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MODERN LAW

SETTLEMENT OF FOREIGN INVESTMENT CONTRACTS DISPUTES THROUGH ARBITRATION

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INTRODUCTION

Arbitration is an important means for contracting parties, especially foreign investment contracts, to resolve disputes that may arise regarding the implementation or interpretation of the terms thereof. Arbitration has many advantages commensurate with the nature of foreign investment contracts, including easing foreign investors' concerns about complex judicial systems, and ensuring the impartiality of the award by ensuring non-alignment with the interest of the host State. Moreover, arbitration has a degree of confidentiality that avoids compromising the status and reputation of all parties, and helps in saving time thanks to its adjudication speed.

Foreign investors insist on arbitration due to the specificity of investment contracts in terms of the parties. Although the host State is only a contracting party, it is nevertheless an extraordinary party due to the sovereign advantages it enjoys, which, in addition to disturbing the economic balance of the contract, enable it to also breach the impartiality that must be available in the national jurisdiction examining disputes. Also, foreign investors insist on an arbitration clause out of fear of judicial immunity that states may enjoy, which ties the hands of the national judiciary of any State in looking into any disputes in which the State is a party.

Undoubtedly, reducing the fears of foreign investors is of immense importance and is the main reason for dividing foreign investment contracts into two types by economists and legal experts. The first is direct investment in which foreign capital, with organization and management, is transferred to the host State to establish projects in which the foreign investor owns controlling shares enabling him to control and manage these projects. While the second is indirect investment in which the role of the foreign investor is limited to merely providing capital to a certain party in the host State without having any control or oversight over the project.

The necessity of this topic is the remarkable status that arbitration acquired recently as a means of resolving disputes for foreign investment contracts. Arbitration has become an efficient and successful alternative to the judicial system in the resolution of investment disputes. No to mention the critical importance of foreign investment in achieving economic development for all States, represented in the intense competition between States in attracting foreign investments. The State of Qatar, in particular, has made great strides in this regard after the tremendous economic and legislative development in recent years, which prompts us to shed light on the role of arbitration in resolving foreign investment disputes.

ARBITRATION AGREEMENT

Arbitration has emerged as one of the best means of settling investment disputes as it enables the disputing parties to settle their investment disputes through highly experienced and qualified arbitrators who are able to effectively settle this type of dispute. Also, arbitration is not bound by certain procedures and dates, as individuals may always determine the place and time of arbitration, in addition to the possibility of determining the nature of the dispute with the selection of the suitable applicable substantive and procedural rules. Arbitration also ensures the least publicity, resulting in an atmosphere of desired serenity between the disputing parties unlike what could be caused by trying to settle the dispute through ordinary judiciary. It also helps in protecting the reputation of the disputants, the confidentiality of their dealings and paves the way for a possible continuation of commercial and economic relations in the future.

As per jurisprudence, the arbitration agreement is a contract in which the contracting parties agree to waive their right to ordinary judicial recourse and rather, resort to one or more natural persons, whether individually or institutionally, for the purpose of settling the potential dispute or the already existing dispute between them by issuing a decisive award binding on its parties.

Also, a number of national legislations were keen to develop a definition for the arbitration agreement, including the Qatari Arbitration Law No. 2 of 2017 that defines the arbitration agreement in its Article (7 – 1) as 'The agreement of the Parties, whether they are legal persons or natural persons having the legal capacity to enter into contracts, to refer to Arbitration, to decide on all or some disputes that have arisen or that might arise between them in respect of a defined legal relationship, whether contractual or non-contractual'. The Arbitration Agreement may be a separate agreement or in the form of an arbitration clause in a contract.

Article (10 – 1) of the Egyptian Arbitration Law defines the arbitration agreement as 'An agreement by which the two parties agree to submit to arbitration in order to resolve all or certain disputes which have arisen or which may arise between them in connection with a defined legal relationship, whether contractual or not'.

While the French Code of Civil Procedure defines the arbitration agreement in its Article (144) as 'A contract whereby the disputing parties refer their dispute to the arbitration of one or several persons'.

TYPES OF ARBITRATION AGREEMENTS IN FOREIGN INVESTMENT CONTRACTS

The arbitration agreement in foreign investment contracts has two types, the first being the Arbitration Submission Agreement, which is a separate agreement between the parties to submit to arbitration all disputes which have arisen between them.

