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### **Modernising Iraq : a vision for a comprehensive petroleum arbitration regime in Iraq**

Al-Bidery, Sinan

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**Modernising Iraq: A Vision for a Comprehensive Petroleum Arbitration  
Regime in Iraq**

By

Sinan Abdulhamza Al-Bidery

A thesis submitted to the University of Bangor, School of Law in fulfilment of the requirements  
for the award of degree of Doctor of Philosophy

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**Dedicated to:**

*To all of the Iraq children who have lost their childhood because of wars*



## **Abstract:**

This PhD research is concerned with the legal system for the settlement of petroleum disputes according to Iraqi law. It deals with international commercial arbitration as a means of resolving such disputes under Iraqi law, since Iraq does not have an adequate legal system for resolving disputes arising from petroleum agreements. It has not yet enacted specific legislation regulating or governing international commercial arbitration in general, and petroleum arbitration in particular. It is still dependent on the Code of Civil Procedure of 1969, which does not suffice to attract international investment. In addition, Iraq has not yet ratified or signed the leading international conventions concerning arbitration, such as the New York Convention of 1958 or the International Center for Settlement of Investment Disputes (ICSID).

The thesis of this PhD is that Iraq needs special rules for the arbitration of petroleum disputes. These rules should achieve the balance between the needs of Iraq in its transitional period and foreign investors' interests. The promulgation of a petroleum arbitration laws is an important legal guarantee which can attract international petroleum companies to Iraq.

Both referencing and black- letter analysis methodology is followed in this thesis. The referancing approach consists of reference to the laws of selected developing countries, especially China and the United Arab Emirates, which have experience and expertise in investment and arbitration. The black- letter analysis approach is also deployed to analyse Iraqi attitudes towards arbitration, the legal nature of petroleum agreements and the challenges facing Iraq causing reluctant and hesitation in developing a comprehensive petroleum arbitration regime.

This study tests, and finds it convincing that petroleum agreements are, indeed a special kind of investment agreement. The subject matter of this agreement is of exceptional monetary value and belongs to the Iraqi people. Article 111 of the Iraqi Constitutional of 2005 provides that "Oil and Gas are owned by all the people of Iraq in all regions and governorates".<sup>1</sup> Therefore, these agreements should be treated differently by subjecting them to a specialised arbitration regime

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<sup>1</sup> Iraqi Constitution of 2005 publishes in Official Gazette issue 4012 of 28 May 2005. An English Language translation of the 2005 Constitution is available at <<http://investpromo.gov.iq/policies-and-laws/>> accessed on 10 April 2014.

rather than ordinary international commercial arbitration. The author's vision, set out in this work, is that Iraq should promulgate petroleum arbitration laws and develop a specialised system to support this. These laws would lend weight to the application of Iraqi national law, and make the country more attractive for foreign investment. An independent petroleum arbitration centre should be established along the lines of Dubai's International Arbitration Center and the Chinese International Economic and Trade Arbitration Commission. Its awards should be considered as final and enforced in the same manner as domestic awards.

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## **Abbreviations:**

AALCC	The Afro - Asian Legal Consultative Committee
ACICA	Australian Center of International Commercial Arbitration
ADCCP	Abu Dhabi Code of Civil Procedures
AU	African Union
BOD	British Oil Development L Ltd
BP	British Petroleum
BPC	Basra Petroleum Company
CFP	Compagnie Française des Pétroles
CPA	Coalition Provisional Authority
CIETAC	Chinese International Economic and Trade Arbitration Commission
CERDS	Charter of Economic Rights and Duties of States
CJISTP	United Nations Convention on Jurisdictional Immunities of States and Their Property of 2005
DFI	Development Fund for Iraq
DICAL	Draft International Commercial Arbitration Law of 2011(Iraq)
DLOG	Draft Law of Oil and Gas of 2007(Iraq)
ELFJ	The Enforcement Law of Foreign Judgments in Iraq
ERAP	French Organization for Oil Prospection and Activities
HKIAC	Hong Kong International Arbitration Center
IAMB	The International Advisory and Monitoring Board
IBA	The International Bar Association
ICC	The International Chamber of Commerce
ICJ	The International Court of Justice



ICSID	The International Center for Settlement of Investment Disputes
IIAPCO	The Independent Indonesia American Petroleum Company
INOC	The Iraqi National Oil Company
IPC	The Iraqi Petroleum Company
IFG	The Iraqi Federal Government
KLRC	Kuala Lumpur Regional Center for Arbitration
KRG	The Kurdistan Regional Government
MIGA	The Multilateral Investment Guarantee Agency
MPC	Mosul Petroleum Company
NOSO	North Sumatra Oil Development Corporation
OHADO	The Organization for the Harmonization of Business Law in Africa
OPEC	Organization of Petroleum Exporting Countries
PRC	The Peoples Republic of China
PSNR	Permanent Sovereignty over Natural Resources Resolution
PTA	The Preferential Trade Area for Eastern and Southern Africa
SC	Security Council
SIAC	The Singapore International Arbitration Centre
SoCal	Standard Oil of California
TPC	Turkish Petroleum Company
UK	The United Kingdom
UN	United Nations
USA	The United States of America
USSR	The Union of Soviet Socialist Republic
UAE	The United Arab Emirates

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*LIAMCO (Libyan American Oil Company v. The Socialist Peoples' Libyan Arab Jamahiriya)* (1977) 62 ILR 140.

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*Ruler of Qatar v. International Maritime Oil Company Ltd* (1953) 20 ILR 534.

*Sapphire (International Petroleum Ltd v. National Iranian Oil Company)* (1967) 35 ILR 136.

*Serbian Loan Judgment*, [1929] P.C.J. Rep. Series A, No. 20.

*Siderius Inc. v. Compania de Acero del Pacifico. S.A* United States District Court, S. D. New York, 453 F. Supp. 22 1978.

*Société Gatoil v. National Iranian Oil Co*, 1993, Rev Arb 281-7.

*Sojuznefteexport v. Joc Oil, Ltd* USSR Chamber of Commerce and Industry case No. 109/ 1980 in XVIII Y.B Com ARB 92 (1993).

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*Ohntrup v. Firearms Centre Inc.*, 516 F. Supp. 1281, (E.D.Pa. 1981).

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

المحكمة الفيدرالية العراقية العليا، القرار رقم 1970/288 (النشره القضائيه، السنه الثانيه) رقم 100.1.

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محكمة استئناف بغداد – الرصافه، القرار رقم 109 في 1 شباط 2010.

The Iraqi Court of Cassation decision No355 on 13 May 1971 (Judicial Review, third year) No. 158.

محكمة تمييز العراق، القرار رقم 355 في 13 من ايار لسنة 1971 (النشره القضائيه، السنه الثالثه) 158.

The Iraqi Court of Cassation decision No 10/11, on 30/01/19.

محكمة تمييز العراق، القرار 11/10 في 30 من كانون الثاني

## Chapter One: Introduction

### 1. 1. Introduction:

There is no doubt that petroleum has a great influence on a state's economy, whether that state is a producer or a consumer. Some countries, including for example the United States of America (hereinafter USA), produce oil, but in insufficient quantities, and need also to import it. The discovery of this fuel in some countries led to a revolution in the level of living standards. In some oil producing countries, petroleum became the primary source of income. For example, the Arab Gulf countries were formerly dependent on the export of agricultural crops and the trade in some marine produce as their sources of income.<sup>1</sup> These countries were poor and undeveloped before their discovery of petroleum, which subsequently became their main source of income and the source of rapid growth and modernisation. Consequently, many oil producing countries try to protect this wealth, which dominates their economies. The discovery of petroleum has not only had an impact on the economy of the oil-producing countries, it has also played an important role in reshaping the history of these countries.

Of course, there must be a demand for a commodity in order for it to be valuable. Consumer countries seek ways to gain and secure this vital material to sustain their factories, transportation and military power. The demand for petroleum from these countries has dramatically increased. Oil prices have risen as a result of competition between users, and tax revenue from oil has also been a factor.

Competition between some of these countries has led to strife between some consumer countries and some oil producing countries. The consumer states have made efforts to gain control over petroleum. Competition<sup>2</sup> also emerged between oil producing countries themselves

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<sup>1</sup> Khaldoun Nassan Al-Naqeeb, *Society and State in the Gulf and Arab Peninsula: A Different Perspective* (Routledge 2012) 169.

<sup>2</sup> Vally Koubi, Gabriele Spilker, Tobias Böhmelt and Thomas Bernauer concluded that "our review of the literature suggests that there is some evidence on the association of resource abundance and conflict. Hence, many empirical studies show that resources can play a role in armed conflict". Vally Koubi et al., 'Do Natural Resources Matter for Interstate and Interstate Armed Conflict?' [2013] *Journal of Peace Research* 1.

and led to war as in, for example, the war between Iraq and Kuwait in 1991.<sup>3</sup> The competition is not only between the oil producing countries but also exists within the oil producing countries, and has led to disputes, such as the disputes between the Iraqi Federal Government (hereinafter IFG) and the Kurdistan Regional Government (hereinafter KRG).

Dispute settlement is a significant aspect of any contractual relationship, particularly in international petroleum agreements. This is because, on the one hand, a large amount of capital is 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. The stakes are very high for both sides. It is a situation in which neither party wants to risk losing, and therefore choosing a suitable method for resolving disputes arising from such agreements is considered vital in determining any agreement between the parties. There are different means of settling the dispute: the parties can agree to recourse to mediation, negotiation, litigation or arbitration.

Arbitration is a popular means of resolving disputes in commercial matters. It has become the primary and most effective system for resolving commercial disputes.<sup>4</sup> Nevertheless, the attitudes to arbitration are different with regard to petroleum disputes. While international petroleum companies<sup>5</sup> prefer this option, oil producing countries, among them Iraq, take a suspicious view of arbitration as a way of settling disputes. Some oil producing states believe that submitting a petroleum dispute to arbitration is a violation of sovereignty.<sup>6</sup> In addition, the disparity between the economic capacities of the contractual parties, which is reflected in the petroleum agreement terms, obliges the developing countries to take a tough stance in order to protect their interests from the overwhelming economic power of these companies.<sup>7</sup> Arbitration centres in particular do not apply the national laws of the host states and

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<sup>3</sup> Stephan Schmid, *Gulf War II (1990/91) - Iraq Between United Nations' Diplomacy and United State's Policy* (Auflage 2006) 5; Zachary C. Shirkey, *Is This a Private Fight or Can Anybody Join?: The Spread of Interstate War* (Ashgate Publishing Limited 2009) 193.

<sup>4</sup> Gary Brain Born, *International Commercial Arbitration in the United States: Commentary and Material* (2<sup>nd</sup> edn, Kluwer Law International 200) 1-2.

<sup>5</sup> Hans Smit, 'The Future of International Commercial Arbitration: A Single Transnational Institution?' (1968-1987) 25 *Columbia Journal of Transnational Law* 9.

<sup>6</sup> Gus Van Harten, 'The Public- Private Distinction in the International Arbitration of Individual Claims against the State' (2008) 56 *International and Comparative Law Quarterly* 371.

<sup>7</sup> M. Sornarajah, 'The Myth of International Contract Law' (1981) 15 *Journal of World Trade Law* 187.

these arbitration chambers tend to adjudicate in the petroleum companies' interest.<sup>8</sup> Because of these circumstances, many host states have decreed that the national court has exclusive authority to settle disputes arising from petroleum contracts.

Iraq has one of the world's largest deposits of petroleum. Its modern history has been shaped by petroleum. In the last three decades, Iraq has endured three successive wars,<sup>9</sup> as well as the economic sanctions imposed by the Security Council (hereinafter the SC), which continued for more than 13 years.<sup>10</sup> These sanctions did not allow Iraq to make any commercial transactions or foreign investments, apart from exporting a limited amount of petroleum.<sup>11</sup> Iraqi petroleum revenues earned from the sale of this limited amount were subjected to the supervision and control of the United Nations (hereinafter the UN).<sup>12</sup> These revenues served to provide Iraq with food and other necessities.<sup>13</sup> Such events impacted negatively on the Iraqi economy, particularly on the petroleum industry sector.

After 2003, Iraq sought to revive its economy and to overcome the challenges facing it by attracting foreign investors and companies to invest in Iraq, especially in the petroleum sector, which is considered to be the backbone of the Iraqi economy. The aim was to restore Iraq to its place among the oil producing countries and also to restore its active role as the state with the second greatest petroleum reserves in the world. The author regards the arbitration method of resolving disputes as a strategic tool for attracting foreign investors, especially in a complex situation such as the one faced by Iraq. It should be considered one of the most important guarantees given by host states in order to attract foreign investors, particularly in post- conflict states in which investors will be mindful of the type of forum that will undertake to resolve petroleum disputes.<sup>14</sup>

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<sup>8</sup> Samson L. Sempasa, 'Obstacle to International Commercial Arbitration in African Countries' (1992) 41 *International and Comparative Law Quarterly* 387.

<sup>9</sup> The war between Iraq and Iran (1980-1988); the first Gulf War 1991: the second Gulf war 2003.

<sup>10</sup> UNSC Res 661 (6 August 1990) UN Doc S/RES/0661.

<sup>11</sup> UNSC Res 986 (15 April 1995) UN Doc S/RES/986.

<sup>12</sup> UNSC Res 986 (15 April 1995) UN Doc S/RES/986.

<sup>13</sup> UNSC Res 986 (15 April 1995) UN Doc S/RES/986.

<sup>14</sup> 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* (Adonis & Abbey Publishers Ltd 2010) 3.

## 1.2. The Importance of This Research:

This study, focusing on the settlement of disputes in petroleum agreements by arbitration in Iraqi law, has been chosen for several reasons. These are as follows:

1. Arbitration has grown rapidly in the last decades as an effective means of resolving disputes in commercial agreements in general, and in petroleum disputes particularly. Most petroleum agreements refer to arbitration as a means of settling any dispute arising from such agreements, either through *ad hoc* or institutional arbitration.

2. Arbitration occupies a large area of legal debate, especially in disputes arising from petroleum agreements, which have special conditions. The subject matter of the agreement is petroleum, which is different from other economic commodities, like tin, copper and iron, because it involves the issue of state sovereignty. Therefore, it has become a major concern, not only for all stakeholders in the petroleum investment sector, but also for lawyers and the academics. Arbitration is an active field of law in practice and theories in many international conferences and media.<sup>15</sup>

3. While the importance of arbitration increases in the world, Iraq has not yet enacted specific legislation regulating or governing international commercial arbitration in general and petroleum arbitration in particular. Although the Draft Law of Oil and Gas<sup>16</sup> 2007 (hereinafter DLOG) refers to resolving petroleum disputes by arbitration, the Representative Council of Iraq did not adopt it. Iraq depends on certain legal texts that are found in the Code of Civil Procedure Law No. 83 of 1969<sup>17</sup> (hereinafter CCP) and these provisions are unsatisfactory, being both incomplete and out of date. The legislation itself is obsolete and has a number of unclear issues, especially with regard to

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<sup>15</sup> For example, the annual International Bar Association conference (IBA) available at < [http://www.ibanet.org/LPD/Dispute\\_Resolution\\_Section/Arbitration/Conferences.aspx](http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Conferences.aspx) > accessed on 10 April 2014 and the International Chamber Of Commerce (ICC) available at <<http://www.iccwbo.org/about-icc/organization/icc-training-and-conferences/> > accessed on 10 April 2014.

<sup>16</sup> Article 39 (B) of DLOG which provides that:

If the dispute cannot be resolved by agreement, the matter shall be referred to the Minister to resolve through discussions with senior officers of the holders of rights concerned. Failing resolution through these discussions the matter of dispute may be submitted to arbitration or to the competent judicial authority.

This translation from Arabic language to English Language by Council of Ministers Oil and Energy Committee the whole text is available at <<http://www.krg.org/uploads/documents/Draft%20Iraq> > accessed on 10 April 2014.

<sup>17</sup> Iraqi Civil Procedures Law No 83 of 1969 published in the Iraqi Official Gazette vol 2, 1969 477.

applicable laws. Thus, this study is giving weight for the arbitration of petroleum disputes in Iraqi law. Furthermore, Iraq has not enacted any laws to regulate the enforcement of foreign arbitral awards in Iraq. The implementation laws in Iraq focus on foreign judgments. They do not offer any mechanism for the regulation of foreign arbitral awards. Meanwhile, many developing countries are enacting and updating their international commercial arbitration, as well as establishing new centres for arbitration. Iraq needs to modernize across the board in order to keep up with the competition.

4. After 2003, Iraq's petroleum sector suffered greatly, not only because of the mistaken policies of Saddam Hussain towards the petroleum sector, but also because of violence, and the invasion of Iraq. After the above mentioned date, Iraq tried to revive its exhausted economy and depended on petroleum sector revenues to improve other sectors, for example, agriculture, industry and tourism. For these reasons Iraq has reviewed its economic policy in an attempt to revive this important sector. It has to attract foreign investors by providing them with legal and financial safeguards. On the other hand, Iraq has to ensure special protection of the wealth of the Iraqi people and to take their interests into account. Iraq should encourage foreign investors by providing them with a legal safeguard to preserve their rights. One of the important ways to entice foreign investors to invest in Iraq is arbitration, especially concerning the settlement of disputes arising from petroleum agreements.

### **1.3. Petroleum Arbitration a Brief Review of the Academic Literature:**

Arbitration occupies a significant place in legal studies. This is not only because it has become the dominant method for resolving disputes arising from investment agreements and one of the most effective ways for a state to attract foreign investors. It is also considered the most controversial method for settling such disputes, particularly when the subject matter is petroleum. International arbitration impedes the authority of national courts to settle petroleum disputes and, in many cases, prevents the host states from applying their national laws. This arouses suspicions among the host states with regard to arbitration and increases the intensity of the debates concerning national courts and the jurisdiction of national laws. The applicable law is not the only obstacle facing petroleum arbitration. There are also sovereignty issues,



particularly when one of the parties to the dispute is the host state, which also has sovereignty over natural resources.<sup>18</sup> Sovereign immunity would be waived by the host state if it chose arbitration to settle petroleum disputes. The state may waive its immunity, either before the dispute arises, when this is agreed in advance within the contract, or after the dispute arises. Therefore, the choice of arbitration as a means of settling petroleum disputes entails important concerns for host states such as Iraq, which seeks to develop and attract foreign investors to its energy sector. The Iraqi legal system does not provide any specialised method of resolving petroleum disputes which arise in ordinary times, let alone in transition. Iraq has no arbitration law, although the draft of an international commercial arbitration law was proposed in 2011.<sup>19</sup> It still depends on some articles in the CCP which was designed to settle domestic disputes. Foreign investors in particular would prefer national courts not to settle such disputes. This is so, even if this court has independence from the political system in a host state in economic transition, as in the case of Iraq. The absence of any such arbitration mechanism therefore deters much needed foreign investment in Iraq, notably in the economically vital national energy sector.

There is also the question of how Iraq will deal with the enforcement of arbitral awards, whether foreign or local. Iraq does not enforce any foreign judgments unless it has an agreement with the state issuing such a judgment. This creates difficulties, because Iraq is not party to any international conventions for the enforcement of foreign arbitral awards, such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958<sup>20</sup> (hereinafter the New York Convention of 1958).

Close study of the literature reveals that in the general field of arbitration, some authors do focus on the energy sector. These legal authors hold different views about international arbitration as a method of resolving petroleum disputes. Some of them claim that international arbitration is a good way to settle such disputes. On other hand there are those, particularly authors from developing countries who, for differing reasons, do not favour international arbitration to settle petroleum disputes.

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<sup>18</sup> Article 111 of Iraqi Constitutional Law of 2005. Iraqi Constitution of 2005 publishes in Official Gazette issue 4012, 28 May 2005.

<sup>19</sup> In 2011, Iraq attempted to design a draft law on International Commercial Arbitration (DICAL) to resolve international commercial disputes. However, this draft has not yet been passed by the Iraqi parliament. In this study the author will review and discuss some of these draft Articles.

<sup>20</sup> The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, adopted on 3 May 1956, entered into force on 7 June 1959, UNTS vol 330, 3.

W. Michael Reisman states that:

The private actor is generally unwilling to subject itself to the jurisdiction of courts in command economies or economies in transition and even when a local judiciary can boast a degree of independence, (.....) Hence the need for a neutral forum, which modern international commercial arbitration provides.<sup>21</sup>

Reisman concluded that arbitration is the best method for resolving disputes in countries which have special systems of economic or political organization. However, petroleum companies prefer to settle their disputes with the host state by arbitration, even if those states have not adopted command economies or if the political situation is stable. Therefore arbitration is a method welcomed by petroleum companies, whether or not the host state has special circumstances. Iraq formerly had a socialist economic system, but after 2003 the country sought to open its doors to foreign investment and make arbitration one of its methods for resolving disputes in the petroleum sector amicably, in the same manner as the United Arab Emirates (hereinafter the UAE) and the People's Republic of China, (hereinafter the PRC), which have stable economic systems.

Thomas Wälde argues that arbitration can offer better expertise than national courts, particularly in the petroleum and energy industry. He reasoned that:

National courts are generally not considered as expert and accepted, in particular between companies from different countries, as arbitration. The move towards horizontal, contractual and international transactions in the electricity and gas industry means that commercial disputes multiply and arbitration (plus ADR) seems the only acceptable method of dealing with them.<sup>22</sup>

His view is that national courts do not have sufficient expertise to resolve the disputes arising from investment agreements, especially disputes concerning the energy sector. Therefore arbitration is considered by petroleum companies to be a preferable means of resolving such disputes. However, although arbitration provides the expertise required for both parties, each party is either a host state or a petroleum company. The international petroleum companies which prefer arbitration as a method of resolving petroleum disputes arising between host states and petroleum companies do “not resort to arbitration against each other.”<sup>23</sup>

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<sup>21</sup> W. Michael Reisman, 'International Arbitration and Sovereignty' (2002) 18 *Arbitration International* 231.

<sup>22</sup> Thomas Wälde, 'The Role of Arbitration in the Globalisation of Energy Market' [2000] *CEPMLP Journal Online* < <http://www.dundee.ac.uk/cepmlp/htm> > accessed on 29 June 2011.

<sup>23</sup> *ibid.*

Jan Paulsson has stated that “it would be a fundamental error to think that arbitration is designed to serve the interests of industrialized countries”.<sup>24</sup> He submits evidence to support his statement. He based this on a 1982 report<sup>25</sup> which showed that the number of parties who preferred arbitration under the rules of the ICC increased in recent years with north-south contracts. However, despite the evidence submitted by Paulsson of the increasing popularity of arbitration, many host states continue to believe that arbitration is devised to serve petroleum companies only, as will be seen in later parts of this work. This is one of the crucial reasons why arbitration has been rejected as a method of resolving petroleum disputes in many host states.

There are several stands in the writings that come from the developing world. Some argue that, if they had their own way, host states would not choose to select arbitration to resolve disputes at all. Samir Saleh said “It can almost be said that it is only when left with no alternative –and then racked by apprehension- that an Arab party will comply with an arbitration clause”.<sup>26</sup> He sees arbitration as something imposed by foreign companies and, if there is any other option, the host states from Arab countries will not agree to settle their disputes by arbitration.

Virtus Chitoo Igbokwe justifies the host states’ fear of international arbitration as follows: “one reason for the suspicion of international arbitration of oil investment is the perceived bias in the choice of law applicable to the merits of the disputes.”<sup>27</sup> Although applicable law is one of many concerns it is considered the most important, since it is linked to the issue of violation of sovereignty, especially in cases where the subject of the dispute is petroleum.

Masood argues that the:

International arbitration of petroleum investment disputes can be an effective process for the settlement of disputes arising out of oil agreements if the reasons for the suspicion by developing countries are removed. This can be achieved by fair representation from developing countries in the international arbitration institutions and

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<sup>24</sup> Jan Paulsson, ‘Third World Participation in International Investment Arbitration’ (1987) 19 ICSID REVIEW- Foreign Investment Law Journal 44.

<sup>25</sup> Arbitration between parties from industrialized and Less Developed Countries, Report of the Committee on International Commercial Arbitration to the 1982 International Association Conference in Montreal, prepared by Professor K.-H. Bockstiegel.

<sup>26</sup> Samir Saleh, ‘The Settlement of Disputes in the Arbitration World Arbitration and Other Methods’ (1986) 4 Berkeley Journal of International Law 280.

<sup>27</sup> Virtus Chitoo Igbokwe, ‘Developing Countries and the Law Applicable to International Arbitration of Oil Investment Disputes: Has the Last Word Been Said?’ (1997) 14 Journal of International Arbitration 99.

by subjecting the petroleum contracts to the national law of the host States, unless it is agreed otherwise.<sup>28</sup>

Masood's opinion is consistent with the resolutions of the General Assembly of the UN,<sup>29</sup> which recommend that host states should have the right to apply their national laws over natural resources. Despite the UN Resolutions recommending the application of host states' national laws, there are nonetheless many cases<sup>30</sup> where laws other than those of the host state are applied to petroleum disputes.

Lawrence Atsegbua concludes that "the future of international arbitration of oil investment disputes may lie in accepting the superiority of municipal law over international law in time of conflict between the two systems and not in the theory of "internationalization" of oil investment disputes".<sup>31</sup> He argues that in future, municipal law will have primacy over international law, which is considered to be one of the important reasons behind the host states' fears of arbitration. He believes that this will help to "dispel the cloud of suspicion by developing countries towards international arbitration, particularly in respect of oil investment disputes."<sup>32</sup> However, foreign petroleum companies as investors in the petroleum sector prefer to not to apply the national laws of the host state and seek to apply laws that are not those of the host state because they think that the host state's laws are not sufficient to govern petroleum agreement in cases where disputes arise between the host state and petroleum companies.<sup>33</sup>

Sornarajah argues that the success of arbitration in other fields, such as the sale of goods, [C]annot be transferred to petroleum disputes. Nor can the trade, investment or commercial relationships between private parties from different countries be transferred to the area of petroleum where the disputing parties are in different positions.<sup>34</sup>

He argues that petroleum agreements and petroleum disputes have characteristics which make them distinct from ordinary investment agreements and that this is because both parties to this agreement have different positions. The host state, which is one of the arbitration

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<sup>28</sup> Masood Hossain Masood, 'International Arbitration of Petroleum Disputes' (Ph. D thesis, Aberdeen University 2004) 79.

<sup>29</sup> UNGA Res 3171 (17 December 1973) UN Doc S/RES/3171; UNGA Res 3201 (1 May 1974) UN Doc S/RES/3201; UNGA Res 3281 (12 December 1974) UN Doc S/RES/3281.

<sup>30</sup> For example, *Petroleum Development Ltd v. The Sheikh of Abu Dhabi* (1951) 18 ILR 144; *Ruler of Qatar, International Maritime Oil Company* (1953) 20 ILR 534.

<sup>31</sup> Lawrence Atsegbua, 'International Arbitration of Oil Investment Disputes: The Severability Doctrine and Applicable Law Issues Revisited' (1993) 5 African Journal of International and Comparative Law 634.

<sup>32</sup> *ibid.*

<sup>33</sup> This issue will be discussed in Chapter Three and Five.

<sup>34</sup> M. Sornarajah, *International Commercial Arbitration: The Problem of State Contracts* (Longman 1990) 8.

agreement parties, possesses sovereignty, which is not found in petroleum companies.

However, the author justifies that petroleum agreements differ to other investment agreements because petroleum agreement's parties' legal condition is not because of subject matter of petroleum agreement which is petroleum. However, the host state obviously can waive its sovereignty and both parties then occupy an equal position.

El-Kosheri and Tarek Riad also argue that petroleum agreements are different from other commercial agreements.

Contrary to these commercial law transactions, in the petroleum development agreements the foreign private person undertakes to contribute equity and/or technology in the process of consolidating the national economy through the exploitation of a vital economic sector still insufficiently developed.<sup>35</sup>

The authors point to the economic and technology value of these agreements as a feature distinguishing them from normal investment agreements. However, one could argue that the criterion adopted by these authors is found also in ordinary investment agreements: most investment agreements have economic value and require high levels of technology. Thus, they seem to be overstating the case.

Abdullah Alsaidi<sup>36</sup> also argues that petroleum agreements have different features which make them different from investment agreements. He cites three features which make these agreements different. These are: the period of time involved, which is longer in petroleum agreements than in investment agreements; the scope of petroleum agreements, which is wider than in investment agreements; and finally the "cost recovery which simply means that all petroleum companies have the right to cover all their exploration costs once petroleum has been discovered".<sup>37</sup> It seems that the author here depends on features found in concession agreements, which represent an earlier generation of these agreements. However, in modern agreements, the situation is different: most of the new petroleum agreements specify the scope of land that would be the subject matter of the exploration process and a period of time shorter than in a concession agreement. Therefore, these features cannot be depended upon to distinguish petroleum agreements from investment agreements. Moreover, in the present author's view, petroleum

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<sup>35</sup> Ahmed S El-Kosheri and Tarek F Raid, 'The Changing Role in the Arbitration Process (With Regard to the Applicable Law Governing the New Generation of the Petroleum Agreements)' (1985-1986) 1 Arab Law Quarterly 475.

<sup>36</sup> Abdullah Mohammed Alsaidi, 'Petroleum Arbitration: Applicable Law and Appropriate Arbitral Forum (A Study of Petroleum Disputes in Arab Countries)' (Ph. D thesis, Queen Mary, University of London 2004) 66- 68.

<sup>37</sup> *ibid.*

agreements are merely a type of investment agreement, and they are additionally regulated by constitutional law which, in the case of Iraq, underscores the sovereign interests in the subject matter of the agreement.<sup>38</sup>

Abdullah Al- Faruque rightly claims that petroleum agreements are also distinct from investment agreements because the former contain a risk element. He states that “the probability of different kinds of risk and uncertainties remains a basic feature of petroleum contracts”.<sup>39</sup> Obviously, the risk element is found in every agreement, whether it is a petroleum or an investment agreement.

Blyschak correctly argues that the developing countries have come to believe that arbitration is a “sword used by (...) investors to attack legitimate government regulation in the public interest”.<sup>40</sup>

According to Blyschak many host states conscious of the significance of consent to a waiver of state sovereignty. They feel that “this consent has been illegitimately expanded”.<sup>41</sup> However, many states regulate the limit of waiver of sovereignty through bilateral agreements between the host states and investors or through the contract.

The participation of the host state in arbitration as one of the dispute parties gives the arbitration process special features. This is because the host state has a sovereignty by which it will not be subject to any foreign jurisdiction unless chooses to waive that sovereignty.

There are several aspects linked to sovereignty concerns in this area: sovereignty over natural resources as an inherent part of the right to state, sovereignty over disputes resolutions for disputes arising from them over, from immunity jurisdiction and sovereign immunity. The host state has permanent sovereignty over natural resources as the political entity through which “a people” entre to the right to govern themselves their resources. Therefore, for the host state itself to submit to arbitration is in conflict with the principle of the permanent sovereignty over natural resources of the host state which owns these resources. Lawrence Atsegbua accurately indicated that “most developing countries see international arbitration as directly incompatible with the

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<sup>38</sup> This issue be discussed extensively in Chapter Two of this thesis.

<sup>39</sup> Abdullah Al- Faruque, ‘Stability in Petroleum Contracts: Rhetoric and Reality (Lessons from the Experiences of Selected Developing Countries and Economies in Transition (1980-2002) (Ph.D thesis, University of Dundee 2005) 22.

<sup>40</sup> Paul Michael Blyschak, ‘State Consent, Investor Interests and the Future of Investment Arbitration: Reanalyzing the Jurisdiction of Investor-State Tribunal in Hard Cases’ (2009) 9 *Asper Review of International Business and Trade Law* 99.

<sup>41</sup> *ibid.*

principles of permanent sovereignty over natural resources”.<sup>42</sup> However, every host state has a right to permanent sovereignty over its natural wealth. The state should also manage this wealth in a way that attracts foreign investors and achieves benefits for its people. In this regard, arbitration is considered to be one of the most important guarantees to foreign investors, especially in investments requiring a high degree of technology and capital investment, as in the petroleum sector. However, most developing countries who seek to attract foreign investors update and promulgate those of their laws which involve investment, including arbitration laws.<sup>43</sup>

A host state waives its sovereignty when it agrees to recourse to arbitration. Georges R. Delaume stated that “all concur that a state party to an arbitration agreement is precluded from asserting its immunity in order to frustrate the purpose of the agreement”.<sup>44</sup> According to Delaume that arbitration agreement would not be effective unless the state waived its sovereignty. Therefore state sovereignty would render the arbitration agreement fruitless. The author does not explain here whether the waiver of sovereignty agreed by the state should be an implicit or an explicit waiver but some suggests it would be both, and the effect is the same.

Hazel Fox rightly suggests that the host state’s laws should express this waiver, especially those laws of the state by means of which the parties sought to enforce the arbitral award. She suggests that states who are parties to the ICSID should ensure that “their law on state immunity relating to enforcement of arbitral awards conforms to the minimum international standard”.<sup>45</sup> However, Fox does not state whether the state should express the waiver of jurisdiction sovereignty; she merely refers to the waiver of sovereignty of execution.

Yemi Osinbajo points out that the court will judge whether to reject or accept that submission to arbitration constitutes a waiver (according to the arbitration agreement concluded by parties); also that the subject matter of the dispute may itself determine the question of state immunity. He states that:

[I]n the case of a court this will depend on whether the court accepts or rejects the view that submission to arbitration by agreement would itself amount to a waiver of

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<sup>42</sup> Lawrence Atsegbua, ‘International Arbitration of Oil Investment Disputes: The Severability Doctrine and Applicable Law Issues Revisited’ (1993) 5 African Journal of International and Comparative Law 634.

<sup>43</sup> As will be seen in Chapter Three of this work.

<sup>44</sup> Georges R. Delaume, ‘State Contracts and Transnational Arbitration’ (1981) 75 The American Journal of International Law 784.

<sup>45</sup> Hazel Fox, ‘State Immunity and Enforcement of Arbitral Awards: Do We Need an UNCITRAL Model Law Mark II for Execution against State Property?’ (1996) 12 Arbitration International 89.

immunity, and whether in the particular circumstances (even if it were to hold that such an arbitration agreement would not amount to a waiver) the subject matter of the dispute is itself one for which immunity can be legitimately claimed.<sup>46</sup>

Yemi Osinbajo tries to create a link between the arbitrability issue and sovereignty. However, the arbitrability issue is regulated by host state laws that decree which issues can be the subject matter of arbitration agreement and which cannot.

Sovereign immunity is not limited to the state but is extended to its entities. This point is made by Maniruzzaman, who reported that:

State practice suggests that whether a State is seeking immunity from jurisdiction or from execution against State owned property, the State and its wholly-owned or controlled enterprise consider themselves to be functionally the same, so that the activities of State enterprise are considered to be carried out by the State in its exercise of sovereign authority.<sup>47</sup>

He also states that “A State or State enterprise that is legally part of the State itself can waive immunity either expressly or implicitly by a contractual provision or an arbitration clause in a contract with another party.”<sup>48</sup>

Maniruzzaman reported that the enterprises of the host state have sovereignty. Those enterprises can waive their sovereignty in different ways. However, Maniruzzaman does not explain the extent to which these enterprises may enjoy sovereignty.

The UAE and China are countries that have been selected for comparison with Iraq. Gary R Feulner and Amjad Ali Khanted claim that in the UAE the waiver of sovereign immunity should be incorporated in the main contract “In international contracts involving the State, appropriate waiver of sovereign immunity and provisions safeguarding a party from acts of State should be incorporated, to the extent that such terms are negotiable”.<sup>49</sup> These authors focus on a case in which the state waives its sovereignty before the dispute arises: they do not discuss cases in which disputes arise after the conclusion of the investment agreement and this agreement does not include clause of sovereignty waiver.

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<sup>46</sup> Yemi Osinbajo, ‘Sovereign Immunity in International Commercial Arbitration: The Nigerian Experience and Emerging State Practice’ (1992) 4 African Journal of International and Comparative Law 1.

<sup>47</sup> A. F. M. Maniruzzaman, ‘State Enterprise Arbitration and Sovereign Immunity Issues’ (2005) 60 Disputes Resolution Journal 1.

<sup>48</sup> *ibid.*

<sup>49</sup> Gary R Feulner and Amjad Ali Khanted, ‘Dispute Resolution in the United Arab Emirates’ (1986) 1 Arab Law Quarterly 312.



Wang Houli showed that “China stands by traditional principles of the jurisdictional immunity of states (.....) [A]ccordingly, courts at various levels in China do not hear cases against foreign states or governments”.<sup>50</sup> He also argues that China’s view of sovereignty “is not merely a customary rule, but a fundamental principle of international law in the modern international community”<sup>51</sup>

Wu Dawei explains that “Nowadays, internationally, the approach to grant immunity to sovereign states and their property has been universally shifted from the original absolute immunity to restrictive immunity of sovereign states and their property”.<sup>52</sup> This explanation of WU Dawei gives us evidence that the Chinese view of absolute sovereignty has changed to one of restrictive immunity. However, Lijiang Zhu expresses a different opinion; He argues that China has not changed its view about sovereignty, which is absolute sovereignty. He states, “I could not see the indication of the acceptance of the restrictive approach from Article 1 of the Law of Judicial Immunity of 2005”.<sup>53</sup>

Huang Jin and M.A Jingsheng claim that:

China insists on the sovereign immunity of the State *per se*, which means that all activities carried on in the name of the State should enjoy immunity, unless the state voluntarily waives its immunity. This is the principle of absolute sovereign immunity.<sup>54</sup>

However, on 14 September 2004, China signed the United Nations Convention on Jurisdictional Immunities of States and Their Property, 2005<sup>55</sup> (hereinafter CJISTP). This convention designed a restrictive approach to state immunity. According to this convention the signatory states will be subject to the same jurisdictional rules as private structures in regard to commercial activities.

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<sup>50</sup> Wang Houli, ‘Sovereign Immunity: Chinese Views and Practices’ (1987) 1 Journal of Chinese Law 23.

<sup>51</sup> *ibid* 31.

<sup>52</sup> Wu Dawei, ‘Explanations’, Gazette of the Standing Committee of the National People’s Congress of the People’s Republic of China, N07, 2005, Published on 15 November 2005, Beijing, 546.

<sup>53</sup> Lijiang Zhu, ‘State Immunity from Measures of Constraints for the Property of Foreign Central Banks: The Chinese Perspective’ (2007) 6 Chinese Journal of International Law 67.

<sup>54</sup> Huang Jin and M.A Jingsheng, ‘Immunities of States and Their Property: The Practice of the People’s Republic of China’ (1988) 17-18 *Chin Yrbk Intl L* 179.

<sup>55</sup> United Nations Convention on Jurisdictional Immunities of States and Their Property was adopted during the 65th plenary meeting of the General Assembly by resolution A/59/38 of 2 December 2004. In accordance with its articles 28 and 33, the Convention shall be open for signature by all States from 17 January 2005 until 17 January 2007, at United Nations Headquarters in New York.

Iraq has a suspicious attitude towards arbitration. The main reason behind this suspicion is the sovereignty issue. Iraq sees arbitration as a violation of its sovereignty. The Iraqi Office of Legal Codification explained in Decree No. 122/1978 as of 28 of August 1978 the reasons preventing Iraq's ratification of the New York Convention 1958:

The International Commercial Arbitration included foreign element, where it held beyond the borders of Iraq and the arbitrators could be foreign nationals, applying foreign law, either substantive law or procedural law. Therefore, the enforcement of foreign arbitral awards inside Iraqi republican territories faces legal and sovereignty obstacles (...) therefore the issue of adhering to the New York Convention in 1958, recognizing and enforcing foreign awards, requires the agreement of the Iraqi authorities which plan prospective public economic policy. Because of the many political aspects involved in this accession, it would involve the reform and change of Iraqi law.<sup>56</sup>

Haider Ala Hamoudi sees the sovereignty issue as one of the legal obstacles in the petroleum sector. He said that "there are significant legal obstacles to consider. Iraq does not currently offer sovereign guarantees on its oil contracts. The oil contracts that exist are as between the international oil consortia bidding on them and a state-owned oil company in Iraq."<sup>57</sup>

Sovereignty over resources, sovereignty over disputes and sovereign immunity are there for important obstacles facing petroleum arbitration.

#### 1.4. Aims and Objectives:

The main aim of this study is to discuss that Iraqi legislation for the resolution of petroleum disputes is inadequate, and that therefore Iraq requires special legislation for the arbitration of petroleum disputes. This legislation should contain rules for creating a balance between the petroleum companies' interests and Iraqi national interests. They should be considered as protective rules for host states and petroleum companies.

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<sup>56</sup> Decree No. 132/1978 as of 28 of August 1978. The translation from Arabic to English by the author. See below the Arabic text:

أن التحكيم التجاري الدولي يتضمن عنصرا أجنبيا. حيث انه قد يتم خارج حدود البلاد. وقد يتعهد به الى محكمين اجانب قد يطبقون قانونا أجنبيا سواء من ناحية القواعد الموضوعية أم من ناحية القواعد الإجرائية. وعليه فإن تنفيذ أحكام التحكيم الأجنبي داخل نطاق الجمهورية العراقية يلاقي دونه حوائل قانونية وسيادية (.....) وعليه فإن الانضمام الى معاهدة نيويورك 1958 بشأن الاعتراف بأحكام التحكيم الأجنبي وتنفيذها يستلزم أستخراج رأي الجهات العليا التي تقوم بتخطيط السياسة الاقتصادية العامة لأن في ذلك الانضمام جوانب سياسية ينبغي مراعاتها ومقتضيات عملية تستدعي الدراسة وذلك الانضمام يستوجب مراجعة القوانين العراقية وتعديلها.

<sup>57</sup> Haider Ala Hamoudi, 'Iraq Oil Sector Misfortunes' (6 August 2012) <<http://jurist.org/forum/2012/08/haider-hamoudi-iraq-oil.php>> accessed on 19 September 2014.

The aims and concerns of this thesis involve the following:

1. To review and assess the relationship between Iraq and the international petroleum companies.
2. To examine and determine the legal nature of petroleum agreements, focusing on Iraq in respect of the legal nature of these agreements.
3. To examine and analyse the developing countries' and international petroleum companies' attitudes to arbitration as a means to resolve petroleum disputes and to review the factors which contribute to altering some host states' attitudes towards this means, focusing on the attitudes of Iraq, UAE and China.
4. To analyse that petroleum arbitration agreements are independent of petroleum agreements under Iraqi Law.
5. To examine and determine the proper law which should govern the arbitration procedures and the substantives of petroleum disputes. And also to critically analyse that national laws can be a preferable means of governing petroleum agreements and arbitration procedures.
6. To discuss Iraq's ability to create the legal environment in which foreign arbitral awards can be enforced.
7. To suggest a proposal for Iraqi petroleum arbitration.

### **1.5. The Thesis Statement:**

While this thesis explores many legal and policy issues that have implications for other states in a similar position, it is focused on the unusually complex situation of petroleum arbitration in Iraq. Exhausted from wars and conflicts and multidimensional challenges, Iraq has been looking to rebuild its economy by attracting and maintaining foreign investment, particularly in the critical petroleum industry.

This Ph.D thesis proposes that Iraq, a country in transition and aspiring to attract foreign investment yet desirous to retain sovereignty, including control over its vital economic resources, cultural concepts and future progress, is in particular need of a national strategy and implementation plan. These must take into account the interests of stakeholders, whether domestic or foreign, who invest large amounts of capital and an enormous amount of

technological equipment in the petroleum sector, and also the special needs of Iraq. The Iraqi state understandably seeks to exploit its most valuable natural resource, petroleum, and in doing so it must achieve the balance between the needs of stakeholders, whether from Iraq or from different nationalities, and the needs of Iraq. The commercial environment remains underdeveloped. Due to the political circumstances in Iraq, it has not been possible up to the present time to provide a sufficient legal framework to regulate petroleum agreements, let alone settle disputes arising from them. This thesis argues that the formal justice system in Iraq does not offer means of dispute settlement which are sufficient to attract and maintain international investment. It argues that arbitration can supply the necessary balance between the needs of Iraq and her people, and the interests of those foreign corporations and individuals that invest in the Iraqi petroleum industry sector. This thesis argues that arbitration is the best way to resolve disputes arising from international petroleum agreements. Furthermore, the author will demonstrate that petroleum is a special case that petroleum agreements are in fact a special sort of investment agreement, and that petroleum agreements therefore should be treated in different way. Furthermore, petroleum arbitration needs a special regime going beyond ordinary commercial arbitration. The comparative approach, especially in developing countries like China and the UAE, and their experiences and expertise of investment and arbitration, provides a good source of inspiration. It will be argued that Iraq does have the ability to create and establish an efficient arbitration system. The author argues that, under the critical circumstances facing Iraq, the country should enact legislation to regulate foreign investment in general and the petroleum industry in particular, legislation that provides for arbitration of disputes through a permanent specialised autonomous arbitration institution, located in Baghdad. Such a plan by passing the ordinary court system, will allow for the development of Rule of Law in Iraq by insulating the still embryonic and fragile Iraqi justice system from highly contentious and politically sensitive disputes, while developing a specialised new skill around petroleum arbitration.

Accordingly, the thesis will conclude with a suggested Petroleum Arbitration Law, which is in line with international practices and is tailored to the particular circumstances of Iraq and the corporations and individuals seeking to invest in her petroleum industry.

## 1.6. Research Questions:

Each investor will be anxious about three issues: stability, monetization rights and international arbitration. Consequently, if one of these factors is not present the investor may be discouraged from investing.<sup>58</sup> The main questions which this thesis aims to answer are the following:

1. Is the existing arbitration regime in Iraq sufficient for dealing with petroleum disputes?
2. Do petroleum disputes in Iraq require a modern, special and comprehensive regime of arbitration, going beyond commercial arbitration and achieving the balance between Iraqi interests<sup>59</sup> and foreign investors' interests?

In exploring the author's hypothesis, the following additional research questions must be answered: are petroleum agreements investment agreements under Iraqi law? What is the Iraqi attitude to petroleum arbitration? Does Iraq still harbor suspicions with regard to international commercial arbitration as a means of settling petroleum disputes, or has there been a change in its attitude? Are petroleum disputes arbitrable under Iraqi law? Do current provisions concerning arbitration agreements are sufficient to deal with petroleum arbitration agreement, or there is a need to update and amend them? Does the arbitration clause remain valid and effective if the main petroleum agreement becomes invalid in Iraqi law? Is submitting Iraqi petroleum disputes to arbitration by arbitration agreement to be considered as a waiver of its sovereignty? And what is the law governing the petroleum arbitration agreement under Iraqi law? Do current provisions regarding law applicable of petroleum arbitration adequate to deal with petroleum disputes or it is need to update and modernize them? What are the laws governing petroleum arbitration procedures and substantive issues under Iraqi law? Do current provisions of enforcement foreign

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<sup>58</sup> David Brent Grantham, 'Caveat Investor: Assessing the Risks and Rewards of IOCs Entry into Iraq' (2010) 3 *Journal of World Energy Law & Business* 304.

<sup>59</sup> The second paragraph of Article 112 of the Iraqi Constitution of 2005 provided that:

The federal government, with the producing regional and governorate governments, shall together formulate the necessary strategic policies to develop the oil and gas wealth in a way that achieves the highest benefit to the Iraqi people using the most advanced techniques of the market principles and encouraging investment.

The translation from Arabic Language to English Language is available at <<http://investpromo.gov.iq/policies-and-laws/>> accessed on 12 April 2014.

judgments is sufficient to deal with foreign petroleum arbitral awards or these provisions need update and amend?

Also, is the lack of implementation laws to regulate the enforcement of foreign arbitral awards a hindrance to the enforcement of such awards? How will Iraq deal with the sovereign immunity of execution in regard to petroleum arbitral awards?

The author tries to answer these important questions in the following chapters and sections of this study.

### **1.7. Methodology:**

In order to answer the research questions and attain the stated objectives of the project, this study will rely on both analytical and comparative approaches in combination.

Analytical approach: this study depends on black letter legal analysis. It analyses the important arbitral awards concerning petroleum disputes and the texts of laws, such as PRC arbitration law and UAE arbitration law, as well as relevant Iraqi laws. In addition, this study analyses the Iraqi relationship with international petroleum companies, the legal nature of petroleum agreements and the problems and issues facing Iraq in enacting petroleum arbitration. The reasons why Iraq and other developing countries have antipathy towards arbitration will also be examined. This thesis will analyse all these subjects.

The referencing approach has been used in order to answer the main questions of this study and to propose optimal and sufficient rules that should be adopted by petroleum arbitration law. It is necessary to have recourse to special referencing to laws from different countries and to choose those rules which are most appropriate for the draft law annexed to this thesis. Therefore, as noted earlier this study draws on the UAE and PRC Arbitration Law.<sup>60</sup> Both of those countries became parties to important international conventions, such as the New York Convention of 1958 and the International Center for Settlement of Investment Disputes<sup>61</sup>

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<sup>60</sup> Both of these countries' arbitration laws will be the subject of extensive discussion in Chapter Three.

<sup>61</sup> According to Washington Convention the International Center for Settlement of Investment Disputes was established in 1965 to settle the disputes between the states and nationals from other states. It is known as ICSID Convention or Washington Convention. Convention on the Settlement of Investment Disputes between States

(hereinafter ICSID). Both of PRC and UAE are developing countries which have followed a successful investment policy by investing outside their states' borders and also by attracting foreign investment by promulgating and updating their arbitration laws to be consistent with international standards.<sup>62</sup> In addition, they have centres for international commercial arbitration which have become famous throughout Asia and the Middle East. Therefore, those countries' laws will offer a rich foundation for our study. The UAE is a member of Organization of Petroleum Exporting Countries (hereinafter OPEC) and is considered to be an active member in regard to OPEC policy.<sup>63</sup> It shares this position with Iraq, which is also considered one of the more important OPEC members. The UAE's successes in investing its petroleum revenue and improving its economic position may inspire Iraq in transition. The PRC has also had a favourable experience regarding investment after changing its economic policy in the 1970s from a centralized social economic system to an open door policy. This change contributed to attracting investment and also Chinese investment outside China's borders. One of the reasons for choosing to reference to the PRC's law to Iraqi law is that China concluded many investment agreements with Iraq, especially in the development of the petroleum sector. The PRC's companies have developed an important petroleum field in Iraq, the Al- Ahdab field.<sup>64</sup> In addition, China has a strict attitude towards sovereignty, yet has been prepared to resolve disputes arising from investment agreements. Therefore, for general and specific reasons this study will depend on referncening to these countries' laws.

This study depends on primary sources and secondary sources. The primary sources consist of international commercial arbitration legislations from Iraq, the UAE and the PRC. This study not only depends on international commercial arbitration laws; it also depends on different legislations which are relevant to this study, for example, constitutional law, civil law,

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and Nationals of Other States, adopted on 18 March 1965, entered into force on 14 October 1966, UNTS, vol 575, 159.

<sup>62</sup> For example, China promulgated the Arbitration Law in 1994 and the UAE promulgated the Federal Arbitration Law in 1992. Recently The UAE reviewed a new draft of the 2008 International Commercial Arbitration based on UNCETRAL Model Law.

<sup>63</sup> Nicholas B Angell, 'Regulation of Business under the Developing Legal System of the United Arab Emirates' (1986) 1 Arab Law Quarterly 119.

<sup>64</sup> This field developed by China National Petroleum Company according to agreement between the Iraqi government and the abovementioned company in 2008. The agreement between Iraq and the company take the type of technical service contract. It will be continue for 23 years. Al-Ahdab field considered one of the major fields in Iraq. It is expected to produce three millions tons of crude petroleum per year. Edward Wong, 'China Open Oil Fild in Iraq' *The New York Times* (New York, 28 June 2011) < [http://www.nytimes.com/2011/06/29/world/asia/29chinairaq.html?\\_r=0](http://www.nytimes.com/2011/06/29/world/asia/29chinairaq.html?_r=0) > accessed on 2 September 2014.

and oil and gas laws in the countries referenced. This study also relies on petroleum agreements concluded between Iraq and foreign petroleum companies and also petroleum agreements between other countries and petroleum companies, as well as international conventions involved in arbitration in general and international conventions involved in the recognition and enforcement of foreign arbitral awards in particular. Moreover, it deals with the most controversial arbitral awards.

The secondary sources are varied. There are specialised books in different languages, for example books in the Arabic language, especially books containing topics related to Iraq and the UAE. It should be mentioned here that there are few sources in the English language which address arbitration in Iraq. Therefore the author depends on important books in the Arabic language. These books and articles has been translated from Arabic language to English by author. Use is also made of articles, publications and reports issued by the Iraqi Oil Ministry. The author also depends on books and articles concerning arbitration in China written in English language for Chinese authors and some formal website contain Chinese laws and regulation written also in English language.

In this study reference to the host states will be used to point to the petroleum producing countries and also this study will depend on petroleum to reference to oil and gas.

### **1.8. Contribution of Knowledge:**

As mentioned previously in the literature review section,<sup>65</sup> many authors<sup>66</sup> claim that petroleum agreements are different from ordinary investment agreements and attempt to provide reasons for the difference. The author, however, argues that under Iraqi law, although petroleum agreements are a special kind of investment agreement they are not totally different from the ordinary kind of agreement, with which they have features in common.<sup>67</sup> It was also argued that petroleum agreements constitute a special case under Iraqi law, not because of their

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<sup>65</sup> See pages 9, 10 and 11 of this chapter.

<sup>66</sup> M. Sornarajah, *International Commercial Arbitration: The Problem of State Contracts* (Longman 1990) 8; Ahmed S El-Kosheri and Tarek F Raid, 'The Changing Role in the Arbitration Process (With Regard to the Applicable Law Governing the New Generation of the Petroleum Agreements)' (1985-1986) 1 Arab Law Quarterly 475; Abdullah Mohammed Alsaidi, 'Petroleum Arbitration: Applicable Law and Appropriate Arbitral Forum (A Study of Petroleum Disputes in Arab Countries)' (Ph. D thesis, Queen Mary, University of London 2004) 66- 68.

<sup>67</sup> This issue will explain in pages 65 and 66 of chapter two.



long duration or their need for advanced technology but because petroleum is owned by the entire Iraqi people.<sup>68</sup> Petroleum is a sovereignty issue.

This thesis also proposes a comprehensive petroleum arbitration law for Iraq and gives details of how it should be formulated. Some authors advocate petroleum arbitration but fail to specify precisely what form it should take. Others focus on currently applicable law and give weight to national law. The present author maintains that an Iraqi form of petroleum arbitration should be promulgated. The legislation should contain special rules and include within its scope not only applicable law but also arbitration agreements and the enforcement of foreign arbitral awards. These rules should be compatible with Article 111 and 112 of the Iraqi constitution of 2005 and should aim to achieve a balance between the interests of foreign investors and the needs of Iraq.

## **1.9. Structure of the Work:**

This work is divided into seven chapters. The first chapter (the present one) is devoted to an introduction to the key issues of the thesis and contains reasons for the study, objectives of the study, thesis statement and research questions. Chapter Two focuses on petroleum agreements, which are considered as the foundation of petroleum disputes. It presents the background to Iraq's petroleum industry and illustrates the role played by actor states and international petroleum companies in formulating the history of this industry. This chapter also shows the types of petroleum agreement. Moreover, this chapter explains why the petroleum agreement is considered by the author as a special type of investment agreement and that it therefore requires a special regime of arbitration. Furthermore, this chapter discusses and examines the legal nature of petroleum agreements and reviews the various opinions expressed about this legal nature. Most of the references relate to petroleum countries, especially the developing countries, which are suspicious about arbitration, which they believe to require waiver of sovereignty to a private party or entity. By accepting arbitration, they allow foreign law to govern disputes, which are submitted to courts other than their own. Meanwhile, the petroleum companies and western countries prefer international commercial arbitration as a means of settling any disputes arising from petroleum agreements. Therefore the attitudes of both parties diverge. These

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<sup>68</sup> Article 111 of Iraqi constitution.

attitudes will be represented in Chapter Three, with a focus on the attitudes of Iraqi, the UAE and PRC towards arbitration. Chapter Three is linked with Chapter Two. It gives us a clear picture of the realities of petroleum agreements and the arbitration regime in Iraq. The fourth chapter focuses on petroleum arbitration agreements through analysis of the provisions which regulate arbitration agreements in Iraq and discussing the extent to which current provisions can be relied on in dealing with petroleum arbitration. In addition, this chapter asks whether these provisions need to be updated and if so, suggests how this might be done. Chapter Five discusses and analyses the method that determines which laws govern the obligations and rights arising from petroleum agreements and the laws governing the procedures of arbitration. In addition, the chapter reviews the most important arbitral awards in this area and the international organizations, such as the United Nations (hereinafter UN) and the OPEC. Furthermore, Chapter Five enquires whether current provisions are sufficient for the needs of petroleum arbitration in Iraq, and whether they need to be modernised. Chapter Six is devoted to examining the enforcement of arbitral awards and how Iraq can deal with this issue in cases where Iraqi implementation laws do not explain expressly the enforcement of foreign arbitral awards in general and petroleum arbitral awards in particular. The chapter evaluates the legal regime of enforcement of foreign arbitral awards and enquires whether this regime is sufficient to deal with petroleum arbitral awards. It is suggested that Iraq should reform its laws to facilitate and enforce arbitration awards. Chapter Seven is divided into four sections. Sections one and two are devoted to the important conclusions of this study, while section three will contain proposals for a comprehensive Iraqi petroleum arbitration regime drawing from international best practice.

## **Chapter Two: Petroleum Agreements in Iraq**

### **2.1. Introduction:**

There is a strong connection between the production of petroleum and the economic health of Iraq. The country depends almost totally on petroleum revenue.<sup>1</sup> For this reason, this revenue was considered as a foundation for the rebuilding the Iraqi economy in the aftermath of the second Gulf War, especially with regard to infrastructure.

The Iraqi petroleum industry has a long history, beginning in 1925 when Iraq was the first of the Arab countries to sign a concession agreement. This industry has affected and influenced the major political events experienced by Iraq. Foreign petroleum companies played a great role in shaping Iraqi modern history. It could be said that petroleum was the main reason behind the numerous recent conflicts and wars in which Iraq has been engaged.

The form of petroleum agreement governing the relationship between Iraq and the international petroleum firms developed dramatically after the Second World War. The new generation of petroleum agreements has features that differ from the earlier concession agreements. In the new generation of petroleum agreements, Iraq as a host state has a major role in negotiation and has developed a strong position as a contractual party. Petroleum agreements therefore hold a special position under Iraqi law, and need to be treated differently from ordinary investment agreements. The legal nature of petroleum agreements has been debated by many contemporary writers, and no consensus has ever been reached.

In order to give an adequate account of petroleum arbitration, it will be necessary first to present a history of the Iraqi petroleum industry. This chapter will therefore relate that history and review the relationship between Iraq and foreign companies. The chapter explains the types of petroleum agreements and examines the main factors behind the emergence of a new generation of these agreements. In addition, the chapter argues that petroleum agreements have special characteristics distinguishing them from investment contracts, and consequently there is a

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<sup>1</sup> Petroleum revenue accounts for about 90% of the Iraqi economy. David Brent Grantham, 'Caveat Investor: Assessing the Risks and Rewards of IOCs Entry into Iraq' (2010) 3 *Journal of World Energy Law & Business* 304.

need for petroleum arbitration to exist. Finally, the chapter discusses the legal nature of petroleum agreements.

## **2.2. Historical Perspective:**

Bell argues that there is an overlap between the petroleum industry and international relationships.<sup>2</sup> The Iraqi political situation has been affected by petroleum since it was first discovered in commercial quantities in Naftakana, a region near the border with Iran.<sup>3</sup>

The history of the petroleum industry of Iraq can be divided into four phases. First, the beginnings of the discovery of petroleum in Iraq; second, the pre-nationalisation era; third, the post-nationalisation era; and fourth, post- occupation Iraq.

### **2.2.1. The Discovery of Petroleum and Early Extraction (1872-1920):**

Iraq was a part of the Ottoman Empire (it became a modern state in 1920).<sup>4</sup> It was divided into three provinces, Mosul, Baghdad and Basra,<sup>5</sup> all controlled by the Ottoman Empire.

The first attempt to develop a petroleum industry in Iraq took place during the time of the Ottoman Empire. Medhat Pasha (1869-1872)<sup>6</sup> built a refinery in 1871 in order to refine the petroleum extracted in the town of Mandele, which is located in the north of Iraq. German experts helped with the construction of this refinery.<sup>7</sup>

In 1882, the Ottoman Sultan Abdulhamid II (1876-1909)<sup>8</sup> ordered all the petroleum land in Mosul, including Al-Qayarah, to be brought under the control of his own private Treasury in

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<sup>2</sup> Dawn Bell, 'International Control of Iraq Oil: How the Oil –For – Food Program Fits in, and Implications for the Future' (2004) 8 *Richmond Journal of Global Law and Business* 129.

<sup>3</sup> M. S. Vassiliou, *The A to Z of the Petroleum Industry (the A to Z Guide Series)* (Scarecrow Press, Inc 2009) 272.

<sup>4</sup> V. J. Parry et al, *A History of the Ottoman Empire to 1730* (M. A. Cook ed, Cambridge University Press 1976) 143; Charles Tripp, *A History of Iraq* (2<sup>nd</sup> edn, Cambridge University Press 2002) 8; Jan Hallenberg and Håkan Karlsson (eds), *The Iraqi War: European Perspectives on Politics, Strategy and Operations* (Routledge 2005) 84.

<sup>5</sup> *ibid.*

<sup>6</sup> 21 نوري عبد الحميد، التاريخ السياسي لأمتيازات النفط في العراق 1925-1952، بيروت 1980، 21  
[Noree Abdul Hameed, *The Political History of Iraq Oil Concession Agreements 1925-1952* (Beirut 1980) 21];  
Lucy Dean et al (eds), *The Middle East and North Africa 2004* (50<sup>th</sup> edn, Europa Publication 2004) 445.

<sup>7</sup> 21 نوري عبد الحميد، التاريخ السياسي لأمتيازات النفط في العراق 1925-1952، بيروت، 1980، 21  
[Noree Abdul Hameed, *The Political History of Iraq Oil Concession Agreements 1925-1952* (Beirut 1980) 21].

<sup>8</sup> Gökhan Çetinsaya, *Ottoman Administration of Iraq, 1890-1908* (Routledge 2006) 2.

return for a small sum of money, claiming that he was safeguarding these lands from foreign exploitation.<sup>9</sup>

Abdulhamid II subsequently subjected all petroleum agreements to his own control by decrees enacted in 1889 and 1898. According to these decrees, the conclusion of petroleum concession agreements was limited to exploration and exploitation, and these were to be conducted in Baghdad and Mosul under the auspices of his private Treasury.<sup>10</sup> Henceforth, all negotiations would be conducted with Sultan Abdulhamid II.<sup>11</sup>

The first flow of Iraqi petroleum in commercial quantities was in 1913, in Naftakana, south of Kanaqien, and was engineered by the Anglo- Persian Oil Company, which was later to become the Anglo- Iranian Oil Company and finally British Petroleum (hereinafter BP).<sup>12</sup> The petroleum discovered at that time was used solely to supply domestic demand and was not exported.<sup>13</sup> The next important discovery was in 1927 in Baba Gurgur, Kirkuk, and was made by the Turkish Petroleum Company (hereinafter the TPC) which was renamed the Iraqi Petroleum Company (hereinafter the IPC) in 1929.<sup>14</sup>

As previously indicated, the petroleum industry influenced the politics of the region. It also drew in other states during this period, namely Britain, Germany, France, and The United States of America.

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<sup>9</sup> Edwin Black, *Banking on Baghdad: Inside Iraq's 7,000- Year History of War, Profit, and Conflict* (John Wiley & Sons, Inc 2004) 104.

<sup>10</sup> جواد العطار، تاريخ البترول في الشرق الاوسط 1901-1972، بيروت، 20، 1977-27-  
[Jawad Al-Ataar, *The Petroleum History in the Middle East 1901- 1972* (Beirut 1977) 20-27].

<sup>11</sup> Ibid; 155، الطبعه الثانيه، 1974، دار ألفارابي محمد أحمد، النفط والعرب،  
[Muhammad Ahmed, *Petroleum and the Arabs* (2<sup>nd</sup> edn, Al-Farabi house 1974) 155].

<sup>12</sup> James Bamberg, *The History of The British Petroleum Company: Volume 2 The Anglo- Iranian Years, 1928- 1954* (Cambridge University Press 1994) 156.

<sup>13</sup> M. S. Vassiliou, *The A to Z of the Petroleum Industry (the A to Z Guide Series)* (Scarecrow Press, Inc 2009) 272.

<sup>14</sup> Abbas Alnasrawi, *The Economy of Iraq: Oil, War, Destruction of Development and Prospects, 1950-2010* (Greenwood Press 2010) 2; Laura S. Etheredge (ed), *Region in Transition: Iraq* (Britannica Educational Publishing 2011) 38.

### 2.2.1.1. *The Role of Germany:*

Germany was one of the main international actors in this period. In 1903, it was the first state to take advantage of the opportunity to explore Iraq for petroleum.<sup>15</sup> The Anatolian Railway Company, which was a German corporation financed by Deutsche Bank, obtained a concession agreement to build the Berlin to Baghdad railway.<sup>16</sup> According to this concession, the company was also permitted to excavate minerals and petroleum in areas on both sides of this railway up to 20 kilometres.<sup>17</sup>

On 17 July, 1904, the Anatolian Railway Company signed a contract with the Sultan's Treasury. Under this contract, the company undertook to carry out preliminary investigations to explore for petroleum in Baghdad and Mosul for a period of one year.<sup>18</sup> Moreover, the company was granted the right to exploit these fields that it discovered, if it so wished, under a special agreement involving cooperation with the Treasury and under special supervision.<sup>19</sup> It had a right to gravel pits, forest and quarries, and to the establishment of tile and brick works, hydro-electric plants and storehouses.<sup>20</sup>

A coup d'état in the Ottoman Empire in 1908 led to the end of the project. However, that was not the end of German ambitions in Iraq. In 1911, Germany and Britain established a company<sup>21</sup> called the African and Western Concession Co, Ltd. The company was reconstituted in 1912 and its legal nature was changed from a limited company to a joint stock company, with its headquarters in London.<sup>22</sup> As well as changing its name to Turkish Petroleum Company

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<sup>15</sup> Mohamed bin Abdul Latef, *Middle East Oil: A Redistribution of Values Arising from the Oil Industry* (University Press of America 1991) 26.

<sup>16</sup> George W. Stocking, *Middle East Oil: A Study in Political and Economic Controversy* (Vanderbilt University Press 1970) 41; A. K. B Evans and J. V. Gough (eds), *The Impact of the Railway on Society in Britain: Essays in Honour of Jack Simmons* (Ashgate Publishing Company 2003) 88.

<sup>17</sup> *ibid.*

<sup>18</sup> John Albert White, *Transition to Global Rivalry: Alliance Diplomacy and the Quadruple Entente, 1895-1907* (Cambridge University Press 1995) 21; Thomas Philipp and Birgit Schaebler (eds), *The Syrian Land: Processes of Integration and Fragmentation: Bilād Al-Shām from the 18 to the 20<sup>th</sup> Century* (Steiner 1998) 82; V. Necla Geyikdagi, *Foreign Investment in the Ottoman Empire International Trade and Relations 1854-1914* (I. B. Tauris & Co Ltd 2011) 96.

<sup>19</sup> *ibid.*

<sup>20</sup> *ibid.*

<sup>21</sup> Dawn Bell, 'International Control of Iraq Oil: How the Oil –For – Food Program Fits in, and Implications for the Future' (2004) 8 *Richmond Journal of Global Law and Business* 129.

<sup>22</sup> Jan Hallenberg and Håkan Karlsson (eds), *The Iraqi War: European Perspectives on Politics, Strategy and Operations* (Routledge 2005) 84.

(TPC),<sup>23</sup> this company obtained the right to the exploitation of petroleum in Iraqi territory, particularly around the province of Mosul. However, little came of this arrangement.<sup>24</sup>

In 1914, negotiations between the German government, the British government, the National Bank of Turkey, the Shell Company and the Anglo – Persian Oil Company resulted in a re-distribution of the TPC's share ownership, as follows: 50% for the Anglo – Persian Oil Company, 25% for Deutsche Bank and, 25% for the English – Saxon Oil Company, which was a branch of the Royal Dutch- Shell Company.<sup>25</sup>

Negotiations then commenced between the British, German and Turkish governments in respect of concessions for exploiting the petroleum in Iraq territory. However, the TPC stopped its petroleum extraction activities in Iraq after the outbreak of World War 1.<sup>26</sup>

### **2.2.1.2. The Role of Britain:**

Britain had no direct interest in Iraqi petroleum until the early twentieth century, when it found the penetration of Germany to be a threat to its economic and political interest in the Persian Gulf.<sup>27</sup> Britain tried to limit this infiltration and became drawn into the intense competition to obtain petroleum concessions.<sup>28</sup>

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<sup>23</sup> This company was founded by Deutsche Bank, the National Bank of Turkey, Anglo- Persian Petroleum Company and Royal Dutch Shell. Jan Hallenberg and Håkan Karlsson (eds), *The Iraqi War: European Perspectives on Politics, Strategy and Operations* (Routledge 2005) 84.

محمد أزهر سعيد السماك، اقتصاد النفط والسياسة النفطية: أسس وتطبيقات، دار الكتب، 1987، 7  
[Mohamed Azher Saad Al- Samak, *The Economics of Petroleum and Petroleum Policy: Principles and Applications* (Dar Al Kotob 1987) 7].

<sup>24</sup> Dawn Bell, 'International Control of Iraq Oil: How the Oil –For – Food Program Fits in, and Implications for the Future' (2004) 8 *Richmond Journal of Global Law and Business* 129; David Styan, *France and Iraq: Oil, Arms and French Policy- Making in the Middle East* (I. B. Taurise & Co Ltd 2006) 13.

<sup>25</sup> Mahboob Alam, *Iraqi Foreign Policy since Revolution* (2<sup>nd</sup> edn, K. M. Rai Mittal for Mittal Publications 1995) 144; David Styan, *France and Iraq: Oil, Arms and French Policy- Making in the Middle East* (I. B. Taurise & Co Ltd 2006) 13; Roy L. Nersesian, *Energy for the 21st Century: A Comprehensive Guide to Conventional and Alternative Sources* (2<sup>nd</sup> edn, M. E. Sharpe, Inc 2010) 151.

<sup>26</sup> Mohamed bin Abdul Latef, *Middle East Oil: A Redistribution of Values Arising from the Oil Industry* (University Press of America 1991) 159.

<sup>27</sup> جواد العطار، تاريخ البترول في الشرق الاوسط 1901-1972، بيروت، 20-1977  
[Jawad Al-Ataar, *The History of Petroleum in the Middle East 1901- 1972* (Beirut 1977) 20-21]; Mohamed bin Abdul Latef, *Middle East Oil: A Redistribution of Values Arising from the Oil Industry* (University Press of America 1991) 155.

<sup>28</sup> Stephen Pelletiere, *Iraq and the International Oil System: Why America Went to War in the Gulf* (Greenwood 2001) 23.

This competition between the Great Powers intensified when oil began to be used as fuel for their naval craft. It then became the most essential raw material.<sup>29</sup> In 1901, Britain obtained the rights to the Turkish petroleum refinery at Shat al- Arab.<sup>30</sup> Britain entered into an agreement with the Ottoman Empire: petroleum would be exported from the Ottoman imperial lands, including Iraq, in exchange for British military protection. By 1912, the British government was urgently seeking sources of petroleum in order to provide the British naval fleet with fuel.<sup>31</sup> In that year, Britain, together with the Netherlands and Germany established the TPC to exploit petroleum in the Mosul and Baghdad provinces.<sup>32</sup> The British Navy converted from using coal to using oil in 1912-1913 and this decision by Churchill, the First Lord of the Admiralty, in 1913, significantly impacted on the increasing competition for petroleum between Germany and British.<sup>33</sup>

Turkey took part in the First World War as an ally of Germany. Britain invaded Iraq, which was part of the Turkish Empire, in 1916.<sup>34</sup> British troops occupied Baghdad in 1917 and Kirkuk in 1918.<sup>35</sup> Stephen Pelletiere explained the Britain interest in Iraq as follows:

A big question about World War I is why the Allies devoted so much time and resources to waging the fight in the Middle East (...) [o]nly one explanation carries weight, that the British were determined to take control of the area because of its oil.<sup>36</sup>

In 1916, Britain and France signed the Sykes – Picot treaty.<sup>37</sup> According to this treaty, Britain and France divided spheres of influence between themselves.<sup>38</sup> France anticipated the presence of copious quantities of petroleum in Mosul in northern Iraq, which was within the

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<sup>29</sup> Peter Sluglett, *Britain in Iraq: Contriving King and Country* (Columbia University Press 2007) 67.

<sup>30</sup> Courtney Hunt, *The History of Iraq* (Greenwood Press 2005) 59.

<sup>31</sup> عبد المنعم عبد الوهاب، النفط بين السياسة والاقتصاد، الكويت، 1974، 102.  
[Abdul Monam Abdul Wahab, *Petroleum between Political and Economy* (Kiwaite 1974) 103].

<sup>32</sup> Peter Sluglett, *Britain in Iraq: Contriving King and Country* (Columbia University Press 2007) 67.

<sup>33</sup> *ibid*; Courtney Hunt, *The History of Iraq* (Greenwood Press 2005) 58; David Styan, *France and Iraq: Oil, Arms and French Policy- Making in the Middle East* (I. B. Taurise & Co Ltd 2006) 11.

<sup>34</sup> Lucy Dean et al (eds), *The Middle East and North Africa 2004* (50<sup>th</sup> edn, Europa Publication 2004) 445; Peter Sluglett, *Britain in Iraq: Contriving King and Country* (Columbia University Press 2007) 8.

<sup>35</sup> *ibid*.

<sup>36</sup> Stephen Pelletiere, *Iraq and the International Oil System: Why America Went to War in the Gulf* (Greenwood 2001) 29.

<sup>37</sup> The Sykes – Picot treaty was concluded between France and Britain during the First World War, on 16 May 1916.

<sup>38</sup> Usha Natarajan, 'Creating and Recreating Iraq: Legacies of the Mandate System in Contemporary Understandings of Third World Sovereignty' (2011) 24 *Leiden Journal of International Law* 799.



French sphere.<sup>39</sup> Britain therefore placed itself in a critical position in relation to France when it entered Mosul and started drilling wells, and also built a railway between Mosul and Kirkuk.<sup>40</sup> Britain was in breach of the treaty as a result of entering the French zone of influence, but France merely submitted a protest note.<sup>41</sup> At the end of the First World War Britain took possession of Germany's share in the TPC, putting an end to Germany's role in Iraq, and inaugurating a new era there.<sup>42</sup> It could be said that Britain was successful in excluding the competition of other powers in Iraq.

### **2.2.1.3. The Role of France:**

France was one of the great powers that sought to obtain a petroleum concession in the Iraq region of the Ottoman Empire. French attempts to obtain petroleum concessions in the Iraq region had started at the end of the nineteenth century, when French petroleum experts had helped to develop and increase petroleum production in the Toz Kormatoo and Baba Gurgur petroleum fields.<sup>43</sup> France, like Britain, became aware of German influence in the Iraq region in the course of its attempts to establish its place among the powers that owned the Middle East petroleum industry, which at the time were Britain and the USA.<sup>44</sup> France's need for petroleum increased notably in the period from 1914 to 1918, as it was the fuel used by its navy during the war. It was for this reason that France agreed to conclude the Sykes- Picot treaty in 1916.<sup>45</sup> The latter agreement gave France control over Syria, and the petroleum-rich province of Mosul as a part of Syria.<sup>46</sup> French ambitions to control Mosul province led to disputes with the British, who

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<sup>39</sup> Edward Peter Fitzgerald, 'France's Middle Eastern Ambitions, the Sykes-Picot Negotiations, and the Oil Fields of Mosul, 1915-1918' (1994) 66 *Journal of Modern History* 697; Peter Sluglett, *Britain in Iraq: Contriving King and Country* (Columbia University Press 2007) 29.

<sup>40</sup> جواد العطار، تاريخ البترول في الشرق الاوسط 1901-1972، بيروت، 1977، 25  
[Jawad Al-Ataar, *The Petroleum History in the Middle East 1901- 1972* (Beirut 1977) 25].

<sup>41</sup> Mohamed bin Abdul Latef, *Middle East Oil: A Redistribution of Values Arising from the Oil Industry* (University Press of America 1991) 159.

<sup>42</sup> جواد العطار، تاريخ البترول في الشرق الاوسط 1901-1972، بيروت، 1977، 25  
[Jawad Al-Ataar, *The Petroleum History in the Middle East 1901- 1972* (Beirut 1977) 25].

<sup>43</sup> *ibid* 23.

<sup>44</sup> David Styan, *France and Iraq: Oil, Arms and French Policy- Making in the Middle East* (I. B. Taurise & Co Ltd 2006) 9-10.

<sup>45</sup> William E. Watson, *Tricolor and Crescent: France and the Islamic World* (Greenwood Publishing Group, Inc 2003) 200.

<sup>46</sup> James Barr, *A Line in the Sand: Britain, France and the Struggle That Shaped the Middle East* (Simon & Schuster UK Ltd 2011) 2.

wanted this province to be within their own sphere of interest.<sup>47</sup> However, after a series of negotiations between France and Britain, the agreement was amended and Mosul became part of the region that was to be under the British government's control.<sup>48</sup> In 1920, France owned a quarter of the shares in the TPC as a consequence of Germany's defeat in the First World War,<sup>49</sup> and this is provided the basis of the French petroleum industry in the last century. France's role in Iraq expanded after the First World War, and it concluded important agreements to enhance its petroleum industry and to ensure access to petroleum. The French were major participants in the Iraqi petroleum industry prior to its nationalisation.<sup>50</sup>

#### **2.2.1.4. The United States of America (USA):**

The United States had long sought to find ways to reach Iraq's petroleum, and it was for this purpose that Colby M. Chester was sent to Turkey in 1908. Chester was a retired Admiral and a former attaché at the American embassy, and his mission was to negotiate with the Ottoman authorities on behalf of the USA to obtain a concession for the Anatolian Railway Company to construct a line between Mosul and Kirkuk, and in addition, for the right to be granted to the USA to exploit petroleum in the area on both sides of the railway. Chester's efforts were facilitated by the Chamber of Commerce, the Commercial Office and the Transport Association of New York, which provided him with large sums of money.<sup>51</sup>

Due to American political support and his previous relationship with the Turks, Chester succeeded in gaining some concessions to exploit petroleum in some parts of the Ottoman Empire. However, the USA was unable to implement these concessions because of the coup

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<sup>47</sup> David Styan, *France and Iraq: Oil, Arms and French Policy- Making in the Middle East* (I. B. Taurise & Co Ltd 2006) 15.

<sup>48</sup> Usha Natarajan, 'Creating and Recreating Iraq: Legacies of the Mandate System in Contemporary Understandings of Third World Sovereignty' (2011) 24 *Leiden Journal of International Law* 799.

<sup>49</sup> David Styan, *France and Iraq: Oil, Arms and French Policy- Making in the Middle East* (I. B. Taurise & Co Ltd 2006) 13.

<sup>50</sup> This will be discussed in the next sections of this chapter.

<sup>51</sup> جواد العطار، تاريخ البترول في الشرق الاوسط 1901-1972، بيروت، 1977، 21. [Jawad Al-Ataar, *The Petroleum History in the Middle East 1901- 1972* (Beirut 1977) 21]; Fiona Venn, *Oil Diplomacy in the Twentieth Century* (Macmillan education Ltd 1986) 17.

against Sultan Abdulhameed II that occurred a few weeks after the concessionary agreement was signed. Subsequently, the concessions had no legal validity.<sup>52</sup>

As noted competition between the Great Powers to secure petroleum supplies increased because of the importance of petroleum as an essential fuel for naval vessels during World War I. The great powers were thereby motivated to enter into petroleum concession agreements with the Ottoman Empire. They also entered into agreements with each other so as to secure petroleum, as in the Sykes Picot agreement. These agreements between the Great Powers reveal the disputes between them<sup>53</sup> over petroleum areas in the Middle East, and notably in Iraq. These agreements between the great powers reshaped Iraq after the First World War. Iraq had previously been subject to the control of the Ottoman Empire, and had no role in the management and control of its own natural resources. The Ottoman Empire controlled Iraq most valuable form of natural wealth, petroleum, and petroleum concessions were given to the Empire's allies. The end of the Ottoman era, however, did not give Iraq the opportunity to control its own petroleum; instead a new era began, in which control was exercised by British companies.

### **2.2.2. The Pre – Nationalisation Era in Iraq (from 1920 to 1972):**

After the allied victory in World War I, the competition between the allied nations became intense. In their efforts order to secure control over resources, these nations began to dispute with each other over control of petroleum regions. The origin of these disputes is to be found in the Sykes – Picot agreement,<sup>54</sup> which took place before the war ended. However these disputes were settled in 25 April 1920, when France and Britain met in Italy to conclude a treaty known as the San Remo agreement.<sup>55</sup> Under this agreement, mandate territories were created from parts of the former Turkish Empire and divided among the allied powers. Lebanon and Syria came under a League of Nations Mandate<sup>56</sup> administered by the French, while Iraq and Palestine came

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<sup>52</sup> Gökhan Çetinsaya, *Ottoman Administration of Iraq, 1890-1908* (Routledge 2006) 2.

<sup>53</sup> For example, the disputes between Britain and France over the province of Mosul after World War I.

