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ARBITRATION AS A DISPUTE RESOLUTION METHOD IN IRAQ AND INDIA  
(COMPARATIVE STUDY)

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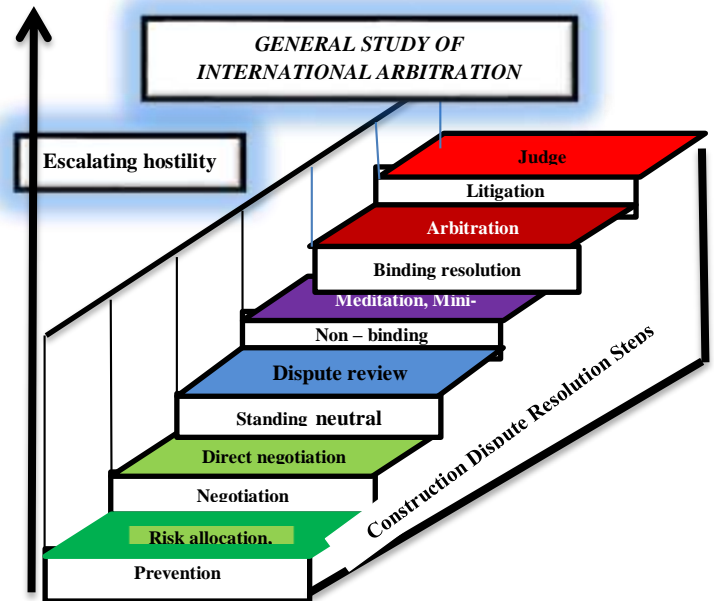
ABSTRACT

Construction projects are unique, limited for a specific period and accomplished with specifically created groups of experts. Additionally, construction projects can become complicated because of different attitudes; different areas of interests and because of the important issues of time, money and quality. Furthermore, globalization plays an always-growing role in the field of construction. Impacts of globalization can lead to two or even more parties from different countries accomplishing a project, sites all over the world and international employees. Considering all these influences, the appearance of disputes is no rarity.

**KEYWORDS:** Arbitration agreement, Independence of the Arbitration Clause, Appointment of Arbitrators, Procedural Law, Enforcement of the Award, Arbitration centers, cost and expenses, Iraq and India. .

