BRILL

ARAB LAW QUARTERLY 30 (2016) 53-71

Arab Law
Quarterly
brill.com/alq

Petroleum Arbitration Agreement in Iraq: A Tortoise and Hare Race

Sinan Al-Bidery
Lecturer, School of Law, al-Qadisiyah University, Iraq
sinanalbidery@gmail.com

Abstract

Trustworthy and effective arbitration is a vital guarantee for foreign investors in the petroleum sector, especially those seeking to invest in post-conflict countries such as Iraq. This article is an evaluation of petroleum arbitration agreements in Iraq, which has not yet promulgated a basic arbitration law, let alone for international investment disputes, nor is it is a party to the New York Convention of 1958 or a member of International Centre for the Settlement of Investment Disputes. It examines the use of legislation concerning arbitration agreements, and argues that the relevant provisions are satisfactory for everyday domestic arbitration, but are inadequate in dealing with international commercial disputes, such as over petroleum. Therefore, it is critical, if Iraq is to be able properly to manage the exploitation of her petroleum resources, and her investor relations, that the legal framework is improved. The author makes recommendations on what is needed.

Keywords

arbitration agreement – petroleum agreement – arbitrability – applicable law – foreign investment

* Doctor of law, Bagnor University. Profound thanks to my supervisor, Prof. Suzannah Lintion, for her comments and feedback.

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1 Introduction

Dispute settlement is a significant aspect of any contractual relationship, particularly in petroleum agreements. This is because, on the one hand, a large amount of capital has been invested by the international petroleum company in such an agreement and, on the other hand, the subject of the petroleum agreement represents the natural resources of the host nation and dominates its economy.

International arbitration as a preferred method for settling disputes, including petroleum disputes, cannot take place unless the parties agree to submit their dispute to arbitration. This agreement is called the arbitration agreement, by which the jurisdiction of the national court is excluded and the dispute is submitted to an arbitral tribunal.[1] The agreement is considered to be the guide for both parties as it contains provisions that define the procedures of the arbitration process as a whole. Hence, such an agreement contains critical issues that totally control the arbitration.

Iraq seeks to attract foreign investors to rebuild its battered economy. It continues to suffer from the after-effect of wars, misguided policies towards the petroleum sector followed by successive governments, and United Nation sanctions on Iraq.[2] Arbitration is considered the most effective means to resolve disputes and one of the important legal strategic instruments for attracting foreign investors, especially in a complex situation such as the one faced by Iraq.[3] It is considered one of the most important guarantees given by host states in order to attract foreign investors, particularly in post-conflict states where investors would be conscious of the forum employed for the resolution of petroleum disputes.[4]

1 Emmanuel Gaillard and John Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Alphen aan den Rijn: Kluwer Law International, 1999), 261; Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (New York: Cambridge University Press, 2012), 18.

2 UNSC Res 661 (6 August 1990) UN Doc S/RES/0661; UNSC Res 687(8 April 1991) UN Doc S/RES/687.

3 David Brent Grantham, 'Caveat Investor: Assessing the Risks and Rewards of IOCs Entry into Iraq', *Journal of World Energy Law & Business* 3(3) (2010): 304-314.

4 Virtus C. Igbokwe and Obijiofor Aginam, 'Foreign Direct Investment in Post-Conflict Countries', in: Virtus C. Igbokwe, Nicholas Turner and Obijiofor Aginam (eds.), *Foreign Direct Investment in Post-conflict Countries: Opportunities and Challenges* (London: Adonis and Abbey Publishers Ltd., 2010) 3.

However, despite the significance of arbitration agreements to the arbitration process, Iraqi law has no specialised legislation such agreements.[5] This is because Iraq has not promulgated international commercial arbitration laws involving investment disputes in general and petroleum disputes in particular. Iraq depends on the Code of Civil Procedures No. 83 of 1969 (CCP).[6] This law was designed to regulate domestic arbitration, and Iraq has not been a party to international conventions involving international commercial arbitration such as the New York Convention[7] of 1958 and the Washington Convention of 1965.[8] However, in February of 2011 the draft law of International Commercial Arbitration was proposed to resolve international commercial disputes but, this draft has not yet passed through the Iraqi Parliament. In this article the author will review and discuss some of these draft articles.

Therefore, Iraqi prospects for attracting foreign investment are slim, given it faces competition from many other host states attract foreign investors by promulgating and updating their arbitration laws. The question is, therefore, whether the current provisions of Iraqi petroleum arbitration agreements are sufficient to keep pace with developments in other host states? In other words, can a tortoise win the race with the hare?

This article therefore seeks to examine the provisions of Iraq's petroleum arbitration agreements in the absence of the promulgation of legislation on international commercial arbitration. This article also shows to what extent these provisions in petroleum arbitration can be relied upon.

