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ARBITRATOR LIABILITY IN IRAQI LEGISLATION AND JUDICIARY: (COMPARATIVE ANALYTICAL STUDY)

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ABSTRACT

Arbitration has become, in our present time, a very important message to settle disputes, especially commercial ones, which require a quick settlement away from ordinary method. With the increasing interest in the role of arbitration, the interest in the role of the arbitrator increased too, so, there is an urgent need to determine the legal position of the arbitrator, which is governed by two different systems: the judicial and the contractual, and this (duplicity) leads to the difference of legal jurisprudence in determining the nature of the arbitrator's task and the extent of the reflection of what was presented in the defining the rights and obligations of the arbitrator and thus the rise of his liability in the event of causing harm to others. The study Scope: is trying to exhibit the establishment of the arbitrator liability in the terms of the positive laws and judgments. Due to the research subject ambiguity and the lack of specialized studies, the research will consider the arbitration legal regulations of the laws organized it, such as the Law of the Iraqi Civil Procedures, the Egyptian Arbitration Act, the Law of the French Procedures and Public Principles in Civil Laws.

INTRODUCTION

The arbitrator (who arbitrates) is the person to whom the litigants have been entrusted with the task of settling the dispute under arbitration contract. The arbitrator task was, and still, entrusted to someone who has experience and justice. The head of the family was the one who did this in the ancient Babylonian society to settle conflict within the community and the same method followed in the pre-Islam era, the sheikh of the tribe is the one who arbitrates it. While in the honorable Islamic Sharia, the arbitrator, has singled out a special system that makes judiciary and arbitration side by side: **Basis of**

the study idea: Arbitration has become, in our present time, a very important message to settle disputes, especially commercial ones, which require a quick settlement away from ordinary method. With the increasing interest in the role of arbitration, the interest in the role of the arbitrator increased too, so, there is an urgent need to determine the legal position of the arbitrator, which is governed by two different systems: the judicial and the contractual, and this (duplicity) leads to the difference of legal jurisprudence in determining the nature of the arbitrator's task and the extent of the reflection of what was presented in the defining the rights and obligations of the arbitrator and thus the rise of his liability in the event of causing harm to others. If his mission was judicial, this would grant him immunity from any liability, but if his liability was based on a contractual error, he would assume the role of the third contracting party. The principle that the arbitrator is subject to liability is one of the prevailing principles in all legal system; if it seems vary in scope between narrow and broad, it is not conceivable that the arbitrator is concerned with all liability. Some legal jurisprudence has tended to claim that the liability of the arbitrator is his responsibility for a contractual error. Another trend finds it existing according to causing harm to others (i.e. an illegal act). There is another who believes the professional error of the arbitrator in addition to the arbitration institution responsibility for its harm act. The arbitrator liability may be fulfilled as a judge, or as an arbitration contract party to the. The arbitrator liability varies according to breach attributed to him, as it may be a contractual liability when he breaches a contractual obligation or tort liability when he breaches an obligation out of the contractual obligations. Moreover, a large part of the jurisprudence has called for the necessity to confirm the professional liability. The arbitrator is asked contractually if he breached a contractual commitment, and tort if his harm was not a result of a contractual commitment. **The study Scope:** is trying to exhibit the establishment of the arbitrator liability in the terms of the positive laws and judgments. Due to the research subject ambiguity and the lack of specialized studies, the research will consider the arbitration legal regulations of the laws organized it, such as the Law of the Iraqi Civil Procedures, the Egyptian Arbitration Act, the Law of the French Procedures and Public Principles in Civil Laws.

The Study Problem

it is the same for the purposes intended for the study, and then it is an attempt to remove the duplication that surrounds the legal position of the arbitrator and in a way that affects the rights and obligations of the latter, as well as defaults of legislators in regulating the provisions of the legal status of the arbitrator, including the Iraqi procedures law, in addition to the lack of Iraqi legislation to a fully lawful regulation to arbitration system,, especially the international aspect, in view of other legislation regulating arbitration, and the foreign investment that Iraq witnesses, with the legislative void, and the urgent need to regulate the legislative void referred to. Next, the basic research problem is: (Establishing the legal liability of the arbitrator if he breaches his obligations and causes harm to the parties of the contractual relationship or others in line with the legal nature of his assignment.

