.

⁵⁵ Ali Kadhim Jawad Al- Fanahrah, Dr. Noor Fariyah Binti Mohd Noor and Dr. Ahmad Bashawir Bin Haji Abdul Ghani, (2015) *The Legal Nature of Oil Contracts*. 9. 43-49.

⁵⁶ Article 31 of Arbitration clause contained in the oil Convention between the Government of Saudi and American Arabian Oil Company (Aramco) in 1933.

⁵⁷ Article 55 of Arbitration clause contained in the Petroleum Agreement between the Government of the Kingdom of Saudi Arabia and the Japanese trading company of the Petroleum Ltd. in 195.

However, there is a bargaining power for the oil producing country in the oil contract, where the agreements to form an arbitral tribunal between the parties to the oil contract are weak, as in the case of Egyptian oil contracts, there are five members of the arbitral tribunal, three of whom are chosen by the oil state and one by the oil company while the fifth member is chosen to act as president⁵⁸.

Duration (of the formation) of the arbitral tribunal

The parties to the contract must agree to appoint arbitrators within a certain period. One party gives written notice to the other party to choose an arbitrator during the agree period. The agreed timeframe varies and can range from 15-30 days⁵⁹, or may rise up to 60 days depending on uncertainty. Also in the event that the president is appointed as a third arbitrator or a final arbitrator, where there is agreement between the parties to the dispute to determine the arbitrator, in the absence of a party agreement, this task must be completed before proceeding to arbitration or within 60 days at the request of the parties appointed by the arbitrators⁶⁰.

The power to appoint arbitrators in case of refrain of the parties for appointment

Although this arrangement and coordination may arise in the formation of the arbitral tribunal where one of the parties to the dispute refuses to contribute to the formation of the arbitrator or the president, this abstention is one of the obstacles to the implementation arbitration agreement in oil contracts. In such a case, what is the solution for this obstacle?

Oil contracts have recognized such obstacles, thus granting the appointment authority in the event of a refusal to the foreign party. This party may be the national judicial authority in the oil-producing country, to the legislation of oil-producing country, to the judiciary in a foreign country, to the rules of arbitral tribunal that do not belong to a state or to a person with a political or independent status.

Jordan has adopted this system in many oil contracts as one of the party to the dispute has failed to appoint an arbitrator. One example is the Convention to participate in oil exploration and production between the Jordanian Natural Resources Authority and company Medallion-Huber Jordan that *if the second party fails to appoint an arbitrator in this case, the first party shall be entitled to*

⁵⁸Article (IX) of the exploitation of the oil contract RasGharib (1) in 1938.

⁵⁹Nicholas Angell, An Overview of Legal Structures in The GCC Countries - Issues of Risk and Strength, Legal Services | (United Arab Emirates, 2006).

⁶⁰Article 31 of Arbitration clause contained in the oil Convention between the Government of Saudi and American Arabian Oil Company (Aramco) in 1933.

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submit request to the competent Jordanian court to appoint a second arbitrator "in some contracts extend the power of the Jordanian national judiciary to appoint the third arbitrator in addition to the arbitrators if no agreement reached for appointment⁶¹.

Conditions to be met in the arbitral tribunal in oil contracts

At the beginning of this study, the characteristics and advantages of the arbitration system as a means of resolving the dispute were discussed. These characteristics have made this method effective and recommended in most financial activities of a high level of commercial and economic activities.

These characteristics include neutrality, independence and C.P. experts. There is no doubt that these characteristics are qualities that the arbitral tribunal must respect. Consequently, it can be said that in addition to the eligibility requirement of the arbitrator that presumed to be fulfilled, the arbitrator must have qualities of impartiality, independence and experience.

The independence

The independence of the arbitral tribunal (members/panel) means that the arbitrator's ability to act as a neutral individual, and a decision based solely on the merits of the case can be necessary for arbitration. Consequently, the arbitrator shall not be bound by the party appointed by him with a special association, and shall not have the desire to satisfy the party appointed or neglected in favour of the dispute in general, hoping to appoint him again⁶². This condition can be considered more stringent in the case of arbitration than in the case of state court proceedings. This is simply because bias or corruption cannot be tolerated in something as sensitive and important as arbitration. *Uberriemefidei* (utmost good faith) shall be displayed at all times. The independence of the arbitrator is more than the obligation imposed on the arbitrator, it is an essential element in the function and arbitration itself⁶³.