2 Requirements for the Validity of a Petroleum Arbitration Agreement

There are several requirements for a petroleum arbitration agreement to be enforceable under Iraqi law. Without these legal requirements, the arbitration

5 Iraqi law recognises arbitration agreements in Article 251 of the Code of Civil Procedures Law No. 83 of 1969, which provides that 'the parties may agree to arbitrate a specific dispute, and may also agree to arbitrate all disputes arising from the execution of a specific contract'. This article was translated from Arabic to English by Mahir Jalili, 'International Arbitration in Iraq', *Journal of International Arbitration* 4(3) (1987): 109-130. The Iraq Draft Law on International Commercial Arbitration of 2011 (DICA) also recognizes various types of arbitration agreements in Article 4(2 and 3).

6 The Iraqi Civil Procedures Code No. 83 of 1969.

7 Convention on the Execution of Foreign Arbitral Award (10 June 1958), UNTS, 38.

8 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (18 March 1965), UNTS, 159.

agreement will be considered null and void and the arbitration will not take place at all.[9] These requirements concern the formal aspect of the arbitration agreement, which is that it should be in writing, or be concerned with the substantive aspects of the agreement, such as the consent of parties to the arbitration, the capacity of contractual parties, and arbitrability.

2.1 *Formal Requirements*

The arbitration agreement must be embodied in writing.[10] The writing requirement raises several questions. These questions are: Is an oral agreement valid? Do modern communication methods such as telex, telephone or e-mail qualify to meet this requirement? If the arbitration agreement is to be in writing, must it also be signed in order to be considered valid, or is the written form alone sufficient?

Iraqi law requires the arbitration agreement to be in written form only for evidential purposes.[11] The Iraqi CCP stipulates that the written requirement is for evidentiary purposes 'The arbitration agreement cannot be proved unless it is in writing'.[12] Iraqi law does not stipulate a specific form of arbitration agreement and gives the parties absolute freedom to design the form of the agreement. Arbitration agreements under Iraqi law are considered consensual contracts. This approach is approved by the Iraqi Court of Cassation which considers that the arbitration agreement is a consensual agreement and the written requirement serves an evidentiary function.[13] However, the Iraqi Draft of International Commercial Arbitration (DICA), has a different approach

9 Moses, *supra* note 1 at 21.

10 Article 252 of the Iraqi Code of Civil Procedures No. 83 of 1969.

11 For instance UK Arbitration Act of 1996, Section 5(3) 'where parties agree otherwise than in writing by reference to terms which are in writing'. It is clear from this provision that an oral arbitration agreement is considered in writing as soon as the parties reference to clause as already in writing. The Netherlands Arbitration Law 1986 also uses the written form for evidence purposes. This Act declares that the arbitration agreement shall be confirmed by writing explicitly or inclusively. See: Article 1021 from the Netherlands Arbitration Act of 1986, which provided that 'The arbitration agreement must be proven by an instrument in writing. For this purpose an instrument in writing which provides for arbitration or which refers to standard conditions providing for arbitration is sufficient, provided that this instrument is expressly or impliedly accepted by or on behalf of the other party'.

12 Article 252 of CCP, see Jalili, *supra* note 5 at 125.

13 The Iraqi Court of Cassation Decision No. 355 on 13 May 1971 published in Judiciary Review (2) third year 158.

and stipulates that the arbitration agreement must be in writing, or otherwise be null.[14]

As noted, the CCP does not describe the written form or refer to modern technology and that was a serious lacuna.[15] Nevertheless, it could be said that the cause of this shortcoming is that the CCP was promulgated in 1969, when most modern forms of written communication had not yet been invented. The Iraqi government is ambitious to attract investors by reforming its investment laws. At the same time, the world is witnessing a growth in the telecommunications sector and in the speed of transactions in the investment sector, as elsewhere. Article 252, however, is silent on these developments.[16]

In connection with the third question, it is noteworthy that some legal systems with specialised arbitration laws[17] do not require the arbitration agreement to be signed. The arbitration agreement meets the requirements when it is written and the written agreement is sufficient. In contrast, the New York Convention requires the arbitration agreement to be, as its Article II(2) states, 'signed by the parties'. Nevertheless, Redfern and Hunter assess that this requirement has largely disappeared.[18] Iraqi law does not require the signature of the parties on an arbitration agreement.[19]

In view of the above discussion, the author presents the view that Iraq should stipulate that petroleum arbitration agreement must be in the form of a written document, otherwise it will be null and void. The written form is a particular requirement in arbitration agreements in respect of petroleum disputes as mentioned above. It is important also because the subject matter of the contractual agreement is petroleum, which is one of the main national

14 Article 4(1) of the Iraq Draft of International Commercial Arbitration of 2011.

15 Article 252 of CCP provided that: 'The arbitration agreement cannot be proved unless it is in writing. The parties may agree to arbitration during the judicial hearing. If the court is satisfied of the existence of the arbitration agreement or if it approves an arbitration agreement made by the parties during the judicial hearing, it shall stay the action until the arbitral award is made'. See Jalili, *supra* note 5 at 125.

16 In this regard, the Iraqi International Commercial Arbitration Draft recognizes modern methods of communication, like fax and e-mail, and also stipulated that the arbitration agreement should be signed by the parties concerned. The Iraqi draft approach is succeeding with regard to the written requirement. See Article 4 of DICA of 2011.