While the second type is the Arbitration Clause, which is a clause in the foreign investment contract laying down that future disputes between the parties should be settled by arbitration.

It is noted that the Qatari legislator has equated the Arbitration Clause with the Arbitration Submission Agreement by expressing both types as "arbitration agreement" in accordance with the first paragraph of Article 7 of the Qatari Arbitration Law.

While Article (1442) of the French Code of Civil Procedure defines the arbitration clause as an agreement by which the parties to one or more contracts undertake to submit to arbitration disputes which may arise in relation to such contract(s). At the same time, the French legislator did not define the submission agreement.

That leaves us with the question regarding the relationship between the arbitration clause and the original contract, is the arbitration clause a simple clause among the other contract clauses? Or is it independent of the rest of the other contract clauses?

To answer the above question, most jurists see that the independence of an arbitration agreement means that the arbitration clause shall be considered a separate contract even though it is only part of the underlying contract or one of its clauses. The independence of the arbitration agreement is based on the fact that this agreement constitutes a contract within the other contract, i.e. the arbitration agreement constitutes a contract equivalent to the underlying contract. Therefore, if the arbitral tribunal decides that the contract containing the arbitration agreement to be non-existent, void and without effect, it does not render the arbitration agreement itself void or invalid.

Most national arbitration legislation has explicitly provided for the principle of the independence of an arbitration agreement in relation to the original contract, aiming to help the parties in reaching a speedy resolution of their investment disputes.

The Qatari legislator adopted the above opinion in the first paragraph of Article (16) of the Qatari Arbitration Law No. 2 of 2017, which stipulates: "The arbitration clause shall be considered as an agreement independent of the other clauses of the contract. The nullity, rescission or termination of the contract shall have no effect on the arbitration clause contained therein, as long as the clause is itself valid."

Accordingly, the underlying contract may be invalid and the arbitration clause can still remain valid, unless the cause of invalidity or avoidance also includes the arbitration clause, for example, if the contract had been concluded by an incompetent person.

Also, the invalidity of the arbitration clause does not affect the validity of the underlying contract, however, if the parties clearly state that the arbitration clause shall be material to their satisfaction with the rest of the contract clauses (i.e. for the conclusion of the contract), then the invalidity of this clause shall invalidate the contract.

Although the French law was devoid of any provision regarding the independence of the arbitration clause, the French judiciary had been keen to highlight such principle in several judgments. One of which was the judgment rendered by the French Court of Cassation in 1982, which stated that in international arbitration, the arbitration clause is fully independent from the underlying contract. In addition, the judgment rendered by the same court in 1993 which stated that the independence of the arbitration clause from the underlying contract had become a material rule of French law.

IMPACT OF THE ARBITRATION CLAUSE ON THE JUDICIAL AND EXECUTIVE IMMUNITY OF THE HOST STATE

A State party to investment contracts involving a foreign element may sometimes seek to evade arbitration by leveraging its immunity as a sovereign State from being subject to the jurisdiction of a foreign State, in order to argue that it may not be subject to arbitration. One of the established principles of public international law is that, based on the concept of sovereignty and equality of States, each State enjoys judicial immunity vis-à-vis the jurisdiction of foreign States, in the sense that disputes to which the State, or one of its affiliated public legal persons, is a party may only be examined by the judiciary of that State, which means that foreign States have no jurisdiction over such disputes, whether formal or arbitrary.

Hence the seriousness of judicial immunity in foreign investment contracts. How can an arbitration agreement be one of the guarantees that a foreign investor relies on in contracting with the host State or its representative, when the latter can invoke its judicial immunity? This is therefore a breach of the fundamental conditions on which the contractual relationship is based, which necessitates the accountability of the State.

However, arbitration has a special feature as it is based on the will of the parties. Therefore, as the State inserts the arbitration clause in the contract from its own free will, it waives its judicial immunity by accepting the insertion of the arbitration clause.

Thus, the host State that agrees on arbitration to settle disputes arising from the contract concluded with the foreign investor may not

invoke its judicial immunity before the arbitrator or arbitral tribunal.

An arbitration agreement is a special form of justice that is not subject to the authority or immunity of any State and therefore does not constitute an infringement on the sovereignty of the State party to the dispute. Moreover, the State enters into that legal relationship on its own will, under a law that allows it to do so, with its prior consent, and without any pressure or coercion.

