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Obstacles that may Hinder the Arbitration Process and the Role of third Parties in the Arbitration Dispute

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Abstract

The development of the arbitration system, and the acceptance of states and natural or legal persons to it, and the importance and effectiveness of arbitration in resolving international disputes and its confidentiality and to enable the parties to choose their arbitrators and the applicable law. This distinguishes arbitration from other methods of dispute resolution. Accordingly, in light of the changes and the complexity of relations, especially the emergence of nodal groups that include more than one contract, and the different legal relations between the parties and their intertwining. Questioning the principle of relativity led to arbitration clause on the parties. And where the arbitration agreement was defined as "an agreement between two parties to refer to arbitration all or some of the disputes that have arisen or may arise between them regarding a specific legal relationship, whether contractual or non-contractual. The arbitration agreement may be in the form of an arbitration clause contained in a contract or form separate agreement. Accordingly, the meaning of the article and the provisions that follow from it is that the effect of the contract, whether it is obligations, rights or duties, cannot extend except to its parties, and the party is every person who participated willingly, whether by origin or by proxy, in the formation of the contract and others, otherwise. And on it I will clarify in the paper This research is whether or not others have a relationship in the arbitration dispute.

Keyword

Arbitration, Dispute, Agreement, Contractual, Principle.

Importance of the topic

The importance of the topic lies in the importance of arbitration as one of the

alternative methods for settling disputes, including the importance of clarifying the scope of the arbitration agreement and its extension to third parties, and clarifying the legislative vacuum in the matter of third parties.

Research problem

The research problem lies in the fact that the new Bahraini law did not address the issue of extending the arbitration clause to others, which left the door open to refer to the general provisions of the civil law with regard to the relativity of contracts and their effects. The right to resort to the judiciary.

Research Methodology

In writing this research paper, I relied on a mixed approach between descriptive and analytical, so I used the descriptive approach in describing the articles of law related to the subject of research and the analytical approach in order to identify the true will of the legislator and judicial applications in order to identify some cases in which the arbitration clause can be extended to others.

Introduction

The concept of the other and its importance

The third party is the foreigner in the case, as he called the person who does not benefit from the matter agreed upon between two or more parties with anything, and nothing of the matter harms him with the foreigner or third party, including everyone who has no relationship with the subject of the contract and is not affected by it, he is (the third party). Hence, we first discuss the concept of third parties, and secondly, the role of third parties in the arbitration dispute. What is meant by third parties in the arbitration dispute

1- Defining another language

The third party in the linguistic concept is the change - the third party in the case, and it is not represented in the judgment or the third party insurance contract

2- Defining others idiomatically

And it means a third idiomatically in the legal sense, it is a third party who was not a party to the contract, nor a successor to one of the contracting parties, which is what is called a foreign third party originally from the contract, so the effect of the contract does not extend to it as long as it is far from the circle of contracting.

3- Legally

Every person who is outside the framework of the arbitration agreement and is not

one of its parties and wants to enter into the dispute arising between the two parties, whether his intervention in the arbitration dispute is an original intervention or a joining intervention by one of the parties to the dispute.

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Accordingly, we can see from the previous definitions that the third party in the arbitration dispute is: "Any person, whether a natural or legal person, who was not a party to the arbitration agreement or the arbitration dispute, and may enter or be included in the arbitration dispute voluntarily or according to the law."

Distinguishing others from the party to the arbitration agreement

The direction to arbitration is an exceptional, consensual path that does not take place except with the consent of the two parties. By this, what is meant by the party to the arbitration agreement is everyone who concluded the arbitration agreement by himself or by his representative.

The UNOCTRAL rules came to indicate the parties to the arbitration, as one or more persons, whether a natural or legal person who fulfills the legal conditions of eligibility and the will of one of the parties, in agreement with the other party, to resort to arbitration, whether for an existing or future dispute.

Thus, we can first deduce that the person is natural, but the UNOCTRAL rules did not indicate whether the arbitration clause extends to more than one of its natural parties, and accordingly we refer to the rules of the Bahraini civil law to clarify this. Where the natural person who is the party to the agreement is represented by the same person, and this includes his general successor and his private successor in accordance with the law. The word "two parties to the dispute" is not limited to the two original parties, but rather it means the two parties and those who represent them in the contract as well.