17 For example, China Arbitration Law of 1994 and Algeria Law of Civil and Administrative Procedures No. 8-9 of 2008.

18 Nigel Blackaby *et al.*, *Redfern and Hunter on International Arbitration* (New York: Oxford University Press, 2009), 89.

19 The opposite view is adopted by Article 4 of the Iraqi DICA of 2011 which stipulates that the arbitration agreement should be signed by the parties in written form.

resources of the host state, and also because of the enormous value of capital and equipment supplied by investors, which either party might lose through litigation. The written arbitration agreement maintains parties' rights and protects them from the forgetfulness or neglect which might result under an oral agreement. The petroleum arbitration agreement is vital because it constitutes a map for the contractual parties while they are drawing up the procedures of arbitration, and contains important details in regard to that arbitration. Without such a map, the parties may be lost and be led into subsidiary disputes leading to lost time and money. Therefore, the agreement should be clear and certain, aspects that may be missing from an oral agreement.

Therefore, the Iraqi DICA regulates formal requirements of arbitration agreement. It recognises modern means of communication such as fax and e-mail and also stipulates that the arbitration agreement must be signed by the parties involved.[20] Here, the Iraqi draft approach succeeds in regard to written requirements by filling the gap left by the CCP.

An important issue that arises in regard to the requirement for writing is the applicable law. Hence, the question arises here: What is the applicable law governing the formal requirements and for determining if under Iraqi law an arbitration agreement is valid? The Iraqi CCP does not address the question of which law should govern the formal requirements of arbitration agreements and it is left to the conflict rules in Iraqi Civil Law to determine the law that should govern the formal requirements of a contract. Article 26[21] of the Iraqi Civil Law No. 40 of 1951 declares that contracts are subject to the law of the state in the territory of which the contract was concluded in regard to its formal requirements. Thus, according to this Article, the formal requirements for an arbitration agreement are subject to the law of the place where the arbitration agreement was concluded.[22] The DICA does not include an article which designates the applicable law of formal requirement in arbitration agreement.

2.2 *Substantive Requirements*

Under Iraqi law the arbitration agreement will be valid substantially and thus enforceable if it is based on three foundations: consent, capacity and arbitrability. The parties in arbitration must give their consent, the latter must issue from parties who have the legal capacity, and the dispute must be capable of

20 Article 4(1) of the Iraqi International Commercial Arbitration Draft of 2011.

21 Article 26 of Iraqi Civil Law No. 40 of 1951 provided that 'The form of contracts shall conform to the law of the state wherein they have been concluded'.

22 Article 26 of Iraqi Civil Law No. 40 of 1951.

being settled by arbitration. These requirements will be discussed in the three following sub-sections.

2.2.1 Consent

Consent is considered the most significant of the substantive requirements. It is the heart of the arbitration agreement which is in turn the core of the arbitration process. It means that the parties have agreed to refer their dispute to settlement by arbitration.[23]

Consent is embodied in the host state's acceptance of the exclusion of the national court's jurisdiction to settle petroleum disputes by subjecting such disputes to the jurisdiction of non- national courts or to arbitration institutes.[24] So, without the host state's consent in the arbitration agreement, it cannot be subjected to the jurisdiction of another state's courts.[25] Therefore, consent in arbitration agreements expresses the host state's implied waiver of its jurisdiction.[26]

The question arising here is whether the Iraqi State's consent to an arbitration agreement is to be considered as a waiver of Iraqi sovereign immunity jurisdiction. Iraq, like many civil law countries, does not regulate laws involve in sovereignty issues, as do common law countries.[27] Also Iraq has not been a party to international conventions regulating such issues, such as the ICSID or the UN Convention on Jurisdictional Immunities of States and Their Property of 2005 (hereafter CJISTP).[28] However, the author takes the view that Iraq would be waiving its sovereign immunity jurisdiction impliedly as soon as it consented to refer to arbitration as a way to settle a petroleum dispute, even if it does not express this waiver in the petroleum agreement. The existence of an arbitration agreement in the main petroleum contract gives an indication that Iraq waived its jurisdiction immunity in favour of arbitration.

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23 The Iraqi Civil Law No. 40 of 1951 regulates the consent issues in Articles 77-92.

24 Gaillard and Savage (eds.), *supra* note 1 at 261; Moses, *supra* note 1 at 18.

25 Wang Houli, 'Sovereign Immunity: Chinese Views and Practices', *Journal of Chinese Law* 1(1) (1987): 23-32.

26 Georges R. Delaume, 'State Contracts and Transnational Arbitration', *The American Journal of International Law* 75(4) (1981): 784-819; Gary B. Sullivan, 'Implicit Waiver of Sovereign Immunity by Consent to Arbitration: Territorial Scope and Procedural', *Texas International Law Journal* 18 (1983): 329-345 (Comment).

27 For example, the UK promulgated the State Immunity Act 1978 and the USA promulgated the Foreign Sovereign Immunities Act of 1976.