The Study plan and methodology

The plan of the subject and the extent of its treatment of the problem of study is appropriate to divide it into three topics that establish the liability of the arbitrator for the damages that he may cause as a result of carrying out his duties and the resulting obligations that depend on determining the nature of his legal position. The first topic addressed the contractual error as a base for the arbitrator liability. The second topic discussed the arbitrator liability for the harm act and the extent of establishing a tort liability for breaching a previous legal commitment according to a tort mistake. The third topic tackles the extent of establishing the arbitrator liability according to a mistake in the rule organizing the profession behavior. The study adopted comparative analytical approaches to the examination its three topics considering inference, once, and deduction, at once another, ending with a number of conclusions and recommendations that are hoped to serve as a modest and simple contribution to fill the legislative gap, especially the Iraqi one, in a way that keep pace with the cultural, scientific and constructive development, that the contemporary society witnesses today. The similar research pattern have been used in various fields such as energy economics and other social sciences.

The establishment of arbitrator liability

In view of what the legal jurisprudence has established, the reality imposes a fact that: the arbitrator, on the level of settle the dispute, is like a special judge who issues binding judgments in the offered dispute, and on another level, he is a party of the arbitration contract concluded between him and the litigants. This led to a wide disagreement in jurisprudence over the extent of the arbitrator's liability, between a denier and a supporter, which led to the difference in legislation regarding the regulation of his liability and the recognition of his immunity or not ⁽¹⁾. Therefore, the study in these section dealings with establishing the liability of the arbitrator, we shed light on three topics, the first of which is the liability for the contractual error of the arbitrator, and the second will be for the arbitrator's default error. The third topic will stop at the professional error of the arbitrator. In the result, we notice that liability is established for each topic.

The First Topic

The Contractual Error of the Arbitrator

Contractual liability arises for a breach of a prior contractual obligation ⁽²⁾. In the event that the debtor does not carry out his obligations stipulated in the contract, and it is not possible to force him to implement them, or it is impossible to implement these obligations by a mistake or an error by the debtor, which achieves the contractual liability of the debtor, and the creditor has the right to demand compensation and the same ruling if the debtor delays the fulfillment of his obligations ⁽³⁾

The study concludes that this liability finds its source in the contractual relationship between the arbitrator and the litigants, as the arbitrator's

agreement with the parties to the arbitration dispute under the arbitration contract may arrange his contractual liability by the other party of the contract, for example, if he breaches the performance of the task he accepted or delayed in its performance in a way that cause damage for one of the litigants or for both of them, or if the arbitrator hides his relationship with one of the litigants or its arsenal, or put off issuing the judgment till the end of the defined time or period, or adding unjustified expenses and other cases where the arbitrator breaches his commitments he accepted according to arbitration contract ⁽¹⁾. Those who adopted this approach find that the arbitration is of a contractual nature, since the tendency that prevails over it is the principle of the power of will, so they favor the nature of contractual arbitration as a consensual contract binding on both sides and from the compensation contract. In addition, those who support this approach say that determining the nature of the arbitrator's liability is closely related to the nature of his relationship with the parties to arbitration litigation ⁽²⁾, which is supported by this study by adopting the aforementioned of what the jurisprudence agreed upon to adapt this relationship as a contractual relationship that falls under the framework of private law. Despite the difference of jurisprudence regarding adapting this relationship in a precise manner, whether it is an agency, a work contract, a contractor, or is it a contractual relationship of a special kind, the point which the honored Court of Cassation decided: (1- That the arbitration contract is one of the consensual contracts binding on both sides and arranges reciprocal obligations on each of the contracting parties which are at the same time rights for each of them..)⁽³⁾ From the foregoing, it can be said: the arbitrator responsibility is a contractual responsible, so it submits to the public rules of this liability, as the French jurisprudence called: (there is no mind to define the arbitrator liability on a contractual base; contract is the base in defining the arbitrator liability) ⁽¹⁾, considering the French course regarding not to mind holding the contractual responsible of arbitrator according to Article (1142) of the French Civil Code ⁽²⁾. The availability of the elements of contractual liability are required, in order for its provisions to arrange, including error, damage and causal relationship, to determine the obligations of the arbitrator, which, upon breaching them, is considered to have erred intentionally ⁽³⁾. The arbitrator shall be asked about his gross is takes and about fraud if it was done by him, which represents a breach of his contractual obligations, giving the other party of the arbitration contract the right to request the termination of the contract. If the arbitrator omissions, without a justified reason, doing his deities, which is to issue the appropriate judgment and settling the dispute, contract liability is also fulfilled and he is obliged to compensate the other party for the damage he suffered as a result of his failure to do so, in order to compel this damage. So it can be said that in order to achieve the liability under discussion, the element of damage resulting from a recent error, which is the arbitrator ⁽⁴⁾, must be established. In addition to what had been mentioned above, the causal relationship between the error and the damage must be established, provided that this damage resulted from the error, otherwise, the offender, the person doing the damage, is exempt from liability of compensation whenever this causal relationship is interrupted or broken, such as if his error is a result of majeure force, a sudden accident, or the action of others ⁽⁵⁾. Legislation confirms the arbitrator liability for breaching his obligation to settle the dispute, to do so during the agreed period or the other