During an arbitrator nomination, the person lacking independence is not supposed to be the nominee. The arbitrator has a financial interest in the outcome of the case, or is compensated unilaterally by the party appointing him, or any other reasons similar to doubting the independence of the arbitrator who

⁶¹ Article 20 (C) of the Convention concluded in 1997.

⁶² Diego M. Papayannis, (2016). Independence, impartiality and neutrality in legal adjudication. *Revus*. 28. 10.4000/revus.3546.

⁶³ Caroline Verbruggen, THE ARBITRATOR – AS A NEUTRAL THIRD PARTY (YOUNGICCA BLOG 22 JAN 2011) Available at < <http://www.youngicca-blog.com/?p=96> >

is not supposed to be nominated. If there is such a relationship, the nominated arbitrator is required to disclose it⁶⁴.

Neutrality

Neutrality as a component of thought does not mean substantive neutrality, but cultural, intellectual neutrality, cultural and social openness. Neutrality must be provided in oil disputes that take into account, and the nature of disputes arising from international economic development contracts, which is one of the economic and commercial disputes. Arbitration as a means of resolving disputes is not possible if every arbitrator in the arbitral tribunal is attributed to the concepts of cultural intolerance of his country, which prevents him from thinking about or adopting various other concepts.

Experience

One of the terms of the arbitrator is; experience in the subject matter of the dispute for consideration and resolution. This means that the arbitrator must have practical knowledge of the parties concerned, the legal structure of the country that deals with it and the terms of the arbitration contract⁶⁵.

The law applicable to (the subject) in oil contracts disputes

The law applicable to the subject in oil contract disputes varies from contract to another contract according to each dispute. In this regard, there are four directional classifications. The first direction supports the national law of the oil state as a law applicable to the issue in oil contracts disputes. The second direction supports the oil contract law itself as law governs the issue in oil contracts disputes. The third direction calls for the application of public international law as the law that governs the issue in oil contracts disputes, and final direction relates to the application of law across the countries as a law governing the issue in oil contracts disputes.

The national law of the oil producing state as a law applicable to the subject in oil contracts disputes.

This trend calls for the application of the national law of the oil country that governs the dispute, the subject of the oil contract, on several factors. The first is that the national legislation in oil contracts of the states, and the second is the provisions contained in the legal rules in the oil contract itself. The third trend is the jurisprudential trend as well as the judicial trend, the fourth is the arbitration

⁶⁴ UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT Dispute Settlement International Commercial Arbitration 5.3 Arbitral Tribunal

⁶⁵Dr. Abdul Aziz Khanfousi, Introduction to the Arbitration Law (Academic Book Center, 2018).

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decisions, and the other is the position of arbitration decisions issued by the United Nations in this regard.

The position of the national legislation of the oil-producing state.

The national legislation of the oil-producing contracting state with the oil company with which an arbitration agreement appears in the form of an arbitration clause in the oil contract, and it is undoubtedly effective in resolving disputes related to oil contracts because it suits the characteristics of these contracts whether in the oil producing or non-producing contracting country, as well as whether the role of the mediator for one of the oil operations. One example is the maintenance of an oil pipeline through its territory, such as Lebanon and Jordan⁶⁶.

National legislation, especially oil legislation, deals, of course, with all matters related to the oil situations and the relationships that arise from the oil industry in the Contracting State⁶⁷.

Oil states have enacted oil legislations to address aspects of the exploitation of this wealth. for instance Saudi Arabia through a system of mining in 1972 and the establishment of the Ministry of Petroleum and Mineral Resources, which works with the Saudi Arabian Oil Company (Saudi Aramco) to maintain oil wealth in all stages of exploitation⁶⁸. Likewise in Iraq, through oil and its products in 1964, and other laws, including the allocation of areas to invest in oil wealth in 1967, the establishment of a national minerals company in 1969, the establishment of a public company for consulting and planning oil projects in 1972, and the regulations and instructions related to the General Corporation for Oil Interests in Oil Wealth⁶⁹. Likewise, the Algerian Petroleum Act 1965 and the Iranian Petroleum Act 1957⁷⁰.