28 UNIS Convention on Jurisdictional Immunities of States and Their Property of 2005 (adopted 2 December 2004).

2.2.2 Capacity

The general rule in any contract under Iraqi law is that the parties must have the legal capacity to conclude the contract, otherwise it is null and void.[29] The situation in arbitration agreements is no different from that in other contracts.[30] The consent in an arbitration agreement must issue from the parties having full capacity, otherwise the arbitration agreement will be considered null and void.[31] Therefore the lack of parties' capacity provides a good basis to claim that an arbitration agreement is null and void, and thus recognition and enforcement of an arbitral award may be refused.[32] Thus the question arising here is: Do the Iraqi State and its entities have the capacity to conclude a petroleum arbitration agreement?

The Iraqi CCP law does not refer explicitly to the capacity of the state and its entities.[33] However, Article 245 of the Iraqi CCP provides that the parties must have the capacity to enter into an arbitration agreement. This article, however, does not describe to the capacity of a legal person because CCP does not make any provision for international arbitration. The DICA of 2011 likewise does not elaborate on the parties' capacity or that of a particular legal person. It could be inferred that as with the CCP this draft has left the issues to be regulated by general provisions in civil law.[34] According to Article 47(a) and (b) of the Iraqi Civil Law, Iraq and its entities have the legal capacity to conclude petroleum arbitration agreements.[35] At the same time, the Iraqi legislature has not promulgated any regulation to prohibit itself from settling petroleum disputes by arbitration or from imposing any restriction on recourse to arbitration. Also, past practice shows that Iraq has concluded many petroleum agreements containing arbitration clauses, such as Article 40 of the petroleum agreement made in 1925 between Iraq and the Iraqi Petroleum Company.[36] It could be concluded that Iraq has the capacity to conclude petroleum arbitration

29 Article 96 of Iraqi Civil Law No. 40 of 1951.

30 Article V(1)a of the New York Convention of 1958 provided that 'The parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made'.

31 Article 133 of Iraqi Civil Law No. 40 of 1951.

32 Article V(1) of the New York Convention 1958.

33 For example, sub-central governing entities and Iraqi State institutions.

34 Article 47 of Iraqi Civil Law No. 40 of 1951 regulate the legal person capacity. According to Article 47 (a and b) the Iraqi State and its entities have legal capacity.

35 *Ibid.*

36 Article 40 of the petroleum agreement between Iraq and IPC of 1925.

agreements even though the Iraqi government rejected the submission of disputes between Iraq and petroleum companies to arbitration after it promulgated Act No. 80 of 1961.[37] In any case, the Iraqi position does not mean that it prohibits arbitration, but it does not prefer arbitration as a best option to resolve such disputes. Therefore Iraq or its entities, enterprises, political subdivisions of the state or instrumentalities of the state do have the sovereign authority to conclude arbitration agreement.[38]

The other question raised here is: Which law will govern the parties' capacity in petroleum arbitration agreements?

The determination of the law which is to govern the authority of the state and its entities is considered an important issue in determining whether the state has the capacity to enter into an arbitration agreement. As a general rule, in Iraqi law capacity is subject to private law. So, the capacity of contractual parties is governed and determined by their own law. Article 18(1) of Iraqi Civil Law No. 40 of 1951 provides that 'the capacity applies by the state law which the person belongs to it by his nationality'. The law that applies to determine capacity is nationality law.

A further question, arising in regard to this point is: Does this principle apply to the parties' capacity in respect of petroleum arbitration agreements?

To answer this question, it is suggested that Iraq should apply Article 18 of the Civil Law in regard to petroleum arbitration agreement. This means that the national law of the parties will be considered in these kinds of agreements.

In any event, the private law as the applicable law of parties' capacity has some drawbacks. The issue is whether the state could use the personal law as a means of avoiding the arbitration and would claim that it lacks the legal capacity to conclude an arbitration agreement under its own legislation.[39] In such a case, the arbitration agreement would be void when the state concluded an

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37 The Law for Determining the Investment Area of Petroleum Companies No. 80 of 1961, published in the *Iraqi Official Gazette*, Issue 616 on 12 December 1961, 380.

38 In this regard, Article 2(b) of CJISTP of 2005 provided that '(*b*) "State" means:
(i) the State and its various organs of government;
(ii) constituent units of a federal State or political subdivisions of the State, which are entitled to perform acts in the exercise of sovereign authority, and are acting in that capacity;
(iii) agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State;
(iv) representatives of the State acting in that capacity', CJISTP Convention of 2005.

39 Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (New York: Oxford University Press, 2007), 130.

arbitration agreement and then denied it under the plea of lack of capacity according to its own legislation. This would inevitably be a violation of the principle of good faith and also leads to the instability of transactions.[40] It is unacceptable that the party which entered into a contractual relationship freely and agreed to submit its dispute to arbitration should defeat this agreement by depending on national law which the party knew previously to be its state law. Being aware of the national laws of the contractual parties and of the good faith principle, the state or its entities cannot subsequently invoke or reject an arbitration agreement under the plea of some restriction contained within its own national laws. Therefore, to avoid the parties of arbitration agreements hiding behind their personal legislation, this issue is limited by some national laws.[41] The Iraqi CCP law and DICA do not regulate this issue.