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Accordingly, we will show the cases of distinguishing others from the parties to the litigation

(1) Distinguishing others from the general successor:

General rule

And which was stipulated in Article 133/1 of the Bahraini Civil Code that the effects of the contract concluded by the predecessor are all transferred to the general successor in all rights and obligations that resulted from the contracts concluded by the predecessor before his death, on condition that they do not conflict with the rules of inheritance. Accordingly, the general successor is the one who succeeds the predecessor in his financial responsibility, such as the heir or the testator for part of the estate. Accordingly, for the aforementioned rule to work, it

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- Bahria Wehbeya, Issani Nehme, Third Parties in Arbitration Litigation, Memorandum for Obtaining a Master's Degree in Law, 2016, Abdul Rahman Mirah University, electronic resource www.Univbejaia.dz/jspui/bitstream/123456789/1/, Sunday, 08/25/2022- 18:00pm
- Dictionary of meanings, Arabic, electronic source: www.almaany.com/ar/dict/ar-, Modany, 01/09/2022, 14:30 pm

is required:

- 1- The positive elements of the inheritance's financial liability, represented by the money or rights left behind by him with others, are not released to his general successor until after payment of his debts or obligations.
- 2- The negative elements of the debts of the bequeathed to the successor are restricted within the limits of the rights transferred to him in respect of this inheritance.

The principle is that all the effects of the contract pass to the general successor, but every rule has an exception and we review these exceptions that are stipulated in Article 133 / b of the Bahraini Civil Code.

The first exception

When the two parties agree that the effects of the contract will not extend to the general successor, the contract is the law of the contracting parties. If the will of the parties is directed that this right or obligation is limited to both parties and does not exceed it, then it is so. This is because the effect of the contract going to the general successor is not part of the general system, and it is possible to agree on its violation.

The second exception:

And it is in the event that the nature of the right or obligation does not transfer its effect to the general successor, as if the person is a specific artist or a specific lawyer, then the effect of those contracts is not transmitted to his heirs, because the contractual nature or obligation prevents this.

The third exception

And that case is according to the law, with an explicit provision in the law that prevents the transfer of the effect of the contract to the general successor, for example: the termination of the agency contract with the death of the agent .

(2) Distinguishing others from private successors

Accordingly, the special successor is the one who receives from someone else a property in itself or a real right, and he succeeds him in the contracts related to it. The principle is that the special successor does not extend to him the effects of the contracts concluded by the predecessor except in the cases stipulated in Article 134 **of the Bahraini Civil Code**

- That the contract concluded by the predecessor was before the transfer of the money to his successor, it is not expected that the effect of the contract will be transferred after the termination of the obligation arising between the two parties.

³ - Counselor / Ahmed Medhat Al-Maraghi, The Intermediate Explanation of Civil Law, Part One, The Commitment Theory. 2004, p. 451

Example: the seller of the property sells the property for the second time to a person other than the buyer after the buyer paid and registered the property in his name.

That this contract is related to the money that is not to the private successor, and if it is one of the necessities of the thing, such as rights that complement the thing, for example: in the event that the advances arranged a right of easement for the property, then the successor to whom the property is transferred receives it enjoying this right and the specific obligations of the thing, such as the obligation of the predecessor who owns real estate for transgression A

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Third parties and their role in the arbitration dispute

Accordingly, in this requirement, we first review the relativity of the arbitration clause, and then indicate the cases in which third parties can be considered a party to the dispute.

The relativity of the arbitration agreement

The UNOCTRAL Model Rules clarified the concept of the arbitration agreement in Article 7 of it as "an agreement between the two parties to refer all or some of the disputes to arbitration...".

Accordingly, and what is established in jurisprudence, jurisprudence, and law is that arbitration is based on the consent of the parties to it as an alternative to resorting to the courts of the state to resolve disputes arising between them within the framework defined by the law, and therefore the will of the parties is what creates arbitration, and thus it is not permissible to oblige people to resort to arbitration, The matter with which the arbitration agreement cannot be established if that will fails, and from here comes the relativity of the arbitration agreement, meaning that it is not invoked and does not arrange its effects except for the person whose will was directed to him, and this is what the Egyptian Court of Cassation ruled: "The legal organization of arbitration is based on The consent of the parties and their acceptance of it as a means of resolving all or some of the disputes that have arisen or may arise between them on the occasion of a certain legal relationship, contractual or non-contractual. Accordingly, when the agreement fails, it is forbidden to say that arbitration has taken place, which entails the relativity of its effect, so it is not invoked except in the face of the party that accepted it and accepted its opponent.