<sup>54</sup> The Sykes – Picot treaty was concluded between France and Britain during the First World War, on 16 May 1916.

<sup>55</sup> San Remo agreement was sign in 24 April 1920. It is enter in force in 24 July 1922.

<sup>56</sup> The British and French governments declared their desire to help Arab regions in the Ottoman Empire to become independent Arab states. This project was announced at the Paris Conference in 1919, when the Allies categorized Iraq as Class A mandate to be administered by the British Government under League of Nations supervision until such time as Iraq could govern itself. The British Mandate in Iraq formally ended in October

under a British mandate.<sup>57</sup> Furthermore, the dispute over Mosul, settled in this agreement, gave to France Germany's shares in the TPC, which amounted to 25%, in return for France's waiver of its claims on Mosul in favour of Britain.<sup>58</sup> The French government was obliged to facilitate the building of pipelines to transfer petroleum from fields in Iraq and Iran to seaports in the Mediterranean.<sup>59</sup>

Meanwhile the news of this agreement, which was limited to Britain and France, was leaked to the USA. The Americans then protested that, under the terms of the mandate, the granting of monopoly concessions was prohibited, and it insisted on having its own share in Middle East petroleum.<sup>60</sup> Britain suggested that all US companies should be integrated into one company, to be known as The Middle East Development Company. This company came to own 25% of the TPC.<sup>61</sup>

In 1920, Iraq became independent of the Ottoman Empire under the nominal kingship of Amir Abdullah, who was the son of Sharif Husain and the brother of Amir Faisal. The country was nevertheless under a British mandate.<sup>62</sup> In 1921, a kingdom was established and Amir Faisal became the first King of Iraq.<sup>63</sup> After the founding of the Iraqi state, the TPC submitted a request to the Iraqi government for the grant of a concession to exploit petroleum in Baghdad and Mosul.<sup>64</sup> In 1923, the Iraqi and British governments began negotiations over these new petroleum concessions. During the negotiations, Iraq insisted on a 20% share in the TPC.<sup>65</sup>

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1932. Iraq became independent and at that date joined the League of Nations with full membership. J. P. Docherty, *Iraq* (Chelsea House Publisher 2003) 34; Fred M. Shelley, *Nation Shapes: The Story Behind the World's Borders* (ABC-CILO, LIC 2013) 411.

<sup>57</sup> Edward Mead Earle, 'The Turkish Petroleum Company- a Study in Oleaginous Diplomacy' (1924) 39 *Political Science Quarterly* 265.

<sup>58</sup> William P. Rawles, 'Provisions for Minerals in International Agreements' (1933) 48 *Political Science Quarterly* 513.

جواد العطار، تاريخ البترول في الشرق الاوسط 1901-1972، بيروت، 1977، 26

[Jawad Al-Ataar, *The Petroleum History in the Middle East 1901- 1972* (Beirut 1977) 21].

<sup>59</sup> William Strivers, *Supremacy and Oil: Iraq, Turkey, and the Anglo- American World Order* (Cornell University Press 1982) 485.

<sup>60</sup> وزارة المعارف العراقية، نفطنا: محاولات للاتفاف على التأميم (الحلقة 34، 1972، ص9)

[The Iraqi Ministry of Information, 'Our Oil: Attempts to Circumvent the Nationalization' (34 series, 1972, p 9)].

<sup>61</sup> *ibid.*

<sup>62</sup> Charles Tripp, *A History of Iraq* (2<sup>nd</sup> edn, Cambridge University Press 2002) 40.

<sup>63</sup> *ibid.* 47.

<sup>64</sup> جورج عزيز ياقو، الاستثمار الوطني المباشر وتأميم النفط في العراق، سلسلة الثقافه النفطية، وزارة النفط العراقية، 1988، 70-80

[George Aziz Yako, *The Direct National Investment and the Nationalization of Oil in Iraq* (the Iraqi Ministry of Oil 1988) 70-80].

<sup>65</sup> Leon M. Jeffries (ed), *Iraq: Issues, Historical Background, Bibliography* (Nova Science Publisher, Inc 2003) 146.

Finally, in 1925, the Iraqi Council of Ministers agreed to grant this company a concession for a period of 75 years. None of the Iraqi demands were met, except those relating to Khanqin and Basra. This agreement became the first petroleum concession in the Arab world.<sup>66</sup>

In that period, the Iraqi state had a major role in influencing the Iraqi petroleum industry. To highlight this role, I have divided my discussion into two parts. The first part deals with Iraqi state intervention in the petroleum industry before World War II. The second part focuses on the Iraqi state's role after World War II.

### ***2.2.2.1. The Iraqi State's Intervention in the Petroleum Industry before World War II:***

The discovery of petroleum in the Middle East led to drastic changes in economic, social and political life.<sup>67</sup> The political aspect is notable because the exploitation of petroleum came to be associated with the history of the Middle East. The Great Powers, particularly, Britain,<sup>68</sup> used different ways to secure control over petroleum resources. For example, Britain signed a series of agreements with tribal leaders in Iraq and imposed its dominance in the Persian Gulf.<sup>69</sup> Britain also developed a procedure for determining prices and restricting business and other activities of petroleum companies that were operating in the Middle East subject to British protection.<sup>70</sup> The policy followed by Britain impacted on the historical development of the activities of the Iraqi Petroleum Company (hereinafter the IPC).<sup>71</sup> In 1928, shareholders in the IPC signed an agreement to prevent them from competing among themselves, or with the IPC,

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<sup>66</sup> جورج عزيز ياقو، الاستثمار الوطني المباشر وتاميم النفط في العراق، سلسلة الثقافه النفطية، وزارة النفط العراقيه، 1988، 70-80، [George Aziz Yako, *The Direct National Investment and the Nationalization of Oil in Iraq* (The Iraqi Ministry of Oil 1988) 70-80]; Melvin Conant, *Access to Energy, 2000 and After* (The University Press of Kentucky 1979) 51.

<sup>67</sup> Atif A. Kubursi, *Oil Industrialization & Development in the Arab Gulf States* (Groom Helm Ltd 1984) 1.

<sup>68</sup> After the World War I Particularly after 1920 when Iraq administrated by British Government according to the League of Nations Mandate, Britain play important role in Iraqi petroleum industry the next sections will explain who the Brtish petroleum company plays such role.

<sup>69</sup> محمد مغربي، السيادة الدائمه على مصادر النفط، دراسه في الامتيازات النفطية في الشرق الاوسط والتغيير القانوني، بيروت دار الطليعة، 1973، 51-52

[Mohamed Magrabe, *Permanent Sovereignty over Oil Resources: A Study in Concession Agreement in the Middle East and the Legal System Change* (Dar Al. Taleaa 1973) 51-52].

<sup>70</sup> *ibid.*

<sup>71</sup> On the 8<sup>th</sup> June 1929, the Turkish Petroleum Company (TPC) was renamed the Iraqi Petroleum Company (IPC). Dawn Bell, 'International Control of Iraq Oil: How The Oil –For – Food Program Fits in, and Implications for the Future' (2004) 8 *Richmond Journal of Global Law and Business* 129.

for concessions inside the areas formerly controlled by the Ottoman Empire. This agreement was known as the Red Line Agreement<sup>72</sup> and it remained in force until 1948.<sup>73</sup>

The IPC did not discover petroleum in commercial quantities until 14 November 1927, when petroleum began to flow from the Baba Gurgur field in Kirkuk.<sup>74</sup> This is considered to be the second most important petroleum discovery in Iraq.<sup>75</sup>

In 1931, the Iraqi government announced its willingness to pave the way for new foreign companies to obtain concession contracts outside the IPC's areas. It is worth noting that this announcement was an attempt by the Iraqi government to attract rival companies in order to create new concessions with fairer terms. A new competitor appeared in the form of British Oil Development Ltd, (hereinafter BOD).<sup>76</sup> This company was able to win a concession to exploit petroleum in Iraq. The IPC tried to stand against the company through granting an increased number of concessions within the Red Line Agreement territories. It succeeded in challenging the BOD's influence and ultimately purchased all BOD shares. BOD changed its name to the Mosul Petroleum Company (hereinafter the MPC) and gained a further concession. With these important concessions, Iraqi oil fields came under the control of the IPC.<sup>77</sup> This company imposed its dominance on competitors in the area and emerged as an influential authority by tightening its grip on all concessions and challenging those which the Iraqi government granted to other companies.

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<sup>72</sup> The Red Line Agreement was signed on 31 July 1928.

<sup>73</sup> محمد مغربي، السيادة الدائمة على مصادر النفط، دراسته في الامتيازات النفطية في الشرق الأوسط والتغيير القانوني، بيروت دار الطليعة، 1973، 51-52

[Mohamed Magrabe, *Permanent Sovereignty over Oil Resources: A Study in Concession Agreements in the Middle East and the Legal System Changes* (Dar Al. Taleaa 1973) 51-52].

<sup>74</sup> جواد العطار، تاريخ البترول في الشرق الأوسط 1901-1972، بيروت، 1977، 152-1977

[Jawad Al-Ataar, *The Petroleum History in the Middle East 1901- 1972* (Beirut 1977) 152]; نوري عبد الحميد، التاريخ السياسي لامتيازات النفط العراقيه 1925- 1952، بيروت، 30، 1980، 31

[Noree Abdul Hameed, *The Political History of Iraq Oil Concession Agreements 1925-1952* (Beirut 1980) 30-31]; R.W.Ferriery and J.H. Bamberge, *The History of the British Petroleum Company: The Developing Years 1901-1932* (Cambridge University Press 1982) 60.

<sup>75</sup> See page 26 of this chapter.

<sup>76</sup> Zuhaer M. Mikdashi, *A Financial Analysis of Middle Eastern Oil Concessions 1901- 65* (E. A. Prager 1966) 72; John Malcom Blair, *The Control of Oil* (Pantheon Books 1976) 31-34.

<sup>77</sup> Zuhaer M. Mikdashi, *A Financial Analysis of Middle Eastern Oil Concessions 1901- 65* (E. A. Prager 1966) 73; Toyin Falola and Ann Genova, *The Politics of the Global Oil Industry: An Introduction* (Praeger 2005) 184.

By 1938, the Basra Petroleum Company (hereinafter the BPC) was granted a concession for a period of 75 years, covering all Iraqi territory that had not been granted to other companies, and also including Iraqi territorial waters and Iraq's share of neutral waters.<sup>78</sup>

In the light of the above, it may be seen that the petroleum companies that were granted concession agreements before World War II extended their domination over the Iraqi petroleum industry. Taking advantage of unfair terms, the foreign petroleum companies controlled all areas rich in petroleum and were granted concessions in large areas of Iraqi territory.<sup>79</sup> Moreover, the petroleum agreements concluded in that period were of long duration, like the 1925 agreement between Iraq and the IPC, which extended for 75 years. What is more, these companies enjoyed a monopoly of all petroleum operations, from the initial exploitation to the refinement stage and including its export and sale in international markets. They were also mapping the entire policy of the Iraqi petroleum industry. These companies, it can be said, curtailed Iraq's right to exploit its petroleum wealth fairly through their formulation of unclear and unfair terms in concession contracts held with the Iraqi government.<sup>80</sup>

In the short period between the acquisition of the concessions and the outbreak of World War II, the petroleum industry of the Middle East in general, and of Iraq in particular, continued to rely entirely on foreign companies. Consequently the Iraqi government played no part in the petroleum industry. Opposition to any interference from the Iraqi government was in the foreign petroleum companies' interest. An example of this was the petroleum agreement of 1925. When Iraq laid claim to 20% of the TPC: Iraq signed the agreement but its claim was not recognised.<sup>81</sup>

The Iraqi government at this time was not strong enough to negotiate concession agreements with foreign companies on equal terms.

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<sup>78</sup> محمد لبيب و صاحب ذهب، اتفاقيات وعقود البترول، في البلاد العربية، الجزء الاول، 1969، 150

[Mohamed Labeeb and Sahib Dahab, *Petroleum Agreements in Arabic Countries* (1969) 150]; Toyin Falola and Ann Genova, *The Politics of the Global Oil Industry: An Introduction* (Praeger 2005) 184.

<sup>79</sup> For example, the IPC signed a petroleum agreement with the Iraqi Government in 1931. The area of this agreement covered the Iraqi lands east of the Tigris River, while the territory west of this river was granted in two separate concessions to affiliates of the IPC, the MPC and BPC. Bernard Taverner, *Petroleum, Industry and Governments: A Study of the Involvement of Industry and Government in the Production and Use of Petroleum* (2<sup>nd</sup> edn, Kluwer International Law 2008) 23.

<sup>80</sup> Dawn Bell, 'International Control of Iraq Oil: How The Oil –For – Food Program Fits in, and Implications for the Future' (2004) 8 *Richmond Journal of Global Law and Business* 129.

<sup>81</sup> Roy L. Nersesian, *Energy for the 21st Century: A Comprehensive Guide to Conventional and Alternative Sources* (2<sup>nd</sup> edn, M. E. Sharpe, Inc 2010) 152.

### 2.2.2.2. Iraqi Government Intervention in the Petroleum Industry after World War II:

The end of World War II<sup>82</sup> was a turning point for most petroleum-producing countries. The petroleum countries of the Middle East, particularly Iraq, started paying more attention to their petroleum wealth and realized the importance of petroleum in the shaping of international political relationships. Moreover, four important factors stimulated many of the petroleum production countries to intervene in the petroleum industry.<sup>83</sup> These factors are as follows:

1. The emergence of new companies that were independent of the existing major companies. The French Organization for Oil Prospection and Activities (hereinafter the ERAP) was one such newcomer. These companies offered better terms than those offered by the major companies. In order to obtain more concessions, these companies laid claim to areas where the presence of petroleum was potential, or areas where concessions had been waived by the main companies because they could not find petroleum.<sup>84</sup>

2. The intervention of foreign investment companies gained influence on the internal affairs of the host country, and were therefore able to control policies for the production and sale of petroleum and to set the price. In addition, the production of crude petroleum was not sufficient when compare the production of petroleum with the petroleum quantities found in these fields.<sup>85</sup>

3. The spread of nationalisation in the Middle East petroleum countries, a particular example being the nationalisation of Iranian petroleum in 1951,<sup>86</sup> when the Iranian parliament, during the premiership of Dr Mohammed Mosaddegh, enacted legislation to

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<sup>82</sup> Germany lost the war and put itself in the same situation as in World War I. The main petroleum companies controlled 80% of the world's total production. Also the military power of the states that owned these companies was sufficiently strong to prevent German access to oil resources. Christopher Tugendhat, *Oil the Biggest Business* (Eyre & Spottiswood 1968) 112.

<sup>83</sup> يوسف الصائغ، سياسات النفط العربي في السبعينات فرصه ومسؤوليه، المؤسسه العربيه للدراسات والنشر، 1983، 58 [Yousife Al-Saag, *Arab Oil Policies in the Seventies: Opportunity and Responsibility* (the Arabic Institution for Studies and Publish 1983) 58].

<sup>84</sup> Henry Cattan, *The Evolution of Oil Concession in the Middle East and North Africa* (Oceana Publications 1967) 5.

<sup>85</sup> يوسف الصائغ، سياسات النفط العربي في السبعينات فرصه ومسؤوليه، المؤسسه العربيه للدراسات والنشر، 1983، 60 [Yousife Al-Saag, *Arab Oil Policies in the Seventies Opportunity and Responsibility* (the Arabic Institution for Studies and Publish 1983) 60].

<sup>86</sup> Homayoun Mafie, 'Iranian Concession Agreements and the Role of the National Iranian Oil Company: Economic Development and Sovereign Immunity' (2008) 48 *Natural resources Journal* 407.



nationalize the petroleum industry in Iran.<sup>87</sup> This law conveyed a strong warning to the companies that monopolized the oil industry in the region.

4. A new type of petroleum contract appeared. The profit-sharing principle emerged in Venezuela in 1948, when legislation was enacted to impose an additional tax on the profits of petroleum companies, whereby the government's share of net income was to be at least 50%.<sup>88</sup> This new tax system moved from Venezuela to the Arab Gulf countries. In 1950, Saudi Arabia was the first of the Middle East countries to apply this form of taxation, doing so by means of a Royal Decree. It subsequently became widespread in the Middle East.<sup>89</sup>

During this period, the Iraqi government's role in the petroleum industry increased and became more effective, in a process that evolved through three stages.

The first stage began after the Second World War II and lasted until 14 July 1958 revolution, when Iraqi government appealed to the IPC to review the Iraqi share. Article 10 of the IPC concession agreed with the Iraqi government in 1934 provided that Iraq had a right to reconsider the concession twenty years after the commencement of petroleum exports, which was in 1934.<sup>90</sup> The position taken by the Iraqi government came as a result of neighboring states amending their concession agreements with petroleum companies.<sup>91</sup>

On 24 May 1950, the Iraqi Minister of the Economy sent an ultimatum to the MPC to export the largest possible quantity of crude petroleum.<sup>92</sup> A month after this ultimatum he sent another

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<sup>87</sup> Alan W. Ford, *The Anglo Iranian Oil Dispute of 1951-1952* (University of California Press 1954) 182; Homayoun Mafie, 'Iranian Concession Agreements and the Role of the National Iranian Oil Company: Economic Development and Sovereign Immunity' (2008) 48 *Natural Resources Journal* 407.

<sup>88</sup> Venezuela Law of Hydrocarbons and its Regulations of 1943 in Barrows Company (ed), *South America: Basic Oil Laws and Concession Contracts*, Vol 2 (Petroleum Legislation 1967) 22-23.

<sup>89</sup> يوسف الصائغ، سياسات النفط العربي في السبعينات فرصه ومسؤوليه، المؤسسة العربيه للدراسات والنشر، 1983، 61 [Yousife Al-Saag, *Arab Oil Policies in the Seventies: Opportunity and Responsibility* (the Arabic Institution for Studies and Publications 1983) 61].

<sup>90</sup> Dawn Bell, 'International Control of Iraq Oil: How The Oil –For – Food Program Fits in, and Implications for the Future' (2004) 8 *Richmond Journal of Global Law and Business* 129; Melvin Conant, *Access to Energy, 2000 and After* (The University Press of Kentucky 1979) 51.

<sup>91</sup> Among the agreements amended were those between the Amino Oil Company and Kuwait in 1948, and between Saudi Arabia and the Western Pacific Company. Ragaei El Mallakh, *Economic Development and Regional Cooperation Kuwait* (The University of Chicago Press 1968) 39; E. A. Mabruk, *Offshore Oil Concession Agreements in OPEC Member Countries* (Monaco 1965) 17-18.

<sup>92</sup> 349، 1980، بيروت، نوري عبد الحميد، التاريخ السياسي لأمتيازات النفط في العراق 1925-1952، [Noree Abdul Hameed, *The Political History of Iraqi Oil Concessions 1925-1952* (Beirut 1980) 349].

to the BPC ordering an acceleration of drilling operations.<sup>93</sup> The Minister warned the company that if it did not export a sufficient quantity of crude petroleum this would be viewed as an unjustified disregard of the Iraqi government. The company was also placed under an obligation to export a large quantity of crude petroleum as quickly as possible.<sup>94</sup>

The Iraqi government signed an agreement with the Khanaqin Oil Company in 1951. This agreement gave the Iraqi government the right to buy the petroleum produced as from the 1 January 1952.<sup>95</sup>

Subsequently the Al- Rafidain Petroleum Company, which was owned by the IPC, took over the sale of petroleum. The Iraqi government took control of all sales activity and also obliged this company to operate the Al- Wonde refinery and to increase its production of crude petroleum to as much as 2 million tons annually.<sup>96</sup>

Another important achievement for the Iraqi government during this period was the signing in 1952 of a profit- sharing agreement between Iraq and the major petroleum companies in the country (IPC, MPC, and BPC).<sup>97</sup> The most significant term of the agreement is Article 4, which allocates 50% of the profits to the Iraqi government. Article 6 sets out the minimum amounts payable by the three companies, which were to be not less than 20 million pounds per year.<sup>98</sup> These achievements, however, were insufficient to satisfy the Iraqi government, which by this time aspired to complete control over its most important natural resource. However, the Iraqi share of the profits did not rise above 50%, while in other states, such as Venezuela, the government share of the profits jumped up to 50%.<sup>99</sup>

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<sup>93</sup> نوري عبد الحميد، التاريخ السياسي لأمتيازات النفط في العراق 1925-1952، بيروت 1980، 349

[Noree Abdul Hameed, *The Political History of Iraqi Oil Concessions 1925-1952* (Beirut 1980) 349].

<sup>94</sup> محمد أزهر سعيد السماك، اقتصاد النفط والسياسة النفطية: أسس وتطبيقات، دار الكتب، 1987، 228

[Mohamed Azher Saad Al- Samak, *Petroleum Economics and Petroleum Policy: Principles and Applications* (Dar Al Kotob 1987) 228].

<sup>95</sup> *ibid.*

<sup>96</sup> *ibid.*

<sup>97</sup> Abbas Alnasrawi, *The Economy of Iraq: Oil, War, Destruction of Development and Prospects, 1950-2010* (Greenwood Press 2010) 2.

<sup>98</sup> محمد يوسف علوان، النظام القانوني لاستغلال النفط في الأقطار العربي، جامعة الكويت، 1982، 58

[Mohamed Yousief Alwan, *The Legal System of Exploitation Oil in the Arab Countries* (Al Kuwait University 1982) 58].

<sup>99</sup> محمد أزهر سعيد السماك، اقتصاد النفط والسياسة النفطية: أسس وتطبيقات، دار الكتب، 1987، 229

The second stage began in 1958 when Iraq abolished the monarchy and became a republic, with Abdul Kareem Qasim as its first president. The first act taken by the new government was to acquire the Kanaqin Petroleum Company,<sup>100</sup> which could not fulfill its obligations towards the Iraqi government under the 1957 agreement described above.<sup>101</sup> By 1959, the Al-Rafidain Petroleum Company had disappeared and an oil products distribution company was established in its place.<sup>102</sup>

The main obstacle facing the new government was that there was no investment in the Iraqi territory controlled by the petroleum companies under the terms of the concession. Several rounds of negotiations between Iraq and the petroleum companies failed to settle this issue of non-investment. Eventually, in 1961, Iraq enacted Law No 80<sup>103</sup> to force these companies to waive their control of land amounting to about 99% of the concession areas.<sup>104</sup> Despite the IPC's protest that Law No 80 was inconsistent with the terms of the concession agreements concluded in 1925, 1932, and 1938, it finally submitted to this law and limited its activities to areas specified by it.<sup>105</sup>

These achievements were in domestic affairs. At the foreign policy level, Iraq sought with other petroleum-producing countries, namely Iran, Kuwait, Saudi Arabia and Venezuela, to establish an organization for countries which exported petroleum. Accordingly, a conference was held in Baghdad between 10 and 14 September 1960,<sup>106</sup> the result being the foundation of the

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[Mohamed Azher Saad Al- Samak, *Petroleum Economics and Petroleum Policy: Principles and Applications* (Dar Al Kotob 1987) 229].

<sup>100</sup> *ibid.*

<sup>101</sup> *ibid.*

<sup>102</sup> *ibid.* 288.

<sup>103</sup> The Law Determining the Investment Area of Petroleum Companies. No 80 of 1961 published in Iraqi Official Gazette, Issue 616 on 12 December 1961, 380.

<sup>104</sup> عبد اللطيف الشواف، حول قضية النفط في العراق، المكتبة الحديثة، 23 [Abdul Lattef Al- Shawaf, *About the Oil Case in Iraq* (The Modern Library) 23]; محمد يوسف علوان، النظام القانوني لاستغلال النفط في الأقطار العربية، جامعة الكويت، 1982، 36 [Mohamed Yousief Alwan, *The Legal System of Exploitation Oil in Arab Countries* (Al Kuwait University 1082) 36].

<sup>105</sup> Michael E. Brown, 'The Nationalization of the Iraqi Petroleum Company' (1979) 10 *International Journal of Middle East Studies* 109.

<sup>106</sup> Rene G. Ortiz, 'The Role of OPEC until the Year 2000' (1984) 8 *The Fletcher Forum* 285; Edmund Jan Osmańczyk, *Encyclopedia of the United Nations and International Agreements: N-S*, vol. 3 (Anthony Mango ed, 3<sup>rd</sup> edn, Routledge 2003) 1702; Thomas M. Leonard, *Encyclopedia of the Developing World: O-Z*, vol. 3 (2006) 1212.

OPEC. The main objective of OPEC was to create unity and a common petroleum policy among its members.<sup>107</sup>

In 1964, the Iraqi government established the Iraqi National Oil Company (hereinafter the INOC) in accordance with Act No (11),<sup>108</sup> which was reformed three years later in accordance with Act No. (123) 1967<sup>109</sup> and also Act No, (97) 1967,<sup>110</sup> which provided in its Article (1) that the Iraqi National Oil Company should have an exclusive right to invest in all Iraqi areas.

At that time, the Iraqi government was in a strong position. It subjected all the petroleum companies to its legislation. Its determination to control its own natural resources was expressed through laws enacted in this period. For example, the provisional constitution enacted on 29 April 1964 provides in Article 9 that all natural resources and their revenue were to be owned by the Iraqi state in order to ensure that this revenue was exploited in the best way.

The third stage began with the outbreak of the revolution of 17 July 1968, when the Baath Party took power in Iraq. This period was characterised by political stability.<sup>111</sup>

Iraq achieved some important successes at this time, for example, in compelling the petroleum companies to increase their production of crude petroleum during negotiations in Tehran.<sup>112</sup> Iraq took part in these negotiations in cooperation with representatives from OPEC countries.<sup>113</sup> The consequences of this agreement were an increase in crude petroleum prices and an augmentation of tax from 50% to 55% and cancellation of the marketing deduction. In June 1971, the government revived its demand for the price of Iraq's petroleum to be raised to the same level as that of Libya, and the IPC agreed to this increase.

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<sup>107</sup> The Organization of Petroleum Exporting Countries, a *Brief History: article*. <[http://www.opec.org/opec\\_web/en/about\\_us/24.htm](http://www.opec.org/opec_web/en/about_us/24.htm)> accessed on 21 August 2014.

<sup>108</sup> The Law in the Establishment of the Iraqi National Oil Company No. 11 of 1964 published in Iraqi Official Gazette, Issue 912 on 8 February 1964 64.

<sup>109</sup> The Law in the Establishment of the Iraqi National Oil Company No. 123 of 1967 Published in Iraqi Official Gazette, Issue 1474 on 21 September 1967 588.

<sup>110</sup> The Law for the Determination of the Investment Area of the Iraqi National Oil Company Published in Iraqi Official Gazette, Issue 1449 on 7 August 1967 482.

<sup>111</sup> Dawn Bell, 'International Control of Iraq Oil: How The Oil –For – Food Program Fits in, And Implications For the Future' (2004) 8 Richmond Journal of Global Law and Business 129.

<sup>112</sup> Tehran negotiations it is sign as of 14 February 1971.

<sup>113</sup> قاسم احمد العباس، قصة اتفاقية طهران 1971 وثائقها، مجلة النفط والتنمية، العدد الثالث، 1978، 172.

[Qasim Ahmed Al –Abass, 'The Story of the Tehran Agreement of 1971 Documentary' (1978) 3 The Oil and Development Journal 172].

In 1968, the INOC concluded a service contract with the ERAP.<sup>114</sup> Two years after this agreement France received its first imports of Iraq petrol.<sup>115</sup> It is apparent from these events that the Iraqi government had begun looking for other opportunities and contracts in order to achieve its aims. This contract also demonstrated the Iraqi government's ability to control its natural resources.

### 2.2.3. The Post – Nationalisation Era (1972 – 2003):

Iraq concluded several new contracts with foreign petroleum companies other than the major ones. Cooperation with these smaller companies helped to set Iraq on the road towards developing its national petroleum industry and motivated it to promulgate, on 1 February 1972, Law No 69.<sup>116</sup> By the terms of this law all operations of the IPC were nationalised.<sup>117</sup> The Iraqi government subsequently promulgated a series of laws to regulate nationalisation, such as Laws No 70, 90 and 101 of 1973. By virtue of these laws some of the common shares in the BPC were nationalized. Finally, Act No 200 in 1975<sup>118</sup> nationalised all remaining shares in this company. Thenceforth Iraq controlled its export operations directly.<sup>119</sup> In that period, Iraq adopted three approaches to sustain its petroleum industry. First, it promulgated rules to regulate the industry and to secure complete control over it.<sup>120</sup> Second, it followed a policy of looking for areas not previously subject to petroleum exploration, mainly in the north of the country, employing companies specialising in geological scans.<sup>121</sup> Third, it signed contracts with companies from Germany, the Union of Soviet Socialist Republic (hereinafter the USSR), Bulgaria, Romania,

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<sup>114</sup> This contract was ratified by law No (5) in 1968.

<sup>115</sup> Humberto Cedeno (ed), *The Development of the Iraqi Oil Production after Nationalization: 1972- 2003* (Freie University 2008) 20.

<sup>116</sup> The Nationalization Law of the Iraqi Petroleum Company No 69 of 1972 Published in the Iraqi Official Gazette, Issue 2146 on 1<sup>st</sup> July 1972 428.

<sup>117</sup> النفط في العراق من الامتيازات الى الاستثمار الوطني المباشر 1912-1972، مكتب الاعلام والنشر، شركة النفط الوطني العراقيه 1973، 19 [ Oil in Iraq: from Concessions to National Direct Investment 1912-1972, The Publishing and Information Office, The Iraqi National Petroleum Company, 1973, 19]; حسين زكريا، المشاركة والتأميم: دليل البترول العربي، بيروت، 1973، 264 [Hassan Zakareia, *Participation and Nationalization: The Arab Petroleum Company Guide* (Beirut 1973) 264].

<sup>118</sup> The Law in the Nationalization of the Basra Petroleum Company No 200 of 1975 Published in the Iraqi Official Gazette, Issue 2502 on 8 December 1975 7.

<sup>119</sup> 101، 1980، دار الطليعة، سعدون حمادي، مذكرات وآراء في شؤون النفط، [Saadon Hamade, *Memoranda and Opinions on Petroleum Issues* (Al- Talea House 1980) 101].

<sup>120</sup> For example, Laws No 70, 90 and 101 in 1973.

<sup>121</sup> Michael E. Brown, 'The Nationalization of the Iraqi Petroleum Company' (1979) 10 International Journal of Middle East Studies 121.

and Czechoslovakia to undertake survey operations and exploration.<sup>122</sup> In that period the USSR played an important role in the Iraqi petroleum market. It helped to provide the INOC with equipment, to train the company's staff and helped Iraq to develop skills such as well-drilling and transportation.<sup>123</sup> In this period Iraq created successful policies for the development and control of its petroleum industry. A landmark was reached in 1972, when Iraq exported its first consignment of petroleum products to the global market. The country had demonstrated its ability to explore and export petroleum to the international market and at the same time to fight against the monopolies of the petroleum companies, and in doing so became the first Gulf state to control its own petroleum revenues.<sup>124</sup>

In 1979, relations between Iraq and Iran deteriorated because of a border dispute.<sup>125</sup> The war between Iraq and Iran began in 1980. Both countries possessed vast petroleum wealth, which in each case was exposed to severe damage. In 1984, a tanker war began,<sup>126</sup> and ships carrying petroleum were bombed by military aircraft. The attacks not only involved the warring states but extended to other countries like Saudi Arabia and Kuwait.<sup>127</sup> As a result of these attacks, Iranian production of crude oil was reduced and Iraqi revenues also fell below the normal level. The petroleum industry in Iraq was exposed to extreme damage, not only to its tankers but also to pipelines, petroleum exporting ports, and refineries.<sup>128</sup> For example, the most important refineries in Iraq, Basra and Kirkuk in the north of Iraq, was bombed. The revenue from petroleum was spent on arms and other sectors were deprived of this revenue.<sup>129</sup> By 1987

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<sup>122</sup> Oles M. Smolansky and Bettie Moretz Smolansky, *The USSR and Iraq: The Soviet Quest for Influence* (Duke University Press 1991) 22.

<sup>123</sup> Mordechai Abir and Aryeh Yodfat, *In the Direction of the Gulf: The Soviet Union and the Persian Gulf* (Franck Cass and Company Limited 1977) 12; Rouhollah K. Ramazani, *The Persian Gulf and the Strait of Hormuz* (Sijthoff & Noordhoff 1979) 46; Toyin Falola and Ann Genova, *The Politics of the Global Oil Industry: An Introduction* (Praeger 2005) 165.

<sup>124</sup> Humberto Cedeno (ed), *The Development of Iraqi Oil Production after Nationalization: 1972- 2003* (Freie University 2008) 19.

<sup>125</sup> Kaiyan Homi Kaikobad, 'IUS ADBELLUM: Legal Implications of the Iran -Iraq War' in Ige F. Dekker and Harry H. G. Post, *The Gulf War of 1980-1988: The Iran-Iraq War in International Legal Perspective* (Martins Nijhoff Publisher 1992) 51; Farhang Rajaei (ed), *The Iran-Iraq War: The Politics of Aggression* (The University Press of Florida 1993) 14.

<sup>126</sup> Dilip Hiro, *The Longest War: The Iran-Iraq Military Conflict* (Routledge 1991) 129; Helen Chapin Metz, *The Tanker War, 1984-78: Article* (1988) at <<http://countrystudies-us/iraq/htm>> accessed on 2 January 2011.

<sup>127</sup> *ibid.*

<sup>128</sup> *ibid.*

<sup>129</sup> The value of Iraqi deals with the Soviet Union reached 10 billion dollars and all of it was spent on military equipment. At the end of the war Iraq's debt was 80- 100 billion dollars. See; Ryan Frei, 'Extracting Oil from

Iraq was facing economic problems as a result of its policy towards the petroleum sector during the war. It therefore raised its production of crude petroleum above the percentage level prescribed by OPEC. The other OPEC countries were concerned about this increase in production, and some countries tried to limit the increase by halting Iraq's use of pipelines which extended into their territory.<sup>130</sup>

In 1987 the INOC was abolished, having been merged with the Iraqi Ministry of Oil, in accordance with Act No 267 of 1987.<sup>131</sup>

The war between Iraq and Iran ended in 1988<sup>132</sup> and in that year several OPEC members, including Kuwait, diverged from the common policy on production, and caused a lowering of petroleum prices. This change of policy badly affected Iraqi petroleum revenue.<sup>133</sup> Iraq claimed that Kuwait was trying to sabotage the Iraqi economy through the lowering of petroleum prices. It also accused Kuwait of stealing Iraqi oil from the Rumaila oil field, through drilling in a way that facilitated the extraction of oil across the border.<sup>134</sup> As a consequence relations between Iraq and Kuwait became increasingly strained. Finally, on 2 August 1990, Iraq invaded Kuwait. As a result of the invasion occupation, Iraq was subjected to military attack by the United States of America and its allies for a period of six weeks. Most of these attacks targeted the Iraqi infrastructure, including petroleum refineries and pipelines.<sup>135</sup> In addition, the United Nations Security Council issued Resolution No. 661,<sup>136</sup> providing for the imposition of economic sanctions on Iraq. This resolution was followed by another, No. 687, which subjected Iraq to the demands of the international community and required a withdrawal from Kuwait as a condition for lifting the sanctions. This resolution forced peace on Iraq and included the following terms:

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Turmoil: The Iraqi Oil Industry and its Role as a Promising Future Player in the Global Energy Market (2004) 4 Richmond Journal of Global Law and Business 147.

<sup>130</sup> Humberto Cedeno (ed), *The Development of Iraqi Oil Production after Nationalization: 1972- 2003* (Freie University 2008) 60.

<sup>131</sup> Decree of the Iraqi Revolutionary Command Council No (267) of 1987 published in the Iraqi issue 3149, on 11 May 1987, 237.

<sup>132</sup> UNSC Res. 598 (20 July 1987) UN Doc R/RES/598.

<sup>133</sup> Abbas Alnasrawi, *The Economy of Iraq: Oil, War, Destruction of Development and Prospects, 1950-2010* (Greenwood Press 2010) 115.

<sup>134</sup> Abbas Alnasrawi, *Iraq's Burdens (Oil, Sanctions and Underdevelopment)* (Greenwood 2002) 64.

<sup>135</sup> Dawn Bell, 'International Control Of Iraqi Oil: How The Oil –For – Food Program Fits in, and Implications for the Future' (2004) 8 Richmond Journal of Global Law and Business 129.

<sup>136</sup> UNSC Res 661 (6 August 1990) UN Doc S/RES/0661.

Section C, decides that Iraq shall unconditionally accept, under international supervision, the destruction, removal or rendering harmless of its weapons of mass destruction, ballistic missiles with a range over 150 kilometres, and related production facilities and equipment. It also provides for establishment of a system of ongoing monitoring and verification of Iraq's compliance with the ban on these weapons and missiles. It requires Iraq to make a declaration, within 15 days, of the location, amounts and types of all such items.<sup>137</sup>

Under these resolutions, Iraq was also prevented from trading, and its assets were frozen in international banks. This led to shortages of human needs, such as food, medicines and medical equipment. In 1991 the United Nations agreed that Iraq needed to rebuild its infrastructure and to ensure its humanitarian needs.<sup>138</sup>

This report revealed living conditions in Iraq, and paved the way for the Security Council to adopt Resolution No. 986 in April 1995.<sup>139</sup> Under this resolution Iraq was allowed to sell a limited quantity of petroleum for the provision of basic humanitarian needs, under UN auspices. Iraq was able to sell petroleum to the value of one billion US dollars every three months.<sup>140</sup> This was a relatively low quantity, and was insufficient to meet all the essential needs of Iraq. Despite this shortcoming, the programme was the largest one implemented by the UN. It aimed to secure Iraqi needs for supplies of food and medicine, but also to retain UN supervision of Iraqi petroleum revenues. This was to ensure that Saddam Hussein did not use this revenue to develop a nuclear weapons programme. It was not until 1996 that Iraq resumed its shipments of crude oil to world markets.<sup>141</sup>

Saddam Hussein encouraged foreign petroleum companies to sign contracts in order to pressure the international community into lifting economic sanctions. Iraq concluded a contract

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<sup>137</sup> UNSC Res 687(8 April 1991) UN Doc S/RES/687.

<sup>138</sup> United – Nation- Economic and Social Council, *The UN Sanctions against Iraq and Human Rights: report* (31 August 1991) <<http://i-p.org/un-sanctions-iraq.htm>> accessed on 4 January 2014.

<sup>139</sup> UNSC Res 986 (15 April 1995) UN Doc S/RES/986.

<sup>140</sup> Christopher Foote et al., 'Economic Policy and Prospects in Iraq' (2004) 18 *Journal of Economic Perspectives* 47.

<sup>141</sup> For more details about these programmes see: Office of the Iraq Programme, *Oil-for-Food: report* (3 January 2011) <<http://www.un.org/depts/oip/htm>> accessed 3 January 2011; Dawn Bell, 'International Control Of Iraqi Oil: How The Oil –For – Food Program Fits in, and Implications for the Future' (2004) 8 *Richmond Journal of Global Law and Business* 129; Ryan Frei, 'Extracting Oil from Turmoil: The Iraqi Oil Industry and Its Role as a Promising Future Player in the Global Energy Market (2004) 4 *Richmond Journal of Global law and Business* 147; Gregory Townsend, 'The Iraqi Claims Process: A Progress Report on the United Nations Compensation Commission & U.S Remedies' [1994-1995] (1) *Loyola of Los Angeles International and Comparative Law Journal* < <http://www.heinonline.org.unicat.bangor.ac.uk> > accessed on 4 January 2011.



with the China National Petroleum Company, allowing China to exploit oil from the Al- Ahadab petroleum field. In addition, a 23 -year contract was signed in 1997 with a Russian Company, LUK Oil, to develop the Al-Qurna petroleum field.<sup>142</sup>

It is clear from the above that in the post-nationalisation era, the Iraqi petroleum industry was drastically affected by historical and political events. In the 1970s the industry flourished and developed rapidly. Many factors contributed to this flourishing, such as the nationalisation laws promulgated by the Iraqi government, the involvement of new companies and the conclusion of service and development agreements. However, in the 1980s and 1990s the petroleum industry witnessed a collapse of the 1970s achievements because of two successive wars, which caused severe damage to petroleum infrastructures, and also because of UN sanctions. Furthermore, some of the petroleum agreements concluded with various foreign petroleum companies was not sufficient and do not serve the Iraqi interests.

#### **2.2.4. Post Occupation Iraq 2003 Onwards:**

In March 2003, the United States, Britain, and their allies launched a military attack on Iraq in order to eliminate the authority of Saddam Hussein. The USA gained UK support owing to a claim that Saddam Hussein possessed weapons of mass destruction and was a threat to world peace. As a result of this attack the USA and its allies were able to impose their control on Iraq and to occupy it.<sup>143</sup> However, the international community was aware that these claims were false, and built on incorrect intelligence information.<sup>144</sup> Iraq emerged from these events with a devastated economy and with debts amounting to \$380 billion.<sup>145</sup> On 22<sup>nd</sup> May 2003, the UN

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<sup>142</sup> Sandra T. Vreedenburg, 'The Saddam Oil Contracts and What Can Be Done' (2003-2004) 2 DePaul Business & Commercial Law Journal 559; Darius Adam Marzec, 'The New Iraq: Resolving Public and Private Obligations Incurred under Saddam Hussein's Rule in the Context of International Arbitration' (2005) 7 Cardozo Journal of Conflict Resolution 163; Robert D. Tadlock, 'Occupation Law and Foreign Investment In Iraq: How an Outdated Doctrine Has Become an Obstacle to an Occupied Population' (2004-2005) 39 University of Francisco Law Review 227.

<sup>143</sup> Robert D. Tadlock, 'Occupation Law and Foreign Investment In Iraq: How an Outdated Doctrine Has Become an Obstacle to an Occupied Population' (2004-2005) 39 University of Francisco Law Review 227; Owen Bonheimer, 'The Duty to Prevent Waste of Iraqi Assets during Reconstruction: Taming Temptation through ICJ Jurisdiction' (2004-2005) 34 Public Contract Law Journal 273.

<sup>144</sup> George A. Lapzo and David Cortright, 'Containing Iraq: Sanctions Worked' [2004] (83) Foreign Affairs < <http://www.heinonline.org.unicat.bangor.ac.uk> > accessed on 4 January 2011.

<sup>145</sup> Thomas D. Grant, 'The Security Council and Iraq: an Incremental Practice' (2003) 97 the American Journal of International Law 823.

Security Council passed Resolution 1483,<sup>146</sup> in accordance with which Iraq could export its crude oil again. This Resolution paved the way to end the Oil-For-Food programme and its supervision by the occupying power.<sup>147</sup> The reasons behind this resolution were the increasing need for petroleum and gas, particularly since Iraq is a major source of petroleum, and to give the Iraqi people the right to build institutions and infrastructure through the investment of petroleum revenue. Iraq was then able to restore its petroleum industry and to conclude new contracts with international petroleum companies freely in order to develop its petroleum sector.<sup>148</sup> On 8 June 2004, the UN issued Resolution No 1546,<sup>149</sup> allowing it to keep control over the Development Fund for Iraq (hereinafter the DFI) because of the unstable political situation and because there was no permanent government. On 18 December 2007, the SC extended the power of the International Advisory and Monitoring Board (hereinafter the IAMB) over the DFI, and the surviving Iraq assets in foreign banks were frozen in accordance with Resolution 1790, paragraph 3.<sup>150</sup> This was followed by the issue of Resolution No1859 on 22 December 2008,<sup>151</sup> to extend the provisions of paragraph 22 of resolution 1483<sup>152</sup> until 31 January 2009, and to retain the supervision of the IAMB over petroleum revenue.<sup>153</sup> Finally, the Oil-For-Food programme was terminated in accordance with Resolution No 1958,<sup>154</sup> on 15 December 2010.

As noted, these UN resolutions contributed to the revival of the petroleum industry by allowing Iraq to export its petroleum again. However, the industry faced significant obstacles in this period. After 2003, there was looting to contend with, and destruction of the infrastructure, especially in petroleum pipelines. Another problem was the smuggling<sup>155</sup> of petroleum products or crude oil across borders, which further deprived Iraq of petroleum revenue.<sup>156</sup> Many factors

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<sup>146</sup> UNSC Res 1483 (22 May 2003) UN Doc S/RES/1483.

<sup>147</sup> Thomas D. Grant, 'The Security Council and Iraq: An Incremental Practice' (2003) 97 the American Journal of International Law 823.

<sup>148</sup> Rex J. Zadalis, *Claims Against Iraqi Oil and Gas: Legal Considerations and Lessons Learned* (Cambridge University Press 2010) 53.

<sup>149</sup> UNSC Res 1546 (8 June 2004) UN Doc S/RES/1546.

<sup>150</sup> UNSC Res 1790 (18 December 2007) UN Doc S/RES/1790.

<sup>151</sup> UNSC Res 1859 (22 December 2008) UN Doc S/RES/1859.

<sup>152</sup> UNSC Res 1483 (22 May 2003) UN Doc S/RES/1483.

<sup>153</sup> UNSC Res 1790 (18 December 2007) UN Doc S/RES/1790.

<sup>154</sup> UNSC Res 1958(15 December 2010) U N Doc S/RES/1958.

<sup>155</sup> Private Sector Development in the Middle East and North Africa, Supporting Investment Policy and Governance Reform in Iraq 2007-2008, 2010, OCED,106.

<sup>156</sup> Frank R. Gunter, 'Corruption in Iraq: Conflict, Costs and Causes' (Article) <<http://martindale.cc.lehigh.edu/sites/martindale.cc.lehigh.edu>> accessed on 26 April 2014.

encouraged smuggling, not least the operations of insurgency groups.<sup>157</sup> The problems caused by the theft of petroleum were aggravated by the sabotage of installations and pipelines.

The main cause of the problems facing the industry, however, is corruption.<sup>158</sup> The high price of petroleum and the fragility of Iraq's institutions<sup>159</sup> have meant that petroleum revenue has been subject to misappropriation and misuse.<sup>160</sup>

These critical problems facing the industry have deprived Iraq of a significant amount of the revenue needed to rebuild the exhausted petroleum sector. However, Iraq has undergone important political, economic and social changes during this period. Among the many legislative innovations has been the drafting in 2007 the DLOG, which has not yet been ratified by the Iraqi parliament. This law determines the general principles of foreign investment in the petroleum sector. It also contains basic regulations for the formation of an Iraqi National Oil Company which was abolish, revenue sharing, and the reorganization of the Ministry of Oil.<sup>161</sup>

### **2.3. Types of Petroleum Agreement:**

Petroleum contracts between the host state and petroleum companies are a fundamental legal instrument governing the exploration and exploitation of petroleum wealth. Despite the importance of petroleum in international politics and economics,<sup>162</sup> petroleum contracts signed prior to World War II failed to achieve a balance between the interests of the producing country and those of the investment companies.<sup>163</sup> This was due to a lack of capital and technical expertise on the part of the producing countries and the greater degree of economic and political

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<sup>157</sup> Special Inspector General for Iraqi Reconstruction, 'Hard Lessons: The Iraqi Reconstruction Experience' Report (2009) < [http://www.sigir.mil/files/HardLessons/Hard\\_Lessons\\_Report.pdf](http://www.sigir.mil/files/HardLessons/Hard_Lessons_Report.pdf) > accessed on 26 April 2013.

<sup>158</sup> Philippe Le Billon, 'Corruption, Reconstruction and Oil Governance in Iraq' (2005) 26 *Third World Quarterly* 685; Nidham G Al Abasey, 'Cakes without Sugar: Reasons behind Foreign Investor Reluctance to Enter Mesopotamia' (2013) 42 *Syracuse Journal of International Law and Commerce* 147.

<sup>159</sup> Private sector Development in the Middle East and North Africa, Supporting Investment Policy and Governance Reform in Iraq 2007-2008, 2010, OECD 103.

<sup>160</sup> *ibid.*

<sup>161</sup> Susan L. Sakmar, 'The Status of the Draft Iraq Oil and Gas Law' (2008) 30 *Houston Journal of International Law* 289.

<sup>162</sup> Zhiguo Gao, *International Petroleum Contracts: Current Trends and New Directions* (Graham & Trotman Ltd 1994) 1.

<sup>163</sup> Silvana Tordo, David Johnston and Daniel Johnston, *Petroleum Exploration and Production Rights: Allocation Strategies and Design Issues* (The World Bank 2010) 8.

control exercised by the multinational companies.<sup>164</sup> These factors allowed petroleum companies to obtain contracts with no dispute over the terms of the concession. These unequal agreements severely affected the economies of the petroleum-producing countries, depriving them of the benefits of petroleum revenue necessary for economic development. The nature of these contracts changed significantly after the Second World War, due to growing foreign investment in petroleum countries and the emergence of competitors to previously monopolistic companies. New types of concession appeared, bearing names such as service contract, production-sharing contract and participation agreement.<sup>165</sup> The reasons for this will be further discussed in point two of this section. Therefore this section is divided into two points; first, traditional concession contracts second, modern concession contracts.

### **2.3.1 Traditional Concession Contracts:**

Concession agreements first emerged at the beginning of the twentieth century in the Middle East, when foreign petroleum companies entered this area.<sup>166</sup> The first foreign petroleum company to enter the Middle East was the Anglo-Persian Oil Company, when on 28 May 1901 the Iranian government granted an Englishman named William Knox D’Arcy a concession for the exploration and exploitation of petroleum in the Persian Gulf for a period of six decades.<sup>167</sup> In return, sixteen per cent of the company’s profits were to be paid to the Iranian government.<sup>168</sup> This was the best known concession of the time. Then in 1933, Saudi Arabia gave a concession to the Standard Oil Company of California to utilize an area larger than that for which D’Arcy had obtained a concession in Iran.<sup>169</sup>

The petroleum industry in the Middle East before the Second World War was controlled by a few giant companies, namely the Compagnie Francaise des Petroles, (hereinafter the CFP),

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<sup>164</sup> M. Sornarajah, ‘The Myth of International Contract Law’ (1981) 15 *Journal of World Trade Law* 187.

<sup>165</sup> David N. Smith and Louis T. Wells, ‘Mineral Agreement in Developing Countries: Structure and Substance’ (1975) 69 *American Journal of International Law* 560.

<sup>166</sup> Kenneth S. Carlston, ‘The International Role of Concession Agreements’ (1957-1958) 52 *Northwestern University Law Review* 618.

<sup>167</sup> The Agreement between the Government of the Shah of Persia and William Knox D’Arcy, Appendix to Annex 1419c, in the League of Nations, *Official Journal*, XIII, (1932) 2305-2307.

<sup>168</sup> Valérie Marcel, *Oil Titans: National Oil Companies in the Middle East* (Royal Institute of International Affairs 2006) 16.

<sup>169</sup> Irvan H. Anderson, *ARAMCO, The United States and Saudi Arabia: A Study of the Dynamic of Oil Foreign Policy 1933-1950* (Princeton University 1981) 25; Nwosu E. Ikenna, ‘“International Petroleum law”: Has It Emerged as a Distinct Legal Discipline?’ (1996) 8 *African Journal of International and Comparative Law* 428.

British Petroleum (hereinafter BP), Gulf, Mobile, Exxon, Standard Oil of California (hereinafter SoCal), Royal- Dutch, and Texaco.<sup>170</sup>

A traditional concession agreement is a contract between two parties; the first is the host state and second is the petroleum company, called the concessionaire. The host state gives the company rights to exploration, extraction and production extraction within the territory of the host state for an extended period of time.<sup>171</sup> It is concluded directly between the host state and the petroleum company seeking to obtain the concession. In recent decades, the concession has come to take three forms:

1. The concession concluded between the petroleum producing country itself and the foreign company. After the discovery of petroleum in commercial quantities, a company should be established involving the petroleum producing state and the concessionaire. The host state contributes to the capital of this company. Iraq, however, did not adopt this form of contract.<sup>172</sup>

2. The concession signed by the host State, with its national company as a first party and the concessionaire as a second party.<sup>173</sup>

3. The concession is signed between a State owned company as a first party and the concessionaire as a second party.<sup>174</sup>

The traditional concession agreement has many features that differ from other contracts. The duration of the concession agreement is very long, up to 75 years or more.<sup>175</sup> The concession agreement covers a large area of the host state's territory and may include all of it.<sup>176</sup> The petroleum company in a concession agreement may be obliged to pay a small royalty to the

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<sup>170</sup> M. S. Vassiliou, *The A to Z of the Petroleum Industry (the A to Z Guide Series)* (Scarecrow Press, Inc 2009) 14; From Concession to Participation: Restructuring the Middle East Oil Industry, [1973] (48) New York University Law Review < <http://www.heinonline.org.unicat.bangor.ac.uk> > accessed 28 September 2010.

<sup>171</sup> Nicholas Miranda, 'Concession agreements: From Private Contract to Public Policy' (2007) 117 Yale Law Journal 510.

<sup>172</sup> أحمد عبد الحميد عشوش، النظام القانوني لاتفاقيات النفط في الدول العربية، جامعة القاهرة، 1975، 321 [Ahmed Abdul Hameed Ashosh, *The Legal System of the Petroleum Agreement in Arabic States* (Cairo University 1975) 321].

<sup>173</sup> *ibid.*

<sup>174</sup> *ibid.*

<sup>175</sup> For example, the petroleum agreement between Iraq and the IPC was to last for 75 years.

<sup>176</sup> For example, the concession agreement between the Sultanate of Oman and Petroleum Development (Oman) Limited of 1937.

host state in proportion to the quantity of petroleum produced, without taking into consideration the market price.<sup>177</sup> For example, in the concession agreement between the Iraq and Kanaqin Oil Company, this company was obliged to pay just 4 gold shillings for each ton of petrol.<sup>178</sup> The government of Muscat and Abu Dhabi was paid 3 rupees per ton of petroleum.<sup>179</sup> In traditional agreements, the concessionaire is granted the exclusive right to the area designated in the concession contract. Article 1 of the agreement between the Iraqi government and the BPC in 1938 provided the BPC with the right to drill in order to extract petroleum and natural gas and to prepare these materials for trading.<sup>180</sup> The company had exclusive rights to exploit and produce the petroleum within the area specified in the agreement<sup>181</sup> and, moreover, the concession agreement did not allow the first party (the host state) to renegotiate the terms of the concession.<sup>182</sup> However the concession agreement was simpler than modern concessions, since the concessionaire took possession of all the petroleum produced in any quantity, while the host state received only a small amount of taxation in return.<sup>183</sup>

The petroleum company which had a concession agreement was not subject to the local judiciary with regard to most of the issues connected to their activity. It was considered preferable to present these issues for international arbitration.<sup>184</sup>

### 2.3.2. The Modern Concession Agreement:

The modern concession agreement appeared after World War II, which involved a number of political and economic events, and circumstances that contributed to the evolution of this type

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<sup>177</sup> Henry Cattan, *The Evolution of Oil Concession in the Middle East and North Africa* (Oceana Publications 1967) 2; Zhiguo Gao, *International Petroleum Contracts; Current Trends and New Directions* (Graham & Trotman Ltd 1994) 9.

<sup>178</sup> James Bamberg, *The History of The British Petroleum Company: Volume 2 The Anglo- Iranian Years, 1928-1954* (Cambridge University Press 1994) 157.

<sup>179</sup> David N. Smith and Louis T. Wells, 'Mineral Agreements in Developing Countries: Structure and Substance' (1975) 69 *American Journal of International Law* 560; Atef Suleiman, 'The Oil Experience of the United Arab Emirates and Its Legal Framework' (1988) 6 *Journal of Energy & Natural Resources Law* 1.

<sup>180</sup> Benjamin Shwadran, *Middle East Oil: Issues and Problems* (Schenkman Publishing Company, Inc 1977) 11.

<sup>181</sup> The petroleum agreement concluded between the Iraqi government and the Basra Oil Company in 1938.

<sup>182</sup> M. E Bruton, C. J. Cummings and J. D. Todesco, 'International Oil and Gas Development: A Canadian Perspective' (1991) 29 *Alberta Law Review* 138.

<sup>183</sup> 65، 2003، حفيفه سيد الحداد، العقود المبرمه بين الدوله والاشخاص الطبيعيه، الحلبي، 2003، 65.  
[Hafeza Saeed Al Hadad, *Contracts Concluded between States and Foreign Parties* (Al –Halabee 2003) 65].

<sup>184</sup> 100، 2003، عبد الله حسين، بتزول العرب: دراسه اقتصاديه وسياسيه، دار النهضه، 2003، 100.  
[Husain Abdullah, *Arab Petrol: Economic and Policy Study* (Dar Al – Nahda 2003) 100].

of contract in terms of diversity of form and content. Included among the new kinds of contract were the production-sharing agreement, the participation agreement and the service agreement.

Overtime, the producing countries become aware of the importance of petroleum in the domestic and global economy and of the benefits which its revenues could contribute to other sectors of their economy, such as agriculture, industry, education, and transport. As a consequence, these countries followed two paths to regain their wealth: first, by nationalisation of the petroleum industry and second, by renegotiation of contracts with foreign companies.<sup>185</sup>

For several reasons, the petroleum companies were obliged to accept re-negotiation and thus we see the emergence of new types of petroleum agreement. Firstly, new petroleum companies began to compete with the major monopolistic companies, and these newcomers offered more favourable terms to the petroleum countries.<sup>186</sup> There was also the formation of OPEC, which played a part in obliging petroleum companies to renegotiate concession terms.<sup>187</sup> OPEC instigated a new kind of relationship between producing countries and petroleum companies that strengthened the producing countries' bargaining position. It also played a crucial role in setting petroleum prices and facilitated the exchange of information between OPEC members, who were able to conclude agreements that offered more favourable terms to the host states. Their example encouraged other producing states to question the terms of their own concession agreements.<sup>188</sup>

A trend towards nationalisation was another reason for petroleum companies to be apprehensive about their concessions. Iran, for example, nationalized its petroleum industry in 1951.<sup>189</sup> An important role was also played by a United Nations resolution 1803 that recognized the right of every state to have sovereignty over its own natural resources.<sup>190</sup> These resolutions were adopted by various different states and included in their constitutions. Such were the general conditions contributing to the appearance of new types of petroleum agreement. As for

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<sup>185</sup> Ernest E. Smith and Johan S. Dzienkowski, 'A Fifty- Year Prospective on World Petroleum Agreement' (1989) 24 Texas International Lawyer Journal 13.

<sup>186</sup> David N. Smith, *Mining the Resources of the Third world: From Concession Agreements to Service Contracts: report* (14 April 1973). P.229 <<http://www.heinonline.org.unicat.bangor.ac.uk>> accessed on 2 October 2014.

<sup>187</sup> OPEC Resolution XVI of 1968; also OPEC supported Iraq in its negotiations with the IPC in Resolution XX 115 and XX 116 of 1970: both of these resolutions concerned production policy and royalties.

<sup>188</sup> Ernest E. Smith and Johan S. Dzienkowski, 'A Fifty- Year Prospective on World Petroleum Agreements' (1989) 24 Texas International Lawyer Journal 13.

<sup>189</sup> Morris A. Adelman, *The World Petroleum Market* (Johan Hopkins University Press 1973) 219.

<sup>190</sup> UNGA Res 1803(XVII) (14 December 1962); UNGA Res 1314 (XIII) (12 December 1958).

Iraq, there were additional factors involved in its decision to adopt this modern form of concession agreement. Because of the nationalisation of Iran's petroleum industry in 1951, production in that country decreased.<sup>191</sup> Consequently, the petroleum companies sought to extend their activities to Iraq and Kuwait so as to increase the production of petroleum and also to thwart the programme of nationalisation in Iran.<sup>192</sup> There was also an increased global demand for petroleum after World War II due to construction and reconstruction in many states, and there was also an expansion of military industries.<sup>193</sup>

Modern concessions have characteristics different from those of traditional concession. First of all, the financial benefits in modern concessions are varied, and include royalties, taxes, rents and bonuses.

**Royalty:** The payment of royalties relies on the amount of production. The obligation is imposed on the petroleum companies regardless of whether the project realizes profits.<sup>194</sup> It is a specified amount of money that is separate from the profits,<sup>195</sup> and is the return paid by the petroleum company to the host state in exchange for each unit of petroleum production. It is different from the initial fee and the rent, as the petroleum company does not pay these unless it discovers petroleum in commercial quantities.<sup>196</sup> In 1974, many OPEC member-countries which literally raised royalty interests to 20%. The royalty regime was rejected by some countries, such as the United Kingdom, Norway, and Denmark.<sup>197</sup> Article 34 of the DLOG provided for the percentage of royalty to be 12.5% of gross production, while the Kurdish law of Oil and Gas No.

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<sup>191</sup> Parvin Alizadeh and Hassan Hakimian, *Iran and the Global Economy: Petro Populism, Islam and Economic Sanctions* (Routledge 2014) 17.

<sup>192</sup> عبد الوهاب النجار، سياسة التجاره الخارجيه في العراق بعد الحرب العالميه الثانيه، جامعة بغداد، 1996، 428. [Abdul Wahab Al- Najar, *Foreign Trade Policy in Iraq after World II* (Baghdad University 1996) 428].

<sup>193</sup> Henry Cattan, *The Evolution of Oil Concessions in the Middle East and North Africa* (Oceana Publications 1967) 5.

<sup>194</sup> Charlotte J. Wright and Rebecca A. Gallun, *International Petroleum Accounting* (Penn Well Corporation 2005) 36.

<sup>195</sup> Henry Cattan, *The Evolution of Oil Concessions in the Middle East and North Africa* (Oceana Publications 1967) 8.

<sup>196</sup> أحمد عبد الحميد عشوش و عمر بكر، النظام القانوني لاتفاقيات النفط في دول مجلس التعاون الخليجي: دراسه مقارنه، مؤسسة الشباب، 1997، 203.

[Ahmed A. Hamed Ashoush and Amur Baker, *The Legal System of Petroleum Agreements in Gulf Cooperation Countries: a Comparative Study* (Al – Shabab Institution 1997) 203].

<sup>197</sup> Claude Duval et al, *International Petroleum Exploration and Exploitation Agreements: Legal, Economic & Policy Aspects* (2<sup>nd</sup> edn, Barrows Company Inc 2009) 65.



22 of 2007<sup>198</sup> imposed royalties based on a density criterion (article 37/E of the draft stipulated 7.5% royalties for heavy crude oil, rising gradually to 10% for light and medium petroleum).

**Taxes:** By the 1950s the notion of taxation of concession revenue had become widespread in the contracts between the concessionaire and the host country.<sup>199</sup> The tax is associated with profits. The percentage increases when the company achieves high revenue and decreases when profits are low. It is this factor which distinguishes taxes from royalties.<sup>200</sup> Before the Second World War, petroleum companies were exempt from paying taxes to the host state,<sup>201</sup> but after the war this situation changed because of the high prices of crude petroleum, which were reflected in the companies' profits, whereas the host state earned little revenue. Hence, the host states began their struggle with the petroleum companies, seeking by re-negotiation or the enactment of new laws to impose taxes on the companies' profits.<sup>202</sup> Ultimately, the petroleum producing countries were able to subject the companies to these demands,<sup>203</sup> and as a result the role of the producing countries changed dramatically in terms of the equality of oil contracts. The host countries gained the upper hand in the decision- making at all stages of production, and turned out to be effective and influential partners.

**Bonuses:** Generally, petroleum companies pay bonuses to the host government. There are three types: the bonus that comes with the signing of the contract, the bonus at the start of production bonus, and the exploration bonus.<sup>204</sup>

**Rent:** Host countries charge the petroleum company a rent as a part of the revenue. It is the amount of money paid by the petroleum company to the host state due to the latter's ownership

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<sup>198</sup> The Kurdish law of Oil and Gas No. 22 of 2007 publishes in Kurdistan Official Gazette 15 November 2007, vol 75, 23.

<sup>199</sup> Henry Cattan, *The Evolution of Oil Concessions in the Middle East and North Africa* (Oceana Publications 1967) 44.

<sup>200</sup> عبد الحميد الاحدب، النظام القانوني للنفط في السعودية العربية، نوفل، بيروت، 1982، 160-158. [Abdul Hameed Al-Ahdab, *Petroleum and the Legal System in Saudi Arabia* (Nawfel 1982) 158-160].

<sup>201</sup> For instance, article (21) from the agreement between Saudi Arabia and Aramco Oil Company in 1933.

<sup>202</sup> The Libyan Oil Law No.25 in 1955 which increased the tax percentage to 50%.

<sup>203</sup> علي عبد الرزاق، أثر القانون الدولي العام في تطوير عقود الامتيازات النفطية: دراسته تطبيقية حول دول منظمة الدول المصدرة للنفط اوبك 1952- 2000، 53

[Ali Abdul Razak, *The Impact of Public International Law on the Development of Petroleum Concession Agreements: An Empirical Study of OPEC 1952-2000* (Encyclopedia of Iraqi laws 2010) 53].

<sup>204</sup> Ernest E. Smith and Johan S. Dzienkowski, 'A Fifty Year Prospective on World Petroleum Agreements' (1989) 24 *Texas International Lawyer Journal* 13; Bernard Taverner, *Petroleum, Industry and Governments: A Study of the Involvement of Industry and Government in the Production and Use of Petroleum* (2<sup>nd</sup> edn, Kluwer International Law 2008) 130.

of the territory in which the petroleum field is located. The petroleum company pays the rent in return for the utilization of this area of land. The amount of the rent is determined by the size of the area and its location.<sup>205</sup>

Secondly, the scope of the concession is more limited in the modern petroleum agreement than in the traditional concession, which sometimes included the whole territory of the host state so as to prevent competition from other companies. As a consequence, a vast remainder of the territory went without investment, and the host state was also deprived of the optimal exploration of its territory which competition would have allowed.<sup>206</sup>

The situation altered after World War II. The relinquishment clause became an important feature of the modern generation of concessions. Petroleum agreements restricted the petroleum company's right to control the land of the host country by means of a provision involving relinquishment of territory.<sup>207</sup> Many states were keen to include such a regulation in their laws.<sup>208</sup> In relinquishing certain areas defined in the contract where oil was not discovered in commercially viable quantities, the concessionaire is more quickly able to move to those areas where petroleum is to be found in larger quantities.<sup>209</sup> This restriction stimulates the investor to expedite exploration and exploitation, so as to implement the contract on time, since the concessionaire would be obliged, after a fixed period starting from the signing of the contract, to relinquish certain previously identified areas.<sup>210</sup> This term helps each party to avoid disputes. The company's right to exploit the area is not absolute but is restricted to the period of the concession. The contract determines the area which the petroleum company can exploit. Also,

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<sup>205</sup> أحمد عبد الحميد عشوش و عمر بكر، النظام القانوني لاتفاقيات النفط في دول مجلس التعاون الخليجي: دراسه مقارنه، مؤششة الشباب، 1997، 204

[Ahmed A. Hamed Ashoush and Amur Baker, *The Legal System of the Petroleum Agreement in Gulf Cooperation Countries: A Comparative Study* (Al – Shabab institution 1997) 204].

<sup>206</sup> أحمد عبد الحميد عشوش، النظام القانوني لاتفاقيات النفط في الدول العربيه، جامعة القاهرة، 1975، 55-72

[Ahmed Abdul Hameed Ashosh, *the Legal System of the Petroleum Agreement in Arabic States* (Cairo University 1975) 55-72].

<sup>207</sup> The Offshore Agreement between the Government of Saudi Arabia and Arabia American Oil Company (Aramco) of 1948.

<sup>208</sup> Article 9 of Libyan Petroleum Law No 25 of 1955.

<sup>209</sup> Michael A. G. Bunter, *The Promoting and Licensing of Prospective Petroleum Acreage* (Kluwer Law International 2002) 181-82.

<sup>210</sup> Michael H. Davies, 'Oil Concession Agreements in the Arab Republic of Egypt' (1982) 10 Energy & Natural Resources Lawyer VI.

the petroleum arrangement provides the mechanism by which the petroleum company is given the means to rent a part of the land and to put its equipment on it.

Third, the period of the modern concession is shorter than that of earlier concessions. The contract duration is 20– 30 years, although this period will probably be extended if both parties agree. Generally, the host state tends to decrease the period of concession by compulsory relinquishments, and also by fixing the period of time.<sup>211</sup>

Fourth, modern concession agreements contain so-called adaptation clauses, or re-negotiation clauses, which are intended to help the contractual parties to avoid a dispute when a new circumstance appears, and to provide them with the necessary protection if facing hardship.<sup>212</sup> The host country obligates the petroleum company to re-negotiate in accordance with changes in its political or economic policy or an alteration of its laws, instead of altering the conditions of the contract individually.<sup>213</sup>

Fifth, the international petroleum company is obliged to submit to the host state details of the minimum of cost per year of exploration activity for each square kilometre of the exploited oil field,<sup>214</sup>

The different forms of the modern concession agreement, production sharing agreements, service agreements, and participation agreement, will be illustrated in this section.

### ***2.3.2.1. The Production Sharing Agreement (PSA):***

The production sharing agreement<sup>215</sup> (hereinafter the PSA) is based on the important principle that petroleum is under the ownership of the host state and that only the host state has a

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<sup>211</sup> Claude Duval et al., *International Petroleum Exploration and Exploitation Agreements: Legal Economic & Policy Aspects* (2<sup>nd</sup> edn, Barrows Company Inc 2009) 65.

<sup>212</sup> Piero Bernardini, 'Stabilization and Adaptation in Oil and Gas Investment' (2008) 1 *Journal of World Energy Law & Business* 98.

<sup>213</sup> Johan Y. Gotanda, '*Renegotiation and Adaptation Clauses in Investment Contracts Revisited: Article*' (2003) <[http:// works.bepress.com/gotanda/8](http://works.bepress.com/gotanda/8)> accessed on 13 February 2014.

<sup>214</sup> The Libyan Petroleum law No. 25 of 1955.

<sup>215</sup> The first appearance of this agreement was in Indonesia in 1966 when Pertamina, which is an Indonesian petroleum company, signed a contract with the Independent Indonesia American Petroleum Company (hereinafter the IIAPCO). The notion of a production sharing agreement emerged in Indonesia after Indonesia's President Sukarno mapped out a new petroleum policy in 1959, followed by the enactment of Law No. 44 in 1960. During the next five years, a large number of petroleum firms concluded production sharing agreements

right to the disposal of petroleum.<sup>216</sup> This type of agreement results from the principle of the permanent sovereignty of the state over natural resources.<sup>217</sup> In accordance with this agreement the host state grants the petroleum company rights to the exploration and exploitation of petroleum in a specific area for a limited duration. In return the company retrieves the expenses incurred during its exploration activities, together with a percentage of the profits, or a portion of petroleum, the amounts of these to be determined by a contract.<sup>218</sup>

This agreement is based on the notion of risk, since the petroleum company may conduct its exploration operations in areas where there is only a minimal expectation of discovery, or in areas that have not yet yielded petroleum in commercial quantities. The state bears the expenses of the survey and of whatever excavation is necessary in order to reach the petroleum reservoirs. The petroleum company undertakes that in conducting exploration activities it does so without any costs paying by host state to petroleum company until the discovery of petroleum.<sup>219</sup> If the company detects oil in commercial quantities, it will establish a new contractual relationship between itself and the host country. This contract takes the form of a PSA. However, if the company does not find the petroleum in sufficient quantities there would be no responsibility placed on the parties, and in addition the host state would not be required to pay the cost of drilling and the geological survey or any additional expenses to the petroleum company.<sup>220</sup>

The fundamental difference between the traditional concession and the PSA is the allotment of production between the host state and petroleum firms in the PSA. It is usual in these conditions that a share of production is held in reserve in order to allow petroleum companies to

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with the Indonesian government. Japan had the largest portion of these agreements. David N. Smith and Louis T. Wells, 'Mineral Agreement in Developing Countries: Structure and Substance' (1975) 69 *American Journal of International Law* 560; Daniel Johnston, *International Petroleum Fiscal Systems and Production Sharing Contracts* (Penn Well Corporation 1994) 40; Macartan Humphreys, Jeffery D. Sachs and Joseph E. Stiglitz (eds), *Escaping the Resource Curse* (Columbia University press 2007) 17.

<sup>216</sup> M. Sornarajah, *The International Law on Foreign Investment* (3<sup>rd</sup> edn, Cambridge University Press) 118.

<sup>217</sup> *ibid.*

<sup>218</sup> Ernest E. Smith and Johan S. Dzienkowski, 'A Fifty- Year Prospective on World Petroleum Agreements' (1989) 24 *Texas International Lawyer Journal* 13; Bernard Taverne, *Co-Operative Agreements in the Extractive Petroleum Industry* (Kluwer Law International 1996) 170-171; Charlotte J. Wright and Rebecca A. Gallun, *Fundamentals of Oil & Gas Accounting* (5<sup>th</sup> edn, Penn Well Corporation 2008) 682.

<sup>219</sup> Silvana Tordo, David Johnston and Daniel Johnston, *Petroleum Exploration and Production Rights: Allocation Strategies and Design Issues* (The World Bank 2010) 10.

<sup>220</sup> عبد الأمير الأنباري، المنظمه العربيه للدول المصدرة للنفط: مبادئ صناعة النفط والغاز، بغداد، 1976، 24.

[Abdul Ameer Al- Anbaree, *The Organization of Arab Petroleum Exporting Countries: Principles of the Oil and Gas Industry* (Baghdad 1976) 24].

recover expenditures incurred in exploration and development operations.<sup>221</sup> Concession contracts differ from the PSA in two respects: possession and title. In the traditional concession, the petroleum company has the right to carry out mining, to extract crude oil and to sell it in the global market. By these means, it maintains control of all exploration activities. However, in a PSA, the company undertakes to execute the production operation for the benefit of the host state. The host country retains possession and controls the mining rights. It has the title to petroleum wealth, while the petroleum company possesses the proportion of production provided by the contract.<sup>222</sup>

PSAs have significant features, and the most important of these is that the petroleum company bears all the risks involved in failure to find petroleum, and also carries all the operation costs, while the host state only pays these costs if the petroleum company finds petroleum in commercial quantities.<sup>223</sup> In that case the petroleum company can regain its expenditure on production operations by receiving a share of the petroleum production. This share is known as cost petroleum. The contract sets the percentage of the cost petroleum that the petroleum company is allowed to own, usually around 30% to 40%. The remaining oil, which is known as profit petroleum, is split between the petroleum company and the host state in accordance with the ratio agreed in the contract.<sup>224</sup> This percentage is dependent on the level of production. It may start at 25% for the foreign partner, or at a specific rate, followed by reduction of this rate whenever production increases.<sup>225</sup> The petroleum firms are obliged to pay taxes on the output from their activities.<sup>226</sup>

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<sup>221</sup> M. E Bruton, C.J. Cummings and J. D. Todesco, 'International Oil and Gas Development: A Canadian Perspective' (1991) 29 Alberta Law Review 138.

<sup>222</sup> Claude Duval et al, *International Petroleum Exploration and Exploitation Agreements: Legal Economic & Policy Aspects* (2<sup>nd</sup>, Barrows Company Inc 2009) 71; علي عبد الرزاق، أثر القانون الدولي العام في تطوير عقود الامتيازات النفطية: دراسته تطبيقية حول دول منظمة الدول المصدرة للنفط اوبك 1952-2000، 77 [Ali Abdul Razak, *The Impact of Public International Law on the Development of Petroleum Concession Agreements: An Empirical Study of OPEC 1952-2000* (Encyclopaedia of Iraqi laws 2010) 77].

<sup>223</sup> *ibid.*

<sup>224</sup> M. E Bruton, C.J. Cummings and J. D. Todesco, 'International Oil and Gas Development: A Canadian Perspective' (1991) 29 Alberta Law Review 138.

<sup>225</sup> حسين عبد الله، نفط العرب: دراسته اقتصاديه وسياسيه، دار النهضة، 2003، 108 [Husain Abdullah, *Arab Petrol: Economic and Policy Study* (Dar Al – Nahda 2003) 108].

<sup>226</sup> M. E Bruton, C.J. Cummings and J. D. Todesco, 'International Oil and Gas Development: A Canadian Perspective' (1991) 29 Alberta Law Review 138.

Despite the proliferation of these agreements, some countries continue to ban foreigners from possession, or participation in the production of mineral resources. For example, the Mexican Constitution of 1917, Article 27, prohibits foreigners from owning the country's natural resources.

Iraq signed a production sharing agreement for the first time in March 1997.<sup>227</sup> It was between the Iraqi Oil Ministry and a coalition of Russian companies, and concerned investment in the western part of the Qurna oil field in the south of Iraq. In July 1997, another contract was concluded between the Iraqi Ministry of Oil and a coalition of Chinese companies for investment in the Al- Ahdab petroleum field, also in the south of Iraq.<sup>228</sup> The latter was called the Development and Production Contract. Both were, in essence, production sharing agreements. As mentioned previously, Saddam signed these contracts with the aim of attracting investment from foreign oil companies, and used these companies to as a means of pressurizing the international community to lift sanctions on Iraq.<sup>229</sup>

The KRG concluded a production sharing agreement with the Norwegian firm DNO in 2006. This is regarded as the first production sharing contract signed after the second Gulf War, and involved the Twake field.<sup>230</sup> Subsequently, the KRG signed negotiated and signed contracts with a variety of petroleum corporations of various nationalities: Dana Gas from the UAE, the Canadian companies Western Sands and Heritage Oil, a British company, and Reliance Oil from India. Despite objections from the central government in Baghdad concerning the validity of these contracts, the KRG overrode the opposition and signed seven agreements with different

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<sup>227</sup> In Arab countries, this type of agreement first emerged in Egypt in 1969, when the Egyptian Public Company for Petroleum concluded a production sharing agreement with a Indonesia company called the North Sumatra Oil Development Corporation (hereinafter NOSO). Egypt signed a large number of contracts of this type, sixty in all between 1973 and 1979. A large number of existing participation agreements were transformed into production sharing agreements. This form of agreement became popular in other Arabian countries, such as Syria, Jordan, Qatar, and Yemen. In other Arab states, including Libya, Oman and Sudan, amendments of the traditional concessions changed them to production sharing agreements.

علي حسن عبد الامير، عقود المشاركة بالانتاج النموذج العراقي، 2010، العدد الثامن والتاسع، المجلد الثالث، مجلة الحقوق، 245

[Ali Hassan Abdul Ameer, 'Production Sharing Contracts: The Iraqi Model' (2010) 3 (8,9) Al- Hukouk 245].

<sup>228</sup> The declaration of the Russian Energy Minister about the signature of this agreement. جريدة الجمهورية، العدد 9475، الاحد 22 آذار 1997، 1

[Al- Jmhorea newspapers, v (9475) Saturday 22 march. 1997. P.1].

<sup>229</sup> Edward Wong, 'China Open Oil Field in Iraq' *The New York Times* (New York, 28 June 2011) < [http://www.nytimes.com/2011/06/29/world/asia/29chinairaq.html?\\_r=0](http://www.nytimes.com/2011/06/29/world/asia/29chinairaq.html?_r=0) > accessed on 2 September 2014.

<sup>230</sup> Amy Myers Jaffe, *Iraqi Oil Sector: Issues and Opportunities: Article* (December 2006). < [http://large.stanford.edu/publications/power/references/baker/work/docs/iraq\\_oil\\_issuesandopportunities.pdf](http://large.stanford.edu/publications/power/references/baker/work/docs/iraq_oil_issuesandopportunities.pdf) > accessed on 3 November 2014.

petroleum companies.<sup>231</sup> The KRG argued that the agreements signed with the international petroleum companies were valid according to Articles 110, 114 and 115 of the Constitution of Iraq of 2005, which identified the exclusive and shared powers of the IFG and the KRG but did not refer explicitly to the right to limit oil and gas production to the Iraqi Government.<sup>232</sup>

Some international organizations tried to persuade Iraq that the production sharing agreement was the best form of contract for attracting foreign investment companies, in view of the unstable security situation.<sup>233</sup> In the present author's view, Iraq should not use this type of contract to motivate petroleum firms to invest in Iraq. Contracts of this kind are suitable for countries where the probability of discovering petroleum is minimal, but this is not the case with Iraq, a country with the third largest reserves of petroleum. They are suited to developing countries lacking the financial ability to fund exploration operations where there is only a possibility of petroleum reserves. In Iraq, petroleum extraction costs only one dollar for each barrel,<sup>234</sup> even though the situation is unstable due to the amount of violence and destruction in the country. Iraq needs to provide the petroleum companies with a climate of security, and either it should contract private security companies or the petroleum companies themselves should contract these companies to secure their exploration operations. Iraq's additional costs can be deducted from Iraqi petroleum, so that finally Iraq will be a mortgagee to the oil companies.

### **2.3.2.2. Service Agreements:**

According to this form of agreement the host country grants the petroleum company rights to mining and exploration in exchange for payment, previously agreed between the parties of the agreement.<sup>235</sup> Hence the international petroleum company will be a contractor in the service of the national petroleum company or the petroleum exporting country, in return for a fee. Either

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<sup>231</sup> Rex J. Zedalis, *The Legal Dimension of Oil and Gas in Iraq: Current Reality and Future Prospects* (Cambridge University press 2009) 29-30.

<sup>232</sup> Rex J. Zedalis, 'Foundations of Baghdad's Argument that Regions lack Constitutional Authority over Oil and Gas Developments' (2008) 26 *Journal of Energy & Natural Resources Law* 303 (comment).

<sup>233</sup> International Tax and Investment Centre, *Oil Lobby Calls for Use of Production Sharing Agreements in Iraq: report* (2004) < [http://www.historycommons.org/entity=international\\_tax\\_and\\_investment\\_centre\\_1](http://www.historycommons.org/entity=international_tax_and_investment_centre_1) > accessed on 2 December 2014.