As for executive immunity, it means that the arbitral award is not affected by the legislation issued by the State that may affect in one way or another, the fairness of such award.

The effects of the arbitration agreement accepted by the State must also include the enforcement of the arbitral award, in order to reach stable dealings and effective arbitration agreement, as the acceptance of the arbitration by a State despite its immunity would be meaningless if it could leverage its immunity to suspend the enforcement of the arbitral award.

One of the awards granted in this regard is the arbitral award granted in case No. 3879 of 1984 under the International Chamber of Commerce. The facts of that case are summarized in that in 1975, Egypt, Saudi Arabia, United Arab Emirates and Qatar concluded an agreement for establishing the Arab Organization for Industrialization (AIO), the object of which was the development of an arms industry for the benefit of the four states. AIO concluded a contract with the English company named Westland Helicopters Limited to create a joint stock company for the purpose of manufacturing and selling "Lynx" helicopters. For this purpose, the English company Westland entered into a series of contracts with this company in 1978. However, in 1979, and based on the decisions of the Arab Summit held in Baghdad, the three states (Saudi Arabia, United Arab Emirates and Qatar) decided to end the existence of AIO starting from 1st July 1979, that a liquidation committee would be set up, and that all contracts concluded by them be null and void. As a result, the English company "Westland" submitted a request for arbitration to the ICC Arbitral Tribunal. Due to the absence of other parties in the arbitral proceedings, the Tribunal granted an interlocutory award that it had jurisdiction over the case and affirmed that, according to the prevailing concept, the conclusion of the arbitration agreement waives judicial and executive immunity.

LAW GOVERNING ARBITRATION AGREEMENT IN FOREIGN INVESTMENT CONTRACTS

In fact, the legal rules governing the process of settling disputes through arbitration are crucial and must be agreed upon if the parties to the dispute decided to resort to an arbitral tribunal. Parties to a dispute in foreign investment contracts resort to arbitration only to reach a successful solution that they may not receive if they decided to proceed with formal rules of national laws, as well as to avoid the possibility of disclosing the secrets of their disputes as the national judicial proceedings are public.

The established rule related to normal litigation proceedings is that they are subject to judge's opinion, however, arbitral proceedings are quite different. Arbitral proceedings are subject to the law of will and the rules agreed upon by the parties to the investment relationship. In case they do not agree on specific legal rules applicable to the investment dispute, then the arbitrator chooses the applicable rules, or chooses to apply the international trade law.

Law of Will governing the Arbitration Agreement in Foreign Investment Contracts

Most national legislation stipulates that the will of the parties to choose the law applicable to the investment dispute shall take precedence, as long as this does not deviate from the jus cogens of the States concerned or is not tainted by fraud towards the law that was to be applied to the subject matter of the dispute.

Qatari law has adopted the principle of the law of will, giving the parties the freedom to agree on the procedural and substantive legal rules applicable to the arbitral dispute. As paragraph 1 of Article (19) of the Qatari Arbitration Law No. 2 of 2017 stipulates: "Subject to the provisions of this Law, the Parties may agree to the Arbitration procedures, including rules of evidence, which must be followed by the Arbitral Tribunal. They also have the right to subject these procedures to the rules in force in any Arbitration institution or Centre inside or outside the State."

Also, paragraph 1 of Article (28) of the same law stipulates: "The Arbitral Tribunal shall determine the dispute pursuant to the legal rules agreed by the Parties. If the Parties agree to implement the law or the legal system of a given state, only the substantive rules of that state shall be followed, but not the rules concerning conflict of laws, unless the Parties expressly agree otherwise."

The French Code of Civil Procedure, as well, adopted the same principle, as Article (1496) thereof stipulates: "The Arbitral Tribunal shall determine the dispute pursuant to the legal rules agreed by the Parties."

On that issue, some wonder whether the will of the parties should be explicit or implicit in investment dispute arbitration?

To answer this question, some jurists have argued that the will of the parties must be explicit and clear in order to perform its function in determining the rules of procedure. Implicit will be taken into account in the area of contracts, but it is the other way around in arbitration, given the importance of this issue in the conduct of the proceedings.