Appeal No. 4729 of 72, Session 06/22/2004, S 55, P. 1, P. 638, S 117.

- The parties to arbitration, as previously stated in the first claim, mean that they concluded the arbitration agreement themselves or who represents them correctly, and this characteristic is usually evident from the signature on papers or

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- Dr. Muhammad Saeed Al-Raho and Dr. Hisham Shukri, Baban, International Commercial Arbitration, University of Bahrain Press, 2011, p. 291

letters and other legally considered methods for concluding the arbitration agreement, but this signature or others must be Focused on the will to conclude the arbitration agreement.

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What is meant by writing or signing must be according to his capacity in the agreement. It is not sufficient to sign in a capacity other than the capacity of the party, such as signing to approve the arbitration agreement between the two parties or the approval of the rest of the contract. Where the facts of the case are summarized

- "About a contract concluded between the Egyptian General Authority for Tourism and Hotels and the South Pacific Movement, and related to the construction and exploitation of a tourist site on the Giza Pyramids Plateau, after which an additional agreement was concluded between the two parties including an arbitration clause with the International Chamber of Commerce, and this is the agreement signed by the Minister of Tourism Al-Masry, after putting it in the phrase, looks and relies, and as a result of political changes, the Egyptian administration was forced to cancel the project, when the South Pacific Company adhered to the arbitration clause with the International Chamber of Commerce in the face of the General Authority for Tourism and Hotels and its claim for compensation, the Egyptian government argued that it lacks jurisdiction because it is not a party to the arbitration agreement. However, the arbitral tribunal rejected this other argument, which prompted the Egyptian government to challenge the ruling before the Paris Court of Appeal. The Court of Appeal ruled that the signature of the competent minister (Minister of Tourism) on a contract between an investor and a public sector entity in Egypt is at the bottom of the contract after placing the phrase "consideration and approval"). agreed and ratified approved) does not make the Egyptian government a party to this contract, and therefore it is not bound by the arbitration clause, because the signing of the agreement indicates the direction of the Egyptian government's intention to be a party F in the contract, but it is a kind of trusteeship and control that it exercises over the activities in the archaeological area, so the minister's signature on the agreement that includes the arbitration clause is not counted.

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- Accordingly, we find that it means the relativity of the arbitration clause is that the agreement is not binding except with regard to its two parties, so it does not go to others, but our exception from that principle has appeared some emerging cases in which the arbitration clause extends to other than its parties, due to the international economic and commercial development and the emergence of some problems related to arbitration regarding Relating to multi-party contracts or the association of some contracts closely with the absence of the arbitration clause except for one of them and other hypotheses that have appeared recently and accordingly.

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⁶ - Dr. Muhammad Saeed Al-Raho and Dr. Hisham Shukri, Baban, previous reference, p. 176

⁷ - Dr. Khaled Jamal, Sources of Obligation and Its Provisions in the Bahraini Civil Law, University Press, 2011, p. 140

- Previous reference, Al Waseet fi Explanation of Civil Law, p. 448

Cases of considering third parties as parties to the arbitration dispute

There are many cases in which third parties can be considered a party to the arbitration agreement, due to the independence of the arbitration clause from the original contract and other contracts that may be associated with the contract. We will show the most important of them as follows, according to the Bahraini legislator, due to the absence of clauses or clarification in the Bahraini arbitration law and the unustral rules attached with it.

Conditioning for the benefit of others

As it is established jurisprudence, jurisprudence and law that the conditional interest of a third party entails direct rights for a third party in the face of the contractor, and for this reason the conditional in his favor in an agreement that includes a condition for the interest of a third party is to request his work in his favor and he claims his right through arbitration, and that is in accordance with the text of Article (138) of the Bahraini Civil Code Which stipulates that "the obligor may uphold, in the face of the beneficiary, all the defenses that arise for him from the stipulation contract and that he could have invoked in the face of the conditional."

This is what the rulings of the Egyptian Court of Cassation settled on.

Which stipulates the provisions of Articles 154 and 155 of the Civil Code, and as stated in the explanatory memorandum of the Civil Law and the preliminary project memorandum - that the stipulation in the interest of others has become a general rule, after it was an exception that does not work except in cases related to it, and it involves a natural departure from the rule.