<sup>234</sup> Daniel Behn, 'Sharing Iraqi's Oil: Analyzing Production Sharing Contracts under the Final Draft Petroleum Law' (2007) Center of Energy, Petroleum and Mineral Law and Policy Working Papers Series <<http://ssrn.com/abstract=976407.htm>> accessed on 29 April 2014.

<sup>235</sup> Claude Duval et al., *International Petroleum Exploration and Exploitation Agreements: Legal Economic & Policy Aspect* (2<sup>nd</sup> edn, Barrows Company Inc. 2009) 85.

the company pays cash or the host state is obliged by the terms of the contract to sell the crude petroleum to the petroleum company at a reduced price.<sup>236</sup> Based on this, there is no legal relationship between the foreign petroleum company and the petroleum sources in the ground. The national oil company remains the owner of the petroleum resources.<sup>237</sup>

This form of petroleum arrangement is considered a cause for concern with regard to the sovereignty of the host state because it puts the foreign company in the position of an entrepreneur, and not as a partner with a share in production petroleum. Another concern relates to the ownership of petroleum resources in concession agreements and the concessionaire's ownership of the petroleum resources in return for royalties.<sup>238</sup>

The first service agreement in the Middle East took place in Iran on 12 December 1966, when the Iran National Oil Company signed a service contract with the French company ERAP. Some authors regard this as the first service agreement in the world. Iran then signed seven service contracts in 1974.<sup>239</sup>

The first service contract in an Arab country was agreed between the INOC and the ERAP in Iraq on 3 February 1968.<sup>240</sup> Iraq concluded two further contracts, one with the Petrobras Oil Company of Brazil,<sup>241</sup> and then a second with the India Oil and Natural Gas Company.<sup>242</sup> After the signing of agreements of this kind, the door to investment in Iraq was closed to the international oil companies. This was despite the INOC announcement to the world's press in 1973 that there were large areas of lands available to the international oil companies for investment through service contracts like the one with ERAP. A proposal for putting an end to all the outstanding issues between Iraq and the international companies resulting from nationalisation was submitted by the European Companies Group after the signing of the 1973

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<sup>236</sup> Daniel Johnston, *International Exploration Economics, Risk, and Contract Analysis* (Penn Well Corporation 2003) 41.

<sup>237</sup> Silvana Tordo, David Johnston and Daniel Johnston, *Petroleum Exploration and Production Rights: Allocation Strategies and Design Issues* (The World Bank 2010) 10.

<sup>238</sup> Claude Duval et al., *International Petroleum Exploration and Exploitation Agreements: Legal Economic & Policy Aspect* (2<sup>nd</sup> edn, Barrows Company Inc 2009) 85.

<sup>239</sup> Pierre Terzian, 'Price, Revenues and Oil Contracts in the Arab Countries and Iran.' (PhD thesis, Sorbonne University) 248.

<sup>240</sup> This contract was ratified by law No.5 in 1968.

<sup>241</sup> The contract signed on 8 August 1973, and was ratified by law No. 135 in 1973.

<sup>242</sup> David N. Smith, Louis T. Wells, 'Conflict Avoidance in Concession Agreements' (1976) 17 *Harvard International Law Journal* 51.



convention, but was rejected by the Iraqi government.<sup>243</sup> However, Iraq contracted for a second time in 2008 with respect to some petroleum fields.<sup>244</sup>

There are three kinds of service contract: the pure service agreement, the risk service agreement, and the technical assistance contract.

The pure service agreement is common in the United States. It does not give rights to production, and so it is not preferred by foreign companies. By the terms of the pure service contract, the national oil company contracts the foreign petroleum firm to carry out a definite service in exchange for a fee.<sup>245</sup> Some countries try to make this contract more attractive by allowing the petroleum company to have crude oil as a fee. This is called a buyback agreement. It has come into use in some oil fields in Iran.<sup>246</sup>

The risk service contract is widespread in Latin America. Under this type of agreement the foreign company explores a limited area of land. If it finds petroleum in commercial amounts, the firm undertakes to develop it and in return has a right to lien, which would either be in the form of cash or in kind, by taking crude oil at a reduced price.<sup>247</sup> If, however, the company fails to find petroleum, it would nonetheless bear all the costs and also would have no exploration rights.<sup>248</sup>

The third sort of service contract is a technical assistance contract. It is common in Arab Gulf countries and is considered more advanced than other types of service agreement. According to this contract, the petroleum company supplies the host state with technical assistance in all exploration operations, and sometimes in refining petroleum. The petroleum

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<sup>243</sup> سعدون حمادي، مذكرات وأراء في شؤون النفط، دار الطليعة، 1980، 101

[Saadon Hamade, *Memoranda and Opinions in Petroleum Issues* (Al- Talea House 1980) 137-38].

<sup>244</sup> Claude Duval et al, *International Petroleum Exploration and Exploitation Agreements: Legal Economic & Policy Aspects* (2<sup>nd</sup> edn, Barrows Company Inc 2009) 85.

<sup>245</sup> Simon Brinsmead, 'Oil Concession Contracts and the Problem of Hold-Up: article' (24 August 2007) <<http://www.dundee.ac.uk/cepmlp/gateway/index.php?news=28999>> accessed on 15 February 2014.

<sup>246</sup> Gorge Miotit, 'Production Sharing Agreements: Privatizing the Oil under another Name: article'. <[www.carbonweb.org](http://www.carbonweb.org)> accessed 2 May 2010; Daniel Johnston, *International Exploration Economics, Risk, and Contract Analysis* (Penn Well Corporation 2003) 41.

<sup>247</sup> Andrew Inkpen and Michael H. Moffett, *The Global Oil & Gas Industry: Management, Strategy & Finance* (Penn Well Corporation 2011) 226.

<sup>248</sup> Ernest E. Smith and Johan S. Dzienkawski, 'A Fifty- Year Prospective on World Petroleum Agreements' (1989) 24 *Texas International Law Journal* 13.

company's services may include supplying equipment and training staff. In return, the host country is obliged to pay the company's costs.<sup>249</sup>

The service contract is in some ways similar to the production sharing agreement. The company's petroleum exploration is limited both in area and in duration. The contractor undertakes to bear the whole cost and to carry all the risks arising from exploration operations, and also agrees to apply a relinquishment term. The contractor often undertakes to fund the development and exploration operations after finding petroleum in commercial quantities.<sup>250</sup> However, service contracts differ from other types of oil agreements. In this type of contract, the oil produced belongs to the host state, which has a right to dispose of the oil and is committed to pay all the costs accrued by the contractor. The host country either pays in cash, or in kind, as a share of the oil produced, and either without the payment of interest, or with interest paid in advance.<sup>251</sup>

The contractor's contribution to the management of exploration operations in the wake of the discovery of petroleum is established in the agreement. The host country has a large part of the responsibility for management, more so than the contractor but, prior to the discovery, the management of operations is shared between the state and the contractor.<sup>252</sup>

### **2.3.2.3 The Participation Agreement:**

The idea underlying the participation agreement is that the petroleum company owned by the host state are partners, sharing completely in the exploration for petroleum but with the foreign partner bearing the risks of the exploration.<sup>253</sup> In other words, the foreign partner bears

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<sup>249</sup> Ernest E. Smith and Johan S. Dzienkawski, 'A Fifty- Year Prospective on World Petroleum Agreements' (1989) 24 Texas International Law Journal 13.

<sup>250</sup> عبد الله حسين، اقتصاد البترول، دار النهضة، 1970  
[Hassan Abdulah, *Petroleum Economic* (Dar Al- Nahda 1970) 294].

<sup>251</sup> علي عبد الرزاق، أثر القانون الدولي العام في تطوير عقود الأمتيازات النفطية: دراسته تطبيقية حول دول منظمة الدول المصدرة للنفط أوبك 1952- 2000، 76

[Ali Abdul Razak, *The Impact of Public International Law on the Development of Petroleum Concession Agreements: An Empirical Study of OPEC 1952-2000* (Encyclopaedia of Iraqi laws 2010) 76].

<sup>252</sup> عبد الامير الانباري، المنظمه العربيه للدول المصدرة للنفط: مبادئ صناعة النفط والغاز، بغداد، 1976، 26

[Abdul Ameer Al- Anbaree, *The Organization of Arab Petroleum Exporting Countries: Principles of the Oil and Gas Industry* (1976, Baghdad) 26].

<sup>253</sup> Nicky Beredjick and Thomas Wälde (eds), *Petroleum Investment Policies in Developing Countries* (Kluwer Academic Publisher Group 1988) 44.

the whole cost of the exploration operations and the host country does not pay if petroleum is not discovered in commercial quantities.<sup>254</sup>

If petroleum is found, however, the contract will be changed into a development and production contract. The participation agreement would be as a joint venture with the host state or its petroleum entity. The host country has a significant role and also maintains its sovereignty.<sup>255</sup> The host state and the foreign petroleum company form a joint venture to develop the petroleum reserves. In the joint venture, the foreign company contributes capital, technological equipment and expertise while the host state contributes the acreage.<sup>256</sup> Accordingly, ownership and management are divided equally between the parties. The foreign company pays royalties taxes if it achieves profit.

The participation agreement is considered a significant step forward when compared to the concession agreement. It also paves the way to limiting the concession regime by giving the national partner an opportunity to participate in the exploration operations. In addition, the host country makes a major contribution to management and planning, and with this experience obtains the ability to train its own citizens to conduct exploration activities in the future.

This arrangement made its first appearance in Iran and Indonesia between 1957 and 1960.<sup>257</sup> In Iran, the parliament approved the first production sharing agreement, which was signed between Iran and the Italian oil company ENI, on 24 August 1957, after a series of meetings in Cairo and Tehran attended by Enrico Mattei, the president of the ENI. Enrico Mattei also attended the Iranian Council meeting at which a petroleum law was enacted in 1957. The suggestions made by Enrico Mattei to the Iranians played a major role in the formulation of the

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<sup>254</sup> حسين عبد الله، نפט العرب: دراسه اقتصاديه وسياسيه، دار النهضة، 105، 2003

[Husain Abdullah, *Arab Petrol: Economics and Policy Study* (Dar Al – Nahda 2003) 105].

<sup>255</sup> Claude Duval et al., *International Petroleum Exploration and Exploitation Agreements: Legal Economic & Policy Aspects* (2<sup>nd</sup>, Barrows Company Inc 2009) 101; جواد العطار، تاريخ البترول في الشرق الاوسط 1901-1972، بيروت، 1977، 121

[Jawad Al-Ataar, *Petroleum History of the Middle East 1901- 1972* (Beirut 1977) 121].

<sup>256</sup> Bernard Taverne, *Petroleum, Industry and Governments: A Study of the Involvement of Industry and Government in the Production and Use of Petroleum* (2<sup>nd</sup> edn, Kluwer International Law 2008) 131-32.

<sup>257</sup> Sevinc Carlson, *Indonesia's Oil* (Westview Press 1977) 17.

production sharing agreement approved in this law,<sup>258</sup> and also in the arrangements for it to be changed to a participation agreement.

In fact, the concept is not new. Its origins pre-date the discovery of petroleum in commercial amounts in the Middle East. The San Remo convention provided in Article 8 that petroleum countries have a right to share a percentage of the corporate capital with the international oil company. This principle was confirmed again in the Iraq Oil Company agreements in 1925 and those of the MPC in 1932, and also those of the BPC.<sup>259</sup>

#### **2.4. Are Petroleum Agreements Different from Investment Agreements under Iraqi Law?**

There is an important question to be answered here. Is the petroleum agreement different from an investment agreements and if so, can it be said that these agreements have a special nature and require a special regime of arbitration?

Some authors<sup>260</sup> argue that petroleum agreements have features that distinguish them from other investment contracts. This is so because these agreements contain a risk element, as in, for example, the production sharing agreement and the risk service contract.<sup>261</sup> However, risks in a petroleum agreement stem not only from internal issues specific to the industry. They may also arise from external factors, such as revolutions or coups in the petroleum-producing countries, or changed political circumstances, particularly in states dominated by dictatorial regimes. These events create an unstable environment for petroleum contracts. In this regard, the political context may lead to a change in the economic policy of the host state. This issuing of new laws

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<sup>258</sup> محمد أزر سعيد السماك، النفط العراقي بين السيطرة الأجنبية والسيادة الوطنية، بغداد، 50، 1981  
[Mohamed Azher Saad Al-Samak, *Iraqi Oil between Foreign Control and National Sovereignty* (Baghdad 1981) 50].

<sup>259</sup> محمد لبيب وصاحب ذهب، اتفاقيات وعقود البترول في البلاد العربية، 1969، 34-36  
[Mohamed Labebe and Saheb Dahab, *Petroleum in Arabic Countries* (1969) 34-36].

<sup>260</sup> M. Sorenrajah, *International Commercial Arbitration: the Problem of State Contracts* (Longman 1990) 8; Ahmed S El-Kosheri and Tarek F Raid, 'The Changing Role in the Arbitration Process (With Regard to the Applicable Law Governing the New Generation of Petroleum Agreements)' (1985-1986) 1 Arab Law Quarterly 475; Abdullah Mohammed Alsaidi, 'Petroleum Arbitration: Applicable Law and Appropriate Arbitral Forum (A Study of Petroleum Disputes in Arab Countries)' (Ph. D thesis, Queen Mary, University of London 2004) 66- 68.

<sup>261</sup> The authors' opinions are represented previously in pages 10 and 11 from Chapter One.

by host states may expose petroleum agreements to risks, for example, nationalisation laws, which have been widespread in the Latin America and the Middle East.<sup>262</sup>

Moreover, the scope of the petroleum contract covers wide areas and extends to the sea, including territorial waters and beyond.<sup>263</sup> Furthermore, the duration of petroleum agreements can be in excess of 75 years.

However, are the above mentioned factors sufficient justification for regarding petroleum agreements as unique? Despite the special features of petroleum agreements, it is unjustifiable for petroleum agreements to be given a special status under Iraqi Law. This is so because most of these features may be commonly found in investment agreements. The risk factor may be found in other agreements where the investment project may be subject to nationalisation, as was the Suez Canal, nationalized by the Egyptian government in 1956. Also in regard to the area of the petroleum agreement, it could be said that most modern petroleum agreements contain an aside of relinquishment, and that the petroleum agreement is limited in terms of the real area of exploration and exploitation. The duration of modern petroleum agreements is also less than in concession agreements. The long time periods and wide territorial areas were one of the most important features of the concession agreement but, as mentioned in the previous section, the latter are considered as belonging to an older generation of petroleum agreements and are now disappearing.

However, the author argues that the petroleum agreement in Iraq is special kind of investment agreement, different from ordinary investment agreements. This is so because its subject matter is petroleum, which is Iraq's most valuable natural resource. Petroleum is a special case under Iraqi law, and was so even under former Iraqi governments. Iraqi law adopted the principle of permanent sovereignty over natural resources and deemed petroleum to be owned by all of the Iraqi people.<sup>264</sup> Under various circumstances of Iraq, the people its

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<sup>262</sup> Iraq nationalized its oil industry in 1972, Libya in 1973, Iran in 1951.

<sup>263</sup> E. A. Mabruk and E. A. Mabruk, *Offshore Oil Concession Agreements in OPEC Member Countries* (Monaco 1965) 6.

<sup>264</sup> The legal systems of the world address the ownership of natural resources, especially petroleum, in different ways. For example, the USA maintains the occupation system, which gives the owner of the land the right to own what is beneath it. Another type of ownership is known as the Regalian Law system. According to this system, natural resources belong to no one until they are discovered. This was the system adopted by France. Finally, there is the Domanial Law system, according to which petroleum belongs to the state. This approach

government have complete sovereignty over petroleum.<sup>265</sup> The abolished interim constitution of Iraq of 1970 provided that in Article 13 “National resources and basic means of production are owned by the People. They are directly invested by the Central Authority in the Iraqi Republic, according to exigencies of the general planning of the national economy”.<sup>266</sup> It was clear from this Article that the Iraqi national resources were owned by the Iraqi people and the Iraqi central government had the power to dispose of this asset in accordance with the requirements of the national economy of Iraq. The Iraqi constitution of 2005<sup>267</sup> asserts the same principle, and petroleum remains under the ownership of the Iraqi people. Article 111 sets out this principle, stating that “Oil and Gas are owned by all the people of Iraq in all regions and governorates”.<sup>268</sup> This article gives all Iraqi people equally the full and complete ownership of oil and gas and gives the IFG the power to control and manage this important wealth. Article 112 section (2) stipulates that:

The federal government, with the producing regional and governorate governments, shall together formulate the necessary strategic policies to develop the oil and gas wealth in a way that achieves the highest benefit to the Iraqi people, using the most advanced techniques of market principles and encouraging investment.<sup>269</sup>

This article gives the IFG the main role in conceptualizing and formulating strategic policies for developing oil and gas wealth. These agreements have special features not present in ordinary investment agreements, distinguishing petroleum agreements from other investment agreements under Iraqi law on account of their subject matter and the ownership of petroleum by the Iraqi people which is regulated by previous and current Iraqi constitutions.

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has been adopted by most developing countries, because it recognizes their sovereignty over natural resources. Victor Rodriguez-Padilla, ‘Sovereignty over Petroleum Resources: The End of an Era?’ (1991) 3 Energy Studies Review 108.

<sup>265</sup> Article 111 of the Iraqi Constitution of 2005.

<sup>266</sup> Interim Constitution of Iraq of 1970 published in the Official Gazette issue 1900, 17 July 1970, p 3. An English language translation of the Interim Constitution of Iraq of 1970 is available at <<http://gjpi.org/library/primary/statutes/>> accessed at 25 May 2014.

<sup>267</sup> Iraqi Constitution 2005 published in the Official Gazette issue 4012, 28 May 2005.

<sup>268</sup> An English language translation of the 2005 Constitution is available at <<http://investpromo.gov.iq/policies-and-laws/>> accessed on 10 April 2014.

<sup>269</sup> *ibid.*

Therefore, in fixing the scope and provisions of investment, Iraqi investment law No 13 of 2006<sup>270</sup> excluded oil and gas extraction and production. Article 29 of this law provided that “All areas of investments shall be subject to the provisions of this law except:

“First: Investment in Oil and Gas extraction and production”.<sup>271</sup>

It can be seen from Article 29 of this Investment Law that Iraqi law gives petroleum agreements a special position by not subjecting them to the provisions of other investment agreements. This enhances the author’s argument that petroleum agreements need special provisions of arbitration compatible with their special status.

## **2.5. The Legal Nature of Petroleum Agreements:**

The importance of identifying the legal nature of petroleum contracts becomes apparent when substantive law is applied to these contracts, that is, when it has to be decided whether these contracts are international agreements, administrative contracts or civil contracts. The first of these is subject to public law and the latter to private law. Identifying the legal nature of these agreements is important in deciding whether they should be subject to national litigation or arbitration. In addition, the determination of the legal nature of petroleum agreements entails a determination of the type of arbitration that is, whether it is to be international arbitration or domestic or private arbitration. The discussion which follows assesses the legal nature of petroleum agreements.

### **2.5.1 Is a Petroleum Agreement an International Treaty?**

It should be express that the petroleum contract is neither an international treaty nor has it the effects of a treaty. According to Iraqi law, petroleum agreements are not international treaties because petroleum agreements are concluded in a manner that distinguishes them procedurally from international treaties. Petroleum agreements are subject to Iraqi law<sup>272</sup> rather than

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<sup>270</sup> The Iraqi Investment Law No 13 of 2006 published in Iraqi Official Gazette, Issue 4031 on 17 January 2007, 4.

<sup>271</sup> The English language translation of the Iraqi Investment Law is available at <<http://investpromo.gov.iq/policies-and-laws/>> accessed on 10 April 2014.

<sup>272</sup> Regulations for Implementing Government Contracts No.1 of 2014. Published in the Iraqi Official Gazette, Issue 4325, 16 June 2014, 56.

international law. Under Iraqi law, an international treaty will not be valid unless approved by the Iraqi Parliament, whereas a petroleum agreement does not need to be validated by the Iraqi Parliament. The international treaty parties are nation states, whereas the parties to petroleum agreements are the host state and the petroleum company.

However, in international scale, there is a trend towards giving such agreements an international character.<sup>273</sup> Stephen Schwebel, later to become an International Court of Justice (hereinafter ICJ) judge has agreed that the agreement is represented as an international treaty, subject to international law.<sup>274</sup> Friedmann has agreed that this is because these contracts contribute to the building of the national economy of the host state.<sup>275</sup> According to this view, the foreign company is treated as if it were a subject of international law with an international character. It is treated for this purpose, as being equivalent to a state.<sup>276</sup> Curtis claims that “[a] significant part of public international law is devoted to the interpretation and effects of treaties, which are contractual agreements. Many of the rules of treaty law can be applied to economic development agreements”<sup>277</sup>

However, this view is opposed by some authors, who argue that a contract is not an international treaty. As Bowett stated the contract:

(...) [n]ot only is not a treaty but cannot even be regarded as analogous to a treaty. For there is a world of differences between an agreement under international law between two equal, sovereign states and a contract between a state and a private party governed prima facie by the state’s own law.<sup>278</sup>

Similarly, Mansour Al- Saeed said:

Economic development agreements (...) are not in fact treaties, since one of the parties in the economic agreement is a private individual or corporation. Superficially, they look very similar to treaties, both in their negotiation and drafting. However, they

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<sup>273</sup> Stephen M. Schwebel, ‘International Protection of Contractual Arrangements’ (1959) 53 Proceedings of the American Society 266.

<sup>274</sup> Stephen M. Schwebel, ‘International Protection of Contractual Arrangements’ (1959) 53 Proceedings of the American Society 266.

<sup>275</sup> Wolfgang Friedmann, *The Changing Structure of International Law* (Columbia University Press 1964) 188-212.

<sup>276</sup> Hamid Reza Nikbakht Fini, ‘State Contracts and Arbitration’ (PHD, Exeter University 1990) 85.

<sup>277</sup> Christopher T. Curtis, ‘The Legal Security of Economic Development Agreements’ (1988) 29 Harvard International Law Journal 317.

<sup>278</sup> Derek William Bowett, ‘State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach’ (1988) 59 (49) *The Brit Yrbk Intl L* 55.



cannot be regarded as treaties since they are not between subjects of international law.<sup>279</sup>

This view can also be found in the Vienna Convention on the Law of Treaties, 1969, Art (a), which stipulates that:

““treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;”<sup>280</sup>

According to this article of the Vienna Convention, the petroleum agreement is not an international treaty because the parties of international treaties are states whereas, in the case of a petroleum agreement, one of the parties is a company or private individual.

The ICJ adopted the view that the petroleum agreement before it was not an international treaty in the *Anglo- Iranian Oil Co.*<sup>281</sup> The dispute arose between Iran and the Anglo-Iranian oil company regarding the petroleum agreement signed between them in 1933. In 1951, Iran enacted a law to nationalize its petroleum industry. The UK brought this dispute to the ICJ. The ICJ rejected the case for lack of jurisdiction. This is best explained in the separate opinion by Sir Arnold McNair:

The Court cannot accept the view that the contract signed between the Iranian Government and the Anglo-Persian Oil Company has a double character. It is nothing more than a concessionary contract between a Government and a foreign corporation. The United Kingdom Government is not a party to the contract; there is no privity of contract between the Government of Iran and the Government of the United Kingdom. Under the contract the Iranian Government cannot claim from the United Kingdom Government any rights which it may claim from the Company, nor can it be called upon to perform towards the United Kingdom Government any obligations which it is bound to perform towards the Company. The document bearing the signatures of the representatives of the Iranian Government and the Company has a single purpose: the purpose of regulating the relations between that Government and the Company in regard to the concession. It does not regulate in any way the relations between the two

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<sup>279</sup> Mansour Al- Saeed, ‘Legal Protection of Economic Development Agreements’ (2002) 17 Arab Law Quarterly 150.

<sup>280</sup> Vienna Convention on the Law of Treaties, adopted on 22 May 1969, came into force on 27 January 1980, UNTS, vol. 1155, p. 331.

<sup>281</sup> *Anglo-Iranian Oil Co (United Kingdom v. Iran)* [1952] ICJ Rep 93, 519.

Governments.<sup>282</sup>

Similarly, in the *Saudi Arabian v. Arabian American Oil co (Aramco)*,<sup>283</sup> the arbitration tribunal did not apply international law to the agreement because the concession agreement was not considered to be an international treaty.

Hence the correct view would be that, the petroleum agreement cannot be considered international treaty and has the implications of the treaty. This is because an international treaty is concluded between two or more states having sovereignty, and in the case of a petroleum agreement the oil company has no sovereignty.

### **2.5.2. Is a Petroleum Agreement an Administrative Contract?**

An administrative contract is a contract between two parties one of them is public person. Iraq is a civil law country therefore it is important to wonder if the petroleum agreement has administrative contract nature. It should be made clear from the beginning that the petroleum agreement is not administrative contract under Iraqi law. The Iraqi state as a host state concludes petroleum agreements with petroleum companies in equal footing. It is not like an administrative contract where only the state has the authority to change the contract. In petroleum agreements, the host state cannot change the agreement terms unless the second party accepts the change. Petroleum agreements, unlike administrative contracts, contain a stabilization clause.

However, petroleum agreements can be considered by some to be similar to administrative contracts and subject to administrative law. This is because the contract is governed by the public law of the host state in some aspects, which sets it closer to the idea of the administrative contract.<sup>284</sup>

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<sup>282</sup> *Anglo-Iranian Oil Co (United Kingdom v. Iran)* [1952] ICJ Rep 93, 518-19.

<sup>283</sup> *ARAMCO (Saudi Arabia v. Arabian American Oil Company)* (1958) 27 ILR 117.

<sup>284</sup> Lionel Neville Brown et al., *French Administrative Law* (Butterworths 1973) 58; René Seerden, F. A. M. Stroink (eds), *Administrative Law of the European Union, Its Member States and the United States* (Intersentia Uitgevers Antwerpen 2002) 69.

Both are concluded by a public authority in order to achieve a public interest. Hence, the host state can make amendments to the petroleum agreement unilaterally, or abrogate it without any liability. However, the second party in petroleum agreement can reserve the right to sufficient compensation for any damages that may be realized by the adjustment or abrogation of the contract.<sup>285</sup> In contrast to the administrative contract, the private contract, which is subject to private law, contains principles such as the binding force of the contract and the equal legal status of the parties. This view is reflected in the laws of countries influenced by the French legal system.<sup>286</sup> The French State Council has held that administrative contracts have particular features and should be governed by specific rules in order to protect the public interest.<sup>287</sup> Civil laws, according to this opinion, are enacted to protect the individuals' interest. Therefore, the law emphasizes the principle of equality. So, from the point of view of the French State Council, the application of the civil law to these contracts would impede the functioning of public utility or prevent it from performing its services well. Hence, these rules should be abandoned.<sup>288</sup>

On this basis, the administrative law considers that contracts are administrative contracts when entered into by a legal entity, or concluded by governments in order to conduct a public facility, or public utility. Al Saeed argues that they therefore also include conditions uncommon in private law.<sup>289</sup>

In the *BP v. Libya*<sup>290</sup> arbitration, the arbitrator considered petroleum agreements to be administrative contracts according to Libyan law. The same consideration applied to the *Aminoil v. Kuwait*<sup>291</sup> arbitration.

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<sup>285</sup> Viktor Soloveytschik, 'New Perspectives for Concession Agreements: a Comparison of Hungarian Law and the Draft Laws of Belarus, Kazakhstan, and Russia' (1993-1994) 16 *Houston Journal of International Law* 261.

<sup>286</sup> These countries are: Morocco, Algeria, Lebanon, Libya, Kuwait and the United Arab Emirates. سليمان الطماوي، المبادئ العامة في القانون الإداري: دراسة مقارنة، الطبعة الخامسة، دار الفكر العربي، 1991، 53. [Soliman Al- Tammawi, *General Basis of the Administrative Contract: A Comparative Study*, (5<sup>th</sup> edn, Dar al Fiker Al Arabi 1991) 53].

<sup>287</sup> Lionel Neville Brown and John Bell, *French Administrative Law* (Oxford University Press 2003) 202.

<sup>288</sup> غسان رباح، العقد التجاري الدولي، بيروت، 2008، 133. [Gassan Rabah, *The International Commercial Contract*, (Beirut 2008) 133].

<sup>289</sup> Mansour Al- Saeed, Mansour Al- Saeed, 'Legal Protection of Economic Development Agreements' (2002) 17 *Arab Law Quarterly* 150.

<sup>290</sup> *BP Exploration Co. (Libya) Lt. v Government of the Libyan Arab Republic* (1979) 53 ILR 297.

<sup>291</sup> *Aminoil (the Government of the State of Kuwait v The American Independent Oil Company)* (1982) 66 ILR 518.

With regard to a petroleum agreement concluded between a government or public entity and a concessionaire, its aim is arguably to achieve a public interest. However, in contradistinction to the particular terms found in the administrative contract, the petroleum agreement includes a clause intended to maintain the stability of the contract, called the stabilization clause. In accordance within this clause, the host state cannot change the contract terms as a result of the enactment of new laws unless the second party agrees to a change in these terms.<sup>292</sup>

The administrative contract was distinguished from the petroleum agreement in arbitration involving Texaco, in the matter of *Texaco Overseas Petroleum Company v. Libyan Arab Republic*.<sup>293</sup> The Libyan government signed agreements with Texaco and Calasiatic in 1955 and 1968, and the dispute arose between the contracted parties when Libya enacted law No.66 of 1973 to nationalize the Texaco and Calasiatic concessions. Both companies notified the Libyan government that they would submit their dispute to arbitration. The sole arbitrator, Dupuy, refused to uphold the Libyan government's claims that the concession signed between it and the two companies was an administrative contract. Dupuy showed that the Libyan government's contract with the two companies placed the parties on an equal footing and that the contract did not contain any exceptional conditions.<sup>294</sup>

Thus, the petroleum agreement is not considered as a public or administrative contract under Iraqi law even if it involves some public law elements, such as taxes or royalties. Nevertheless this contract also contains elements of private law including, for example, consent and provisions of compensation which resulting from damage. Moreover, Iraq, when concluding the contract with a petroleum company, signs it on an equal footing.

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<sup>292</sup> Mansour Al- Saeed, Mansour Al- Saeed, 'Legal Protection of Economic Development Agreements' (2002) 17 Arab Law Quarterly 150.

<sup>293</sup> *Texaco Overseas Petroleum Company v. Libyan Arab Republic* (1979) 53 ILR 389.

<sup>294</sup> *Texaco Overseas Petroleum Company v. Libyan Arab Republic* (1979) 53 ILR 389.

### 2.5.3 Is a Petroleum Agreement a Private Contract?

Some authors hold the view that petroleum agreements are private contracts because these agreements contain elements related to private law and exist as a consequence of the commercial nature of the transaction.<sup>295</sup>

These private elements are represented by the parties' freedom to choose the way to settle disputes either by submitting the dispute to the national court or by arbitration, and also the allowing of the contractual parties to choose the applicable law that governs the contract.<sup>296</sup> In addition, petroleum contracts contain stabilization clauses which prohibit the host state from enacting in the future any legislation that may change the conditions of the agreement.

According to Iraqi law,<sup>297</sup> agreements in which the subject matter is petroleum are a special type of private contract. This particular form of wealth is given special protection by the Iraqi constitution.<sup>298</sup> Iraqi law must exclusively govern the substantive issues of such agreements.<sup>299</sup>

However, the petroleum agreement cannot be regarded as a private contract by virtue of these elements alone. It cannot deny or ignore the aforementioned public law elements.

### 2.5.4. Petroleum Contracts Contain a Mixture of Public and Private Law Features:

The position here is that petroleum agreement is not a private contract, since a sovereign state is one of the parties. Nor is it a public service contract. But, Mafi argue, it contains elements of both private and public law.<sup>300</sup>

This view was adopted by the arbitrator in the *Liamco v. Libya*<sup>301</sup> case, when he stated, “although a concession contract partakes of mixed public and private legal character, it retains a

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<sup>295</sup> Henry Cattan, *The Law of Oil Concessions in the Middle East and North Africa* (Oceana Publications 1967) 20.

<sup>296</sup> Mansour Al- Saeed, ‘Legal Protection of Economic Development Agreements’ (2002) 17 Arab Law Quarterly 150.

<sup>297</sup> Article 111 of Iraqi constitution of 2005.

<sup>298</sup> See previous section.

<sup>299</sup> This issue was discussed in Chapter Five of this thesis.

<sup>300</sup> Homayoun Mafi, ‘Iran’s Concession Agreements and the Role of the National Iranian Oil Company: Economic Development and Sovereign Immunity’ (2008) 48 Natural Resources Journal 407.

<sup>301</sup> *LIAMCO (Libyan American Oil Company v. the Socialist Peoples’ Libyan Arab Jamahiriya)* (1977) 62 ILR 140.

predominant contractual nature”.<sup>302</sup> In this regard, the arbitrator Cavin, in *Sapphire v. National Iranian Oil Company*<sup>303</sup> indicated that a petroleum contract has a nature distinct from that of other commercial contracts.<sup>304</sup>

Dr Al-Khunami has shown that the petroleum concession is a legal act and has a dual legal nature. From one aspect, it creates the rights of the concessionaire to exploit oil, and this is regarded as an administrative decision, but from another aspect, it regulates the process of exploration and is to be regarded as a contract.<sup>305</sup> This raises an important question as to which elements predominate in these agreements, those of public law or those of private law. How can it be determined which elements relate to private law and which to public law? This is not an easy question to answer because the elements are various and depend upon the nature of the host state’s legislation policy.<sup>306</sup> For instance, in the United Kingdom the state owns and natural resources. It does not allow any person to claim rights over resources unless a licence has been conferred by the Crown recognizing those rights.<sup>307</sup> These licences are regulated by binding legislation and ratified by Parliament despite their having a contractual basis and containing some aspects of a commercial transaction.<sup>308</sup> According to British law, therefore, the petroleum agreement should not be regarded as having only a contractual private aspect only, since there is also an element of regulation by the state.<sup>309</sup>

France embodies another example of state ownership of natural resources. French law confers on the state the exclusive right to exploit these resources. In addition, the concession agreement granted to the investor party is regulated by an administrative contract. Thus, the

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<sup>302</sup> *ibid* 168.

<sup>303</sup> *Sapphire (International Petroleum Ltd v. National Iranian Oil Company)* (1967) 35 ILR 136.

<sup>304</sup> International Centre for the Settlement of Investment Disputes *Amco Asia Corporation v. Republic of Indonesia* (1986) 89 ILR 45.

<sup>305</sup> محمد الغنيمي، شروط التحكيم في عقود النفط، بحث القي في المؤتمر العربي الثالث للبتترول الذي عقد في الاسكندرية، 1961، 23  
[Mohamed Al-Khunami, ‘Arbitration Clauses in Petroleum Agreements’, Article presented at the third Arab Petroleum Conference, held in Al – Alexandria , October 1961, 623].

<sup>306</sup> Mansour Al- Saeed, ‘Legal Protection of Economic Development Agreements’ (2002) 17 Arab Law Quarterly 150.

<sup>307</sup> T.C. Daintith and G.D.M Willoughby, *UK Oil and Gas Law* 36 (Sweet & Maxwell 2001) 1060- 1061.

<sup>308</sup> *ibid*.

<sup>309</sup> Omon Anenih, *The UK Petroleum Production Licence – Is It a Contract or a Regulation and Does it Matter?* < <http://www.dundee.ac.uk/cepmlp/car/assets/images/Omon.pdf> > accessed on 31 March 2011.

latter contract is a unilateral amendment or abrogation on the part of the state by virtue of public interest.<sup>310</sup>

To sum up, it is clear that scholars and contemporary writers and also arbitrators hold differing views on the legal nature of petroleum agreements. Arguably, these variations and divisions of opinion suggest the view that petroleum agreements have a dual legal nature. The division of opinion originates from the tunnel vision of writers and arbitrators with regard to the elements of law regulating these agreements. Each previous view has focused on one element of the law, either public or private, while ignoring other elements. The present author is of the view that these agreements have a special legal nature, consisting of private and public law elements which are shaped by a state's own legal system. Each of the elements will carry a different weight when considered in the light of the nation state's legislation and its policy with regard to natural resources.

## **2.6. Conclusion:**

This chapter has presented the Iraqi petroleum industry from the first discovery of its petroleum until the present time, focusing on the important role played by international petroleum companies in shaping not only the development of the Iraqi petroleum industry but also Iraqi political history. The chapter also reviewed the experiences of other petroleum producing countries insofar as they impact directly or indirectly on the development of the Iraqi petroleum industry.

The Iraqi government had no significant role in the management of its petroleum industry until 1958. This is reflected in its petroleum agreements, which contained unfair terms. After 1958 the role of the government of Iraq became stronger through the promulgation of important legislation for the regulation of the petroleum sector and the nationalisation of petroleum. It also reviewed many of the petroleum agreements previously concluded with petroleum companies.

However, despite Iraq's vast reserves of petroleum and its low exploration costs, opportunities to achieve the required level of investment were lost. Wars, mistaken policies and

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<sup>310</sup> Barry Nicholas, *The French Law of Contract* (Clarendon Press 1982) 202.

corruption led to a decline in this vital sector. The international community's sanctions regime had a devastating effect.

Petroleum agreements in Iraq developed remarkably in the second half of the last century, as a result of Iraqi state intervention in the industry and also because of various political and economic factors in the world as a whole. These factors included the appearance of new competitors to the monopoly petroleum companies and UN resolutions which encouraged host states to control their own natural resources and to achieve complete control of their economies. In addition, host states acquired an increased awareness of the importance of this vital resource. Modern petroleum agreements reflect an equality of economic relationship between the host state and the petroleum companies. In these new types of agreement, the role of the producing country is altered. Instead of merely collecting royalties, it owns its resources and shares in the companies' profits.

According to the Iraqi constitution of 2005, petroleum, which is Iraq's most valuable natural resource, is owned by the Iraqi people. Petroleum agreements occupy a special position owing to their subject matter, and petroleum agreements need to be treated as a special type of ordinary investment agreement. As a result of the peculiarity of petroleum agreements, arbitration, which is considered an alternative to judgment by an Iraqi national court, is also different from investment arbitration.

These agreements have a dual legal nature. They are subject to a mixture of elements of public and private laws. The contracts have a special character and legal nature making them different from other investment contracts. As a consequence, petroleum arbitration should be governed by special rules, particularly since arbitration has considerable influence in petroleum transactions as an instrument for settling disputes.



## **Chapter Three: An Evaluation of the Attitudes of Host States and Petroleum Companies towards Arbitration as a Means of Settling Petroleum Disputes**

### **3.1. Introduction:**

The petroleum agreement is a long term contract, extending for decades, and during this long period events may occur that cause disputes. Dispute settlements are an important aspect of the legal framework governing these agreements: their subject matter is natural resources, which is an important source of income for some countries, and in some cases the only source. The agreements also involve a large volume of the petroleum company's capital. Thus, if these disputes remain unsettled for a long period, perhaps several years, they may cost both parties large sums and, if petroleum prices change during that time, large losses may be incurred by both sides. It is therefore important for the parties to find an appropriate means to save time and costs. International commercial arbitration includes this feature which makes it an optimal means for petroleum companies to resolve disputes. In addition, arbitration can be seen as the best alternative to the national court of the host state. It is also consensual, because the parties agree to resolve the disputes through a third party, to choose the law and to select arbitrators who have experience in such disputes.

Despite these characteristics, arbitration is viewed with antipathy by many host countries. They see it as impugning the sovereignty of the state, since, in submitting itself to a non-national decision-maker and subjecting itself to foreign laws, the state waives that sovereignty. There is particular antipathy to the institutions and laws of Western countries, which colonized some of the host countries in the past. In addition, arbitration for the settlement of disputes is a system designed and developed by the institutions of Western countries.

This chapter will review and analyse the points of view in this area. It will focus on the situations of different groups of countries and their changes of attitude towards arbitration, and will analyse the causes and effects of these changes. The attitudes of Iraq, the UAE and PRC towards arbitration as a means of settling petroleum disputes will be highlighted. Moreover, this chapter presents the point of view of the petroleum companies and the reasons for their preference for arbitration.

### 3.2. A Global Overview of Host States' Attitudes towards Arbitration:

International commercial arbitration is still the means preferred by foreign investors for the settlement of disputes, particularly petroleum disputes.<sup>1</sup> They consider it an effective mechanism for resolving disputes, and also as a way to protect themselves. This is because arbitration achieves neutrality by excluding the courts of the host state, and also because of the savings in efforts, in terms of both cost and time.<sup>2</sup> The role of arbitration developed steadily after 'gun boat diplomacy' ceased to be a means of settling disputes, and especially with the spread of nationalism in Asia and Africa. Arbitration has adopted by developed countries,<sup>3</sup> and many petroleum companies include arbitration clauses in their agreements with host states.

However, many host states from the developing world took a different view of international commercial arbitration, as this chapter will show. While it affords protection and safety to foreign investors, it arouses concern and suspicion in many host states. These states view arbitration as an instrument designed to serve the petroleum companies' interests<sup>4</sup> and as a surrogate for diplomatic interference. There are several reasons for this attitude. Some host states from developing countries were colonised over a long period of time by Western countries.<sup>5</sup> Thus, the relationship between these countries was not equal or based on mutual interest, and the inequality was reflected in the economic field. The host states, which had natural resources, concluded unbalanced petroleum contracts, such as concession agreements with unfair terms.<sup>6</sup> International arbitration as a system for settling disputes arose from the investment agreements developed by western countries. These countries and the multinational companies

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<sup>1</sup> Gary Brain Born, *International Commercial Arbitration in the United States: Commentary and Material* (2<sup>nd</sup> edn, Kluwer Law International 200) 1-2.

<sup>2</sup> Hans Smit, 'The Future of International Commercial Arbitration: A Single Transnational Institution?' (1968-1987) 25 *Columbia Journal of Transnational Law* 9.

<sup>3</sup> Lawrence Atsegbua, 'International Arbitration of Oil Investment Disputes: The Severability Doctrine and Applicable Law Issues Revisited' (1993) 5 *African Journal of International and Comparative Law* 634.

<sup>4</sup> Bernardo M. Cremades and David J. A. Cairns, 'The Brave New World of Global Arbitration' (2002) 3 *The Journal of World Investment* 173.

<sup>5</sup> Joseph T. McLaughlin, 'Arbitration and Developing Countries' (1979) 13 *International Insurance Law Review* 211.

<sup>6</sup> Lawrence Atsegbua, 'International Arbitration of Oil Investment Disputes: The Severability Doctrine and Applicable Law Issues Revisited' (1993) 5 *African Journal of International and Comparative Law* 634; See Chapter Two of this thesis on the subject of features of concession agreements.

played an important role in establishing arbitration centres, of which the International Chamber of Commerce (ICC)<sup>7</sup> is a typical example.

Some host states view international arbitration as a direct violation of the principle of sovereignty, since their own judiciary authority and national laws are excluded by subjecting petroleum disputes to a foreign law or third party.<sup>8</sup> The host state's concerns are intensified by the fact that the disputes concerned natural resources, which constituted the backbone of these countries' economies and which they feared to lose.<sup>9</sup> Moreover, some host states lack a culture of arbitration, and there is unequal participation and unequal representation on the part of some host states' lawyers in the international institutions.<sup>10</sup>

These factors increase the antipathy of many host states towards international commercial arbitration. The following sections will discuss the attitudes of different groups of host states towards arbitration and will also review and analyse the factors behind the changes in those attitudes.

### **3.2.1. The Latin American Attitude with Regard to Arbitration:**

Historically, Latin American states have been known for their hostility and antipathy to arbitration.<sup>11</sup> These countries have not accepted arbitration as a way of resolving disputes,<sup>12</sup> instead requiring investors to have recourse to their domestic courts.

In dealing with foreigners, Latin American countries were keen to preserve such norms as non-interference in internal affairs, regional integrity, national sovereignty and also to give

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<sup>7</sup> Samson L. Sempasa, 'Obstacles to International Commercial Arbitration in African Countries' (1992) 41 *International and Comparative Law Quarterly* 387.

<sup>8</sup> Gus Van Harten, 'The Public- Private Distinction in the International Arbitration of Individual Claims against the State' (2008) 56 *International and Comparative Law Quarterly* 371.

<sup>9</sup> Augustus A. Agyemang, 'African Courts, the Settlement of Investment Disputes and the Enforcement of Awards' (1985) 1 *Journal of African Law* 31; Lawrence Atsegbua, 'International Arbitration of Oil Investment Disputes: The Severability Doctrine and Applicable Law Issues Revisited' (1993) 5 *African Journal of International and Comparative Law* 634.

<sup>10</sup> Jalal El Ahadab, 'Arab Arbitration V. International Arbitration? The Case for a Reconciliation' (2008) 25 *Journal of International Arbitration* 276.

<sup>11</sup> Horacio A. Grigera Naon, 'Arbitration in Latin America: Overcoming Traditional Hostility (An Update)' (1990-1991) 22 *Inter- American Law Review* 203.

<sup>12</sup> Alejandro M. Garro, 'Enforcement of Arbitration Agreements and Jurisdiction of Arbitral Tribunals in Latin America' (1984) 1 *Journal of International Arbitration* 301; Jonathan C. Hamilton, 'Three Decades of Latin American Commercial Arbitration' (2009) 1 *Journal of International Law* 1099.

priority to national courts and laws when disputes arose between foreign investors and the state or its entity.<sup>13</sup>

The Calvo doctrine<sup>14</sup> emerged as a reaction to what is called the “diplomatic protection policy” applied by some Western countries towards their citizens abroad. Foreign countries would intervene militarily under the plea of protecting its citizens. Example of this policy was the French military interventions in Mexico in 1838 and 1861,<sup>15</sup> based on complaints made by French investors against the Mexican government.<sup>16</sup>

The Calvo doctrine aimed to subject foreign investors and their property to national laws and jurisdiction, to place foreigners on an equal footing with citizens of the country, to prevent foreign interference and to eliminate ‘gunboat diplomacy’.<sup>17</sup> In addition, it aimed to develop the principle of reciprocity regarding the payment of compensation to foreigners.<sup>18</sup> This principle was also called the “national standard,” as opposed to the “minimum standard” of treatment<sup>19</sup> applied by major powers and states which exported capital. This principle aimed to treat foreign investors according to the principles of justice and the rules generally accepted by civilized nations, especially with regard to compensation for expropriation.<sup>20</sup>

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<sup>13</sup> Paul Peters and Nico Schrijver, ‘Latin America and International Regulation of Foreign Investment: Changing Perceptions’ (1992) 39 *Netherlands International Law Review* 355.

<sup>14</sup> This doctrine was developed by the Argentine lawyer and diplomat Carlos Calvo in the nineteenth century. Donald Shea, *The Calvo Clause: A Problem of Inter- American and International Law and Diplomacy* (University of Minnesota Press 1955) 9; Alden F. Abbott, ‘Latin America and International Arbitration Conventions: The Quandary of Non- Ratification’ (1976) 17 *Harvard International Law Journal* 131.

<sup>15</sup> Donald Shea, *The Calvo Clause: A Problem of Inter- American and International Law and Diplomacy* (University of Minnesota Press 1955) 9; Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 13.

<sup>16</sup> Jane M. Alcala and Joshua Briones, ‘Arbitration in Latin America: A First Look at the Impact of Legislative Reforms’ (2007) 13 *Law and Business Review of the Americas* 996.

<sup>17</sup> Alwyn V. Freeman, ‘Recent Aspects of the Calvo Doctrine and the Challenge to International Law’ (1946) 40 *The American Journal for International Law* 121; Tuomas Kuokkanen, *International Law and the Environment: Variations on a Theme* (Kluwer Law International 2002) 186.

<sup>18</sup> Charles Lipson, *Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries* (University of California Press 1985) 8-9.

<sup>19</sup> “In the early twentieth century, the major powers and capital- exporting states, including the US and the UK, took the position that foreign nationals and their property were entitled, under customary international law, to a minimum standard of treatment. These minimum standards were essentially similar to the standards of justice and treatment accepted by ‘civilized states,’ including the European states and the US”. Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 12.

<sup>20</sup> Martins Pappas, *The International Minimum Standard and Fair and Equitable Treatment* (Oxford University Press) 2.

In nineteenth century Latin America, the political, economic and social circumstances lacked stability, resulting in injury and damage to the properties of foreign investors, who dominated the investment sectors, especially natural resources. This led to increased demands by foreign investors for the intervention of their governments to protect them, in view of the inability of local courts to do so.<sup>21</sup> Latin America was subjected to this intervention, which became normal behaviour on the part of the international community.<sup>22</sup> The repetition of intervention crystallised the practice, and this came to underpin the Western countries' relationship with the Latin American countries. Consequently, the latter adopted the Calvo doctrine of the primacy of national law and equal treatment for national and foreign investors,<sup>23</sup> after which the resolution of disputes by international arbitration or international law became impossible in these countries.<sup>24</sup>

The Calvo doctrine became widespread in all Latin American countries and occupied a significant place in regional legal life.<sup>25</sup> The importance of this doctrine is apparent in the treaties concluded by Latin American countries, which contained what was known as a Calvo Clause.<sup>26</sup> These countries came to insist on such clauses being included in investment treaties. Many constitutions of Latin American countries also included the doctrine, as, for example, Article 27 (I) of the Mexican Constitution of 1917:

Only Mexicans by birth or naturalization and Mexican companies have the right to acquire ownership of lands, waters, and their appurtenances, or to obtain concessions for the exploitation of mines or of waters. The State may grant the same right to foreigners, provided they agree before the Ministry of Foreign Relations to consider themselves as nationals in respect to such property, and bind themselves not to invoke the protection of their governments in matters relating thereto; under penalty, in case of noncompliance with this agreement, of forfeiture of the property acquired to the Nation.

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<sup>21</sup> Donald Shea, *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy* (University of Minnesota Press 1955) 9.

<sup>22</sup> *ibid.* The next pages of this sub-section will discuss how and why arbitration became impossible way to resolve disputes arisen from commercial and investment agreements.

<sup>23</sup> Lionel M. Summers, 'Arbitration and Latin America' (1972-1973) 3 *California Western International Law Journal* 1; Bruce G Rinker, 'The Future of Arbitration in Latin America; A Study of its Regional Development' (1976) 8 *Case Western Reserve Journal of International Law* 487 (Note).

<sup>24</sup> *ibid.*

<sup>25</sup> (*United Mexican States v. Ashley*) United States, Supreme Court of Texas (1977) 63 ILR 95.

<sup>26</sup> Paul Peters and Nico Schrijver, 'Latin America and International Regulation of Foreign Investment: Changing Perceptions' (1992) 39 *Netherlands International Law Review* 358.

Likewise, Article 136 of the Constitution of the Republic of Peru of 1979 provided that:

Foreign enterprises domiciled in Peru are subject without restriction to the law of the Republic. In any agreement which the state signs with foreigners or with juridical person, or in the concession which are granted to them, the express acceptance by the former of the jurisdiction of the laws and the courts of the Republic and their renunciation to any diplomatic recourse must be made clear.<sup>27</sup>

The Andean Code states in Decision 24:

[In] no instrument relating to investment or the transfer of technology shall there be clauses that remove possible conflict or controversies from the national jurisdiction and competence of the recipient country or allow the subrogation by states to the right and action of their national investors<sup>28</sup>

This principle was supported by Article 2 (2) (c) of General Assembly Resolution No 3281, which provided that “in any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals.”<sup>29</sup>

The Calvo doctrine was applied for decades, not only by Latin American countries but also by other countries who voted for the aforementioned United Nations resolution. It succeeded in eliminating the policy of diplomatic protection formerly pursued by western countries, thus restricting foreign interference in the internal affairs of Latin American countries.<sup>30</sup> In those countries, it led to a rejection of the international “minimum standard” and of the practice of resolving disputes by international law, which meant that international arbitration was effectively frozen.<sup>31</sup>

However, the attitude towards arbitration in Latin American countries started to change dramatically. The reasons behind this change are the willingness of the leaders of these countries to overcome poverty by attracting foreign capital and finding outlets in the global markets,

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<sup>27</sup> The Constitution of the Republic of Peru of 12 July 1979.

<sup>28</sup> The Andean Code states in Decision 24 cite in Roger C. Wesley, ‘The Procedural Malaise of Foreign Investment Disputes in Latin America: From Local Tribunals to Fact-finding’ (1975) 7 *Law and Policy in International Business* 813.

<sup>29</sup> UNGA Res 3281 (12 December) UN Doc S/RES 3281.

<sup>30</sup> Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 13.

<sup>31</sup> Paul Peters and Nico Schrijver, ‘Latin America and International Regulation of Foreign Investment: Changing Perceptions’ (1992) 39 *Netherlands International Law Review* 355.

particularly for petroleum.<sup>32</sup> Peters and Schrijver argue that this could not be achieved unless steps were taken to liberate their economic systems from certain restrictions and to find methods, such as arbitration, to attract the foreign investment and also to help resolve the crisis in the judicial system of Latin America and find alternative means to resolve disputes.<sup>33</sup>

Therefore, many of Latin America States become party to various conventions of arbitration. The participation of these countries in arbitration conventions had a great impact on the growing confidence in arbitration. These conventions were considered as one of the main factors encouraging these countries to choose arbitration as a means to settle disputes.<sup>34</sup> Many Latin American Countries try to attract foreign investors who prefer arbitration to resolve their with host state. Therefore Most of these countries ratified the New York Convention of 1958<sup>35</sup> for the recognition and enforcement of arbitral awards which facilitate enforcing foreign arbitral awards,<sup>36</sup> and this convention paved the way for the change to arbitration as a means of dispute settlement.<sup>37</sup> Another significant development in the situation of Latin American countries' was when these countries ratified the World Bank Convention, or what is called the Washington Convention of 1965.<sup>38</sup> The convention which has long been viewed by Latin American states as incompatible with the Calvo doctrine.<sup>39</sup> The Multilateral Investment Guarantee Agency (hereinafter MIGA) also succeeded in attracting many countries from Latin America. The

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<sup>32</sup> Lionel M. Summers, 'Arbitration and Latin America' (1972-1973) 3 California Western International Law Journal 1; Jay G. Martin, 'Venezuela as an Opportunity for Investment in the Petroleum Industry' (1999) 20 Energy Law Journal 325.

<sup>33</sup> Paul Peters and Nico Schrijver, 'Latin America and International Regulation of Foreign Investment: Changing Perceptions' (1992) 39 Netherlands International Law Review 355; Paul E. Mason, Mauricio Gomm-Santos, 'New Keys to Arbitration in Latin – America' (2008) 25 Journal of International Arbitration 41.

<sup>34</sup> Jonathan C. Hamilton, 'Three Decades of Latin American Commercial Arbitration' (2009) 1 Journal of International Law 1099.

<sup>35</sup> The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, adopted on 3 May 1956, entered into force on 7 June 1959, UNTS vol 330, 3. For example, Argentina (1989), Bolivia (1995), Brazil (2002), Chile (1975), Colombia (1979), and Venezuela (1995) available at < <http://www.newyorkconvention.org/new-york->> accessed on 12 June 2014.

<sup>36</sup> *Siderius Inc. v. Compania de Acero del Pacifico. S.A* United States District Court, S. D. New York, 453 F. Supp. 22 1978. See: Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 25.

<sup>37</sup> Bret Fulkerson, 'A Comparison of Commercial Arbitration: the United States & Latin America' (2000- 2001) 1 Houston Journal of International Law 551.

<sup>38</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States, adopted on 18 March 1965, entered into force on 14 October 1966, UNTS, vol 575, 159.

<sup>39</sup> The International Center for the Settlement of Investment Disputes is supported by many Latin American countries for instance, Chile and Argentina (1991), Ecuador (1986). Paul Peters & Nico Schrijver, 'Latin America and International Regulation of Foreign Investment: Changing Perceptions' (1992) 39 Netherlands International Law Review 355.

MIGA provided, in its Annex II, for the resolution through arbitration of the investment disputes between the host state and the MIGA.<sup>40</sup> The Latin American countries subscribed not only to global conventions, they also signed many regional conventions. In 1975, the Latin American Countries<sup>41</sup> ratified the Inter- American Convention on International Commercial Arbitration,<sup>42</sup> which is known as the Panama Convention. Modelled on the New York Convention, it aims at the recognition of arbitral awards.<sup>43</sup> This convention is applied when the parties fail to reach an accord on the procedural rules for the management of the arbitration.<sup>44</sup> This convention was also ratified by the United States in 1990.<sup>45</sup> Bilateral treaties played an important role in increasing the adoption of arbitration as a means of settling disputes between the member countries.<sup>46</sup> A significant event was the promulgation of the UNCITRAL Model Law<sup>47</sup> by the United Nations in 1985.<sup>47</sup> This model law had considerable influence on the Latin American countries and many of them adopted these rules in whole or in part.<sup>48</sup>

All these factors and reasons contributed to encouraging Latin American countries to adopt commercial arbitration as a method for settling disputes. The change in the situation of these countries was apparent when the Andean Pact issued Decision 220 in 1987 which provided, in Article 34, “For the settlement of disputes or conflicts deriving from direct foreign investment or

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<sup>40</sup> This convention was ratified or signed by Brazil, Bolivia, Colombia, El Salvador, Nicaragua, Peru, Chile and Ecuador. Horacio A. Grigera Naon, ‘Arbitration in Latin America: Overcoming Traditional Hostility (An Update)’ (1990-1991) 22 *Inter- American Law Review* 203.

<sup>41</sup> The Latin American Countries which ratified Panama Convention in 1975 were: Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, Uruguay and Venezuela. See Department of International Law Organization of American States, Washington D. C. available at <<http://www.oas.org/juridico/english/signs/b-35.html>> accessed on 1 June 2014.

<sup>42</sup> The Inter- American Convention on International Commercial Arbitration, adopted on 1 January 1975, entered into force on 16 June 1976, ILM vol 336, 141.

<sup>43</sup> Hamid G. Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award* (Kluwer Law International 2002) 73; Christian Bühring-Uhle, Lars Kirchhoff and Gabriele Scherer, *Arbitration and Mediation in International Business* (Kluwer Law International 2006) 63.

<sup>44</sup> Alejandro M. Garro, ‘Enforcement of Arbitration Agreements and Jurisdiction of Arbitral Tribunals in Latin America’ (1984) 1 *Journal of International Arbitration* 301; R. Doak Bishop, James E. Etri, *International Commercial Arbitration in South America: article* (2001) < <http://www.kslaw.com/library/pdf/bishop3.pdf> > accessed on 25 June 2014.

<sup>45</sup> *Progressive Casualty Insurance. Co v. C.A. Reaseguradora Nacinnal de Venezuela* United States Court of Appeals, Second Circuit 1993, 43. It stated the possibility of applying the Panama Convention and not the New York Convention.

<sup>46</sup> Paul Peters and Nico Schrijver, ‘Latin America and International Regulation of Foreign Investment: Changing Perceptions’ (1992) 39 *Netherlands International Law Review* 355.

<sup>47</sup> UNCITRAL Model Law (1985) 24 ILM 1302.

<sup>48</sup> Simon Greenberg, Christopher Kee, and Romesh Weeramantry, *International Commercial Arbitration An Asia – Pacific Perspective* (Cambridge University Press 2011) 15.



from the transfer of technology, Member Countries shall apply the provisions established in their local legislation.”

This development in Latin America’s attitude towards arbitration has impacted positively on legislative policy in these countries. It is evident that in many of them there was an acceleration in the enactment of laws governing commercial arbitration. These laws became a guide that spread through the Latin American countries, and the use of arbitration was adopted by Peru, Brazil, Argentina, Mexico, Chile Bolivia, Chile, Venezuela and Uruguay.<sup>49</sup> Interestingly, these countries were not only overcoming obstacles by enacting laws enabling arbitration; they were also eager to develop sophisticated legislation of their own. In this regard, the Chilean experience should be mentioned. Chile has taken some important steps in order to raise the profile of commercial arbitration and has achieved a great deal in improving its commercial laws and creating a climate favourable to arbitration. It has signed and ratified international conventions for arbitration, either international or a regional, such as the New York convention of 1975 and the Panama convention of 1976, and has also enacted Law 19.917 which attempts to bring Chilean law closer to the UNCITRAL Model Law.<sup>50</sup>

To summarise, over the past decades Latin American attitudes to arbitration have changed. There are many factors behind this turnaround, which is represented by the decisions of these countries to join conventions for commercial arbitration, such as the New York Convention, the ICSID, and the Panama Convention. Latin American countries also desire to stimulate investment and attract foreign capital, and these motives have encouraged these countries to overcome their suspicion and mistrust regarding arbitration, with many of them enacting commercial arbitration laws.

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<sup>49</sup> Charles Robert Norberg, ‘Current Issue in International Commercial Arbitration: Recent Developments in Inter-America Arbitration’ (1991) 12 Northern Journal of International Law & Business. 86.

<sup>50</sup> Karina Cberro Varela, ‘The New Chilean Arbitration Law: Will Chile Become a New International Arbitration Venue?’ (2006) 10 Max Planck Yearbook of United Nation Law 682.

### 3.2.2. The Attitudes of African Countries towards Arbitration:

Like many host states, African states have long expressed mistrust and dissatisfaction towards arbitration as a means of settling disputes.<sup>51</sup> The attitudes of these countries did not emerge from a vacuum.<sup>52</sup> Many factors have contributed to this view and have led these countries to prefer other methods to resolve their disputes, such as negotiations and conciliation.<sup>53</sup>

Some African countries fear the multinational companies, which have financial balances exceeding that of their own countries and also have overlapping relationships with other states and therefore the ability to influence the political decisions of governments.<sup>54</sup> In addition, these multinational companies have played an undeniably important role in instituting the famous international arbitration centres and it is to these centres that these companies prefer to bring their disputes for settlement.<sup>55</sup> African countries viewed arbitration laws and institutions as instruments in the service of developed countries, as was indicated by the Afro-Asian Legal Consultative Committee (hereinafter AALCC). This committee stated in 1976 that:

These institutions had rules which did not work out particularly favorably for the developing countries in the matter of venue, choice of arbitrators, and also fees and charges leviable by the institution concerned. Since most of these institutions functioned under the auspices of chambers of commerce and other association of trade, it was difficult to visualize the manner or the means by which practical steps could be taken to effect modification of the rules of such institutions to bring them into conformity with the interests of developing countries<sup>56</sup>

The AALCC Committee proposed that the international institutions of arbitration should take into consideration the interests of developing countries and should amend the rules of these

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<sup>51</sup> S. Azadon Tiewul and Francis A Tesgah, 'Arbitration and the Settlement of Commercial Disputes: A Selective Survey of African Practice' (1975) 24 *International and Comparative Law Quarterly* 393.

<sup>52</sup> Samson L. Sempasa, 'Obstacle to International Commercial Arbitration in African Countries' (41) *International and Comparative Law Quarterly* 387.

<sup>53</sup> *ibid.*

<sup>54</sup> M. Sornarajah, 'The Myth of International Contract Law' (1981) 15 (3) *Journal of World Trade Law* 187.

<sup>55</sup> Samuel K.B. Asante, 'The Perspective of African Countries on International Commercial Arbitration' (1993) 6 *Leiden Journal of international Law* 331.

<sup>56</sup> Asian-African Legal Consultative Committee, Report of the Seventeenth, Eighteenth and Nineteenth Sessions held in Kuala Lumpur (1976), Baghdad (1977) and Doha (1978), Secretariat of the committee, New Delhi, p. 131-138.

institutions in order to afford adequate protection to developing countries.<sup>57</sup> According to Asante, this proposal was a result of AALCC Committee's statement that "the rules of some of those arbitral institutions in developed countries did not provide adequate procedure to protect the interests of parties from the developing countries,"<sup>58</sup> and that, if these institutions did not respond to this request, these countries would not enforce the arbitral awards issued by these institutions.<sup>59</sup>

Arbitration occupies an uneven position in the continent of Africa, as is apparent from the participation data compared by Asante which shows that Sub-Saharan African participation in arbitration is lower than that of North African countries.<sup>60</sup> Geographic factors were involved here, since, due to their greater proximity, these countries have a long history of economic relationships and commercial transactions with Europe.<sup>61</sup>

African countries, like most developing countries, were subjected to colonialism for many decades.<sup>62</sup> This is reflected in their legal systems, including the systems of arbitration. Arbitration law was generally handed down by the colonial administration and its rules were restricted to the regulation of domestic arbitration. They did not include international arbitration and moreover were too inadequate to cover the entire arbitration process. Domestic courts, therefore, had an important influence on the arbitral tribunal.<sup>63</sup> The scantiness of those laws and their inability to constitute a comprehensive legal system to govern arbitration on the one hand, and the lack of international arbitration rules on the other hand, led to reluctance on the part of African states to recourse to arbitration as a means of resolving disputes.

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<sup>57</sup> Asian-African Legal Consultative Committee, Report of the Seventeenth, Eighteenth and Nineteenth Sessions held in Kuala Lumpur (1976), Baghdad (1977) and Doha (1978), Secretariat of the committee, New Delhi, p. 141.

<sup>58</sup> *ibid.*

<sup>59</sup> Asian-African Legal Consultative Committee, Report of the Seventeenth, Eighteenth and Nineteenth Sessions held in Kuala Lumpur (1976), Baghdad (1977) and Doha (1978), Secretariat of the committee, New Delhi, p. 131-138.

<sup>60</sup> Samuel K.B. Asante, 'The Perspective of African Countries on International Commercial Arbitration' (1993) 6 *Leiden Journal of international Law* 331.

<sup>61</sup> *ibid.*

<sup>62</sup> This period from 1898 to 1960.

<sup>63</sup> Amazu A. Asouzu, *International Commercial Arbitration and Africa States* (Cambridge University Press 2001) 121.

Eventually, the situation of African countries changed, particularly after they won their independence. These states started to emerge as independent members of the international community and began to re-evaluate their economic relations with the colonial powers through reforms to their economic and commercial laws.

Apart from the political events mentioned above, there were other reasons behind this change in attitude. The ICSID was established on 18 March 1965<sup>64</sup> and African countries were among the first to sign<sup>65</sup> and ratify<sup>66</sup> this convention. As Rosalyn Higgins affirms, “The draft [ICSID Convention] (...) received the support of many African states, especially Nigeria, who feel that it gives them a basis for proceeding against the excesses of private contractors.”<sup>67</sup> The response of the African countries to the ICSID convention and their participation in it was greater than that of Latin American countries.<sup>68</sup> The African states’ subscription is regarded as an important factor in motivating these countries to change their situation. African countries also participated in another treaty, the New York Convention. However their participation in this convention was lower than was the case with the ICSID Convention, and consequently the impact of the New York convention has been less pronounced in these countries.<sup>69</sup>

In addition to international conventions, the African countries established regional organisations and conventions relating to arbitration. The AALCC<sup>70</sup> is one of the significant regional organizations which succeeded in attracting many African and Asian countries to become members. The AALCC established a regional centre for arbitration, located in Cairo, which applied the UNCITRAL rules of arbitration.<sup>71</sup> In 1987, the Preferential Trade Area for Eastern and Southern Africa (hereinafter the PTA) established a centre of arbitration to provide

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<sup>64</sup> Augustus A Agyemang, ‘African States and ICSID Arbitration’ (1988) 21 *The Comparative and International Law Journal of Southern Africa* 177.

<sup>65</sup> Tunisia was the first African state to sign the (ICSID) convention, on 5 May 1965. The list of ICSID states members are available at < <http://icsid.worldbank.org/ICSID/frontServlet?>> accessed on 25 August 2014.

<sup>66</sup> Nigeria was the first African state ratify this convention, on 23 August 1965 available at < <http://icsid.worldbank.org/ICSID/frontServlet?>> accessed on 25 August 2014.

<sup>67</sup> Rosalyn Higgins, *Conflict of Interests: International Law in a Divided World* (Bodley Head 1965) 71.

<sup>68</sup> Samuel K.B. Asante, ‘The Perspective of African Countries on International Commercial Arbitration’ (1993) 6 *Leiden Journal of International Law* 331.

<sup>69</sup> Augustus A. Agyemang, ‘African Courts, The Settlement of Investment Disputes and The Enforcement of Awards’ (1985) 1 *Journal of African Law* 31.

<sup>70</sup> The AALCC was established in 1956. It consisted of forty –five countries from Asian and Africa.

<sup>71</sup> Samson L. Sempasa, ‘Obstacles to International Commercial Arbitration in African Countries’ (1992) 41 *International and Comparative Law Quarterly* 387.

its services to the sub-Saharan region: the PTA Centre for Commercial Arbitration, which is located in Djibouti.<sup>72</sup> The Organization for the Harmonization of Business Law in Africa, (hereinafter the OHADO),<sup>73</sup> has been prominent in encouraging African countries to participate in arbitration. It aimed to co-ordinate the business laws of African countries and to modernise their commercial laws, and also to promote arbitration as the way to settle the disputes and to develop the investment sectors in these countries. OHADA invited all members of the African Union (hereinafter the AU) to adhere to it.<sup>74</sup>

These regional centres for arbitration, created by conventions or organizations, contributed to helping African countries to overcome their concerns about Western countries arbitration. Many African countries<sup>75</sup> enacted arbitration laws by following the UNCITRAL Model Law in total or in part, or by enacting rules through their own legislative power.<sup>76</sup> These laws were characterized by clarity and explicitness with regard to commercial arbitration, although they were not uniform or harmonized.<sup>77</sup> However, they are considered as important indicators of the change in these countries' attitudes towards arbitration. The Djibouti International Arbitration Law of 1984 provides a good example of what is mentioned above. Sempasa argues that this law provides model of an integrated code.<sup>78</sup> It is based on two important principles, the freedom of the parties to choose an arbitration procedure and the support of a judicial structure, with the domestic courts playing a supporting role to the parties if needed. The Djibouti International

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<sup>72</sup> Samson L. Sempasa, 'Obstacles to International Commercial Arbitration in African Countries' (1992) 41 *International and Comparative Law Quarterly* 387.

<sup>73</sup> It was established by treaty in 1993 and came into force in 1995. Fourteen francophone African countries signed this treaty, and later two more countries adhered to it. They are: Benin, Burkina Faso, Cameroon, the Central African Republic, Chad, the Federal Islamic Republic of Comoros, Congo, Ivory Coast, Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Mali, Niger, Senegal and Togo. See; Jean Alain Penda, *the Applicability of OHADA Treaty in Cameroon: the way Forward: article* (01/01/2004). < [http://www.ohada.com/infohada\\_detail.php?art](http://www.ohada.com/infohada_detail.php?art)> accessed on 2 June 2011; The ECOWAS Treaty as a Legal Tool For the Adoption of OHADA Treaty and Laws by Anglophone ECOWAS States, a paper presented at the OHADA 2008 conference, organized by the Cercle Horizon- club OHADA, Orlean, France, held at the School of Law at Orlean University from 2-4 July 2008; Jamis Eisenfeld and Francois Serres, 'African Legal Developments in the United States and Sub-Saharan Africa' (2001) 35 *International Lawyer* 869.

<sup>74</sup> Nelson Enonchong, 'The Harmonization of Business Law in Africa: Is Article 42 of the Treaty a Problem?' (2007) 51 *Journal of African Law* 95.

<sup>75</sup> For example, The Djibouti International Arbitration Law of 1984, Algerian Arbitration Law No 8-9 of 2008 and Tunisian Arbitration Code No 3 of 1993.

<sup>76</sup> Sudan enacted an international commercial arbitration law in 2005, without adopting the UNCITRAL Model Law.

<sup>77</sup> Katherine Lynch, *The Forces of Economic Globalization: Challenges to the Regime of International Commercial Arbitration* (Kluwer Law International 2003) 267.

<sup>78</sup> Samson L. Sempasa, 'Obstacle to International Commercial Arbitration in African Countries' (41) *International and Comparative Law Quarterly* 387.

Arbitration Law also provides for a committee competent in international arbitration matters, known as the Commission for Arbitration Appeals.<sup>79</sup> This Commission submits assist for dispute parties by offering them with suitable arbitral services.<sup>80</sup> Djibouti was followed by Nigeria, which enacted its Arbitration and Conciliation Law No.11 in 1988: this was based on the UNCITRAL Model Law of Arbitration and the UNCITRAL Conciliation Rule of 1980.

### **3.2.3. The Asian Pacific Attitude towards Arbitration:**

The situation in Asia is different from that of other continents. In the Latin American and African countries, there was an inherent hostility to arbitration, which was viewed as an instrument to serve the multinational companies, whereas in Asia it was widely accepted as a peaceful means of resolving a broad range of disputes.<sup>81</sup> It was not considered strange or exceptional, since the concept of arbitration is rooted in ancient Asian traditions.<sup>82</sup>

Some newly independent Asian countries became party to international conventions concerning arbitration after the Second World War. The New York Convention of 1958 was one of the conventions found to be acceptable by Asian countries and signed by some of them<sup>83</sup> The ICSID Convention also succeeded in attracting some Asian countries to become signatories.<sup>84</sup>

The sympathetic attitude of Asian countries did not, however, prevent arbitration from facing some challenges and obstacles. One of these obstacles was the absence of any mechanism of implementation or guidance for foreign arbitral awards in Asian courts, since some Asian countries had not ratified the New York Convention of 1958.<sup>85</sup> The vagueness of the procedure

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<sup>79</sup> S. K. Chatterjee, 'The Djibouti Code of International Arbitration' (1987) 4 *Journal of International Arbitration* 58.

<sup>80</sup> Amazu A. Asouzu, *International Commercial Arbitration and Africa States* (Cambridge University Press 2001) 173.

<sup>81</sup> Tommy Koh, 'International Law and the Peaceful Resolution of Disputes: Asian Perspective, Contributions, and Challenges' (2011) 1 *Asian Journal of International Law* 57.

<sup>82</sup> Jingzhou Tao, *Arbitration Law and Practice in China* (2<sup>nd</sup> edn, Kluwer Law International 2008) 1.

<sup>83</sup> These countries are: Pakistan (1958), Cambodia and India (1960), Japan (1961), Sri Lanka (1962), Philippines (1967), South Korea (1973), Hong Kong (1977), Singapore (1986), China (1987) and Vietnam (1995); see the list of New York convention countries at < [http:// newyorkconvention.org/new-york->](http://newyorkconvention.org/new-york-) accessed on 22 June 2014.

<sup>84</sup> For example China (1993), Japan (1972), Singapore (1968) and Philippines (1968); see the list of ICSID Convention countries available at < <http://icsid.worldbank.org/ICSID/frontServlet?>> accessed on 22 June 2014.

<sup>85</sup> A F M Maniruzzaman, 'International Commercial Arbitration in the Asia Pacific, Asian Values, Culture and context' (2002) 30 *International Business Lawyer* 508.

of foreign awards implementation was coupled with the intervention by courts, which used the pretext of public policy.<sup>86</sup>

However, in the 1980s and 1990s, international commercial arbitration evolved dramatically in Asian-Pacific countries. It became well known as a region where arbitration occupied an important place, and Greenberg et al report that at least 500 international arbitrations occur there annually,<sup>87</sup> a major reason behind this growth has been the economic openness of the countries of this region. Through the increase of commercial and investment transactions, the economies of countries such as Japan, China, Hong Kong, India and Singapore began to grow impressively.<sup>88</sup> Hong Kong and Singapore became the most important seats for international commercial arbitration.<sup>89</sup> Other arbitration centres were opened in Asia and became prominent, namely the Singapore International Arbitration Centre (hereinafter the SIAC), the Australian Centre of International Commercial Arbitration (hereinafter the ACICA),<sup>90</sup> the Chinese International Economic and Trade Arbitration Commission (hereinafter CIETAC),<sup>91</sup> the Hong Kong International Arbitration Centre (hereinafter the HKIAC),<sup>92</sup> and the Kuala Lumpur Regional Centre for Arbitration (hereinafter the KLRCA).<sup>93</sup>

A booming economic climate impacted positively on the commercial law of these countries, and on their arbitration law in particular. The Asian-Pacific countries enacted and reformed national arbitration laws and took into account the compatibility of these laws with international developments. Many Asian countries, such as Bangladesh, Cambodia, Hong Kong, India and Japan, depend on the UNCITRAL Model Law.<sup>94</sup> New Zealand was the first state in the world to adopt the revised UNCITRAL Model Law of 2006, and it was followed by Singapore and

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<sup>86</sup> A F M Maniruzzaman, 'International Commercial Arbitration in the Asia Pacific, Asian Values, Culture and context' (2002) 30 *International Business Lawyer* 508.

<sup>87</sup> Simon Greenberg and Christopher Kee, and Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific perspective* (Cambridge University Press 2011) 15.

<sup>88</sup> *ibid.*

<sup>89</sup> *ibid.*

<sup>90</sup> It is established, in 1985 the Australian Centre for International Commercial Arbitration available at <[www.acica.org.au](http://www.acica.org.au)> accessed on 5 May 2014.

<sup>91</sup> China International Economic and Trade Arbitration Commission available at <[www.cietac.org](http://www.cietac.org)> accessed on 1 April 2014.

<sup>92</sup> Hong Kong International Arbitration Centre available at <[www.hkiac.org](http://www.hkiac.org)> accessed on 6 March 2014.

<sup>93</sup> Kuala Lumpur Regional Centre for Arbitration available at <[www.rackl.org.my](http://www.rackl.org.my)> accessed on 4 May 2014.

<sup>94</sup> Simon Greenberg, Christopher Kee, and Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific perspective* (Cambridge University Press 2011) 15.

Australia.<sup>95</sup> In addition, the Asia-Pacific countries' interest in arbitration theory attracted legal experts, practitioners and academic professors to conferences that specialized in arbitration media.<sup>96</sup>

### **3.2.4. The Attitude of Middle East Countries towards Arbitration:**

Middle East countries, like many host states in other regions, have been suspicious of arbitration as a means of resolving disputes arising from petroleum contracts. They have preferred to resort to national courts, and this has been the case particularly with those which produce the largest amounts of oil, namely, Saudi Arabia, Iran, Iraq, Kuwait, the UAE, Oman and Qatar. Despite this suspicion, however, these countries are considered to be the first states to settle their petroleum disputes by arbitration. The arbitration between *Petroleum Development Ltd v. The Sheikh of Abu Dhabi*<sup>97</sup> in 1951 followed a dispute that arose when the ruler of Abu Dhabi, Sheik shakibut, attempted to shift the drilling rights of Petroleum Development Limited to another American company. The original agreement<sup>98</sup> was concluded in 1939. It included an arbitration clause in Article 15 (a) which provided that:

[I]f at any time during the currency of this Agreement there should be any difference or dispute between the two parties as to the interpretation or execution of any provision thereof, or anything herein contained or in connection herewith, such dispute shall be referred to two arbitrators, one selected by each of the two parties, and a referee to be chosen by the arbitrators, before proceeding to arbitration.<sup>99</sup>

*The Ruler of Qatar v. International Marine Oil Company Ltd*<sup>100</sup> was another famous arbitration case in the history of Middle East petroleum concessions. The agreement concluded between the Sheikh of Qatar and International Marine Oil Company refers to arbitration as a means of settling any dispute arising between the contractors with regard to rights and liabilities:

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<sup>95</sup> Michael Hwang S. C. and Shaun Lee, 'Survey South East Asian Nations on the Application of the New York Convention' (2008) 25 Journal of International Arbitration 873.

<sup>96</sup> Sally A. Harpole, 'Factors Affecting the Growth (or Lack Thereof) of Arbitration in the Asia Region' (2003) 20 (1) Journal of International Arbitration 103.

<sup>97</sup> *Petroleum Development Ltd v. The Sheikh of Abu Dhabi* (1951) 18 ILR 144.

<sup>98</sup> This agreement was written in the Arabic language. In this connection see Mana Saeed Al- Otaiba, *The Petroleum Concession Agreements of the United Arab Emirates 1939- 1971(Abu Dhabi)*, vol. 1(Croom Helm 1982) 11.

<sup>99</sup> *ibid.*

<sup>100</sup> *The Ruler of Qatar v. International Marine Oil Company Ltd* (1953) 20 ILR 534.



it also makes reference to the choice of arbitrators<sup>101</sup> as also do the *Saudi Arabia v. Arabian American Oil Co (ARAMCO)*<sup>102</sup> and *Kuwait v. American Independent Oil CO (LIAMCO)*.<sup>103</sup>

It should be stated that in the past all arbitration involved Western companies and that developing countries viewed this arbitration as being designed to serve the interests of Western countries. The situation was reflected in these companies' domination of the contractual relationship, including the arbitration clauses, and in the fact that the arbitrators did not apply the national law of the host states. Al- Samaan argues that the arbitral tribunals upheld the view that the laws of the host countries were immature and deficient in the principles that should govern oil concessions.<sup>104</sup> It is significant that these arbitrations were *ad hoc* rather than institutional forms of arbitration.<sup>105</sup>

The unbalanced position created by this situation gave the host countries involved a strong incentive to change their policies with regard to arbitration. The inadequacies revealed by these cases resulted in the emergence of an urgent need to promulgate and codify arbitration and trade laws.<sup>106</sup>

In the view of the present author, this shift in attitude on the part of the Arab Middle East countries was not because they preferred arbitration as a means of resolving petroleum disputes and therefore freely chose it. It was because they wished to avoid those factors which would lead them to lose if they were forced to resort to arbitration in the future.

Nonetheless there was a shift towards support for arbitration and this alteration appeared in different forms. It resulted in the accession of the Middle East countries to international

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<sup>101</sup> M. Sornarajah, *International Commercial Arbitration: The Problem of State Contracts*, (Longman Singapore 1990) 534.

<sup>102</sup> *ARAMCO (Saudi Arabia v. Arabian American Oil Co)* (1958) 27 ILR 117.