⁶⁶Ghassan Rabah, International commercial contract (Arab ideology house, Beirut 2007).

⁶⁷Fatouros, A. A. (1968) "Permanent Sovereignty Over Oil Resources, a Study of Middle East Oil Concessions and Legal Change, by Muhamad A. Mughraby; The Law of Oil Concessions in the Middle East and North Africa, by Henry Catton; The Evolution of Oil Concession in the Middle East and Africa, by Henry Catton," Indiana Law Journal: Vol. 43: Issue 4, Article 8. Available at: <<https://www.repository.law.indiana.edu/ilj/vol43/iss4/8>>

⁶⁸This system issued a Royal Decree No. 20/M of 1972 and the approval of the Council of Ministers Resolution No. 396 of 1972.

⁶⁹Ministry of Petroleum and Minerals in Iraq, a group of laws, regulations and instructions of the Ministry of Oil and Minerals and its affiliates.

⁷⁰Ahmed Abdul Hameed Achoc, The oil law (2nd Ed Youth league house 2006).

The legal rules in the oil contract

Regarding to legal rules in the oil contract, the national law of the oil producing country is the contract that governs aspects of the oil contract. For example, that the oil contracts stipulate the application of the national tax system of the oil-producing country to the company's operations of foreign oil, whether these operations are within or outside the oil state and relate to the sale of crude oil, refining, transportation and marketing⁷¹. Regarding the use of the workforce in terms of employing local workers and the necessity of targeting the construction of the oil project when holding training courses, however, these labour relations are always subject to the laws and regulations in force governing these relations⁷². The oil country also undertakes through the oil contracts that pay the oil companies a fair compensation as a result of the state's seizure of petroleum products and anything related to the oil company in the event of a national emergency resulting from the war or a severe case of oil shortage and its compensation in accordance with national legislation⁷³.

Position of jurisprudence and judiciary pro the application of national law of the oil producing state.

Thus, jurisprudence and the power are sympathizers to the application of the national law of the oil-producing country. Therefore, it is correct from the jurisprudence to apply the national law of the oil producing country because of an idea in favour of this law, which encourages people to contract with foreign governments, and this means subjecting this relationship to the rules of national law in this country in terms of its origin and contractual implementation and all the effects of contractual obligations⁷⁴. The oil companies invested are legal persons and are not persons in public law such as the oil States, thus the relationship between the company and the state is subject to the provisions of the rules of private and not public law, so that the countries as a person of public international law are subject to the provisions of this law⁷⁵.

⁷¹Article14 (D) of oil contract concluded between the Saudi government and the Japanese trading company of the Petroleum Ltd. in 1957.

⁷²This provision is contained in Article10 of the Agreement between Saudi Arabia and the pipeline company through the Arab countries in 1947.

⁷³Article43 of oil contract concluded between the Saudi government and the Japanese trading company of the Petroleum Ltd

⁷⁴Fatouros, A. A. (1968) "Permanent Sovereignty Over Oil Resources, a Study of Middle East Oil Concessions and Legal Change, by Muhamad A. Mughraby; The Law of Oil Concessions in the Middle East and North Africa, by Henry Catton; The Evolution of Oil Concession in the Middle East and Africa, by Henry Catton," Indiana Law Journal: Vol. 43: Issue4, Article 8. Available at: <<https://www.repository.law.indiana.edu/ilj/vol43/iss4/8>>

⁷⁵GhassanRabah, International commercial contract (Arab ideology house, Beirut 2007).

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The position of arbitral awards in oil disputes

The case in arbitration awards in the oil disputes, where in oil disputes between the Sheikh of Abu Dhabi and the Petroleum Development Company Ltd in 1951 it was emphasized that the national law of the Emirate of Abu Dhabi is the law in force, likewise in the case of arbitration between the President of Qatar and Marine International Petroleum Company Ltd in 1953 where the arbitral tribunal recognized that Islamic law applied in Qatar is an appropriate law applicable to the dispute, as well as in the of arbitration case Aramco with the Saudi government in terms of the application of Saudi law in terms of mining concessions and oil⁷⁶.