aforementioned duties. Article 803, Al-Masry's pleadings states: Legislation confirms the arbitrator liability for breaching his obligation to settle the dispute, to do so during the agreed period or the other aforementioned duties. Article 803, Al-Masry's pleadings states: (If the arbitrator does not complete the arbitration after accepting the arbitration without an acceptable reason, he may be adjudicated with the implications for litigation) and so Article (801) of this law states: (The arbitrators shall rule on the conditional date unless the litigants agree to extend it). The Austrian legislator stipulated in Article (584 /2) of the Austrian Amended Civil Procedure Law of 1996, that (an arbitrator who did not fulfill his duties, or did not perform them in a timely manner, would be responsible towards the parties for any damage that may occur as a result of this reduction or delay and even if the matter came to the point of ending the arbitrator trial). It seems that some of the legislations did not directly regulate the foregoing, but the research finds that they dealt with that within its articles indirectly, which is the Iraqi legislator's approach in the law of pleadings, as we find a text in Article (260: (The arbitrator, after accepting the arbitration, is not allowed to step down without an accepted excuse.). In the same direction, the Lebanese legislator proceeded in the Code of Procedure Principles in Article (3/769) of it, stating that: (After accepting the assignment, the arbitrator may not step down without a gross reason, otherwise it is permissible to judge him with compensation for the injured) ⁽¹⁾. The study confirms that court rules have taken on the liability of the contractual arbitrator. The French Court of Cassation, in a judgment issued on July 27/1937, in which it stated that the decisions of: (Arbitration issued on the basis of the arbitration stipulation is one unit with this stipulation and its contractual character applies to it). Likewise, what was stated in the ruling of the Federal Supreme Court in Germany, as it ruled that: (The relationship between the parties and the arbitrator shall be governed by the arbitration contract) ⁽²⁾. The same trend has been adopted by the Iraqi legislator in arbitration, whose rulings are regulated by Chapter Two of the amended Civil Procedure Law No. (83) 1969, as well as Law No. (34) in 1928 according to which the protocol on the arbitration clause was ratified, which was signed in Geneva on 24 / 1/1923, where articles (2-3) include of the Protocol include (that each Contracting State follows the implementation of arbitration decisions issued in its territory by its employees in accordance with its national laws). The abstract of this argument study goes that the Iraqi legislator has made, in establishing the arbitration contract between the arbitrator and the litigants, the liability for breaching the obligations that this contract entails, subject to Article (168) of the Iraqi Civil Law ⁽¹⁾

The Second Topic

The Arbitrator Liability for the Harmful Act

The liability for the personal act (negligence) means the liability of the person for the work issued from him, and it is the general basis for liability. In other words, it is a breach of a legal obligation not to harm others, as it arises from the harmful act, and it does not take place except by the erection of its three pillars from a fixed or presumed error from whom the harmful act was issued, a harm inflicted on the injured person, and a causal relationship between the

error and the harm in a way that makes the harm possible This damage arose from that error and as a result of its occurrence ⁽²⁾. The Iraqi Civil Code, which defines the common provisions for unlawful acts, stipulated in Article (204) that (every infringement that infects others with any harm other than what was mentioned in the previous articles requires compensation)⁽³⁾ Some jurists in America and England have argued that the basis for the question of the arbitrator is the quasi-judicial work assigned to him, not the questioning is not the contract concluded between him and the litigants. Therefore, it is not possible to talk about the liability of the arbitrator to construct a breach of a contractual obligation, but it is possible to question him based on his breach of a legal obligation similar to that of the state judge ⁽¹⁾. This is what the judiciary rulings in both America and England followed, when it decided to grant the arbitrator immunity like that enjoyed by a state judge, including what was stated in the US Supreme Court's decision in which the arbitrator is considered a quasi-judicial employee, as well as the ruling of the same court in *Airco v. Rapistan* case, where it judged that the lack of accountability includes the arbitrator concealing his private ties with the litigants or one of them ⁽²⁾. The arbitrator is asked about his default legal breach, in the Latin systems, for what is issued from him in what is not mentioned in the contract, it is unpalatable to deny the importance of the contractual will and to approve the error in absolute terms, which is what the study mechanism is heading in this research ⁽³⁾. The study finds it is possible to establish the arbitrate or liability for his personal work (in default) when he performs certain actions, including ⁽⁴⁾.