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The economy of the benefits of contracts is on the contracting parties and not others, as the contractor is obligated before the stipulation in the interest of the beneficiary, so the latter gains a direct right, even if he is not a party to the contract, and in this way the contract itself is a source of this right. For this reason, it required that the conditional party have a material or moral personal interest in executing the stipulated obligation for the benefit of others, and allowed him to revoke the condition as long as the third party did not declare his desire to benefit from it, unless that is contrary to the spirit of the contract. If the beneficiary accepts the condition or if the condition is an obligation on the one who stipulated, then his right becomes binding or irrevocable, and it is a direct right originating in the contract, then he may demand the implementation of the condition.

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Appeal No. 604 of 44 Session 01/29/1980 S 31 P 1 AM 244 S 169 On the

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Lawyer Ali Al-Arian impacts the principle of the group of companies in extending the arbitration agreement to a party other than the signatory. Electronic article: <http://almu7amy.blogspot.com/2018/05/blog-post.html>

- pnama canal wins arbitration case against GUPC consoetium.Naida Hakirevic. - Harith Suleiman Al-Farouqi, The Legal Dictionary, English - Arabic, Library of Lebanon, 2014. pg. 158

other hand, the party stipulated in the agreement may implement the arbitration clause contained in the contract by filing an arbitration lawsuit to claim a third party stipulated in his favor, and the latter may benefit from this ruling issued in his favor despite He is not a party to the dispute.

(2) Undertaking for the benefit of others

It is an agreement between two persons, one of whom undertakes against the other to force a third person to abide by the legal act that was concluded. This is what was regulated by Article 135 of the Bahraini Civil Code. If a person pledges to another to make a third party commit himself to a specific matter, he is bound by that pledge to the exclusion of others. If the third-party refuses to assume the obligation undertaken, the obligor is in breach of his obligation, and he is obligated to compensate the oblige for the damage he suffered as a result of his breach, unless he himself offers to carry out the thing undertaken, and he is within his power without harming the oblige. If the third party accepts the obligation, he shall be liable for it and the obligor shall be absolved of his obligation, and he shall be liable for it from the time of his consent, unless it is evident that he intended that the effect of this consent be based on the time of issuance of the undertaking.

It is clear from the preceding article that the commitment of a third party is a result of free will, and that is by means of a new contract arising from his acceptance of the subject matter of the pledge. In this case, third parties cannot be compelled to implement the obligation, as others are free to accept or reject the undertaking.

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Appearing as the owner of the character

Since one of them may contract with a person who appears to him and suggests that he is the owner of the company or is a representative of the manager, then this relationship is considered to protect good faith and the effect of the arbitration agreement goes to the principal who is from the third party who did not sign the corporate contract.

With the multiplicity of forms of companies, the multiplicity of parties to contracts and the extension of liability. Therefore, we mention the parent company and the branch company.

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Here lies the question: If the parent company has contracted with another party and this contract stipulates an arbitration clause, does the arbitration clause extend to the subsidiary company or not? And if the branch company contracts, does the arbitration clause extend to the parent company?

In the first case, when the parent company contracts with another party and stipulates the existence of arbitration to resolve disputes, it is applied and extended

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¹¹ - Rulings of Cassation - Technical Office - Madani Al-Sunnah 55 - p. 638, electronic source: <http://www.laweg.net/Default.aspx?action=LawEg&Type=16&JID-89872>

- Dr. Fathi Wali, Governor of Arbitration in National and International Commercial Disputes, Note and Clients of the Knowledge Foundation in Alexandria, 2014, pg. 440

to the branch company, because the branch company does not have a legal personality separate from the parent company.

As for the second case, when the branch company enters into a contract with another, it also extends to the parent company, but two conditions must be met: that the company's articles of association give the branch the authority to agree or stipulate the arbitration clause, and also in the event that the branch company enters, approves, or adheres to the arbitration clause, then it must Act as a representative of the original company.

The holding company and subsidiary company

The holding company and the subsidiary company have two independent legal personalities, and therefore the arbitration clause does not extend to the other company. This is what the Egyptian Court of Cassation ruled in its ruling.

"The mere fact that one of the parties to the arbitration dispute is a company within a group of companies in whose capital a mother company contributes is not considered evidence of the latter's commitment to the contracts concluded by the first that include the arbitration clause, unless it is proven that it interfered in its implementation or caused confusion regarding the oblige in a way that confuses its will With the will of the other company .

Commercial cassation June 22, 2004 in appeal Nos. 4729 and 4730 for the year 73 BC Subscribing to a consortium.