However, in this author's view, capacity is considered a personal case under Iraqi law and it should be covered by the private law of the contractual parties and also should follow a universal approach in regard to which personal law is the law of nationality or domicile. Also, if we consider nationality law as a personal law, then that would be the law applicable to the parties' capacity to conclude petroleum arbitration agreements. That is because such law is characterised by stability and it is easy to determine it through identifying the state to which the party belongs and this would determine the applicable law. Moreover, one could choose the domicile law as a subsidiary choice if the nationality law was not sufficient to determine the applicable law, as in a case in which one of the parties has more than one nationality.

2.2.3 Arbitrability

Arbitrability as a substantive requirement deals with the issue of whether the parties to an arbitration agreement have agreed that the dispute is capable of being settled by arbitration.[42] In general, the subject matter of an arbitration

40 Hans Van Houtte, *The Law of International Trade* (London: Sweet and Maxwell, 1995), 389; W. Laurence Craig, William Park and Jan Paulsson, *International Chamber of Commerce Arbitration* (New York: Oxford University Press, 2000), 45.

41 For instance, the Swiss Federal Law on Private International Law of 1987 Article 177(2) provides that 'A state . . . which is party to an arbitration agreement, cannot invoke its own law in order to contest its capacity to arbitrate or the arbitrability of a dispute covered by the arbitration agreement'.

42 Loukas A. Mistelis and Stavros L. Brekoulakis (eds.), *Arbitrability: International and Comparative Perspectives* (Alphen aan den Rijn: Kluwer International Law, 2009), 3.

agreement must be capable of being settled by arbitration, otherwise the arbitration agreement would became void and then unenforceable.[43]

The arbitrability issue is not just a question of law. It is influenced by different factors, including economic and political ones, and also it is determined by the public policy of the country.[44] It overlaps with public policy. Therefore, if the arbitration agreement conflicts with the public policy of the state it will be considered inarbitrable and then void.[45]

Iraqi law declares that arbitration is not valid except in matters which may be settled by composition.[46] Article 254 of CCP provided that:

> Arbitration shall not be permitted unless it relates to matters capable of conciliation and unless the parties are capable of the disposal of their rights. Arbitration shall be permitted between husband and wife in accordance with the Personal Status Code and the principles of Islamic Sharīʿah.

Therefore the general rule under Iraqi law in regard to arbitration is that an issue that cannot be resolved by composition is considered inarbitrable, for example, crimes, taxes and other matters concerning public policy.[47] Article 704(1)[48] and (2) of the Iraqi Civil Law No. 40 of 1951 set out the scope of conciliation in paragraph (1), which requires that the subject matter of composition should be subject to charge and determinable. Thus it seems from this Article that arbitration is not permissible in contracts that are free of charge, such as a donation and a secondment contract, but is permissible in other contracts such as insurance contracts and mortgage contracts as long as these do not

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43 Richard C. Reuben, 'First Options, Consent to the Arbitration, and the Demise of Arbitrability: Restoring Access to Justice for Contracts with Arbitration Provisions', *SUM Law Review* 56(2) (2003): 819-884.

44 Marna Lourens, 'The Issue of 'Arbitrability' in Context of International Commercial Arbitration (Part1)', *South Africa Mercantile Law Journal* 11(3) (1999): 363-383; Ilias Bantekas, 'The Foundations of Arbitrability in International Commercial Arbitration', *Australian Year Book of International Law* 27(1) (2008): 193-224.

45 Blackaby, *supra* note 17at 124.

46 Article 254 of Iraqi Code of Civil Procedures Law No. 83 of 1969.

47 Article 254 of Code of Civil Procedures No. 83 of 1969 and Article 704(1 and 2) of Civil Law No. 40 of 1951.

48 Article 704(1) of Iraqi Civil Law No. 40 of 1951 provided that: 'The subject matter of the composition must be something against which a consideration may be taken and must be defined if it is something which needs to be received and delivered'.

stand in contrast to public policy.[49] Paragraph 2 of this article sets out that: 'No composition may be concluded in respect of matters related to the public order or morality, but composition is allowable in respect of financial interests which result from the personal status or which arise from the commission of an offence'. The DICA also provides that the arbitration should not apply to issues which may not result in conciliation or are against public order or related to nationality or personal statutes, except for issues involving a financial interest.[50]

The arbitrability issue raises important question in Iraqi law: Are petroleum disputes capable of being resolved by arbitration? Iraq permits petroleum disputes to be settled by arbitration although it does not determine explicitly whether petroleum disputes are arbitrable. It seems obviously to be the case to judge from many petroleum agreements[51] concluded with different petroleum companies that refer to the settlement of any disputes arising from this agreement by arbitration. Also the Iraqi Draft Law on Oil and Gas of 2007 declared explicitly that petroleum disputes may be settled by arbitration.[52]