On the other hand, others see that the application of the law to procedural matters of arbitration does not only mean binding the arbitrator to the law expressly determined by the will of the parties, but also, giving the arbitrator the opportunity to disclose the law determined by the implicit will of the parties in the absence of their express choice. This is especially the cases where the parties omit to expressly define the law or have expressed it in unclear or inaccurate terms.

In our judgement, we support the first jurisprudential practice and believe that there should be an explicit and firm will to determine the law governing the arbitration agreement in foreign investment contract disputes in order to

avoid any confusion or ambiguity that may arise from the implicit will of the parties.

Arbitrator's freedom to choose the applicable law:

It may be difficult for the parties to agree on a particular law as each party wants to apply its own national law or a law of its own choosing. Since each party is ignorant of the legal provisions of the other party and both are ignorant of the provisions of any neutral law, they have no choice but to remain silent and not agree on the law applicable to the dispute.

In such case, the parties decide to give the arbitrator the freedom to determine the law applicable to the dispute.

The question now arises as to which law the arbitrator in foreign investment disputes will apply to the dispute?

In fact, there are two means of doing this, the first being the application of the conflict approach established in the law, and the second being the express and direct choice of the applicable law.

On the one hand, we prefer the second means because of the complexity and difficulty of resorting to conflict-of-laws rules to determine the applicable law. The conflict approach is bound to the law of the arbitrator's jurisdiction, whereas in foreign investment contracts there is no law of jurisdiction, and therefore is not required to follow this approach. On the other hand, one of the reasons that prompted the parties to resort to arbitration is to evade the issues that may result from conflict of laws to determine the law applicable to the dispute, and therefore the direct determination of the rules removes many problems.

In Qatar, paragraph 2 of Article (19) of the Qatari Arbitration Law No. 2 of 2017 stipulates: "The Arbitral Tribunal may, subject to the provisions of this Law, apply the procedures that it deems appropriate, including the authority of the Arbitral Tribunal to accept the evidence submitted and to assess the extent of its relevance to the subject of the dispute, its materiality and its weight, unless there is an agreement between the Parties regarding the determination of the Arbitration procedures in accordance with the previous paragraph of this Article."

Also, paragraph 2 of Article (28) of the same law stipulates: "If the Parties do not agree to the applicable legal rules, then the Arbitral Tribunal shall apply the law determined by the conflict of laws rules."

While Article (1054 / 2) of the French Code of Civil Procedure stipulates: "If the Parties do not agree to the applicable legal rules, then the Arbitral Tribunal shall apply the rules of law which it deems appropriate in the case."

Arbitrator's application of the international trade law:

In foreign investment contracts, the arbitrator

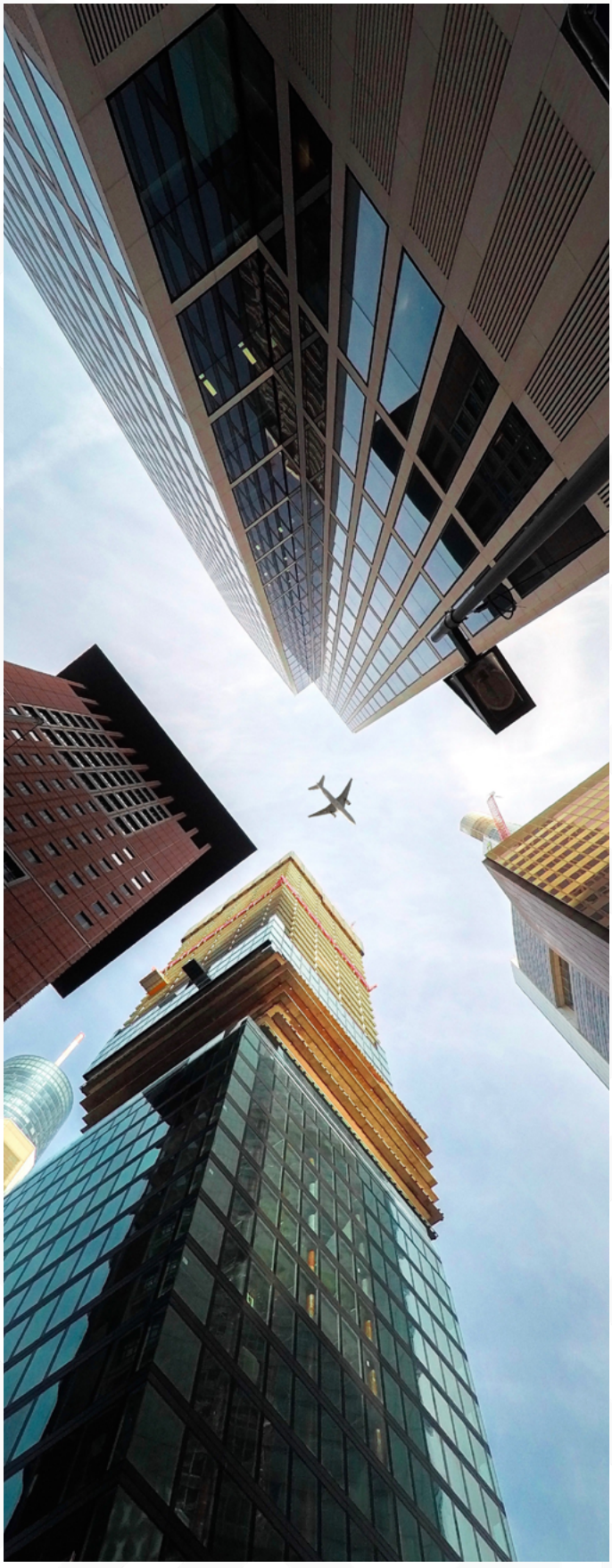
may find himself compelled to resolve the dispute based on rules of creation of international trade customs and traditions that are independent of national laws. This is due to the shortcomings of national laws and their different concepts, which would hinder the progress of international trade in general and foreign investment in particular, as principles and rules of national laws only covers internal relations.