<sup>103</sup> *Aminoil (the Government of the State of Kuwait v The American Independent Oil Company)* (1982) 66 ILR 560.

<sup>104</sup> Yahya Al- Samaan, 'Dispute Resolution in Saudi Arabia' (2000-2001) 71 *Islamic & Middle East Law* 79.

<sup>105</sup> Jalal El Ahadab, 'Arab Arbitration v. International Arbitration? The Case for a Reconciliation' (2008) 25 *Journal of International Arbitration* 279 note 19.

<sup>106</sup> Husain M.Al-Baharna, 'International Commercial Arbitration in a Changing World' (1994) 9 *Arab Law Quarterly* 150.

conventions, such as the New York Convention of 1958<sup>107</sup> and the ICSID Convention,<sup>108</sup> and also regional conventions, such as the Arab League Convention of 1952, the Arab Amman Convention on Commercial Arbitration of 1987<sup>109</sup> and the Riyadh Convention on Judicial Cooperation of 1983. This latter convention addressed the important issue of arbitration in articles 25 and 37, which deal with the recognition and enforcement of foreign arbitral awards.<sup>110</sup> Several centres of arbitration were established in the region, namely the Gulf Cooperation Council Countries Commercial Arbitration Centre 1995, the Dubai International Financial Centre in 2004, and the Dubai Centre for Conciliation and Arbitration, the Bahrain Centre of International Arbitration, 1993, the Kuwait Centre for Commercial Arbitration, the Qatar Arbitral Centre and the Saudi Arabia Centre in 2007.<sup>111</sup>

The legislation movement in the region was not limited to the Arab countries: it included Iran, one of the major petroleum – exporting countries. Iran subjected the *Sapphire case* to arbitration and took important steps to develop its arbitration laws. Its arbitration law of 1997 followed the UNCITRAL Model Law 1985, whereas previously it had relied on the Civil Procedure Code, 1939 (Articles 632-676). These provisions are, designed to govern domestic arbitration, also applied international law, because they made no distinction between domestic and international arbitration.<sup>112</sup> Iran also became a member in the Iran-United States’ Claims

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<sup>107</sup> Bahrain (1988), Iran (2001), Jordan (1979), Kuwait (1978), Qatar (2002), Saudi Arabia (1994), United Arab Emirates (2006). The list of the states members in the York Convention of 1958 is available at <<http://www.newyorkconvention.org/contracting-states/list-of-contracting-states>> accessed on 19 August 2014.

<sup>108</sup> Bahrain (1996), Jordan (1972), Kuwait (2009), Qatar (2011) Saudi Arabia (1980), Syria (2006), United Arab Emirates (1982). The list of the states members in the ICSID Convention is available at <<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ContractingStates&ReqFrom=Main>> accessed on 19 August 2014.

<sup>109</sup> Iraq (1989), Jordan (1989), Lebanon (1992), Sudan (1993), Yemen (1988). The list of states members is available at <<http://www.Jurisint.org/en/ins/155.htm>> accessed on 16 June 2014.

<sup>110</sup> This convention’s articles are available at < <http://www.unchr.org/refworld/type,MULTILAT> > accessed on 12 June 2014.

<sup>111</sup> Jalal El Ahadab, ‘Arab Arbitration v. International Arbitration? The Case for Reconciliation’ (2008) 25 Journal of International Arbitration 280.

<sup>112</sup> Hamid G. Gharavi Salans, ‘The 1997 Iranian Law on International Commercial Arbitration: The UNCITRAL Model Law à l’Iranienne’ (1999) 15 International Arbitration 2; Jamal Seifi, ‘New Trends – Actors in Iranian Law Relating to Arbitration’ (2000) 75 Philippine Law Journal 47.

Tribunal, which is considered to be one of the most significant multi-claim arbitration tribunals of recent times.<sup>113</sup>

### **3.3. The Attitudes of Iraq, UAE and PRC towards Arbitration:**

#### **3.3.1. The Iraqi Attitude towards Arbitration:**

The stance adopted by Iraq, one of the most important petroleum-producing countries in the world, was not different from that of countries of the other regions. Suspicious and distrust were the features that characterized the Iraqi position towards arbitration.

Although arbitration come to play an increasing role worldwide as a means to resolve disputes and also as a way to attract foreign investors, the Iraqi legislature enacted no laws to regulate the country's involvement in international commercial arbitration; neither does it distinguish between domestic arbitration and international arbitration. Iraqi law regulate domestic arbitration by means of the CCP,<sup>114</sup> Chapter Three (Articles 251-276) the most relevant parts and, thereafter any arbitral tribunal held in Iraq, even if it occurred between foreign parties, applied the CCP provisions.<sup>115</sup> The recourse to arbitration in Iraq was considered as an exception to the public authority of the judiciary.<sup>116</sup> The court plays an important role in enforcing the arbitral award. Article 272 of the CCP stipulates that the award cannot be enforced unless the competent court approves it through verifying its compatibility with the substantive and formal rules of Iraqi law. Majid is one of the views see that as prevents the arbitration from attaining its objectives of saving time, effort and costs.<sup>117</sup>

As mentioned above, Iraqi law, unlike the law of other countries,<sup>118</sup> regulates domestic arbitration without any reference to international arbitration. However, Iraqi law has neither

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<sup>113</sup> Jamal Seifi, 'New Trends – Actors in Iranian Law Relating to Arbitration' (2000) 75 Philippine Law Journal 47.

<sup>114</sup> Iraqi Civil Procedures Law No83 of 1969 published in the Iraqi Official Gazette vol. 2, 1969 477.

<sup>115</sup> Saleh Majid, 'Arbitration in Iraq' (2004) 19 Arab Law Quarterly 267.

<sup>116</sup> Article 3 of the Judiciary Authority Law of 1962 provides that Iraqi courts should have judicial authority over civil and criminal cases held in Iraq.

<sup>117</sup> Saleh Majid, 'Arbitration in Iraq' (2004) 19 Arab Law Quarterly 267.

<sup>118</sup> For example, Article 3 of Egyptian Arbitration Law No. 27 of 1994 which provides that:

Within the context of this Law, the arbitration is international whenever its subject matter is a dispute related to international commerce in any of the following cases:

*First:* If the principal places of business of the two parties to the arbitration are situated in two different States at the time of the conclusion of the arbitration agreement. If either party to the arbitration has more than one place of business, due consideration shall be given to the place of business which has the closest

regulated nor prohibited international arbitration, and therefore one would agree that Iraq is not opposed to international commercial arbitration as a means of settling petroleum disputes. This seems to be the implication of some Iraqi national laws which recognise international arbitration as a way to resolve disputes arising from commercial transactions and regional and international conventions signed by Iraq, and also in practice. The following sub-sections will discuss Iraq's acceptance of international commercial arbitration under national law, international conventions and in practice.

### ***3.3.1.1. The Position of International Commercial Arbitration in Iraqi National Laws:***

As mentioned previously, the Iraqi CCP does not regulate international commercial arbitration. However, it could be concluded from some national laws that arbitration has actually got a place in the Iraqi legal system.

**Civil Law:** Article 16 of Iraqi Civil Code No. 40 of 1951<sup>119</sup> declares that foreign arbitral awards may be enforced in Iraq. The act regulating this matter is Law No. 30 of 1928,<sup>120</sup> which recognised the enforcement of the foreign award, so that if the Iraqi party concludes an agreement with a foreign company and agrees also to have recourse to arbitration by a foreign tribunal, and that tribunal renders an arbitral award, then this award would be enforced in Iraq and the foreign award could not be restrained under a plea that Iraq did not accept international arbitration. In recent decades, it has become common for the contractual parties to conclude a model agreement which contains an arbitration clause.

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relationship with the arbitration agreement. If either party to the arbitration does not have a place of business, then the place of its habitual residence shall be relied upon.

*Second:* If the parties to the arbitration have agreed to resort to a permanent arbitral organization or to an arbitration centre having its headquarters in the Arab Republic of Egypt or abroad.

*Third:* If the subject matter of the dispute falling within the scope of the arbitral agreement is linked to more than one country.

*Fourth:* If the principal places of business of the two parties to the arbitration are situated in the same State at the time of the conclusion of the arbitration agreement, but one of the following places is located outside the said State:

- a) the place of arbitration as determined in the arbitration agreement or pursuant to the methods provided therein for determining it;
- b) the place where a substantial part of the obligations emerging from the commercial relationship between the parties shall be performed; or
- c) the place with which the subject matter of the dispute is most closely connected.

Egyptian Arbitration Law No. 27 of 1994. It is published in the Official Gazette No.16 (bis) on 21 April 1994.

<sup>119</sup> Iraqi Civil Law No.40 of 1951, published in the Iraqi Official Gazette, Issue 3015 on 8 December 1951 243.

<sup>120</sup> The Iraqi Law for the Enforcement of Foreign Courts' Judgments. Published in the Iraqi Official Gazette, 1928 61.

**Commercial Law:** Iraqi Commercial Law No. 30 of 1984,<sup>121</sup> Article 297, states that the parties have the freedom to refer to the model contract. Article 295 of this law states that the provisions of the law governed international transactions. However, the parties are free to agree to an alternative. Iraqi commercial law therefore gives the parties freedom to regulate their agreements and to choose the clauses that are consistent with their interests, and among these clauses is an arbitration clause.

**The Iraqi Law for Enforcement** No. 45 of 1980<sup>122</sup> provides in Article 3 (2) that foreign arbitral award can be enforced in Iraq in accordance with Law No. 30 of 1928.

**The Investment Law**<sup>123</sup> No (13) was promulgated in 2006 and refers explicitly to arbitration as a means of resolving disputes in Article 27 paragraph 4 and 5. Paragraph 4 provides that:

[I]f one of the parties to a dispute is subject to the provisions of this law, they may, at the time of signing the agreement, agree on a mechanism to resolve disputes, including arbitration, pursuant to the Iraqi law or any other internationally recognized entity.<sup>124</sup>

It seems that international commercial arbitration is recognised by this law as an amicable way to settle disputes by giving the contractual parties the freedom to choose arbitration as one of a range of option.

***The Draft International Commercial Arbitration Law of 2011 (the DICAL):***

Although this draft has not yet been passed by the Iraqi Parliament, it is a significant indication of Iraq's new attitude towards arbitration. It is an important step towards placing Iraq on the world map of arbitration. This draft, however, regulates international commercial

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<sup>121</sup> Iraqi Commercial Law No 30 of 1984, published in the Iraqi Official Gazette, Issue 2987, 2 April 1984, vol 1, 230.

<sup>122</sup> Iraqi Law for Enforcement No 45 of 1980, published in the Iraqi Official Gazette, Issue 2762, 17 March 1980, vol 1, 444.

<sup>123</sup> The Iraqi Investment Law No 13 of 2006, published in the Iraqi Official Gazette, Issue 4031, 17 January 2007, 4

<sup>124</sup> The translation from Arabic to English is available at <<http://investpromo.gov.iq/policies-and-laws/>> accessed on 10 April 2014.

transactions,<sup>125</sup> whereas this thesis argues that the petroleum agreement is a special kind of investment agreement.

*The DLOG*<sup>126</sup> refers to arbitration as acceptable way to resolve petroleum disputes. Article (39) paragraph (b) provides that:

B- If the dispute cannot be resolved by agreement, the matter shall be referred to the Minister to resolve through discussions with senior officers of the holders of the rights concerned. Failing resolution through these discussions, the matter of dispute may be submitted to arbitration or to the competent judicial authority.<sup>127</sup>

It is seems from this that Iraqi law recognises arbitration as a means to settle petroleum disputes. It is apparent from this review of Iraqi national laws that Iraq accepts and recognises arbitration in commercial, investment or petroleum agreements.

#### ***Regulations for Implementing Government Contracts No.1 of 2014:***<sup>128</sup>

The Regulations for Implementing Government Contracts No.1 of 2014 gives the contractual parties three options to choose if they failed to settle their disputes amicably. These options are arbitration, refer the disputes to the Iraqi national court and choose one of the way that provides by contract to settle the disputes. Article 8 (second) 2 states that:

Second- When the contractual parties cannot reach to agreement to settle their disputes amicably, the parties must recourse to one of the ways that provides by the contracts which are:

A- Arbitration, which should be according with follow:

2) International Arbitration: the parties can choose arbitration as one of the way to settle the disputes in necessary cases and strategic venture or important venture and that should be when one of the contractual parties is foreigner.<sup>129</sup>

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<sup>125</sup> Article 1 (4) of the Iraqi DICAL, which provides that “the arbitration will be international commercial arbitration if the subject matter of the dispute relates to international trade.” This Article was translated from Arabic to English by the author. Below the Arabic text:

رابعا: التحكيم التجاري الدولي: يكون التحكيم التجاري دوليا إذا كان موضوعه نزاعا يتعلق بالتجارة الدولية

<sup>126</sup> This Law has not yet been passed by the Iraqi Parliament.

<sup>127</sup> Translation from Arabic to English available at Council Of Ministers Oil and Energy Committee <<http://www.krg.org/uploads/documents/Draft%20Iraq> > accessed on 10 April 2014.

<sup>128</sup> Regulations for Implementing Government Contracts No.1 of 2014. Published in the Iraqi Official Gazette, Issue 4325, 16 June 2014, 56.

<sup>129</sup> The translation from Arabic to English is conducted by author. Below the Arabic text:

الماد 8 ثانيا: عند عدم التوصل الى اتفاق ودي يتم اللجوء الى أحد الاساليب التي يجب أن ينص عليها في العقد وهي كالاتي:

### 3.3.1.2. The Regional and International Conventions:

Iraq is party to many of the regional conventions concerned with arbitration concluded between Arab States, such as the Convention of the Arab League of Nations for the Enforcement of Judgments, which was concluded on 15 September 1952,<sup>130</sup> the Arab Amman Convention on Commercial Arbitration, 1987, and the Riyadh Convention for Judicial Cooperation of 1983 (hereinafter Riyadh Convention).<sup>131</sup> Despite Iraq being a member of many inter-Arab conventions, its adherence to other international conventions is almost non-existent, except for its ratification of the Geneva Protocol on Arbitration Clauses in 1923 (hereinafter Geneva Protocol of 1923).<sup>132</sup> Although is party to this Protocol, there has been no resulting simplification of the procedural rules of arbitration and no change in Iraqi laws to facilitate the enforcement of arbitral foreign awards.<sup>133</sup> Iraq has until this time, failed to join to the leading international conventions that regulate arbitration, namely as the ICSID and the New York Convention of 1958. The reasons behind Iraq's refusal to adhere to the New York Convention have been legal and political. The Iraqi Office of Legal Codification explained in Decree No. 122/1978 of 28 August 1978, the reasons preventing Iraq's ratification of the New York Convention 1958 as follows:

International Commercial Arbitration includes foreign elements when taking place outside the borders of Iraq, and the arbitrators could be foreign nationals, applying foreign law, either substantive law or procedural law. Therefore, the enforcement of foreign arbitral awards inside the territories of the Iraqi Republic face legal and sovereignty obstacles (.....) therefore adherence to the New York Convention of 1958 and the recognition and enforcement of foreign awards would require the agreement of the Iraqi authorities responsible for planning public economic policy.

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أ- التحكيم ويكون وفقا لما يأتي:  
2) التحكيم الدولي: لجهة التعاقد اختيار التحكيم الدولي لتسوية المنازعات في حالات الضرورة وللمشاريع الأستراتيجية الكبرى أو المهمة وعندما يكون أحد طرفي العقد أجنبيا.

<sup>130</sup> Iraq becomes party of the League of Arabic States Convention for Enforcement of Judgments 1952 according to law No. 35 on 26 March 1956 which published in Iraqi Official Gazette, issue 3802 on 6 June 1956. Yahya Al-Samaan, 'Dispute Resolution in Saudi Arabia' (2000-2001) 71 Islamic & Middle East Law 79.

<sup>131</sup> Riyadh Arab Agreement for Judicial Cooperation of 1983, it entered force on 30 October of 1985, league of Arab States. Iraq became party to this convention according to law No. 110 of 1983 which is published in Iraqi Official Gazette, issue 2976 on 16 of January 1984, 22.

<sup>132</sup> The Geneva Protocol on Arbitration Clauses of 1923 signed at Genva on 24 September 1923, LNTS, vol XXVII, No. 678 of 1924, 158.

<sup>133</sup> حميد يونس، شرط التحكيم ورقابة المحكمه على الاحكام القضائيه في التشريع العراقي، 2، 1993، مجلة القضاء، 26، [Hameed Younis, 'Arbitration Clauses and Court Censorship concerning Arbitrators' Awards in Iraqi Legislation' (1993) (2) A-I Kazaa Journal 26]

Because of its political aspects, accession would involve the reform and alteration of Iraqi laws.<sup>134</sup>

Furthermore, Iraq did not join the Geneva Convention for Execution of Foreign Arbitral Awards of 1927<sup>135</sup> (hereinafter Geneva Convention of 1927) which encouraged member states to recognize arbitral awards rendered by other member states and to recognize agreements involving persons subject to different jurisdictions.<sup>136</sup>

However, this did not prevent Iraq from agreeing, on an ad hoc basis, to resolve disputes through arbitration by concluding with some foreign companies contracts containing arbitration clauses.<sup>137</sup>

In this respect, Article 9 of the Iraqi Commercial and Industrial Union Law No.24 of 1983 set out the functions this Union, namely, to act as arbitrator, to participate in arbitral tribunals in order to resolve commercial and industrial disputes taking place between the members of this Union themselves, or between them and other parties, and to choose experts and arbitrators.

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<sup>134</sup> Decree No. 132/1978 as of 28 of August 1978. The translation from Arabic to English is by the author. See below the Arabic text :

أن التحكيم التجاري الدولي يتضمن عنصرا أجنبيا. حيث انه قد يتم خارج حدود البلد. وقد يتعهد به الى محكمين اجانب قد يطبقون قانونا أجنبيا سواء من ناحية القواعد الموضوعية أم من ناحية القواعد الإجرائية. وعليه فإن تنفيذ أحكام التحكيم الأجنبي داخل نطاق الجمهورية العراقية يلاقي دونه حوائل قانونية وسيادية (.....) وعليه فإن الانضمام الى معاهدة نيويورك 1958 بشأن الاعتراف بأحكام التحكيم الأجنبي وتنفيذها يستلزم استخراذ رأي الجهات العليا التي تقوم بتخطيط السياسه الاقتصادية العامه لأن في ذلك الانضمام جوانب سياسيه ينبغي مراعاتها ومقتضيات عمليه تستدعي الدراسه وذلك الانضمام يستوجب مراجعة القوانين العراقيه وتعديلها.

<sup>135</sup> The Geneva Convention for Execution of Foreign Arbitral Awards of 1927, signed at Geneva on 26 September of 1927, LNTS, vol XCII, 302.

<sup>136</sup> Article (1) of Geneva Convention of 1927 provides that:

In the territories of any High Contracting Party to which the present Convention applies, an arbitral award made in pursuance of an agreement, whether relating to existing or future differences (herein after called "a submission to arbitration") covered by the Protocol on Arbitration Clauses, opened at Geneva on September 24, 1923, shall be recognized as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting Parties to which the present Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties.

<sup>137</sup> Article (1) of Geneva Convention of 1927 provides that:

In the territories of any High Contracting Party to which the present Convention applies, an arbitral award made in pursuance of an agreement, whether relating to existing or future differences (herein after called "a submission to arbitration") covered by the Protocol on Arbitration Clauses, opened at Geneva on September 24, 1923, shall be recognized as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting Parties to which the present Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties.



### 3.3.1.3 *The Practice*

As indicated in a previous chapter, the Iraqi petroleum industry witnessed important events, such as nationalisation and changes in circumstances brought about by revolutions and coups. These events created disputes arising from petroleum concessions, which were characteristically of long duration. Iraqi policy towards arbitration for the settlement of disputes emerged from petroleum agreements that were not fixed and specific, but depended on the varied economic policies of the different governments which ruled Iraq.

When the first concessions were concluded between Iraq and foreign companies, (the IPC, MPC and BPC), in the 1930s, disputes arising from petroleum concessions were referred to arbitration as a means of settlement. This was enabled through the agreements themselves, for example Article 40 of the petroleum concession agreement between Iraq and the IPC in 1925<sup>138</sup> and Article 36 of the petroleum concession agreement between Iraq and the MPC in 1932<sup>139</sup> also Article 41 of the petroleum concession agreement between Iraq and the BPC in 1938.<sup>140</sup>

As was indicated in Chapter Two, the dominance of these companies and their monopoly of the petroleum exploration contracts were achieved through long- term concessions.<sup>141</sup> Iraq was under a British mandate when it concluded these contracts and most of the companies were of British nationality.<sup>142</sup> This resulted in an imbalance between the contracting parties, which is reflected in the clauses of the petroleum concessions concluded in this period, including the arbitration clauses.

As previously explained, in 1958, new policies began to emerge in Iraqi, with the state now playing an important role in the petroleum industry, particularly after the enactment of Law No.80 in 1961, reducing the concession areas controlled by the petroleum companies.<sup>143</sup> Disputes arose from the enactment of this law, and the petroleum companies subsequently called

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<sup>138</sup> هاشم علوي، شرط التحكيم وتأثيره على عقود النفط، 1971، 2، مجلة القضاء، 40

[Hashem Allawe, 'The Arbitration Clause and its Implications in Iraqi Petroleum Contracts' (1971) 2 Al- Kaza Journal 40].

<sup>139</sup> *ibid.*

<sup>140</sup> *ibid.*

<sup>141</sup> See Chapter Two section two.

<sup>142</sup> See sub-section 2.2.1.2. (The Role of Britian) of Chapter Two.

<sup>143</sup> See sub- section 2.2.2.2 (Iraqi Government Intervention in the Petroleum Industry after World War II) of Chapter Two.

for Iraq to settle disputes through arbitration, since they regarded the new law as a unilateral action by Iraq.<sup>144</sup> However, the Iraqi government rejected the companies' complaints. The Iraqi government justified its rejection on the basis of its sovereign right to promulgate whatever measures it found necessary for the protection of its natural resources, and argued that there was no reason to resort to arbitration.<sup>145</sup>

However, Iraqi's rejection of arbitration through the enactment of law No. 80 did not mean that Iraq completely rejected arbitration. Several economic and commercial agreements concluded between Iraq and other countries refer to arbitration as a way to settle disputes.<sup>146</sup> In this period Iraq did not pursue a single-minded policy with regard to arbitration, as is apparent from the arbitration clauses in the aforementioned agreements. In some of them, Iraq accepted arbitration in principle, but neglected to explain important details, such as the law which should govern the dispute, and the choice of the arbitrator and the seat of arbitration.<sup>147</sup> The economic protocol for the transfer of capital and investment between Iraq and Kuwait, however, included details concerning the choice of arbitrator and the law governing the disputes.<sup>148</sup> The Economic Cooperation Protocol between Iraq and Germany did not specify the application of Iraqi law to any disputes that might arise,<sup>149</sup> while other agreements allowed a recourse to arbitration if the common committee failed to settle the dispute.<sup>150</sup>

As the above examples show, arbitration clauses were not a universal procedural feature of agreements concluded between Iraq and other parties. This was due to the lack of any international arbitration law regulating the arbitration clause.

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<sup>144</sup> عبد اللطيف الشواف، حول قضية النفط العراقيه، بيروت، 1966، 48

[Abdul Lateif Al- Shawaf, *Concerning the Case of Iraqi Petroleum* (Beirut 1966) 48].

<sup>145</sup> *ibid.*

<sup>146</sup> Article 16 of the economic and technical cooperation between Iraq and Gecko Slovakia in 1960 refers to arbitration as a mean to settle any dispute arising from this agreement; Article (10) of the economic development agreement between Iraq and Bulgaria in 1967 refers to arbitration.

<sup>147</sup> Article 16 of the economic and technical cooperation between Iraq and Gecko Slovakia in 1960 refers to arbitration as a means of settling any dispute arising from this agreement.

<sup>148</sup> Article 60 of the economic protocol for the transfer of capital and investment between Iraq and Kuwait in 1964.

<sup>149</sup> Article H of this Protocol.

<sup>150</sup> Article 10 of the economic development agreement between Iraq and Bulgaria in 1967 refers to arbitration.

In the 1970s and 1980s the official Iraqi attitude became more emphatic in its resistance to arbitration.<sup>151</sup> Iraq made arbitration the last option for the amicable resolution of disputes. Only if a committee formed from the contracting parties failed to settle the dispute by negotiation would they have recourse to arbitration.<sup>152</sup> Iraq considered that arbitration affected the principle of national sovereignty and detracted from the prestige of the Iraqi judiciary.<sup>153</sup> This is made clear in a statement, (No. 920, of 1973), by a committee on petroleum matters and enforcement of agreements, addressed to the Iraqi Ministry of Planning, which declared that “the International Arbitration clause impacts on the principle of sovereignty and the sovereignty of Iraqi national courts”.

In a nutshell, the official Iraqi attitude towards the role of international arbitration in petroleum disputes was distinctly negative during this period, and arbitration during petroleum disputes with foreign companies was avoided.

The official position changed gradually after 2003 due to the exceptional political, economic and legal circumstances. Iraq emerged from the war with its economy completely destroyed. The destruction encompassed the vital petroleum sector. Iraq depends largely on revenue from this sector to rebuild the infrastructure, and that task requires the participation of foreign companies with the necessary technical equipment and capital, and obviously the creation of a favourable investment climate and protection for them. International arbitration is the best means to resolve petroleum disputes for international companies. It reduces the concerns of these companies, which do not like submitting themselves to the judgments of the national court of the host state. In the case of Iraq, the situation is compounded by the absence of an international arbitration law and the lack of any mechanism to enforce the foreign arbitral award, as well as the intervention of the courts in arbitration procedures.<sup>154</sup> These factors contributed to a review of economic and legal policy in Iraq. As mentioned in the previous sub-section, Iraq promulgated Investment Law No.13 of 2006, which recognizes arbitration, and there is also a

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<sup>151</sup> Jalal El- Ahdab, *Arbitration with The Arab Countries* (3<sup>rd</sup> edn, Kluwer Law International 2011) 231.

<sup>152</sup> Saleh Majid, ‘Arbitration in Iraq’ (2004) 19 *Arab Law Quarterly* 267.

<sup>153</sup> Jalal El- Ahdab, *Arbitration with The Arab Countries* (3<sup>rd</sup> edn, Kluwer Law International 2011) 231.

<sup>154</sup> David Brent Grantham, ‘Caveat Investor: Assessing the Risk and Rewards of ICOs Entry into Iraq’ (2010) 3 *Journal of World Energy Law & Business* 304.

reference to arbitration for the settlement of petroleum disputes within the Oil and Gas Law. Consequently, arbitration in Iraq can be said to have entered a new era.

The changes affected institutions as well as laws. A new centre for arbitration was established in Al-Najaf, in the south of Iraq.<sup>155</sup>

To sum up, the status of arbitration in Iraq passed through two historical phases. The first phase began in 1958 with state intervention in the petroleum industry,<sup>156</sup> and continued until 2003. In this period, although Iraq had a generally negative attitude to arbitration, it accepted a resort to arbitration as a means of settling disputes in several economic and petroleum agreements. Sometimes the country resorted to arbitration under the pressure and influence of petroleum companies, and sometimes it did so to encourage investment and to attract foreign companies that possessed modern technology. In any case, Iraq did not follow a fixed and specific rule with regard to arbitration clauses and procedures, and it also avoided becoming a party to the New York Convention 1958, which aimed to facilitate the recognition and enforcement of foreign arbitral award and the enactment of laws regulating international arbitration.<sup>157</sup>

The second phase began after 2003, when Iraq and its economic sector underwent a torrent of changes. The country tried to root arbitration in its legal environment, influenced by a strong desire to attract foreign investors and to rebuild its devastated economy.<sup>158</sup> This endeavour took different forms, including changes in the law and the establishment of an arbitration institution.

This chapter shown how significant feature of host states has been the alteration in their attitudes towards arbitration, from early antipathy to a sympathetic view, expressed by their adherence to international conventions, such as the New York Convention 1958, the ICSID Convention or regional conventions, and also by the enactment or updating of local laws. Their aim is to attract investors and to strengthen their economies, and this is particularly the case with countries which have natural resources but at the same time suffer from poverty, wars, and a

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<sup>155</sup> International Commercial arbitration Centre Najaf is available at <<http://www.najafchamber.net/en/centers/icacn/index.1.htm>> accessed on 14 May 2014.

<sup>156</sup> See pages 40 and 41 of Chapter Two.

<sup>157</sup> See pages 100 and 101 of this chapter.

<sup>158</sup> See sub-section 2.2.3 (Post Occupation Iraq 2003 Onwards) of Chapter Two.

dearth of capital and technology. In this respect, an important question arises: has the alteration in the attitudes of these countries to arbitration been imposed through necessity, because these states remain the weaker parties, or does the alteration result from these countries becoming aware of the importance of arbitration as an amicable method for settling the disputes? In other words, is the choice of arbitration based on genuine free will?

Arguably, the parties from developing countries would prefer not to choose arbitration at all. Samir Saleh has observed, “It can almost be said that it is only when left with no alternative –and then racked by apprehension- that an Arab party will comply with an arbitration clause.”<sup>159</sup> Developing countries were bound to arbitration by the urgent need for capital and technology. They accepted arbitration because they were the weaker parties in the economic equation of concession agreements, in which they accepted many unfair terms.<sup>160</sup> At the same time, the main petroleum producers from Western countries, for example the United States and the United Kingdom, have exempted their own petroleum disputes from arbitration.<sup>161</sup> Moreover, the multinational oil companies do not own recourse to arbitration to resolve disputes between themselves.<sup>162</sup> This confirms the specificity of petroleum disputes.

In the case of Iraq, a developing country and one of the major petroleum producers, wars exhausted its economy and the petroleum sector bore a major part of the destruction. The sector needs reform through attracting foreign investors with advanced technology. The situation in the country remains unstable due to insecurity, corruption and the sabotage of petroleum installations, such as the refinery pipes. Does Iraq accept arbitration based on free will and its commitment to the importance of arbitration or because it urgently needs to attract international oil companies? In fact, arbitration is becoming the legal system adopted by many host states as they find it a suitable way to resolve disputes and also to protect their capital and investment. Reality has dictated the need for host states to access technology and scientific potential. If handled carefully, it can be an effective mechanism for the resolution of disputes through the

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<sup>159</sup> Samir Saleh, ‘The Settlement of Disputes in the Arbitration World. Arbitration and Other Methods – Trends in Legislation and Case Law’ (1985-1986) 1 Arab Law Quarterly 199.

<sup>160</sup> *ibid.*

<sup>161</sup> Thomas Wälde, ‘Investment Arbitration under the Energy Charter Treaty’ [1996] CEPMLP Journal Online < <http://www.dundee.ac.uk/cepmlp/htm> > accessed on 29 June 2011.

<sup>162</sup> Thomas Wälde, ‘The Role of Arbitration in the Globalization of Energy Markets’ [2000] CEPMLP Journal Online < <http://www.dundee.ac.uk/cepmlp/htm> > accessed on 29 June 2011.

enactment of special rules to safeguard petroleum arbitration and the establishment of special institutions and centres for the settlement of petroleum disputes. The existence of such institutions and centres would encourage parties from developing countries to submit their disputes to them, particularly when the representation in them of developing countries is increased. The organization of conferences devoted to the subject of petroleum arbitration would further help to spread the legal arbitration culture in developing countries, as would the application of national laws to the petroleum contracts of the host state and the modification of national laws to bring foreign arbitration awards in line with international laws.

### **3.3.2. The Attitude of the UAE towards Arbitration:**

The UAE is one of the most important petroleum producers and a member of OPEC. Its attitude towards arbitration has varied from rejection to acceptance it is an important case study for Iraq. In order to understand this evaluation in its approach this section will examine the situation there.

The UAE has depended largely on the rules of arbitration set out in the Abu Dhabi Code of Civil Procedures (hereinafter ADCCP) which came into force in 1970.<sup>163</sup> Its chapter 9 (Articles 82 to 98), deals with arbitration rules. This law has been widely influential, not only in Abu Dhabi but also in other Emirates. The ADCCP is considered to be the first UAE law to devote such attention to arbitration.<sup>164</sup> However, its promulgation did not prevent some Emirates from prohibiting arbitration outside Emirate borders. In 1988, the Emirate of Dubai issued a Decree:

Ordering that from 6th February 1988, no contract to which the Government of Dubai or one of its departments is a party may provide for arbitration outside Dubai nor that any such arbitration be subject to any law or procedure other than the laws and procedures in force in Dubai.<sup>165</sup>

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<sup>163</sup> عمر عبد المنعم، قانون المرافعات أمدنيه مطبوعات جامعة الامارات العربية المتحدة، 1983، 5 [Omer A. M, *The Law of Civil Procedure* (U.A.E. University publication 1983) 5].

<sup>164</sup> The contract law of 1971, which was effective in two emirates, Dubai and Ra's al-Khaymah, provided general provisions of arbitration. However this law did not refer to different types of arbitration, and the ADCCP filled the lacuna by recognizing the various types.

<sup>165</sup> Dubai Official Gazette of 1988, issue No 166 p.11. This text was translated by Obaid Saqer Busit, 'The System of Arbitration in the U.A.E Problems and Prospects' (Ph.D. thesis, University of Durham 1991).

The purpose of the Decree was to establish a national arbitration system in the UAE after cases relating to petroleum disputes were lost<sup>166</sup> and to keep arbitration within the UAE so that its national laws would apply. However, the Decree could not realize its aims because foreign companies did not welcome Dubai's decision to apply its own domestic law.<sup>167</sup> A new Decree was promulgated, amending the first one. It is provided that:

Excluding from {the first Decree} wherever the general interest demands, the Ruler of Dubai may exclude the Government of Dubai departments and corporations from the obligation of the 1988 Decree.<sup>168</sup>

The experience of the UAE with regard to petroleum arbitration has not fulfilled expectations. Its arbitration law is undeveloped, there has been a lack of uniformity in its approach to arbitration, and its laws have failed to recognize the various types of arbitration agreement. In addition, many of the Arab Gulf States have lost legal cases related to petroleum disputes.<sup>169</sup>

In the past two decades, however, the UAE has adopted a more positive attitude towards arbitration, as demonstrated by its promulgation of the Federal Code of Civil Procedures No.11 of 1992.<sup>170</sup> This law devotes its Chapter III (Articles 203 to 218) to arbitration provisions, thus filling a legislative gap.<sup>171</sup> As indicated above, the UAE had no federal law governing arbitration. The 1992 Code does not distinguish between domestic arbitration and international arbitration but it recognizes different types of arbitration agreement.<sup>172</sup> The UAE recently reviewed the draft of a federal arbitration law which is based on UNCITRAL Model law.<sup>173</sup> This law was drafted in response to the UAE's need to assume an important role in international trade and investment. The relevant article of this law will be explained in this study, as will Federal Law No.11 of 1992. The promulgation of this law is not the only factor that contributed to the

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<sup>166</sup> *Petroleum Development Ltd v. The Sheikh of Abu Dhabi* (1951) 18 ILR 144.

<sup>167</sup> *ibid.*

<sup>168</sup> Dubai Official Gazette of 1988 issue No.167, 10.

<sup>169</sup> *Petroleum Development Ltd v. The Sheikh of Abu Dhabi* (1951) 18 ILR 144; *The Ruler of Qatar v. International Marine Oil Company Ltd* (1953) 20 ILR 534.

<sup>170</sup> UAE Federal Code of Civil Procedures Law No. 11 of 1992 published in the Official Gazette, issue No. 235, 8 of March 1992.

<sup>171</sup> Essam Al Tamimi (ed.), *A Practitioner's Guide to Arbitration in the Middle East and North Africa* (Jurist Net 2009) 485.

<sup>172</sup> Jalal El- Ahdab, *Arbitration with the Arab Countries* (3<sup>rd</sup> edn, Kluwer Law International 2011) 784.

<sup>173</sup> Essam Al Tamimi (ed.), *A Practitioner's Guide to Arbitration in the Middle East and North Africa* (Jurist Net 2009) 485.

enhancement of arbitration in the UAE: the country also became a party to conventions that were important for arbitration. It became a party to the New York Convention of 1958 on 19 November 2006, and also joined the ICSID Convention on 22 January 1982. These conventions contributed to bring the UAE into the international investment community. Moreover, the UAE became a party to many regional conventions which impacted on the enforcement of arbitral awards. It became a party to the Gulf Cooperation Council Convention on the Enforcement of Judgments in 1996 and the Riyadh Convention in 1983.

The factors cited above contributed to giving arbitration a prominent place in the UAE as a method for the resolution of disputes arising from investment disputes in general and petroleum agreements in particular.

As a result of the supportive attitude towards arbitration, important centres appeared in the UAE, such as the Dubai International Arbitration Centre, which has become one of the most important centres in the Middle East.<sup>174</sup> There was also the Dubai International Financial Centre, which opened in 2004. Today, the UAE, unlike Iraq, can be a good example to be a nation of pivotal importance in the world of petroleum.

### **3.3.3. The Attitude of PRC towards Arbitration:**

PRC is different from Iraq and the UAE in that it has a long and rich cultural history of arbitration. This culture qualifies Chinese law to be one of the bases to comparison in this study. The history of arbitration in China began in 1912, when the Chinese government promulgated the Institution for Business Arbitration Office in 1912, followed in 1913 by the Working Rules for Business Arbitration Office.<sup>175</sup> The latter law allowed for disputes to be submitted to the Business Arbitration Office.<sup>176</sup> In 1930, China promulgated the Law of Settling Disputes between Labour and Management, and in 1949 the municipal government of Tianjin promulgated the Tianjin Municipality Interim Rules of Organization for Mediation and

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<sup>174</sup> Reza Mohtashami, Antonia Birt and Lee Rovinescu, 'Arbitration Guide IBA Arbitration Committee: United Arab Emirates' (1913) International Associated Bar 1.

<sup>175</sup> Jingzhou Tao, *Arbitration Law and Practice in China* (2<sup>nd</sup> edn, Kluwer Law International 2008) 1.

<sup>176</sup> *ibid.*



Arbitration Commission, which set up rules for mediation and arbitration.<sup>177</sup> In this period, China did not distinguish between domestic and foreign- related arbitration. The distinction between those terms grew gradually in the 1949.<sup>178</sup>

Before the promulgation of the Arbitration Law of 1994, arbitration was exclusively domestic, since all disputes arising from various issues were subject to domestic arbitration.<sup>179</sup> In the 1970s, China abandoned the socialist trade system and inaugurated a new “Open Door Policy.”<sup>180</sup> This policy was combined with the promulgation of many new laws to enhance this reform. In 1981 China promulgated the Economic Contract Law of the PRC. This law offered amicable ways to resolve disputes arising in regard to economic contractual relationships, such as consultation, conciliation and arbitration.<sup>181</sup> In 1983, the State Council of China promulgated the Regulation on Economic Contract Arbitration of the PRC, which provided in its Article 2 that “The State General Administration for Industry and Commerce and the economic contract arbitration boards established by local administrations for industry and commerce are the organs of arbitration for economic contracts”. As shown above, China had passed a series of laws regulating economic arbitration contracts. These laws, however, were not independent, autonomous party principles and the arbitral award was not binding.<sup>182</sup> The new economic policy followed by China motivated it to review its arbitration law. PRC tried to make domestic arbitration consistent with international standards by promulgating the Arbitration Law of 1994,<sup>183</sup> which contains important international principles. It enhances the independence of the arbitration process by preventing China’s agencies from interfering with the arbitration process through the appointment of arbitrators. Article 8 of the PRC Arbitration Law provides that “Arbitration shall be carried out independently according to law and shall be free from

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<sup>177</sup> Jennifer Sackin, ‘Online Dispute Resolution with China: Advantageous, But at What Cost?’ (2010) 12 *Cardozo Journal of Conflict Resolution* 245.

<sup>178</sup> Jingzhou Tao, *Arbitration Law and Practice in China* (2<sup>nd</sup> edn, Kluwer Law International 2008) 2.

<sup>179</sup> *ibid.*

<sup>180</sup> Zhang Yuqing and James S. McLean, ‘China’s Foreign Economic Contract Law: Its Significance and Analysis’ (1978) 8 *Northwestern Journal of International Law & Business* 120; Peter Fenn, Michael O’Shea and Edward Davies (eds.), *Dispute Resolution and Conflict Management in Construction: An International Review* (2<sup>nd</sup> edn, Routledge 2005) 45.

<sup>181</sup> Ge Liu, ‘International Commercial Arbitration in China: History, New Developments, and Current Practice’ (1995) 28 *The John Marshall Law Review* 539.

<sup>182</sup> Jingzhou Tao, *Arbitration Law and Practice in China* (2<sup>nd</sup> edn, Kluwer Law International 2008) 4.

<sup>183</sup> Adopted at the Ninth Meeting of the Standing Committee of the Eighth National People’s Congress on August 31, 1994 and promulgated by Order No.31 of the President of the People’s Republic of China on August 31, 1994.

interference of administrative organs, public organizations or individuals”. Article 14 of the Arbitration Law of 1994 also provides that “Arbitration commissions shall be independent from administrative organs and there shall be no subordinate relationships between arbitration commissions and administrative organs”. In addition, this law recognised the autonomy of the parties and gave them the freedom to choose the arbitrators.<sup>184</sup> Moreover it is gave the arbitral award binding force.<sup>185</sup>

In 1982, the Chinese State Council promulgated the Regulation on the Exploration of Offshore Petroleum Resources in Cooperation with Foreign Enterprises in 1982.<sup>186</sup> This law encouraged the amicable resolution of petroleum disputes, and in the case of failure to resolve the dispute in this way, the parties would be able to have recourse to an arbitration commission in China for mediation or arbitration.<sup>187</sup> The Sino- Foreign Equity Joint Venture Law of the PRC of 1983 provided in Article 97 that “Disputes arising over the interpretation or execution of the agreement, contract or articles of association between the parties to the joint venture shall, if possible, be settled through friendly consultation or mediation. Disputes that cannot be settled through these means may be settled through arbitration or judicial means”. These laws display China’s attitude to arbitration and are considered also as an important step forward.

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<sup>184</sup> Article 6 of the PRC Arbitration Law of 1994 provided that “The arbitration commission shall be selected by the parties through agreement”.

The English text is available at <[http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383756.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383756.htm)> accessed on 17 of May 2014.

<sup>185</sup> Article 9 of the PRC Arbitration Law of 1994 provided that :

A system of a single and final award shall be practiced for arbitration. If a party applies for arbitration to an arbitration commission or institutes an action in a People’s Court regarding the same dispute after an arbitration award has been made, the arbitration commission or the People’s Court shall not accept the case.

If an arbitration award is set aside or its enforcement is disallowed by the People’s Court in accordance with the law, a party may apply for arbitration on the basis of a new arbitration agreement reached between the parties, or institute an action in the People’s Court, regarding the same dispute.

The English text available on < [http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383756.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383756.htm)> accessed on 17 of May 2014.

<sup>186</sup> Regulations of the People’s Republic of China Concerning the Exploitation of Offshore Petroleum Resources in Cooperation with Foreign Enterprises Promulgated by the State Council on January 30, 1982, Order No.318.

<sup>187</sup> Article 27 of Regulation on the Exploration of Offshore Petroleum Resources in Cooperation with Foreign Enterprises of 1982 stated:

Any dispute arising between foreign and Chinese enterprises during the cooperative exploitation of offshore petroleum resources shall be settled through friendly consultations. If it cannot be resolved through consultation, mediation and arbitration may be conducted by an arbitration body of the People’s Republic of China, or the parties to the contract may agree upon arbitration by another arbitration body.

China ratified the New York Convention of 1958 on 2 December 1986.<sup>188</sup> This step by China enhanced international commercial arbitration and also had the effect of encouraging foreign investors to submit their disputes to international arbitration institution in China. In 1990, China also joined the ICSID Convention.<sup>189</sup>

### **3.4. The Attitudes of Petroleum Companies towards Arbitration:**

Arbitration became the preferred alternative to the national courts of the host state for the resolution of disputes because it possessed the advantages of enforceability, speed, neutrality, flexibility and economy.<sup>190</sup>

There were additional reasons for the international petroleum companies to prefer arbitration, and sometimes even to impose it on Third World countries. These companies did not believe that the legal frameworks of the host states were adequate for the settlement of such disputes, and therefore sought to avoid the national laws and the national courts of the host states. As far as laws were concerned, the companies regarded those of the host states as too immature to be applied to petroleum disputes and suffered from deficiencies in terms of their ability to absorb and comprehend the advanced technology which characterised such agreements. These factors are apparent in the Aramco award, where the arbitral tribunal stated that: “The regime of mining concessions, and, consequently also of oil concessions, has remained embryonic in Moslem law and is not the same in different schools. The principles of one school cannot be introduced into another, unless this is done by an act of authority.”<sup>191</sup> These companies also avoid submitting themselves to the national court of the host state. They believe that, because the other party would be the host state, the latter’s case would make a stronger impact on the court, so that the award would be in the host state’s interest. This view has been supported by commentators from

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<sup>188</sup> China accessed the New York Convention of 1958 in accordance with a decision issued by the Standing Committee of the National People’s Congress on China Joining the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted on 2 December 1986 and effective from 22 April 1987.

<sup>189</sup> International Centre of for Settlement of Investment Disputes available at <<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ContractingStates&ReqFrom=Main>> accessed on 1 June 2014.

<sup>190</sup> Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (5<sup>th</sup> edn, Oxford University Press 2009) 31-33; Sally A. Harpole, ‘Factors Affecting the Growth (or Lack Thereof) of Arbitration in the Asia Region’ (2003) 20 *Journal of International Arbitration* 31.

<sup>191</sup> *ARAMCO (Saudi Arabia v. Arabian American Oil Co)* (1958) 27ILR 136.

western countries, who argue that the judicial authorities of the host countries are not independent and are subject to political pressure.<sup>192</sup> Paulsson does not mince his words that:

Level-headed Third World negotiators will in fact concede that truly independent judiciaries do not yet exist in many of their countries. You can say it just as brutally as that. There is no reason to hide what is in everyone's mind. If you have a large contract involving the Government, there is no reason to pretend that the local judiciary will be exempt from political pressure.<sup>193</sup>

Also: "For it is a fact of life that the tradition of a truly independent judiciary, impervious to political pressures, is lacking in large parts of the Third World (which is not to say that it is always present in developed countries)."<sup>194</sup>

Arbitrators, by contrast, are chosen by the parties on the basis of their expertise in specific areas relevant to each particular dispute. These arbitrators have a background in commercial transactions and especially in petroleum agreements, which require knowledge of continually evolving technology, and such knowledge may be not available to a host state judge.<sup>195</sup>

### **3.5. Conclusion:**

This chapter has presented the views of both developing and developed countries towards arbitration and the reasons behind the diversity of attitudes. The points of view of developing countries and western countries tend to be different. There is a wary attitude towards international commercial arbitration in general, and petroleum arbitration in particular. Several reasons for this distrust have been suggested; some of these reasons, such as colonisation, breaches of the host state's sovereignty, and the superior economic power of the petroleum companies, are shared by the developing countries. Hostility has also stemmed from the absence of a legal culture in regards to arbitration and the lack of representation for developing countries in the institutions of arbitration. There are also reasons specific to each group of developing countries. Latin American countries take a stern view of arbitration because they consider it as foreign intervention by alternative means when it allows for foreign laws to be applied to such

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<sup>192</sup> Jan Paulsson, 'Third World Participation in International Investment Arbitration' (1987) 19 ICSID REVIEW- Foreign Investment Law Journal 44.

<sup>193</sup> Jan Paulsson, 'North- South Arbitration' (1984) 50 Journal of International Arbitration 42.

<sup>194</sup> Jan Paulsson, 'Third World Participation in International Investment Arbitration' (1987) 19 ICSID REVIEW- Foreign Investment Law Journal 44.

<sup>195</sup> Hans van Houtte, *The Law of International Trade* (Sweet & Maxwell 1995) 410.

disputes. African countries were colonised by western countries for many decades and subjected to unbalanced investment agreements with foreign companies.

However, many host states have changed their attitudes, and various factors have contributed to this alteration. The need to encourage foreign investment has led developing countries to adhere to new international and regional conventions, and the promulgation by the United Nation of the UNCITRAL Model law has also been an important positive influence on the arbitration laws in developing countries. Many new centres for arbitration have opened and arbitration laws have been updated or newly enacted, based partially or wholly on UNCITRAL Model law.

The situation in Iraq is not very different from that of other developing countries. It has taken a suspicious view of arbitration. It did not distinguish between domestic and international arbitration and regulated arbitration in accordance with its civil procedures. It ratified most of the regional arbitration conventions but it did not sign or ratify international conventions such as the New York Convention of 1958 and the ICSID Convention. In the 1960s many Iraqi investment agreements contained clauses referring to arbitration, although there was no uniformity in these agreements. Antipathy reached a peak in the nineteen seventies, when Iraq refused to be subjected to arbitration because it was considered prejudicial to the principle of national sovereignty.

The Iraqi suspicious view of arbitration based mainly on political concerns. After 2003, Iraqi attitudes to arbitration changed under the pressure of a need to rebuild its economy. This evolution has taken different forms, such as the enactment of new laws referring to arbitration as means of settling disputes and the establishment of a centre of arbitration. The Iraqi suspicious view of arbitration based mainly on political concerns.

Foreign petroleum companies prefer arbitration to other means of dispute settlement, because it avoids the interference of national courts and also frees them from the necessity to subject themselves to the laws of the host states, which they believe are insufficiently mature for the governance of such disputes.

## **Chapter Four: Petroleum Arbitration Agreements**

### **4.1. Introduction:**

International arbitration is a preferred mechanism for settling disputes, including petroleum disputes, but it cannot take place unless the parties agree to submit their dispute to arbitration. They do so through an arbitration agreement. In a typical petroleum dispute, the jurisdiction of the national court is excluded and the dispute is submitted to an arbitral tribunal. The agreement is considered to be the guide for all involved, as it contains provisions that define the procedures of the arbitration process as a whole. Hence, such an agreement contains the critical issues that govern the arbitration.

A dispute may already exist or may be anticipated, and so arbitration agreements need to cover both cases. Therefore, there are two types of arbitration agreement, which are known as arbitration clauses and submission agreements.

These arbitration agreements can only be enforced if certain formal requirements are met, and consequently any deficiency in these requirements renders the agreement unenforceable. The non-enforceability of the arbitration agreement extends to the settlement of the arbitral award itself.

The arbitration agreement plays an important role in the success of the arbitration process but only if it is independent of the petroleum agreement itself, which is primary. Logically and legally, every clause in the main agreement should follow the fate of the agreement that contains the clause. However, the typical petroleum arbitration agreement, whether it is a submission agreement or an arbitration clause, is independent of the main petroleum agreement. That means the validity of the arbitration agreement is determined separately from the validity of the main agreement itself. However, this issue raises debate, especially in the case of an arbitration clause that is considered an integral part of the main contract from the physical aspect.

To prepare the ground for an examination of the important issues related to arbitration agreements for petroleum disputes under Iraqi law, this chapter presents the two forms of this agreement in Iraqi law, the arbitration clause and the submission agreement. This chapter also

examines the formal and substantive requirements of a petroleum arbitration agreement, focusing on the Iraqi state and its entities, and their capacity to conclude the arbitration agreement in transition. The chapter will also consider whether or not Iraqi law considers petroleum disputes to be arbitrable. In addition, the chapter examines the Iraqi law applicable to arbitration agreements and whether this law is consistent with international standards. The subject of the applicable law is still controversial in petroleum arbitration, as it raises the important issue of the validity of arbitration agreements. In particular, the Iraqi CCP<sup>1</sup> does not contain the laws applicable to the arbitration agreement. It refers instead to the conflict of laws in Iraqi Civil Law No. 40 of 1951.<sup>2</sup>

This chapter seeks to establish whether current Iraqi provisions concerning arbitration agreements are sufficient to deal with petroleum arbitration agreement, or whether there is a need to update and amend them. In this chapter the author also seeks to answer the question of whether the petroleum arbitration agreement is considered a waiver of sovereign immunity jurisdiction. In addition, the author seeks to answer the question of whether petroleum arbitration agreements under Iraqi law will still be effective if the primary agreement is void. In other words, does Iraqi law consider the petroleum arbitration agreement to be separate from the main contract? This chapter will devote a separate section to examining the severability question under Iraqi law and compares the Iraqi approach to that of the PRC and of the UAE.

#### **4.2. The Types of Arbitration Agreement:**

There are two fundamental kinds of arbitration agreement. The first type is in the form of a clause that is usually contained in the main contract, a so-called “arbitration clause”. The second type is a separate contract and is known as a “submission agreement”.<sup>3</sup> According to Iraqi law, the parties can conclude an arbitration agreement before or after a dispute has arisen between them, and they can also enter into an arbitration agreement even if a procedure before the court

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<sup>1</sup> Iraqi Civil Procedures Law No. 83 of 1969, published in the Iraqi Official Gazette, vol. 2, 1969, 477.

<sup>2</sup> Iraqi Civil Law No.40 of 1951, published in the Iraqi Official Gazette, Issue 3015, 8 December 1951, 243.

<sup>3</sup> Article 7 (1) of the UNCITRAL Model Law of 1985 provides that “An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement”. UNCITRAL Model Law on International Commercial Arbitration with amendment as adopted in 2006 according to the General Assembly Resolution 40/72 on 11 December of 1985 and the General Assembly Resolution 61/33 on 4 December of 2006.

has started.<sup>4</sup> Article 251 of CCP, provides that “It is permissible to agree on resolving a certain dispute through arbitration. Also, it is permissible to agree on arbitration as a dispute resolution mechanism for all disputes that may arise from the implementation of a certain contract”.<sup>5</sup>

UAE law also recognises different kinds of arbitration agreements. Article 203 (1) of the Civil Procedures Law No 11 of 1992<sup>6</sup> provides that “The parties to a contract may generally stipulate in the basic contract or by a supplementary agreement”.<sup>7</sup> According to this Article, the arbitration agreement has two forms under UAE law. The first can take the form of a clause, while the second can take the form of a separate agreement.

The PRC Arbitration Law 1994<sup>8</sup> recognises arbitration agreements. Article 16 provides that “An arbitration agreement shall include arbitration clauses stipulated in the contract and agreements of submission to arbitration that are concluded in other written forms before or after disputes arise.”<sup>9</sup> According to Chinese law, an arbitration agreement can be a basic term in the main contract or can be a separate agreement concluded between the parties after the dispute arises.<sup>10</sup>

The following section will be divided into two sub-sections, the first one dealing with the arbitration clause and the second with the submission agreement.

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<sup>4</sup> Article 252 of CCP provides that:

The arbitration agreement may not be proved except by written evidence. However, arbitration can be agreed upon during the action (proceedings). If the arbitration agreement was proved to the court or if the court has approved such an agreement in the course of the proceedings, then the court shall decide to postpone the suit until an arbitral award is issued.

The translation from Arabic to English is available at < <http://gjpi.org/library/primary/statutes/>> accessed on 14 June 2014. The Court of Appeal of Baghdad decided that, if the parties decide to recourse to arbitration, the court will consider this decision and delay the suit until the arbitral award is rendered by the arbitral tribunal. The Court of Appeals of Baghdad- Resaffa, decision No 109 on 1 of February 2010.

<sup>5</sup> The translation from Arabic to English is available at < <http://gjpi.org/library/primary/statutes/>> accessed on 10 March 2014.

<sup>6</sup> The UAE Federal Code of Civil Procedures No. 11 of 1992 Published in the Official Gazette No. 235 of 8 March 1992.

<sup>7</sup> The translation from Arabic Language to English Language available at < <http://www.diac.ae/idias/rules/uae/chapter3/>> accessed on 2 September 2014.

<sup>8</sup> Adopted at the Ninth Meeting of the Standing Committee of the Eighth National People’s Congress on August 31, 1994 and promulgated by Order No.31 of the President of the People’s Republic of China on August 31, 1994.

<sup>9</sup> The English text is available at < [http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383756.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383756.htm)> accessed on 17 of May 2014.

<sup>10</sup> Tang Houzhi, ‘Arbitration- A Method Used by China to Settle Foreign Trade and Economic Disputes’ (1984) 4 Pace Law Review 519.



#### 4.2.1. Arbitration Clause:

An arbitration clause is a clause stating that disputes or differences which may arise from the main contract in the future will be settled by arbitration.<sup>11</sup> As mentioned above, this type of agreement is in the form of a clause that is one of the terms of the main agreement. This type of clause has flourished and become widespread in international trade in general, and in petroleum agreements in particular,<sup>12</sup> since the third decade of the twentieth century.<sup>13</sup> For example, Article 40 of the 1925 agreement between Iraq and the IPC contains an arbitration clause referring disputes to arbitration.<sup>14</sup>

An arbitration clause may be wide in scope, as when the parties agree to refer to the arbitration of all disputes which may arise from the contract concluded between them, regardless of the nature of the dispute (whether it is legal, financial or technical). Also this clause may be narrow if the parties limit it to a specific dispute.<sup>15</sup> Generally, this type of agreement is brief<sup>16</sup> and general, since it cannot contain all the details concerning a dispute which has not yet happened.<sup>17</sup>

The clause contains the contractual parties' agreement and the manner in which they should behave when disputes arise between them. The parties are obliged to submit their dispute to arbitration. The clause is considered to make apparent their desire to waive their right to litigation before the dispute arises.<sup>18</sup>

In the arbitration clause, the parties plan for the risk that a dispute may arise, and give their consent based on this possibility. This issue causes debate in civil law countries, because the

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<sup>11</sup> Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press 2008) 17.

<sup>12</sup> The concession agreement between Iran and the D'Arcy Company in 1901 Art 17, the concession agreement between Saudi Arabia and Aramco in 1933.

<sup>13</sup> *ibid.*

<sup>14</sup> The concession agreement between Iraq and IPC in 1925.

<sup>15</sup> Hans van Houtte, 'Conduct of Arbitral Proceedings' in Petar Sarcevic (ed), *Essays on International Commercial Arbitration* (Martinus Nijhoff 1989) 122; Oliver Dillenz, 'Drafting International Commercial Arbitration Clauses' (1997-1998) 21 *Suffolk Transnational Law Review* 221.

<sup>16</sup> *Arab African Energy Corporation Ltd. v. Olierproducten Nederland BV*, [1983] 2 *Lloyds' Rep* 419.

<sup>17</sup> Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (5<sup>th</sup> edn, Oxford University Press 2009) 86.

<sup>18</sup> Mauro Rubino-Sammartano, *International Arbitration Law and Practice* (2<sup>nd</sup> edn, Kluwer International Law 2001) 197.

dispute has not yet arisen, and the parties do not know if it will arise or not, so the clause expresses their agreement to an undetermined possibility.<sup>19</sup> Under Iraqi law arbitration clauses can be also drafted by the competent authority. For example, Article 69 of the “General Conditions of Contract for Works of Civil Engineering of Construction”<sup>20</sup> stipulates that any dispute arising out of the contract or performance of the work should first be referred to the engineer, who will give his decision to settle the dispute.<sup>21</sup> The engineer’s decision will be binding on the parties, but

If the Employer or the Contractor be dissatisfied with any such decision then and in any such case either the Employer or the Contractor may within 30 days after receiving notice of such decision require that the matter be referred to a Committee of Arbitration to be formed in the following manner.<sup>22</sup>

However, Iraqi Civil Law excluded this type of arbitration agreement with regard to insurance policies and considered arbitration clauses contained in policy documents to be null and void.<sup>23</sup>

#### **4.2.2. Submission Agreements:**

A submission agreement is a supplementary agreement between disputing parties to refer an existing dispute to arbitration. It is concluded between them after the dispute arises.<sup>24</sup>

The characteristics of a submission agreement are different from those of an arbitration clause. It is a separate document, and independent of the main contract. It consists of several clauses determining significant elements and matters governing the arbitration process. It identifies the subject matter of the dispute, the applicable law, the costs of the arbitration, identity and contact details of the agreed arbitrators and the mechanism for appointing them, the

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<sup>19</sup> Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (5<sup>th</sup> edn, Oxford University Press 2009) 87; W. Laurence Craig and others, *International Chamber of Commerce Arbitration* (3<sup>rd</sup> edn, Oxford University Press 2000) 38.

<sup>20</sup> General Conditions for Works of Civil Engineering Construction, issued by Iraqi Ministry of Planning, Legal Department 1973. The translation from Arabic language to English language is by Mahir Jalili, ‘International Arbitration in Iraq’ (1987) 4 *Journal of International Arbitration* 109.

<sup>21</sup> *ibid.*

<sup>22</sup> *ibid.*

<sup>23</sup> Article 985 (4) of Iraqi Civil Law No 40 of 1951, published in the Iraqi Official Gazette, Issue 3015 on 8 December 1951 243.

<sup>24</sup> Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford University Press 2007) 98.

place of arbitration, the domain of arbitration and other important matters.<sup>25</sup> Therefore it is usually longer than an arbitration clause. However, sometimes the submission agreement takes a brief form.<sup>26</sup>

The question about the parties' consent is less important than with arbitration clauses because the dispute is known and determined. The parties are dealing with a fact, not just a possibility; they have full knowledge and awareness of the dimensions of the dispute and so they know what they are agreeing to. The submission agreement therefore tends to be specific and tailored.

It is important to distinguish between a submission agreement and an arbitration clause. The latter is only considered valid and enforceable if followed by a valid and enforceable submission agreement.<sup>27</sup> The reason for this may be that, as the disputes become more clearly defined and the details become clearer, the arbitration clause, as mentioned above, becomes shorter and contains fewer details of the arbitration. Therefore, some legislation stipulates that the parties should conclude an agreement that expresses the particular arbitration procedures, even if the main contract contains an arbitration clause.<sup>28</sup> In any event, this situation has been changing recently, and some legislators have abandoned this view.<sup>29</sup>

The difference between the types of arbitration agreement is not a legal difference but rather a difference in form. Both types have the same legal implications. The Iraqi CCP does not

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<sup>25</sup> Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (5<sup>th</sup> edn, Oxford University Press 2009) 86.

<sup>26</sup> W. Laurence Craig et al., *International Chamber of Commerce Arbitration* (3<sup>rd</sup> edn, Oxford University Press 2000) 39.

<sup>27</sup> Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (5<sup>th</sup> edn, Oxford University Press 2009) 86.

<sup>28</sup> For example, Argentinian law stipulates that parties should conclude a submission agreement in order for the arbitration clause to be considered valid. The ICC Rules adopt the same doctrine and do not consider the arbitration clause effective unless the submission agreement is submitted by the parties. Alejandro E Fargosi, 'Commercial Arbitration in Argentina' (1989) 20 *University of Miami Inter- America Law Review* 687; W. Laurence Craig et al., *International Chamber of Commerce Arbitration* (3<sup>rd</sup> edn, Oxford University Press 2000) 38; Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell 2007) 122.

<sup>29</sup> French law changed in 1925. For more details, see Emmanuel Gaillard and John Savage (eds), *International Commercial Arbitration* (Kluwer Law International 1999) 191-196.

distinguish between the types of arbitration agreement.<sup>30</sup> Therefore in this study, the term “arbitration agreement” is used to refer to both types of arbitration agreement.

### **4.3. Requirements for the Validity of Petroleum Arbitration Agreements:**

There are several requirements for the petroleum arbitration agreement to be enforceable under Iraqi Law. Without these legal requirements, the arbitration agreement will be considered null and void and then the arbitration will not take place at all. These requirements concern the formal aspect of the arbitration agreement, which is that it should be in writing, or concern the substantive aspects of the agreement, such as the consent of the parties to the arbitration, the capacity of the contractual parties and arbitrability. Therefore, this section will discuss these requirements in two subsections. The first will discuss the formal requirements and the second will discuss the essential requirements.

#### **4.3.1. Formal Requirements:**

The foundation of any contract is consent. The agreement is concluded if there is consent between the parties, and without this important element the contract is null.<sup>31</sup> However, the arbitration agreement is subject to the further formal requirement that it must be embodied in writing.<sup>32</sup> This requirement is very important for many reasons. First, the arbitration agreement is considered the foundation of the arbitration: it is necessary in order for the arbitration to occur and it sets up the arbitration procedures. Second, it ensures that the parties agree to recourse to arbitration instead of submitting their dispute before the national courts, so it serves as a waiver of their right to take up their dispute before a national court.<sup>33</sup> Third, a written form is needed as evidence for the existence of this agreement and its contents.<sup>34</sup>

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<sup>30</sup> In this regard, Article 251 CCP.

<sup>31</sup> Article 73 of the Iraqi Civil Law provides that “A contract is the unison of an offer made by contracting party with the acceptance of another party in a manner which establishes the effect thereof in the object of the contract”. The translation from Arabic language to English language available at < <http://gjpi.org/library/primary/statutes/>> accessed on 23 March 2014.

<sup>32</sup> Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell 2007) 148.

<sup>33</sup> J.D.M Lew and S.M Kroll, *Comparative International Commercial Arbitration* (Kluwer International Law 2003) Para 7-7, 131.

<sup>34</sup> Toby Landau, ‘The Requirement of a Written Form for an Arbitration Agreement’ in Albert Jan van den Berg (ed), *International Commercial Arbitration: Important Contemporary Questions* (Kluwer Law International

However, the importance of the written requirement has been criticized by some authors. Kaplan has argued:

[I]f an arbitration clause is contained within an otherwise binding agreement why should it be necessary to be able to point to a signature or to a written record of the agreement? Contracts involving millions of dollars are created in this way and it is permissible to ask what is so special about the arbitration clause to require it to comply with Article 7(2).<sup>35</sup>

Herrmann also argues that the requirement for the arbitration agreement to be written is obsolete and there should be complete freedom of form.<sup>36</sup> That is because such requirements may restrict the parties' freedom, particularly in the scale of international commercial transactions, which require rapid action.<sup>37</sup> This view was adopted by the UNICTRAL Model Law<sup>38</sup>, which release the arbitration agreement from the requirement to be in written form in order to facilitate the commercial transaction in practice.<sup>39</sup>

However, among both supporters and opponents of this requirement there are several questions in respect of the writing requirement under Iraqi law, namely: Is an oral agreement valid or not? Do modern communication methods like telex, telephone or email 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 to be valid?

To answer the first question, there is no doubt that the written requirement has great weight in national laws. However, the legal importance of the written requirement varies from country to country, and there is no universal or fixed approach to determine the validity of an oral agreement. As a consequence, the answer will vary from country to country. One could classify

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2003) 43; Emilia Onyema, *International Commercial Arbitration and the Arbitrator's Contract* (Routledge 2010) 17.

<sup>35</sup> Justice Neil Kaplan, 'The Model Law in Hong Kong- Two Years On' (1992) 8 *Arbitration International* 223.

<sup>36</sup> Gerald Herrmann, "The Arbitration Agreement as the Foundation of Arbitration and its Recognition by the Courts" the ICC congress series no. 9 (1999)

<sup>37</sup> Alan Uzelac, 'The Form of the Arbitration Agreement and the Fiction of Written Orality. How Far Should We Go?' (2001) 8 *Croatian. Arbit Y bk* 83.

<sup>38</sup> Article 7 (2) of the UNCITRAL Model Law of 1985 amendment on 2006 provides that "The arbitration agreement shall be in writing".

<sup>39</sup> Jack Graves, 'ICA and The Writing Requirement: Following Modern Trends Towards Liberalization or Are We Stuck In 1958?' (2009) 3 *Annals FLB - Belgrade Law Review* 36; Richard Garnett and Luke Nottage 'The 2010 Amendments to the International Arbitration Act: A New Dawn for Australia?' (2011) 7 *Asian International Arbitration Journal* 29.

the national laws in terms of their attitudes to this requirement into three categories. The first group provides that the arbitration agreement must be in writing, otherwise it is considered null.<sup>40</sup> These national laws consider the written nature of the arbitration agreement as a requirement of validity, not for its evidentiary function only.<sup>41</sup>

The second group of national laws requires the arbitration agreement to be in written form only for evidential purposes.<sup>42</sup>

The third group of legal systems does not stipulate any particular form of writing. Such an approach is followed by Germany and Denmark.<sup>43</sup> An oral arbitration agreement is valid according to the German law if the parties stipulate that it is to be so.<sup>44</sup>

Iraqi Law follows the second approach. The Iraqi CCP stipulates in Article 252 that “The arbitration agreement may not be proved except by written evidence”.<sup>45</sup> Iraqi law does not stipulate the specific form of arbitration agreement and gives the parties absolute freedom to design its form. Arbitration agreements under Iraqi law are considered consensual contracts: this approach was approved by the Iraqi Court of Cassation which considers that the arbitration agreement is a consensual agreement that is evidenced in writing.<sup>46</sup>

The UAE has also adapted the second approach of a written requirement. The Civil Procedures Law of 1992, Article 203 (2), declares that the arbitration agreement cannot be approved unless it is in written form. The UAE draft arbitration law of 2008, Article 7 (2), requires that the arbitration agreement must be in writing, otherwise it is void.

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<sup>40</sup> Peter R. Sonderby, ‘Commercial Arbitration: Enforcement of an Agreement to Arbitrate Future Disputes’ (1971-1972) 5 *The John Marshall Journal of Practice and Procedure* 72.

<sup>41</sup> For example, the Jordanian Arbitration Law No. 31 of 2001 at Article 10 (A) provides that “the arbitration agreement must be in written, otherwise it void”.

<sup>42</sup> For instance the UK Arbitration Act of 1996, Section 5 (3) provides: “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 to be considered in writing as soon as the parties make reference to a 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. Article 1021 of the Netherlands Arbitration Act of 1986 provides 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”.

<sup>43</sup> Jur Jorgen Trolle, ‘National Reports: Denmark’ (1980) 28 *V YB Comm. Arb* 29.

<sup>44</sup> Ottoarndt Glossner, ‘National Reports: Germany’ (1980) 60 *YB Comm. Arb* 64.

<sup>46</sup> The Iraqi Court of Cassation decision No355 on 13 May 1971, published in *Judiciary Review* (2) third year 158.

Chinese law adheres to the first approach, that of a written requirement. Article 16 of the PRC Arbitration Law of 1994 provides that “An arbitration agreement shall include arbitration clauses stipulated in the contract and agreements of submission to arbitration that are concluded in other written forms before or after disputes arise”.<sup>47</sup> The arbitration agreement must be in writing otherwise it is considered void.<sup>48</sup>

The difference between the pertinent national laws on the significance of the written requirement is not the only difficulty. There are also differences among these legal systems as to the manner of meeting this requirement, and the acceptability of modern methods of communication, such as telex, e-mails and telegrams. Article II (2) of the New York Convention<sup>49</sup> defines the arbitration agreement in writing “[t]he term ‘agreement in writing’ shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams”. The Convention tries to give a definition of the term “agreement in writing” to overcome this obstacle, but this definition remains too narrow to cover all the issues related to this requirement, since modern technology is constantly developing new methods of communication.<sup>50</sup> However, the inflexibility of the New York Convention in regard to a definition of written agreement is alleviated by the definition of ‘writing’ in the UNCITRAL Model Law 1985. This is broader than the New York Convention definition and goes further in respect of modern communication methods. Article 7 (4) of the UNCITRAL Model Law provides for the validity of:

The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is acces[-]sible so as to be useable for subsequent reference; “electronic communica[-]tion” means any communication that the parties make by means of data messages; “data message” means information generated,

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<sup>47</sup> The English text is available at < [http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383756.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383756.htm)> accessed on 17 of May 2014.

<sup>48</sup> Article 18 of the China Arbitration Law of 1994 provides that “If an arbitration agreement contains no or unclear provisions concerning the matters for arbitration or the arbitration commission, the parties may reach a supplementary agreement. If no such supplementary agreement can be reached, the arbitration agreement shall be null and void”. The English text is available at <[http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383756.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383756.htm)> accessed on 17 of May 2014.

<sup>49</sup> The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, adopted on 3 May 1956, entered into force on 7 June 1959, UNTS vol 330, 3.

<sup>50</sup> Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford University Press 2007) 100.

sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.<sup>51</sup>

In spite of Iraq following the strict approach in respect to the written requirement, the CCP does not describe the written form, nor does it refer to modern telecommunications. Article 252 is devoid of any reference to the written form, and this presents a serious lacuna. The reason for this deficiency is that the CCP was promulgated in 1969, when many modern forms of written communication were yet to be discovered. This provision clearly needs to be updated if Iraq is to succeed in attracting more foreign investment.

With regard to the UAE, Article 203 (2) of the Civil Procedures Law of 1992 does not contain any definition of the written form. However, the UAE Federal Arbitration Draft Law of 2008 defined the written form in Article 7(2) and refers to modern telecommunications and the exchange of letters and email.

According to Tao, the PRC arbitration law does not provide a clear definition of written form and has left the door open in respect of the range of written forms of arbitration agreement.<sup>52</sup> Article 16, which is enacted to meet the formal requirement, mentions “other written form”, but this phrase is not clear. In any event, Article 11 of PRC Contract Law of 1999<sup>53</sup> provides a definition of ‘written form’ and thus it fills the shortcoming in arbitration law. It enumerates specific written forms, such as the exchange of letters, email, telex and facsimile.<sup>54</sup> This article mirrors the modern forms of writing and the development of methods of communication followed by commercial transactions: it captures any textual means that are used by the parties to give a visual expression of the contents of the agreement.

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<sup>51</sup> UNCITRAL Model Law on International Commercial Arbitration with amendment as adopted in 2006 according to the General Assembly Resolution 40/72 on 11 December of 1985 and the General Assembly Resolution 61/33 on 4 December of 2006.

<sup>52</sup> Jingzhou Tao, *Arbitration Law and Practice in China* (2<sup>nd</sup> edn, Kluwer Law International 2008) 42; Manjiao Chi, ‘Is the Chinese Arbitration Act Truly Arbitration-Friendly: Determining the Validity of Arbitration Agreement under Chinese Law’ (2008) 4 *Asian International Arbitration Journal* 104.

<sup>53</sup> Adopted at the Second Session of the Ninth National People’s Congress on March 15, 1999 and promulgated by Order No. 15 of the President of the People’s Republic of China on March 15, 1999.

<sup>54</sup> The China Contract Law of 1999 Article 11 provides that “A writing means a memorandum of contract, letter or electronic message (including telegram, telex, facsimile, electronic data exchange and electronic mail), etc., which is capable of expressing its contents in a tangible form”. The English text is available at < [http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383756.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383756.htm)> accessed on 17 of May 2014.



It is recommended that Iraqi law should follow the UAE Draft Law of 2008 by mentioning the form of the written document. It is worth mentioning that the DICAL adopted this approach and stipulates that the arbitration agreement must be in writing, otherwise the arbitration agreement will be invalid.<sup>55</sup>

Many legal systems do not require the arbitration agreement to be signed, so that the arbitration agreement meets the requirements simply by being written. However, the New York Convention requires the arbitration agreement to be signed by the parties: Article II (2) contains the phrase “signed by the parties”. Nevertheless, it could be said that this requirement has largely disappeared.<sup>56</sup> Iraqi law does not require the signature of the parties on arbitration agreements that are in the form of a submission agreement. However, the UAE Federal Arbitration Draft of 2008 follows a different approach: it stipulates that the agreement of arbitration is ‘written’ if it is signed by the parties.<sup>57</sup> Signatures are not necessary in the PRC’s arbitration law, where the written arbitration agreement is sufficient to meet the requirement for writing.<sup>58</sup>

In view of the abovementioned discussion, the author presents the view that Iraq should follow the approach of the Chinese Arbitration Law of 1994 by stipulating that the arbitration agreement must be in a written form, and that otherwise it will be null and void. In respect of petroleum arbitration agreements, the foundation of petroleum arbitration, without this agreement the arbitration will not occur. It constitutes a map for the contractual parties. It draws up the procedures of arbitration, and contains other important details. Without such a map the negotiations may go astray and the parties led into costly and time-wasting subsidiary disputes. There is a need for clarity and precision, and these features may be missing from an oral agreement, and so the written form is an important requirement in arbitration agreements. This is especially true in cases where the subject matter of the dispute is petroleum. The latter may constitute one of the main national resources of the host state, and the value of capital and

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<sup>55</sup> Article 4 (1) of Iraqi DICAL.

<sup>56</sup> Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (5<sup>th</sup> edn, Oxford University Press 2009) 89.

<sup>57</sup> The UAE Federal Arbitration Draft of 2008 Article 7 (2) ; Essam Al- Tamimi (ed), *Practitioner’s Guide to Arbitration in the Middle East and North Africa* (Juris Net LLC and Excelencia FZ 2009) 494.

<sup>58</sup> Frederick Brown and Catherine A. Rogers, ‘The Role of Arbitration in Resolving Transnational Disputes: A Survey of Trends in the People’s Republic of China’ (1997) 15 *Berkeley Journal of International Law* 329.

equipment supplied by investors is enormous. A written arbitration agreement upholds the rights of the parties and protects them from the danger of falling into the limbo that may result from an oral agreement. In the interests of clarity, the required written form should be defined by adopting the approaches of the UAE Arbitration Draft and the PRC Contract Law. The modern forms and methods of writing should be permissible.

The petroleum arbitration agreement, then, must be in written form and must also be signed by the parties, whether physically or electronically, in order to prove the parties' consent and to be considered as a valid agreement. In this regard, the Iraqi DICAL recognizes modern modes of communication, such as fax and email, and also stipulates that the arbitration agreement should be signed by the parties. The Iraqi draft approach is successful with regard to the written requirement.<sup>59</sup>

An important issue that arises in regard to the requirement for writing is the applicable law. There is a question of which applicable law is to govern the formal requirements and to ensure that the arbitration agreement is valid under Iraqi law. The CCP does not stipulate the law that should govern the formal requirements of arbitration agreements, and the law governing the formal requirements of a contract is therefore determined by the conflict rules of Iraqi civil law. Article 26 of the Iraqi Civil Law No. 40 of 1951 provides that "The form of contracts shall conform to the law of the state wherein they have been concluded".<sup>60</sup> And so, for example, if an agreement with an Iraqi entity subject to Iraqi civil law was concluded in France, then under the Iraqi civil law French law would be applicable.

The UAE Civil Procedures Law of 1992 does not contain an article regulating the applicable law, and neither is it covered in the Draft UAE Arbitration Law of 2008. However, Article 19 of the UAE Civil Law Transaction No.5 of 1985 provides that the formal requirements are either subject to the law of the state that is the common domicile of the contractual parties if they have the same domicile; or subject to the law of the state on whose territory the contract was concluded if the parties have different domiciles, unless the parties agree to apply another law.

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<sup>59</sup> Article 4 (1) of the Iraqi DICAL.

<sup>60</sup> The translation from Arabic language to English language is available at <<http://gjpi.org/library/primary/statutes/>> accessed on 23 March 2014.

The PRC Arbitration Law does not address the law that will govern the formal requirements of arbitration agreements.

#### **4.3.2. Substantive Requirements:**

The arbitration agreement will be valid substantially and thus enforceable if it is based on three foundations: consent, capacity and arbitrability. The parties to arbitration must give their consent, having the legal capacity to do so, the dispute must be one that is capable of being settled by arbitration. These requirements will be discussed in the three following sub-sections.

##### **4.3.2.1. Consent:**

Consent to arbitration 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. Most national laws and international conventions stipulate that consent must be in writing, and in some legal systems it must be signed in order to be valid.

Consent in an arbitration agreement means that the parties have agreed to refer their dispute to settlement by arbitration. It grants the arbitral tribunal the jurisdiction to settle the dispute, without which the tribunal can take no action.<sup>61</sup> If there is no consent between the parties, or if there is misrepresentation or duress, the arbitration agreement will be void, and no arbitration will take place.<sup>62</sup> Therefore, the parties should show their unequivocal consent to the arbitration, as in, for example, Article II (1) of the New York Convention, which requires the parties to the dispute to “undertake to submit to arbitration”.

Schreuer argues that consent is the convergence of the offer issued by one of the parties with acceptance from the other party.<sup>63</sup> The consent of the parties must be clear and not ambiguous, and this must be apparent in the words explaining the parties’ intention to have recourse to arbitration and the manner in which it is to be arranged. In other words, the existence of consent

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<sup>61</sup> Christoph Schreuer, ‘Consent to Arbitration’ [2005] 5 Transnational Dispute Management < URL: [www.transnational-dispute-management.com/article.asp?key=555](http://www.transnational-dispute-management.com/article.asp?key=555)> accessed on 30 April 2014; Andrew Newcombe and Liuis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 44.

<sup>62</sup> W T Major and Christine Taylor, *Law of Contract* (9<sup>th</sup> edn, Pearson Education Limited 1996) 5-7.

<sup>63</sup> Christoph Schreuer, ‘Consent to Arbitration’ [2005] 5 Transnational Dispute Management <URL: [www.transnational-dispute-management.com/article.asp?key=555](http://www.transnational-dispute-management.com/article.asp?key=555)> accessed on 30 April 2014.

depends on the clarity of the way the consent is formulated. Therefore, any vagueness in drafting the parties' intention can cause problems in determining the consent. The parties can explain their consent in any form or means of communication chosen from the means cited in the previous section.