3 The Applicable Law of Petroleum Arbitration Agreements

Petroleum arbitration agreements, like any other agreement concerning investment or commercial transactions, raise issues relating to their governing law. In fact, this issue comes into existence when one of the parties' claims before the arbitrator that the arbitration agreement is not valid on the grounds of the formal or substantive requirements. Therefore the law governing the arbitration agreement should be determining on the basis of these issues.[53]

The issue of the law governing the arbitration agreement can be raised before the national court on the occasion of the recognition and enforcement of the arbitral award after it has been rendered.[54]

In connection with the above discussion, it could be said that determining the applicable law of arbitration agreement under Iraqi law raises difficulties. That is because Iraqi law has been silent on this issue, since it does not

49 Assad Fadell, *The Provisions of Arbitration Agreement and Its Procedures: Comparative Study* (El-Qadisiyah: Niebuhr Publications, 2011), 63 (in Arabic).
50 Article 9 of Iraqi International Commercial Arbitration Draft of 2011.
51 For instance, Article 40 of the petroleum agreement of 1925 between Iraq and IPC.
52 Article 39(c) from the Iraqi Draft Law of Gas and Oil of 2007.
53 Born*, supra* note 24 at 426.
54 Article V(1)(a) of the New York Convention 1958.

expressing regulate commercial arbitration agreements.[55] However, Civil Law No. 40 of 1951 addresses the applicable law of contracts in Article 25(1), which provides that:

> The contractual obligations shall be governed by the law of the state wherein lies the domicile of the contracting parties if they have a common domicile; where they have a different domicile the law of the state within which the contract was concluded will be applied unless the contracting parties have agreed (otherwise) or where it would be revealed from the circumstances that another law was intended to be applied.

This Article can be applied to arbitration agreements on the grounds that they are to do with 'contractual obligation'.

Therefore, as Article 25(1) indicates, the law applicable to the arbitration agreement may be the law chosen by the parties in agreement with each other. This law chosen by the parties may be based on various grounds, such as the nationality of one party, the law of that party's domicile and also the law of the place where the contract is performed. In this case, the Iraqi court has the last word in deciding the validity of this law, as long as it is not contrary to the mandatory rules of the Iraqi legal system. Iraqi courts have a broad discretion to apply the law as chosen by parties as long as it ensures that this law does not contrast with the Iraqi public order rules.[56] However, sometimes the parties do not agree explicitly about the law applicable, in which case the Iraqi court has a broad discretion to conclude the law that should apply on the arbitration agreement by evidence such as the choice of the place of the court or the language of the main agreement.

Also, Article 25(1) of the Iraqi Civil Law indicates that the law of common domicile, where such exists, could be applied. However, this may raise difficulties. It is rare, for example, that contractual parties in a petroleum agreement have the same domicile. Even if it should happen to be the case that the applicable law will be the national law of both parties, it may be easy for the parties

55 The Iraqi International Commercial Arbitration Draft also does not express the law that should govern the international arbitration agreement and prefers to leave the matter to the provisions in civil law and that really is the lacuna in this draft. Determining the applicable law of arbitration agreement as mentioned in main text is considered one of the important issues in international commercial arbitration.

56 Article 32 of Iraqi Civil Law No. 40 of 1951 provides that 'the provisions of a foreign law as prescribed in the preceding provisions may not be applied if they are inconsistence with the public order and morals of Iraq'.

to change their domicile and the court then has the very difficult task of determining the domicile and then the applicable law. The author's view is that, in determining the law applicable to an arbitration agreement, Iraqi law should depend on the nationality of parties rather than their domicile.

The third law that may apply according to Article 25 is the law of the place of contract. Based on this choice, the law of the place where the parties concluded their contract will apply to the arbitration agreement. In this case, if the parties concluded the main contract in Baghdad, the Iraqi law will also apply to the arbitration clauses.

The Iraq Civil Law, enacted in the 1951, needs to be reviewed in order to absorb the latest global developments regarding conflict of laws and the applicable law of commercial agreements. The law should be consistent with modern international developments and fit to serve Iraqi aims in transition which are rebuild its battered economy by attract foreign investors.

4 Separability of Petroleum Arbitration Agreement under Iraqi Law

Arbitration agreements are usually part of a single inter-commercial legal document, the contract which form the basis of the agreement. The petroleum agreement between the host state and the investor, like any other ordinary agreement, sometimes cannot be performed. This may be, for example, because of the main contract is null and void as a result of the neglect of one of the essential requirements or may be the petroleum agreement has been terminated.[57] Given one or another of these two cases, it may be considered to provide a sufficient plea for the host state to refer the matter to the national courts instead of arbitration by claiming, on the basis that the main contract is void or has been terminated, that the arbitration clause is also invalid. Such a case would raise a question as to whether the host state can legally claim that the arbitration agreement follows the main contract's fate, in other words, whether the invalidity extends to cover all the main agreement clauses, among them the arbitration clause, or whether the arbitration clause will be valid and consequently will perform its function in settling the disputes between the parties. Also the question of the legal relationship between the arbitration agreement and the petroleum agreement arises when one of the parties claims that the arbitration clause is invalid: will that have an effect on the main underlying contract?