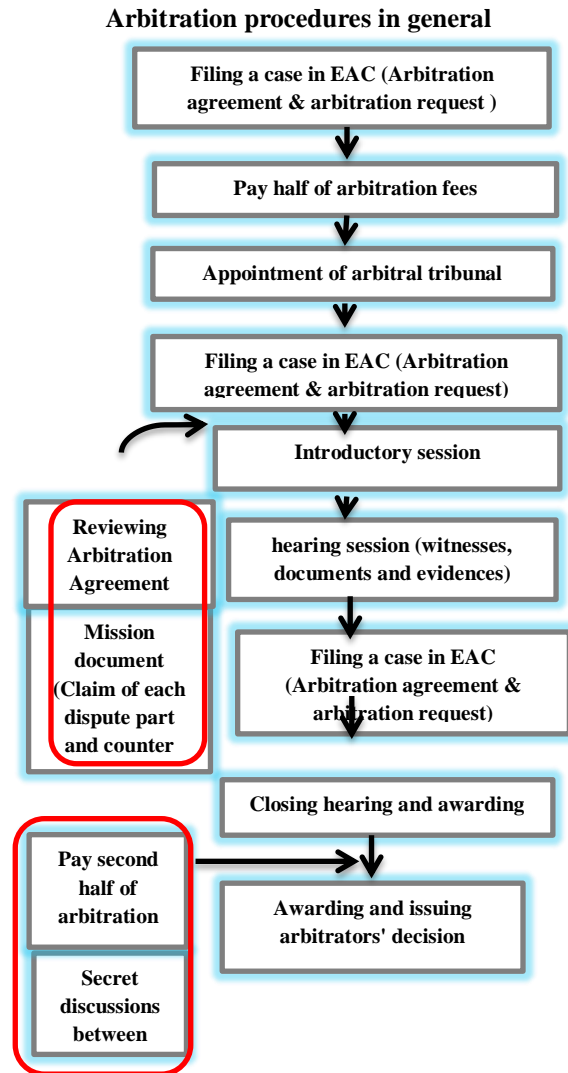
INTRODUCTION

Arbitration is the selected method of dispute resolution in almost all standard construction contracts. Compared to litigation; arbitration has a series of advantages that particularly makes it suitable for dealing with construction disputes. This study aims to evaluate and improve the Engineering Arbitration procedures as an alternative mechanism to solve disputes of delays in projects relating Iraq and India with a comparative study between those two countries. This aim is achieved by exploring the acceptance level of construction parties, identifying strengths and weaknesses in arbitration procedures and then suggesting improvements. In this research the engineering arbitration procedures in Iraq and India is investigated and compared to an international and regional arbitration institutions. Generally, the main aim of this study is to improve the engineering arbitration procedures in Iraq.



1-The steps are taken from ( Groton, as cited in Cheung, 1999)

2-The shane is designed by the searcher



**COMPARITIVE STUDY BETWEEN IRAQ AND INDIA (PARAMETERS)**

**1- Arbitration Agreement**

**INDIA**

The provisions of the Arbitration & Conciliation Act, 1996, govern arbitration in India ('the Act'). The Act provides that an arbitration agreement may be in respect of any or all disputes that have arisen or that may arise, in respect of a defined legal relationship, whether contractual or not. The Act further provides that an arbitration agreement may be in the nature of an arbitration clause in a contract, or a separate agreement between such parties.

**IRAQ**

Article 251 of the CCP provides that an agreement on arbitration may be made in relation to a specific or existing dispute as well as in relation to future disputes, which may arise from a contract. An

agreement on arbitration may be made as a clause in the contract or as a separate contract, except in insurance policies where an arbitration agreement must be in a form of a separate contract.

**2- Independence of the Arbitration Clause**

**Iraq**  
 A question arises as to whether an arbitration clause remains valid and effective if the main contract is not valid or becomes invalidated. There is no provision in the Iraqi law on this matter. However, it can be assumed that the arbitration clause is independent from the main contract, and the invalidity of the main contract does not necessarily invalidate the arbitration clause. This assumption is based on article 139 of the Civil Code, which states that in case of an invalidity of a provision of a contract, such invalidity does not affect the rest of the contract, unless the invalid provision was the basis of the agreement.

**India**

The Indian law of arbitration contained in the Arbitration and Conciliation Act 1996 (Act) provides that the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. The arbitration agreement shall be deemed independent of the contract containing the arbitration clause, and invalidity of the contract shall not render the arbitration agreement void. Hence, the arbitrators shall have jurisdiction even if the contract in which the arbitration agreement is contained is vitiated by fraud and/or any other legal infirmity.

**3- Appointment of Arbitrators**

**Iraq**

There are no qualifications required for the arbitrators, but they must be impartial and must possess full legal capacity. Also, there is no provision excluding the appointment of non-Iraqi arbitrators, therefore it is possible to appoint foreign arbitrators and foreign experts in arbitration proceedings in Iraq. In fact, in a dispute arising from a contract between the Iraqi Construction Company and the dissolved Reconstruction Council of Iraq, the dispute was referred to a single foreign arbitrator chosen by the parties. The decision of the arbitrator was subject to an appeal on other grounds, and was approved by the Court of Cassation as correct and binding.

The number of the arbitrators and the method of their appointment are subject to the agreement of the parties, but the number of arbitrators must be an uneven number. If to appoint one or more arbitrators. The decision of the court to disqualify an arbitrator is subject to an appeal as stated in article 261 of the CCP.

Furthermore, the presence of such reasons (of disqualification) can be held as a reason for repealing any arbitral decision taken by such disqualified arbitrator or arbitrators.

#### **India**

The Act allows full freedom to the parties in the matter of appointment of arbitrators. However, if there is a failure of the parties, agreed mechanism for appointment, the Chief Justice of a High Court (in the case of a domestic arbitration) or the Chief Justice of the Supreme Court of India (in the case of an international commercial arbitration) may be approached for this purpose. This is the first instance in which the Act envisages recourse to a court in relation to arbitration proceedings.