Many national laws on arbitration have allowed parties who don't wish to apply a national law, to apply the provisions of international trade law. This means the set of principles and legal systems selected from all sources that have gradually nurtured and continues to nurture the legal structures and legal functioning of parties involved in international trade.

In this regard, Article (1496) of the French Code of Civil Procedure stipulates: "In any situation, the arbitrator shall take into consideration the commercial traditions."

Also, paragraph 4 of Article (28) of the Qatari Arbitration Law stipulates: "In any situation, the Arbitral Tribunal shall determine the dispute in accordance with the terms of the contract, and shall take into consideration the customs and commercial traditions followed in that type of transaction."

In this regard, it is worth noting the diversity of sources of international trade rules, which vary according to different areas of international trade. However, in foreign investment contracts, they may be limited to international agreements, the terms of the contract, and trade customs and traditions. The latter is the result of repeating certain customs characterized by professional specificity, which become established customs over time that the arbitrator resorts to in foreign investment contracts even if they conflict with a non-binding legal provision. This occurs as the arbitrator does not derive his jurisdiction from a particular national law, as he works without national jurisdiction attempting to draft his own law.



FORMAL PROCEDURES TO BE FOLLOWED IN THE ARBITRATION AGREEMENT IN FOREIGN INVESTMENT CONTRACTS

Upon the commencement of the arbitration proceedings, through the submission of a request for arbitration from the parties to the foreign investment contract, the process of forming the arbitral tribunal and defining the task entrusted to the arbitrators begins. Then the arbitrator or the arbitral tribunal start examining the arbitral process and the evidence and supporting documents provided by each of the parties to form its doctrine and understanding, in preparation for its adjudication. Originally, consideration of the arbitration process for foreign investment contract disputes should begin in the presence of the parties or mostly in the presence of representatives of their choice, however sometimes it may proceed in the absence of the respondent party who may refuse to participate in the proceedings, and also the plaintiff who may fail to attend the arbitral process.

Arbitration in general, arbitration in foreign investment disputes in particular, and national arbitration rules, does not prevent parties to the arbitration in investment contract disputes from appointing representatives on their behalf in the arbitration process. They have full freedom to do so with respect to their right to defend themselves, which is an inalienable and fundamental right of the parties to litigation and arbitration.

There are no restrictions regarding the representatives selected by the parties, and no certain requirements that a person must meet to act as a representative before the arbitral tribunal. Representatives may be lawyers, counsels, associate or any other person. However, the party wishing to appoint a representative should notify the other party of his intention in due time to allow the latter to also appoint a representative if he so wishes. Failure to give such notice gives the other party the right to request adjournment from the arbitral tribunal, who must agree, otherwise it may amount to a violation of the law.