57 Blackaby, *supra* note 17 at 117.

However, the answer to the above question is expressed by the doctrine of separability of the arbitration agreement, which blocks the host state from evading arbitration under the plea of the main contract's nullity.[58] Applying this doctrine, the petroleum arbitration agreement is valid even if the main contract was null and void and vice versa.[59] Therefore, based on this doctrine, the arbitration agreement is totally independent from the petroleum agreement and separate,[60] although it is physically part of the main contract. So, the arbitration agreement has no accessory relationship. This doctrine gives the relationship a new dimension, which is to protect arbitration as a whole and to generate a separate procedural relationship between the parties.[61]

However, the separability doctrine raises an important question: Is the arbitration agreement independent under the Iraqi law?

Iraqi law does not have a clear answer about the autonomy of the arbitration agreement from the main contract. There is no article in the Iraqi CCP to express this doctrine. However, it could be said that the separability doctrine finds its legal roots in the Iraqi Civil Code No. 40 of 1951, in Article 139. This Article provided that:

> Where the part of the contract is void that part only will be void and the remaining part of the contract will remain valid and be considered as an independent (separate) contract unless it is revealed that the contract would not have been concluded without the part which has been voided.

This declares that if one article of the main agreement is invalid and the other articles are valid, then the invalid one become null, the rest of the articles remain valid and effective, and the invalid one does not affect in contract.[62] Thereby, the invalid clause is excluded from the main contract while the valid ones are treated as an independent contract.[63] However, this article cannot be applied if the invalid clause was the motivation behind concluding the main contract.[64] This approach was confirmed by the Iraqi Supreme Court which

58 Gaillard and Savage (eds.), *supra* note 1 at 210.

59 Julian D.M. Lew, Loukas A. Mistelis and S.M. Kroll, *Comparative International Commercial Arbitration* (Alphen aan den Rijn: Kluwer International Law, 2003), 102.

60 Reuben, *supra* note 41 at 56.

61 Moses, *supra* note 1 at 20.

62 Saleh Majid, 'Arbitration in Iraq', *Arab Law Quarterly* 19 (2004): 267-276.

63 Abdul Mounaam Faraj, *Resources of Obligation* (Beirut: Mostafa al-Halbee, 1960), 303. (in Arabic)

64 Article 139 of Iraqi Civil Code No. 40 of 1951.

held that 'if a party's acceptance of arbitration is not limited, then arbitration may cover all matters subject of the dispute'.[65] Therefore, following the reasoning of the above-mentioned article, the petroleum arbitration agreement has a position independent from the main petroleum agreement under Iraqi law. Even if it is take clause form, this clause is still valid and effective even if the main agreement is invalid. The Iraqi DICA of 2011 adopted the doctrine of the severability of arbitration agreement: this mirrors an Iraqi desire to be consistent with modern international arbitration laws.[66]

To sum up, as a form of contract, the petroleum arbitration agreement is separable from the main contract under Iraqi law. Therefore it is immune from any litigation which considers it null or void because the main contract is null. Thus, petroleum arbitration agreements are distinguished from other agreements and clauses. The separability doctrine gives the petroleum arbitration agreement a special character, distinct from other types of arbitration. The adoption of such a doctrine by Iraqi law will play a significant role in attracting investment because arbitration is one of the important considerations for the foreign investor.

5 Proposals to Reform Petroleum Arbitration Agreement Provisions

There is no doubt that any step to reform arbitration agreement in general and petroleum arbitration agreement in particular will fruitless unless reform the legal environment of petroleum investment. These reforms would enhance the legal system of investment in Iraq in general and petroleum investment in particular. At the same time they would encourage international petroleum companies to invest in Iraq. This article, therefore, suggests general proposals for reform of the Iraqi legal system's governance of the petroleum investment environment. These suggestions would be important in making a suitable environment for the success of petroleum arbitration in Iraq. The evidence from this study suggests the need to promulgate a general commercial arbitration law and a specialised oil and gas law to regulate the petroleum industry in Iraq as overall as specialised oil and gas arbitration law.

5.1 *General Commercial Arbitration Law*

In order to attract and encourage foreign investors to invest in Iraq in transition, Iraq must promulgate commercial arbitration law as an important legal

65 The Supreme Court Decision No. 228/ 1970 (*Judicial Review*, Second Year) No. 1, 100.

66 Article 8 of International Commercial Arbitration Draft of 2011.

guarantee grant to foreign investors. This law should contain criterion to distinguish between international commercial arbitration law and domestic law. The Iraqi commercial arbitration law should also adapt modern principles of international commercial arbitration such as, party autonomy and severability doctrine.

To ensure that Iraqi commercial arbitration law would be effective and serve Iraqi aims in transition to rebuild Iraqi economy and attract foreign investors. The Iraq should become party in international conventions involve in arbitration. The results of this article support the idea that the time is ripe for Iraq to join the New York Convention of 1958 and ICSID Convention which also applies to host states or its entities and also to the other party as a legal entity.