By subjecting disputes arising from petroleum agreements to the jurisdiction of other courts or institutes, the host state accepts the exclusion of the jurisdiction of the national court. Without the host state's waiver of sovereign immunity in petroleum agreements or its consent to an arbitration agreement, it cannot be subjected to the jurisdiction of another state's courts. Therefore, Sullivan argues, consent in arbitration agreement expresses the host state's implied waiver of its sovereignty immunity of jurisdiction.<sup>64</sup>

The question arising here is whether the Iraqi state's consent to petroleum arbitration agreements can be considered as a waiver of Iraqi sovereign immunity jurisdiction. Iraq, like many civil law countries, does not regulate sovereignty issues. This is in contrast to common law countries.<sup>65</sup> Iraq is also not party to relevant international conventions, such as the ICSID or the UN Convention on Jurisdictional Immunities of States and Their Property of 2005 (hereinafter the CJISTP).<sup>66</sup> However, the present author's view is that Iraq waives its sovereign immunity impliedly as soon as it consents to arbitration. This implicit waiver applies across the board, and includes petroleum disputes. The existence of arbitration agreements in main petroleum contracts gives evidence that Iraq waives its jurisdiction immunity. Similarly the UAE does not regulate sovereignty issues. The PRC Civil Procedures Law of 1991<sup>67</sup> gives the jurisdiction to settle foreign-related disputes to an arbitration agency if there is a written arbitration agreement. Article 257 of this law provides that:

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<sup>64</sup> Gary B. Sullivan, 'Implicit Waiver of Sovereign Immunity by Consent to Arbitration: Territorial Scope and Procedural' (1983) 18 *Texas International Law Journal* 329 (comment); Wang Houli, 'Sovereign Immunity: Chinese Views and Practices' (1987) 1 *Journal of Chinese Law* 23.

<sup>65</sup> For example the UK promulgated the State Immunity Act 1978 and the USA promulgated the Foreign Sovereign Immunities Act of 1976.

<sup>66</sup> United Nations Convention on Jurisdictional Immunities of States and Their Property was adopted during the 65th plenary meeting of the General Assembly by resolution A/59/38 of 2 December 2004. In accordance with its articles 28 and 33, the Convention shall be open for signature by all States from 17 January 2005 until 17 January 2007, at United Nations Headquarters in New York.

<sup>67</sup> Adopted at the Fourth Session of the Seventh National People's Congress and promulgated by Order No. 44 of the President of the People's Republic of China on April 9, 1991.

[I]f the parties have (.....) written arbitration agreement stipulating the submission of the dispute for arbitration to an arbitral organ in the People's Republic of China handling cases involving foreign element, or to any other arbitral body, they may not bring an action in a people's court.<sup>68</sup>

China is one of the states that signed the CJISTP.<sup>69</sup>

#### **4.3.2.2. Capacity:**

The general rule in any contract is that the parties must have the legal capacity to conclude the contract; otherwise it is void. Arbitration agreements are no different from other contracts. The consent in an arbitration agreement must issue from parties having full capacity, otherwise the arbitration agreement will be considered void. Therefore the lack of parties' capacity provides a good basis to claim that an arbitration agreement is void and thus recognition and enforcement of an arbitral award may be refused.<sup>70</sup> The New York Convention of 1958 declared that "the recognition and enforcement of an arbitral award may be refused if the parties to the arbitration agreement were under incapacity".<sup>71</sup>

In Iraqi law, a natural person<sup>72</sup> or a legal person<sup>73</sup> can conclude an arbitration agreement if she, he or it has the legal capacity. However, this sub-section will focus on the capacity of the Iraqi state and its entities to enter into an arbitration agreement when it is one of the parties to an agreement with a foreign petroleum company.

The capacity of parties with regard to arbitration agreements raises some critical issues, such as the manner in which Iraqi law deals with the capacity of the state and its entities in regard to petroleum arbitrations, and the law that governs the parties' capacity to conclude arbitration agreements.

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<sup>68</sup> The English text is available at < [http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383756.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383756.htm)> accessed on 17 of May 2013.

<sup>69</sup> PRC sign this convention in 14 September 2014. United Nations Treaty Collection < [https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg\\_no=III-13&chapter=3&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=III-13&chapter=3&lang=en)> accessed on 12 June 2014.

<sup>70</sup> Article V (1) of New York Convention 1958.

<sup>71</sup> The New York Convention of 1958 Art V. 1 (a).

<sup>72</sup> The Iraqi civil law determines that the age at which a person has the legal capacity to conclude a contract, whether it is a civil or a commercial contract, is 18 years. Article 106 of Iraqi Civil Law No 40 Of 1951 provides that "the age of majority is eighteen years completed". The translation from Arabic language to English language is available at < <http://gipi.org/library/primary/statutes/>> accessed on 23 March 2014.

<sup>73</sup> Article 47 of Iraqi Civil Law No 40 of 1951.

## **Do the Iraqi State and Its Entities Have the Power to Conclude a Petroleum Arbitration Agreement?**

International conventions and national laws have different positions with regard to the capacity of the state and its entities to enter into an arbitration agreement.

At the international level, the Geneva Protocol of 1923<sup>74</sup> and the Geneva Convention of 1927<sup>75</sup> do not contain any article to regulate the states' capacity to enter into arbitration agreements. However, the European Convention of International Commercial Arbitration 1961<sup>76</sup> (hereinafter European Convention of 1961) declares explicitly that legal persons have the capacity to conclude arbitration agreements. Article 2 (1) provides that ““legal persons of public law” have the right to conclude valid arbitration agreements. This convention affects many countries which have incorporated this rule in their national law.<sup>77</sup>

On the level of national laws, there is no universal approach in respect of the capacity of the state and its entities. Some countries have a strict position towards the state and its entities. They impose rigorous restrictions or prohibit the state and its establishment from concluding arbitration agreements. For example, in a law of 30 November 1986, Libya prohibited recourse to arbitration, and the Libyan state and its entities do not have the capacity to enter into arbitration agreements, including petroleum arbitration agreements.<sup>78</sup> Some other states impose restrictions on the capacity of the state and its entities. For example, the Saudi Arabian Arbitration Regulation of 1983<sup>79</sup> restricts the capacity of the state and its agencies by requiring the agreement of the President of the Council of Ministries; otherwise the state does not have the

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<sup>74</sup> The Geneva Protocol on Arbitration Clauses of 1923 signed at Geneva on 24 September 1923, LNTS, vol XXVII, No. 678 of 1924, 158.

<sup>75</sup> The Geneva Convention for Execution of Foreign Arbitral Awards of 1927, signed at Geneva on 26 September of 1927, LNTS, vol XCII, 302.

<sup>76</sup> The European Convention 1961 of International Commercial Arbitration, entered into force on 7 January 1964, No. 7041, UNTS vol 484, 349.

<sup>77</sup> For instance, Article 177 (2) of the Swiss Private International Law of 1987 provided that “A state, or an enterprise held by, or an organization controlled by 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”.

<sup>78</sup> Jalal El Ahadab, ‘Arab Arbitration v. International Arbitration? The Case for a Reconciliation’ (2008) 25 Journal of International Arbitration 279.

<sup>79</sup> The Saudi Arabia Arbitration Regulation, Article 3, provides that “Government Agencies are not allowed to resorted to arbitration for the settlement of their disputes with third parties except after having obtained the consent of the President of the Council of Ministers. This provision may however be amended by resolution of the council of Ministers”.

capacity to enter into arbitration agreements.<sup>80</sup> In most European countries, and in some Latin American countries, such as Chile, the laws recognise the capacity of the state and its entities to conclude arbitration agreements without restriction.<sup>81</sup>

However, Iraqi law does not refer explicitly to the capacity of the state and its institutions to enter into arbitration agreements. Article 245 of the Iraqi CCP merely provides that the parties must have the capacity to enter into an arbitration agreement. However, this article does not refer to the capacity of a legal person or the Iraqi state's capacity to conclude international arbitration agreements. It also does not make any provision for international arbitration. The Iraqi DICAL also does not contain any article to define the capacity of the parties, particularly the capacity of a legal person, although it is concerned with international commercial arbitration. It could be inferred from that this draft left the issues to be regulated by the general principles of civil law, which explain the categories of legal persons and considers the state to belong to one of these categories. Article 47 of the Iraqi Civil Law provides that "Juristic persons are: a) The State".<sup>82</sup> At the same time, the Iraqi legislature has not promulgated any regulation to prohibit itself from settling its petroleum disputes by arbitration, nor has it imposed any restriction on recourse to arbitration. Also, practice shows that Iraq has concluded many petroleum agreements containing arbitration clauses, such as Article 40 of the petroleum agreement made as long ago as 1925 between Iraq and the IPC.<sup>83</sup> It could be concluded that Iraq has the capacity to conclude petroleum arbitration agreements, even though the Iraqi government rejected the submission to arbitration of disputes between Iraq and petroleum companies with the promulgation of Act No. 80 of 1961.<sup>84</sup> The Iraqi position is that it does not prohibit arbitration, but that it does not regard arbitration as the best option for the resolution of such disputes. So it can be argued that the Iraq state or any agency, enterprise, political subdivision or

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<sup>80</sup> W M Ballantyne, 'Arbitration in the Gulf States: "Delocalisation": A Short Comparative Study' (1985-1986) 1 Arab Law Quarterly 205.

<sup>81</sup> Rene David, *Arbitration in International Trade* (Kluwer Law and Taxation 1985) 171.

<sup>82</sup> The translation from Arabic language to English language is available at <<http://gjpi.org/library/primary/statutes/>> accessed on 23 March 2014.

<sup>83</sup> Article 40 of the petroleum agreement between Iraq and IPC.

<sup>84</sup> The law of determine the investment area of petroleum companies No 80 of 1961 publish in Iraqi Official Gazette, Issue 616 on 12 December 1961, 380.

instrumentality of the state, does have the sovereign authority to conclude arbitration agreements.<sup>85</sup>

Like Iraqi law, the UAE Federal Civil Procedures Law does not define what constitutes a legal person. It stipulates that the parties who conclude the arbitration agreement should have full capacity,<sup>86</sup> but does not state whether the parties have to be natural persons or legal persons. However, the UAE Federal Arbitration Draft of 2008 mentions the capacity of a legal person in Article 7 (1). The PRC Arbitration Law of 1994 also provides in Article 2 that “legal persons and other organizations that are equal subjects may be arbitrated”.<sup>87</sup>

### **Which Law Is to Govern the Parties’ Capacity in Petroleum Arbitration Agreements?**

The choice of the law which is to govern the authority of the state and its entities is important in order to determine whether the state has the capacity to enter into an arbitration agreement. As a general rule in Iraqi law, capacity is subject to personal law. This means that 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 “capacity shall be governed by the law of the state of which the person (individual) is a national”.<sup>88</sup> The law that applies is national law not domicile law, meaning that the law of the individuals that rely or a legal entity’s place of incorporation on head office will determine the matter.

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<sup>85</sup> In this regard see Article 2 (b) of CJISTP of 2005 which provides 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”. United Nations Convention on Jurisdictional Immunities of States and Their Property was adopted during the 65th plenary meeting of the General Assembly by resolution A/59/38 of 2 December 2004. In accordance with its articles 28 and 33, the Convention shall be open for signature by all States from 17 January 2005 until 17 January 2007, at United Nations Headquarters in New York.

<sup>86</sup> Article 203 (4) of UAE Civil Procedures Law No 11 of 1992.

<sup>87</sup> The English text is available at < [http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383756.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383756.htm)> accessed on 17 May 2014.

<sup>88</sup> The translation from Arabic language to English language available at < <http://gjpi.org/library/primary/statutes/>> accessed on 23 March 2014.



The question then arises as to whether this principle also applies to the parties' capacity in respect of petroleum arbitration agreements.

Before answering this question it would be helpful to review first of all the New York Convention,<sup>89</sup> which addresses the parties' capacity to conclude arbitration agreements. This convention offers a popular provision concerning the applicable law of capacity. Article V (1) (a) refers to "the law applicable to them" without determining exactly which law should govern capacity. According to Craig, the normal practice is to refer to the personal law, whether that of the nationality or the domicile, rather than to the law chosen by the parties.<sup>90</sup> This principle has gained wide acceptance despite the convention's failure to determine a universal approach in regard to the application of the law of nationality or domicile.<sup>91</sup> However, Iraq was not a party to the New York Convention, and so it can be argued that Iraq does not need to depend on this principle with regard to capacity in petroleum arbitration agreements.

The UAE Civil Procedures Law No11 of 1992 does not stipulate the law that governs legal capacity. However, Article 11 (1) of the UAE Civil Law No 5 of 1985 provides that the law governing the legal capacity is personal law, and thus the parties' nationality is the decisive factor. This is similar to the Iraqi approach.

The PRC's Arbitration Law of 1994 does not determine which law should govern the parties. Likewise, Article 143 of the PRC Civil Code of 1986 does not determine the applicable law of the capacity of a legal person; it only determines the applicable law of the natural person. However Article 14 of Decree of the President of the People's Republic of China No. 36 of 2010<sup>92</sup> provides that:

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<sup>89</sup> Similarly, the European Convention adapts this principle in Article 6 (2) which provides "(...) courts of Contracting States shall examine the validity of such agreement with reference to the capacity of the parties, under the law applicable to them".

<sup>90</sup> W. Laurence Craig et al., *International Chamber of Commerce Arbitration* (3<sup>rd</sup> edn, Oxford University Press 2000) 44, foot note 3.

<sup>91</sup> For Example, Article 11 (1) of Egyptian Civil Law No 131 of 1948, Article 11 of Libyan civil Law of 1953, and Article 33 of Kuwaiti Law to regulate the relationship contain foreign element No 5 of 1961.

<sup>92</sup> The Law of the People's Republic of China on the Laws Applicable to Foreign-related Civil Relations was adopted on 28 October 2010 at the 17th session of the Standing Committee of the 11th National People's Congress of the People's Republic of China, and came into effect on 1 April 2011.

Items such as the civil capacity, civil competence, organizational structure and shareholder rights, etc. of a juridical person and its branches are governed by the law of the place of registration.

The law of the principal place of business of a juridical person may be applicable where such principal place of business is different from the place of registration. The principal place of business of a juridical person shall be deemed to be its habitual residence.<sup>93</sup>

A review of the New York Convention and the UAE approaches to the applicable law on the parties' capacity suggests that there is consensus that the applicable law will be personal law, and dependent on the nationality criterion. Therefore, returning to the issue of Iraq, it is suggested that it should apply Article 18 of its Civil Law, meaning that the issue of capacity will be determined by personal law, and that the national law of the parties will be considered in this kind of agreement.

The personal law as the applicable law has some drawbacks. However, one of these is that a state could use the personal law in a plea to avoid arbitration, on the ground that, under the law of nationality, that state's legislation lacks the legal capacity to conclude an arbitration agreement.<sup>94</sup> This could cause violation to the principle of good faith, and could also lead to instable transactions.<sup>95</sup> It is unacceptable that parties who enter into contractual relationships freely and who accept the submission of the dispute to arbitration can later defeat this agreement by invoking their national law. Previous knowledge of national laws by contractual parties and the good faith principle should prevent the state or its entities from avoiding arbitration agreement under the plea of some restrictions contained within its own national laws. Legal restrictions have been introduced in some countries<sup>96</sup> in order to prevent the parties to arbitration agreements from hiding behind their personal legislation.

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<sup>93</sup> English text is available at < <http://cjcl.oxfordjournals.org/content/1/1/185.full>> accessed on 12 June 2014.

<sup>94</sup> Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford University Press 2007) 130.

<sup>95</sup> H. Van Houtte, *The Law of International Trade* (Sweet & Maxwell 1995) 389; W. Laurence Craig and others, *International Chamber of Commerce Arbitration* (3<sup>rd</sup> edn, Oxford University Press 2000) 45.

<sup>96</sup> 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".

To prevent the parties to arbitration agreements from hiding behind their personal legislation, some contemporary opinion holds that certain mandatory rules of law and international public policy should apply.<sup>97</sup>

However, in the present author's view, capacity should be considered a personal case and it should be covered by the personal law of the contractual parties. It should also follow a universal approach in regard to which personal law is the law of nationality or domicile. Also, if we consider the 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 characterized by stability and it is easy to determine it through identifying the state to which the party belongs, thus determining 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, for example, in cases where one of the parties has more than one nationality.

#### **4.3.2.3. Arbitrability:**

Arbitrability as a substantive requirement deals with the issue of whether the dispute is capable of being settled by arbitration. In general, the subject matter of an arbitration agreement must be capable of being settled by arbitration, otherwise the arbitration agreement would become void and thus unenforceable.<sup>98</sup>

In this regard, we should distinguish between the term "scope of arbitration" and the term "arbitrability". As mentioned above, the arbitrability issue is connected with the validity of settling the dispute by arbitration, while the "scope" or "domain" of the arbitration agreement deals with the kind of disputes that are covered by the arbitration agreement. Therefore the

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<sup>97</sup> Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell 2007) 187.

<sup>98</sup> Richard C. Reuben, 'First Options, Consent to the Arbitration, and the Demise of Arbitrability: Restoring Access to Justice for Contracts with Arbitration Provisions' (2003) 56 SMU Law Review 819; Loukas A. Mistelis, 'Arbitrability- International and Comparative Perspectives. Is Arbitrability a National or an International Law Issue?' in Loukas A. Mistelis and Stavros L. Brekoulakis (eds), *Arbitrability: International & Comparative Perspectives* (Kluwer Law International 2009) 3.

parties to an arbitration agreement may contain in that agreement different types of disputes to be settled by arbitration, but one of them may be incapable of settlement by arbitration.<sup>99</sup>

The arbitrability issue is controlled by different factors, including economic and political ones, and it is also impacted by the public policy of the country.<sup>100</sup> In other words, if the arbitration agreement conflicts with the public policy of the state it will be considered inarbitrable and then void as a matter of domestic law.<sup>101</sup> Public policy as a notion is of course flexible, and differs from country to country and from time to time.<sup>102</sup>

It is recognised that each state has the freedom to determine through its laws and policies which issues may or not be settled by arbitration. International conventions recognise this right of the states. Article II (1) of the New York Convention provides that the subject matter must be of a kind “capable of settlement by arbitration”.

Unsurprisingly, national laws take various approaches to determine the disputes capable of being settled by arbitration. Iraqi law declares that arbitration is not valid except in matters which it determines.<sup>103</sup> The general rule in Iraqi law in regard to arbitration is that an issue that cannot be resolved by settlement, such as crimes, taxes and other matters of public policy, is considered inarbitrable. Article 704 (1) and (2) of the Iraqi Civil Code No. 40 of 1951 sets out the scope of settlements in Paragraph (1), which provides that “[T]he subject matter of the compromise must be something against which a consideration may be taken and must be

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<sup>99</sup> Klaus Peter Berger, ‘Re-examining the Arbitration Agreement: Applicable Law – Consensus or Confusion?’ [2006] < <http://law.queensu.ca/international/globalawprogramms>> accessed at 14 November 2011; W. Laurence Craig et al, *International Chamber of Commerce Arbitration* (3<sup>rd</sup> edn, Oxford University Press 2000) 86.

<sup>100</sup> Marna Lourens, ‘The Issue of ‘Arbitrability’ in Context of International Commercial Arbitration (Part1)’ (1999) 11 South Africa Mercantile Law Journal 363; Ilias Bantekas, ‘The Foundations of Arbitrability in International Commercial Arbitration’ (2008) 27 Australian Ybk of Intl L 193.

<sup>101</sup> Nigel Blackaby et al., *Redfren and Hunter on international Arbitration* (5<sup>th</sup> edn, Oxford University Press 2009) 124.

<sup>102</sup> Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell 2007) 292.

<sup>103</sup> Article (254) of Iraqi CCP provided that “Arbitration is only allowed in matters that can be subject to reconciliation, and by parties who are entitled to dispose of their rights. Arbitration may be implemented among spouses according to the civil status law and the provisions of the Islamic [*Share’a*]”. The translation from Arabic language to English language is available at < <http://gjpi.org/library/primary/statutes/>> accessed on 23 March 2014.

defined if it is something which needs to be received and delivered”.<sup>104</sup> It seems from this article that arbitration is not permissible in contracts that are free of charge, such as secondment contracts and those based on a donation but it is permissible in other contracts, such as insurance contracts and mortgage contracts, as long as these do not conflict with public policy.<sup>105</sup> Paragraph (2) of this Article set out the issues that were to be considered inarbitrable by stipulating 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.<sup>106</sup>

The Iraqi DICAL also provides that the arbitration should not be on issues which may not be subject to reconciliation, or which are contrary to public order or related to nationality or personal statutes, except for issues involving a financial interest.<sup>107</sup>

The UAE law has the same approach, and does not determine explicitly the matters that may be resolved by arbitration. According to Luttrell, it considers inarbitrable matters which cannot be resolved by settlement.<sup>108</sup> In China, the arbitration law offers more determination in regard to disputes capable of being settled by arbitration. Tao explains that it permits all disputes having a commercial nature and extends also to disputes over rights of intellectual property and securities.<sup>109</sup> However, this law excludes administrative disputes, personal rights disputes, labour disputes and agricultural projects.<sup>110</sup>

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<sup>104</sup> The translation from Arabic language to English language available at < <http://gjpi.org/library/primary/statutes/>> accessed on 23 March 2014.

<sup>105</sup> أسعد فاضل حكام عقد التحكيم وإجراءاته: دراسة مقارنة، دار نيبور، 63 [Assad Fadell, *The Provisions of Arbitration Agreement and Its Procedures: Comparative Study* (Niebuhr publications 2011) 63].

<sup>106</sup> The translation from Arabic language to English language available at < <http://gjpi.org/library/primary/statutes/>> accessed on 24 March 2014.

<sup>107</sup> Article 9 of Iraqi International Commercial Arbitration Draft of 2011.

<sup>108</sup> Sam R. Luttrell, ‘Arbitration in Dubai’ (2009) 12 *International Trade and Business Law Review* 140.

<sup>109</sup> Jingzhou Tao, *Arbitration Law and Practice in China* (2<sup>nd</sup> edn, Kluwer Law International 2008) 59.

<sup>110</sup> China Arbitration Law 1994 Article 3 (1) and (2) provides that “The following disputes may not be arbitrated:

(1) Marital, adoption, guardianship, support and succession disputes;  
(2) administrative disputes that shall be handled by administrative organs as prescribed by law”. The English text is available at < [http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383756.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383756.htm)> accessed on 17 May 2014.

The arbitrability issue raises important questions in Iraqi law: are petroleum disputes capable of being resolved by arbitration? And which law should govern the question of arbitrability?

Generally, the national laws of petroleum-producing countries differ in regard to whether petroleum disputes are capable of being settled by arbitration. Some countries consider petroleum disputes arbitrable,<sup>111</sup> but others exclude petroleum disputes from settlement by arbitration.<sup>112</sup> Iraqi law permits petroleum disputes to be settled by arbitration, although it does not determine explicitly whether petroleum disputes are arbitrable. However, many petroleum agreements<sup>113</sup> concluded with different petroleum companies refer to the settlement by arbitration of disputes arising from the agreements. Moreover, the Iraqi DLOG declares explicitly that petroleum disputes may be settled by arbitration.<sup>114</sup>

In a landscape of diversity, arbitrability raises the issue of conflict of laws, especially when the disputes involve a petroleum agreement. In these cases, the question arises as to which law is applicable to arbitrability, and according to which law can the arbitrator or the court determine whether or not the dispute is arbitrable; and also which law is applicable under Iraqi law

Indeed, in order to determine the law that governs arbitrability we should distinguish between two cases. The first case is when the issue of arbitrability arises before the arbitral award is rendered, based on the claim of one of the parties that the arbitration agreement is not valid because the dispute is inarbitrable.<sup>115</sup> The second case is when the arbitrability arises before a national court at the stage of recognition and enforcement of the arbitration award. In the first case, arbitrability is considered a substantive requirement and it must be subject to the law governing the arbitration agreement.<sup>116</sup> This approach is that used by certain international

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<sup>111</sup> For instance, Libyan Law No. 25 of 1955 and the Iranian Petroleum Law of 1957.

<sup>112</sup> Spanish Petroleum Law of 26 of November 1958 Article 57.

<sup>113</sup> For instance, Article 40 of petroleum agreement of 1925.

<sup>114</sup> Article 39 (c) from the Iraqi DLOG.

<sup>115</sup> Ilias Bantekas, 'The Foundations of Arbitrability in International Commercial Arbitration' (2008) 27 Australian Yearbook of International Law 193.

<sup>116</sup> This approach can be concluded from the international conventions. Article IV (2) (a) of the European Convention 1961 provides "under the law to which the parties have subjected their arbitration agreement". The European Convention 1961 of International Commercial Arbitration (enter into force 7 January 1964) 7041 UNTS vol 484, 349. According to this convention, the law governing arbitrability is the law governing the

conventions. For example, Article IV (2) (a) of the European Convention 1961 provides “under the law to which the parties have subjected their arbitration agreement” the law governing arbitrability is the law governing the arbitration agreement.

In the second case, arbitrability is important to the recognition and enforcement of the arbitration agreement. Then, a court dealing with the matter will apply its national law to decide whether or not the dispute is capable of being settled by arbitration.<sup>117</sup> This principle has been adopted by many international conventions. Article 1(b) of the Geneva Convention on Arbitration of 1927 provides that “the subject-matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon”. Also, Article V (2) of the New York Convention declares that the arbitral award cannot be enforced if “the subject matter of the differences is not capable of settlement by arbitration under the law of that country”. Moreover, the European Convention of 1961 has the same approach in Article IV (2) (b), similarly referring to “the law of the country in which the award is to be made”. This approach was also adopted by the UNCITRAL Model Law of 1985 in Article 34.

The Iraqi CCP does not determine the applicable law of arbitrability. It could be said that Article 25 (1) of the Iraqi Civil Law applies. This Article will be discussed extensively in the following section.<sup>118</sup>

To sum up, the arbitrability issue is governed by the law governing the arbitration agreement and also by the national law of the court which enforces the arbitration award. International conventions do not have a uniform approach with regard to the law that should govern arbitrability. They refer to two laws, which may lead to the possibility of inconsistency. The judge applies its national law and the arbitrator applies the law of the arbitration agreement in regard to arbitrability, because the arbitrator cannot know in advance which country will enforce the award of arbitration.

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arbitration agreement; See Emilia Onyema, *International Commercial Arbitration and the Arbitrator's Contract* (Routledge 2010) 19.

<sup>117</sup> Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford University Press 2007) 225.

<sup>118</sup> See page 144 of the following section.

#### 4.4. The Applicable Law of Petroleum Arbitration Agreements:

The petroleum arbitration agreement, like any other arbitration agreement concerning investment agreements or commercial transactions, raises issues related to the applicable law. But there are also special issues that arise, and these will be discussed here.

In fact, this issue comes into existence when one of the partys' claims before the arbitrator that the arbitration agreement is not valid on the grounds of the formal requirements, or the parties consent and their capacity or the disputes is not arbitrable. The arbitrator should therefore settle these issues on the basis of the law governing the arbitration agreement.<sup>119</sup>

Also, the issue of the law governing the arbitration agreement is raised before the national court on the occasion of recognition and enforcement of the arbitral award after it has been rendered.<sup>120</sup> Therefore, for all these possibilities, it is necessary to determine the law governing the arbitration agreement in order to determine its validity.

The present author view is that express choice by the parties of the law governing the arbitration agreement is of great advantage in avoiding the difficulties of conflict of laws. Also, if such a choice is made, it will be easy for the arbitrators to know the law that will decide the validity of the arbitration agreement and this will save the time and effort for both the parties and the arbitral tribunal. Nevertheless, the parties often do not determine the law that will govern the arbitration agreement, especially when the arbitration agreement takes the form of a clause inside the main contract.<sup>121</sup> The parties prefer to leave this matter to the discretion of the arbitral tribunal. In most cases, when the parties cannot reach an agreement they are more worried about the petroleum agreement clauses than the issue of the law governing the arbitration clause.<sup>122</sup> In case of the parties' choice, the domestic court or the arbitral tribunal must determine the law that

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<sup>119</sup> Gary Brian Born, *International Commercial Arbitration*, vol 1 (Kluwer Law International 2009) 426.

<sup>120</sup> Article V (1) (a) of the New York Convention 1958; Leonardo Graffi, 'The Law Applicable to the Validity of the Arbitration Agreement: A Practitioner's View' in Franco Ferrari and Stefan Kröll (eds), *Conflict of Laws in International Arbitration* (European Law Publisher 2011) 22.

<sup>121</sup> Gary Brian Born, *International Commercial Arbitration*, vol 1 (Kluwer Law International 2009) 428; Hege Elisabeth Kjos, *Applicable Law in Investor-State Arbitration: The Interplay between National and International Law* (Oxford University Press 2013) 116.

<sup>122</sup> Carlo Croff, 'The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem?' (1982) 16 *International Lawyer* 613; Bernard Hanotiau 'The Law Applicable to Arbitrability' report, ICCA Congress Paris, 1999, (no.9) p. 146-167; Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell 2007) 142.



governs the arbitration agreement. This question raises vigorous debates. Several possibilities and presumptions result from this debate that could be applied to the arbitration agreement, particularly when the arbitration agreement is autonomous of the main contract.<sup>123</sup> In this regard, there are significant questions to be answered, such as what is the applicable law that should govern the arbitration agreement and how to determine the law that governs the petroleum arbitration agreement under Iraqi law.

To answer the first question, it could be concluded from the international conventions<sup>124</sup> and national laws<sup>125</sup> that there are two laws that can be applied to the arbitration agreement. The first is the law which governs the main agreement and the second is the law of the seat of arbitration.

It seems logical that the law governing the main contract should govern the arbitration agreement also. Since this agreement sometimes has an arbitration clause<sup>126</sup> forming part of the contents of the main contract, regardless of the principle of severability of the arbitration agreement,<sup>127</sup> this approach has been supported and adopted by many authors and national laws.<sup>128</sup> One author states that “The autonomy of the arbitration clause of the principal contract does not mean that they are totally independent one from the other”.<sup>129</sup>

In addition, this view was adopted by arbitration practice in the ICC Award, Case No. 2626, which held that “the law applicable to the main contract also tacitly governs the situation of the

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<sup>123</sup> Nigel Blackaby et al., *Redfren and Hunter on International Arbitration* (5<sup>th</sup> edn, Oxford University Press 2009) 166.

<sup>124</sup> Article V (a) of New York Convention 1958 and European Convention 1961 Article VI (2) and also Article 34 (2) of the Model Law.

<sup>125</sup> Article 178 (2) of Swiss Private International Law of 1987, and Article 458 of Algerian Arbitration Law of 1993.

<sup>126</sup> In this regard see *Union of India v McDonnell Douglas Corp* [1993] 2 Lloyd’s Rep 48. In this case, the court stated that “An Arbitration Clause in a commercial contract like the present one is an agreement inside an agreement (.....)The parties may make an express choice of law to govern their commercial bargain and that choice may also be made of the law to govern the agreement to arbitrate”.

<sup>127</sup> Nigel Blackaby et al., *Redfren and Hunter on International Arbitration* (5<sup>th</sup> edn, Oxford University Press 2009) 166.

<sup>128</sup> Likewise, according to the Swiss Private International Law Act 1987, the law applicable to the arbitration agreement may be the same law that governs the main contract. Article 178 of this law provides that “As to substance, the arbitration agreement shall be valid if it complies with the requirements of the law chosen by the parties or the law governing the object of the dispute and, in particular, the law applicable to the principal contract, or with Swiss law”.

<sup>129</sup> Yves Derains, ‘The ICC Arbitrate Process, Choice of Law Applicable to the Contract and International Arbitration’ (1995) 6 ICC International Court of Arbitration Bulletin 16-17.

arbitration clause, in the absence of any specific provisions”.<sup>130</sup> Therefore, the law governing the main contract may govern the arbitration agreement as a choice when the express choice of the parties is absent, even where the arbitration agreement is autonomous of the main contract as mentioned above.

However, in 1952 Professor Sauser Hall, in a report submitted to the Institute of International Law, stated that the law of the seat of arbitration should govern the arbitration totally, including the arbitration agreement.<sup>131</sup> He justified his opinion on the basis of the contractual and jurisdictional nature of arbitration. This leads inevitably to applying the law of the state which has the closest connection to the arbitration, which is the state containing the venue of the arbitration procedures.<sup>132</sup> This point of view was adopted by the Amsterdam Resolution of 1957 in Article 11.<sup>133</sup> The law of the seat of arbitration as the law applicable to the arbitration agreement has been given great weight in arbitration practice, national law and international conventions. In *Deutsche Schachtbau v. Shell International Petroleum Co Ltd*<sup>134</sup> the law governing the arbitration agreement was Swiss law, although the arbitral tribunal decided to apply general principles of law.<sup>135</sup> The law of the seat of arbitration finds wide acceptance in private international law, because such law is considered to have the closest connection with the arbitration agreement. This seems obvious from Article V (1) (a) of the New York Convention, which gives weight to the law of the seat in cases where the parties do not choose the law governing their arbitration agreement.<sup>136</sup> Moreover, this approach can be found in Article 18 (1)

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<sup>130</sup> S. Jarvin and Y. Derains, *Collection of ICC Arbitral Awards 1974-1985* (1990) 316.

<sup>131</sup> Sauser Hall, ‘The Arbitration in Private International Law’ (1952) 1 Yearbook of Institute of International Law 530 (French languages).

<sup>132</sup> *ibid.*

<sup>133</sup> Article (11) of Amsterdam Resolution of 1957 provided that:

The rules of choice of law in force in the state of the seat of the arbitral tribunal must be followed to settle the law applicable to the substance of the difference

Within the limits of such law, arbitrators shall apply the law chosen by the parties or, in default of any express indication by them, shall determine what is the will of the parties in this respect having regard to all the circumstances of the case.

If the law of the place of the seat of the arbitral tribunal so authorizes them, the parties may give the arbitrators power to decide *ex cequo et bono* or according to the rules of professional bodies.

<sup>134</sup> *Deutsche Schachtbau v. Shell International Petroleum Co Ltd* [1991] 1 A.C. 295.

<sup>135</sup> *ibid* 310.

<sup>136</sup> Article V (1) (a) of the New York Convention 1958 which provide that “under the law of the country where the award was made”.

of the ICC Rules of 2012, which provide that “The place of the arbitration shall be fixed by the Court unless agreed upon by the parties”.<sup>137</sup>

It seems that the international conventions, in addressing the issue of applicable law, give the law of the seat of arbitration great importance by subjecting the arbitration agreement to this law if the parties do not choose the law. It should be noted that the UNCITRAL Model Law 2010 considered this approach to determine the law which applies to arbitration agreements in Article 35 (1) “(.....) Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate”.

Based on this review of the international conventions and national laws, the author’s view is that, when the parties cannot reach agreement to determine the law applicable to their arbitration agreement, the law that should govern the arbitration agreement should be the law of the main contract because it is considered the closest to the parties’ will. Also, there is a close relationship between the arbitration agreement and the main contract, because the aim of the former is to settle the dispute arising from the latter. Moreover, the choice of law of the main contract might limit the conflict of law by applying a uniform legal system to govern both contracts instead of different laws. Furthermore, applying this law can avoid the contrast of autonomous arbitration agreements in particular. Some laws do not accept this principle, as will be discussed in the next section of this chapter.

In connection with the second question, it could be said that determining the applicable law of petroleum arbitration agreement under Iraqi law raises difficulties. That is because, like many national laws, Iraqi law has been silent on this issue it does not regulate arbitration arising from

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<sup>137</sup> Article 18 (1) of ICC Rules, 2012; Article VI (2) of European Convention on International Commercial Arbitration of 1961 which provided that Furthermore, the European Convention of 1961 adopted this basis in Article VI (2) which provides that:

In taking a decision concerning the existence or the validity of an arbitration agreement, courts of Contracting States shall examine the validity of such agreement with reference to the capacity of the parties, under the law applicable to them, and with reference to other questions.

- (a) Under the law to which the parties have subjected their arbitration agreement;
- (b) Failing any indication thereon, under the law of the country in which the award is to be made;
- (c) failing any indication as to the law to which the parties have subjected the agreement, and where at the time when the question is raised in court the country in which the award is to be made cannot be determined, under the competent law by virtue of the rules of conflict of the court seized of the dispute.

A court may also refuse recognition of the arbitration agreement if under the law of that jurisdiction the dispute is not capable of settlement by arbitration.

petroleum disputes.<sup>138</sup> However, the rules of conflict of laws in Civil Law No. 40 of 1951 address 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.<sup>139</sup>

This article can be applied to arbitration agreements on the grounds that it deals with contracts.

Therefore, as Article 25 (1) indicates, the law applicable to the arbitration agreement may be the law chosen by the parties. This choice may be based on different grounds, such as the nationality of one party, the law of his domicile and also the law of the place where the contract was performed. In this case, the Iraqi court has the last word in deciding the validity of this law, as long as does not conflict with the mandatory rules of the Iraqi legal system. Iraqi courts have a broad discretion in applying the law chosen by the parties after they have ensured that this law does not offend against Iraqi public order rules.<sup>140</sup> However, sometimes the parties disagree about the applicable law, in which case the court has a broad discretion to decide the law that should apply to the arbitration agreement, based on evidence such as the court's choice of the place, or the language of the main agreement.

Also, Article 25 (1) indicates that the law of common domicile could be applied if the parties are domiciled in the same place. However, this choice raises difficulties. It is rare, for example, for contractual parties in a petroleum transaction to have the same domicile. Even if it should happen that the applicable law will be the national law of both, it is easy for the parties to change their domicile and this makes it difficult for the court to determine the domicile and thus

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<sup>138</sup> The Iraqi DICAL also does not express the law that should govern the international arbitration agreement and leaves the matter to civil law. This is a genuine lacuna in this draft. Determining the applicable law of arbitration agreement, as mentioned in the main text, is considered one of the most important issues in international commercial arbitration.

<sup>139</sup> The translation from Arabic language to English language available at < <http://gjpi.org/library/primary/statutes/>> accessed on 25 March 2014.

<sup>140</sup> Article 32 of Iraqi Civil Law No 40 of 1951 which provides that “the provisions of a foreign law as prescribed in the preceding provisions may not be applied if they are inconsistent with the public order and morals of Iraq”. The translation from Arabic language to English language is available at < <http://gjpi.org/library/primary/statutes/>> accessed on 25 March 2014.

the applicable law. The author's view is that Iraqi law should depend on the nationality of parties rather than their domicile to determine the law applicable to an arbitration agreement.

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 which the parties concluded their contract will apply to the arbitration agreement. In this case, if the parties concluded the main contract in Baghdad, Iraqi law will apply to the arbitration clauses also.

In view of the fact that the Iraq Civil Law was enacted in the 1950s, it now needs to be reviewed in order to absorb the latest development in the world in regard to conflict of laws and the applicable law of commercial agreements. The law should be consistent with modern international developments and fit to serve the Iraqi targets in transition.

The UAE Civil Procedures Law does not offer any provision to show the applicable law of arbitration agreements. However, Article 19 of UAE Civil Transaction Law No5 of 1985 states that the applicable law of contract is the personal law of the parties, depending on the domicile criterion if the contractual parties have a common domicile. Otherwise, the law of the state where the contract was concluded will apply, unless the parties agreed to apply a different law.

The PRC Arbitration Law does not address the question of the law applicable to the arbitration agreement. However, the Supreme People's Court has recently addressed the applicable law of arbitration agreements. In its most recent judicial interpretation of 2006, it declared that the parties may agree on the law that will govern the arbitration agreement. If, however, the parties cannot agree on the applicable law, the law of the place of arbitration will be applicable, or otherwise the law of the place where the court is situated.<sup>141</sup> This interpretation is compatible with Article V (1) of the New York Convention, to which China is a party, although Iraq has not yet become a party. It seems that the PRC law concerning the applicable law of the arbitration agreement has been successful, and it is proposed that Iraq should follow

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<sup>141</sup> Article 16 of The Supreme People's Court provided that:

the law as agreed by the parties shall apply to the examination over the validity of the foreign –related arbitration agreement; where the parties concerned have not agreed on the applicable law but have agreed on the place of arbitration, the law of the place of arbitration shall apply; and where neither the applicable laws nor the place of arbitration is agreed or the agreement on the place of arbitration is not clear, the laws of the place where the court is located shall apply.

the Chinese approach, which combines the law of the main agreement as a first choice, with the seat of arbitration as a second option, leaving the laws of the place where the court is situated as a last option.

#### **4.5. The Legal Relationship between the Petroleum Agreement and Arbitration Agreement:**

The petroleum agreement between the host state and petroleum company, like any other agreement, sometimes cannot be performed. It may be, for example, that the principal contract is invalid as a result of the neglect of one of the essential requirements, or it may be that the contract is terminated.<sup>142</sup> Either of these two cases may constitute a sufficient plea to allow the host state to subject the matter to the national courts instead of arbitration, by claiming that the arbitration clause is invalid due to the invalidity of the main contract. In such cases, the question is whether the host state can legally claim that the arbitration agreement follows the main contract's fate; in other words, does the invalidity extend to cover all clauses of the petroleum agreement, including the arbitration clause, or does the arbitration clause remain valid and capable of performing its function of settling the disputes between the parties? There is also the question of the legal relationship between the arbitration agreement and the petroleum agreement: if one of the parties claims that the arbitration clause is invalid, will that have an effect on the main underlying contract?

The answer to the above question is expressed by the doctrine of separability of the arbitration agreement, which prevents the host state from evading arbitration under a plea of the invalidity of the main contract. According to this doctrine, the petroleum arbitration agreement is valid even if the main contract is not valid, and vice versa.<sup>143</sup> Therefore, based on this doctrine, the petroleum arbitration agreement is totally separate and independent from the petroleum agreement,<sup>144</sup> although it is physically part of the main contract. Therefore the

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<sup>142</sup> Nigel Blackaby et al., *Redfren and Hunter on International Arbitration* (5<sup>th</sup> edn, Oxford University Press 2009) 117.

<sup>143</sup> Julian .D.M Lew and S.M Kroll, *Comparative International Commercial Arbitration* (Kluwer International law 2003) 102; Gary Brain Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (2<sup>nd</sup> edn, Kluwer International Law 2006) 108; Trevor M. Cook, Trevor Cook and Alejandro I. Garcia, *International Intellectual Property Arbitration* (Kluwer International Law 2010) 119.

<sup>144</sup> Richard C. Reuben, 'First Options, Consent to the Arbitration, and the Demise of Arbitrability: Restoring Access to Justice for Contracts with Arbitration Provisions' (2003) 56 SMU Law Review 819.

arbitration agreement does not have an accessory relationship. This doctrine gives the arbitration process a new dimension, which is to protect the transaction as a whole and to become binding for both parties, which cannot evade it.<sup>145</sup> Even if the main contract containing the arbitration clause is invalid, this clause will remain valid in order to play its important role in resolving disputes.<sup>146</sup> It could be described as a weight that tipped the balance in favour of the arbitration process: the survival of the arbitration clause means the survival of the arbitration process as a whole.

However, the separability doctrine raises many questions, such as whether this doctrine has recognition in international instruments or arbitration laws. If so, what is the position of the Iraqi arbitration law in relation to this doctrine? Is the petroleum arbitration agreement independent under Iraqi law? And also, what are the legal implications of this doctrine? These questions will be discussed in the following sub-sections.

#### **4.5.1. Is the Separability Doctrine a Universal Approach?**

Recently, the separability doctrine has raised extensive debate among lawyers, especially in regard to arbitration clauses that have a physical relationship with the main contract, in contrast to submission agreements.<sup>147</sup> Some authors<sup>148</sup> do not accept the separability doctrine, claiming it lacks legal logic or that it is a mere legal fiction. They believe that there is not a single reason to justify the assertion that the arbitration clause should survive and not share the invalidity of the rest of the main contract's clauses.<sup>149</sup> They argue the parties' obligation to settle the dispute by arbitration disappears as soon as the main contract, which is considered the container of this

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<sup>145</sup> Richard C. Reuben, 'First Options, Consent to the Arbitration, and the Demise of Arbitrability: Restoring Access to Justice for Contracts with Arbitration Provisions' (2003) 56 SMU Law Review 819.

<sup>146</sup> Gary Brain Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (2<sup>nd</sup> edn, Kluwer International Law 2006) 108; Edward Brunet et al., *Arbitration Law in America: A Critical Assessment* (Cambridge University Press 2006) 260; James H. Carter and John Fellas, *International Commercial Arbitration in New York* (Oxford University Press 2010) 15.

<sup>147</sup> Mauro Rubino-Sammartano, *International Arbitration Law and Practice* (2<sup>nd</sup> edn, Kluwer International Law 2001) 225.

<sup>148</sup> Adrian Baron, 'The Australian International Arbitration Act, the Fiction of Severability and Claims for Restitution' (2000) 16 *Arbitration International* 159; John J. Barcelo, 'Who Decides the Arbitrators' Jurisdiction? Separability and Competence – Competence in Transnational Perspective' (2003) 36 *Vanderbilt Journal of Transnational Law* 1125.

<sup>149</sup> Mauro Rubino-Sammartano, *International Arbitration Law and Practice* (2<sup>nd</sup> edn, Kluwer International Law 2001) 225.

clause, is invalid<sup>150</sup> because “Nothing can come from nothing”.<sup>151</sup> This saying was used in the USA decision *Pollux Marine Agencies Inc.v.Louis Dreyfus Corp.*<sup>152</sup> The court stated that “(.....) it does seem to the court that something can be severed only from something else that exists. How can the court ‘serve’ an arbitration clause from a non-existent charter-party?”<sup>153</sup> Sornarajah has stated that: “Assuming that the contract is based in the law of the host state and derives its external validity from that system, a valid law destroying the contract will have the effect of destroying all its clauses”.<sup>154</sup> The present author’s view is that the latter arguments would be valid if the arbitration clause is considered as an ordinary clause, but the arbitration clause is rather a contract in clause form. It promises to conclude the contract in future by resolving any dispute that may arise from the main contract. The parties’ intention to include this in their main contract may also entail that they sometimes choose a law different from that of the the main contract, and this law may survive the arbitration clause. So, how should we interpret the parties’ freedom to choose the law that governs this clause if it has a legal status different from that of other main contract clauses?

Some authors<sup>155</sup> try to accept this doctrine partially by distinguishing between the contract that is void *ab initio* and the non-existent contract. According to this opinion, if the main contract was void *ab initio* the arbitration clause would not be affected by the fate of the main contract. It will be separable from the main contract but, if the main contract was non-existent, the arbitration clause will follow the fate of the main contract and it can be said that it is separable from the main contract. In short, the separability doctrine cannot apply in cases of non-existent contracts.<sup>156</sup> However, national laws<sup>157</sup> and the arbitration rule<sup>158</sup> have ignored this distinction.

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<sup>150</sup> M. Sornarajah, ‘The Climate of International Commercial Arbitration’ (1991) 8 *Journal of International Arbitration* 57.

<sup>151</sup> John J. Barcelo, ‘Who Decides the Arbitrators’ Jurisdiction? Separability and Competence – Competence in Transnational Perspective’ (2003) 36 *Vanderbilt Journal of Transnational Law* 1115.

<sup>152</sup> *Pollux Marine Agencies Inc.v. Louise Dreyfus Corp.*, 455 F. Supp. 218 (S.D.New York 13July 1978).

<sup>153</sup> *Pollux Marine Agencies Inc.v. Louise Dreyfus Corp.*, 455 F. Supp. 218 (S.D.New York 13July 1978).

<sup>154</sup> M. Sornarajah, *International Commercial Arbitration: The Problem of State Contracts* (Longman 1990) 16-17.

<sup>155</sup> Pieter Sanders, *L’autonomie de la clause compromissoire: In Hommage à Frédéric Eisemann* (Paris 1978) 31 (French Language).

<sup>156</sup> Anthony Gardner, ‘The Doctrine of Separability in Soviet Arbitration Law: An Analysis of Sojuzneftexport v. JOC Oil Co’ (1990) 28 *Columbia Journal of Transnational Law* 301 (note).

<sup>157</sup> Article 178 (3) of Swiss Private International Law of 1987, Article 23 of Egyptian Arbitration Law No 27 of 1994.



However, the separability doctrine found support and justification in the arguments of Judge Schwebel, who in 1987, tried to construct a separability doctrine based on four pillars. The first of these is the parties' intention in deciding to resort to arbitration rather than to a court.<sup>159</sup> Second is the separability doctrine, which prevents the parties from using the invalidity of the main agreement as a plea to evade arbitration. So, this doctrine closes the door in the face of the party which attempts this evasion.<sup>160</sup> Third, the parties have in fact concluded two agreements with different targets. The first agreement is concluded as a commercial transaction and the second one is to settle any dispute arising from the first contract; and therefore if the main agreement is invalid or has a defect, the second one will survive to play its role and settle the dispute.<sup>161</sup> Fourth, if the arbitration agreement is not separated, the dispute will be subject to the court, contrary to the provisions of the arbitration agreement, which aims to reduce time and costs.<sup>162</sup>

However, the arguments of Schwebel did not escape criticism. It has been said that they merely describe the result of the separability doctrine, and that they provide a theoretical justification without a practical dimension.<sup>163</sup>

In any event, the separability doctrine has taken strong and firm steps towards universality. It has gained wide recognition and acceptance by many arbitration laws, either directly<sup>164</sup> or indirectly,<sup>165</sup> and it has also been adopted in arbitration rules. The doctrine has had great influence in practice in regard to petroleum arbitration, for instance, in the three arbitral tribunal awards between Libya and foreign petroleum companies, *BP v. Libya*<sup>166</sup>, *Texaco v. Libya*<sup>167</sup> and

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<sup>158</sup> Article 16 (1) of UNCITRAL Model Law 1985.

<sup>159</sup> S. M. Schwebel, *International Arbitration: Three Salient Problems* (Grotius Publications 1987) 3-6.

<sup>160</sup> S. M. Schwebel, *International Arbitration: Three Salient Problems* (Grotius Publications 1987) 3-6.

<sup>161</sup> *ibid.*

<sup>162</sup> *ibid.*

<sup>163</sup> W. Laurence et al., *International Chamber of Commerce Arbitration* (3<sup>rd</sup> edn, Oxford University Press 2000) 48.

<sup>164</sup> For example Article 23 of Egyptian Arbitration Law No 27 of 1994.

<sup>165</sup> For example Article 178 (3) of Swiss Private International Law of 1987 which provided that "The validity of an arbitration agreement may not be contested on the grounds that the principal contract is invalid or that the arbitration agreement concerns a dispute which has not yet arisen".

<sup>166</sup> *BP Exploration Co. (Libya) Ltd. v. Government of the Libyan Arab Republic* (1979) I.L.R. 297.

<sup>167</sup> *Texaco Overseas Petroleum Company v. Libyan Arab Republic* (1979) 53ILR 389.

*LIMCO v. Libya*.<sup>168</sup> The arbitration body in these cases applied the separability doctrine and confirmed that the arbitration agreements remained effective even after the Libyan government terminated the petroleum concessions by nationalisation.<sup>169</sup> This doctrine has become a principle in international law. In *Elf v. NIOC*,<sup>170</sup> the sole arbitrator stated that: “The autonomy of an arbitration clause is a principle of international law (.....) adopted by international organizations and in treaties. Also, in many countries, the principle forms part of national arbitration law”.<sup>171</sup>

#### 4.5. 2. Is The Petroleum Arbitration Agreement Independent under Iraqi Law?

Iraqi law does not have a clear answer about the autonomy of the petroleum arbitration agreement in relation to the main contract. There is no article in the CCP that expresses this doctrine. However, it could be said that the separability doctrine finds its legal roots in the Iraqi Civil Code No 40 of 1951. Article 139 provides 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.<sup>172</sup>

This article provides that if one provision of the main agreement is invalid and the other provisions are valid, then the invalid one becomes null and the rest remain valid and effective. The invalid one does not affect the contract. So, the invalid clause is excluded from the main contract while the valid ones are treated as an independent contract.<sup>173</sup> However, this article cannot be applied unless the invalid clause was the motivation behind the conclusion of the main contract.<sup>174</sup> This approach was confirmed by the Iraqi Supreme Court, which held that “if a

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<sup>168</sup> *LIAMCO (Libyan American Oil Company v. The Socialist Peoples' Libyan Arab Jamahiriya)* (1977) 62 ILR 140.

<sup>169</sup> *ibid.*

<sup>170</sup> *ELF Aquitaine Iran v. National Iranian Oil Co* (1986) 11 Y.B Com ARB 97; See: *Sojuznefteexport v. JOC Oil, Ltd* case USSR Chamber of Commerce and Industry case No. 109/ 1980 in XVIII Y.B Com ARB 92 (1993).

<sup>171</sup> *Sojuznefteexport v. JOC Oil, Ltd* case USSR Chamber of Commerce and Industry case No. 109/ 1980 in XVIII Y.B Com ARB 92 (1993).

<sup>172</sup> The translation from Arabic language to English language is available at <<http://gjpi.org/library /primary /statutes/>> accessed on 25 March 2014.

<sup>173</sup> 1960،303 عبد المنعم فرج، مصادر الالتزام، مصطفى الحلبي، [Abdul Mounaam Faraj, *The Resources of Obligation* (Mostafa Al Halbee 1960) 303].

<sup>174</sup> Article 139 of Iraqi Civil Code No 40 of 1951.

party's acceptance of arbitration is not limited, then arbitration may cover all matters subject of the dispute".<sup>175</sup> Therefore, according to the above-mentioned article, the petroleum arbitration agreement has a position independent of the main agreement under Iraqi law, even if it is in clause form, and it remains valid and effective in cases where the main agreement is invalid. The Iraqi DICAL adopts the doctrine of the separability of arbitration agreements, thus reflecting the Iraqi desire to be consistent with modern international arbitration laws.<sup>176</sup> By way of referencing, the UAE Federal Civil Procedures Law No. 11 of 1992 does not express the separability doctrine, which may put the arbitration clause in a critical position if one of the parties invokes the invalidity of the main contract which contains such a clause.<sup>177</sup> However, in recent years, the UAE courts have tended to recognise the separability doctrine.<sup>178</sup> The Draft of the Federal Arbitration Law 2008 recognises this doctrine explicitly in Article 16 (1).<sup>179</sup>

In regard to the position of China's Arbitration Law of 1994 on the separability doctrine, Article 19 provides that: "An arbitration agreement shall exist independently. The amendment, rescission, termination or invalidity of a contract shall not affect the validity of the arbitration agreement. The arbitration tribunal shall have the power to affirm the validity of a contract".<sup>180</sup> This doctrine is also to be found in China's contract law of 1999, which in Article 57 provides that "If a contract is null and void, revoked or terminated, it shall not affect the validity of the dispute settlement clause which independently exists in the contract". However, China recognised the doctrine before the Arbitration Law 1994, when it signed the Vienna Convention on the International Sale of Goods.<sup>181</sup> This convention provides in Article 81 (1) that "Avoidance

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<sup>175</sup> The Supreme Court Decision No 228/ 1970 (Judicial Review, Second Year) No 1. 100.

المحكمة الفيدرالية العراقية العليا، القرار رقم 1970/288 (النشره القضائيه، السنه الثانيه) رقم 100.1

<sup>176</sup> Article 8 of Iraqi DICAL.

<sup>177</sup> عبد الحميد الاحدب، التحكيم في الدول العربيه، الحلبي، 2009، 216

[Abdul Hamed AL- ahdab, *The Arbitration in Arab Countries*, (2009, Al-Halabee) 216].

<sup>178</sup> Essam Al- Tamimi (ed), *Practitioner's Guide to Arbitration in the Middle East and North Africa* (Juris Net LLC and Excelencia FZ 2009) 494.

<sup>179</sup> This article provided that :

The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the Arbitration Agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the Arbitral Tribunal that the contract is null and void shall not by itself determine the validity of the arbitration clause

<sup>180</sup> The English text is available at < [http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383756.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383756.htm)> accessed on 17 of May 2014.

<sup>181</sup> United Nations Convention on Contracts for the International Sale of Goods, 11 April 1980, N 25567, UNTS vol 1489, 3.

does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract”<sup>182</sup>.

To sum up, the petroleum arbitration agreement is separable from the main contract under Iraqi law. So, it is immune from any litigation that 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 petroleum arbitration agreements a special character.

Iraq needs to include this doctrine in its petroleum arbitration because of its theoretical and practical importance for the country, and because it will play a significant role in attracting investment. Investors will then feel reassured that the arbitration process will be effective and the arbitration agreement will remain valid even if the petroleum agreement is void. The type of arbitration is one of the most important considerations for foreign investors.

#### **4.5.3. Legal Implications of the Separability Doctrine:**

The separability of the arbitration agreement from the primary agreement has important positive implications, particularly with regard to the enhancement of the arbitration process and the enforcement of the arbitration agreement.

Firstly, the petroleum arbitration agreement does not share the fate of the main contract and so remains valid and effective even if the main agreement is void, regardless of whether this agreement takes the form of an arbitration clause or a submission agreement. This doctrine can be considered as the legal foundation for the survival of the arbitration agreement.<sup>183</sup> However, it is worth mentioning that to apply the separability doctrine and that the arbitration agreement

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<sup>182</sup> *ibid.* However, although, China ratified this convention but the practice aspect has different approach that appears from the Shanghai Higher People’s Court in case of *CNTIC v. Swiss Industrial Resources Company incorporated* cited by, Loukas A. Mistelis, *Concise International Arbitration* (Kluwer Law International 2010) 676.

<sup>183</sup> Julian .D.M Lew, S.M Kroll, *Comparative International Commercial Arbitration* (Kluwer International law 2003) 104; Gary Brain Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (2<sup>nd</sup> edn, Kluwer International Law 2006) 108; Edward Brunet et al., *Arbitration Law in America: A Critical Assessment* (Cambridge University Press 2006) 260; James H. Carter and John Fellas, *International Commercial Arbitration in New York* (Oxford University Press 2010) 15.

should be valid that means there is no lack of essential requirements, but if the lack of main agreement affect on the arbitration clause in this case cannot apply this doctrine.

Secondly, the law governing the petroleum arbitration agreement may be different from the law governing the main contract.<sup>184</sup> The parties have the freedom to choose the law that governs their petroleum arbitration agreement, which is not necessarily the same law as the one that governs the primary agreement.<sup>185</sup>

Finally, the separability doctrine enhances and protects the competence-competence principle which gives the arbitral tribunal the power to determine on its own jurisdiction, whether or not the main agreement which concluded the arbitration agreement is valid.<sup>186</sup> The separability doctrine is different from the competence-competence principle. The latter means that the arbitrators have the power to settle the dispute even when the primary agreement which concluded the arbitration clause is invalid,<sup>187</sup> while the former decrees that the arbitration agreement is still valid even if the main agreement is void, so that these principles have different domains. However, they are frequently linked, because they have a common target, that of preventing judicial interference from hindering the arbitration process.<sup>188</sup>

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<sup>184</sup> Edward Brunet et al., *Arbitration Law in America: A Critical Assessment* (Cambridge University Press 2006) 260.

<sup>185</sup> Edward Brunet et al., *Arbitration Law in America: A Critical Assessment* (Cambridge University Press 2006) 260; James H. Carter and John Fellas, *International Commercial Arbitration in New York* (Oxford University Press 2010) 15.

<sup>186</sup> Mahmood Bagheri, *International Contracts and National Economic Regulation: Dispute Resolution through International Commercial Arbitration (Studies in Comparative Corporate & Financial Law)* (Kluwer International Law 2000) 131.

<sup>187</sup> Richard C. Reuben, 'First Options, Consent to the Arbitration, and the Demise of Arbitrability: Restoring Access to Justice for Contracts with Arbitration Provisions' (2003) 56 SMU Law Review 819.

<sup>188</sup> John J. Barcelo, 'Who Decides the Arbitrators' Jurisdiction? Separability and Competence- Competence in Transnational Perspective' (2003) 36 Vanderbilt Journal of Transnational Law 1115.

#### **4.6. Conclusion:**

The aims of this chapter were to address and examine the petroleum arbitration agreement, particularly with regard to Iraqi law. Such agreements lie at the heart of the arbitration process and without them petroleum arbitration could scarcely exist. Generally, it was noted that Iraq has no arbitration law; it therefore relied on the Civil Procedure Law and the Civil Law to regulate arbitration agreements. In general, the CCP has regulated several issues and left other important issues related to this agreement to the Civil Law. The reasons for the inability of the law to regulate these issues have been diagnosed: it was seen that Iraqi law has not addressed international arbitration, and furthermore the relevant laws were out of date, and inconsistent with international standards and unsuited to the task of encouraging the foreign investment in the petroleum sector. Therefore, the current laws for regulating petroleum arbitration agreements cannot be relied upon.

Although DICAL attempted to design provisions for regulating international commercial arbitration in a manner consistent with modern arbitration laws, the draft contained no articles addressing important issues such as the applicable law of arbitration agreements and the applicable law of formal requirements. Furthermore it did not refer to the capacity of both parties, leaving that matter to the provisions in the CCP Law and Civil Law.

To ensure it is enforceable, an arbitration agreement should fulfil several requirements, classified into two types and known as formal and essential requirements. Iraqi law considers the written requirement to have an evidential purpose. The author's view is that petroleum arbitration agreements must be in writing because of their subject matter, petroleum, which represents a critical amount of the national wealth of the host state and large capital investment and technological equipment provided by foreign companies, all of which could be lost to the parties through litigation. Consent, however, should come from both parties. Consent is also considered as a waiver by the host state of its sovereign immunity jurisdiction. The parties in a petroleum agreement are the host state or its entities and a foreign company. There is no restriction on the capacity of the Iraqi state and its entities to prevent or prohibit them from entering into a petroleum arbitration agreement.

However, in Iraqi, it is not clear what law should govern the issue of capacity in the arbitration agreement. The author suggests that the applicable law in regard to the arbitration of petroleum agreements is personal law, depending on the nationality of the party, which ensures greater stability than domicile law. The last essential requirement is that the petroleum dispute should be arbitrable under Iraqi law, and in this regard Iraqi law has not determined whether or not the petroleum agreement is capable of being settled by arbitration. However, practice suggests that Iraq considers that petroleum disputes can be resolved by arbitration.

The applicable law on arbitration agreements can be found in the form of general principles in Iraqi civil law. The petroleum arbitration agreement has an autonomous position in relation to the petroleum agreement. It is separate and distinct from the primary agreement, which means that this clause does not affect the main agreement's invalidity and vice versa. Iraqi law has not invoked this doctrine explicitly, although it could be concluded that it is affirmed in Article 139 of the Iraqi Civil Law No. 40 of 1951. The author suggests that Iraqi law should adopt this doctrine explicitly in regard to petroleum arbitration. Such an action would encourage foreign investment in the petroleum sector, where arbitration as a means to solve the dispute could be effective, even in cases where the main agreement was invalid.

## **Chapter Five: The Law Applicable to Petroleum Arbitration Procedures and Substantive Issues**

### **5.1 Introduction:**

The parties have the freedom to choose where the arbitration process takes place and they are also free either to choose the law of the place where the arbitration is held or to opt for a different legal system. The laws of the place of arbitration and its influence on proceedings can give rise to acrimonious debate. There are two theories involving this issue. One of them deprives the laws of the place of arbitration of any influence by removing the procedures from the control and supervision of those laws and delocalizing the arbitration process. The other theory gives greater significance to the place where the arbitration is held by conducting it under the control and supervision of the domestic courts. This division of opinion impacts on arbitral tribunal awards for which there is no universally accepted standard.

Determination of the legal system under which the arbitration takes place is important because it is that system which governs some very important issues, such as conduct of the arbitration process, its form and substance, its accessibility and the validity of the arbitration. The autonomy of the parties involved is given priority and under Iraqi law they have the opportunity to choose the law which determines all these issues in accordance with the relevant international conventions and existing laws: if they do not do so then that task falls to the arbitrators.

The applicable law of arbitration is considered to be a critical issue as it involves serious multi-dimensional challenges for both contractual parties. It has practical and economical as well as legal dimensions. Arbitration is no longer a process by which the arbitrator seeks only what is equitable; there is also the question of which laws are to govern the arbitration process as a whole. The task facing the arbitral tribunal is made more difficult when the contending parties disagree on the issue of applicable law, especially when there is uncertainty as to which law should govern the arbitration process. Arbitral tribunals then have to confront competing claims as to which law should govern their procedures and which law should determine the rights and duties of the parties involved. Petroleum arbitration raises two questions with regard to



applicable law. These are: which law governs the petroleum arbitration procedures and which law governs the substantive issues arising from the petroleum agreement under Iraqi Law?

The controversy becomes more intense when the subject of debate is the law applicable to petroleum agreements. Determining the applicable law in this case is not limited to its legal aspects but can also draw in a struggle between the economic and political interests of each party when, as mentioned above, each mistrusts the other's legal system. The host state has an inherent concern that petroleum companies' states laws were designed to serve those companies' interests in situations where the host state has much to venture and much to lose. On the other hand, the petroleum companies may regard the legal institutions of the host state as immature and unfit for the purpose of governing such complex and high value agreements. Choosing laws to govern these agreements is not therefore a matter of theoretical preference; various legal and economic consequences arise from the choice made, and these will be taken into consideration by the parties who determine the law. Some of the attempts to find appropriate laws involve removing these agreements from the domain of national law and applying international law. Others theorists would subject petroleum agreements to systems removed from both national and international law, such as general principles are a sources of international of law, transnational law or *lex contractus*; while still others try to subject these agreements to national law. The latter theory is widely accepted by international organizations. It is supported by OPEC and the United Nations. Controversy over the law applicable to petroleum agreements has practical as well as theoretical significance in the determination of arbitral tribunal awards, which are made without employing any universal standard of applicability. Most of these awards apply international law on the grounds that the national law is unsuitable for governing such transactions in the modern world.

This chapter seeks to establish if the current provisions regarding law applicable of petroleum arbitration adequate to deal with petroleum disputes or it is need to update and modernize them. Therefore, the following section is dedicated to examining the law governing general arbitration procedures under Iraqi law, UAE Law and PRC Law. It is also reviewing the important theories and approaches to arbitral awards and their place in Iraqi law, UAE and PRC. Section three is devoted to examining the laws applicable to petroleum agreements in Iraq, UAE and PRC while section four contain represent important conclusions of this chapter.

## 5.2. Procedural Law in Arbitration:

Neutrality is the most important characteristic of arbitration between parties in a dispute and it may be sought in different ways, for example, by choosing arbitrators of different nationalities, or by choosing locations for the proceedings in countries other than those of the parties to the dispute. The country which is chosen as a location should be unconnected to the parties by way of residency, nationality or business.<sup>1</sup> As a result, the parties' endeavours to achieve neutrality may lead to diversity with regard to the applicable laws. The important issue arising here is the choice of the law which will govern the arbitration procedures. This will differ from the substantive law, which was discussed in Section Three of this chapter. The former law governs the arbitration procedures while the latter deals with the merits of disputes.<sup>2</sup> It was believed for a long period that the law governing substantive issues applied also to arbitration proceedings, so that the applicable law of arbitration procedures was considered to present a serious problem of conflicting laws.<sup>3</sup> However, this view has changed and the law governing arbitration procedures is no longer held to be necessarily the same as the law governing the substantive issues.<sup>4</sup>

It is important to distinguish between the *lex arbitri* and procedural law. The *lex arbitri* offer the legal mandatory rules for the settlement of disputes between parties by arbitration.<sup>5</sup> The *lex arbitri* regulate various issues concerning control and validity of the arbitration process.<sup>6</sup> It may also extend to other matters, such as determining whether the dispute is capable of settlement by arbitration, the formation of the arbitral tribunal through the appointment or replacement of arbitrators, defining the arbitrators' powers, deciding the interim measures, ensuring the equality of the parties and their freedom to determine certain procedural rules, providing the assistance of judicial power if needed, hearing the claims and counter-claims of the

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<sup>1</sup> Christopher Dugan et al., *Investor-State Arbitration* (Oxford University Press 2008) 92.

<sup>2</sup> Roy Goode, *Goode on Commercial Law* (Ewan McKendrick ed, 4<sup>th</sup> edn, Penguin Books 2010) 1341.

<sup>3</sup> Vitek Danilowicz, 'The Choice of Applicable Law in International Arbitration' (1985- 1986) 9 *Hasting International and Comparative Law Review* 235.

<sup>4</sup> The first recognition of the autonomous *lex arbitri* was in *Sumitomo Heavy Industry v Oil and Natural Gas Commission* [1994] 1 *Lloyd's Rep.* 45.

<sup>5</sup> Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford University Press 2007) 233.

<sup>6</sup> Simon Greenberg, Christopher Kee and Romesh Weeramantry, *International Commercial Arbitration: An Asia – Pacific Perspective* (Cambridge University Press 2011) 60.

parties, overseeing the methods used by parties to present their disputes and the form and validity of the arbitration award.<sup>7</sup>

The *lex arbitri* issues which are regulated differ from one country to another and from one arbitration to another, depending on the parties' willingness to be bound by a set of applicable rules.<sup>8</sup> It may be said that despite a significant body of literature devoted to the study of *lex arbitri* there is no commonly accepted approach for determining the issues involved.<sup>9</sup> Procedural law set out the rule that how arbitration is conducted and equal treatment.<sup>10</sup> Some authors try explaining the differences between *lex arbitri* and procedural law "is to consider the *lex arbitri* as governing matters external to the arbitration and the procedural law as governing matters internal to the arbitration procedure (but excluding substantive issues)."<sup>11</sup>

The applicability of *lex arbitri* is not of merely theoretical importance. It has vitally important practical implications. As mentioned previously, this form of law offers the parties to the dispute and the arbitrators' mandatory provisions in regard to procedural rules for the tribunal and may assist in deciding its constitution, the place of arbitration and the law applicable to the arbitration procedures.<sup>12</sup> The question of the applicable law confronts the arbitrator, and may also confront the judge when the court has recognises and enforces the arbitral award. The award may be the subject of an appeal by one of the parties on the grounds that the arbitral award is invalid because the arbitral tribunal was not constituted according to the applicable law of *lex arbitri* or because the award was given in accordance with procedures which were incompatible

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<sup>7</sup> Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (5<sup>th</sup> edn, Oxford University Press 2009) 177; P D Ehrenhaft, 'Effective International Commercial Arbitration' (1977) 9 *Law and Policy in International Business* 1191.

<sup>8</sup> Joseph F. Morrissey and Jack M. Graves, *International Sales Law and Arbitration: Problems, Cases and Commentary* (Kluwer International Law 2008) 333.

<sup>9</sup> Gabriel M. Wilner, 'Determining the Law Governing Performance in International Commercial Arbitration: A Comparative Study' (1965) 19 *Rutgers Law Review* 646; Alain Hirsch, 'The Place of Arbitration and the Lex Arbitri' (1979) 34 *Arbitration Journal* 44; Smedresman, 'Conflict of Laws in International Commercial Arbitration: A Survey of Resent Development' (1977) 7 *California Western International Law Journal* 263.

<sup>10</sup> Simon Greenberg, Hristopher Kee and J. Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press 2011) 59.

<sup>11</sup> *ibid.*

<sup>12</sup> Article 1493 of the French Civil Code provides that:

If difficulties arise in the constitution of the arbitral tribunal in an arbitration which takes place in France or which the parties have agreed shall be governed by French procedural law, the most diligent party may, in the absence of a clause to the contrary, apply to the Precedent of the Tribunal de Grande Instance of Paris.

with the applicable law of *lex arbitri*. Hence, determining the law applicable to *lex arbitri* plays an important part in instruments of international law as well as in academic debates.

### **5.2.1. The Methods for Determining the Applicable Law of Petroleum Arbitration Procedures, the *Lex Arbitri*:**

The methods for determining the applicable law of petroleum arbitration procedures have been addressed largely by international conventions<sup>13</sup> and their formulations have developed significantly. These developments can be classified into three stages. The first stage allowed the parties to choose the *lex arbitri* and the seat of arbitration. This approach was embodied in the Geneva Protocol of 1923<sup>14</sup> and the Geneva Convention of 1927.<sup>15</sup> Article 2 of the 1923 Geneva Protocol of Arbitration provided that “The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place”. It appears that this Article did not explain clearly which law should apply mainly and which should be secondary, that is, should the law chosen by the parties apply mainly and the law of the country in which the arbitration takes place apply in a secondary way. This ambiguity in the text of Article 2 gave rise to debates over its interpretation. This debate continued even after the Geneva Convention 1927 came into force, since the latter did not address the question of the applicable law of arbitration but instead referred back to the Geneva Protocol 1923.<sup>16</sup>

The second stage, clearer and more coherent than the first, allowed the parties to choose which law should be given priority and for the law of the seat of arbitration to be applied secondarily. This was the principle adopted by the New York Convention of 1958,<sup>17</sup> which provided in Article V (d) that: “The composition of the arbitral authority or the arbitral procedure

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<sup>13</sup> Starting with the Geneva Protocol of Arbitration 1923, and followed by the Geneva Convention 1927, the New York Convention 1958, the European Convention of International Commercial Arbitration 1961, the ICSID Convention or Washington Convention 1965.

<sup>14</sup> The Geneva Protocol on Arbitration Clauses of 1923 signed at Geneva on 24 September 1923, LNTS, vol XXVII, No. 678 of 1924, 158.

<sup>15</sup> The Geneva Convention for Execution of Foreign Arbitral Awards of 1927, signed at Geneva on 26 September of 1927, LNTS, vol XCII, 302.

<sup>16</sup> Horacio A. Grigera Naón, *Choice-Of- Law Problems in International Commercial Arbitration* (J. C. B. Mohr 1992) 272.

<sup>17</sup> The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, adopted on 3 May 1956, entered into force on 7 June 1959, UNTS vol 330, 3.

was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.”

Unambiguously, the New York Convention provided that the arbitration proceedings must be consistent with the parties’ agreement and if the latter could not reach agreement about the procedural law the law of the arbitration seat would apply. The third stage is represented by the European Convention of 1961<sup>18</sup> and the ICSID Convention 1965.<sup>19</sup> These conventions are similar to those mentioned above insofar as they grant the parties autonomy in choosing the applicable law of arbitration procedure but take a different approach in cases where the parties fail to reach agreement in determining the law governing those procedures. For example Article IX (d) of the European Convention of 1961, provides that:

1. The setting aside in a Contracting State of an arbitral award covered by this Convention shall only constitute a ground for the refusal of recognition or enforcement in another Contracting State where such setting aside took place in a State in which, or under the law of which, the award has been made and for one of the following reasons:

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, with the provisions of Article IV of this Convention.

This convention apparently gives the parties freedom and autonomy in choosing the law applicable to arbitration procedures. However, the law applicable when the parties fail to reach agreement about the law governing their arbitration procedures is addressed in Article IV. Its provisions are designed for cases where agreement over the choice of applicable law is absent.

1. The parties to an arbitration agreement shall be free to submit their disputes: (a) to a permanent arbitral institution; in this case, the arbitration proceedings shall be held in conformity with the rules of the said institution; (b) to an ad hoc arbitral procedure; in this case, they shall be free inter alia (iii) to lay down the procedure to be followed by the arbitrators.

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<sup>18</sup> The European Convention 1961 of International Commercial Arbitration, entered into force on 7 January 1964, No. 7041, UNTS vol 484, 349.

<sup>19</sup> According to Washington Convention the International Center for Settlement of Investment Disputes was established in 1965 to settle the disputes between the states and nationals from other states. It is known as ICSID Convention or Washington Convention. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, adopted on 18 March 1965, entered into force on 14 October 1966, UNTS, vol 575, 159.

3. Where the parties have agreed to submit any disputes to an ad hoc arbitration by one or more arbitrators and the arbitration agreement contains no indication regarding the organization of the arbitration, as mentioned in paragraph 1 of this Article, the necessary steps shall be taken by the arbitrator(s)

4. When seized of a request the President or the Special Committee shall be entitled

as need be: (d) to establish directly or by reference to the rules and statutes of a permanent arbitral institution the rules of procedure to be followed by the arbitrator(s),<sup>20</sup>

The selected paragraphs from Article IV of the European Convention, 1961, apparently distinguish between the law applicable to the arbitration procedures when the parties chose the institutional arbitration and the law in *ad hoc* arbitration. In the former case, the arbitration is conducted according to the rules of the institution which is chosen by the parties to settle their disputes, while in the latter, the arbitrators are empowered to choose the applicable law or, in cases where the arbitrators do not do so, “the President or the Special Committee” chooses the arbitral law to be applied.

The approach of the ICSID Convention to the applicable law of arbitration proceedings is embodied in Article 44, which provides that:

Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.<sup>21</sup>

It could be concluded that the above article is designed to prescribe methods to be followed in choosing the applicable law in arbitration proceedings.<sup>22</sup> According to Article 44 of the ICSID Convention, there are four ways to determine the applicable law: firstly, by applying the convention’s provisions, except in cases where the parties agree otherwise; secondly, by the agreement of the parties involved; thirdly, if the parties cannot reach agreement, the ICSID Center Arbitration Rules as they stand at the time of the parties assent to arbitration will be

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<sup>20</sup> The European Convention 1961 of International Commercial Arbitration, entered into force on 7 January 1964, No. 7041, UNTS vol 484, 349.

<sup>21</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States, adopted on 18 March 1965, entered into force on 14 October 1966, UNTS, vol 575, 159.

<sup>22</sup> Thomas V. Firth, ‘The Law Governing Contract in Arbitration under the World Bank Convention’ (1968) 1 New York University Journal of International Law and Politics 253.

applied. Finally, the arbitral tribunal is empowered to decide on all procedural questions not covered by the provisions of the convention.

It can be concluded from the above that the *lex arbitri* can be determined either by parties to the dispute or by arbitrators, or, by dint of failure to reach agreement or simply by preference, the matter may be left to the discretion of the arbitral tribunal.

#### **5.2.1.1. By Parties:**

Allowing the parties to choose the law governing their arbitration procedures was the first measure to be widely welcomed and it was accepted by international instruments<sup>23</sup> and by national law.<sup>24</sup> It facilitates the arbitrator's task by precluding conflict and offering pragmatic choices for the legal governance of arbitration procedures, based on the wishes and the consent of the parties involved.<sup>25</sup> The latter can determine the legal procedure provided by the arbitration agreement before or after the disputes arise.<sup>26</sup> The parties can determine the applicable law either explicitly or implicitly. The explicit choice will normally be included in the arbitration agreement as a written term or alternatively may be agreed orally before the arbitral tribunal. The implied choice may be indicated by acts or words which make the intentions of the parties clear to the arbitrators through the vocabulary which is used and the facts which are presented and these will be relied on as evidence of the parties' intentions.<sup>27</sup> For example, the arbitrators may feel entitled to conclude from references made to the place of arbitration chosen by the

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<sup>23</sup> See the previously pages; See also Article 19 (1) of the UNCITRAL Model Law "Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings".

<sup>24</sup> Article 182 (1) of the Swiss Private International Law of 1987, Article 1039 of the Netherlands Code of Civil Procedure of 1986 and Article 25 of Egyptian Arbitration Law No. 27 for 1994.

<sup>25</sup> Tibor Varady, John J. Barcelo III and Arthur T. Von Mehren, *International Commercial Arbitration: A Transnational Perspective* (4<sup>th</sup> edn, West, Thomson Reuters 2009)

<sup>26</sup> Article 3 (2) of Rome Convention on the Law Applicable to Contractual Obligations of 1980 provided that:  
The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Convention. Any variation by the parties of the law to be applied made after the conclusion of the contract shall not prejudice its formal validity under Article 9 or adversely affect the rights of third parties.

This convention was opened to signature on 19 June 1980 and it came into force on 1 April 1991.

<sup>27</sup> John Collier and Vaughan Lowe, *The Settlement Of Disputes In International Law: Institutions and Procedures* (Oxford University Press 1999) 240-241; Julian D. M Lew, Loukas A. Mistelis and Stefan M. Kroll, *Comparative International Commercial Arbitration* (Kluwer International Law 2003) 415.

parties that the latter intend to accept the arbitration procedures of that place.<sup>28</sup> However, to draw conclusions regarding the applicable law from the parties' intentions may create major difficulties for the arbitrators because of disagreement between the parties with regard to the applicable law.<sup>29</sup>

The Iraqi CCP<sup>30</sup> recognises the parties' autonomy in determining the law that will govern the arbitration procedures. According to Article 265 (1), the parties have freedom to choose the law which will govern the arbitration procedures. They can conduct the arbitration under Iraqi law or they can reject it by subjecting their arbitration procedures to some other body of national law. Alternatively they may choose the UNCITRAL Model Law<sup>31</sup> or combine the laws of more than one legal system.<sup>32</sup> This freedom, however, is not absolute. Certain rules are compulsory and the parties are not permitted to formulate rules which are in contradiction of public policy. They are restricted by Iraqi mandatory rules which are the rules of the seat of arbitration.<sup>33</sup> Article 39 (D) 1 of Iraqi DLOG determines the procedural law. It is suggested that the parties follow "the Rules of Procedure for Arbitration Proceedings of Paris, Geneva or Cairo for the Settlement of Disputes between States and Nationals of other States and based on the Iraqi Law."<sup>34</sup> It seems from this that the parties are restricted to three options of law, while Article 265 (1) of the Iraqi CCP does not restrict the parties gives them the freedom to choose any law

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<sup>28</sup> In case of *Union of India v McDonnell Douglas* the Judge Saville stated that:

If the parties do not make choice of procedural law to govern their arbitration, then the court will consider whether they have made an implicit choice. In this circumstance the fact that the parties have agreed to a place for the arbitration is a very strong pointer that implicitly they must have chosen the law of that place to govern the procedures of the arbitration.

*Union of India v McDonnell Douglas*, [1993] 2 Lloyd's Rep 48, 50.

<sup>29</sup> Julian D. M Lew, Loukas A. Mistelis and Stefan M. Kroll, *Comparative International Commercial Arbitration* (Kluwer International Law 2003) 415.

<sup>30</sup> Iraqi Civil Procedures Law No. 83 of 1969 published in the Iraqi Official Gazette vol 2 of 1969, 477.