The self-law of the oil contract as a law applicable to the subject in oil contract disputes

This trend to implement the law of self-control oil contracts as a law applies to disputed issues presented in arbitration, on the basis that it has become a well-established principle in the field of international commercial contracts where the law that the parties agree to apply to these specific contracts will be in the foreground and priority compared to any other laws that apply to subject of the contract⁷⁷.

The position of the supporters of this trend

Professor Fredros, one of the strongest advocates of this trend, does not see any possibility of subordination of contracts concluded by the State with the person of private law to domestic or international law. On the contrary, it is believed that these contracts are self-sufficient with all their rights and obligations without resorting to any other law⁷⁸.

Examples of oil contracts

An example of oil contracts that refer to the application of national law and international public law is the Jordanian oil contract concluded between Natural Resources Authority and Medallion-Huber Jordan, which was mentioned in relation to the law in force; *“that Jordanian laws and the regulations issued for their implementation, including regulations relating to performance of security and effective Oil Operations carried out under this Convention in order to maintain the oil resources in the Jordan shall apply to the performance of the*

⁷⁶LorenzoCotula. (2018) Reconsidering Sovereignty, Ownership and Consent in Natural Resource Contracts: From Concepts to Practice. In: Bungenberg M., Krajewski M., Tams C., Terhechte J., Ziegler A. (eds) European Yearbook of International Economic Law 2018. European Yearbook of International Economic Law, vol 9. Springer, Cham.

⁷⁷Ali Kadhim Jawad Al- Fanahrah, Dr. Noor FarihahBintiMohd Noor and Dr. Ahmad Bashawir Bin Haji Abdul Ghani, (2015) The Legal Natural of Oil Contracts. 9. 43-49.

⁷⁸ Ibid

*contractor or oil company of Jordan under the present Convention on condition that do not contradict these laws or the regulations or any amendment thereto or explained with terms of this Agreement for the duration of effect, as If such laws or the regulations does not control or partially control any case be subject to discussion then apply the principles of international law in general*⁷⁹. Consequently, it is clear that the parties to this oil contract have agreed to give priority to the terms of this contract in another country to bypass the contradiction with its provisions of laws and regulations in the event that the national law governing what cannot be governed by the terms of the contract does not qualify and that the deficit is also the national law, then the contract refers to international law, including the principles it contains as general law.

The position of arbitral awards

Although the motive behind this theory Pactasuntservanda that made the contract itself law is only to protect foreign investment from the risk of national legislation such as confiscation of property and other measures that may harm their interests⁸⁰. In the case of Aramco with the Kingdom Saudi Arabia, where it was stressed that the contract must be based on a positive law to recognise the effects of the parties to the contract agreed to achieve, the arbitral tribunal did not recognise the trend. This was also repeated in the arbitration process between the California Asian Oil Company, Texaco and the Libyan government in 1977⁸¹.

Law across the states (public and private international law) as a law applicable to the subject in oil contract disputes

First, law across the states is traditionally defined as *“a set of rules governing the actions and events that exceed the limits of the state this law includes the rules of public international law and private international law”*. In other words, this law includes all laws that governing the actions of the state when it transcends the national scope⁸².

⁷⁹ The Hashemite Kingdom of Jordan Energy and Minerals Regulatory Commission Status Report Convention on Nuclear Safety, (August 2016), In the fulfillment of Article 5 of the Convention on Nuclear Safety.

⁸⁰ Vincent Ramette, Algerian Legal Research(2018). Available at: <<https://www.nyulawglobal.org/globallex/Algeria1.html> >

⁸¹ Ibrahim F. I. Shihata, Destination Embargo of Arab Oil: Its Legality Under International Law (The American Journal of International Law, vol. 68, no. 4, 1974, pp. 591–627).