5.2 *Oil and Gas Law*

The evidence from this study suggests the need to promulgate oil and gas laws, to regulate the petroleum industry as whole and also to regulate the management of Iraqi petroleum wealth between the Iraqi regions and provinces in order to serve the interests of the Iraqi people and to give the Iraqi central government a wide role in this regard by giving it the exclusive right to manage the petroleum industry in Iraq. This is because the government is supposed to be the most able to understand the Iraqi people's needs and to distribute the petroleum revenues fairly between Iraqi people.

5.3 *Petroleum Arbitration Law*

Iraq should promulgate arbitration law specialized in petroleum disputes. The promulgation of such law is considered one of the important legal guarantees which attract international petroleum companies to Iraq. This law should contain rules create a balance between Iraqi interests and stakeholders' interests. The petroleum arbitration law should mirror important issues like parties autonomy, give priority to national laws for governing petroleum arbitration and address the sovereignty issue by prohibiting the enforcement of any arbitration award unless the states consent to the enforcement of such awards through arbitration agreement.

Petroleum arbitration agreements under Iraqi law, as discussed previously, are considered to be the heart of the petroleum arbitration process. They contain important procedures about the arbitration and also they express the state parties' consent to waive their sovereign immunity. So, amend and update such agreement may attract the petroleum investors and be in line with modern arbitration law. Therefore this study summarise important suggestions to update petroleum arbitration agreement in Iraq.

1. The petroleum arbitration agreement must be in writing; otherwise it will be null and invalid. The written form should be defined. The petroleum arbitration agreement should be signed by both parties to prove the parties' consent, whether the signature is physical or electronic.
2. The state party should express its desire to waive its immunity and should determine to what extent it would waive its immunity.
3. The applicable law should be provided by the arbitration law because of the importance of the written agreement in determining its validity. This study proposes that the applicable law formally required in petroleum arbitration agreements should be the law of the state on the territory of which the contract was concluded.
4. The capacity of the state and the legal person should be expressed by Iraqi arbitration law.
5. The applicable law of capacity in petroleum arbitration agreements should be the personal law of the parties. Nationality criteria should be considered in order to determine personal law.
6. The applicable substantive law should be the same law as that which governs the petroleum arbitration agreements and the governing the arbitrability in the recognition and enforcement petroleum arbitration agreement before national court should be the law of the court.
7. The Iraqi petroleum arbitration law should offer some choices to the applicable law of petroleum arbitration agreement first law is the law of main agreement which is petroleum agreement or the law of the seat of arbitration or the law of court place. However, this study intend likely to base on the law govern main agreement.
8. The Iraqi law should express explicitly the separability doctrine of petroleum arbitration agreement and this agreement should be considered valid even if the petroleum agreement is invalid. This is so because the adoption of such a doctrine will survive the arbitration process and enhance competence -competence principles in arbitration.

5.4 *The Iraqi DICA of 2011*

Although the Iraqi DICA of 2011 attempted to design provisions for regulating international commercial arbitration in a manner consistent with modern arbitration laws, this draft has many lacunas. It has no articles to address important issues such as the applicable law of arbitration agreement and the applicable law of formal requirement; nor does it refer to the capacity of both parties, this being left to provisions in the CCP law and civil law. Therefore, these gaps should be address by expressing the applicable law of arbitration agreement and applicable law of formal and substantive requirement.

6 Conclusion

The aim of this article was to address and examine the arbitration agreement and what it should be under the Iraqi law, since it is considered the heart of any arbitration process. Without such an agreement, containing the map of such a process, petroleum arbitration could be described as ad hoc and arbitrary. Generally, it was noted that the Iraq has no arbitration law and therefore relies on the CCP and Civil Law to regulate the arbitration agreement. In general the CCP has regulated several issues and left other important issues related to this agreement to the Civil Law. The reasons behind this law's inability to regulate these issues, as identified previously, is that this law has not addressed international arbitration; also the laws that refer to them were out of date and are inconsistent with international standards or do not encourage foreign investment in the petroleum sector. The current laws were regulate arbitration agreement are not sufficient and con not be relied upon to regulate petroleum arbitration agreement.

Therefore, Iraq must take steps towards reform its legal environment of investment. Iraq must promulgate arbitration law involve in international commercial disputes in general and petroleum disputes in particular. Such a step would encourage foreign investors, particularly foreign petroleum companies, to invest in Iraq in transition. In addition to that Iraq must give attention to enforcement law by update this law and amend it to can be concluded enforcement foreign arbitral award. Furthermore, Iraq must join to international conventions such as New York Convention of 1958 and ICSID.

Undoubtedly, reform the legal environment of investment in Iraq would make Iraq fertile soil for investment, particularly petroleum investment. The suggested reforms enhance the legal system in the resolution of petroleum disputes. The provisions for petroleum arbitration agreements as a foundation of petroleum arbitration need to be updated and principles which expressly enhance the petroleum arbitration process, such as severability doctrine, need to be adopted. The above proposals would serve as stimulant doses, enabling the tortoise to win the race.