First:

If the damage occurred on non-parties of the arbitration contract, i.e. the damage occurred outside the circle of the contractual relationship, on the condition that the arbitrator is not aware and without issuance fraud by the litigants by submitting false documents to accuse the arbitrator.

Second:

Likewise, the liability of the default arbitrator shall rise if one of the basic pillars of the contract fails, so that the contract is null and void, and it is not possible to hold the judge accountable for his failure to perform an obligation arising from a null contract.

Third:

The liability of the arbitrator shall also be assumed, if he did not preserve the privacy of the disputes presented to him, in the event that he did not contract with the litigants in the matter of resolving the dispute regarding them.

Based on what the study observed, and in cases where the negligent error breaches a previous legal obligation that causes harm to others, in the arbitrator caused moral (significant) harm to others or to one of the litigants from the contractual relationship parties in the arbitration contract, so he is obligated to compensate this type of damage within his personal liability for his actions that caused the damages. The damage, according to the general theory of the commitment, whether a physical, that is to say affecting a one of the financial rights of person; his body or properties or any of other rights, or

if the right is a moral (significant) that affects a person in a non-financial right that would affect him in his feelings or emotions and, where most of the civil legislation, including the Iraqi civil law, did not take into consideration the compensation for the latter (moral harm) if the error was a contractual one, stipulated compensation for it if the error was tort⁽¹⁾. Considering the study approach: that compensation for the tort liability is more abundant for the one affected than for the compensation for the contractual error, in the end, the person who cause damage compensates for only the expected direct damages, that is, compensation in the contractual liability is for the expected direct damages unless he made it by cheat or a gross mistake, while the compensation for the tort liability includes the full direct expected and unexpected damage. While the tort error includes compensation for direct expected damage and the unexpected initially⁽²⁾ According to the general rules, the scope of compensation for tort liability is wider and greater than that determined in contractual liability, as the contractor is asked for the direct damage expected to be obtained upon contracting in terms of the type and amount of compensation only, and he is not asked about the unexpected damage, unless it caused by his fraud or his gross mistake, while in the tort liability scope, compensation includes all direct damage, whether expected or unexpected⁽¹⁾. Of this is what was stated in the text of Article (1/205) of the Iraqi Civil Code, as it states that (the right to compensation for moral harm is also addressed, so every transgression against others in his freedom, honor, reputation, social status, or consideration. The financier makes the infringer liable for compensation).

The Third Topic

Rules of conduct that requires Accountability

A third approach goes to questioning the arbitrator and to regard the error of the rules of professional conduct in the event that the contract (arbitration contract), is found or not. They regard this mistake as a violation of the rules of conduct adopted by the careful professional, and those who follow this standard find that accountability exists whether in the presence of a contractual commitment or a legal commitment. The professional nature of the error, according to this vision, constitutes a certain standard by which the error is known; that does not allow the rules of civil liability, with their contractual and tort errors, to question the arbitrator according to that liability. Therefore, they see that the arbitrator is questioned based on the task assigned to him (i.e. the judges), leaving the will identical as base of liability to the extent of applying the rules of professional conduct without establishing this accountability based on a breach of a previous legal commitment (tort error).⁽²⁾ Part of the regulations determining the tort error basing on breaching the rules of professional conduct with the care of the usual man⁽¹⁾, and the accountability of their professionals is raised about their inability to provide the usual care of their likeminded professionals, when they had to spend in implementing what was entrusted to them with an acceptable amount of usual care and the expertise devoted to the likes of that task, which was taken by the English courts in one of their judgments for those who contract professionally: (He must exert a reasonable skill and care in implementing)⁽²⁾ The abstract is