⁸² Andrew de Lotbinière McDougall, Tuuli Timonen and Nika Larkimo, “Recent trends in International Arbitration” White & Case LLP, 2018, <<<https://www.whitecase.com/sites/whitecase/files/files/download/publications/recent-trends-in-international-arbitration.pdf>>>

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This is a departure from the scope of conflict of laws applicable in the framework of private international law on the application of general principles of law and customs and habits of trade and some uniform laws in international trade, in addition to observing the rules related to organizing the legal procedure of the international institutions for the public that have nothing to do with the national and international legal system, as well as observing international administrative law, the decisions of courts and their bodies, national and international arbitration in this regard⁸³. Consequently, the law intervenes across the states as mentioned to determine the legal basis applicable to the conflict regardless to its origin, whether domestic or international law⁸⁴.

Second, in order to implement the law across states, the parties to the oil contract provide a provision that includes the application of this law, either by mentioning the law across states or mentioning one of its content such as the general principles of law⁸⁵. This is what was mentioned in the arbitration clause in the Kuwaiti oil contract concluded in 1966 with BP Kuwait Ltd, Gulf Kuwait and the Kuwait Oil Company Ltd, which conveyed the will of the parties to this contract for implement the law across the states through legal rules of various sources, which included the legal rules from the source of international law, another from the source of domestic law, and the other that the judiciary has adopted in its decisions, as well as principles in public law.

Third, if the investor does not feel reassured about the state's actions, it can be addressed by concluding economic investment agreements the host country from which the investment companies emanate, and, accordingly, the legal rules applicable to contract disputes for the development of economic investment are determined on the one hand, and the determination of jurisdiction when there are no property rights for the host country of the investing company, the country can exercise the right of diplomatic protection and limit international responsibilities.

The law applicable to proceedings during an oil dispute

The law applicable to dispute proceedings during oil contracts differs from one dispute to another depending on what is found in the arbitration clause in the oil contract from the provisions related to this law on the one hand or that have been deleted from the other.

⁸³Ibid

⁸⁴Vincent Ramette, Algerian Legal Research (2018). Available at: <<https://www.nyulawglobal.org/globalex/Algeria1.html> >

⁸⁵Ahmed Abdul Hameed Achoc, The oil law (2nd Ed, Youth league house 2006)

National law of the oil-producing state

The national law of a Contracting State is the law applicable to procedures during an oil dispute when the parties have already agreed to apply this law, which includes in the arbitration clause in the oil contract.

Moreover, the national law of the oil-producing country is the law applicable to procedures during the oil conflict as arbitration procedures have been agreed upon the territory of the host country.

Law of the place of arbitration proceedings

It may also be the law to the country in which arbitration procedures are applied during the oil disputes, and whether or not the country is a party to the oil contract.

On the other hand, al-FaqihCattan (An Islamic jurist) does not support this view, but rather believes that a clear distinction must be made between two separate cases. In the first case, if the place chosen for arbitration is subordinate to the Contracting State, national law applies to the procedures even if it is not mentioned. In the second case, if the place chosen for arbitration is the territory of a foreign country that is not a party to the oil contract, then the laws of the state refrain from applying against their national laws on arbitration proceedings unless there is an explicit provision authorizing this, this is a manifestation of respect for the sovereignty of the Contracting State that must not be subject to the legislation of another country⁸⁶. An example is the rule that was applied in the case of the California Asian Oil Company and Texaco, against the Libyan government; where the Dboi arbitrator decided that: *“the law of the host country can be applied to arbitration between the company and a person other than the State. In the present case, the second person is the state which becomes with this solution is not acceptable”*⁸⁷.

Law across the states (public and private international law)

Here the question arises what is the situation if the law applicable to the subject of the dispute is the law across the states, what are the legal rules applied to the procedures in this case?

⁸⁶E., J. (2019) UAE Law Comparison with other GCC Legal Systems, Available at: <<https://ivypananda.com/essays/uae-law-comparison-with-other-gcc-legal-systems/>>

⁸⁷ Ibid

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The arbitral tribunal has the power to define these rules with its extensive experience and sufficient knowledge in international arbitration matters, and in most cases the arbitral tribunal exercises its powers within it and chooses the option of resorting to the adoption of what is practical in the international implementation, which is called business law. Business law deals with legal rules that are subject to law across states⁸⁸.