A consortium can be defined as a syndicate or a temporary cooperative association that meets to exchange cooperation for a common purpose, whether it is an international association or a union of banks .

In the case of more than one company linked in one economic activity between them, does the arbitration clause extend to one of those companies that are not one of the parties to the contract covered by an arbitration clause?

Jurisprudence and jurisprudence differed in what we seek in practice regarding the extension and validity of the arbitration agreement to third parties in this case or not, so the French judiciary, as well as the arbitral tribunal of the International Chamber of Commerce in Paris and others, went to the validity of the agreement in the face of the rest of the companies, even if not all companies signed. This is the direction followed by the arbitral tribunal of the International Chamber of Commerce in Paris in the well-known case known as the "Panama Canal" case, where it ruled that the consortium contracting with those responsible for the Panama Canal should pay compensation estimated at 240 million dollars for damages.

According to a report issued by the UNCITRAL Working Group on Arbitration Matters, the application of the "company principle" requires proof of a set of elements:

1 - That a group of companies, including the company that did not sign the

- - Previous reference, Bahriya Wehbeya, Issani Nehme, p. 13

¹² - UNCITRAL, Article 7, Clause 3

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arbitration agreement, be a single economic reality.

- 2- That the company that is not a signatory to the arbitration agreement and which is intended to be bound or bound by it has played an effective role in concluding and executing the contract that includes the arbitration clause.
- 3- That the commitment of the non-signatory company or its commitment to the arbitration agreement reflect the common intention of all parties and parties to the contract subject of the arbitration dispute

As for the other approach, which the Cairo Court of Appeal concluded, provided that the arbitration agreement does not extend to the partners who did not sign the arbitration clause in the consortium, they cannot adhere to it, as it ruled the invalidity of the arbitration ruling, which decided to include a company that did not sign the arbitration agreement in the arbitration dispute, and to oblige it to be jointly liable. With the company that signed it, on the basis that it is united by one economic unit.

It appears from the aforementioned that there are multiple forms and cases in which the arbitration clause can be extended to others, provided that the necessary elements and conditions are met in each case separately.

Judicial applications differed in taking into account these cases or not, and from my opinion I agree with the opinion of the Egyptian legislator, since the adoption of the extension of the arbitration clause to the consortium leads to an infringement of one of the constitutional rights, which is the right to resort to the ordinary courts

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The Bahraini legislator implicitly took the same position as the Egyptian legislator by restricting the extension of the arbitration clause to third parties. The previous subscriptions have been amended to authorize a lawyer, for example, to represent before arbitration, contract contracts and arbitration terms, since in the past it was sufficient to give this power of attorney the signature of the authorized signatory on behalf of the company on the agency, but now Evidence of accompanying the partners must be attached to refer the lawyer to resort to arbitration and to sign the parties

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This is a consolidation of the rule that whoever has the right to conclude the arbitration contract is the one who has the right to dispose of the right itself.

Conclusion and Recommendations

Nevertheless, uncertainties still remain as to the contours of these concepts and how they are understood within the context of individual disputes and jurisdictions. Thus, parties would be well-advised to remain cautious when drafting their arbitration agreements and contemplating arbitration proceedings; and to consider the implications of these two concepts from the perspectives of the

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- Dr.. Abdel Qader and Rasma Ghaleb Electronic article: The case of Hadaba Al-Ahram is one of the famous arbitration cases, Amman Newspaper, January 25, 2017, the electronic source. www.omandaily.com/p=431518

- Rulings of Cassation - Technical Office - Cities, Part One - for the year 31, p. 344, previous reference

governing law of the dispute, the law of the seat and the laws of countries for potential recognition and enforcement. Additional consideration must be given if UNCTRAL public policy could also be triggered. Arbitrators themselves also have a role during the proceedings in seeking to ensure as far as is possible that their awards cannot be deemed non-arbitrable or to violate public policy

In conclusion, the topic of the scope of the arbitration agreement is one of the most important topics that need research, focus and examination by those in charge of examining any dispute through arbitration: The parties from the general successor and the special successor are not from others. The origin is relative to the arbitration clause, and the exception to that rule is that the arbitration clause can be extended. To third parties in certain cases, forms and conditions. Resorting to civil law and its rules in most matters related to the subject of third parties in the arbitration dispute. The legislator recommended amending laws to deal with minors by clarifying the scope of the arbitration clause extending to others.