that study finds: since arbitration is not limited to the will of the parties to the contractual relationship in the arbitration contract and to the result that ends with the resolution of the dispute and the issuance of a final judgment in it, it begins with the parties' agreement on arbitration and moves to the arbitration procedures and the professional aspect specialized in this beside the person's grandchild. The usual objective aspect of the nature of that task to which he was entrusted, to end with a judgment that is the judgment of the arbitrator⁽³⁾. The research does not support what went to the direction that adopts the establishment of liability basing on the absolute error in the rules of conduct of the profession, as this will transfer the budget, represented by special protection, of the arbitrator at the expense of the litigants, the second party of the contractual relationship in the arbitration contract and in contradiction to the general provisions of liability, so the duties and tasks of the arbitrator, in addition to organizing them contractually as well they are imposed by the provisions governing the arbitration process, and both of them establish these obligations, which show that observing the proper conduct of the arbitration litigation until the judgment is issued was taken up and regulated in the texts of the laws governing the arbitration process. From the foregoing of the abstract, the study confirms that the contractual liability of the arbitrator is established when he breaches a contractual obligation as a party to the arbitration contract, and the arbitrator is held accountable according to the tort error for the occurrence of damages from which the contractual error cannot rise, for a breach of a previous legal obligation and the matter does not stop in establishing responsibility for the rules of conduct of the profession as far as the latter relates to the criterion of error, for these rules to serve as a standard for the behavior of an ordinary professional person. Thus, the error of the arbitrator will be determined by the circumstances of the adjudication of the dispute before him, where the most important of them are his experience, his professionalism and his technical specialization.

RESULTS

To have a full benefit of, the researcher summarized the most important results obtained throughout this study to be as follows:

- 1- The arbitrator, on one side, is a special judge who settles the dispute among parties, and on the other hand he is a party in the arbitration contract.
- 2- The arbitration contract is one of the consensual contracts with compensation, which entails obligations for both parties: the arbitrator and the parties of the arbitration dispute.
- 3- The arbitrator is obligated after the nomination for the assignment with a set of obligations, some are during the arbitration litigation procedures, such as his obligation to settle the dispute himself and to adhere to the basic principles of litigation, to issue the judgment within the specified period, to commit to carry out the task until its end, and to maintain the obtained information confidentiality.
- 4- It is necessary to determine the liability of the arbitrator if individuals have suffered harm or damages a result of his actions, the opinions differed on establishing the civil arbitrator liability; some claim that it is a contractual liability, other call for the arbitrator tort liability, and some other call for the arbitrator professional liability. However, we noticed that it is not possible to take one of these opinions as a whole, as the arbitrator liability is contractual

when its conditions and pillars are met when he breaches a contractual obligation, and it is a default liability in cases where it is not possible to move his contractual liability for breaching a legal obligation.

5- Cases of achieving the liability of the arbitrator may be in his capacity as a special judge, or as a party of the arbitration contract. According to the consensual nature that prevails the arbitration process, the arbitrator can stipulate exemption from it, as we are still within the framework of contractual liability according to Article (259) of the Iraqi Civil Code.

6- It is not possible for them to stipulate an exemption from liability for negligence, in which compensation is limited to moral damage without the possibility of the latter in the contractual liability.

7- Compensation for direct damage expected only in contractual liability unless the arbitrator commits a gross mistake or deceit in bad faith or in participation with the opponent, while the compensation includes direct damage in full, expected and unexpected in compensation for liability.

RECOMMENDATIONS

Throughout researching establishing the accountability of the arbitrator, the study recommends a number of recommendations that we hope the Iraqi legislature will take into consideration, the most important ones perhaps be the following:

1- Given the openness in Iraq to foreign investment, it is very important to expedite the completion and legislation of the Iraqi International Commercial Arbitration Law draft.

2- It is good to get use of some of the provisions of the Model Law of International Commercial Arbitration issued by the United Nations, but caution should be exercised in this, because some provisions of this law collide with the obstacle of our public system, including the text of Article (14 / Second) of the draft which corresponds to the repealed Article (7/19) of the Egyptian Arbitration Law, which the Constitutional Court in Egypt jugged its unconstitutionality for its contravention of system, as it makes the arbitration board the opponent and the ruler at the same time, so the Iraqi legislator must pay attention to these issues with quoting from the texts of the Law.

3- The necessity to regulate the arbitrator's civil liability, especially with regard to contractual liability, in a precise manner that negates the jurisprudence and protects the arbitrator from arbitrary prosecutions by litigants, and guaranteed the parties their right to obtain compensation if they are harmed as a result of the conduct of the arbitrator in the arbitration. We suggest that the stipulation be in the following form (The arbitrator who did not fulfill his obligations or delay them shall be liable towards the litigants for any damage that may occur as a result of that breach).

4- The necessity to acknowledge or confirm explicitly a kind of immunity for the arbitrator, that closes the door to the jurisprudences in this field, and that this immunity is relative and does not protect the arbitrator from liability completely, such as that related to his fraud or his gross mistake, since the latter moves the judge's liability, so it is more appropriate for the arbitrator as well. We also suggest that the stipulation is in the following: (The arbitrator shall not be responsible for any action or commissioning during, or due to, the performance of the arbitration mission, unless it was badly intended).

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