<sup>31</sup> The UNCITRAL Model Law of 1985 provides that:

Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

<sup>32</sup> Article 265 (1) of Iraqi CCP provides that "The arbitrators shall abide by the rules and procedures stipulated in the Civil Actions Law, unless the arbitrators were expressly exempted from that in the arbitration agreement, or any other subsequent agreement, or a particular procedural process was put down for the arbitrators' task". The translation from Arabic language to English language is available at < <http://gjpi.org/library/primary/statutes/>> accessed on 26 March 2014.

<sup>33</sup> Article 265 (2) of the Iraqi CCP.

<sup>34</sup> This translation from Arabic language to English Language by Council Of Ministers Oil and Energy Committee the whole text is available at <<http://www.krg.org/uploads/documents/Draft%20Iraq>> accessed on 10 April 2014.



unless it against the Iraqi mandatory law.<sup>35</sup> It is suggested that the Article 265 (1) can be apply on petroleum arbitration which enhance the parties autonomy principles so, the parties have autonomy to decide which law can govern their arbitration procedures unless it in contrast with Iraqi mandatory rules. Article 39 (D) of the Iraqi DLOG mirrored the Iraqi need for independent institution involved in petroleum disputes. It is important indication that there are legal vacuum in regard of legal system of resolving disputes. Therefore Iraq as post-conflict state tries to full this gap by borrowing the forum of resolving petroleum disputes.<sup>36</sup> The UAE Federal Code of Civil Procedures No. 11 of 1992<sup>37</sup> gives the parties freedom to determine the law applicable to arbitration procedures.<sup>38</sup> The UAE Draft Arbitration Law of 2008 has followed the same route as the international conventions and most national legal systems by recognising the parties' autonomy to choose the law which will govern the arbitration procedure.<sup>39</sup> In China pre 1948, the parties' ability to choose the procedures of arbitration was not consistent with international practise.<sup>40</sup> This was so because any dispute submitted to China International Economic and Trade Arbitration Commission<sup>41</sup> (hereinafter CITAC) will subject to this center's rules.<sup>42</sup> However the situation is changed in 2005 when the last revision of the CITAC Rules provided in Article 4 (2) that "the parties' agreement shall prevail", this means that the parties have autonomy to choose the law that will govern the arbitration proceedings.<sup>43</sup>

The Iraqi law follows the same path as international conventions and modern national law by granting the parties' autonomy to choose the applicable law of arbitration procedures but that

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<sup>35</sup> Article 21 of Iraqi DICAL also gives the parties freedom to choose the procedural law.

<sup>36</sup> Tai- Heng Cheng, 'Law on Loan: Legal Reconstruction after Armed Conflict' in in Virtus C. Igbokwe, Nicholas Turner and Obijiofor Aginam (eds), *Foreign Direct Investment in Post- conflict Countries: Opportunities and Challenges* (Adonis & Abbey Publishers Ltd 2010) 86.

<sup>37</sup> The UAE Federal Code of Civil Procedures No. 11 of 1992 Published in the Official Gazette No. 235 of 8 March 1992.

<sup>38</sup> Abdel Hamid El- Ahdab and Jalal El- Ahdab, *Arbitration with the Arab Countries* (3<sup>rd</sup> edn, Kluwer Law International 2011) 798.

<sup>39</sup> Article 28 (1) the UAE Draft Arbitration Law of 2008.

<sup>40</sup> Jingzhou Tao, *Arbitration Law and Practice in China* (2<sup>nd</sup> edn, Kluwer Law International 2008) 125.

<sup>41</sup> Revised and Adopted by the China Council for the Promotion of International Trade /China Chamber of International Commerce on January 11, 2005. Effective as from May 1, 2005.

<sup>42</sup> *ibid.*

<sup>43</sup> Michael Moser and Peter Yuen, 'The New CITAC Arbitration Rules' (2005) 21 *Arbitration International* 394.

does not mean that the parties can exclude the rules which have a compulsory nature or agree on rules which violate the public policy of Iraq.<sup>44</sup>

### **5.2.1.2. By Arbitrators:**

The parties do not always make use of their right to choose the law that will govern the arbitration procedure, either through neglect or because they cannot reach agreement about the law or because they prefer to leave the matter to the arbitral tribunal. Whatever their reasons, if the parties do not express their choice of procedural law, it will be determined by the arbitrators.<sup>45</sup> The arbitrators, like the parties, have the freedom to determine the procedural law. They can apply the law of the seat of arbitration, or international law, or may choose the general principles of law, unlike the judge, who is restricted by *lex fori*, the law of the forum. However, the arbitrators' freedom to choose the procedural law is determined by the mandatory rules<sup>46</sup> of the place of arbitration and the parties' agreement.<sup>47</sup> The arbitrators can choose the seat of arbitration law or can choose set of arbitration rule or select several national laws. The Iraqi CCP law gives the arbitrators the authority to determine the procedural law in cases where the parties fail to make a choice.<sup>48</sup> However, Iraqi Law determines the arbitrators' freedom to choose the procedural Law of arbitration in public policy of Iraq.<sup>49</sup> Article 265 (2) provided that "if the arbitrators are authorised by the parties to reach a compromise, then they shall not be bound to follow the rules of court, nor the rules of law, except those rules relating to public order".<sup>50</sup> The Iraqi DICAL also gives the arbitrator freedom to select the procedural law if the parties cannot reach to agreement.<sup>51</sup> The Federal Code of Civil Procedure of UAE No.11 of 1992 empowers the

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<sup>44</sup> Article 265 (2) of Iraqi CCP "If the arbitrators were authorized to embark on a settlement, then they shall be exempted from complying with the rules and procedures stipulated in the Civil Actions Law, except those pertaining to public order".

<sup>45</sup> France J. Higgins, William G. Brown and Patrick J. Roach, 'Pitfalls in International Commercial Arbitration' (1979-1980) 35 the Business Lawyer 1035.

<sup>46</sup> Pierre Mayer, 'Mandatory Rules of Law in International Arbitration' (1986) 2 Arbitration International 274; Alan Scott Rau, 'The Arbitrator and Mandatory Rules of Law' (2008) American Review of International Arbitration 2.

<sup>47</sup> Article V (1) (d) of the New York Convention.

<sup>48</sup> Article 265 (2) of Iraqi CCP.

<sup>49</sup> Abdel Hamid El- Ahdab and Jalal El- Ahdab, *Arbitration with the Arab Countries* (3<sup>rd</sup> edn, Kluwer Law International 2011) 245.

<sup>50</sup> The translation from Arabic language to English is available at <<http://gjpi.org/library/primary/statutes/>> accessed on 26 March 2104.

<sup>51</sup> Article 21 of Iraqi DICAL.

arbitrator with wide freedom to determine the procedural law when the parties cannot reach agreement. Article 212 (1) of The Federal Code of Civil Procedure of UAE No.11 of 1992 provides that:

The arbitrator shall issue his award without being bound by any procedures other than those stipulated in this Chapter and those pertaining to calling of the parties, hearing of their pleas and enabling them to submit their documents. Notwithstanding the foregoing, the parties to the dispute may agree on certain procedures to be followed by the arbitrator.<sup>52</sup>

The UAE Arbitration law Draft of 2008 recognises the arbitral tribunal's right to determine the procedural law.

The PRC arbitrator law does not refer to the arbitrator right to determine the applicable law if the parties cannot reach to agreement. However, Article 33 (1) of CIETAC rules of 2012 provided that:

The arbitral tribunal shall examine the case in any way that it deems appropriate unless otherwise agreed by the parties. Under any circumstance, the arbitral tribunal shall act impartially and fairly and shall afford reasonable opportunities to all parties for presentations and debates.<sup>53</sup>

### **5.2.2. The Relationship between the Procedural Law and the Seat of Arbitration:**

As mentioned earlier in this chapter, the parties have the freedom to choose the place where they feel the arbitration can be conducted naturally where they can determine the law governing the arbitration procedures.<sup>54</sup> They may choose the law of the seat of arbitration or a different domestic legal system or they can apply international law. The question arising here is: to what extent are the arbitration proceedings restricted by association with the law of the seat of arbitration? Are the arbitration procedures free from the controllers of the seat of law or are they subject to the legal framework of the arbitration seat? With regard to petroleum disputes, there are two views governing the relationship between the place of arbitration and procedures of arbitration: delocalisation theory and national or seat theory. The arbitral awards in petroleum disputes play a major role in providing the foundation stone for these theories and also contribute

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<sup>52</sup> The translation from Arabic language to English is available at <<http://www.diac.ae/idias/rules/uae/chapter4/>> accessed on 13 August 2014.

<sup>53</sup> The English text is available at < <http://www.cietac.org/index.cms>> accessed on 29 August 2014.

<sup>54</sup> See page 157 of this chapter.

to the development and maturation of these theories. Therefore any examination of the relationship between the arbitration proceedings and the seat of arbitration should be conducted by following two approaches. The first approach is theoretical: it proceeds by examining the most significant theories in this area. The second approach is the practical one, and consists of selecting the most influential arbitral awards in petroleum disputes.

#### ***5.2.2.1. The Delocalisation Theory:***

This theory claims there is no relationship between the arbitration process and the place which hosts this process.<sup>55</sup> It entails detaching the petroleum arbitration proceedings completely from the control of the courts and the laws of the state where it takes place. It also aims to unify the system of law.<sup>56</sup> The arbitration award is independent of the local courts or the interventions of domestic law.<sup>57</sup> But does it serve and protect the interests of both parties with regard to petroleum arbitration?

It is a theory which has raised acrimonious debates among scholars. Its proponents have produced various arguments in its support. They argue that the parties who choose a foreign state as the seat of arbitration are not related to that state and have no connection with it, and the state courts have no control over the arbitration process as long as the parties have no connection with that state.<sup>58</sup> When the arbitration and the enforcement of the arbitral award are subject to the supervision of the state courts where it takes place, then the process is subject to a dual legal system the national law of the arbitration place and the law governing the arbitration procedures. It should be subject only to the law of the place where the award is made and the court of this place should play the main role in the arbitration process.<sup>59</sup> In this regard, the capacity of the national court and law to control the arbitration process may allow national

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<sup>55</sup> Simon Greenberg, Christopher Kee and Romesh Weeramantry, *International Commercial Arbitration: An Asia – Pacific Perspective* (Cambridge University Press 2011) 68; Patrick Dumberry, ‘International Investment Contract’ in Tarcisio Gazzini and Eric De Brabandere (eds), *International Investment Law: The Sources of Rights and Obligations* (Martinus Nijhoff Publishers) 225.

<sup>56</sup> Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford University Press 2007) 246.

<sup>57</sup> Petar Sercevic, ‘The Setting Aside and Enforcement of Arbitral Awards under the UNCITRAL Model Law’ in Petar Sarcevic (ed), *Essays on International Commercial Arbitration* (Martinus Nijhoff 1989) 181.

<sup>58</sup> Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press 2008) 56.

<sup>59</sup> Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (5<sup>th</sup> edn, Oxford University Press 2009) 190.

interests to dominate international interests.<sup>60</sup> The supporters of the theory, moreover, advocate a contractual concept of arbitration which considers the agreement of the parties to be the source of the legitimacy of the arbitration.<sup>61</sup> Furthermore, giving the laws of the seat of arbitration control over the arbitration may hinder its progress and cause delays due to the restrictions and impediments imposed by those laws.<sup>62</sup> For all the above-mentioned reasons, supporters of this theory claim that arbitration proceedings should be free from the controlling influence of domestic law and that the interests of international commerce require it to be independent of any national legal system. It can depend, for example, on public international law.<sup>63</sup>

However, this theory faces various criticisms. The arguments of its opponents emphasize the importance of the place of arbitration in relation to the enforcement of the arbitration award and the significant contribution made by the court to the success of the arbitration process. These opponents argue that any legal activity which takes place in a particular state should be subject to the law of that state.<sup>64</sup> Mann contends that “(.....) [e]very arbitration is a national arbitration, that is to say, subject to a specific system of national law”<sup>65</sup> and that “the *Loi de l’arbitrage* is the law of the country in which the tribunal has its seat”.<sup>66</sup> He believes that the arbitral award should be obligatory for the parties if they are associated with the law of the place where the arbitration occurs.<sup>67</sup> This view rejects the theory that the parties should have complete control over the arbitration process by establishing their own legal system and argues that they should be neither autonomous nor exempt from the jurisdiction of the legal system of the arbitration seat.<sup>68</sup> The legal system of the place of arbitration, the argument goes on, does not deny the parties’ freedom but rather describes and determines the parameters of that freedom. It has been stated that “According to this principle the parties are at liberty to make such

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<sup>60</sup> Jan Paulsson, ‘Delocalisation of International Commercial Arbitration: When and Why It Matters’ (1983) 32 *International and Comparative Law Quarterly* 53.

<sup>61</sup> Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford University Press 2007) 249.

<sup>62</sup> William W Park, ‘National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration’ (1989) 63 *Tulane law review* 647.

<sup>63</sup> *ARAMCO (Saudi Arabia v. Arabian American Oil Company)* (1958) 27 ILR 117.

<sup>64</sup> Jan Paulsson, ‘Arbitration Unbound: Detached From the Law of Its Country of Origin’ (1981) 30 *International and Comparative Law Quarterly* 358.

<sup>65</sup> Francis A. Mann, ‘Lex Facit Arbitrum’ (1986) 2 *Arbitration International* 241.

<sup>66</sup> *ibid.*

<sup>67</sup> *ibid.*

<sup>68</sup> Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford University Press 2007) 250.

arrangement as they like but, as is well known, in all legal systems the principle of party autonomy is subject to a great and growing number of qualifications”.<sup>69</sup> In addition even the proponents of the delocalisation theory concede that arbitration does not take place in a legal lacuna<sup>70</sup> and that the parties will, sometimes ask the court to assist in certain matters, for example, the appointment of arbitrators or the imposition of arbitral orders, or the enforcement of interim measures of protection.<sup>71</sup> Therefore the ancillary role played by the court is indispensable to the parties and to the arbitral tribunal. Moreover, the parties look to save costs and time by conducting the arbitration process quickly. They give great importance to this and, while accepting the subjection of the arbitration process to the arbitration court’s supervision, they wish for the enactment of correct and valid awards.<sup>72</sup> The parties would not want complete freedom to the detriment of the arbitral award’s validity. Furthermore, detaching the arbitration procedures from the procedural law of the place where the arbitration takes place may give grounds for setting aside the award, which then could not be enforced.<sup>73</sup>

Despite the arguments defending the theory, there has been a general failure of delocalisation in practice. A prominent example of this failure is to be found in the laws of Belgium, specifically Article 1717 of the *Code Judiciaire* of 27 March 1985 which provided that:

The Court of Belgium may be seized of a request for annulment only if at least one of the parties to the dispute decided by the arbitral award is either a physical person having Belgian nationality or residence, or a legal entity created in Belgium or having a branch or any other establishment in Belgium.<sup>74</sup>

According to this article, parties who are not Belgian citizens or do not reside in that country or have a business connection there were not subject to review by Belgian courts but were subject only to the court of the country where the arbitral award was sought to enforce. However, parties started to avoid Belgium as a seat of arbitration and the article was amended in

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<sup>69</sup> Clive M. Schmitthoff, *Select Essay on International Trade Law* (Chia- Jui Cheng ed, Kluwer Academic Publishers 1988) 654.

<sup>70</sup> Jan Paulsson, ‘Delocalisation of International Commercial Arbitration: When and Why It Matters’ (1983) 32 *International and Comparative Law Quarterly* 53.

<sup>71</sup> Hong-lin Yu, ‘A Theoretical Overview of the Foundations of International Commercial Arbitration’ (2008) 2 *Contemporary Asia Arbitration Journal* 256; Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press 2008) 57.

<sup>72</sup> Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford University Press 2007) 250.

<sup>73</sup> Okezie Chukwumerije, *Choice of Law in International Commercial Arbitration* (Quorum Books 1994) 89.

<sup>74</sup> The Belgian *Code Judiciaire* of 27 March 1985.

1998.<sup>75</sup> Professor Goode examined the reason for this amendment and concluded that: “this ingenious measure back-fired as the arbitration community came to see that its effect was to leave parties who wanted judicial assistance or had good grounds for annulment with nowhere to go”.<sup>76</sup>

However, it could be said that the theory of delocalisation has not gained wide acceptance either from the legal community or from the parties themselves, who feel that detaching the arbitration process from any supervision by the court of the place in which they choose to conduct the process would endanger their chances of achieving valid enforceable awards. Subjecting the arbitration procedures to the court and law of the place of arbitration allows the arbitral award to be scrutinized for any defects which the losing party considers as grounds for setting aside the arbitral award. Therefore the most important part of the arbitration process, which is the enforcement of the arbitral award, may be challenged and as a consequence the award may not be made. With regard to petroleum disputes, it could be said this theory was designed to serve and protect the petroleum companies’ interests to the detriment of the interests of the host state.

#### **5.2.2.2. The Seat Theory:**

In the seat theory, unlike the delocalisation theory, there is a link between the municipal laws governing the arbitration procedures and the place where the arbitration takes place. Accordingly, the law of the place of arbitration would govern the arbitration procedures and the court of this place would also have the jurisdiction to supervise the arbitration process.<sup>77</sup> The purpose of the connection between the law of the place and arbitration procedures is to make sure that the arbitration process is conducted in a sound manner, or as Redfern puts it. “the *Lex arbitri* helps to ensure that the arbitral process works as it should”.<sup>78</sup> The arbitration process derives its legality and legitimacy from the seat of arbitration which also guarantees the

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<sup>75</sup> Roy Goode, ‘The Role of The *Lex Arbitri* in International Commercial Arbitration’ (2001) 17 *Arbitration International* 19.

<sup>76</sup> Roy Goode, ‘The Role of The *Lex Arbitri* in International Commercial Arbitration’ (2001) 17 *Arbitration International* 19.

<sup>77</sup> Roy Goode, *Goode on Commercial Law* (Ewan McKendrick (ed), 4<sup>th</sup> edn, Penguin Books 2010) 1308; Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (5<sup>th</sup> edn, Oxford University Press 2009) 191.

<sup>78</sup> Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (5<sup>th</sup> edn, Oxford University Press 2009) 191.

legitimacy of the arbitral award.<sup>79</sup> The seat of arbitration is determined by the parties directly or indirectly by reference to specific institutions and often this institution's rules indicate to the parties how to choose the arbitration place,<sup>80</sup> and in the absence of a choice by the parties the arbitral tribunal may choose.<sup>81</sup> Determining the seat of arbitration has great importance in identifying many issues, namely arbitrability, the arbitral tribunal establishment, the formal requirements of any arbitration agreement and then ensuring its validity, and the procedures for setting aside the arbitral award.<sup>82</sup> The seat of arbitration is the place of the arbitral tribunal but that is not necessarily its geographical location. It is rather the "legal domicile or the judicial home of arbitration".<sup>83</sup> In this regard, the question of the seat raises some practical issues. For various reasons, the arbitrators may hold the hearing and meetings in different countries. In that case it would have to be decided which place was to be recognised as the seat of arbitration and consequently which national system of law was to govern the arbitration procedures. In this respect, it is critically important to distinguish between the geographical place of arbitration in which it is convenient<sup>84</sup> to conduct the meetings or hearings and the legal seat of arbitration.<sup>85</sup> The issue is dealt with in the UNCITRAL Arbitration Rules of 2010, Article 18 (2).<sup>86</sup> It distinguishes between the seat of arbitration, which provides the arbitration procedures with its a legal framework, and the geographical location where it is convenient to conduct the hearing.<sup>87</sup> Article 18 (1) provides that "The award shall be deemed to have been made at the place of

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<sup>79</sup> Simon Greenberg, Christopher Kee and Romesh Weeramantry, *International Commercial Arbitration: An Asia – Pacific Perspective* (Cambridge University Press 2011) 66.

<sup>80</sup> For example Article 18 of the ICC Arbitration Rules 2012 which provided that:

1. The place of the arbitration shall be fixed by the Court unless agreed upon by the parties.
2. The Arbitral Tribunal may, after consultation with the parties, conduct hearings and meetings at any location it considers appropriate unless otherwise agreed by the parties.
3. The Arbitral Tribunal may deliberate at any location it considers appropriate.

<sup>81</sup> Article 18 (1) of the UNCITRAL Arbitration Rules 2010 provided that "If the parties have not previously agreed on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case. The award shall be deemed to have been made at the place of arbitration".

<sup>82</sup> Roy Goode, *Goode on Commercial Law* (Ewan McKendrick (ed) 4<sup>th</sup> edn, Penguin Books 2010) 1308.

<sup>83</sup> Gary Brian Born, *International Commercial Arbitration*, vol 1 (Kluwer Law International 2009) 1240.

<sup>84</sup> *Union of India v McDonnell Douglas Corp.*, [1993] 2 Lloyd's Rep. 48.

<sup>85</sup> Filip De Ly, 'The Place of Arbitration in the Conflict of Laws on International Commercial Arbitration: An Exercise in Arbitration Planning' (1991) 12 *Northwestern Journal of International Law & Business* 48.

<sup>86</sup> Article 20 of the UNCITRAL Model Law provides that:

Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

<sup>87</sup> UNCITRAL Model Law 2010 Article 18 (2) which provided that "The arbitral tribunal may meet at any location it considers appropriate for deliberations. Unless otherwise agreed by the parties, the arbitral tribunal may also meet at any location it considers appropriate for any other purpose, including hearings".



arbitration”. The conducting of hearing sessions outside of the arbitration seat does not have any impact of the legal seat of arbitration.<sup>88</sup>

The important question arising here is whether Iraq can be a suitable seat of arbitration and then if it could be argued that a centre of petroleum arbitration should be established in Iraq?

To answer this question the need to know the criteria that the parties depend on to choose the seat of arbitration. As mentioned previously the parties will be looking for a place that has neutrality this means it has no connection with either party law.<sup>89</sup> The other important issue looked for by the parties is the seat of arbitration should be a party of New York Convention of 1958.<sup>90</sup> In order to facility enforcement of arbitral award which is most of countries became parties of this convention. So, is that compatible with Iraqi prospect to establish petroleum arbitration centre?

In fact this considered one of the important challenges facing Iraq that because has not yet joined to New York Convention. Therefore Iraq should join to this convention to facilitate enforcement arbitral award.

Despite certain practical problems, however, the seat theory has wide support. Mann and Sauser are considered to be its most famous proponents. Professor Sauser gives emphasis to the law of the seat of arbitration in its function of governing the arbitration process. He stresses the necessary association between the arbitration and the procedural laws of its seat.<sup>91</sup> Mann strongly supports this theory, arguing that every arbitration should be controlled by national law. It is not acceptable for it to be “suspended in the air”.<sup>92</sup> As mentioned earlier in this section, he stated that every arbitration is a national arbitration and that the arbitral award should not be compulsory unless it is linked to the law of the arbitration seat.<sup>93</sup> According to the proponents of this view, the arbitral award derives its binding force from the legal system of the arbitration

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<sup>88</sup> Simon Greenberg, Christopher Kee, and Romesh Weeramantry, *International Commercial Arbitration: An Asia – Pacific Perspective* (Cambridge University Press 2011) 57.

<sup>89</sup> See section 5.2 of this chapter.

<sup>90</sup> Simon Greenberg, Christopher Kee and Romesh Weeramantry, *International Commercial Arbitration: An Asia – Pacific Perspective* (Cambridge University Press 2011) 82.

<sup>91</sup> Carlo Croff, ‘The Applicable Law in an International Commercial Arbitration: Is it Still a Conflict of Laws Problem?’ (1982) 16 *International Lawyer* 613.

<sup>92</sup> *ibid.*

<sup>93</sup> Francis A. Mann, ‘Lex Facit Arbitrum’ (1986) 2 *Arbitration International* 241.

seat.<sup>94</sup> Its proponents have additional concerns about nationless awards which find themselves existing in a legal vacuum.<sup>95</sup>

This theory has won the support not only of scholars but also state, which have adopted international instruments<sup>96</sup> and national laws that incorporate it.<sup>97</sup> However, the Iraqi CCP does not include any article explaining the Iraqi position regarding the seat of arbitration. Therefore, if the parties do not themselves determine the seat of arbitration, it will be determined by the arbitrators, and if the latter fail to do so, the court having the original jurisdiction shall determine it.<sup>98</sup> According to Article 269<sup>99</sup> of the CCP, the Iraqi court has the original jurisdiction to settle any problem concerning arbitration proceedings. Article 28 of the Iraqi Civil Law No.40, 1951, states that the law of the place of venue will govern and determine the terms of reference, and as a result, any arbitration must occur in Iraq.<sup>100</sup> It seems from both articles that the Iraqi procedural law governs the arbitration procedures. The Iraqi DICAL gives the parties the freedom to chose the arbitration seat<sup>101</sup> they can determine the seat inside or outside Iraq.<sup>102</sup> However, as mentioned previously, the Iraqi DLOG, in Article 39 (D) (1), determines the law that will apply to arbitration procedures in regard to petroleum disputes and it decrees that the procedural rules of Paris or Geneva or Cairo will be followed.<sup>103</sup> This article permits foreign procedural law to govern the arbitration procedures. The present author's view that establish center to settle

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<sup>94</sup> Jan Paulsson, 'Arbitration Unbound: Detached from the Law of Its Country of Origin' (1981) 30 *International and Comparative Law Quarterly* 358.

<sup>95</sup> Mauro Rubino-Sammartano, *International Arbitration: Law and Practice* (2<sup>nd</sup> edn, Kluwer Law International 2001) 485.

<sup>96</sup> For example, Article 2 of Geneva Protocol of Arbitration 1923, Article V (d) New York Convention 1958 Article V (d) and Article 18 (1), (2) of UNCITRAL Model Law 2010.

<sup>97</sup> Many laws have adopted the seat theory, for example, Article 3 of English arbitration act 1996, Article 1493 of French New Code of Civil Procedures and Article 28 of Egypt Arbitration Act No 27 of 1994.

<sup>98</sup> Abdel Hamid El- Ahdab and Jalal El- Ahdab, *Arbitration with the Arab Countries* (3<sup>rd</sup> edn, Kluwer Law International 2011) 246.

<sup>99</sup> Article 269 of Iraqi CCP provides that "Arbitrators should go back to the competent court originally assigned for the dispute to issue its decision for judicial delegations that may be necessary in settling the dispute, or if needed taking legal action as a result of witness abstention or refusal to respond (testify)". The translation from Arabic language to English language is available at < <http://gjpi.org/library/primary/statutes/>> accessed on 26 June 2014.

<sup>100</sup> *ibid.*

<sup>101</sup> Article 22 (1) of Iraqi DICAL.

<sup>102</sup> *ibid.*

<sup>103</sup> Article 39 (D) (1) of the Iraqi DLOG of 2007 which provided that "In accordance with the Rules of Procedure for Arbitration Proceedings of Paris, Geneva or Cairo for the Settlement of Disputes between States and Nationals of other States and based on the Iraqi law". This translation from Arabic language to English Language by Council Of Ministers Oil and Energy Committee the whole text is available at < <http://www.krg.org/uploads/documents/Draft%20Iraq> > accessed on 10 April 2014.

petroleum disputes in Iraq became necessary to remove any contracts may be happen in this regard. This centre will apply the Iraqi procedural law.

The Civil Procedures Federal Law of UAE No.11 of 1991 addresses the seat of arbitration indirectly in Article 208 (1). According to this article, the arbitrator should inform the parties of his or her decision regarding the arbitration seat within a maximum period of thirty days from the starting date of the first session of the arbitral tribunal.<sup>104</sup> It can be concluded from this Article that the existing federal law restricts the parties' freedom to determine the seat of arbitration by giving the arbitrator the exclusive power to determine it. However, the Draft Federal Law of the arbitration of 2008 takes a different view concerning the place of arbitration and gives the parties freedom to choose the arbitration seat themselves or by the arbitral tribunal only in cases where the parties cannot not reach agreement.<sup>105</sup> The arbitral tribunal should further bear in mind the circumstances of the case and the choice of place of the parties.<sup>106</sup> The freedom of the arbitral tribunal under this draft law is restricted by the UAE Law of the rules of arbitration.<sup>107</sup> They may only choose from among places inside the UAE and without reference to anywhere outside the UAE borders in order to avoid the possibility of a foreign arbitral award.<sup>108</sup>

The PRC Arbitration Law of 1994<sup>109</sup> does not address the seat of arbitration directly. However, Article 16 of the Supreme People's Court Judicial Interpretation of 2006 rules that in cases where the parties do not locate the place of arbitration in their arbitration agreement it is assumed that the location will be decided by the selected arbitration commission.<sup>110</sup> The PRC

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<sup>104</sup> Article 208 (1) from the CCP Federal Law of UAE No11 of 1991.

<sup>105</sup> Article 20 of the Federal Draft Law of Arbitration 2008.

<sup>106</sup> *ibid.*

<sup>107</sup> Abdel Hamid El- Ahdab and Jalal El- Ahdab, *Arbitration with the Arab Countries* (3<sup>rd</sup> edn, Kluwer Law International 2011) 799.

<sup>108</sup> *ibid.*

<sup>109</sup> Adopted at the Ninth Meeting of the Standing Committee of the Eighth National People's Congress on August 31, 1994 and promulgated by Order No.31 of the President of the People's Republic of China on August 31, 1994.

<sup>110</sup> Article 16 of Supreme People's Court Judicial Interpretation of 2006 provided that:

[t]he law as agreed by the parties concerned shall apply to the examination over the validity of foreign – related arbitration agreement; where the parties concerned have not agreed on the applicable law but have agreed on the place of arbitration, the law of the place of arbitration shall apply; and where neither the applicable law nor the place of arbitration is agreed or the agreement on the place of arbitration is not clear, the law of the place where the court is located shall apply.

Interpretation of the Supreme People's Court concerning Some Issues on Application of the Arbitration Law of the People's Republic of China, which was adopted at the 1375th meeting of the Judicial Committee of the Supreme People's Court on December 26, 2005, is hereby promulgated, and came into force on September 8, 2006.

Arbitration Law does not discriminate between domestic and foreign arbitration with regard to determining the place of arbitration. This may cause problems in practice when the parties choose a foreign location for domestic arbitration.<sup>111</sup> The Code of Contract Law of 1999 provides that the parties can choose a place outside PRC if the dispute meets the criteria of being foreign- related.<sup>112</sup>

The 2008 UAE Draft Law addresses the question of the seat of arbitration by giving the parties the right to choose the arbitration place: if they cannot do so, the arbitrators will determine the arbitration seat. Iraqi law should adopt and follow the UAE approach in this regard by adopting the seat theory. This is so because this theory serves both parties interests, whether the Iraqi state or a petroleum company. It provides sufficient supervision of the arbitration process by subjecting this process to the court of the state where the arbitration is being conducted.

However, the wide acceptance of the seat theory by the legal community does not immunise it from criticism. From a practical viewpoint, the choice of a seat of arbitration either by parties or by the arbitral tribunal may be motivated by economic or other reasons without consideration of the subjective or objective connections between the parties or their attitude to the law governing the applicable procedures.<sup>113</sup> The parties may not always be content to associate with a particular legal system when they commit themselves to its jurisdiction or they may not have adequate knowledge of the law selected to govern their arbitration procedures.<sup>114</sup> Moreover, it is necessary for the parties to check the mandatory rules of the national law wherever the arbitration takes place in order to avoid an invalid award.<sup>115</sup> In addition, not every country has a

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<sup>111</sup> Jingzhou Tao, *Arbitration Law and Practice in China* (2<sup>nd</sup> edn, Kluwer Law International 2008) 111.

<sup>112</sup> Article 128 of PRC of the Code of Contract Law of 1999 provided that:

If the parties are unwilling to resort to consultation or mediation, or such consultation or mediation fails, the parties may apply to an arbitration institution for arbitration according to the arbitration agreement. The parties to a foreign-related contract may, according to the arbitration agreement, apply to a Chinese arbitration institution or any other arbitration institution for arbitration. If the parties have no arbitration agreement or the arbitration agreement is invalid, they may initiate an action in a people's court. The parties shall implement any legally effective judgment, arbitral award or letter of mediation; in case of a refusal to implement, the other party may apply to a people's court for execution.

<sup>113</sup> Carlo Croff, 'The Applicable Law in an International Commercial Arbitration: Is it Still a Conflict of Laws Problem?' (1982) 16 *International Lawyer* 613.

<sup>114</sup> *ibid.*

<sup>115</sup> Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (5<sup>th</sup> edn, Oxford University Press 2009) 192.

legal system suitable for governing arbitration procedures. This may harm the interest of the parties, who might choose a place for reasons of convenience without considering the implications of that choice.<sup>116</sup>

However, the seat theory has widespread support within the legal community at all levels. It embeds the arbitration process in a legal framework, thus protecting the parties' interests and ensuring the validity of the arbitral award. The parties can avoid countries where the legal system is unsuited to the arbitration process. In any case, most countries have attempted to modernise their national law with regard to arbitration. The solution is for the parties to give close attention to the national law of the seat country and not simply to settle for the most obvious or convenient place.

#### **5.2.1.2.2. Petroleum Arbitration in Practice:**

The roots of delocalisation are to be found in the arbitral award of *Saudi Arabia v. Arabian American Oil Company (ARAMCO)*.<sup>117</sup> The arbitral tribunal encountered the issue of identifying the procedural law. The arbitral tribunal decided to exclude Saudi Arabian national law and USA law, due to various considerations. The parties had already chosen Geneva as the seat of arbitration to comply with the principle of equal treatment for both parties.<sup>118</sup> Also the arbitral tribunal excluded the law of the seat of arbitration and upheld the jurisdictional immunity of the states on the grounds that “the jurisdictional immunity of States (.....) excludes the possibility, for the judicial authorities of the country of the seat, of exercising their right of supervision and interference in the arbitral proceedings which they have in certain cases”.<sup>119</sup> Therefore the arbitral tribunal applied public international law as the law governing the arbitration procedures. The arbitral tribunal justified its decision thus:

(.....) It follows that the arbitration, as such, can only be governed by International Law, since the Parties have clearly expressed their common intention that it should not be governed by the Law of Saudi Arabia, and since there is no ground for the application of the American Law to the other Party. This is not only because the seat of

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<sup>116</sup> Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (5<sup>th</sup> edn, Oxford University Press 2009) 192.

<sup>117</sup> *ARAMCO (Saudi Arabia v. Arabian American Oil Company)* (1958) 27 ILR 117.

<sup>118</sup> *ARAMCO (Saudi Arabia v. Arabian American Oil Company)* (1958) 27 ILR 155- 156.

<sup>119</sup> *ARAMCO (Saudi Arabia v. Arabian American Oil Company)* (1958) 27 ILR 155.

the Tribunal is not in the United States, but also because of the complete equality of the Parties in the proceedings before the arbitrators.<sup>120</sup>

The arbitral tribunal chose “the Draft Convention on Arbitration Procedure, adopted by the International Law Commission of the United Nations in its Fifth Session 1955”.<sup>121</sup> The award in this case is considered to be the first example of the application of public international law directly to the arbitration procedures in a petroleum dispute.

Professor Dupuy, the sole arbitrator in the case of *Texaco v. Libya*,<sup>122</sup> stated that when the parties have not determined the applicable law of arbitration proceedings, the arbitrator should determine it. He held that there are two options when choosing the law to govern the arbitration procedures. The first option is to apply the national law, specifically the law of the seat of arbitration. The second option is to apply public international law. The arbitrator chose to apply public international law and follow the *ARAMCO case* award in accordance with the principle of state sovereignty. He justified his choice of international law as the applicable law of arbitration procedures by stating:

(.....) [t]he fact that, in the present dispute, the parties had agreed to have recourse, if need be, to the President of the International Court of Justice implies that it was their intention that this arbitration should come under the aegis of the United Nations and, therefore, that the system of law governing this arbitration should be international law.<sup>123</sup>

On this issue, the reasoning of the arbitrator was unsatisfactory. He supposes that the parties consented to apply public international law merely because they were willing to be subject to the judgment of the President of International Court of Justice. He makes this the foundation stone of his argument but in doing so he attributes to the parties intentions which in reality may not exist. The choice of the President of International Court of Justice does not necessarily reflect the parties’ desire to be subject to the arbitration procedures of public international law. If it were the case that the parties chose a French arbitrator would it imply willingness for the arbitral procedures to be subject to the national law of France?

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<sup>120</sup> *ARAMCO (Saudi Arabia v. Arabian American Oil Company)* (1958) 27 ILR 156.

<sup>121</sup> *ibid.*

<sup>122</sup> *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. the Government of the Libyan Arab Republic* (1979) 53 ILR 389.

<sup>123</sup> *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. the Government of the Libyan Arab Republic* (1979) 53 ILR 435.

Another award drawing on the delocalisation theory is to be found in the case of *Libyan American Oil Company v. Libya Arab Jamahiriya*<sup>124</sup> (*LIAMCO*). The parties were unable to determine either the seat of arbitration or the law of the arbitral procedure, therefore the matter was left to the sole arbitrator, Dr Mahmassani, who determined that “by decision of the Arbitral Tribunal, independently of the local law of the seat of arbitration”,<sup>125</sup> he would apply “the general principles contained in the Draft Convention on Arbitral Procedure elaborated by the International Law Commission of the United Nations.”<sup>126</sup> The arbitrator justified that because this approach was adopted by International Law Commission of the United Nations.<sup>127</sup> In addition to that this approach is adopted by international conventions for example Article 44 of the ICSID Convention, and in domestic law such as Article 24 of the Swiss International Arbitration Convention of 1969.<sup>128</sup> Moreover, he depends on the *ARAMCO Case* approach, which detached the procedural law of arbitration from the seat of arbitration by applying international law. He also relied on the *Sapphire Case*.<sup>129</sup> However, it seems that his reasoning is not so clear because he depends on two different cases’ approach. The arbitrator in the *ARAMCO Case* it will be relied on delocalisation theory, while in the *Sapphire Case* the arbitrator used a different approach by applying the law of seat of arbitration.

All the above mentioned cases applied international law rather than the national law of the seat of arbitration, thus detaching the arbitration procedures from national law.

In *Sapphire International Petroleum Ltd v. The National Iranian Oil Co*,<sup>130</sup> the sole arbitrator, Cavin, adopted a different approach by subjecting the arbitration procedures to the law of the seat of arbitration, which in this case was Swiss law.<sup>131</sup> He justified his position by arguing that if the parties have the freedom to choose the place of arbitration and they choose instead to

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<sup>124</sup> *Libyan American Oil Company v. The Socialist Peoples' Libyan Arab Jamahiriya* (1982) 62 ILR 140.

<sup>125</sup> *Libyan American Oil Company v. The Socialist Peoples' Libyan Arab Jamahiriya* (1982) 62 ILR 180.

<sup>126</sup> *Libyan American Oil Company v. The Socialist Peoples' Libyan Arab Jamahiriya* (1982) 62 ILR 180.

<sup>127</sup> *Libyan American Oil Company v. The Socialist Peoples' Libyan Arab Jamahiriya* (1982) 62 ILR 180.

<sup>128</sup> Article 44 of ICSID Convention provided that:

Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.

<sup>129</sup> *Sapphire International Petroleum Ltd. v. National Iranian Oil Company* (1963) 35 ILR 163.

<sup>130</sup> *ibid.*

<sup>131</sup> *ibid* 169.

leave the matter to the arbitral tribunal then by implication they are willing to submit them to the law of the place of arbitration.<sup>132</sup> “Even if this interpretation of the parties’ intention is wrong, the rule is that (.....) the arbitration is submitted to the judicial sovereignty of the seat of the arbitration”.<sup>133</sup>

In *BP v. Libyan Arab Republic*,<sup>134</sup> Judge Lagergren, who was the sole arbitrator in the case, did not adopt the *ARAMCO* approach with regard to the application of public international law. He rejected the *ARAMCO* reasoning that applying the procedural law of the seat of arbitration is a violation of the jurisdictional principles of the state which is a party in of the arbitration.<sup>135</sup> He followed the *Sapphire case*<sup>136</sup> approach and chose Danish law, which was the law of the seat of arbitration, as the law applicable to the arbitration procedure.<sup>137</sup> Judge Lagergren reasoned that the parties submitted their dispute to arbitration because they deemed it an effective mechanism for settling their dispute, even if one of the parties was a state. Therefore applying international law as the procedural law of arbitration in stateless arbitration would be less effective than choosing national law as the applicable law for those procedures

In the case of *Kuwait v. AMINOIL*<sup>138</sup> the situation was different from the above-mentioned cases. The parties selected the applicable law of arbitration procedures and the substantive issues of the petroleum agreement according to Article IV (1) of the arbitration agreement between the parties. This stated that the proceedings of the arbitration were subject to the mandatory rules of the place where the arbitration took place.<sup>139</sup> However, the arbitral tribunal explained that this article did not mean that the arbitration proceedings should be entirely subject to the law of the seat, in this case French law, because

[t]he [P]arties themselves, in the Arbitration Agreement, provided the means of settling the essential procedural rules, when they conferred on the Tribunal the power to “prescribe the procedure applicable to the arbitration on the basis of natural justice

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<sup>132</sup> *Sapphire International Petroleum Ltd. v. National Iranian Oil Company* (1963) 35 ILR 163.

<sup>133</sup> *ibid.*

<sup>134</sup> *BP Exploration Co. (Libya) Ltd. Government of the Libyan Arab Republic* (1979) 53 ILR 297.

<sup>135</sup> *ibid* 309.

<sup>136</sup> *Sapphire International Petroleum Ltd. v. National Iranian Oil Company* (1963) 35 ILR 163.

<sup>137</sup> *BP Exploration Co. (Libya) Ltd. Government of the Libyan Arab Republic* (1979) 53 ILR 297.

<sup>138</sup> *Aminoil (the Government of the State of Kuwait v The American Independent Oil Company)* (1982) 66 ILR 518.

<sup>139</sup> *ibid* 523.



and of such principles of transnational arbitration procedure as it may find applicable”<sup>140</sup>

It is apparent from the above discussion that there is dichotomy and uncertainty involved in subjecting the arbitration proceedings to the law of the place where the arbitration is held. Some of the arbitrators have adopted international law and have thus become free from the control of the national law of the place of arbitration, so that the arbitral award becomes stateless, while in other cases the law of the place of arbitration has been adopted.

### **5.3. Substantive Law in Arbitration:**

After it has determined the law of the arbitration procedure, the next task of the arbitral tribunal is to decide which law is to govern the dispute itself. It is this law which determines the rights and obligation of the parties, the legality of the agreement, the courses to be followed by the parties in fulfilling the agreement, the interpretation of the terms of the agreement and the implications involved in breaches of the agreement.<sup>141</sup> This law is unquestionably the most sensitive and critical issue facing the petroleum arbitration process, since the parties involved, the host state and the petroleum company, have different concerns and conflicting interests. The host state, or whatever alternative sovereign entity is involved, will not wish to waive this sovereignty by submitting its dispute to another state’s court or by applying the law of another nation. Also, as indicated in Chapter Three, the host state may take a dubious view of the arbitration, suspecting that the adoption of foreign law may be designed to protect the interests of the petroleum company and that the petroleum agreement itself may be a legal tool for the appropriation of a natural resource which is the life’s blood of the host state’s economy. The petroleum company, on the other hand, may be reluctant to subject itself to the courts or the national law of the host state because of a belief that the legal system will serve the interests of the host state and also that the court is associated with the prevailing political power. The different perspectives of the parties involved generate controversy regarding the choice of the law which law will govern the petroleum agreement. Furthermore it raises concerns as to whether arbitration is an effective method for settling disputes.

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<sup>140</sup> *Aminoil (the Government of the State of Kuwait v The American Independent Oil Company)* (1982) 66 ILR 518.

<sup>141</sup> Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (5<sup>th</sup> edn, Oxford University Press 2009) 194.

Determining which law is to be applied to a dispute is more difficult for an arbitrator than for a judge. This is because arbitrators do not have *lex fori*, whereas judges are restricted to the *lex fori* of their state<sup>142</sup> and can easily determine the applicable law by referring to the rules governing the conflict of laws.<sup>143</sup>

In any event, the applicable law of merits in petroleum disputes raises several questions. How can the applicable law be determined in general, and what approach is followed by Iraqi law, UAE and PRC in this regard? Which law will be suitable to apply and why? An attempt to answer these questions will be made in the following sub-sections.

### **5.3.1. The Method for Determining the Law Applicable to Substantive Issues:**

#### **5.3.1.1. By Parties:**

The parties involved in the early stages of petroleum negotiations agree at that stage on various provisions and clauses in order to determine the rights and obligations of each party. They can also choose for themselves the law that will apply to the merits of the dispute because they are more capable than others of understanding what is required from the agreement and how best to protect their mutual interests. The parties have the freedom to determine the law by which the merits of each set of arguments will be assessed. This principle of party autonomy has great influence in the legal community: it is recognised both by international instruments<sup>144</sup> and by national laws.<sup>145</sup> The parties can explain their choice of law directly by including in their agreement a written term stipulating the law that will govern the agreement; or they can express their choice tacitly before the arbitral tribunal.<sup>146</sup> Express agreement by both parties with regard to this law serves to avoid any possible ambiguities when the arbitral tribunal comes to apply the substantive law. When the parties make only an implicit choice, then the arbitral tribunal must

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<sup>142</sup> Julian D. M. Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards* (Oceana Publications 1978) 67.

<sup>143</sup> *ibid.*

<sup>144</sup> For example, Article 1 of Geneva Protocol of Arbitration of 1923, Article 42 (1) of the Washington Convention of 1965, Article 21 (1) of ICC the Rules of 2012 and the UNCITRAL Model Law 2010 Article 35 (1).

<sup>145</sup> Article 46 (1) of the English Arbitration Act of 1996, the Private International Law of Switzerland of 1987 in Article 187 (1) and Egyptian Arbitration law No 27 of 1994 in Article 39 (1).

<sup>146</sup> Julian D. M Lew, Loukas A. Mistelis and Stefan M. Kroll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 415.

draw its conclusions as to the intentions of the parties by inferences drawn from observed facts and the connotations of the language used.<sup>147</sup>

The parties are free to choose the law at any time.<sup>148</sup> They can make their agreement regarding the applicable law at the time of concluding the agreement, which is the normal practice or they can choose the law at the time when the dispute is heard before the arbitral tribunal.<sup>149</sup> However, the most suitable time for choosing the applicable law is the time when the parties conclude their agreement. This is because choosing the applicable law at the time when the dispute arises may be difficult due to the viewpoints of the parties differing as a consequence of the dispute between them. In any event, the parties are free to choose either the national law of one of the parties, or the law of third state. They can also choose more than one law to govern different issues in the contractual relationship, a principle known as *depeçage*.<sup>150</sup>

It may nonetheless be asked whether the parties are completely free to determine the law or whether that freedom is in reality limited. The parties' wishes should be taken into consideration<sup>151</sup> by the arbitrators but the autonomy of the parties is limited by legal restrictions and factors related to the applicable law chosen by the parties themselves.<sup>152</sup> The freedom of parties is limited by mandatory law and public policy: they cannot choose laws or rules which are contrary to mandatory law or which violate the public policy of the state. Article 32 of Iraqi Civil Law No 40 of 1951 restricts the parties' autonomy by stating that the provisions of foreign law may not apply if this law is contrary to public order and public morality in Iraq. Legal restriction is not the only obstacle to the autonomy of the parties. There may be other factors which make the arbitral tribunal refuse to comply with the wishes of the parties and apply a law

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<sup>147</sup> Julian D. M Lew, Loukas A. Mistelis and Stefan M. Kroll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 415.

<sup>148</sup> Article 3 (2) of Rome Convention on the Law applicable to Contractual Obligations.

<sup>149</sup> Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (5<sup>th</sup> edn, Oxford University Press 2009) 197.

<sup>150</sup> Julian D. M Lew, Loukas A. Mistelis and Stefan M. Kroll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 418.

<sup>151</sup> It should be mentioned here that the UNCITRAL Model Law of 1985 gives the parties the freedom to choose the applicable law of the substantive issues it is provided that in article 28 (1) "The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute". However, this freedom is limited by the terms of the contract and the usages of the trades. The same Article provides in paragraph 4 that "In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction".

<sup>152</sup> Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 842.

different from the one chosen by them.<sup>153</sup> This is the principle of “unsatisfactory theories”<sup>154</sup> and it means that the applicable law should be mature and can govern all aspects and issues of the agreement, as demonstrated clearly by the arbitral award in *Saudi Arabia v. Arabian American Oil Company (ARAMCO)*.<sup>155</sup> The arbitrator justified the application of a law different from the one chosen by the parties by stating that the law determined by the parties was not complete enough to govern the petroleum concession agreement but had “remained embryonic in Moslem law”.<sup>156</sup> However, these are old decisions (1958 is not that long ago) and in most cases the host states try to promulgate modern laws to serve their investment ambitions, (as described in Chapter Three).

Following this discussion about the freedom of parties, an important question arises: does Iraqi law allow the parties to be involved in choosing the law in regard to petroleum agreements or does it adopt a different approach?

No article in the Iraqi CCP recognises the parties’ right to choose the law applicable to the merits of a dispute. This is because, as mentioned in earlier chapters, this law does not regulate international arbitration, and therefore gives little attention to the law applicable to the merits of a dispute. However the Iraqi DICAL recognises the parties’ autonomy and gives the parties freedom to choose the applicable law of their main agreement.<sup>157</sup> The Iraqi Investment Law No 13 of 2006<sup>158</sup> contains no article explaining the mechanism by which either the parties or the arbitrator might choose the applicable law, although it does allow the parties to have recourse to arbitration to resolve disputes. Article 27 (4) of this law reads: “if the parties to a dispute are subject to the provisions of this law, they may, when concluding their contract, agree on the mode of settlement of their disputes, including recourse to arbitration according to Iraqi law or to any internationally recognized scheme”.<sup>159</sup> It is apparent from this article that the phrase “recourse to arbitration according to Iraqi law” does not mean that Iraqi law governs the merits

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<sup>153</sup> Julian D. M Lew, Loukas A. Mistelis and Stefan M. Kroll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 419.

<sup>154</sup> Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 860.

<sup>155</sup> *ARAMCO (Saudi Arabia v. Arabian American Oil Company)* (1958) 27 ILR 117.

<sup>156</sup> *ibid* 163.

<sup>157</sup> Article 30 (1) of Iraqi DICAL.

<sup>158</sup> The Iraqi Investment Law No 13 of 2006 publishes in Iraqi Official Gazette, Issue 4031 on 17 January 2007, 4.

<sup>159</sup> The translation from Arabic Language to English Language is available at <<http://investpromo.gov.iq/policies-and-laws/>> accessed on 26 March 2014.

of the dispute but that the arbitration process is to be conducted according to the Iraqi law by the establishment of an arbitral tribunal of Iraqi arbitrators.<sup>160</sup> However, even if the Iraqi Investment Law had addressed the applicable law issue its approach would not be comprehensive because the Iraqi Investment Law itself excludes oil and gas from its scope.<sup>161</sup> The Iraqi Regulations for Implementing Government Contracts No.1 of 2014<sup>162</sup> did not express the parties' right to choose the applicable law. The Iraqi DLOG of 2007 likewise does not express the principle of the parties' autonomy in choosing the applicable law. A review of these articles involving different branches of Iraqi law leads to the conclusion that Iraqi law does not follow the party autonomy approach in regard to petroleum agreements. However, some Iraqi authors<sup>163</sup> argue that Iraq gives the parties the freedom to choose the law applicable to the dispute. This view is based on their interpretation of Article 25 (1) of Iraqi Civil Code No 40 of 1951 which states 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.<sup>164</sup>

They argue that the parties can agree to apply a law other than Iraqi law. However, in the view of the present author, this opinion is incompatible with the Iraqi approach to petroleum agreements, since the model for the technical service contract of petroleum does not give the parties the right to choose the applicable law. The resolution of the debate is to be found in Article 37 (1) of that law, which provides that "this contract shall be governed, interpreted, and construed the rights and obligations of the Parties determined in accordance with the laws of the Republic of Iraq". Thus the principle of the autonomy of the parties is limited in practice, which considers the application of Iraqi Law to be compulsory with regard to petroleum agreements.

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<sup>160</sup> زهير الحسني, النظام القانوني للتحكيم التجاري الدولي لنزاعات الأستثمار, مجلة القضاء والتشريع, العدد الثاني, السنة الثانية, 2010, 12  
[Zuhaer El- Hasanee, 'The Legal System of International Commercial Arbitration of Investment Disputes' (2010) 2 Judiciary and Legislation Journal 12].

<sup>161</sup> See section 2.4 of chapter two.

<sup>162</sup> Regulations for Implementing Government Contracts No.1 of 2014. Published in the Iraqi Official Gazette, Issue 4325, 16 June 2014, 56.

<sup>163</sup> زهير الحسني, النظام القانوني للتحكيم التجاري الدولي لنزاعات الأستثمار, مجلة القضاء والتشريع, العدد الثاني, السنة الثانية, 2010, 12  
[Zuhaer El- Hasanee, 'The Legal System of International Commercial Arbitration of Investment Disputes' (2010) 2 Judiciary and Legislation Journal 12]; Saleh Majid, 'Arbitration in Iraq' (2004) 19 Arab Law Quarterly 267.

<sup>164</sup> The translation from Arabic language to English language is available at <<http://gjpi.org/library/primary/statutes/>> accessed on 16 March 2014.

The same position is to be found in the Arbitration Law of China,<sup>165</sup> which limits the parties' autonomy with regard to substantive law. It does not include any article setting out the principle of the parties' autonomy and their freedom to select the applicable law. The Chinese Contract Law of 1999 permits the parties to select the law which will govern the elements of the dispute when one of the parties is foreign, except when "otherwise provided by law,"<sup>166</sup> a proviso which indicates that the freedom of the parties is also restricted in Chinese law. These restrictions are found in laws relating to mineral resources. An example is Article 12 of the Equity Joint Venture Implementing Regulations, which states that "(.....) [t]he resolution of disputes arising there under shall be governed by the Chinese law".<sup>167</sup>

The UAE Federal Law No 11 of 1992 and the UAE Draft Law recognise the doctrine of the autonomy of parties and give the parties freedom to select the law applicable to their dispute in Article 28 (1).

### **5.3.1.2. By Arbitrators:**

The arbitrators may also play a role in selecting the applicable law when the parties fail to make a choice: they can also play an auxiliary role when the parties' choices do not apply to all the relevant issues or when the law chosen by the parties is unsatisfactory. In such cases it is the arbitrator who has the task of determining the applicable law.<sup>168</sup> For example, the petroleum agreement between Iraq and ERAP Petroleum Company granted the arbitral tribunal the power

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<sup>165</sup> Arbitration Law of PRC of 1994.

<sup>166</sup> Article 126 of China Contract Law of 1999 which describes  
Contracts Subject to Mandatory Application of Chinese Law  
Parties to a foreign related contract may select the applicable law for resolution of a contractual dispute, except otherwise provided by law. Where parties to the foreign related contract failed to select the applicable law, the contract shall be governed by the law of the country with the closest connection thereto.

The English texts is available at <[http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383756.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383756.htm)> on 29 June 2014.

<sup>167</sup> Promulgated 20 September 1983 by the State Council it is revised 22 July 2001 by the State Council in accordance with the Decision of the State Council to Revise the Law of the People's Republic of China on Sino-foreign Equity Joint Ventures. The English texts is available at <<http://english.mofcom.gov.cn/article/lawsdata/chineselaw>> on 10 August 2014.

<sup>168</sup> Julian D. M Lew, Loukas A. Mistelis and Stefan M. Kroll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 424; Tibor Varady, John J. Barcelo III and Arthur T. Von Mehren, *International Commercial Arbitration: A Transnational Perspective* (4<sup>th</sup> edn, West AThomson Reuters 2009) 654.

to determine the applicable law of merits of the agreement dispute as in Article 35 (d).<sup>169</sup> However, Iraqi Law does not give the arbitral tribunal the right to select the applicable law. The relevant laws, such as the CCP, the investment laws and the DLOG do not empower the arbitrator to determine the applicable law. However, the Iraqi DICAL gives the arbitrators the freedom to choose the applicable law of the substantive issues but this freedom restricted in the terms of contracts and commercial customs.<sup>170</sup> This approach is not consistent with the Iraqi approach in regard of petroleum disputes which provides that the Iraqi law will govern the substantive issue of contract. Similarly the PRC Arbitration Law also does not give the arbitral tribunal the power to select the applicable law. The UAE Arbitration Draft Law of 2008 transfers the rights of the parties to the arbitrators if the former do not choose the applicable law according to Article 28 (2). However, the arbitrators are required to apply the national law of a particular state in accordance with the UAE rules governing the conflict of laws.<sup>171</sup>

However, the law applicable to petroleum agreements is the subject of differing opinions and approaches. In the following sub sections, these varying approaches will be discussed and an attempt will be made to decide which of them is best suited to the governing of petroleum agreements.

#### **5.3.1.2.1. The Theoretical Approach:**

Petroleum disputes inspire controversies as to which law should govern them because these disputes have a special status. It is not simply a question of finding agreement in order to achieve commercial aims; other issues of a legal and political nature are involved. As a consequence of this debate, different types of law are presented as being the appropriate form of applicable law. The important questions are: which of these forms of law should govern petroleum agreements and for what reason should a particular form of law be considered adequate? What follows is an attempt to answer these questions.

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<sup>169</sup> Petroleum agreement between Iraq and ERAP Company of 1968.

<sup>170</sup> Article 30 (4) of the Iraq DICAL.

<sup>171</sup> Article 28 (2) of UAE Arbitration Draft Law of 2008.

### ***5.3.1.2.1.1. The Public International Law (Internationalisation Theory):***

The traditional view concerning the law applicable to petroleum agreements is that they should be subject to public international law: this is known as the internationalisation theory. Internationalisation theory can be traced back to the petroleum concession agreements concluded in the last century in the Middle East.<sup>172</sup> The theory emerged as a response to what was regarded as the insufficiency of the national laws of the developing countries which were the host states when laws for the governance of international commercial agreements were required.<sup>173</sup>

International law has been strongly defended by some authors,<sup>174</sup> who believe it to be capable of governing and regulating the aforementioned type of agreement and that the laws of the nation states to which the parties belonged is inadequate for the governance of contractual agreements, where the agreements are to be considered as a treaty between “international persons”. Thus Mann has argued that “[T]he commercialization of treaties as well as the internationalization of contracts are different aspect of the same fundamental idea”.<sup>175</sup> Mann perceived that these agreements contained objective elements related to international law and for that reason it could be assumed that the parties would wish to transfer their agreements from the sphere of municipal law to that of international law. However, is the abovementioned view compatible with the nature of petroleum agreements? Would the adoption of international law as the applicable law be adequate in governing all the issues and questions involved in such an agreement?

Regarding the first of these questions, it could be said that the petroleum agreement is not an international treaty. This point was established in the discussion of the legal status of petroleum agreements in Chapter Two. There is nonetheless a similarity between international treaties and petroleum agreements in the manner of the conclusion of both agreements. Both types of agreement have similar formal and substantive requirements, for example, the consent, the

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<sup>172</sup> Virtus Chitoo Igbokwe, ‘Developing Countries and the Law Applicable to International Arbitration of Oil Investment Disputes: Has the Last Word Been Said?’ (1997) *Journal of International Arbitration* 100.

<sup>173</sup> Virtus Chitoo Igbokwe, ‘Developing Countries and the Law Applicable to International Arbitration of Oil Investment Disputes: Has the Last Word Been Said?’ (1997) *Journal of International Arbitration* 100.

<sup>174</sup> F. A. Mann, ‘The proper Law of Contracts Concluded by International Persons’ (1959) 35 *Brit. Y. B. Int’l L* 34; Wolfgang Friedmann, ‘The Relevance of International Law to the Process of Economic and social Development’ (1966) 60 *American Society of International Law* 8.

<sup>175</sup> F. A. Mann, ‘The proper Law of Contracts Concluded by International Persons’ [1959] (35) *Brit. Y. B. Int’l L* 34.



signatory of parties and their capacity. The difference lies in the process of ratification and fulfilment.<sup>176</sup> Also the parties involved in an international treaty are different from the parties in petroleum agreements. In the former the parties represent states or a state organization whereas in the latter the parties are states and private legal entities, namely the petroleum companies.<sup>177</sup> In addition, the international treaty may contain the principle of “reservation”, which gives the state the right to disagree on regarding specific provisions of the treaty, whereas the petroleum agreement contains no such principle and the parties are obligated by all the terms of the agreement.<sup>178</sup> Moreover, the aims of the international treaty differ from the aims of the petroleum agreement in which, as in any commercial activity, the motivation is the maximization of profits. Whereas the international treaty draws upon and regulates the legal system appropriate to this activity. The petroleum agreement differs from the international agreement in so many respects that the application of international law to both is not a reasonable option.<sup>179</sup>

It could be said then that international law is not suited to the governance of agreements between petroleum companies and the state because it was designed to govern the interrelationships of nation states or to mediate between nation states and international organisations like the United Nations.<sup>180</sup> Sereni argues that the provisions of international law do not apply only to international persons and each rule of international law is designed to be consistent with the needs and behaviour of those persons who related to the international legal system which considered these provisions a part of this system and also aim to regulate the relationship among the bodies for which it was established.<sup>181</sup>

Furthermore, international law cannot effectively cover issues related to private contracts. It is insufficiently developed to address issues such as set-offs and mistakes in contracts.<sup>182</sup>

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<sup>176</sup> Ian Brownlie, *Principles of Public International Law* (6<sup>th</sup> edn, Oxford Clarendon Press 2003) 582.

<sup>177</sup> Lord McNair, *The Law of Treaties* (Oxford Clarendon Press 1961) 4.

<sup>178</sup> Malcolm N. Shaw, *International Law* (4<sup>th</sup> edn, Cambridge University Press 1997) 642.

<sup>179</sup> A F M Maniruzzaman, ‘International Development Law as Applicable Law to Economic Development Agreements: A Prognostic View’ (2001) 20 *Wisconsin International Law Journal* 1.

<sup>180</sup> Martin Dixon, *Textbook on International Law* (3<sup>rd</sup> edn, Bell and Bain Ltd 1996) 2; Barry E. Carter and Phillip R. Trimble, *International Law* (3<sup>rd</sup> edn, Aspen Law and Business 1999) 2.

<sup>181</sup> Angelo Piero Sereni, *International Economic Institutions and the Municipal Law of States* (Academy of International Law 1959) 209- 210.

<sup>182</sup> Martin Wolff, ‘Some Reservations on the Autonomy of Contracting Parties in the Conflict of Laws’ (1949) 35 *Transactions of the Grotius Society* 143.

However, as described previously in Chapter Three, the adoption of international law as the applicable law is welcomed by petroleum companies since it enables them to avoid the national law of the host state applying natural and developed law. From both practical and theoretical points of view, the arguments favouring the application of international law to petroleum agreements are doubtful.

#### **5.3.1.2.1.2. The General Principles of Law (McNair's Theory)**

The general principles of law recognised by civilized nations can be the applicable law of petroleum agreements if the parties do not determine any other specific legal system to govern their agreement and prefer arbitration as a means of settling their dispute. This statement was the core of Lord McNair's theory.<sup>183</sup> McNair argued that the applicable law of agreements cannot be national law because the national laws of many host states are not sufficiently developed to regulate petroleum agreements. On the other hand, petroleum agreements cannot be subject to public international law *stricto sensu*, because such agreements are not concluded between states or international persons.<sup>184</sup> He also criticized the view which advocates the *Lex Contractus* or *Lex Loci Solutionis* as the applicable law of petroleum agreements because the nature of the contracts and the circumstances of the agreement it is not computable with these laws. He rejected the idea that any agreement between the parties applies the *Lex Loci Solutionis* as applicable law.<sup>185</sup> The general principles of law have been mentioned in Article 38 (1) (c) of Statute of the International Court of Justice.<sup>186</sup> However, it is worth mentioning that the principles referred to in Article 38 were considered as second sources of international law and not as an independent legal system.<sup>187</sup>

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<sup>183</sup> Lord McNair, 'The General Principles of Law Recognized by Civilized Nations' (1957) 33 Brit Yrbk Intl L 4.

<sup>184</sup> *ibid.*

<sup>185</sup> *ibid* 5.

<sup>186</sup> Article 38 of Statute of the International Court of Justice provided that:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

<sup>187</sup> Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (5<sup>th</sup> edn, Oxford University Press 2009) 208; Frances T. Freeman Jalet, 'The Quest for the General Principles of Law Recognized by Civilized Nations – A study' (1962-1963) 10 UCLA Law Review 1041; Rudolf B. Schlesinger, 'Research on the General Principles of Law Recognized by Civilized Nations' (1957) 51The American Journal of International Law 734.

However, just like Article 38 (1) (c) Lord McNair did not define exactly what was meant by “the general principles of law.” He merely comments that “this is a legal doctrine which can be said to have already attained a large measure of recognition as a general principle of law”.<sup>188</sup> He did not specify these principles because, he claimed, they can be developed by parties and by the arbitral tribunal.<sup>189</sup>

Cheng defined these principles of law as ““general principles of law” which are not, therefore, peculiar to any legal system, but are inherent in, and common to, them all. They constitute the common foundation of every system of law”.<sup>190</sup> The sole arbitrator Cavin defined the principles as “rules of positive law, common to civilized nations, such as are formulated in their statutes or are generally recognized in practice”.<sup>191</sup> It appears that the notion of general principles of law is not clear and cannot be enumerated and therefore to identify and formulate these principles is a difficult task.<sup>192</sup>

A theory which claims to apply the general principles of law recognised by “civilized nations” must confront several criticisms. The general principles of law recognised by civilized nations do not constitute an independent legal system, distinct from domestic legal systems and international legal systems as McNair claims. Lalive, who follows this approach, is similarly open to challenge. Lalive stated that “It is therefore likely that all these facts point to the emergence of a new system of law, somewhat half-way between international law *stricto sensu* and domestic law. This is transnational law”<sup>193</sup> Mann says that these principles “are not a legal system at all”.<sup>194</sup>

By their nature, general principles cannot be formulated in any detail. They are no more than general principles which leave petroleum agreements in a legal vacuum while raising

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<sup>188</sup> Lord McNair, ‘The General Principles of Law Recognized By Civilized Nations’ (1957) 33 Brit Yrbk Intl L 4.

<sup>189</sup> Lord McNair, ‘The General Principles of Law Recognized By Civilized Nations’ (1957) 33 Brit Yrbk Intl L 4.

<sup>190</sup> Cheng cited by Frances T. Freeman Jalet, ‘The Quest for the General Principles of Law Recognized by Civilized Nations –A study’ (1962-1993) 10 UCLA Law Review 1041.

<sup>191</sup> *Sapphire International Petroleum Ltd. v. National Iranian Oil Company* (1963) 35 ILR 175.

<sup>192</sup> Rudolf B. Schlesinger, ‘Research on the General Principles of Law Recognized by Civilized Nations’ (1957) 51 The American Journal of International Law 734.

<sup>193</sup> Jean-Flavien Lalive, ‘Contracts between a State or a State Agency and a Foreign Company, Theory and Practice: Choice of Law in a New Arbitration Case’ (1964) 13 International & Comparative Law Quarterly 987.

<sup>194</sup> F. A. Mann, ‘The proper Law of Contracts Concluded by International Persons’ (1959) 35 Brit. Y. B. Int’l L 34.

several theoretical and practical problems.<sup>195</sup> It is significant that there is no detailed enumeration of these principles. As Lalive conceded, “the search of general principles of law is not easy”<sup>196</sup> Other authors<sup>197</sup> have noted that, when employed as the applicable law, the general principles of law “do not provide the kind of detailed code appropriate to complex commercial transactions; and the manner of their application is not always a predictable matter.”<sup>198</sup>

It can be concluded their generality, dependency and lack of any developed code make these principles unsuitable for the governance of such matters as petroleum agreements which contain critical and precise issues.

Despite powerful criticisms, the general principles of law recognized by “civilized nations” have established a place for themselves in the proceedings of petroleum agreements. They were applied in some important petroleum proceedings of the last century, such as the *Sapphire Case*,<sup>199</sup> the *Texaco case*<sup>200</sup> and the *Sheikh of Abu Dhabi Case*.<sup>201</sup> These cases will be discussed extensively in subsequent sub sections.

#### **5.3.1.2.1.3. Transnational Law (The Transnational Theory)**

This theory advocates transnational law as the applicable law for use in to petroleum agreements. It has been supported by C. F. Amerasinghe<sup>202</sup>, J. Cherian<sup>203</sup> and P. Jessup, who tried to define transnational law by including all laws that govern commercial activities taking place beyond national borders of the states which contain private and public international law and also general principles of law related to investment agreements.<sup>204</sup> It is apparent from this

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<sup>195</sup> Derek W. Bowett, ‘Claims between States and Private Entities: The Twilight Zone of International Law’ (1986) 35 Catholic University Law Review 929.

<sup>196</sup> Jean-Flavien Lalive, ‘Contracts between a State or a State Agency and a Foreign Company, Theory and Practice: Choice of Law in a New Arbitration Case’ (1964) 13 International & Comparative Law Quarterly 987.

<sup>197</sup> Jean-Flavien Lalive, ‘Contracts between a State or a State Agency and a Foreign Company, Theory and Practice: Choice of Law in a New Arbitration Case’ (1964) 13 International & Comparative Law Quarterly 987.

<sup>198</sup> John G Collier and Alan Vaughan Lowe, *The Settlement of Disputes in International Law: Institutions and procedures* (Oxford University Press 1999) 245.

<sup>199</sup> *Sapphire International Petroleum Ltd. v. National Iranian Oil Company* (1963) 35 ILR 136.

<sup>200</sup> *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. the Government of the Libyan Arab Republic* (1979) 53 ILR 389.

<sup>201</sup> *Petroleum Development Ltd v. The Sheikh of Abu Dhabi* (1951) 18 ILR 144.

<sup>202</sup> C.F. Amerasinghe, *State Responsibility for Injuries to Aliens* (Oxford University Press 1967) 105.

<sup>203</sup> J. Cherian, *Investment Contracts and Arbitration: The World Bank Convention on the Settlement of Investment Disputes* (A. W. Sijthoff 1975) 34.

<sup>204</sup> P. C. Jessup, *Transnational Law* (Yale University Press 1967) 34.

definition that transnational law is aimed mainly at overcoming the traditional division between public international law and private international law with regard to some issues which transcend the borders of the state. Furthermore it is a law which cannot be attributed to the legal system of any specific country.

To determine what transnational law means, however, a distinction should be made between two trends.

The first trend is to use the terms transnational law and *lex mercatoria* indiscriminately as if both had the same meaning. Goldman defines the *lex mercatoria* as “a set of general principles, and customary rules spontaneously referred to or elaborated in the framework of international trade, without reference to a particular national system of law”.<sup>205</sup> The second trend is to consider the *lex mercatoria* as one of the constituent elements of transnational law, along with commercial custom and general principles of law.<sup>206</sup>

This theory has been supported by a number of authors.<sup>207</sup> It is said to offer flexible rules compatible with the nature of commercial agreements. It also offers contractual parties and arbitrators release from the strictures of national law through the application of common commercial principles which are widely acceptable.<sup>208</sup>

However, transnational theory considered to be an incomplete system because some issues which cannot be regulated or governed by transnational law, for example, questions such as the capacity of contractual parties, consent and interest, require recourse to national law. The deficiencies of this form of law are inescapable inevitable to avoid the lack in this law.<sup>209</sup> Indeed some authors regard transnational law as “mythical”: it cannot be determined easily, consequently,

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<sup>205</sup> B. Goldman, ‘The Applicable Law: General Principles of Law- the *Lex Mercatoria*’ cited in I. D. M. Lew (ed), *Contemporary Problems in International Arbitration* (Martinus Nijhoff Publishers 1987) 116.

<sup>206</sup> Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (5<sup>th</sup> edn, Oxford University Press 2009) 215; Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford University Press 2007) 193.

<sup>207</sup> P. Lalive, ‘Transnational Public Policy and International Arbitration’ in *ICCA Congress Series* No.3 (Kluwer Law International 1987) 257; 2003,755, حفيظه سيد الحداد, العقود التي تعقد بين الدوله والاشخاص الاجنبيه, الحلبي, [Hafeza Saeed Al Hadad, *Contracts Concluded between States and Foreign Parties* (Al –Halabee 2003) 755].

<sup>208</sup> P. Lalive, ‘Transnational Public Policy and International Arbitration’ in *ICCA Congress Series* No.3 (Kluwer Law International 1987) 257; 2003,755, حفيظه سيد الحداد, العقود التي تعقد بين الدوله والاشخاص الاجنبيه, الحلبي, [Hafeza Saeed Al Hadad, *Contracts Concluded between States and Foreign Parties* (Al –Halabee 2003) 755].

<sup>209</sup> Georges R. Delaume, ‘Comparative Analysis as a Basis of Law in State Contract: The Myth of the *Lex Mercatoria*’ (1989) 63 *Tulane Law Review* 575.

it makes the arbitrator's task more difficult, particularly because there is no exhaustive catalogue of all the rules of transnational law.<sup>210</sup> Furthermore, the commercial community is not a coherent and uniform body, it contains ideologies and commercial policies which vary from country to country. For example, developing countries and industrial countries possess different aims and strategies.<sup>211</sup> This casts doubt on the possibility of a uniform transnational legal system.

#### ***5.3.1.2.1.4. The Lex Contractus***

This approach aims to exclude petroleum agreements from the ambit of national law and also from that of public international law by classifying that type of agreement as quasi-international and then subjecting it to the terms and conditions of the contract concluded between the parties.<sup>212</sup> The *Lex contractus* theory was developed and upheld by Verdross who argued strongly that petroleum agreements should be subject to the *pacta sunt servanda* principle, as represented by the agreement concluded between the parties.<sup>213</sup> He justified his thesis by saying that an agreement concluded between the state and a foreign investor should not be governed by the national law of a particular state because the parties to the agreement are of different nationalities and do not have a common domicile; and also the agreement does not have the international character which would justify its subjection to international law.<sup>214</sup> According to Verdross's theory the parties not only choose the law governing their agreement but also create this law on the basis of the terms and conditions of their agreement.<sup>215</sup> Therefore, the argument runs, the terms and conditions designated by the contractual parties constitute an independent and comprehensive legal system governing the contractual relationship, so that the agreement will constitute the resources of that legal system.<sup>216</sup> Accordingly the arbitrator can exclude the

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<sup>210</sup> Georges R. Delaume, 'The Proper Law of State Contract and the *Lex Mercatoria*: A Reappraisal' (1988) 3 ICSID Review Foreign Investment Law Journal 79; Ole Lando, 'The *Lex Mercatoria* in International Commercial Arbitration' (1985) 34 International and Comparative Law Quarterly 749.

<sup>211</sup> Georges R. Delaume, 'Comparative Analysis as a Basis of Law in State Contract: The Myth of the *Lex Mercatoria*' (1989) 63 Tulane Law Review 575.

<sup>212</sup> A. Verdross, 'Quasi-International Agreements and International Economic Transactions' (1964) 18 Y.B World Aff. 230-231.

<sup>213</sup> *ibid.*

<sup>214</sup> *ibid.* 233.

<sup>215</sup> Lawrence Atsegbua, 'International Arbitration of Oil Investment Disputes: The Severability Doctrine and Applicable Law Issues Revisited' (1993) 5 African Journal of International and Comparative Law 634.

<sup>216</sup> Maurice Bourquin, 'Arbitration and Economic Development Agreements' (1960) 15 the Business Lawyer 860; Virtus Chitoo Igbokwe, 'Developing Countries and the Law Applicable to International Arbitration of Oil Investment Disputes: Has the Last Word Been Said?' (1997) Journal of International Arbitration 108.

rules of substantive law by substituting them for the terms of the parties' contract.<sup>217</sup> This theory is based on two fundamental elements: *pacta sunt servanda* and the valid agreement concluded between the parties, considered as a legal system binding for both parties.<sup>218</sup>

The question raised here is whether the *Lex Contractus* can offer an integral legal system covering all issues arising from a petroleum agreement which is isolated from any legal system.

The contractual parties cannot create petroleum agreements which contain comprehensive resolutions of all the issues facing them and also regulate the contractual relationship perfectly without being associated with some form of legal order.<sup>219</sup> This legal system is necessary to answer all the eventualities and problems related to the contract, for example, the performance of the agreement, its validity, its interpretation and its implications, all of which cannot be answered by the agreement.<sup>220</sup> In *ANACONDA-Iran, Inc. v. Iran*<sup>221</sup> the arbitral tribunal refused to apply the *pacta sunt servanda* principle for which the claimant had argued. The tribunal stated that "the doctrine of *pacta sunt servanda* is not a rule which, *per se*, suffices to resolve the remaining issues raised in this case".<sup>222</sup> Another criticism persistently raised against this theory that the validity of an agreement must be based on an external legal system, whether national or international. It is this legal system which describes the route to be followed in order for it to be valid and functional.<sup>223</sup> Lord McNair had claimed that a contract can be exclusive of any legal system. This approach was rejected by the arbitrator in the *ARAMCO Case*.<sup>224</sup> The sole arbitrator Professor Sauser, who was the sole arbitrator, said that "It is obvious that no contract can exist *in vacuo*, i.e., without being based on a legal system."<sup>225</sup> Mann likewise did not believe that the

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<sup>217</sup> Vitek Danilowicz, 'The Choice of Applicable Law in International Arbitration' (1985- 1986) 9 Hasting International and Comparative Law Review 235.

<sup>218</sup> Wolfgang Peter, Jean-Quentin de Kuyper, Bénédict de Candolle, *Arbitration and Renegotiation of International Investment Agreement* (Kluwer Law International 1995) 263.

<sup>219</sup> D. W. Bowett, 'State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach' (1988) 64 Brit Yrbk Intl L 50.

<sup>220</sup> *ibid.*

<sup>221</sup> *ANACONDA-Iran, Inc. Iran* 13 Iran-US Claims TR. 1986-IV, p. 230.

<sup>222</sup> *ANACONDA-Iran, Inc. Iran* 13 Iran-US Claims TR. 1986-IV, p. 233.

<sup>223</sup> Samuel K. B. Asante, 'The Stability of Contractual Relations in the Transnational Investment Process' (1979) 28 International and Comparative Law Quarterly 401.

<sup>224</sup> *ARAMCO (Saudi Arabia v. Arabian American Oil Company)* (1958) 27 ILR 117.

<sup>225</sup> *ARAMCO (Saudi Arabia v. Arabian American Oil Company)* (1958) 27 ILR 165.

parties' freedom can found in isolation from the legal system “which grant(s) it or confer(s) any measure of sovereignty upon the contracting parties”<sup>226</sup>

In short, the *lex contractus* theory is unacceptable within the legal community because it fails to justify the autonomy of *lex contractus*. Furthermore, in making the contract entirely subject to the freedom of the parties there is a danger that this will impinge negatively on the weaker participants in the agreement.

#### **5.3.1.2.1.5. The National Law of the Host State:**

Before the Second World War, state contracts concluded with foreign companies, and particularly with petroleum companies did not expressly apply national law as the applicable law. That these agreements did in reality consider national law as the applicable law is apparent from the stabilisation clauses included in these agreements, which oblige the host state not to amend or abolish the contract unilaterally.<sup>227</sup> It is well known that contracts did not contain clauses of this sort unless national law was the applicable law.<sup>228</sup> The subjection of petroleum agreements to the national law of the host state is considered the main objective of a struggle engaged in by developing countries in order to govern their contractual relationship with the petroleum companies. The host states claim that they are entitled for several reasons to apply their own national law. They point to the significance of the fact that the physical existence of the investment is in the host state and that the contract will be carried out in the host state so that there is a strong connection between the petroleum agreement and the national law of the host state.<sup>229</sup> Other considerations relate to foreign investors who accept to apply the national law of the host state when concluding an agreement.<sup>230</sup> In addition, it is argued that foreign companies are subject to the law of the host state with regard to taxes and fees and the criminal code and so why, they ask, is that law excluded when the matter is the contract itself?

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<sup>226</sup> F. A. Mann, ‘The Proper Law of Contracts Concluded by International Persons’ (1959) 35 Brit Yrbk Intl L 56.

<sup>227</sup> حفيظه سيد الحداد, العقود التي تبرم بين الدوله والاشخاص الاجنبيه, الحلبي, 2003, 413.

[Hafeza Saeed Al Hadad, *Contracts Concluded between States and Foreign Parties* (Al –Halabee 2003) 413].

<sup>228</sup> *ibid.*

<sup>229</sup> Joy Cherian, *Investment Contracts and Arbitration- the World Bank Convention on the Settlement of Investment Disputes* (A. W. Sijthoff 1975) 22.

<sup>230</sup> *ibid.*



However, the notion of applying the national law of the host state is not well received by the petroleum companies, who claim that petroleum projects are linked to economic risk and that this risk is increased when the municipal law of the host state is applied to petroleum agreements.<sup>231</sup> In addition, subjecting petroleum agreements to the national law of the host state places these agreements in danger of being amended or abolished unilaterally by the host state.<sup>232</sup> There is also the criticism that the national law of the host state is insufficiently mature to govern such agreements. This criticism was enhanced by the arbitral award in the *ARAMCO Case*.<sup>233</sup> Here, Saudi Arabian national law was excluded because it was deemed to be too undeveloped to govern the petroleum agreement.<sup>234</sup> Therefore, foreign petroleum companies attempted to evade the application of the national law of the host state by subjecting petroleum agreements to international law. However, this option did not gain acceptance since, petroleum companies are neither an international person nor an organisation, and therefore the logical choice would be to apply the municipal law of the host state. This was the view that prevailed in the *Serbian Loans* case, heard by the Permanent Court of International Justice. The judgment stated that: “(...) any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country.”<sup>235</sup> The United Nations also supported the application of the national law of the host state, especially in cases involving natural resources. A controversial General Assembly United Nations Resolution declared that foreign investment should be governed by municipal state law exclusively.<sup>236</sup> This perspective was strongly supported by OPEC in a Declaratory Statement of Petroleum Policy. This statement urged OPEC members to govern the petroleum agreement by asserting the national law of the host state as the applicable law in petroleum agreements, on the grounds that, since these states are the owners of the natural resources and so their laws should have priority.<sup>237</sup>

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<sup>231</sup> Virtus Chitoo Igbokwe, ‘Developing Countries and the Law Applicable to International Arbitration of Oil Investment Disputes: Has the Last Word Been Said?’ (1997) *Journal of International Arbitration* 109.