In exercise of the powers conferred by the 'Arbitration and Conciliation Act, 1996' and upon considering the 'Scheme for Appointment of Arbitrators by the Chief Justice of Kerala, 1996', the High Court of Kerala hereby stipulates the following eligibility criteria for being considered for inclusion in the panel of Arbitrators maintained by the High Court:

1. The minimum age for empanelment shall be 45 years as on the 1st January of the year in which the application is submitted.
2. The applicant should have a minimum practice of 15 years at the Bar or in the profession or technical field on the date of application.
3. Applicant should be an income tax assessee.

#### **4- Procedural Law:**

Law of arbitration as it has developed globally recognizes that there is a difference between the law of contract and the law governing the conduct of the Arbitral Tribunal. Parties are empowered to nominate which national laws will govern either or both these divisions.

##### **Iraq**

###### **A) Procedural Law:**

According to article 265 of the CCP, arbitration, which takes place in Iraq, should apply the rules of procedure laid down in the CCP, unless otherwise agreed by the parties. In other words, the parties to an arbitration agreement are free to choose other sets of procedural rules, such as the UNCITRAL Arbitration Rules. The parties may also agree to exclude the procedural rules of CCP, which are not of a compulsory nature, and apply other rules as long as such rules are not contrary to Public Order and morals.

###### **B) Substantive Law:**

As to the substantive law, the arbitrator must apply the applicable law to the contract in question. In an Iraqi contract between two Iraqi parties, or in a contract

subject to the Standard General Conditions referred to before, the Iraqi law will apply to the dispute. But, the question arises as to whether it is possible to apply a foreign law to an arbitration which takes place in Iraq. The answer to this question can be derived from the provisions of article 25 of the Civil Code, 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 different domiciles 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."

From the above, it is understood that in a contract, where the domicile of one party at least is outside Iraq, the parties may choose a law other than Iraqi law, provided, however, that the application of such a foreign law is not contrary to Public Order or morals. However, a foreign law would be applicable only to the extent that it is not contrary to Public Order and morals.

#### **India**

The Arbitration and Conciliation Act 1996 (hereinafter called A&C Act) applies to arbitrations, which are held in India between Indian nationals and to international commercial arbitrations whether held in India or out of India. Part I of the A & C Act covers all hues of international commercial arbitration. The Supreme Court in its various judgments has held that the provisions of Part I of the Act would apply to all arbitrations including international commercial arbitrations and to all proceedings relating thereto. Further, where such arbitration is held in India, the provisions of Part I would compulsorily apply and the parties are free to deviate to the extent permitted by the provisions of Part I. In the case of international commercial arbitrations held out of India, provisions of Part I would apply unless the parties by agreement, express or implied exclude all or any of its provisions.. Therefore, a question arises as to whether part I of the A & C Act is excluded either expressly or impliedly by choosing procedural law other than A & C Act for conducting arbitration proceedings.

#### **6- Enforcement of the Award**

##### **Iraq**

After the arbitrators have rendered the award, the parties may voluntarily enforce the award, and thus bring an end to the dispute. But, often one party is not satisfied with the award or wishes to gain time. The

arbitral award is not res judicata and cannot be enforced without a decision of the competent Iraqi court, according to article 272 of the CCP. The court would normally subject the award to thorough and detailed examination from the point of view of form and law.

For the purpose of enforcement, one party must apply to the competent court to confirm the award. Once the award is confirmed by the court, it becomes final and enforceable res judicata judicial decision provided the parties make no further appeal.

The court, in accordance with the provisions of article 274 of the CCP, may either approve the arbitration award or reject it in whole or in part. In the latter case, the court may refer the matter back to the arbitrator to rectify the rejected part of the award or issue a new decision. The court may also decide to adjudicate the case itself. The aforementioned decision of the court confirming or rejecting the arbitration award is subject to appeal to a higher court in accordance with the CCP rules of appeal. Obviously, this would delay the settlement of the dispute even longer, and would frustrate the concept behind arbitration.