This is what the Qatari Arbitration Law stipulates in paragraph 6 of Article (24): "Each Party to the dispute may appoint one lawyer or more to represent them, and may seek the assistance of experts or translators. The Arbitral Tribunal may, at any time, request proof from any Party that establishes the capacity bestowed upon its representative in accordance with the form required by the Law or determined by the Arbitral Tribunal."

In the second case, the respondent may refrain from responding to the plaintiff's claim and refuse to participate in the arbitral process, intending to evade his obligation under the arbitration agreement and placing obstacles in the way of arbitration. Hence, the arbitrator or arbitral tribunal has the right to continue considering the dispute and proceed with the rest of the proceedings until the award is granted even in the absence of the respondent.

Paragraph (B) of Article (25) of the Qatari Arbitration Law stipulates: "The Arbitral Tribunal shall continue the proceedings, if the Respondent fails to submit a statement of defence pursuant to Article 23(2) of this Law, without that being considered an acknowledgement from the Respondent of the Claimant's claims."

French law, on the other hand, made no reference to the issue of the respondent's failure to participate in the arbitral proceedings. Perhaps the reason for this is the desire of the French legislator not to consider the respondent's failure to participate in the arbitral proceedings as evidence of the validity of the

plaintiff's claims, but rather that the arbitrator must perform his duties as if the respondent is present without being influenced by the plaintiff's views.

If the plaintiff himself or his representative fails to appear, the respondent will not be able to continue the arbitral proceedings and the arbitration agreement shall be deemed waived by the plaintiff. Therefore the arbitrator or arbitral tribunal shall decide whether to terminate the arbitration proceedings and consider the request for arbitration as never existed, or to proceed with the arbitral proceedings even in the absence of the plaintiff.

Paragraph (C) of Article (25) of the Qatari Arbitration Law stipulates: "The Arbitral Tribunal may continue with the arbitral proceedings and determine the dispute, based on the evidence and elements of proof available to it, if any of the Parties fail to attend any of the hearings or to submit the requested evidence, documents or information."

It goes without saying that the arbitrator in foreign investment disputes does not adhere to the rules in force before national courts, but rather has broad powers when the parties do not agree on the rules to be enforced, which extend to evidence matters. The arbitrator has the power to verify the various documents and evidence presented and assess their impact on shaping the arbitrator's conviction towards the elements of the dispute. He may form his opinion in the arbitral proceedings based on documents, the testimony of witnesses, certain procedures, or by the assignment of one or more experts. In addition, he may, through the competent judicial court, order interim or provisional measures for the arbitral award to be granted.

CONCLUSION

Although it appears good at the beginning, the relationship between the foreign investor and the host state can quickly deteriorate as a result of the conflict of interest between both parties. Undoubtedly, investment contract disputes have a peculiarity resulting from the fact that such contracts are concluded between a public party represented by the State or one of its public institutions or bodies and a foreign private party. Hence, the fundamental problem that accompanies such contracts is how to reconcile the general objectives that the host state seeks to achieve with the interests and objectives of the foreign investor.

There is no doubt that arbitration in investment contract disputes has become an urgent necessity imposed by the new economic reality and an essential means to promote the economies of developing countries and achieve the desired development, especially since most companies insist on the arbitration clause in their contracts due to its great advantages compared to ordinary litigation procedures, as well as its confidentiality that preserves the reputation and interests of those companies. It also alleviates their concern about the national law of the host State. Arbitration has a fundamental characteristic, which is the principle of the autonomy of will, where the parties are free to agree on the law governing the arbitral proceedings or even the subject matter of the dispute.

Arbitration has become a requirement of international trade and investment, and a means of standing up to any action that harms the interests of the investor, especially with the recognition of the independence of the arbitration clause that shall continue in effect even if the underlying contract is avoided. It is also a means of standing up to actions that lead to the dispossession of the investor's property, and enabling the investor to obtain fair compensation, as the arbitration mechanism has generally indicated its limits in such proceedings. The arbitration system in international law has also established a fundamental rule that has increased its effectiveness in settling investment contract disputes. Namely, the futility of the host States invoking their laws, sovereignty or judicial immunity to evade their obligations with respect to the arbitration agreement they have already concluded of their own volition. All these characteristics have led to arbitration being one of the most optimal and effective means in settling investment contract disputes.

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