<sup>232</sup> Lawrence Atsegbua, ‘International Arbitration of Oil Investment Disputes: The Severability Doctrine and Applicable Law Issues Revisited’ (1993) 5 *African Journal of International and Comparative Law* 634.

<sup>233</sup> *ARAMCO (Saudi Arabia v. Arabian American Oil Company)* (1958) 27 ILR 117.

<sup>234</sup> *ibid* 163.

<sup>235</sup> *Serbian Loan Judgment*, [1929] P.C.J. Rep. *Series A*, No. 20; p. 41.

<sup>236</sup> The General Assembly of the United Nations promulgated resolutions with regard to natural resources (1803, 3171, 3201 and 3281). These resolutions will be described in more detail in subsequent sub-sections.

<sup>237</sup> Resolution No. XVI.90 of the Sixteenth OPEC Conference, 1968, *OPEC Official Resolution and Press Releases, 1968-1980*, p. 80.

Although Iraq retained the petroleum agreement arbitration clause, it stipulated that Iraqi law should be the applicable law of petroleum agreements. The Iraqi Model Technical Service Contract, Article 37 (1), declared that “this contract shall be governed, interpreted, and construed and the rights and obligations of the parties determined in accordance with the laws of the Republic of Iraq.” The Iraqi DLOG, Article 39 (1), made provision for the resolution of disputes in accordance with Iraqi law and for the application of Iraqi law in petroleum agreements. The present author believes that the time is ripe for the enactment of an oil and gas law which reflects Iraq’s aspirations and prospects. Such a law would also embody the developmental and economical aims of the Iraqi petroleum sector. With regard to mineral resources, Chinese municipal law will apply exclusively in petroleum agreements Article 12 of the Equity Joint Venture Implementing Regulations state that “(.....) [t]he resolution of disputes arising there under shall be governed by the Chinese law”.

Article 10 of the UAE Civil Law declared that UAE Law was to be regarded as the authoritative source for the governance of relationships in conflicts of law.<sup>238</sup>

### **Can Iraqi Law Function Adequately as Substantive Law?**

The author believes that most host states in general, and Iraq in particular, have tried to develop and update their national laws and to adopt developed concepts with regard to investment in general and mineral resources in particular in order to attract and encourage foreign investors and also to avoid any allegations from these investors that their national laws are not adequate to the task of governing petroleum agreements. The charge made against national law that it is inadequate is no longer acceptable. Since 2003, Iraq has sought to update and reform its national law with regard to petroleum agreements and has tried to pass new oil and gas laws which recognise arbitration as a means of resolving disputes amicably. Moreover, applying the national law of the host state avoids problems arising from the ambiguities or want of detail which may be encountered in alternative systems such as transnational law or general principles of law. The national law may be considered more effective and more capable of resolving any problems which arise within the negotiation. National law has the capacity to address issues which cannot be resolved by other legal systems, such as questions of consent and

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<sup>238</sup> The Law of Civil Transactions of United Arab Emirates No 5 of 1985.

interpretation and the implications of the contract. Furthermore the host state tried to promulgate legislation containing provisions reflecting its interest in protecting its natural resources.

#### **5.3.1.2.2. Petroleum Arbitration in Practice:**

Subjecting petroleum agreements to the national law of the host state is widely favoured by developing countries, and is supported by United Nations resolutions and the OPEC Declaration. For legal and political reasons, many arbitral tribunals are reluctant to apply national law to petroleum agreements. They give various reasons for choosing alternative systems, claiming for example that the national law is legally inadequate or that is not consistent with public order.

In *the Abu Dhabi case*<sup>239</sup> that country's national law was excluded as the applicable law by Lord Asquith, the sole arbitrator in the case. He justified the rejection of Abu Dhabi municipal law, although he recognised its priority in application. He declared Abu Dhabi law too primitive and inconsistent to be used in an advanced form of commercial agreement.<sup>240</sup> He held that "it would be fanciful to suggest that in this very primitive region there is any body of legal principles applicable to the construction of modern commercial instruments."<sup>241</sup> He added that the agreement itself had referred to "the application of principles rooted in good sense and common practice of generality of civilized nations - a sort of modern law of nature."<sup>242</sup> Furthermore, he believed that the parties' agreement was intended to exclude any application of national law "I do not think that on this point there is any conflict between the parties."<sup>243</sup>

Basing his judgment on these considerations, Lord Asquith proceeded to exclude the competent Abu Dhabi municipal law of merits of dispute and applied instead the English municipal law of petroleum company contracts, despite the fact that he found English municipal law inapplicable to this and relied instead on some rules related to that law which were "so firmly grounded in reason, as to form part of this broad body of jurisprudence"<sup>244</sup>

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<sup>239</sup> *Petroleum Development Ltd v. The Sheikh of Abu Dhabi* (1951) 18 ILR 144.

<sup>240</sup> *Petroleum Development Ltd v. The Sheikh of Abu Dhabi* (1951) 18 ILR 149.

<sup>241</sup> *ibid.*

<sup>242</sup> *ibid.*

<sup>243</sup> *Petroleum Development Ltd v. The Sheikh of Abu Dhabi* (1951) 18 ILR 144.

<sup>244</sup> *ibid.*

It seems that Lord Asquith justified his decision on the grounds of the deficiency of the municipal law of the host state which made it unsuited to govern such a modern transaction. The author believes that any legal system, however close it is to perfection, will encounter issues beyond its competence. It can however, repair its shortcomings by adaptive legislation. In the case of Abu Dhabi municipal law it would have been possible for it to assert its legal relevance by employing the backup resources of the law. So, an arbitrator should not exclude the municipal law under inadequate consideration of the municipal law. Municipal law should not have been excluded in this case, since; the arbitrator could have sought out supplementary legal resources to compensate for any inadequacies. Unfortunately, he then the decision's reasoning indicates that possessed an insufficient knowledge of Islamic law, which has viable theories of contract and obligation which would have been to an extent suitable for the legal governance of such a case.

An approach similar to that followed in the *Abu Dhabi* case can be found in *Ruler of Qatar v. International Maritime Oil Company*.<sup>245</sup> In this case, the municipal law of Qatar was excluded as the applicable law under the same considerations as those of the Abu Dhabi award. The arbitrator, Sir Alfred Bucknill, chose to apply the general principles of law because he considered that the Islamic law of the host state, Qatar, was not adequate for the governance of the petroleum agreement. He decided instead that the parties regulate their agreement in accordance with “principles of justice, equity and good conscience”<sup>246</sup>

It is worth mentioning that, at the beginning that the arbitrator enumerated several facts which weighed heavily in favour of Qatar municipal law: the subject matter of the case was located in Qatar, one of the parties was the Ruler of Qatar and the agreement had been written in the Arabic language.<sup>247</sup> However, all these facts were discounted. Therefore, Qatar law was excluded from the case because was not adequate to govern petroleum agreement.

In the *Sapphire case*,<sup>248</sup> the sole arbitrator, Swiss Federal Judge Pierre Cavin, noted that the parties did not express their choice of applicable law. Consequently, he undertook the task of

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<sup>245</sup> *Ruler of Qatar v. International Maritime Oil Company* (1953) 20 ILR 534.

<sup>246</sup> *Ruler of Qatar v. International Maritime Oil Company* (1953) 20 ILR 545.

<sup>247</sup> *ibid* 544.

<sup>248</sup> *Sapphire International Petroleums Ltd. v. National Iranian Oil Company* (1963) 35 ILR 163.

discovering principles common to the national laws of both parties.<sup>249</sup> However, despite evidence and indications favoring the application of Iranian law, such as that the location of both the *lex loci contractus* and the *lex loci executionis* being Iran, the arbitrator concluded they intended to exclude the application of Iranian law facts and applied general principles of law.<sup>250</sup> The arbitrator draws from Lord McNair's and Jessup's perspectives to support his justification of the arbitral award.<sup>251</sup> Judge Cavin stated that:

It is quite clear from the above that the parties intended to exclude the application of Iranian law. But they have not chosen another positive legal system, and this omission is on all the evidence deliberate. All the connecting factors [the diverse nationalities of the parties, force majeure clause, capital risk], point to the fact that the parties therefore intended to submit the interpretation and performance of their contract to the principles of law generally recognized by civilized nations.<sup>252</sup>

The sole arbitrator also cited Article 37 (2) of the agreement which provided that the *force majeure* clause should be determined in accordance with the principles of public international law.<sup>253</sup> In addition, he relied on Article 38 (1) of the same agreement, which excluded any application of Iranian law and applied the principles created through the common practice of "civilized nations".<sup>254</sup> Accordingly, if Article 37 (2) is combined with Sub paragraph (1) the result "can reasonably be regarded as having a wider application than simply referring to force majeure. It is possible to find in it further evidence of the intention of the parties to submit the interpretation and performance of their agreement to the general principles of law."<sup>255</sup> Moreover, the arbitrator relied on previous petroleum agreements concluded by Iranian National Oil Company (NIOC) and other petroleum companies. As with the Sapphire Company agreement, these agreements applied general principles of international law.<sup>256</sup>

However, this case award showed that the main reason behind the exclusion of Iranian law was the protection of the petroleum company's interests. The arbitrator made apparent when stated that:

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<sup>249</sup> *ibid* 171.

<sup>250</sup> *Sapphire International Petroleums Ltd. v. National Iranian Oil Company* (1963) 35 ILR 171.

<sup>251</sup> *ibid* 175.

<sup>252</sup> *Sapphire International Petroleums Ltd. v. National Iranian Oil Company* (1963) 35 ILR 175.

<sup>253</sup> *ibid* 173.

<sup>254</sup> *ibid*.

<sup>255</sup> *ibid* 174.

<sup>256</sup> *ibid* 173.

(...) [t]he foreign company was bringing financing and technical assistance to Iran, which involved it in investments, responsibilities, and considerable risks. It therefore seems natural that they should be protected against any legislative changes which might alter the character of the contract,(.....) This could not be guaranteed to them by the outright application of Iranian Law, which it is within the power of the Iranian State to change.<sup>257</sup>

It is apparent from the above that the arbitrator saw the exclusion of the national law as providing protection for the foreign company. He asserted that it was in the interest of both parties to apply the general principles of law separate from the peculiarities of the municipal law of the host state which often is unable to offer suitable solutions, especially when the contract performance of the state is unknown to the other party.<sup>258</sup> It appears that the arbitrator excluded the national law under the implied idea of public order.

The **Libyan nationalisation cases**<sup>259</sup> are considered remarkable in that they rejected national law as the applicable law and instead applied international law. The dispute in these cases arose from the same cause, the nationalisation of Libyan oil. In *BP v. Libya*<sup>260</sup> the arbitrator Lagergren depended on Article 28 (7) of the petroleum agreement concluded between the parties, which stipulated the application of principles common to both Libyan law and international law and the application of general principles of law in the event of no such common principles being found. <sup>261</sup> The arbitrator sought these common principles but was unable to find them and so he decided to apply general principles of law.<sup>262</sup>

The arbitrator in *Texaco and California Asiatic Oil Company v. Libya* <sup>263</sup> determined the applicable law by beginning with the question of which law should be applicable to the contract and asking whether parties have the right to identify the law governing their agreement according to the principle of party autonomy. The arbitrator, Professor Dupuy, answered the above

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<sup>257</sup> *Sapphire International Petroleums Ltd. v. National Iranian Oil Company* (1963) 35 ILR 171.

<sup>258</sup> *Sapphire International Petroleums Ltd. v. National Iranian Oil Company* (1963) 35 ILR 175-176.

<sup>259</sup> *Exploration Co. (Libya) Ltd. v. Government of the Libyan Arab Republic* (1979) 53 ILR 329; *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. the Government of the Libyan Arab Republic* (1997) 53 ILR 389; *Libyan American Oil Company v. The Socialist Peoples' Libyan Arab Jamahiriya* (1982) 62 ILR 140.

<sup>260</sup> *BP Exploration Co. (Libya) Ltd. v. Government of the Libyan Arab Republic* (1979) 53 ILR 329.

<sup>261</sup> *ibid.*

<sup>262</sup> *ibid.*

<sup>263</sup> *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. the Government of the Libyan Arab Republic* (1997) 53 ILR 389.

question with the assertion that, in international contracts, the principle of the parties' autonomy means that all legal systems may apply.<sup>264</sup> The arbitrator saw the necessity for determining the legal foundation for applying the doctrine of the parties' autonomy in the current case, then made a distinction between the law governing the contract and the law which gave the contract its binding power, which was international law.

The arbitrator concluded that "the reference which is made mainly to the principles of international law and, secondarily, to the general principles of law, must have as a consequence the application of international law to the legal relationship between the parties."<sup>265</sup>

Although the arbitrator gave justifications for his decision, it appears to the present author that the main intention which lay behind it was to protect the foreign company from a unilateral change to the law by the host state. As Professor Dupuy himself stated, there was a "need for the private contracting party to be protected against unilateral and abrupt modifications of the legislation in the contracting State."<sup>266</sup>

At the beginning of the *LIAMCO case*<sup>267</sup>, the arbitrator emphasized that the legal systems of the two parties were different, hence if there was no express choice of applicable law it would be unfair to choose one and exclude the other.<sup>268</sup> The arbitrator decided therefore that when one of the parties to the dispute is foreign, the tribunal should be guided by general principles of conflict law related to private international law<sup>269</sup> According to these principles the applicable law is the law chosen by the parties expressly or implicitly in accordance with the principle of the autonomy of parties.<sup>270</sup> The arbitrator based his decision on Article 28 (7) of the agreement between Libya and the Libyan American Oil Company (LIAMCO). He stated that the proper law for governing the concession agreement between the parties

(.....) [i]s in the first place the law of Libya when consistent with international law, and subsidiarily the general principles of law. Hence, the principal proper law of the

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<sup>264</sup> *ibid* 442.

<sup>265</sup> *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. the Government of the Libyan Arab Republic* (1997) 53 ILR 453.

<sup>266</sup> *ibid* 454.

<sup>267</sup> *Libyan American Oil Company v. The Socialist Peoples' Libyan Arab Jamahiriya* (1982) 62 ILR 140.

<sup>268</sup> *ibid* 171.

<sup>269</sup> *ibid*.

<sup>270</sup> *ibid*.

contract in the concession was Libyan domestic law. But it was specified in the Agreements that this covers only "the principles of law of Libya common to the principles of international law". Thus, it excludes any part of Libyan law which is in conflict with the principles of international law.<sup>271</sup>

The arbitrator decided that the applicable law was Libyan law after excluding those principles which were not consistent with international law.<sup>272</sup> It is worth mentioning that the arbitrator stated that "Libyan law in general and Islamic law in particular have common rules and principles with international law, and provide for the application of custom and equity as subsidiary sources."<sup>273</sup>

In the *ARAMCO* case,<sup>274</sup> the arbitral tribunal began with the question of which law was to govern the contractual relationship.<sup>275</sup> Article IV of the arbitration agreement contained the solution agreed by the parties. This Article decided that the proceedings would be:<sup>276</sup>

a) [i]n accordance with the Saudi Arabian law, as hereinafter defined, insofar as matters within the jurisdiction of Saudi Arabia are concerned;

(b) [i]n accordance with the law deemed by the arbitration tribunal to be applicable insofar as matters beyond the jurisdiction of Saudi Arabia are concerned.<sup>277</sup>

The arbitral tribunal confirmed that the applicable law agreed by the parties was compatible with the principles of private international law observed in the majority of civilized nations and therefore the arbitral tribunal must observe that law.<sup>278</sup> However, the parties did not specify the application of a sole law: they agreed to apply the law determined by the arbitral tribunal with regard issues not within the scope of Saudi Arabian jurisdiction.<sup>279</sup> The arbitral tribunal excluded the *lex contractus* theory from the scope of the application because it believed that the contract could not be created from a vacuum but must be based on a particular legal system.<sup>280</sup> In addition, the arbitral tribunal excluded international law as the applicable law because the

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<sup>271</sup> *Libyan American Oil Company v. The Socialist Peoples' Libyan Arab Jamahiriya* (1982) 62 ILR 173.

<sup>272</sup> *ibid* 175.

<sup>273</sup> *ibid*.

<sup>274</sup> *ARAMCO (Saudi Arabia v. Arabian American Oil Company)* (1958) 27 ILR 117.

<sup>275</sup> *ibid* 153.

<sup>276</sup> *ibid*.

<sup>277</sup> *ibid* 153-154.

<sup>278</sup> *ibid*.

<sup>279</sup> *ibid*.

<sup>280</sup> *ibid* 165.



concession agreement of 1933 has been concluded between the state and private foreign companies and was not concluded between two states, in accordance with the ruling in the *Serbian Loans* case.<sup>281</sup>

The arbitral tribunal shows a different solution was reached by applying private international law. It explained that, according to the principles of private international law, any contract which has an international character should first be subject to the law chosen by the parties according to the doctrine of the autonomy of parties.<sup>282</sup> If the parties' express choice it would depend on the law presumably proposed by the parties.<sup>283</sup> It also explained the subsidiary laws to which the parties referred could be the "the common *lex patriae* of the parties, or to the *lex loci contractus*, or to the *lex domicilii debitoris*, or to the *lex loci executionis*, or to the law of the country with which the contract has the closest connection."<sup>284</sup> In addition, the arbitral tribunal explained that the contract could be split into different parts and each part subjected to different legal systems.<sup>285</sup>

The arbitral tribunal confirmed that the concession agreement is considered as international law but then the law chosen by the parties should apply. It was considered that the Saudi law chosen by the parties was a suitable choice because it is the law of *lex loci contractus* and also the *lex loci executionis*.<sup>286</sup>

However, the arbitral tribunal decided to apply the "solutions prevailing in British and Swiss practise (.....) this is the law of the country with which the contract has the closest natural and effective connection"<sup>287</sup> in the matters which were not within the jurisdiction of Saudi Arabian law, whereas the issues related to private law would be principally subject to Saudi law. This law contains rules of interpretation and general principles of law and usages followed in the petroleum industry.

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<sup>281</sup> *ARAMCO (Saudi Arabia v. Arabian American Oil Company)* (1958) 27 ILR 153-154.

<sup>282</sup> *ibid.*

<sup>283</sup> *ibid.*

<sup>284</sup> *ibid* 165-166.

<sup>285</sup> *ibid* 166.

<sup>286</sup> *ibid.*

<sup>287</sup> *ibid* 167.

However, Saudi Arabian law was applied only in some areas. Interestingly, the contract was split and each part subjected to different law. The partial application of the municipal law implied that the municipal law of Saudi Arabia was deemed to be inadequate as applicable law.

In the *Aminoil* case,<sup>288</sup> the arbitral tribunal confirmed that Kuwaiti law applied to several issues, “over which it is the law most directly involved”.<sup>289</sup> However, the Aminoil tried to have recourse to transnational arbitration and apply international law, it relying on the argument that petroleum agreements should apply transnational law. However, the arbitral tribunal considered that Kuwaiti law is developed the Kuwait government had announced that the international law is to be considered a part of domestic law and the general principles of law are considered a part of public international law. Also it refers to the application of these principles on petroleum agreements, in fact, according to the agreement terms which they contain.<sup>290</sup> The arbitral tribunal based its argument on Article 3 (2) of the agreement between the parties which declared that:

The law governing the substantive issues between the parties shall be determined by the tribunal, having regard to the quality of the parties, the transnational character of their relations and the principles of law and practice prevailing in the modern world.<sup>291</sup>

As a result of these arguments, the arbitral tribunal applied Kuwaiti law.

### **Comment:**

In all the above mentioned cases, there is apparently no uniform and fixed approach to the application of substantive law to petroleum agreements. It is noted that in several cases, such as *Abu Dhabi*, the *Ruler of Qatar*, *Sapphire* and the Libyan nationalisation cases the national law was removed from the ambit of application as substantive law and the general principles of law recognized by “civilized nations” was applied. If there are civilized nations there are by implication uncivilized nations. In all these cases the municipal law was excluded because the arbitral tribunal considered that these laws were unsuitable for the governance of such developed

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<sup>288</sup> *Aminoil (the Government of the State of Kuwait v The American Independent Oil Company)* (1982) 66 ILR 518.

<sup>289</sup> *ibid* 560.

<sup>290</sup> *ibid* 1000.

<sup>291</sup> *ibid* 518.

agreements. The justification used by the arbitral tribunals in all these instances was vague and did not define the meaning of the term “unsuitable” in the context of international transactions. Does it mean that these national laws were excluded because they did not possess an advanced standard of development in line with international law or does it mean there were shortcomings in its rules or did it mean there were cultural objections policy? Therefore the exclusion of national law on the grounds of unsuitability lends an arbitrary quality to the award

In the *Sapphire* and *Texaco* cases the arbitrators revealed that the main reason behind the removal of the national laws from the sphere of applicability was that these laws would threaten the interests of the petroleum companies in the event of a host state unilaterally altering its own legislation. The arbitral tribunals therefore wished to replace national law with international law

In some instances, the arbitrator based his decision on the presumed intentions of the parties. If the parties did not refer to the application of national law, it was assumed that they did not wish to apply it and that they preferred the general principles of international law recognized by “civilized states”. This approach is evident in the *Sapphire* case, when the arbitrator excluded Iranian law. However, the absence of reference to national law by the parties does not mean that the parties desire to exclude it but, as explained in earlier sections of this chapter, the parties did not give much attention to determining the applicable law, due to the rush to complete the negotiations and sign the contract.

The partial application of municipal law by restricting it to some specific matters and excluding it from others is another way to arrange the exclusion of national law. This practice was evident in the *ARAMCO* case.

#### **5.3.1.2.3. The National Law and the International Organizations Approach:**

Developing countries strove vigorously to insert state contracts in general and petroleum agreement in particular into their national legal systems and resisted any attempt by the petroleum companies to extract these agreements from the sphere of national law transfer them to the sphere of international law. The resistance crystallised into the policies of the OPEC and the General Assembly of United Nations. Their resolutions were the outcome of that striving

and became the basis for much petroleum legislation<sup>292</sup> and the agreements<sup>293</sup> negotiated in the member nations.

#### ***5.3.1.2.3.1. The Organization of Petroleum Exporting Countries (OPEC):***

OPEC's members have championed the localization of petroleum agreements, and oppose the application of public international law or the use of legal systems other than the municipal law of the host state. OPEC's Conference XVI in 1968 led to formulation of a resolution dealing with the settlement of investment disputes. It provided that:

Except as otherwise provided for in the legal system of a member country, all disputes arising between the government and operators shall fall exclusively within the jurisdiction of the competent national courts, as and when established.<sup>294</sup>

After this declaration, OPEC members continued to stipulate that their own national laws were to be the laws applicable to their agreements with foreign petroleum companies and they continued to emphasize the importance of re-localisation in state contracts.<sup>295</sup> In Iran, the service contract agreed in 1978 between the NIOC and the Ultramar Company declared that "This service contract shall be governed by and interpreted in accordance with the law of Iran".<sup>296</sup> Following the same pattern, the agreement between Saudi Arabia and ENI provides that "the right of the second party (ENI) hereunder shall be exercised in a lawful manner, subject to the laws of Saudi Arabia".<sup>297</sup> Similar stipulations were included in changes concluded the legislation of many host states which adopted the OPEC resolution, for example, Saudi Arabia, Iran and Libya.<sup>298</sup>

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<sup>292</sup> For example, Article 13 of The Kingdom of Saudi Arabia's System of Foreign Investment as formulated by Royal Decree of 11 April 2000.

<sup>293</sup> The production sharing agreement between Nigerian National Petroleum Corporation and Ashland Oil Nigeria Limited on 12 June 1973.

<sup>294</sup> Declaratory Statement of Petroleum Policy in Member Countries, Resolution No. XIV.90, 1968 OPEC Conference, Vienna, Austria, reprinted in OPEC Official Resolutions and Press Releases, 1960- 1990, 63.

<sup>295</sup> Lawrence Atsegbua, 'International arbitration of Oil Investment Disputes: The Severability Doctrine and Applicable Law Issues Revisited' (1993) 5 African Journal of International and Comparative Law 634.

<sup>296</sup> Service contract agreement between (NIOC) and Ultramar Company in 1978, cited in J. Kuusi, *The Host State and the Transnational Corporation: An Analysis of Legal Relationships* (Hampshire: Saxon House 1979) 140.

<sup>297</sup> Lawrence Atsegbua, 'International arbitration of Oil Investment Disputes: The Severability Doctrine and Applicable Law Issues Revisited' (1993) 5 African Journal of International and Comparative Law 634.

<sup>298</sup> *ibid* 654.

The OPEC resolution therefore was the inspiration for the enhancing of OPEC members' confidence in their own internal laws in the governance of agreements with foreign companies. It strengthened their ability to influence outcomes which had been weakened by the exclusion of municipal law from the arbitral tribunals in most cases. As Hasan Zakariya, the secretary of OPEC, stated:

[t]he OPEC countries considered their internal laws were sufficiently mature to govern the oil agreements and to provide adequate procedures for dispute settlement and (that) (... ) there was no reason to continue the tradition of divorcing oil contracts from domestic legal systems.<sup>299</sup>

#### ***5.3.1.2.3.1.2. The United Nations***

Another international organization, the United Nations, supports the re-localisation doctrine in state contracts dealing with mineral resources. Some important UN resolutions helped motivate developing countries to re-localize their petroleum agreements. In 1962, the United Nations General Assembly adopted Resolution 1803, on Permanent Sovereignty over Natural Resources (hereinafter PSNR).<sup>300</sup> Article 3 of this resolution reads "In cases where authorization is granted, the capital imported and the earnings on that capital shall be governed by the terms thereof, by the national legislation in force, and by international law".<sup>301</sup> This controversial resolution confirmed the rights of the host states to have control over their natural resources and have permanent sovereignty over these resources. In addition, the General Assembly of the United Nations adopted further resolutions: Resolution No. 3171 (in 1973)<sup>302</sup> and Resolution No. 3201 (in 1974),<sup>303</sup> which established a new international economic order. Resolution 3201 (NEIO) provided for each state to have the permanent and complete sovereignty over its natural resources and all economic activities on its territory. In addition, the state may protect these resources by utilizing them in an appropriate manner, and this autonomy would empower the state with the right to nationalise its resources. Article 2 (2) (c) of United Nations Resolution No. 3281<sup>304</sup> of the 1974 Charter of Economic Rights and Duties of States (herein after CERDS)

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<sup>299</sup> Virtus Chitoo Igbokwe, 'Developing Countries and the Law Applicable to International Arbitration of Oil Investment Disputes: Has the Last Word Been Said?' (1997) 14 Journal of International Arbitration 99.

<sup>300</sup> UNGA Res 1803 (14 December 1962) UN Doc S/RES/1803.

<sup>301</sup> *ibid.*

<sup>302</sup> UNGA Res 3171 (17 December 1973) UN Doc S/RES/3171.

<sup>303</sup> UNGA Res 3201 (1 May 1974) UN Doc S/RES/3201.

<sup>304</sup> UNGA Res 3281 (12 December 1974) UN Doc S/RES/3281.

provided that: “In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalising State and by its tribunals.”

All of the abovementioned resolutions confirm the priority of the law of the host state in the governance of state contracts, particularly petroleum agreements, and cuts any possible links between these contracts and international law which means the concept of the internationalisation of state contracts concept is no longer viable.

#### **5.4. Conclusion:**

The applicable law is the most critical legal issue in the petroleum process, both in the law governing the procedures and in substantive issues. There is no universal or uniform approach to regulating this issue.

Although Iraqi law has not been regulating international arbitration, it recognises the principle of the autonomy of the parties with regard to the applicable law of petroleum arbitration procedures. The arbitrators can also determine this law in cases of there is no express choices made by the contractual parties, although this freedom is restricted by mandatory rules and the public policy of Iraq.

The law governing the place of arbitration has a great impact on the law governing the arbitration procedures. In this regard there are two dominant theories, delocalisation theory and seat theory. In some arbitral tribunals, the procedures are detached and free from any application of the national law of the arbitration place or any supervision or control on the part of the domestic law of the place of arbitration. This approach is applied in accordance with the theory of delocalization which denies any relationship between the arbitration procedures and the place of arbitration. However, this theory has had limited success because it could not protect the developing countries’ interests and is viewed by these countries as a theory designed to protect the interests of the petroleum companies by removing the arbitral award from any supervision by the domestic legal institutions. The seat theory enhances the relationship between the place of arbitration and the law governing the procedures. Accordingly, the arbitral tribunal procedures should be subjected to the supervision and control of a national court, where arbitration is

conducted to ensure that the arbitral award is both effective and enforceable. This theory has won an established place in international conventions and national laws.

The applicable law of petroleum agreements is not devoid of controversy. This controversy causes divisions when attempts are made to determine the applicable law of petroleum agreements. The division has more than a merely theoretical aspect. It also involves practical aspects such as the arbitral tribunal awards when there is the intention to apply international law and remove agreements from the ambit of national law. Most of these awards have not applied the national law of the host state on the grounds of the insufficiency of the municipal law of the host state. However, this consideration dissembles the most important motivation, which is to protect the petroleum companies' interests from any change which might occur in the legislative policy of the host state, for example nationalisation. However, most host states now try to develop and update their involvement laws and include within their legislation modern conceptions for the protection of foreign companies, such as like stabilization clauses and adequate compensation. Therefore, any criticism of national law is no longer acceptable as a justification for completely evading the application of national law. This shift in attitude has been upheld by United Nations Resolutions No. 1803, 3171, 3201 and 3281 and also the declarations of OPEC.

Iraq is one of those countries which have tried to update its laws regarding national involvement. Nonetheless, although Iraq has promulgated and updated several laws related to the investment sector but there is still no regulation covering the petroleum sector of the economy. The time is ripe for the promulgation of such laws for the governance of the most important sector in Iraqi economy, the petroleum sector, and for the regulation of petroleum agreements. Iraqi law should govern the substantive issues in arbitration, which is also the conclusion embodied in Article 39 of DLOG.

## **Chapter Six: Enforcement of Arbitral Award**

### **6.1. Introduction:**

The parties' aim in the arbitration process is to resolve the dispute which arises between them through the rendering of an award by an arbitral tribunal. Therefore, if the arbitral award is not recognised by the losing party the arbitration loses its value as a method of resolving the dispute. The announcement of the award by the arbitrator ends one important part of the arbitration process and a new and critical stage of this process begins, which is enforcement of the arbitral award. At this stage of the arbitration, the winning party will seek to enforce the arbitral award by means of a court of law, which may enforce it or set it aside, according to the state enforcement laws of the state involved; while the losing party will be subjected to the arbitral tribunal award or may seek to challenge this award. Therefore, the foreign investor is not only conscious of the arbitration laws in the host state but will also be aware of the capacity of the host state's laws to bring about the enforcement of such awards.

In Iraq, enforcement of foreign arbitral awards faces some challenges. These challenges originate in the absence of arbitration law and enforcement law. There is no article in the CCP and the accompanying laws which provides explicitly for the enforcement of foreign arbitral awards in Iraq.<sup>1</sup> This has led to a critical lacuna in the legal system which governs such awards. There has been a consequent diversity of opinion regarding the enforcement of such awards in Iraq. Enforcement of foreign arbitral awards is jeopardized since there are no texts under Iraqi law for the enforcement of such awards. Despite Iraqi law provided that petroleum disputes can be resolved by arbitration, it does not design any clear mechanism to enforce petroleum arbitral award.

Given the importance and sensitivity of the enforcement issue, international efforts have been made to regulate it. The enforcement of arbitral awards was regulated by bilateral agreement, regional conventions and multilateral conventions. The Geneva Convention of 1927, the New York Convention of 1958 and the ICSID Convention are considered to be important conventions in this regard. The New York Convention is recognised as the most significant

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<sup>1</sup> The Iraqi DICAL has three articles to regulate enforcement of foreign arbitral awards: Article 40, 41 and 42.



convention for the recognition and enforcement of foreign arbitral awards. Many states are members of this convention, which tries to unify the rules governing enforcement issues by adopting this convention's provisions and integrating them into the national laws of the member states. However, despite its importance, Iraq has not yet signed or ratified the New York Convention. Therefore, this chapter will discuss Iraqi laws involving the enforcement of foreign judgments and also the international and regional conventions that Iraq has joined and the ways in which these conventions affect Iraqi law. Furthermore, it examines the prospects for the enforcement of foreign petroleum arbitration awards through the facilities provided by Iraqi law. This chapter explains and addresses Iraqi courts' capacity to enforce foreign arbitral award and the role which they play in that enforcement.

The endeavour to enforce foreign arbitral awards against a state or its entities is considered a sensitive and difficult task, more so than the enforcement of such an award against private individuals. This is because such enforcement collides with state sovereign immunity, especially when the enforcement involves arbitration awards in petroleum disputes. Many legal systems deal with national resources, particularly gas and petroleum, as sovereignty issues and they are subject to this doctrine. This chapter will examine this doctrine under Iraqi law and how Iraq deals with this issue.

Sovereign immunity is not the only hindrance to the enforcement of arbitral awards. The public policy of the state is also considered to be an obstacle facing the parties. The latter issue does not have a clear or specific scope and moreover the contents of this conception are not known. Public policy is of different kinds, namely domestic, international and transnational. This diversity in public policy determines the availability of the international elements in transactions. The current chapter dedicates a separate section to addressing this issue and explains how Iraqi law deals with public policy.

This chapter will seek to examine whether the current provisions of enforcement foreign judgments is sufficient to deal with foreign petroleum arbitral awards or these provisions need update and amend.

## 6.2. The Grounds for Enforcing Arbitral Awards under Iraqi Law, UAE and PRC:

Notwithstanding the fact that Iraqi law professes to enforce foreign judgments, it does not refer explicitly to the enforcement of foreign arbitral awards.<sup>2</sup> Iraq has no law regulating the recognition and enforcement of foreign arbitral awards. Despite Iraqi Investment Law No. 13 of 2006,<sup>3</sup> referring to arbitration as a method to resolve disputes arising from investment agreements, it has not designed any mechanism to enforce foreign arbitral awards. The silence of Iraqi law regarding the enforcement of foreign arbitral awards has created differences of opinion in this matter. According to one opinion,<sup>4</sup> the Iraqi legal system does not recognise and cannot enforce foreign arbitral awards. This is because the system does not explicitly regulate the enforcement of foreign arbitral awards, either in the Iraqi Implementing Law or in the Iraqi CCP. In addition, the foreign judgment should be final in the country where it is rendered in order for it to be in force under Iraqi law.<sup>5</sup> This opinion derives from Article 272 (1) of the Iraqi CCP which provides that:

According to the request of either party, and after the payment of specified fees, the arbitrators' award shall not be implemented by the executive departments whether the arbitrators who issued it were appointed by court or by way of mutual agreement, unless the competent court of approved it.<sup>6</sup>

So, according to this view the foreign arbitral award must be confirmed by the foreign court before the foreign arbitral award can be enforced in accordance with the Enforcement Law of Foreign Judgments in Iraq No.30 of 1928 (hereinafter ELFJ). Taking another view, Haddad agrees that it cannot be inferred from the provisions of the relevant Iraq laws that the legislation

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<sup>2</sup> Article 2 of the Enforcement Law of Foreign Judgments in Iraq No (30) of 1928 published in Iraqi Official Gazette 61.

<sup>3</sup> Iraqi Investment Law No. 13 of 2006 published in Iraqi Official Gazette, Issue 4031 on 17 January 2007, 4.

<sup>4</sup> حسن فؤاد منعم، تنفيذ الأحكام الأجنبية في العراق: دراسته مقارنة في ضوء قانون تنفيذ أحكام المحاكم الأجنبية رقم (30) لسنة (1928) و اتفاقية الرياض العربي للتعاون القضائي، المكتب الوطني، 2009، 11

[Hassan Foaad Munaem, *Enforcement the Foreign Judgments in Iraq: Comparative Study in Light of Implementing Law No. 30 of 1928 and Al Riyadh Convention for Judicial Cooperative* (National Library 2009) 11];

حسن الهداوي، الوجيز في القانون الدولي الخاص، تنازع القوانين، الجزء الثالث، مطبعة الرشاد، 1963، 194

[Hassan Al-Hadawe, *The Brief Private International Law: Conflict of Laws*, vol 3 (Al Rashad 1963) 194].

<sup>5</sup> Article 6 (e) and 8 (b) of the ELFJ.

<sup>6</sup> The translation from Arabic language to English language available at < <http://gjpi.org/library/primary/statutes/>> accessed on 12 April 2014.

is intended to deal with the enforcement of foreign arbitral awards.<sup>7</sup> However, Haddad states that the foreign arbitral award rendered in foreign countries may be enforceable in Iraq pursuant to the conventions, if any, to which Iraq and those countries are parties.<sup>8</sup>

A different line of argument posits that the foreign arbitral award is to be considered as a national arbitral award and is consequently enforceable under Iraqi Law, pursuant to Articles 272-274 of the CCP, which deal with the enforcement of arbitral awards. These provisions are general: they do not distinguish between domestic or international arbitration and so contain provisions for regulating both types of arbitration.<sup>9</sup>

A third position on<sup>10</sup> argues that foreign arbitral awards should be treated like foreign judgments and can be enforced according to Iraqi implementing laws. The proponents of this view argue that the foreign arbitral award may have foreign judgment status in the country where it is rendered through its confirmation it by the court of the state where the foreign arbitral award was rendered.<sup>11</sup> It then becomes tantamount to a foreign judgment and is consequently subject to the ELFJ in Iraq.

The present author agrees with the third opinion and argues that foreign arbitral awards can be enforced according to the Iraqi ELFJ. It could be said that the condition provided by Article 272, which stipulates that the arbitral award should be confirmed by the competent court in order to be enforceable was designed to apply to national arbitration. Also this article gives no indication that the Iraqi CCP is intended to prohibit enforcement of foreign arbitral awards absolutely: it stipulates that this award should be confirmed by a competent court which can enforce it. In addition, the first opinion argues that the arbitral award should be final in order to be enforceable under Iraqi enforcement law this condition cannot be realized with respect to foreign arbitral awards. However, it could be argued that foreign arbitral awards in some cases

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<sup>7</sup> Hamzeh Haddad, 'Enforcement of Foreign Judgments and Award in Jordan and Iraq' (A Lecture addressed to the IBA Conference) Bahrain (5-8/3/1989).

<sup>8</sup> *ibid.*

<sup>9</sup> حسين المؤمن، الوجيز في التحكيم، بيروت، 1977، 18  
[Hussein Al- Mu'men, *Brief in Arbitration* (Beirut 1977) 18].

<sup>10</sup> *ibid.*; 1973، 212، بغداد، المقارن، والقانون العراقي والقانون المقارن،  
[Mamduh Abdul Kareem, *Private International Law According to Iraqi Law and Comparative Law* (Baghdad 1973) 212].

<sup>11</sup> *ibid.*

can be final by dint of their confirmation in the court where they are rendered and, in ICSID awards, foreign arbitral awards are treated as final judgments.<sup>12</sup> Moreover, enforcement of foreign arbitral award has significant impact on the arbitration process. Hence, the success of any arbitration law depends on the facilities and mechanisms of enforcement offered by the enforcement laws. Therefore, the success of any arbitration law in Iraq depends on enforcement laws which revive this process and at the same time encourage foreign investors. So, the promulgation of arbitration law will not be effective unless the Iraqi ELFJ is amended by the addition of new articles explicitly regulating the enforcement of foreign arbitral awards or promulgating new laws involving the enforcement of foreign arbitral awards.

Article 16 of the Iraqi Civil Law No.40 of 1951<sup>13</sup> provides that judgment rendered by a foreign court would not be enforceable in Iraq unless it is considered a foreign judgment according to the relevant law. The Iraqi Civil Law provision is confirmed by Article 12 of Iraqi Implementing Law No.45 of 1980 which also stipulates what should be considered a foreign judgment according to the Iraqi Enforcement Law No. 30 of 1928 or international convention that applies in Iraq. Consequently, the law governing foreign judgments and foreign arbitral awards would be the Iraqi ELFJ. According to this law, the judgment is considered foreign under Iraqi law if it is rendered by a foreign court according to Article 1 of Iraqi ELFJ, which defines a foreign judgment as “A judgment which is rendered by a non- Iraqi court”.<sup>14</sup> So, the Iraqi law depends on a territorial criterion to distinguish foreign awards from national awards.<sup>15</sup> Based on this criterion adopted by Iraqi law, arbitration awards rendered on Iraqi territory are considered national even if rendered by foreign courts established in Iraq, whereas the legal

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<sup>12</sup> Article 54 (1) of ICSID which provided that “Each contracting state shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that state”.

<sup>13</sup> Iraqi Civil Law No.40 of 1951 published in the Iraqi Official Gazette, Issue 3015 on 8 December 1951, 243.

<sup>14</sup> Translated from Arabic to English by Hamzeh Haddad, ‘Enforcement of Foreign Judgments and Award in Jordan and Iraq’ (A Lecture addressed to the IBA Conference) Bahrain (5-8/3/1989).

<sup>15</sup> This was criterion adopted by New York Convention 1958 in Article I (3)

When signing, ratifying or acceding to this Convention, or notifying extension under Article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, adopted on 3 May 1956, entered into force on 7 June 1959, UNTS vol 330, 3.

criterion states that the judgment is considered foreign if it is based on a foreign element, that is, if one of the parties is of foreign nationality, notwithstanding the place where the court resides.

The UAE provides explicitly in its laws for the enforcement of foreign arbitral awards. Articles 235 and 238 of Federal Civil Procedures Law No 11 of 1992<sup>16</sup> provide for the enforcement of foreign arbitral awards. Article 235 (1) provides that “Judgments and orders passed in a foreign country may be ordered for execution and implementation within UAE under the same conditions provided for in the law of foreign state for the execution of judgments and orders passed in the state”.<sup>17</sup>

PRC law avoids any diversity of opinion by referring to foreign arbitral awards expressly in Article 62 of the China Arbitration Law of 1994.<sup>18</sup> This provides that:

The parties shall perform the arbitration award. If a party fails to perform the arbitration award, the other party may apply to the People’s Court for enforcement in accordance with the relevant provisions of the Civil Procedure Law. The People’s Court to which the application has been made shall enforce the award.<sup>19</sup>

In addition to this article, China’s Law mentions foreign arbitral awards in Articles 257 and 267 of PRC Civil Procedures Law of the People’s Republic of China 1991.<sup>20</sup>

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<sup>16</sup> The UAE Federal Civil Procedures Law No 11 of 1992 published in the Official Gazette No. 235 of 8 of March 1992.

<sup>17</sup> The translation from Arabic to English is available at < <http://www.diac.ae/idias/rules/uae/chapter4/>> on 27 August 2014.

<sup>18</sup> Adopted at the Ninth Meeting of the Standing Committee of the Eighth National People’s Congress on August 31, 1994 and promulgated by Order No.31 of the President of the People’s Republic of China on August 31, 1994.

<sup>19</sup> The English text is available at < [http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383756.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383756.htm)> access on 17 of May 2014.

<sup>20</sup> Article 257 of PRC Civil Procedures Law of the People’s Republic of China 1991 provides that:

If one party fails to comply with the award made by a foreign-affair arbitration institution of the People’s Republic of China, the other party may apply for the enforcement of the award to the intermediate people’s court located in the place where the person against whom the application for the enforcement is made has his domicile or where the property of the person is located.

The English text is available at < [http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383756.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383756.htm)> access on 17 of May 2014.

Article 267 of same law provided that:

If an award made by a foreign arbitration institution needs the recognition and enforcement of a people’s court of the People’s Republic of China, the party shall directly apply to the intermediate people’s court located in the place where the party subject to the enforcement has its domicile or where its property is located. The people’s court shall deal with the matter according to the relevant provisions of the international treaties concluded or acceded to by the People’s Republic of China or on the principle of reciprocity.

### **6.2.1. The Legal Basis for the Enforcement of Arbitral Foreign Awards under Iraqi Law, UAE and PRC:**

The ELFJ regulates the enforcement of foreign judgments. It was the first law to deal with foreign judicial awards. As argued previously, this law can apply to foreign arbitral awards. It is designed to define foreign judgments and contains criteria for distinguishing foreign awards from national ones. This law also details, in Article 6, the conditions that should be available in foreign judgments in order for them to be enforceable and, as argued previously, these conditions should be available also in foreign arbitral awards under Iraqi law. Article 11 determines the scope of this law and the types of foreign judgment that it refers to. Such judgments have to be “(a) foreign judgments issued in a country that has a bilateral agreement with Iraq, (b) and if such country is specifically named by Iraq regulations issued by the government, (c) and subject to a condition of reciprocity.”<sup>21</sup>

The second law dealing with the enforcement of foreign judgment awards is the Implementing Law No 45 of 1980.<sup>22</sup> Its Article 3 (2) shows the scope of this law. This article states that “the law applies to foreign judicial decisions, which become enforceable in Iraq, subject to any applicable international agreement”.<sup>23</sup> Article 12 of the above mentioned law refers to the conditions for the enforcement of foreign judicial awards. Article 12 provides that “no foreign judgment will be enforceable in Iraq unless it is deemed enforceable in accordance with the law of enforcement of foreign judicial awards, or with an international agreement”.

The law of the UAE regulates enforcement of foreign arbitral awards in Federal Code of Civil Procedures Law No 11 of 1992, in Articles (235, 236, 237 and 238). It shows the conditions that should be available in a foreign arbitral award for it to be enforceable. The conditions are contained in article 235 of the current arbitration law.

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The English text available at <[http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383756.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383756.htm)> access on 17 of May 2014.

Adopted at the Fourth Session of the Seventh National People’s Congress and promulgated by Order No. 44 of the President of the People’s Republic of China on April 9, 1991.

<sup>21</sup> Translation from Arabic to English by Hamzeh Haddad, ‘Enforcement of Foreign Judgments and Award in Jordan and Iraq’ (A Lecture addressed to the IBA Conference) Bahrain (5-8/3/1989).

<sup>22</sup> Implementing Law No 45 of 1980 published in Iraqi Official Gazette issue 2762 on 17 May 1980, 444.

<sup>23</sup> The translation from arabic to English by Saleh Majid, ‘Enforcement of Foreign Judgments and Arbitration Awards in Iraq’ (1998) International Trade Law Quarterly 173.

There were no provisions in Chinese law to regulate the enforcement of foreign arbitral award prior to 1982. The enforcement of such awards until then depended entirely on voluntary acquiescence to the judgment by the party against whom the award had been granted, and sanctions for reinforcement were of an unofficial kind.<sup>24</sup> In 1982, PRC promulgated the Trial Civil Procedure Law which was in then replaced by the Civil Procedures Law of the People's Republic of China, 1992. This law is considered to be an important step towards recognition and enforcement of foreign arbitral awards in China.<sup>25</sup> It affirms the grounds for enforcement of foreign arbitral awards, which are the bilateral agreements and the reciprocity principle. Article 204 of the Civil Procedures Law details these grounds. The Chinese Arbitration Law of 1994, Article 62, also regulates foreign arbitral awards.

### **6.2.2. The Conditions of Enforcement of Arbitral Awards under Iraqi Law, UAE and PRC:**

There are certain conditions stipulated by Iraqi law, UAE and PRC to enforce any foreign arbitral award and if any one of these conditions is not met the foreign arbitral award would be unenforceable.<sup>26</sup> The Iraqi courts have the authority to check the presence of these conditions automatically in foreign arbitral awards even if the losing party does not submit its appeal against the award.<sup>27</sup> These conditions are provided by Article 6, 8 and 11 of ELFJ and they will be discussed in the following paragraphs:

#### **6.2.2.1. Service of Notice:**

The Iraqi CCP gives the service notice great importance in any suit. It is considered the basis of the suit's legality and also gives validity to the suit procedures. Iraqi law considers this makes to be related to public order.<sup>28</sup> The party against whom the award is rendered must be notified by the foreign court about the action in sensible and sufficient ways.<sup>29</sup> This party should be given sufficient notice of the arbitral process and it must be certain that the parties receive a

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<sup>24</sup> The translation from arabic to English by Saleh Majid, 'Enforcement of Foreign Judgments and Arbitration Awards in Iraq' (1998) International Trade Law Quarterly 173.

<sup>25</sup> Jingzhou Tao, *Arbitration Law and Practice in China* (2<sup>nd</sup> edn, Kluwer Law International 2008) 160.

<sup>26</sup> Article 6 of the Iraqi ELFJ.

<sup>27</sup> *ibid.*

<sup>28</sup> Article 27 of Iraqi CCP.

<sup>29</sup> Article 6 (a) of Iraqi ELFJ.

fair hearing.<sup>30</sup> A similar provision is found in the UAE Federal Civil Procedures Law No 11 of 1991, Article 235 (c) which stipulates that the parties receive the proper notice of action. The PRC Civil Procedures Law of 1991 also follows the same approach of Iraq and UAE Laws and stipulated that the parties should be noticed.<sup>31</sup>

#### **6.2.2.2. Jurisdiction:**

As noted earlier, the foreign arbitral award would be enforceable in Iraq if it is rendered by a foreign court which has territorial and subject matter jurisdiction.<sup>32</sup> The jurisdiction and all procedures of the court are determined by the law of the country where the court located.<sup>33</sup> Iraqi ELFJ considers the foreign court has the jurisdiction if one of these conditions is available. Article 7 of this law provided that:

- A) where the action relates to moveable or immovable things existing in that country, or
- B) it relates to a contract concluded in that country, or to be performed totally or partially in its territories, or
- C) it relates to acts done totally or partially in the said country, or
- D) where the judgment debtor has voluntarily appeared before the court of that country, or
- E) where he has agreed to the jurisdiction of the foreign court.<sup>34</sup>

UAE law provides the same rule by stipulating that the foreign court must have the jurisdiction.<sup>35</sup> The PRC law does not explain this condition.

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<sup>30</sup> Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (5<sup>th</sup> edn, Oxford University Press 2009) 643.

<sup>31</sup> Article 258 (2) of PRC Civil Procedures Law of 1991 which provided that “the defendant is not duly notified of the appointment of the arbitrators or the arbitration proceedings, or the defendant fails to express his defense due to the reasons for which he is not held responsible”.

<sup>32</sup> Article 6 (b) of the Iraqi ELFJ.

<sup>33</sup> Article 28 of Iraqi Civil Code No 40 of 1951 provided that “The rules of competence (of courts) and all questions of procedures shall be governed by the law of the state wherein a suit is initiated or the proceedings have been commenced”. Translation from Arabic language to English language is available at < <http://gipi.org/library/primary/statutes/>> accessed on 12 April 2014.

<sup>34</sup> Translated from Arabic to English by Hamzeh Haddad, ‘Enforcement of Foreign Judgments and Award in Jordan and Iraq’ (A Lecture addressed to the IBA Conference) Bahrain (5-8/3/1989).

<sup>35</sup> Article 235 (b) of UAE Federal Civil Procedures Law No 11 of 1992 provides that “Judgment or order was passed by the competent court according to the law of the country in which it was passed”. The translation from Arabic to English is available at < <http://www.diac.ae/idias/rules/uae/chapter4/>> on 27 August 2014.



### **6.2.2.3. Award Concerning a Debt or Sum of Money or Civil Compensation:**

The Iraqi ELFJ provides in Article 6 (c) that the foreign award will be enforceable if it concerns debt, a certain sum of money or civil compensation if the foreign judgment is rendered in regard to criminal action. The enforcement of foreign awards is limited to the private law domain, such as judgments related to civil cases, personal status cases and commercial cases; and therefore the award concerning public law will not be subject to enforcement by the ELFJ. The UAE and PRC laws do not adopt such condition by stipulate that the foreign award should be concerns debt.

### **6.2.2.4. Public Order:**

In Iraqi law, the interests of the community, political, social, economic, moral or religious, can be protected by public order. The parties cannot enter into an agreement in conflict with these interests, even if this agreement achieves their interests. Therefore, no foreign award can be enforced in Iraq if it is in conflict with the supreme principles of the Iraqi state.<sup>36</sup> The question of whether or not a foreign award is against public order is subject to the discretion of the court, which has the authority to enforce this judgment. The court's discretion would be subject to Court of Cassation (*Mahkamat Al Tammeez*) supervision. If a Court of Cassation (*Mahkamat Al Tammeez*) finds that this award is against public order then it will reject the enforcement of the award.<sup>37</sup> Iraqi ELFJ confirms this principle by stipulating in Article 6 (d) that the foreign award must be not being contrary to public order. Therefore the foreign arbitral award must not be in contrast with Shari'a, customs, habits and other issues. The UAE adopted the same provision and considers foreign award unenforceable if they are deemed to be against public order.<sup>38</sup> Similarly, the PRC provides that a foreign award will not be enforceable if the People's Court fined this award to be contrary to social and public interest of PRC.<sup>39</sup>

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<sup>36</sup> Article 32 of Iraqi Civil Law No.40 of 1951.

<sup>37</sup> حسن الهداوي، الوجيز في القانون الدولي الخاص: تنازع القوانين، الجزء الثالث، مطبعة الرشاد، بغداد 194، 1963. [Hassin Alhadawei, *Brief in Private International Law: Conflict of Laws* (El Rashad Press 1963)194.]

<sup>38</sup> Article 235 (e) of UAE Federal Civil Procedures Law No 11 of 1992 provides that "It does not conflict or contradict with a judgment or order previously passed by another court in the State and does not include any violation of moral code or public order.

<sup>39</sup> Article 260 of PRC Civil Procedures Law of 1991 which provided that "if a people's court determines that the enforcement of an award will violate the social and public interest, the court shall make a ruling to disallow the

#### **6.2.2.5. Fraud or Dol:**

The foreign award must not have been rendered as a result of fraud by one of the parties. Article 8 (a) of Iraqi ELFJ stipulates that fraud is any behaviour committed by one party in order to change the facts of a case to his benefit, for example, bribing another party's witnesses or theft of the other party's documents. Within of this definition fraud and dol are considered to be significant grounds for not enforcing the foreign award.<sup>40</sup> The UAE does not mentioned any article explain fraud and dol condition. Article 213 (6) of PRC Civil Procedures Law, similarly, provides that "the arbitrators have committed embezzlement, accepted bribes or done malpractice for personal benefits or perverted the law in the arbitration of the case".<sup>41</sup>

#### **6.2.2.6. Reciprocity:**

In order to enforce the foreign arbitral award, the principle of reciprocity should be available between Iraq and the country where the award is rendered. Article 11 of Iraqi ELFJ provides that:

[T]his Act applies to the judgments rendered by foreign courts whenever judgments rendered by Iraqi courts become enforceable in foreign countries according to a particular agreement with the state of Iraq or to particular ordinances to be announced from time to time or according to the laws applicable in these foreign countries (.....)<sup>42</sup>

So, in order to enforce foreign award Iraq should be has an agreement with the state that its court rendered the foreign award. Iraq engages in regional agreement for enforcement arbitral award but it does not become party in international conventions.<sup>43</sup> The UAE adapts the same approach and stipulated that there is should be mutual recognition and enforcement between the UAE and

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enforcement of the arbitration award". The English text is available at <[http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383756.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383756.htm)> access on 17 of May 2014.

<sup>40</sup> Article 196 of Iraqi CCP.

<sup>41</sup> The Decision of the Standing Committee of the National People's Congress on Amending the Civil Procedure Law of the People's Republic of China, adopted at the 30th Meeting of the Standing Committee of the Tenth National People's Congress of the People's Republic of the China on October 28, 2007, is hereby promulgated and shall go into effect as of April 1, 2008.

The English text is available at <[http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383756.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383756.htm)> accessed on 17 of May 2014.

<sup>42</sup> This Article translated from Arabic to English by Hamzeh Haddad, 'Enforcement of Foreign Judgments and Award in Jordan and Iraq' (A Lecture addressed to the IBA Conference) Bahrain (5-8/3/1989).

<sup>43</sup> Section 6.3 of this chapter discuss this point extensively.

the country where the award is rendered. Article 235 (1) of UAE Federal Law No 11 of 1992 Provides that:

Judgments and orders passed in a foreign country may be ordered for execution and implementation within UAE under the same conditions provided for in the law of foreign state for the execution of judgments and orders passed in the state.<sup>44</sup>

Article 236 also provides that:

Provisions of the preceding Article shall apply to the arbitration decision passed in foreign countries. Arbitration decisions must be passed on a matter which may be decided on by arbitration according to the law of the country and must be enforceable in the country it was passed in.<sup>45</sup>

The PRC also provided the same condition and adopted reciprocity. Article 265 of PRC Civil Procedure Law<sup>46</sup> provides that:

(.....) The foreign court may also, in accordance with the provisions of the international treaties concluded or acceded to by that foreign country and the People's Republic of China or with the principle of reciprocity, request recognition and enforcement by a people's court.<sup>47</sup>

### **6.2.3. The Procedures for Enforcement of Foreign Arbitral Awards under Iraqi Law, UAE and PRC:**

In order to give a clear explanation of the enforcement of foreign arbitral awards, it is first of all necessary to distinguish between two cases. The first case is when the enforcement of the foreign arbitral award in Iraq is in accordance with a treaty between Iraq and the state where the foreign arbitral award is rendered. This case will be discussed extensively in subsequent sections. The second case is the enforcement of a foreign arbitral award rendered in a state which has no treaty with Iraq.

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<sup>44</sup> The translation from Arabic language to English is available at < <http://www.diac.ae/idias/rules/uae/chapter4/>> accessed on 13 August 2014.

<sup>45</sup> *ibid.*

<sup>46</sup> The Decision of the Standing Committee of the National People's Congress on Amending the Civil Procedure Law of the People's Republic of China, adopted at the 30th Meeting of the Standing Committee of the Tenth National People's Congress of the People's Republic of the China on October 28, 2007, is hereby promulgated and shall go into effect as of April 1, 2008.

<sup>47</sup> The English text is available at <[http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383756.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383756.htm)> access on 17 of May 2014.

To enforce in Iraq a foreign arbitral award rendered in a state which has no treaty with Iraq to regulate the enforcement, the Iraqi competent court should first render a decision. This decision is known as the “enforcement decision”.<sup>48</sup> It is rendered according to certain proceedings, by submitting an application in the form of a statement of claim to the competent court, which is the First Instance Court (Al-Bida’ya).<sup>49</sup> The application should be attached to a duly legalized and translated copy of the foreign arbitral award.<sup>50</sup> This court has the authority to render the enforcement decision only, without discussing the merits of the case.<sup>51</sup> Article 3 (b) of Iraqi law determines the place where the competent court is located, which is the place where the defendant has his residence. If the defendant has no fixed place of residence in Iraq it would be in the place where his property required a seizure.<sup>52</sup> The question which will be raised here is: if the defendant has no domicile in Iraq and neither does he have property there, is the foreign arbitral award unenforceable in Iraq? It seems from Article 3 paragraph (b) that the debtor should have domicile in Iraq or property and without these two conditions the foreign arbitral award would be unenforceable.<sup>53</sup> However, Article 41 of Iraqi CCP could be applied in these circumstances. It states that “If the defendant has no domicile or residence in Iraq, then the suit shall be filed to the court of the plaintiff’s domicile or residence. If the plaintiff has no domicile or residence in Iraq then the suit shall be filed to the courts of Baghdad”.<sup>54</sup> The present author takes the view that this Article may be applied in order to answer the question of unenforceability of foreign arbitral awards in Iraq in cases where the requirements of Article 3 are not met. In order to render the enforcement decision, the court determines an appointment for the hearing summons the defendant for the hearing session and hears both parties’ defence.<sup>55</sup> If the court finds that the judgment meets all the conditions and requirements provided by law

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<sup>48</sup> Article 2 of the Iraqi ELFJ.

<sup>49</sup> Article 3 of the Iraqi ELFJ.

<sup>50</sup> Saleh Majid, ‘Enforcement of Foreign Judgments and Arbitration Awards in Iraq’ (1998) *International Trade Law Quarterly* 173.

<sup>51</sup> The Iraqi Court of Cassation, No of judgment 10/11, on 30/01/1982. This court state that “Court held has filed the request for an enforcement decision barred from discussing the merits of the case and its function is limited to render an enforcement decision”.

<sup>52</sup> Article 3 (b) of the Iraqi ELFJ.

<sup>53</sup> *ibid.*

<sup>54</sup> The translation from Arabic language to English language available at < <http://gjpi.org/library/primary/statutes/>> accessed on 12 April 2014.

<sup>55</sup> Saleh Majid, ‘Enforcement of Foreign Judgments and Arbitration Awards in Iraq’ (1998) *International Trade Law Quarterly* 173.

No 30 of 1928 then it may render the enforcement decision.<sup>56</sup> In the UAE the situation is different from Iraq because in 2006 the UAE became a member of the New York Convention of 1958. Generally, the terms of the convention supersede local law and therefore the New York Convention terms will apply in regard to the enforcement of foreign arbitral awards in the UAE. It provides the UAE judicial system with the grounds to enforce the foreign arbitral award. According to Article IV (1) the procedures of enforcement of a foreign arbitral award are “(a) the duly authenticated original award or a duly certified copy thereof; (b) the original agreement referred to in Article II or a duly certified copy thereof”. Moreover Article IV (2) of the convention stipulates that the award and the agreement must be produced and made in the official language of the country in which the award is relied on or a translated copy must be provided. If these requirements and conditions are available the court will enforce the foreign arbitral award. These procedures will be followed by member states of the New York Convention. Article 235<sup>57</sup> of UAE law No 11 of 1992 will apply to non-member states of the New York Convention or to states which do not have a treaty with the UAE in this regard. In

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<sup>56</sup> Article 4 and 5 of Iraqi Law ELFJ. Article 40 (2) of Iraqi DICAL design the procedures of enforcement of foreign Arbitral award.

<sup>57</sup> This Article provides that:

1. Judgments and orders passed in a foreign country may be ordered for execution and implementation within UAE under the same conditions provided for in the law of foreign state for the execution of judgments and orders passed in the state.
2. Petition for execution order shall be filed before the Court of First Instance under which jurisdiction execution is sought under lawsuit filing standard procedures. Execution may not be ordered unless the following was verified:-
  - a. State courts have no jurisdiction over the dispute on which the judgment or the order was passed and that the issuing foreign courts have such jurisdiction in accordance with the International Judicial Jurisdiction Rules decided in its applicable law.
  - b. Judgment or order was passed by the competent court according to the law of the country in which it was passed.
  - c. Adversaries in the lawsuit on which the foreign judgment was passed were summoned and duly represented.
  - d. Judgment or order had obtained the absolute degree in accordance with law of the issuing court.
  - e. It does not conflict or contradict with a judgment or order previously passed by another court in the State and does not include any violation of moral code or public order.

The translation from Arabic language to English is available at < <http://www.diac.ae/idiias/rules/uae/chapter4/>> accessed on 13 August 2014.

PRC Law the same procedures are followed because China is one of the New York Convention members.

### **6.3. The Enforcing of Arbitral Awards under International Treaties:**

Enforcement of foreign arbitral awards is considered a critical issue in the arbitration process and has great significance at an international level. This is because the parties normally choose the place where the arbitral awards are rendered with a view to avoiding the choice of a place where a party may have assets to lose, should an award be made against that party, winning parties, however, look for states where the losing party has assets or property with a view to an attachment upon them. Consequently, vigorous international efforts have been conducted to make uniform provisions concerning the enforcement of foreign arbitral awards and to obtain the facility to enforce foreign awards in states where foreign arbitral award are not rendered in its territory. The outcome of these efforts was the inauguration of some important conventions.

#### **6.3.1. Early Convention**

Early Convention to regulate the recognition and enforcement of foreign arbitral awards was the Geneva Convention of 1927.<sup>58</sup> This convention aimed to recognize and enforce foreign arbitral awards in states which were members of the convention in regard to arbitral awards rendered according to arbitration agreements pursuant to the Geneva Protocol of 1923.<sup>59</sup> This protocol emphasized that the arbitration award should be enforced in the state where the award is rendered.<sup>60</sup> However, the Geneva Convention of 1927 goes further than this by providing that the arbitration award can be enforced in any territory of the states which are members of the convention.<sup>61</sup> The convention stipulated some conditions which should be available in arbitration

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<sup>58</sup> The Geneva Convention for Execution of Foreign Arbitral Awards of 1927, signed at Geneva on 26 September of 1927, LNTS, vol XCII, 302.

<sup>59</sup> The Geneva Protocol on Arbitration Clauses of 1923 signed at Geneva on 24 September 1923, LNTS, vol XXVII, No. 678 of 1924, 158.

Iraq became party to the Geneva Protocol on Arbitration Clause of 1923 according to law No.34 of 1928.

<sup>60</sup> Article 3 of Geneva Protocol Provided that “3. Each Contracting State undertakes to ensure the execution by its authorities and in accordance with the provisions of its national laws of arbitral awards made in its own territory under the preceding articles”.

<sup>61</sup> Article 1 of Geneva Convention 1927:

In the territories of any High Contracting Party to which the present Convention applies, an arbitral award made in pursuance of an agreement, whether relating to existing or future differences (hereinafter called "a submission to arbitration") covered by the Protocol on Arbitration Clauses, opened at Geneva on September 24, 1923, shall be recognised as binding and shall be enforced in accordance with the rules of

awards for them to be enforceable<sup>62</sup> and also provided the grounds for non-enforceable awards.<sup>63</sup> Iraq, UAE and PRC are not parties to the Geneva Convention of 1927.

### 6.3.2. The New York Convention of 1958:

The New York Convention of 1958<sup>64</sup> is considered the most significant convention with regard to the recognition and enforcement of foreign arbitral awards. It contains clear and simple procedures for the enforcement of such awards. It has received wide acceptance from the international community.<sup>65</sup> Iraq did not sign or ratify the New York Convention for political and legal reasons and circumstances.<sup>66</sup> The present author's view is that Iraq should access this convention, to which most of the world's states have become parties. The political circumstances which barred Iraq have ended and moreover this convention has designed simple

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the procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting Parties to which the present Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties.

<sup>62</sup> Article 1 of Geneva Convention of 1927 provides that:

- (a) That the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;
- (b) That the subject-matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon;
- (c) That the award has been made by the Arbitral Tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;
- (d) That the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to *opposition*, *appel* or *pourvoi en cassation* (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending;
- (e) That the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.

<sup>63</sup> Article 2 of Geneva Convention 1927:

- (a) That the award has been annulled in the country in which it was made;
- (b) That the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented;
- (c) That the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration.

<sup>64</sup> The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, adopted on 3 May 1956, entered into force on 7 June 1959, UNTS vol 330, 3.

<sup>65</sup> Most of the world's states are members of this convention. It is about 147 states that have ratified this convention. See the list of New York Convention states members available at <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html)> accessed on 20 September 2014.

<sup>66</sup> For more details see chapter three pages 100 and 101; Nidham G Al Abasey, 'Cakes without Sugar: Reasons behind Foreign Investor Reluctance to Enter Mesopotamia' (2013) 42 Syracuse Journal of International Law and Commerce 147.

and clear rules for the recognition and enforcement of foreign arbitral awards. These rules would address the lack of enforcement and recognition of foreign arbitration in the Iraqi legal system. These rules are consistent with the nature of petroleum agreements. Finally, Iraq's accession to the New York Convention would encourage foreign investors to invest in Iraq, especially in the petroleum sector. Article VII (2) of New York Convention provides that:

The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.<sup>67</sup>

Hence, according to this Article, the states which were members of the Geneva Protocol of 1923 and the Geneva Convention of 1927 ceased their membership of both Geneva Conventions as soon as they became parties to the New York Convention of 1958.

Article I (1) of the Convention indicates to whom the New York convention shall apply. It refers to disputes "arising out of differences between persons, whether physical or legal." As is apparent from the wording of this article, the convention applies both to the physical person and the legal person. However, the convention does not refer directly to states or their entities as persons of this convention. The question which arises here is whether the state or its entities will be treated as private individuals (*jure gestionis*) or as public entities (*jure imperii*) and therefore whether the New York Convention could apply to them, notwithstanding the state sovereignty plea? It could be said that the term "legal person" mentioned in this Article refers to a state and its entities as private persons (*jure gestionis*). This view was confirmed by the *ad hoc* Committee<sup>68</sup> which spoke of differences "between persons, whether physical or legal". The Representative of Belgium had proposed that the article should expressly provide that public enterprises and public utilities should be deemed to be legal persons for purposes of this article if their activities were governed by private law. The Committee was of the opinion that such a provision would be superfluous and that a reference in the present report would suffice".<sup>69</sup> This statement by the *ad hoc* committee gives a clear expression to the view that the legal term

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<sup>67</sup> The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, adopted on 3 May 1956, entered into force on 7 June 1959, UNTS vol 330, 3.

<sup>68</sup> United Nation Economic and Social Council, Report of the Committee on the Enforcement of International Arbitral Award, Resumed nineteenth session Item 14, E/2704: E/Ac.42/4/Rev.1, 28 March 1955, Para 24.

<sup>69</sup> *ibid.*



“person” includes states and state entities, so that the convention is applicable to the state and its entities if they are involved in private law.

This is not the only question raised in regard to the persons of the convention. There is also the question of the reservation provided by the convention in Article I (3): “it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration”. As discussed in Chapter Two, petroleum agreements are a special kind of investment agreement and the New York convention applies to commercial relationships. Hence, the question is: could the New York Convention apply to petroleum disputes, which are in fact a special kind of investment dispute, if Iraq became a party to this convention? Sornarajah states that “Disputes arising from state contracts involving natural resources also fall outside the convention”.<sup>70</sup> He argues that “there is a credible view that permanent sovereignty over natural resources constitutes a principle of *ius cogens* of international law”<sup>71</sup> Under the New York convention the member state can determine the commercial relationship according to the national law of that state.<sup>72</sup> According to this “commercial reservation”, a state can invoke a reservation to keep the particularity of a petroleum contract, which may not necessarily be considered an ordinary commercial transaction.<sup>73</sup> Returning to the question, it could be argued that petroleum contracts are a state contract which also has a commercial nature and so the state would waive its immunity as soon as it signed this contract. Moreover, a part of the answer of this question is connected with the arbitrability issue which, according to the New York Convention, is left to be determined by national law and should and can be a flexible ground for making the arbitral award non-enforceable. Therefore the, New York Convention can apply to petroleum contracts under Iraqi Law. However, the commercial reservation obstacle is diminished by the fact that many states who are parties to the New York Convention did not invoke the commercial reservation or withdraw their reservation.<sup>74</sup>

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<sup>70</sup> M Sornarajah, *International Commercial Arbitration: The Problems of State Contracts* (Longman 1990) 240.

<sup>71</sup> M Sornarajah, *International Commercial Arbitration: The Problems of State Contracts* (Longman 1990) 240.

<sup>72</sup> Article I (3) of the New York convention 1958.

<sup>73</sup> A. J. van den Berg, *The New York Arbitration Convention* 1958 (Kluwer 1981) 4-6.

<sup>74</sup> The list of states do commercial reservation of New York Convention is available at <<http://www.newyorkconvention.org/court-decisions/consolidated-list-countries>> accessed on 12 April 2014.

It seems from the above discussion that the New York Convention can apply with regard to the enforcement of foreign arbitral awards arising from petroleum agreements and can also apply to a state and state entities. Hence it could not be said that the New York Convention has limited scope.

Therefore, it is worthwhile to consider the grounds for non-enforceable awards which were adopted by the convention.

Article V (1) of the New York Convention provided exhaustive grounds for non-enforcement of foreign arbitral awards.<sup>75</sup> According to this Article, the court may refuse to enforce the foreign arbitral award in the following cases: (a) the parties to the arbitration agreement were under an incapacity or the arbitration agreement was invalid under the applicable law; (b) the losing party received insufficient notice of the appointment of arbitrators or the arbitration proceedings or the party did not have the opportunity for a defence; (c) the arbitration award dealt with issues not referenced by the arbitration agreement; (d) the arbitration proceedings law was different from the applicable law which was chosen by the parties for the governance of the procedures; (e) the court of the country where the arbitration decision was made set aside or suspended their decision or the award became non-binding for the parties. It is worth mentioning that the competent authority in the country where enforcement of the award

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<sup>75</sup> The UNCITRAL Model Law also provides important ground for non enforcement arbitral award. Article 36 (1) A of this Law provides that:

- (i) a party to the arbitration agreement referred to in article 7 was 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; or
  - (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
  - (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
  - (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
  - (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or
- (b) if the court finds that:
- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
  - (ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

was sought cannot refuse recognition and enforcement of its own bases on the grounds provided by the convention but should receive a request from one of the parties. However Article V (2) paragraph (a) and (b) of the convention give the competent authority in the country where recognition and enforcement of the award was sought the power to refuse the award by its own if the subject matter of the dispute is not arbitrable under the law of the country or it is inconsistent with the public policy of that country.

The UAE ratified the New York Convention in 2006 pursuant to the Federal Decree No 43 of 2006. This Decree came into force on 19 November 2006.<sup>76</sup>

The PRC became a party to the New York Convention on 2 December 1986, its accession becoming effective in China on 22 April 1987.<sup>77</sup> China made two reservations; a reciprocity reservation and a commercial reservation.<sup>78</sup> The Chinese accession to the New York Convention had a significant impact on the laws relating to the recognition and enforcement of arbitral awards.<sup>79</sup> China amended the Civil Trial Procedures law and promulgated the Arbitration Law of 1994 and tried to bring this legislation closer to the provisions of the New York Convention provisions.<sup>80</sup>

### **6.3.3 ICSID 1965:**

The third convention which has a significant place in international arbitration is the ICSID Convention of 1965. This convention plays an important role with regard to the obligations of the arbitral award and its power of enforcement. This issue is considered a critical problem facing the party who receives an arbitration decision in one country but seeks enforcement of it in a different country. The ICSID engendered new procedures for enforcement of arbitral awards. According to the ICSID, the arbitral award is equated with “final judgment of a court in that state”.<sup>81</sup> Pursuant to this article the successful party can enforce an arbitral award as soon as it rendered. The advantage of this procedure is to facilitate the enforcement of arbitral awards

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<sup>76</sup> Jalal El Ahadab, ‘Arab Arbitration V. International Arbitration? The Case for a Reconciliation’ (2008) 25 Journal of International Arbitration 819.

<sup>77</sup> Bruce R. Schulberg, ‘China’s Accession to the New York Convention: An Analysis of the New York Regime of Recognition and Enforcement of Foreign Arbitral Awards’ (1989) 3 Journal of Chinese Law 117.

<sup>78</sup> *ibid.*

<sup>79</sup> Jingzhou Tao, *Arbitration Law and Practice in China* (2<sup>nd</sup> edn, Kluwer Law International 2008) 161.

<sup>80</sup> *ibid.*

<sup>81</sup> Article 54 (1) of ICSID.

under ICSID arbitration.<sup>82</sup> This is not the only factor which distinguishes ICSID Convention from New York Convention. The public policy exception is not available. Although the ICSID provides these important developments for the facilitation of the enforcement of arbitral awards, sovereign immunity remains an impediment.<sup>83</sup> Article 55 of the Convention provides that “Nothing in Article 54 shall be construed as derogating from the law in force in any contracting state relating to the immunity of that state or of any foreign state from execution.” It seems from this article that the ICSID Convention does not address the plea of sovereign immunity and maintains this plea. Sovereign immunity from execution cannot be waived under this convention. So, the enforcement of arbitral award is no different from that of other conventions with regard to the sovereign immunity plea. Iraq did not accede to this convention. The UAE ratified the ICSID Convention on 23 December 1981 while the ICSID Convention entered into force for China on 6 February 1993.

#### **6.4. The Enforcing of Arbitral Awards under Regional Conventions:**

Important regional conventions have been concluded between Arab countries in regard to arbitration. These conventions try to regulate and address important issues related to the enforcement of judgments and arbitration awards rendered in Arabic countries. These conventions which is Iraqi a party are: the League of Arabic States Convention for the Enforcement of Judgment of 1952,<sup>84</sup> the Consolidated Convention for Investment of Arabic Capital in Arabic Countries of 1981, the Riyadh Convention of 1983<sup>85</sup> and the Arabic Convention for Commercial Arbitration of 1987.

Enforcement of foreign arbitral awards in Iraq pursuant to these conventions is governed by Article 3 (2) of the Iraqi Implementation law No 45 of 1980 and not according to Article 11 of the ELFJ, because these arbitral awards do not need a specific order to be enforceable. According to decision No L/21/59 on 22 February 1962, promulgated by the Iraqi Ministry of

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<sup>82</sup> M Sornarajah, *International Commercial Arbitration: The Problems of State Contracts* (Longman 1990) 227.

<sup>83</sup> Okezie Chukwumerije, ‘ICSID Arbitration and Sovereign Immunity’ (1990) 19 *Anglo- American Law Review* 166.

<sup>84</sup> Iraq becomes party of the League of Arabic States Convention for Enforcement of Judgments 1952 according to law No. 35 on 26 March 1956 which published in Iraqi Official Gazette, issue 3802 on 6 June 1956.

<sup>85</sup> Riyadh Arab Agreement for Judicial Cooperation of 1983, it entered force on 30 October of 1985, league of Arab States. Iraq became party to this convention according to law No. 110 of 1983 which is published in Iraqi Official Gazette, issue 2976 on 16 of January 1984, 22.

Justice consider Court of First Instance (Bida'ya) which enforcement decisions in regard of Arabic arbitral awards requests should be submitted to the First Instance Court. These awards have been rendered pursuant to the arbitration and judicial cooperation conventions mentioned above, according to Article 3 (a) of law No 30 of 1928.

#### **6.4.1. Riyadh Convention:**

The League of Arabic States Convention for Enforcement of Judgments 1952<sup>86</sup> was abolished by the Riyadh Convention in accordance with Article 72 of that convention.<sup>87</sup> The Arabic Convention for Commercial Arbitration of 1987 does not enforce it, yet it has been ratified by six Arabic states. Iraq is one of the states which ratified this convention. The Riyadh Convention made significant provisions for dealing with the enforcement of arbitration awards. It does not, however, tackle issues involving arbitration agreements or applicable law, and this section therefore will give priority to the Riyadh Convention of 1983, focussing on Articles which regulate the enforcement of arbitral awards.

The Riyadh Convention is one of the important regional conventions concluded between Arab countries in judicial cooperation. It is considered the most up to date convention in the region with regard to the enforcement judicial judgments. Article 37 of this Convention is devoted to regulating the enforcement of Arabic arbitration awards. Iraq ratified this convention in 1984.<sup>88</sup>

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<sup>86</sup> Iraq becomes party of the League of Arabic States Convention for Enforcement of Judgments 1952 according to law No. 35 on 26 March 1956 which published in Iraqi Official Gazette, issue 3802 on 6 June 1956.

<sup>87</sup> Article 71 of Riyadh Convention provided that:

The present Agreement shall replace, in respect of the states which have ratified it, the three agreements concluded in 1952 within the framework of the League of Arab States in force at present and pertaining to judicial notifications and procurations, execution of penalties, and extradition of criminals.

The English text is available at < <http://www.refworld.org/docid/3ae6b38d8.html>> accessed on 13 August 2014.

<sup>88</sup> Riyadh Convention was ratified by many Arab Countries except Egypt and Islamic State of Comoros. These states are: Palestine, Iraq 1984, Yemen 1984, Sudan 1984, Mauritania 1985, Syria 1985, Somalia 1985, Tunisia 1985, Jordan 1986, Morocco 1987, Libya 1988, United Arab Emirates 1999, Oman 1999, Bahrain 2000, Saudi Arabia 2000, and Algeria 2001. The list of Arabic states members of Riyadh Convention of 1983 is available at < [http://www.gn4me.com/las/arabic/details\\_ar.jsp?art\\_id=329&level\\_id=199](http://www.gn4me.com/las/arabic/details_ar.jsp?art_id=329&level_id=199)> accessed at 31 August 2014.

The Riyadh Convention deals mainly with important issues such as judicial judgments, letters rogatory, legal assistance<sup>89</sup>, publication and notification of judicial and non-judicial documents<sup>90</sup>, extradition,<sup>91</sup> and various other issues related to civil and commercial matters.<sup>92</sup>

Article 37 of the convention deals specifically with the enforcement of arbitration awards which it calls the “arbitration decision award of the arbitrator”. The Riyadh Convention focuses on the enforcement of arbitral awards rendered in Arab states which are members of the convention.<sup>93</sup> According to Article 37 of the convention, the competent court in the country where recognition and enforcement of the arbitral award is sought is prevented from discussing the merits of case.<sup>94</sup>

Article 31 (b) of the Convention provides that the procedural law of the state where the enforcement of the award is sought shall govern the enforcement of the arbitration award process, if the convention has not provided otherwise.<sup>95</sup> The request for enforcement under the convention should be with the following documents attached as provided by Article 34 of the convention

(a) A full and official copy of the judgment signatures which must be authenticated by the competent authority.

(b) A certificate attesting that the judgment is final and has the power of *res adjudicata*, unless this be specified in the text of the judgment itself.