#### **India**

A foreign arbitral award is enforceable in India when on application to the Indian court is made at appropriate jurisdiction and where the court is satisfied that the foreign award is enforceable under chapter I of part II of the Arbitration and Conciliation Act, 1996, the award shall be deemed to be a decree of that court. This brings us to Part II of the Act. The Act provides for enforcement of both the New York Convention awards and the Geneva Convention awards vide Part II thereof. India is not a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 ('Washington Convention') or indeed any other convention or treaty pertaining to enforcement of foreign arbitral awards.

For the purposes of this article, we deal with the provisions relating to the New York Convention alone (since the provisions pertaining to the Geneva Convention are now otiose)

### **7- ARBITRATION UNDER LAW OF**

#### **Iraq**

Iraq is a civil law system and its laws have been subject to constant and significant change in recent years. Many laws and regulations have been issued which have relaxed the legal environment and made it easier for foreigners to invest and operate in the country. Iraq has explicitly endorsed the use or arbitration by investors (see article 27 of Investment Law 2006), as well as the use of arbitration in relation

to government contracts (see article 11 of Regulation No.1 of 2008 'Regulations for Implementing Government Contracts'). The law relating to arbitration however has remained largely untouched. It does not exist as a freestanding law but can be found in articles 251 – 276 of the Code of Civil and Commercial Procedure 1969. The arbitration law is not modern and in parts is very different to the UNCITRAL Model Law on International Commercial Arbitration which is used in many countries around the world

#### **India**

India is a common law system and The Arbitration and Conciliation Act of 1996 ("ACA") was introduced in India to consolidate the laws relating to domestic as well as international commercial arbitration. With its enactment, the Indian Arbitration Act 1940 — a legacy of colonial British was wholly repealed.

The ACA adopted the Model Law for international arbitrations, with a few variations. It also adopted the UNCITRAL Arbitration Rules 1976, the UNCITRAL Conciliation

Rules 1980, and the provisions of the New York Convention as regards recognition and enforcement of foreign arbitral awards.

### **8- ARBITRATION CENTERS**

#### **Iraq**

Parties do not have to use an arbitration center to assist with the arbitral process, but it is recommended. In Iraq, there are no restrictions on which center can be used, so parties can choose international centers (ICC, LCIA) or regional ones (DIFC-LCIA, BCDR-AAA, and CRCICA).

Iraq does have two national centres: the Federation of the Chambers of Commerce Arbitration Centre and The International Commercial Arbitration Centre Najaf. Both centers will accept international as well as domestic disputes, although at present neither center has any cases. Until these centers have a regular caseload of complex cases and a track record, it is unlikely that they will be used by non-Iraqi parties.

#### **India**

The justice providing system in India has come under great stress for several reasons, chief of them being the huge pendency of cases in courts underlining the need for Alternative Dispute Resolution (ADR) methods. The Government of India thought it necessary to provide a new forum and procedure for resolving international and domestic commercial disputes quickly, so you can find many arbitration centers and institutes in many places in India, for example:

Indian Council of Arbitration.

Indian Institute of Arbitration & Mediation

Delhi International Arbitration Centre (DAC)

International Centre of Alternative Dispute Resolution (Working under the aegis of Ministry of Law & Justice, Department of Legal Affairs Government of India, New Delhi) (ICADR)  
 Construction Industry Arbitration Council (CIAC) (Delhi)  
 Construction Industry Development Council, India (CIDC)  
 Indian Merchants' Chamber (IMC)

**9- Costs and Expenses**

**Iraq** (according to: International Commercial Arbitration Center)

**FIRST: Arbitration Fees**

No	The Dispute Amount	Rate of Arbitration Fees	Amount of Arbitration
1	Less than 50,000\$	3% 1,500\$	1000 \$ minimum
2	50,000 – 100,000\$	2.5% 1,250 - 2,500\$	
3	More than 100,000\$	2% 2000\$ and more	