For example, the Jordanian oil contract that concluded between the Jordanian Natural Resources Authority and Anadarko Jordan Co, where multiple legal rules have been collected to be applied to the procedures followed during the consideration of the dispute as stipulated in Article 20 (A) which states that the legal rules of the Jordanian arbitration law apply to arbitration procedures and their inability to resort to the rules and procedures of the UN Commission on international Trade laws (UNCITRAL), and about their inability to deal with something, it is required from the arbitral tribunal to develop the procedures in particular. These rules seem to be a set of rules from various sources, so the term is covered by the law across states.

Conclusions

After completion the study arbitration in oil contracts in oil-producing Arab countries, it was very useful when exposing many aspects of arbitration in relation to the oil relationship that was widely reviewed and analysed in this brief research, and the study also concluded the expansion of some of the main issues outlined below:

In other words, arbitration contains a special technique as an independent method of dispute resolution compared to any other method, dispute resolution is independent, which is the ultimate goal of the arbitration process. Arbitration techniques have different features that offer unique conflict resolution capabilities.

National arbitration rules and others have become aware, whether they are institutional or included in the agreements, therefore, as far as possible, try to ensure free arbitration and remove any obstacles that will bring the arbitration process back, by greatly facilitating arbitration procedures on the one hand, also raising the will of the parties to the transaction subject to arbitration, and thus entice them by this method to resolve existing disputes or that may exist between them.

⁸⁸Vincent Ramette, Algerian Legal Research (2018). Available at:
<<https://www.nyulawglobal.org/globalex/Algeria1.html> >

Oil as a source of natural wealth has become the subject of a large number of oil contracts, which unanimously agree that parties must be subject to arbitration, oil remains of great importance for Oil-producing countries to give special attention in terms of their ability to exercise full power over natural resources, which include oil.

Oil-producing Arab countries are adequately aware that good use of oil is the key to progress, and therefore any legal basis must always be adhered to help them do so.

These principles and all of these rules guarantee that the oil-producing countries have full authority over their sources of wealth in order to protect the exploitation of their resources in a manner and method consistent with the public interest and economic development of their people. Countries are also obligated to pay financial compensations to foreign investors (oil companies) when they are disarmed or nationalized.

National legal rules, whether in the basic system of countries (their constitutions) or through their legislation regulating the exploitation of oil wealth, all these legal rules confirm ownership of the country's oil wealth.

For example, in the Jordanian oil contracts, it is always emphasis that oil belongs to the country. While it has become doubtful recently whether oil-producing countries are free to exercise their right resulting from the ownership of the oil wealth, in light of compensation to the investor for what he lost in disarming his property from the elements of exploitation of oil wealth under the oil contract. Because of this, oil contracts are among the international economic development contracts that are far from disposing of host countries due of lack of investor confidence, but this study showed that most Arab oil contracts are subject to arbitration to resolve disputes that may arise.

But the question that arises here is the judicial immunity of the oil-producing countries, through the State's relinquishment of judicial immunity, either implicitly or explicitly on the basis of the rules of public international law as one of the persons in this law. Consequently, the country considers that persons in public international law enjoy sovereignty and independence from any other international entity as a direct result based on the principle of sovereign equality between nations and persons in public international law. Even the possibility of countries that possess an oil company for diplomatic protection can not sue an oil-producing country at the international level before the International Court of Justice, but as a necessity it must seek the approval of the oil-producing country in advance of this mandate.

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However, many oil-producing countries that participate in arbitral proceedings in oil disputes contains consensual elements, which are the basis for the arbitration process. But this does not mean on the surface that the state is bound by the results of this participation on the basis that it is a private legal person who stands on an equal footing with the oil company to adapt the nature of the relationship as a commercial. This is because the goal of the state in this relationship is to serve the public interest of its people, and therefore cannot be considered waiver of its immunity, which originally decided to protect it at the international level, so how is the country's behavior interpreted as a waiver of judicial immunity before a private legal person!

What appears to be that with regard to the law applicable to the subject of the oil dispute in terms of substantive and procedural laws across the states, the multiplicity of its sources differs in terms of its diversity and its non-dependence on a particular legal system that does not subject states to the rule of legal rules follows the direction differs from its system and law. Interstate the law across the states common rules, customs and standards, has proven to be the best compared to public international law, the self-law of contract and national law, and these laws always contains deficits and shortages to finding enough solutions to the differences that may arise with respect to the oil contract.

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