(c) A copy of the document whereby notice of the judgment was served attested to as a true copy or any other document demonstrating that the defendant had been duly

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<sup>89</sup> Article 4 of Riyadh Convention of 1983.

<sup>90</sup> Part II of Riyadh Convention of 1983.

<sup>91</sup> Article 5 of Riyadh Convention of 1983.

<sup>92</sup> Article 6 of Riyadh Convention of 1983.

<sup>93</sup> Article 37 of convention provides that:

Without prejudice to the provisions of Articles 28 and 30 of this Agreement adjudications of arbitrators shall be recognized and executed by any contracting party in the manner stipulated in this Part subject to the legal norms of the requested party, and the competent judicial authority of the requested party may not discuss the subject of such arbitration nor refuse to execute the judgment except in the following cases:

The English text is available at < <http://www.refworld.org/docid/3ae6b38d8.html>> accessed on 13 August 2014.

<sup>94</sup> *ibid.*

<sup>95</sup> Article 31 (b) of the convention provided that “Procedures pertaining to the recognition of a judgment or the execution thereof shall be subject to the laws of the requested party if not otherwise governed by the provisions of this Agreement.”

The English text is available at < <http://www.refworld.org/docid/3ae6b38d8.html>> accessed on 13 August 2014.

and expressly notified of the action on which the judgment was pronounced when this was pronounced in absentia.

This document submitted to the relevant court in a state which is party obliges the court to enforce the arbitration award.<sup>96</sup>

The Riyadh Convention imposes some conditions for enforcing judgments which should be applied by the contracting states. These conditions are referred to in different articles of the convention. The first condition, which is provided by Article 25 (b) of the convention, stipulates that the relevant court must have the jurisdiction to render the judgment in accordance with laws applied in the country where the enforcement is sought.<sup>97</sup> The second condition is that the parties should receive proper notice.<sup>98</sup> The third is that the judgment should be consistent with public order.<sup>99</sup> These conditions are included in the convention. The convention does not refer to awards based on fraud or the condition of dol and does not refer to the reciprocity principle, as provided by Iraq and the UAE in their competent laws.

It is worthwhile to consider the cases in which according to the convention the arbitral award would be non-enforceable.

Article 37 of the Riyadh Convention enumerates cases where the award is non-enforceable :

(a) if the subject matter of the dispute was not arbitrable according to the law of the state where the parties sought to enforce it (b) if the arbitral award rendered was based on invalid arbitration

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<sup>96</sup> Article 37 of the Riyadh convention (h) which provided that:

If there be a proper, written agreement under which the parties had consented to submit to the competence of the arbitrators in settling a certain dispute or whatever other disputes arising between the two parties in respect of a certain legal relationship, a certified copy of such agreement must be submitted.

The English text is available at < <http://www.refworld.org/docid/3ae6b38d8.html>> accessed on 13 August 2014.

<sup>97</sup> Article 25 (b) provided that:

(b) Subject to the provisions of Article 30 of this Agreement, each contracting party shall recognize the judgments made by the courts of any other contracting party in civil cases including judgments related to civil rights made by penal courts and in commercial, administrative and personal statute judgments having the force of res adjudicata and shall implement them in its territory in accordance with the procedures stipulated in this Part, if the courts of the contracting party which made the said judgments are competent under the provisions of the rules of jurisdiction in force in the requested party, and if the legal system of the requested party does not retain for its courts or the courts of another party the exclusive competence to make such judgements.

The English text is available at < <http://www.refworld.org/docid/3ae6b38d8.html>> accessed on 13 August 2014.

<sup>98</sup> Article 30 (b) of Riyadh Convention of 1983.

<sup>99</sup> Article 30 (a) of Riyadh Convention of 1983.

agreement or the arbitral award has not become final (c) if the arbitrators do not have the competence according to the main contract or arbitration agreement or applicable law according to which law the arbitral award has been rendered. (d) if the dispute parties have not been notified in the proper ways (e) if the arbitral award is in conflict with Islamic Shari'a or public order in the country where enforcement of the award is sought. These cases are modeled on the League of Arabic States Convention for Enforcement of Judgments, 1952, except for one extra case added by the Riyadh Convention, which is that the award must be not inconsistent with Islamic Shari'a. The state where enforcement of the arbitral award is sought must check that none of the above mentioned circumstances apply.

Article 25 (c) of the Riyadh Convention excludes from the convention's scope of application judicial judgments rendered against the contracting state where the judicial judgment sought to enforce against one of its official employees as a result of conducting (or doing) their duty or during that. This article based on principle of execution immunity of the state.<sup>100</sup> However, this Article concerns judgments rendered according to judicial procedures from courts or any institutions having the competent authority to render such judgment related to the dispute parties.<sup>101</sup> It seems from the above discussion that Article 25 (c) does not include enforcement of arbitration awards even if it is rendered against the state where sought to enforce the arbitration award that because this state agree to recourse to arbitration to settle the disputes. Therefore, such a state should enforce the arbitration award unless this award contains one of the cases stated in Article 37.

Article 30 of Riyadh Convention gives the contracting state the authority to not recognise and reject the enforcement of judgment in specific cases which are:

(a) If recognition would be in contradiction with the stipulations of the Islamic Shari'a, the provisions of the constitution, public order, or the rules of conduct of the requested party.

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<sup>100</sup> Article 25 (c) of Riyadh convention of 1983.

<sup>101</sup> Article 25 (a) of Riyadh convention of 1983 which provided that "In the application of this Part, judgement means every decision - regardless of nomenclature - made in pursuance of judicial or jurisdictional procedures of the courts or any competent authority of any party".

The English text is available at < <http://www.refworld.org/docid/3ae6b38d8.html>> accessed on 13 August 2014.



(b) If the judgment was passed in absentia without notifying the convicted party of the proceedings in an appropriate fashion that would enable him to defend himself.

(c) If the law of the requested party applicable to legal representation of ineligible persons or persons of diminished eligibility were not taken into consideration.

(d) If the dispute has given rise to another final judgment in the requested state, or in a third state and if the requested party has already recognized such a final judgment.

(e) If the dispute is also the subject of a case being heard by the courts of the requested party and the action has been brought before the courts of the requested party on a date preceding the presentation of the dispute to the court of the requesting party.”<sup>102</sup>

The Riyadh Convention does not address or deal with sovereign immunity issues in its provisions, therefore these issues are still impediments according to the Riyadh Convention.

Iraq became a member of the Riyadh Convention in accordance with law No 110 of 1983.<sup>103</sup> The UAE became a member of this convention in 1999.<sup>104</sup> The Riyadh Convention is considered useful for Iraq if enforcement of an arbitration award is sought in the UAE because, as mentioned previously, Iraq was not a member of the New York convention of 1958.

## **6.5. Challenges to Foreign Arbitral Award under Iraqi Law, UAE and PRC:**

Rendering of the arbitral award is not in most cases the final part of the arbitration process and does not mean that the dispute between parties is at an end. The losing party may resist compliance with the arbitral tribunal award by challenging this award before a competent court.

Challenge is a critical step in arbitration. A competent court may change the arbitration result to the advantage of the losing party if convincing grounds for challenge are submitted before the competent court. Therefore, the court with the authority to amend the arbitral award may be considered to have an important role. At the same time, this reality provides the arbitral tribunal with a reason to be diligent about the fundamental legal rules that should be considered

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<sup>102</sup> Riyadh Arab Agreement for Judicial Cooperation of 1983, it entered force on 30 October of 1985, league of Arab States. Iraq became party to this convention according to law No. 110 of 1983 which is published in Iraqi Official Gazette, issue 2976 on 16 of January 1984, 22.

<sup>103</sup> The Law of ratify the Riyadh Convention Published in Iraqi Official Gazette Issue no 2976 on 16 March 1984.

<sup>104</sup> The list of Arabic states members of Riyadh Convention of 1983 is available at < [http://www.gn4me.com/las/arabic/details\\_ar.jsp?art\\_id=329&level\\_id=199](http://www.gn4me.com/las/arabic/details_ar.jsp?art_id=329&level_id=199)> accessed at 31August 2014.

during the arbitration process.<sup>105</sup> However, there also disadvantages in challenging the arbitral award, including delay of the arbitration process, the lack of privacy involved in the public hearing and the interference implicit in the challenge. Moreover, both parties will need to pay additional costs.<sup>106</sup>

Iraqi law however recognises the challenge under the name of ‘recourse’<sup>107</sup>, as do many other civil law countries.<sup>108</sup> This term is adopted by Model Law 2012.<sup>109</sup> The UAE also adopts the term ‘recourse’<sup>110</sup> Chinese Law employs the term ‘challenge’,<sup>111</sup> but it amounts to the same as ‘recourse’, and is consistent with the universal term.

The challenge process raises important issues, namely the competent authority of challenge, reasons for the challenge, methods of challenge, time limits and procedures and the consequences of challenging the arbitral award. Therefore this section will divide into subsections to discuss these issues, as follows:

#### **6.5.1. Waiver of the Challenge:**

Under Iraqi Law the parties can waive their right to recourse to arbitral award.<sup>112</sup> The waiver of the parties’ right to challenge the judgment can be also apply to the arbitral award and they can make such waiver after the rendering of the arbitral award but not before.<sup>113</sup> The parties can make their waiver before the competent court or by submitting a document approved by a notary containing their waiver of challenging the arbitral award.<sup>114</sup> UAE Law also gives the parties the right to waive the challenge, whether explicitly or tacitly after the award is made.<sup>115</sup> However,

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<sup>105</sup> Michael J. Moser and Teresa Y. W. Cheng, *Hong Kong Arbitration: A User’s Guide* (Kluwer International Law 2004) 79; Michael McIlwrath and John Savage, *International Arbitration and Mediation: A Practical Guide* (Kluwer International Law 2010) 330.

<sup>106</sup> *ibid.*

<sup>107</sup> The Iraqi DICAL also recognise this term Article 38.

<sup>108</sup> Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (5<sup>th</sup> edn, Oxford University Press 2009) 586.

<sup>109</sup> Article 34 (1) of Model Law 2012 provides that “(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article”.

<sup>110</sup> Jalal El- Ahdab, *Arbitration with the Arab Countries* (3<sup>rd</sup> edn, Kluwer Law International 2011) 818.

<sup>111</sup> Jingzhou Tao, *Arbitration Law and Practice in China* ( 2<sup>nd</sup> edn , Kluwer Law International 2008) 164.

<sup>112</sup> Article 169 of Iraqi CCP.

<sup>113</sup> Jalal El- Ahdab, *Arbitration with the Arab Countries* (3<sup>rd</sup> edn, Kluwer Law International 2011) 827.

<sup>114</sup> Article 169 of Iraqi CCP.

<sup>115</sup> Jalal El- Ahdab, *Arbitration with the Arab Countries* (3<sup>rd</sup> edn, Kluwer Law International 2011) 827.

the parties cannot waive their right before the arbitration award is rendered.<sup>116</sup> In PRC law, there is no provision allowing the waiver of the parties' right to challenge. However it could be said that the right to sue under PRC Law generally cannot be waived by consent.<sup>117</sup>

### **6.5.2. The Competence of the Court to Decide the Challenge:**

In most cases, a specialised court of the place where the arbitral award is made or registered or where the arbitration procedures are has the jurisdiction to decide the challenge of the arbitral award.<sup>118</sup>

However, Iraqi Law does not determine whether the court has jurisdiction<sup>119</sup> to decide the challenge to the arbitral award in regard to international arbitration. That is because as noted, Iraq does not have specific legislation about international arbitration. Therefore, the question which arises here is: in the absence of such a law, can any authority be competent to decide the challenge to the arbitral award?

Article 271 of the Iraqi CCP provides that:

After the arbitrators issue their award in compliance with the foregoing, they shall give a copy of it to each of the parties, and hand over to the competent court the award along with the original arbitration agreement. This shall be done within the following three days of issue, making sure to obtain a receipt for it signed by the court's clerk.<sup>120</sup>

Also, Article 273 of the abovementioned law envisages an arbitrators' award being presented to the "competent court".<sup>121</sup> It seems from these articles that the parties may present the arbitration award to the court which has the original jurisdiction for conformation and the party in this situation can seek to set aside the award or the court would have the imitative to set

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<sup>116</sup> *ibid.*

<sup>117</sup> Reza Mohtashami, Antonia Birt and Lee Rovinescu, 'Arbitration Guide IBA Arbitration Committee: China' (1913) International Associated Bar 1.

<sup>118</sup> Article 2 (a) of Geneva Convention of Arbitration of 1927 which provided that "That the award has been annulled in the country in which it was made" and also Article V (e) of New York Convention of 1958 which provided that "The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."

<sup>119</sup> The Iraqi DICAL in Article 5 determine the court has jurisdiction over the challenge of arbitral award which is Baghdad court of Appeal.

<sup>120</sup> The translation from Arabic language to English language is available at < <http://gjpi.org/library/primary/statutes/>> accessed on 2 June 2014.

<sup>121</sup> The translation from Arabic language to English language is available at < <http://gjpi.org/library/primary/statutes/>> accessed on 2 June 2014.

aside the award in certain circumstances.<sup>122</sup> It could be concluded from the above article that the competent court under Iraqi Law is the court originally having jurisdiction over the dispute.<sup>123</sup>

The competent court under UAE Law is the Court of Appeal.<sup>124</sup> The same approach is followed by the Federal Draft of the UAE, which provides that the competent court for deciding the challenge to the arbitral award is the Abu Dhabi Federal Court of Appeals, which has a jurisdiction to hear the challenge request.<sup>125</sup>

In Chinese Law the People's Court would have the jurisdiction to decide the challenge to the arbitral award. Article 60 of the Arbitration law of 1994 provides that "The people's court shall, within two months from the date of accepting an application for setting aside an arbitration award, rule to set aside the award or to reject the application".<sup>126</sup>

### **6.5.3. Reasons for Challenge:**

As discussed previously, Article 6 of the ELFJ stipulates several conditions that must all be available to enforce petroleum arbitral awards, otherwise the arbitral award would be non-enforceable. This article also provides that the court by its own self can decide that the award is null and then cannot enforce it even if the parties do not submit a request to the court containing the reasons that the arbitral award is null. The Iraqi CCP Law specifies the reasons for challenge to the arbitral award in Article 273. (1) if the arbitral award rendered is based on an unwritten agreement or the agreement of arbitration was invalid or the award went beyond the scope of the arbitration agreement<sup>127</sup> (2) if the award is in contrary to public order or morality or one of the rules of the law in question.<sup>128</sup> (3) if there is any reason for re-trial [according to this law]<sup>129</sup> (4) if there is any substantive or procedural error which affects the validity of the award.<sup>130</sup> It is worth noting that the article has a condition which is not found in Article 6 of the ELFJ. This

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<sup>122</sup> Article 273 of Iraqi CCP.

<sup>123</sup> Jalal El- Ahdab, *Arbitration with the Arab Countries* (3<sup>rd</sup> edn, Kluwer Law International 2011) 257.

<sup>124</sup> Article 222 of UAE Federal Code of Civil Procedures Law No.11 of 1992.

<sup>125</sup> Article 34 of UAE Arbitration Law Draft and also Article 6 of this law which determine the court have jurisdiction over request of set aside.

<sup>126</sup> The English text is available at < [http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383756.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383756.htm)> accessed on 17 of May 2014.

<sup>127</sup> Article 273 (1) of Iraqi CCP.

<sup>128</sup> Article 273 (2) of Iraqi CCP.

<sup>129</sup> Article 273 (3) of Iraqi CCP.

<sup>130</sup> Article 273 (4) of Iraqi CCP.

condition relates to the arbitration agreement. This is that ELFJ does not regulate or mention foreign arbitral awards, and so it is suggested that the conditions of article 273 of CCP law could be added to the reasons for a challenge to the arbitral award according to Iraqi law.<sup>131</sup>

With regard to the UAE and PRC, as mentioned previously these countries are parties to international conventions and their approach to challenging foreign arbitral awards is in accordance with these conventions. Here will be presented the reasons for challenges in regard of their national laws in cases where parties who sought to enforce the arbitral award are not engage in international conventions.

UAE law provides restrictive grounds for challenging the arbitral award in Article 219 of the Civil Procedures Law No 11 of 1992 in the following cases:

(a) if the arbitral award rendered is based on a void arbitration agreement or such agreement did not exist or has expired or if the arbitrators exceed the scope of the agreement.

(b) if the arbitral award was rendered by arbitrators who were not appointed according to the law or the arbitrators did not have the permission to render such an award or if the award rendered was based on an arbitration agreement which did not identify the merits of the subject of the dispute or one of the parties did not have the capacity to agree on arbitration or it is rendered by an arbitrator who does not have the legal capacity to render such an award.

(c) if there is any invalidity in the award or invalidity in the procedural affect in the award.<sup>132</sup>

Chinese Law listed the reasons of challenge the arbitral award in Article 58 of Arbitration Law of 1994 which provided that:

(1) There is no arbitration agreement;

(2) The matters decided in the award exceed the scope of the arbitration agreement or are beyond the arbitral authority of the arbitration commission;

(3) The formation of the arbitration tribunal or the arbitration procedure was not in conformity with the statutory procedure;

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<sup>131</sup> Article 38 of Iraqi DICAL express the reasons of challenge.

<sup>132</sup> The UAE Arbitration Draft Law of 2008 provided the reasons of challenge in Article 34 (2).

(4) The evidence on which the award is based is forged;

(5) The other party has withheld the evidence which is sufficient to affect the impartiality of the arbitration; or

(6) The arbitrators have committed embezzlement, accepted bribes or done malpractice for personal benefits or perverted the law in the arbitration of the case.<sup>133</sup>

#### **6.5.4. Methods of Challenge:**

The parties can challenge the arbitral award in different ways, such as opposition, appeal, review and re-trial. However, Iraqi Law does not regulate the methods of challenging the arbitral award: it merely allows a party to seek annulment of the arbitral award. Article 275 of the CCP provides that “The judgment that is issued by the competent court according to the previous article is not be objected to. However, it shall be challengeable by other methods of appeal stipulated in the law.”<sup>134</sup> It seems from this article that Iraqi Law limits in the competent court’s decision to annulment of the arbitral award. The parties can challenge the arbitral award, employing the means of challenge provided by the law, except for opposition. However, according to Article 275, the parties can then go on to challenge the competent court judgment and pursue the challenge in ways provided by Article 168 of the Iraqi CCP which are “1) Objection to judgments in absence 2) Appeal 3) Retrial 4) Cassation 5) Rectification of cassation decision 6) Objection by third party”<sup>135</sup>

It can be concluded from the above that the method of challenge under Iraqi law with regard to arbitral awards is to challenge the arbitral award before the competent court, and that the law also challenges the judgments which are rendered by the competent court.

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<sup>133</sup> The English text is available at < [http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383756.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383756.htm)> accessed on 17 of May 2014.

<sup>134</sup> The translation from Arabic language to English language available at < <http://gjpi.org/library/primary/statutes/>> accessed on 12 April 2014.

<sup>135</sup> The translation from Arabic language to English language available at < <http://gjpi.org/library/primary/statutes/>> accessed on 12 April 2014.

The UAE Federal Law No 11 of 1992 provided in Article 217 (1) that the arbitral award is not subject to any method of recourse.<sup>136</sup> However, UAE law gives the parties the right to subject the competent court's decision in regard of arbitral awards to suitable methods of recourse.<sup>137</sup> However, the parties can recourse in certain cases, namely, if the arbitrators have the power to settle the dispute by submission; or the parties explicitly waive their right to appeal; or if the dispute value is no more than ten thousands dirham.<sup>138</sup>

According to PRC arbitration law an arbitration award is not subject to judicial appeal but that does not mean that the courts may not supervise arbitration process. The courts can refuse enforcement of an award and repeal or set aside awards independently of the arbitral tribunal.<sup>139</sup>

### **6.5.5. The Time Limits and Procedures:**

Most countries' laws<sup>140</sup> stipulate that the challenge to an arbitral award should be conducted within a limited period. Iraqi law, however, does not provide fixed time limits for parties to submit their request to challenge the arbitral award before the competent court. The UAE Civil Procedures Law No 11 of 1992 also does not determine the legal period for submitting the request to challenge the arbitral award to the competent court. Chinese Law determines six months for the party to submit the request to challenge the arbitral award from the date of receiving the award.<sup>141</sup>

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<sup>136</sup> Article 217 (1) of UAE Federal Code of Civil Procedures law No 11 of 1992 provides that "The award of the arbitrators may not be contested by any manner of appeal". The translation from Arabic language to English is available at < <http://www.diac.ae/idias/rules/uae/chapter4/>> accessed on 13 August 2014.

<sup>137</sup> Article 217 (2) of UAE Federal Code of Civil Procedures law No 11 of 1991 provides that "The judgement approving the arbitrators' award may be contested in any of the appropriate manners of appeal". The translation from Arabic language to English is available at < <http://www.diac.ae/idias/rules/uae/chapter4/>> accessed on 13 August 2014.

<sup>138</sup> Article 217 (3) of UAE Federal Code of Civil Procedures law No 11 of 1992 Provides that "Notwithstanding the preceding paragraph, the award shall not be appealable if the arbitrators were authorized to reconcile the dispute or, if the parties have expressly waived their rights to file an appeal or if the disputed amount was not in excess of Dirhams ten thousand". The translation from Arabic language to English is available at < <http://www.diac.ae/idias/rules/uae/chapter4/>> accessed on 13 August 2014.

<sup>139</sup> Articles 59 to 60 of PRC Arbitration Law of 1994.

<sup>140</sup> Section 70 (3) of English Arbitration Act of 1996 and Article 1486 of French Code of Civil Procedures of 1980.

<sup>141</sup> Article 59 of China Arbitration Law of 1994 which provides that "A party that wishes to apply for setting aside the arbitration award shall submit such application within six months from the date of receipt of the award". The English text available at < [http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383756.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383756.htm)> access on 17 of May 2014.

As mentioned previously, Article 273 of Iraqi Law specifies two ways to challenge the arbitral award. The first is by submitting a request to the competent court or by one of the parties or his agent.<sup>142</sup> The second way is give the competent court the power to annul the award by its own motion when special circumstances are available.<sup>143</sup>

In UAE Law the losing party can submit the request to challenge the arbitral award directly after the arbitral award is rendered. This request should be contain all the conditions of legal action.<sup>144</sup>

PRC Arbitration Law gives the parties 30 days from the date of receiving the written award. Article 56 of PRC Arbitration Law of 1994 provides that:

If there are literal or calculation errors in the arbitration award, or if the matters which have been decided by the arbitration tribunal are omitted in the arbitration award, the arbitration tribunal shall make due corrections or supplementation. The parties may, within 30 days from the date of receipt of the award, request the arbitration tribunal to make such corrections or supplementation.<sup>145</sup>

## **6.6. The Sovereignty Issue:**

As mentioned in earlier chapters, the main reasons behind host states having concerns about arbitration is the submission of their disputes before foreign courts or allowing foreign laws to govern the disputes to the exclusion of the jurisdiction of national courts. The host states regard these laws and arbitration institutions as entities devised to serve the interests of the petroleum

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<sup>142</sup> Article 273 of CCP Iraqi Law provides that:

When the arbitrators' award is presented to the competent court, the disputing parties can revoke this award and so can the court on it's own initiative in the following situations

1. If the award was not issued in a written document, or was based on an invalid agreement, or if it exceeded the limits of the agreement.
2. If the award is not in accordance with or contradicts the rules public order and regulations or any of the arbitration rules specified in this law.
3. For any grounds valid for a retrial.
4. If there was a substantial error in the award or in any of the proceedings that might influence the validity of the award.

The translation from Arabic language to English language available at < <http://gjpi.org/library/primary/statutes/>> accessed on April 2014.

<sup>143</sup> *ibid.*

<sup>144</sup> Jalal El- Ahdab, *Arbitration with the Arab Countries* (3<sup>rd</sup> edn, Kluwer Law International 2011) 827.

<sup>145</sup> The English text is available at < [http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383756.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383756.htm)> accessed on 17 of May 2014.



companies.<sup>146</sup> Iraq is one of the states which refuses to settle disputes arising from petroleum agreements by arbitration, on grounds of sovereign immunity.<sup>147</sup>

Sovereign immunity is considered one of the most significant issues which may hamper the arbitration process, particularly in petroleum disputes. It is a plea adopted by host state against foreign court's jurisdiction over a dispute involving it.<sup>148</sup> Sovereign immunity is one of the principles of international law and according to this principle states are equal and should not be subject to the foreign courts' jurisdiction.<sup>149</sup>

As indicated previously, petroleum arbitration agreements are considered to imply a waiver of the host state's sovereignty immunity and the jurisdiction of the national court. However, this does not mean the total exclusion of the national law of the host state from the governance of the petroleum arbitration agreement or other main contractual terms. This view has been widely upheld by international conventions and laws.<sup>150</sup> The abovementioned statement, however, raises some questions, namely: does this statement extend to the jurisdiction of enforcement; and has this statement resolved the debate about sovereign immunity and designed a uniform approach for national courts.

With regard to the first question it could be said that there are different views of the arbitration agreement's capacity to waive immunity. The first opinion holds that the arbitration agreement amounts to an implied waiver of sovereign immunity that would usually present the court's jurisdiction, where that court is a foreign court. So, according to this view the waiver of sovereign immunity cannot extend to the enforcement of foreign arbitral awards. On this view, the effectiveness of the arbitration agreement's capacity to waive sovereign immunity is very narrow and its jurisdiction is limited.<sup>151</sup> This view was adopted in *Ohntrup v. Firearms Centre*

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<sup>146</sup> Hoda Atia, 'Egypt's New Commercial Arbitration Framework: Problems and Prospects for the Future of Foreign Investment' (2000) 5 *International Trade & Business Law* 1.

<sup>147</sup> See chapter three pages 100 and 101.

<sup>148</sup> M. Sornarajah, *The Settlement of Foreign Investment Disputes* (Kluwer Law International 2000) 290.

<sup>149</sup> Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (5<sup>th</sup> edn, Oxford University Press 2009) 666.

<sup>150</sup> See for example; Article 12 (1) of European Convention on State Immunity of 1972, Article 17 of Australian Foreign State Immunities Act 1985.

<sup>151</sup> Hazel Fox 'Sovereign Immunity and Arbitration' in Julian D.M Lew (ed) *Contemporary Problems in International Arbitration* (Martinus Nijhoff Publishers 1987) 323-33.

*Inc*<sup>152</sup> the court did not accept the enforcement of an arbitral award made in another jurisdiction because “a waiver of immunity by a State to one jurisdiction cannot be interpreted as a waiver to all jurisdictions”<sup>153</sup>

The second view is that the arbitration agreement is not limited to courts’ jurisdiction but also extends to other jurisdictions such as confirmation, recognition and enforcement of the arbitral award.<sup>154</sup> This broader view is based on the New York Convention on the Enforcement of Foreign Arbitral Awards. The supporters of this opinion justify their opinion on the grounds that the state which is a party of convention and submission to arbitration is at the same time in “submission to the jurisdiction of other states which are parties to the convention.”<sup>155</sup> However, this raises a question regarding the position of Iraq, which is not party to the New York Convention. Can this view apply to Iraq? It seems from the above discussion that whether the arbitration agreement amounts to a general waiver of immunity or not is controversial and there is no universal or clear approach to overcoming this obstacle. Sovereign immunity becomes more complex in states such as Iraq which have no act or law to regulate this important issue. The present author’s view is that the waiver of the sovereign immunity issue is a very important question. It pertains to a very sensitive stage of the arbitration process, the enforcement of the arbitral award, which is the aim of the recourse to arbitration. Therefore, the state should mention in its arbitration agreement the extent to which it waives its sovereign immunity. This, like other details such as the determination of the applicable law and the arbitrable issue, could be contained in the arbitration agreement. Here the issue of determining to what extent the arbitration agreement is considered as a waiver of sovereign immunity would be subject to the host state which can determine the limits of the waiver according to the host state’s own interest. By this means both parties can avoid an obstacle which would make the arbitration fruitless.

The sovereign immunity issue may also arise in regard of enforcement of arbitral award made against the host state or its entities. This principle could be used to defend the state from

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<sup>152</sup> *Ohntrup v. Firearms Centre Inc.*, 516 F. Supp. 1281, (E.D.Pa. 1981).

<sup>153</sup> *ibid* 1284-1285.

<sup>154</sup> Georges R. Delaume, ‘State Contracts and Transnational Arbitration’ (1981) 75 the American Journal of International Law 784.

<sup>155</sup> M Sornarajah, *International Commercial Arbitration: The Problems of State Contracts* (Longman 1990) 212.

the jurisdiction of a foreign court or tribunal.<sup>156</sup> At this initial stage, the host state could invoke a plea of immunity to avoid the making of the award in that country.<sup>157</sup> In the same context, the sovereign immunity issue may be raised as a basis of defence by the host state in the execution phase to prevent execution on state property, either before the arbitral award is rendered, when it takes the form of a provisional measure, or after the arbitral award is rendered.<sup>158</sup>

Sovereign immunity represents a serious potential obstacle facing petroleum arbitration with regard to the enforcement of arbitral awards against the host state.

However, the doctrine of absolute sovereign immunity has been undergoing. In some countries, it has been abandoned or limited due to the increase in the host state's role in commercial activities and enlarged investment between host states and private companies, which prefer arbitration as a way to settle disputes. At the same time, host states seek to encourage foreign investment by offering facilities for these companies.<sup>159</sup> Therefore it is frustrating when foreign companies cannot obtain justice because the host state or its entities invoke a sovereign immunity plea.<sup>160</sup> In addition, the domain and nature of the state has changed fundamentally due to the significant influence of practices by the state in the commercial and economic sectors.<sup>161</sup> The restrictive sovereign immunity approach is based on a distinction between disputes concerning purely governmental actions (*acta jure imperii*) and disputes arising from investment contracts (*acta jure gestionis*) which is denied the sovereign immunity doctrine.<sup>162</sup> It seems that this distinction is made on behalf of foreign investors.

Notwithstanding, the restrictive approach of sovereign immunity abandoned the debate about the state immunity in regard of commercial activities' norm to determine which of host state conduct considered governmental or commercial is still obstacle. So, the question here is

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<sup>156</sup> A. van Blankenstein, 'Enforcement of an Arbitral Award against a State: With Whom Are You Dealing?' (1993) 6 Leiden Journal of International Law Foundation 357.

<sup>157</sup> *ibid.*

<sup>158</sup> *ibid* 370.

<sup>159</sup> Michael Singer, 'Abandoning Restrictive Sovereign Immunity: An Analysis in Terms of Jurisdiction to Prescribe' (1985) 26 Harvard International Law Journal 1.

<sup>160</sup> *ibid.*

<sup>161</sup> Nout van Woudenberg, *State Immunity and Cultural Objects on Loan* (Martinus Nijhoff Publications 2012) 109.

<sup>162</sup> A. van Blankenstein, 'Enforcement of an Arbitral Award against a State: With Whom Are You Dealing?' (1993) 6 Leiden Journal of International Law Foundation 357.

what criteria can be depended upon to distinguish between governmental conduct and commercial conduct.

Determining whether conduct is governmental or commercial is not an easy task. However, the courts have established two tests, the purpose test and the nature test.<sup>163</sup> The purpose test focuses on the purpose behind the conduct, whether it is public or private, while the nature test focuses on the act's nature. This mean that if private entities or individuals can fulfill the act then it would be private and consequently sovereign immunity will be denied. If public entities can fulfill the act then sovereign immunity will apply.<sup>164</sup>

However, the important question raised here is, how does Iraqi law address or deal with the sovereign immunity issue?

It could be said that Iraq takes a wavering approach in dealing with the sovereign immunity doctrine. Different economic ideologies were in force before 2003 and after this date. So differences in view with regard to sovereign immunity concerning economic issues are also apparent. These different views can be seen in laws regulating the economic sector. As mentioned in earlier chapters, Iraqi law tries to protect national resources by keeping these resources under a sovereign cloak.<sup>165</sup> Article 15 of the former Iraqi constitution law of 1970 gives the public property special protection<sup>166</sup> and also restricts real estate to Iraqi citizens so, the foreigner cannot owner immovable property in Iraq.<sup>167</sup> It seems from this review that the Iraqi state dominated investment in Iraq and a restrictive doctrine of sovereignty was clearly apparent. This doctrine was invoked strongly in 1978 when Iraq refused to join the New York Convention

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<sup>163</sup> Michael Singer, 'Abandoning Restrictive Sovereign Immunity: An Analysis in Terms of Jurisdiction to Prescribe' (1985) 26 Harvard International Law Journal 1.

<sup>164</sup> Ernest K. Bankas, *The State Immunity Controversy in International Law: Private Suits Against Sovereign States in Domestic Courts* (Springer 2005) 188.

<sup>165</sup> Article 13 of the abolish Iraqi Constitution Law of 1970. Interim Constitution of Iraq of 1970 published in the Official Gazette issue 1900, 17 July 1970, p 3.

<sup>166</sup> Article 15 of Iraqi Interim Constitutional Law of 1970 provided that:

Public ownership and properties of the Public Sector are inviolable. The State and all People are responsible for safeguarding, securing, and protecting it. Any sabotage to it or aggression against it, is considered as sabotage and aggression against the entity of the Society.

An English language translation of the Interim Constitution of Iraq of 1970 is available at <<http://gipi.org/library/primary/statutes/>> accessed at 25 May 2014.

<sup>167</sup> Article 18 of Iraqi Interim Constitutional Law of 1970 provided that "Immobile ownership is prohibited for non-Iraqi, except otherwise mentioned by a law."

of 1958.<sup>168</sup> Iraq used the sovereign immunity doctrine to justify its reluctance to become a party to the New York Convention of 1958.<sup>169</sup> This justification gives strong evidence of the Iraqi attitude towards the sovereign immunity doctrine and indicates the relationship between the sovereign immunity doctrine and investment in Iraq. This view stemmed from the prevailing socialist conceptions and it dominated the economic policies of the Iraqi state.

However, the Iraqi economic view changed after 2003. It was filled with social trade system. It formed the intention to stay out of this system and tended to adopt a more flexible policy towards foreign investment as a result of the political and economic events which happened after 2003 and the special circumstances that Iraq faced. Iraq needs to reconstruct its exhausted economy after the destructive wars which decimated its economy and infrastructure by recovering its sovereignty through self-determination and reform of its legal system in order to serve Iraq's ambition to encourage foreign investment. After the occupation of Iraq the Coalition Provisional Authority (hereinafter CPA) promulgated a regulation declaring that all laws shall remain in force except those replaced by the CPA or superseded by the Iraqi authorities through legislation passed by these authorities.<sup>170</sup> The CPA urged change in the Iraqi legal system with regard to the economic sector.<sup>171</sup> These changes were reflected in many laws promulgated by the Iraqi legislative power dealing with the economic sector. On the 19 September 2003 the CPA issued Order No 39 which replaced all of Iraq's existing foreign

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<sup>168</sup> The Iraqi Office of Legal Codification explained in Decree No. 132/1978 as of 28 of August 1978 the reasons preventing Iraq's ratification of the New York Convention 1958 that:

The International Commercial Arbitration included foreign element, where it held outside the Iraqi border and the arbitrators could be foreign nationals which apply foreign law either substantive law or procedure law. Therefore, enforce foreign arbitral award inside Iraqi republic territories facing legal and political obstacles (.....) therefore the adhering issue to the New York Convention in 1958 to recognize and enforcement the foreign awards require the Iraqi authorities agreement which plans the economic prospect public policy. Because in this accession many political aspects should observe, also this accession should reform the Iraqi laws and change some of it.

See below the Arabic text:

أن التحكيم التجاري الدولي يتضمن عنصرا أجنبيا. حيث انه قد يتم خارج حدود البلد. وقد يتعهد به الى محكمين اجانب قد يطبقون قانونا أجنبيا سواء من ناحية القواعد الموضوعية أم من ناحية القواعد الإجرائية. وعليه فإن تنفيذ أحكام التحكيم الأجنبي داخل نطاق الجمهورية العراقية يلاقي دونه حوائل قانونية وسيادية (.....) وعليه فإن الانضمام الى معاهدة نيويورك 1958 بشأن الاعتراف بأحكام التحكيم الأجنبي وتنفيذها يستلزم أستخراج رأي الجهات العليا التي تقوم بتخطيط السياسة الاقتصادية العامة لأن في ذلك الانضمام جوانب سياسية ينبغي مراعاتها ومقتضيات عملية تستدعي الدراسة وذلك الانضمام يستوجب مراجعة القوانين العراقية وتعديلها.

<sup>169</sup> Decree No 132 / 1978 as of 28 August 1978.

<sup>170</sup> Conor Mccarthy, 'The Paradox of the International Law of Military Occupation: Sovereignty and the Reformation of Iraq' (2005) 43 Journal of Conflict & Security Law 43.

<sup>171</sup> *ibid.*

investment law.<sup>172</sup> This Order was abolished when Iraq promulgated the Law of Investment No. 13 of 2006, which regulated foreign investment in Iraq.

The UAE does not expressly state that foreign states parties have or enjoy immunity. The UAE is not immune from suits but it is immune from their execution.<sup>173</sup>

The PRC has a strict view of sovereign immunity for the state and its property.<sup>174</sup> China is one of the states which signed the CJISTP of 2005,<sup>175</sup> which supports the restrictive approach to sovereign immunity.

However, it could be said Iraq has overcome the sovereignty issue by allowing foreign investors to settle disputes arising from petroleum agreements by arbitration. The state is considered to have waived its sovereignty immunity from jurisdiction as soon as it has agreed to settle a dispute arising a petroleum agreement, so in the view of the present author, the arbitration agreement is considered to waive of sovereign immunity.

## **6.7. The Public Policy Issue:**

The sovereign immunity doctrine is not the only obstacle which can prevent enforcement of an arbitral award. A public policy issue can also be used by host states to resist the enforcement of an arbitral award. Public policy is a common and crucial plea which can be used to resist enforcement of an award or challenge the validity of the arbitration award. Public policy as grounds for challenging the arbitration award includes not only the contents of the arbitral award; it is also contains the procedures whereby the arbitral award was rendered.<sup>176</sup>

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<sup>172</sup> Section 3 Paragraph 1 of CPA Order No. 39 issued on 19 September 2003 provided that “This Order replace all exciting foreign investment law”.

<sup>173</sup> Reza Mohtashami, Antonia Birt and Lee Rovinescu, ‘Arbitration Guide IBA Arbitration Committee: United Arab Emirates’ (2013) International Associated Bar 1.

<sup>174</sup> Peter Thorp and Huawei Sun, ‘Arbitration Guide IBA Arbitration Committee: China’ (2012) International Associated Bar 1.

<sup>175</sup> United Nations Convention on Jurisdictional Immunities of States and Their Property was adopted during the 65th plenary meeting of the General Assembly by resolution A/59/38 of 2 December 2004. In accordance with its articles 28 and 33, the Convention shall be open for signature by all States from 17 January 2005 until 17 January 2007, at United Nations Headquarters in New York.

<sup>176</sup> Javier Carcia de Enterría, ‘The Role of Public Policy in International Commercial Arbitration’ (1990) 21 Law & Pol Int’l. Bus 389.

Despite the importance of the public policy issue, there is no universal concept determining the dimensions of this issue. The concept of public policy is elastic and differs from country to country and also from time to time and therefore each country has a different conception of public policy.<sup>177</sup> So, when an Iraqi court refuses to enforce an arbitral award on the grounds of public policy the award may possibly be enforced in another country. However, determining the contents and the concept of public policy is not an easy task for the judge of the nation where the parties seek to enforce the arbitration award.

There are three types of public policy, namely domestic, international and transnational. This diversity results from the nature of the transaction or from the nationality of the parties. The issue of domestic public policy may be raised in cases of domestic arbitration when both parties have the same nationality.<sup>178</sup> National courts can reject the enforcement of arbitral awards which are contrary to national norms of ethics and justice.<sup>179</sup> The rules of public policy are easily to be found in the legislation of the state and these rules designed to protect the public interests of the state.<sup>180</sup> Sometimes the courts need to take into consideration the public policy of two or more states when the disputes contain international elements involving international arbitration. In such cases the public policy would be international.<sup>181</sup> Transnational public policy contains universal norms and widely accepted standards and the court considers this type of international arbitration to be governed by *lex mercatoria*.<sup>182</sup>

There are some questions arising with regard to public policy: what is the concept of public policy under Iraqi Law? Does Iraqi law make a distinction between different types of public policy? This section will attempt to answer these questions.

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<sup>177</sup> Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (5<sup>th</sup> edn, Oxford University Press 2009) 656.

<sup>178</sup> Kenneth M. Curtin, 'An Examination of Contractual Expansion and Limitation of Judicial Review of Arbitral Awards' (2000) 15 *Ohio State Journal on Dispute Resolution* 337.

<sup>179</sup> *ibid.*

<sup>180</sup> Marc Blessing, 'Mandatory Rules of Law versus Party Autonomy in International Arbitration' (1997) 14 *Journal of International Arbitration* 23.

<sup>181</sup> William W. Park, 'The Specificity of International Arbitration: The Case for FAA Reform' (2003) 36 *Vanderbilt Journal of Transnational Law* 1241.

<sup>182</sup> James D. Fry, 'De'ordre Public International under the New York Convention: Whither Truly International Public Policy' (2009) 8 *Chinese Journal of International Law* 81.

Iraqi law has no definition of the concept of public policy concept in any specific article or piece of legislation. However, Iraqi law refers to this term in Civil Law as public order which has the same meaning as “public policy” and therefore, for the purposes of this study the term public policy will be employed. The mandatory rules of public policy can be seen in different Iraqi legislations: for example, Article 32 of the Iraqi Civil Law prohibits the application of any foreign law which contravenes public policy. As mentioned in an earlier section of this chapter. Iraqi law gives Iraqi courts the power to reject the enforcement of foreign judgments if this judgment is in contrast with public policy.<sup>183</sup> Similarly, UAE Law prohibits the enforcement of any foreign arbitral award which is contrary to public policy. Article 235 (e) of UAE Federal Civil Procedures Law No 11 of 1992 provides that “It does not conflict or contradict with a judgment or order previously passed by another court in the State and does not include any violation of moral code or public order”.<sup>184</sup> The PRC law also does not allow enforce the foreign arbitral award if it is against the Republic of China public policy. Article 260 of PRC Civil Procedure Law provides that “If the people’s court determines that the enforcement of the award goes against the social and public interest of the country, the people’s court shall make a written order not to allow the enforcement of the arbitral award”.<sup>185</sup>

Iraqi law also does not distinguish between different types of public policy. It depends completely on the domestic public policy rules which are provided in different legislations. Therefore the author presents the view that the Iraqi courts will not enforce arbitral awards which conflict with Iraqi public policy with regard to petroleum disputes even if they contain foreign elements. This approach was adopted by the New York Convention which provided in Article V (2) (b) that enforcement may be refused where “the recognition or enforcement of the award would be contrary to the public policy of that country”.

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<sup>183</sup> Article 6 (d) of ELFJ.

<sup>184</sup> The translation from Arabic language to English is available at < <http://www.diac.ae/idias/rules/uae/chapter4/>> accessed on 13 August 2014.

<sup>185</sup> The English text available at < [http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383756.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383756.htm)> accessed on 17 of May 2014. Adopted at the Fourth Session of the Seventh National People’s Congress and promulgated by Order No. 44 of the President of the People’s Republic of China on April 9, 1991.



## **6.8. Conclusion:**

This chapter sheds light on the current legal system of enforcement of arbitral award under Iraqi law. Iraqi law does not provide explicitly for the enforcement of foreign arbitral awards and has not designed any mechanism to enforce such awards. Iraq has two laws to regulate the enforcement of foreign judgments, but these laws do not refer explicitly to the enforcement of foreign arbitral awards. The silence of Iraqi law on this subject has created a diversity of opinions as to whether or not there is a possibility to enforce foreign arbitral award under Iraqi law. However, the author argues that the Iraqi ELFJ is applicable to the enforcement of such awards. It seems that these laws can be applied to arbitral awards. The deficiency in enforcement in the current legal system makes that system inadequate. Therefore Iraq legislators should address this deficiency either by amending the laws involved so as to accommodate the new economic era of Iraq or by promulgating new laws for that purpose. This is so because the absence of such laws may make the arbitration process ineffective and cause first confusion and then aversion among foreign investors.

Iraq has resisted joining the most important conventions involved in the enforcement of foreign arbitral awards, such as, for example, the New York Convention of 1958 and the ICSID Convention. This absence caused a major lacuna and a deficiency in provision for the regulation and enforcement of foreign arbitral awards in Iraq. However, those conventions did not address the sovereignty issue, which is considered an important obstacle in the arbitration process and they did not formulate definite solutions to this problem. Iraq's accession to the New York Convention would contribute to developing a legal system for the enforcement of arbitral awards by adoption of the facilities provided by this convention, particularly as most world states have become parties to this convention. Iraq has already joined most of the regional conventions concluded between Arab countries which regulate the enforcement of arbitral awards rendered in Arab countries, for example, the Riyadh Convention, which is considered important in this regard. However, the Riyadh Convention also has not formulated articles to address the sovereign immunity issue.

The sovereign immunity question plays an important role in the success of any arbitration or conversely can cause it to fail. The sovereign immunity issue, however still arouses acrimonious

debate in the context of the enforcement of the arbitral award, and there is no universal approach to this issue. The author suggests that this issue should be regulated within the arbitration agreement like other issues. The applicable law or the arbitrability issue and the extent to which the state party can waive its immunity should be explicated.

The constitution of Iraq and its laws provide that the sovereignty of Iraq is protected. However, the author has consistently argued that Iraq waives its sovereignty immunity as soon as it agrees to the arbitration clause. So the arbitral award rendered according to arbitration agreement contained the parties' consensus to solve their dispute by arbitration.

The elastic nature of public policy is considered problem for a national judge. However it could be said there is consensus that the judge can depends on the content of international public policy. Iraqi law does not distinguish between international and domestic public policy. Iraq depends on the content of its domestic public policy.

## **Chapter Seven: A Vision for a Petroleum Arbitration Regime in Iraq:**

The purpose of this study was to develop a vision to meet Iraq's need for a legal mechanism sufficient to resolve disputes arising from petroleum agreements through promulgating petroleum arbitration laws and establishing a specialised institution for petroleum disputes. Iraq could then depend on them as a means to resolve disputes arising from petroleum agreements in transition, which are considered to be a special kind of investment agreement. This is because these agreements concern sovereignty issues according to Iraqi law.<sup>1</sup> The study has also provided an analysis of the attitude of host states from developing countries towards arbitration and how they achieve fairness of arbitration, focusing on a comparison of the experiences of PRC and UAE in this regard. In addition, this study examined the applicable law of petroleum arbitration procedures and also the applicable law of petroleum agreement under Iraqi law and argued that the national law is the optimal choice for the governance of petroleum arbitration.

### **7.1. The Key Findings of the Study:**

The study examined and evaluated the current Iraqi regime of arbitration for the resolution of petroleum disputes and sought to discover whether this regime was adequate to deal with petroleum disputes or whether Iraq stood in need of a new and comprehensive regime of arbitration in order to achieve a balance between Iraqi interests and those of foreign investors. It was found that the current Iraqi regime of arbitration is not fully adequate to deal with petroleum disputes. The provisions regulating arbitration in Iraq are founded on various laws and there is no separate legislation for the regulation of international commercial arbitration. The regulation of arbitration in Iraq depends mainly on the laws of the CCP, while the Civil Law regulates issues not covered by the CCP. It also depends on the Iraqi ELFJ to regulate the enforcement of foreign arbitral awards, even though this law does not provide explicitly for the enforcement of foreign arbitral awards, and provides rules for regulating the enforcement of foreign judgments in Iraq. It is the author's view that regulation by the CCP, Iraqi Civil Law and the Iraqi ELFJ does not provide a comprehensive and effective arbitration regime that is attractive to investors. It is suitable for everyday purposes but not for the special requirements of petroleum arbitration.

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<sup>1</sup> Article 111 of Iraqi Constitution of 2005 publishes in Official Gazette issue 4012 of 28 May 2005.

These laws do not regulate important issues in arbitration, such as international arbitration agreements, the applicable law of arbitration and the enforcement of foreign arbitral awards. The author will review the findings extensively, chapter by chapter, and in the next section the manner in which the current Iraqi regime regulates these issues will be shown. The author presents the view that these laws are designed to regulate domestic arbitration and not international commercial arbitration. These laws need to be updated and modernised if they are to be effective in dealing with disputes arising from petroleum agreements. Although there are some provisions in the abovementioned laws that can be applied to regulate and manage arbitration, this does not mean Iraq can depend on these laws in future. Iraq needs to rebuild its shattered economy by attracting investors, particularly foreign investors, who will seek legal guarantees, particularly with regard to the question of arbitration, which is of primary concern to the foreign investor wishing to invest in any host state. Iraq needs a comprehensive petroleum arbitration regime that is compatible with international standards of commercial arbitration. It should follow the example of the UAE, which distinguishes between domestic and international arbitration, and it should update its relevant laws by following the example of the UAE Federal Draft of International Commercial Arbitration of 2008, which depends on UNICTRAL Model Law.

The PRC promulgated the International Arbitration Law of 1994, which regulates the principles issues in arbitration, such as international arbitration agreements, applicable law and the enforcement of foreign arbitral law. This law also distinguishes between domestic arbitration and international commercial arbitration.

## **7.2. Summary and Review the General Findings by Chapters:**

Chapter one is devoted to an explanation of the key issues of the study as a whole. It contains a review of petroleum arbitration in academic literature, and describes the differences of opinion among lawyers with regard to arbitration as a method for resolving petroleum disputes. The chapter shows that lawyers from developing countries tend not to favour arbitration as a means of settling petroleum disputes because it allows the application of foreign law and thus violates the sovereignty of the host state. Some of these lawyers also take the view that petroleum agreements have certain distinctive characteristics that make them different from other

forms of commercial agreement. Other lawyers, however, see arbitration as the best way to resolve petroleum disputes, and it also the method favoured by petroleum companies.

Each chapter of this work offers significant findings and suggestions for a specialised and comprehensive modern arbitration regime. The concluding discussion examines and reference to the laws of the UAE and the PRC which have inspired the author's own vision. Each subsequent chapter answers the questions raised by the research.

Chapter Two reviewed and evaluated the relationship between Iraq and the international petroleum companies by representing the history of Iraq and the role played in Iraq by some countries. It has drawn considerable attention from powerful countries like Germany, Britain, France and USA. Petroleum has been an important factor in the reshaping of Iraqi history and the history of the countries in the Gulf area. It was the main reason behind the conflicts which happened in the Arabian Gulf, such as the war between Iraq and Iran and also between Iraq and Kuwait. This chapter also showed that the Iraqi government before 1958 has no effective role played in petroleum industry. However, after 1958, the Iraqi government started playing an important role and tried to manage this valuable sector by promulgating important laws<sup>2</sup> and also revised the petroleum agreements it had previously concluded with petroleum companies and amended what it found to be unfair conditions in these agreements. However, although Iraq controlled and nationalised its petroleum wealth, this sector was not managed well because of wars and UN economic sanctions. Post 2003, Iraqi petroleum sector is facing dangerous challenges like looting, smuggling, corruption and destroyed by armed groups. These challenges affected in investment on petroleum sector.

The author has argued that petroleum agreements differ in character from investment agreements. This is so because the Iraqi constitution gives petroleum as a natural resource a special importance by placing this wealth under the ownership of the Iraqi people. This important feature granted by Iraqi law makes petroleum agreements a special kind of investment agreement. Hence the author argue that the disputes arising from such agreements need a special kind of arbitration law and an institutional involvement in petroleum disputes, containing rules to achieve a balance between the interests of Iraq as a host state and those of petroleum companies

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<sup>2</sup> Law No. 80 of 1961, Law No. 11 of 1964, law No. 123 of 1967 and law No. 97 of 1967.

as investors in the petroleum sector. The former conclusion is one of the more significant findings to emerge from this study.<sup>3</sup>

The legal nature of petroleum agreements is a controversial question and causes differences in opinion. The author argued that petroleum agreements are not international treaties and moreover neither administrative contracts nor private contracts. They are contracts containing a mix of private and public law features. Their special legal nature is determined by the state's attitude towards its resources and legislation policy.<sup>4</sup> Hence the author takes the view that the national law of the host state should be privileged in any such agreement.

Chapter Three evaluated the host states' general attitudes towards arbitration and also showed that the petroleum companies' attitudes towards arbitration as a method of settling petroleum agreements are different from the host states' attitude. Traditionally, most host states did not welcome arbitration as an alternative to national courts for settling disputes, especially petroleum disputes. However, most of these states changed their attitudes of arbitration for many factors, among them the participation of many host states in regional and international conventions involving arbitration, such as the New York Convention and the ICSID Convention, which required updating their arbitration laws. Petroleum companies, however, take an altogether different view of arbitration in the resolution of disputes. They are reluctant to subject themselves to the national law of host states and fear that the latter's courts may be subject to political pressure.

Iraq, as a host states, has attitudes not much different from those other host states. It views arbitration with suspicion, and therefore arbitration is not a welcome method for settling investment disputes in general and petroleum disputes in particular. The current study has argued that there are two main issues behind Iraq's attitude is sovereignty. Iraq sees arbitration as a violation of Iraqi sovereign immunity jurisdiction,<sup>5</sup> and a way to apply foreign law instead of Iraqi national laws. The author argues that this view reflects negatively on Iraqi legal system and its capacity to settle disputes in amicable ways. Iraq does not regulate international commercial arbitration and has not become party to important international conventions of

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<sup>3</sup> See section 2.4 of chapter two.

<sup>4</sup> For a fuller discussion see section 2.5 of chapter two.

<sup>5</sup> See pages 100 and 101 of chapter three.

arbitration. Despite Iraq's unwelcoming view of arbitration, this study argued that Iraq does not actually prohibit arbitration as a way to solve investment disputes in general and petroleum disputes in particular. This can be inferred from different laws regulating amicable settlements of disputes. Arbitration even has its legal basis the Civil Law<sup>6</sup>, the Commercial Law,<sup>7</sup> the Iraqi Law of Enforcement<sup>8</sup>, the Investment Law<sup>9</sup> and the Draft Oil and Gas Law of 2007. Moreover, Iraq is party to many regional conventions which concern arbitration such as Riyadh Convention. However, even abovementioned laws contain provisions regulate arbitration it is not adequate to deal with petroleum disputes and then attract foreign investors. This study has showed that Iraq need comprehensive and modernise arbitration regime distinguish between domestic and international arbitration.

The UAE was one of the petroleum countries which also did not welcome arbitration. However, the UAE changed its attitude adopted a more positive attitude towards arbitration by updating its arbitration laws and distinguish between domestic arbitration and international commercial arbitration. In addition to that, UAE accessing to the important international conventions, which are the New York Convention and the ICSID Convention. The UAE also developed its arbitration institutions.

The PRC has a long history of arbitration and provided this study with a rich foundation. It has updated its arbitration laws and it is a party to the New York Convention and the ICSID Convention.

Both the UAE and the PRC have established independent arbitration regimes to resolve investment disputes and these can be applied to the regulation of petroleum disputes. It is argued that Iraq should follow these developing countries, which have been successful in attracting foreign investors by instigating modern independent regimes for arbitration.

Chapter Four examine and analysis the current provisions of arbitration agreement and assisted if these provisions adequate to deal with petroleum disputes or it is needed to update and amend.

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<sup>6</sup> Article 16 of Iraqi Civil Law No. 40 of 1951.

<sup>7</sup> Article 297 No. 30 of 1984.

<sup>8</sup> Article 3 (2) of Iraqi ELFJ.

<sup>9</sup> Article 27 of Investment Law No. 13 of 2006.

This study argued that the consent to arbitration is also a mirror of the state party's desire to waive its sovereign immunity jurisdiction. Hence, the author argues that Iraq waives its sovereignty immunity jurisdiction as soon as it agrees to arbitration as a method to settle petroleum disputes. The consent to arbitration should come from parties which have the capacity or the authority to conclude arbitration agreements. The current study argued that according to Iraqi laws and practices the Iraqi state and its entities can conclude petroleum arbitration agreements because there is no law to prohibit Iraq from concluding such an agreement in regard to petroleum disputes. Iraqi law and the UAE's and PRC's laws do not express which law should govern the capacity of arbitration agreement and leave the matter to the general rules in their civil laws to regulate such important issues, which favours the personal law of the party and gives weight to the nationality of the party to determine the personal law. One of the more significant findings to emerge from this chapter is that petroleum disputes are arbitrable in Iraq and there is no law to prohibit such disputes from being resolved by arbitration; also practice shows petroleum disputes can be settled by arbitration, since some petroleum agreements have been concluded between Iraq and petroleum companies.<sup>10</sup> Similarly, the UAE and the PRC consider petroleum disputes arbitrable.

This study show that the Iraqi CCP Law does not determine the law govern petroleum arbitration agreement whether that law should be the law of main agreement or the law of the seat of arbitration. Determining the applicable law make arbitrator decide whether arbitration agreement valid or not on the basis of the law governing that agreement and then can enforce the arbitral award. However, Article 25 of the Iraqi Civil Law regulates this issue and the author believes that this provision can govern the law governing petroleum arbitration agreements. This article determines three laws which can govern such agreements, which are the law chosen by parties or the law of the place where the contracts will be carried out, or the law of the place of contract. This article enhances the parties' autonomy principles by give the parties a freedom to determine the law that will govern petroleum agreement. The UAE Civil Procedures Law also does not determine which law should govern the arbitration agreement and also refers to general rules in civil law, which prefer the personal law of the parties if they have a common domicile, depending on domicile criteria or the law of the location of the contract and also can apply the

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<sup>10</sup> Article 40 of petroleum agreement of 1925.



law chosen by the parties. The PRC has an approach which differs somewhat from that of Iraq and the UAE. It states that the law of the court of the place can apply the arbitration agreement as a last choice, after the parties' autonomy and the seat of arbitration.

This study showed that the petroleum arbitration agreement has autonomy from the petroleum agreement under Iraqi law. Hence, petroleum arbitration agreements are immune from claims that they will be null because the main contract is null under Iraqi law. This argument is based on Article 139 of Iraq Civil Law No. 40 of 1951.<sup>11</sup> The author argues that due to this article, the petroleum arbitration agreement is effective and valid even if the petroleum agreement was void. Severability doctrine enhances the arbitration process and considered important principles should contain by the Iraqi arbitration regime to attract foreign investment. The foreign investors fell save that the host state will not evade under plea that the petroleum agreement is null. The UAE accepted this principle, as did the PRC, which also adopted this principle in its arbitration law. This study also argued that the severability principle has taken strong and firm steps towards universality. This ensures that the petroleum arbitration agreement does not have the same fate as petroleum agreements and the law governing petroleum arbitration agreement may differ from the main agreement.

This study has found that generally there is lack of provision for the regulation of arbitration agreements because Iraq does not enact international commercial arbitration. Consequently, it depends on general rules and principles of Iraqi law to regulate important agreements, for example, the CCP and Civil Law. The CCP does not regulate important issues concerning arbitration agreement like the applicable law of that agreement and also does not recognise the severability doctrine of arbitration agreement which consider one of the important features of petroleum arbitration agreement. Although, civil law deals with applicable law issue and offer the grounds for severability doctrine in Article 139, this law is not adequate to deal with petroleum disputes. Most of these laws are outdated and need to be reformed so as to be suit to the international model of international commercial arbitration laws.

Chapter Five discusses the procedural law and the substantive law of petroleum arbitration and describes how the current regime of arbitration deals with these important issues. According

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<sup>11</sup> See section 4.5 of chapter four.

to Iraqi law, the procedural law can be determined by the parties, or by arbitrators if the parties cannot reach agreement. Iraqi law recognises the principle of the parties' autonomy but this principle is not absolute. It cannot be applied if it is in contrast with public policy or the mandatory rules of the Iraqi state. The UAE and the PRC have similarly adopted the principle of the autonomy of the parties in determining the procedural law of arbitration, with the arbitrators' choice as a secondary means of determining that law. Chapter Five also explains the theories that deal with the procedural law of arbitration, the delocalisation theory and the seat of arbitration theory, both of which have had a major impact on the law governing arbitration procedures. This chapter showed that the Iraqi, UAE and PRC law have adapted this theory. The author vision that Iraq should adapt this theory to govern procedures law of petroleum arbitration because Seat theory enhances the relationship between the seat of arbitration and the law of arbitration procedures through giving the law of arbitration seat weight by linking the arbitration place law with the municipal laws governing the arbitration process. Despite some criticisms of this theory, it has gained wide acceptance in some arbitral awards, international devices and national laws.

The law governing the legal relationship between the host state and the petroleum companies is considered one of the most controversial topics in legal circles. Applicable law also mirrors the conflict between the host state's sovereignty and petroleum companies' interests. The agreement's parties have the freedom to select the law governing their agreement but the autonomy of the parties is restricted by public order issues according to Iraqi law. The law chosen by parties should not be contrary to the public order of morality. This view was adopted by Article 23 of Iraqi Civil Law. Iraqi law restricts the parties' autonomy in regard to petroleum agreement and applies the Iraqi law compulsorily. This reflects Iraqi sovereignty in regard to petroleum agreement. Similarly the PRC laws restrict the parties' autonomy in regard to mineral resources and apply China's law of petroleum agreement. The Iraqi, UAE and PRC law does not give the arbitrator the right to select the applicable law of petroleum agreement.

This chapter showed that determining the applicable law of petroleum agreement raises debate at theoretical and practical levels and also among international organizations which try to find approaches which serve the host state's interest. The difficulty in finding a universal

approach is related to the nature of this agreement and the peculiarity of the subject matter of this agreement. The conflict between the petroleum agreement parties' interests helps in preparing a fertile soil for the appearance of important theories aimed at finding a universal approach to this critical question. Most of the theories aim to detach petroleum agreements from the national law sphere and apply different laws, such as international law, the general principles of law, transnational law or *Lex Contractus*.

This study has argued that Iraqi national law can be an adequate choice as the applicable law of petroleum agreements. This is so because Iraq after 2003 promulgated some laws involving investment and also national laws containing clear details which cannot be found in other laws, such as transnational law or the general principles of law. Moreover, host states promulgated laws reflecting its intention to protect their natural resources in line with the international model. This approach has gained wide acceptance from international organization such as OPEC and the UN, which has promulgated some resolutions reflecting this approach.

Chapter Six evaluated the current legal system for the enforcement of foreign arbitral awards in Iraq and examine whether this system adequate to deal with enforcement foreign arbitral award or not. This chapter showed that Iraq has no law explicitly regulating foreign arbitral awards in general or petroleum arbitral awards in particular. The laws currently over implementation of regulate foreign judgments, but there is no regulation of foreign arbitral awards. This lacuna causes diversity in opinions as to whether Iraqi law is applicable to the enforcement of foreign arbitral awards. The author has argued that foreign arbitral awards in general and petroleum arbitral awards in particular are enforceable under Iraqi law even if Iraqi Implementing Laws do not express explicitly the enforcement of foreign arbitral award. Following the argument that foreign arbitral awards can be treated as foreign judgments, then the Iraqi Implementing Law No. 30 of 1928 can be applied to enforce foreign arbitral awards. This is so because there is no law prohibiting enforcement of such awards and also foreign arbitral awards have a condition in some cases, for example, the awards rendered by the ICSID and also the Iraqi Implementing Law.<sup>12</sup> The UAE and PRC laws provide explicitly for enforcement of foreign arbitral awards and regulate them through their arbitration laws. Thus, regulate enforcement of foreign arbitral award by UAE and PRC arbitration laws give a clear image of

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<sup>12</sup> For a fuller discussion see section 6.2 of chapter six.

foreign investors that the host state recognize enforcement foreign arbitral award. Iraq should follow this approach by provided explicitly enforcement foreign arbitral award and regulate that enforcement. Enforcement of foreign arbitral award is the second question will ask by foreign investors when come to invest in Iraq after arbitration.

This chapter analysis that the Iraqi political concern was the main reason to prevent Iraq from joining to international commercial arbitration thus, depriving it of links to international arbitration conventions and this created a lacuna in the Iraqi legal system regarding the enforcement of foreign arbitral awards. Iraqi adoption of the New York Convention could develop its legal system for the enforcement of foreign arbitral awards, create the legal mechanism for enforcement of such awards and encourage foreign investors. This study has argued that the New York Convention can apply to the state and its entities and also this convention can apply to petroleum agreements. Despite these agreements having special conditions, they contain also commercial feature and also the host state can determine whether or not the disputes arising from this agreement are arbitral. These agreements are important and have wide acceptance, but the conventions do not address the important obstacle facing enforcement foreign arbitral awards, which is the problematic issue of sovereignty.

Unlike Iraq, UAE and PRC become party on New York Convention and ICSID Convention. That is help these states to facility enforcement of foreign arbitral award and update their involvement laws and then encourage investors.

One of the important findings in this study is that sovereign immunity plays an important role in the success or failure of any arbitration. This study has argued that Iraq would be waived of its sovereign immunity as soon as consent submit petroleum dispute to arbitration and arbitral award rendered according to this agreement. This waiver can extend to the enforcement of the foreign arbitral award.

Public policy is also considered one of the important obstacles facing enforcement of the arbitral award. This is so because of its elastic nature. There is a consensus that a national judge can depend on an international public policy. However, Iraq does not distinguish between domestic and international public policy and is still dependent on domestic public policy.

The main argument submitted by this thesis is that the legal system for resolving petroleum disputes in Iraq is inadequate and the provisions of current laws involving arbitration, like the CCP, cannot be totally depended on. It has many lacunae: this is so because this law was designed to regulate national arbitration, not international commercial arbitration. Meanwhile, Iraq looks forward to rebuilding a solid economy in transition and, due to the special circumstances of Iraq, its petroleum sector is considered to be its best prospect at this stage of its history.

Given the special status of petroleum agreements, they should have their own legal system of arbitration supported by a special institution for petroleum arbitration. There is no legal impediment to prevent Iraq from promulgating an arbitration law to settle petroleum disputes. Petroleum disputes are arbitrable under Iraqi law and these disputes can be submitted to arbitration.<sup>13</sup> This law gives the Iraqi national law great weight and furthermore does not violate the sovereign immunity of Iraq. Iraq does have the capacity to promulgate arbitration laws and establish a petroleum arbitration centre.

### **7.3. A New Vision for an Iraqi Petroleum Arbitration Regime:**

The author's vision for the Iraqi legal system's governance of the petroleum investment environment is set out below. These suggestions would be important in making a suitable environment for the success of a petroleum arbitration law and a petroleum arbitration centre in Iraq and of their function as an alternative way for Iraqi courts to resolve petroleum disputes.

#### **7.3.1. General Vision:**

The evidence from this study suggests the need to promulgate oil and gas law, 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 IFG 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. This law should also improve the prospects of the Iraqi people. In addition, this study suggests

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<sup>13</sup> See section 4.3.2.3 of chapter four.

that Iraq should avoid concluding PSAs in the transitional period for economic reasons, and also because PSAs place unfair terms on Iraq which are obstacles preventing it from rebuilding its economy. Moreover Iraq should be stricter of PSAs concluded by KRG which is not have legal foundations to conclude it and also weakens the Iraq's chances to attract international petroleum companies through the conclusion of this type of agreement by the KRG.

The results of this research support the idea that the time is ripe for Iraq to join the New York Convention of 1958. This convention has designed provisions for the recognition and enforcement of arbitral awards and also some provisions concerning arbitration agreements. The author has argued that this convention can apply to petroleum disputes. Iraqi access to this convention enhances and facilitates the legal system of enforcement of petroleum arbitral awards and attracts foreign investors. This convention can also apply to both parties, the state and its entities and also foreign companies. It has become widely popular and most states have become parties to this convention. In addition to the New York Convention, Iraq also should access the ICSID Convention which also applies to host states or its entities and also to the other party as a legal entity. The ICSID Convention has its own mechanism for the recognition and enforcement of arbitral awards and also the contracting parties should recognise and enforce ICSID arbitral award as the final judgment of its courts. This advantage of ICSID awards could be consistent with Iraqi Implementing laws which provide that foreign judgment should be final and enforceable by Iraqi courts.

Where the success of any arbitration process depends on what the enforcement laws offer in terms of facilities for the enforcement of arbitral award, the arbitration law will not be effective unless the Iraqi Implementing Law No. 30 of 1928 is amended and updated. It should add an Article to regulate the enforcement of foreign arbitral awards.

To fill the gap in Iraqi legal culture about arbitration, this study suggests the adoption of commercial arbitration as one of the text books to be studied in Iraqi schools of law.

The results of this study indicate that there should be a rehabilitation of the competent judicial institutions for the enforcement of foreign arbitral awards in order to facility such awards.

The above-mentioned are general suggestions that this study proposes should be followed by the petroleum investment policy makers in Iraq.

### **7.3.2. A Specialised Petroleum Arbitration Law:**

One of the main objectives of this study is to suggest rules for Iraqi arbitration law involving petroleum disputes. These rules should 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 Agreement:**

Petroleum arbitration agreements, as discussed previously, are considered to be the heart of the petroleum arbitration process. It is so because it is considered the important procedures about the arbitration but it is also important because it expresses the state parties' consent to waive its sovereign immunity. The author argues that:

1. The petroleum arbitration agreement must be in writing,<sup>14</sup> otherwise it will be null and invalid. Iraq in this regard should follow the PRC arbitration Law of 1994. Therefore the written form should be defined and should follow the PRC Contract Law of 1999 definition of written form. Moreover, the petroleum arbitration agreement should be signed by both parties to prove the parties' consent, whether the signature is physical or electronic.<sup>15</sup>
2. The state party should express its desire to waive its immunity and should determine to what extend it would waive its immunity.
3. The law applicable of formal requirement should be provided by the petroleum 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

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<sup>14</sup> For a fuller discussion see section 4.3.1 chapter four.

<sup>15</sup> See section 4. 3. 1 of chapter four.

arbitration agreements is the law of the state on the territory of which the contract was concluded. This approach exists in Iraqi Civil Law.

4. The capacity of the state and the legal person should be expressed by Iraqi arbitration law and should follow the PRC 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. This approach exists in UAE, PRC and Iraqi Civil Law.

6. The applicable law of arbitrability before the arbitral award is rendered 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.<sup>16</sup>

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. Iraq in this regard should follow the PRC arbitration Law of 1994. This is so because the adoption of such a doctrine will survive the arbitration process and enhance competence -competence principles in arbitration.

### **Applicable Law of Petroleum Arbitration:**

One of the main concerns of petroleum countries, including Iraq, towards arbitration is the exclusion of the national law of the host state and the application of other laws which have no connection to the national legal system of the host state. The evidence from this study suggests that:

1. In determining the procedural law of petroleum arbitration, weight should be given to the parties' principles of autonomy and also to the seat of arbitration.

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<sup>16</sup> For further discussion see section 4.4 of chapter four.



Therefore this study suggests that the parties should have the freedom to select the law that will govern the procedural law of arbitration. However this freedom should not be absolute: it should be restricted by Iraqi mandatory rules and the principle of public order. The parties must not choose laws contrary to Iraqi mandatory rules or Iraqi public order. If the parties cannot reach agreement on the applicable law then the law of the seat of arbitration should be applied. The parties should have the freedom to choose the seat of arbitration, otherwise the seat of arbitration will be in Iraq.

2. The applicable law of substantive issues should be Iraqi law. The parties' autonomy should be restricted in regard to petroleum agreements and priority given to Iraqi national law<sup>17</sup> to govern substantive issues in the petroleum agreement. Iraq should follow the International Organizations like UN Resolutions and OPEC. This is the approach followed by PRC law.

### **Enforcement of the Petroleum Arbitral Award:**

One of the main concerns of foreign investors is the legal system for the enforcement of foreign arbitral award and the way the laws of the host state deal with this issue. In this regard, the present study has indicated that the current legal system in Iraq is not adequate and stands in need of important amendments. The author puts forward some proposals for amending the legal system for the enforcement of petroleum arbitral awards. These suggestions are intended to encourage foreign investors and to enhance the arbitration process in Iraq.

1. As discussed previously, Iraqi law does not express the enforcement of foreign arbitral awards. However, in this study it has been argued that arbitral awards can be enforced by means of Iraqi Implementing Law No. 30 of 1928. It has been argued that foreign arbitral award amount to a foreign judgment. However, to avoid any debate arising from this, Iraq should stipulate that petroleum arbitral awards should be enforced according to Iraqi law.

2. Petroleum arbitral award cannot be enforceable unless the competent court is rendered exequatur. The place of the competent court should be located where the defendant is resident. If the defendant does not have domicile or property in Iraq, the court of Baghdad would then be the competent court.

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<sup>17</sup> For a fuller discussion see pages 198-199 chapter five.

3. The court should have the jurisdiction to set aside an arbitral award which was not regulated by Iraqi law. This study suggests the competent court should be the court originally having jurisdiction over the disputes. This is the practice followed by the UAE and PRC laws and also by the Iraqi CCP.

4. The Iraqi Implementing Law does regulate the reasons of challenge related to the arbitration agreement. This is because this law does not regulate arbitral awards explicitly. In general, therefore, it seems that to add the reasons of challenge exit in Article 273 of CCP to the reason mentioned by Implementing Law No.30 of 1928 in Article 6.

5. The public policy contents should be determined under Iraqi petroleum arbitration law. This study intends to follow the international public policy type.

### **7.3.3. A Vision for an Iraqi Petroleum Arbitration Centre:**

The study has argued that a petroleum agreement is a special type of investment agreement under Iraqi law. This is because petroleum agreements have special features that differentiate them from ordinary agreements. Therefore the disputes arising from this agreement have no need of a special arbitration law framed exclusively to deal with petroleum disputes. However these disputes need to be submitted to an institution concerned specifically with petroleum disputes, since the formal justice system in Iraq does not provide adequate means for settling petroleum disputes. There is also a need to attract and encourage foreign investors.<sup>18</sup> Therefore one of the main objectives of this study is to propose the founding of a centre for petroleum disputes.

There is a practical need for the establishment of such a centre, which would apply the procedural law of arbitration. In this case Iraqi law would be applied. If the parties fail to agree on the law that governs the arbitration procedure the law will be that of the seat of arbitration.

Clearly there would be practical issues involved in founding such a centre. For example, conflicts of law, sovereignty issues and the enforcement of foreign arbitral awards.<sup>19</sup> However,

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<sup>18</sup> See Chapter One section 1.5.

<sup>19</sup> For fuller discussion see Chapters Five, Section 5.3.1 and Chapter Six, Section 6.6.

the establishment of such an institution would encourage petroleum companies to invest in Iraq and would provide foreign investors with a legal assurance that their disputes would be referred to arbitration. The petroleum companies would be free to choose between the procedural rules of the centre or those of any other law.<sup>20</sup> The centre should be located in Baghdad. This would strengthen and facilitate the application of Iraqi national law and have the effect of reducing conflicts of law.<sup>21</sup> Iraq would be the seat of arbitration and this study gives the seat of arbitration considerable weight in deciding on the applicable law of arbitration. Not only would the problem of conflict of laws be addressed; Iraqi concerns and controversies about sovereignty would also be reduced if Iraqi law were applied to petroleum disputes.<sup>22</sup> In addition, the enforcement of foreign arbitral awards would be enhanced if these awards were subject to Iraqi national court supervision.<sup>23</sup> For all these practical reasons the petroleum arbitration centre should be established in Iraq.

The remit of this institution should be to conclude all disputes arising from petroleum agreements, from petroleum extraction from the petroleum field (upstream, midstream and downstream) and to exports to the global market. Its scope would include all petroleum transactions.

This institution should be inter-governmental, like ICSID. In order to function as an international forum, it should be established by an international convention. The author chose ICSID as an example because the latter has become a natural centre for international arbitration. It has been successful in influencing many countries previously hostile to arbitration to become members.<sup>24</sup> In addition, it provides members with important facilities, such as conciliation and arbitration, and has drawn up important rules to enforce foreign arbitral awards.

The institution should be established under OPEC auspices. That is because OPEC is one of the most important organizations concerned with petroleum and because it drafts petroleum policies for its members, who include the major producing countries. OPEC also takes a strong line with regard to the application of national laws of petroleum agreement and towards the re-

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<sup>20</sup> For fuller discussion see Chapter five section 5.2.

<sup>21</sup> For fuller discussion see Chapter five section 5.2.1.

<sup>22</sup> For fuller discussion see Chapter five page 199.

<sup>23</sup> For fuller discussion see Chapter five section 5.2.1.

<sup>24</sup> For fuller discussion see Chapter Three section 3.2.1 and 3.2.2.

localization of petroleum agreements.<sup>25</sup> Establishing such an institution under OPEC auspices may reduce the concerns about arbitration experienced by host states from producing countries.<sup>26</sup>

The function of this centre should not be limited to the settlement of petroleum disputes: it should also be able to resolve disputes by consultation and mediation. In addition, it should support other functions, such as annual conferences dealing with all aspects of petroleum arbitration, and conduct workshops and training courses in petroleum arbitration.

The petroleum arbitration centre would establish and apply its own rules, which should give considerable weight to important principles, such as the parties' autonomy in choosing the procedural law of petroleum arbitration. The petroleum arbitration agreement should be separable from the main agreement. In addition, the petroleum arbitral award should be rendered as a final award, like an ICSID award, and enforced in the same way as a domestic award. However, if the parties do not apply the petroleum centre rules then the national law of the host state should be applied instead.

Petroleum producing countries would be members of the proposed centre, but the convention would not be limited to those countries. The major petroleum consumer countries and major petroleum industrial countries should be allowed to become members. Beside its original function, which is to resolve disputes arising between the host state and the petroleum companies, this institution would also settle the disputes arising between the petroleum countries and between the petroleum companies.

The establishment of such a centre would play an important role for both producing countries (host states) and consumer countries. Host states that joined such an institution under the auspices of OPEC would find that their apprehensions regarding petroleum arbitration were diminished. They would no longer view arbitration as a device designed to serve petroleum companies' interests only. In addition, combining both parties in the same convention would help to foster a convergence of views.<sup>27</sup> This convergence would contribute to the creation of an international legal system for petroleum arbitration. Moreover, submitting the producing

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<sup>25</sup> See Chapter Five Section 5.3.1.2.3.1.

<sup>26</sup> See Chapter Three, Section 3.2.

<sup>27</sup> See Chapter One, Section 1.1 and also page 29 for the quotation of Stephen Pelletiere.

countries themselves to the rules of such a centre would have the effect of reducing conflict between them.<sup>28</sup> As indicated previously in the Iraqi petroleum history review, petroleum has been the main cause of the internal conflicts and wars that have ravaged Iraq.<sup>29</sup> Conflicts between petroleum countries could be settled at this centre. Furthermore, submitting disputes between petroleum companies would help to reduce those companies' concerns about submitting their disputes to arbitration.<sup>30</sup> The establishment of such a centre in Iraq would encourage host states to have recourse to arbitration, since Iraq is one of the most important producing countries and also one of the developing countries that strongly supports the notion of arbitration.<sup>31</sup> Moreover, Iraq was one of the founder members of OPEC. Iraq is a state that safeguards its petroleum wealth<sup>32</sup> and considers petroleum as a sovereignty issue. Therefore, establishing the centre would have the effect of encouraging other producing countries to deal with their petroleum wealth in the same manner as Iraq.

#### **7.4. Recommendations for Future Research:**

In the light of the examination of the legal system for the settlement of petroleum disputes in Iraq, the main finding of this study is that most of the laws dealing with arbitration are inadequate. Arbitration laws need to be promulgated in line with the international scale model and in the political and economic interests of Iraq. In addition, significant amendments should be made to the Iraqi Implementing Laws.

This study has tried to highlight important issues and to focus on what may contribute to the reform of the legal system of arbitration in Iraq, especially in regard to petroleum disputes. The legal system in Iraq in relation to petroleum agreements is one of the important issues considered in this study. The study shows that more research is required on Iraqi petroleum agreement clauses, particularly the stabilization clause and the adoption clause. The arbitration clause acts as a guarantee that makes foreign investors feel that their investments are safe in host states. However, there are other concerns, regarding, for example, political changes and unwelcome

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<sup>28</sup> *ibid.*

<sup>29</sup> For more details see Chapter Two Section 2.2.

<sup>30</sup> Thomas Wälde, 'Investment Arbitration under the Energy Charter Treaty' [1996] CEPMLP Journal Online < <http://www.dundee.ac.uk/cepmlp/htm> > accessed 29 June 2011.

<sup>31</sup> For fuller discussion see Chapter Three, Section 3.3.1.

<sup>32</sup> Article 111 of the Iraqi Constitution of 2005.

legislation on the part of the host state, such as the introduction of nationalization. These clauses therefore need extensive study by researchers, especially in Iraq, a developing state which lacks stability in its political and economic circumstances.

Iraq is one of the states that has witnessed armed conflicts, both internal and external, and these conflicts have had an undeniably negative impact on Iraqi natural resources, particularly petroleum. It would be worthwhile to assess the effects of these conflicts on Iraqi petroleum investment and to provide a legal framework for protecting petroleum, the nation's most valuable natural resource.

This research has thrown up many topics in need of further investigation in regard to the KRG's authority and its capacity to conclude petroleum agreements with foreign petroleum companies, particularly since the Iraqi Constitutional law of 2005 does not empower the KRG to conclude petroleum agreements. The question is, therefore, whether foreign petroleum companies can conclude agreements by recourse to arbitration. This issue is one of the major challenges facing the Iraqi petroleum industry and it is one that merits considerably more research.

The author finds this point is worthy of examination as it could contribute to the reform of the Iraqi legal system regarding petroleum.

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