**SECOND: Arbitrators Fees**

No	The Dispute Amount	Rate of Arbitrators Fees	Amount of Arbitrators fees	Amount of Arbitration
1	Less than 50,000\$	10%	5,000 \$	3000 \$ minimum
2	50,000 – 100,000\$	8%	5,000 \$	
3	100,000 – 250,000 \$	6%	8,000%	

4	More than 250,000 \$	5%	15,000\$	
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**India** - (according to Indian Council of Arbitration) **FIRST**

1) Registration fees: shall be a payable with regard to the amount in dispute in each case as hereunder. The registration fee shall not be refunded and becomes the property of the council.

- a) Rs.10, 000 / less than Rs. One crore
- b) Rs.20, 000 / more than Rs. One crore

2) Administrative Fee and Arbitrator's fee:

The Administrative fee of (ICA) and Arbitrator's fee (for each arbitrator) will be fixed separately with regard to the amount in dispute including determined interest in each case as under:

	Amount in Dispute	Arbitrator's Fee	Administrative Fee
1	1- Up to Rs.5 lac (Rs. 500,000)	Rs. 30,000 /...	Rs. 30,000 /...
2	From Rs.5 lac one to Rs. 25 lac (Rs. 500,001 to 2,500,000)	Rs. 30,000 / plus Rs. 1,500/ per lac or part therefore subject To a ceiling of Rs.60, 000/..	Rs. 30,000 / plus Rs. 1,500/ per lac or part therefore subject To a ceiling of Rs.60, 000/..
3	From Rs.25 lac one to Rs. 1 crore (Rs. 2,500,001 to 10,000,000)	Rs. 60,000 / plus Rs. 1,200/ per lac or part therefore subject To a ceiling of Rs.1, 50, 000/..	Rs. 60,000 / plus Rs. 1,200/ per lac or part therefore subject To a ceiling of Rs.1, 50, 000/..

	Amount in Dispute	Arbitrator's Fee	Administrative Fee
4	From Rs.1 crore one to Rs. 5 crore (Rs. 10,500,001 to 50,000,000)	Rs.1, 50, 0000 / plus Rs. 22,500/ per lac or part therefore subject To a ceiling of Rs.2, 40, 000/..	Rs.1, 50, 0000 / plus Rs. 22,500/ per lac or part therefore subject To a ceiling of Rs.2, 40, 000/..
5	From Rs.5 crore one to Rs. 10 crore (Rs. 50,500,001 to 100,000,000)	Rs. Rs.2, 40, 000/ plus Rs. 15,500/ per crore or part therefore subject To a ceiling of Rs.3, 15, 000/..	Rs. Rs.2, 40, 000/ plus Rs. 15,500/ per crore or part therefore subject To a ceiling of Rs.3, 15, 000/..
6	Over Rs.10 crore (Rs.1,00,000,000)	Rs. Rs. 3, 15, 000/- plus Rs. 12,500/ per crore or part therefore	Rs. Rs. 3, 15, 000/- plus Rs. 12,500/ per crore or part therefore

**Conclusion:**

The judicial power of most countries does not meet the minimum standards to efficiently solve international trade related disputes. This is another good reason why international arbitration has been increasing. In sum, arbitration already has a very important presence in today's society, and all the trends point to a bigger presence in the future.

For Iraq, in order to attract foreign investment, it is of utmost importance to join the 1958 New York Convention, and to make the necessary legislative amendments in its present laws in order to facilitate enforcement of foreign court judgments and arbitral awards. Because of the strong relationship between law issues and construction engineering details, most engineers incur for legal accountabilities during and after the project. It is strongly recommended that some related clause of law to be taught in universities to make the students of engineering aware of arbitration importance, which may subsequently the reputation of the engineer. The Iraqi legislator dealt with rules of arbitration in Code of Civil Procedures (CCP) of 1969, no. 83, articles 251–276. Judicial precedents will be mainly the Iraqi Court of Cassation. The 1973 law no. 43, which created the Iraqi Chambers of Commerce, allows these chambers to act as arbitrators in commercial disputes with the parties' consent.

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