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Arbitrability of Foreign Investment Disputes in Iranian Law with a Glance to IPCs

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ABSTRACT

The issue of arbitrability in foreign investment treaties poses ongoing challenges for both host nations and foreign investors. Iranian law imposes constitutional constraints on resorting to arbitration, in addition to the provisions outlined in international commercial arbitration regulations. Persistent issues revolve around the requirement of parliamentary ratification of arbitration, the timeframe for such ratification, and the applicability of pre-existing doctrines to treaties concluded prior to the ratification of the Constitution. Despite the fact that Iranian Petroleum Contracts (IPCs) are among the most important foreign investment contracts in Iran, their intricacies create additional challenges. This article examines the legal theories and practices surrounding the arbitrability of contracts in the field of foreign investment, with a specific focus on IPCs, using a descriptive-analytical approach. At the end, Findings reveal that from a domestic standpoint, parliamentary approval must precede the signing of any treaty. The same approach can also be applied to IPCs However, this paper argues that this requirement does not apply to treaties enforced prior to the enactment of the Iranian Constitution. This approach finds support in existing laws and precedents established by the Iranian Court of Administrative Justice.

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Introduction

Arbitration serves as a widely utilized mechanism for resolving disputes within the realm of international law, particularly in the context of international investment agreements. However, certain developing nations harbor concerns that the utilization of arbitration may empower foreign investors to circumvent the jurisdiction of local courts. In Iranian law, Article 139 of the Constitution establishes several conditions that must be scrutinized in relation to arbitration.

Article 139 stipulates that, "[t]he settlement of claims relating to public and state property or the referral thereof to arbitration is in every case dependent on the approval of the Council of Ministers, and the Assembly must be informed of these matters. In cases where one party to the dispute is a foreigner, as well as in important cases that are purely domestic, the approval of the Assembly must also be obtained. Law will specify the important cases intended here."[1]

This paper examines decisions rendered by the Iranian Court of Administrative Justice,[2] the interpretive awards asserted by the Guardian Council,[3] and developments in constitutional law. After clarifying the concept of arbitrability and exploring the status quo, the paper delves into contemporary theories and perspectives. This analysis specifically focuses on the evolving landscape of Iranian oil contracts, particularly those falling under the purview of the new Iranian Petroleum Contract.[4]

1. The Conceptualization of Arbitration

Arbitration has been defined in a variety of ways, such as: "A method of settling disputes by private parties who agree to submit their differences to a third person or persons for final and binding determination"[5] a process for the resolution of disputes by one or more persons, called arbitrators, selected by the parties to the dispute or by an independent institution."[6] or "any arbitration

1 . Retrieved from https://irandataportal.syr.edu/wp-content/uploads/constitution-english-1368.pdf, accessed on February 19, 2024.
2 . ICAJ.
3 . GC
4 . IPC.
5 . Bryan Garner, Black's Law Dictionary (11th ed. St. Paul MN: Thomson Reuters 2019) 128.
6 . International Chamber of Commerce, International Court of Arbitration, Rules of Arbitration, 2022, Art. 1.

relating to differences between parties arising out of a legal relationship, whether contractual or not, whether commercial or not."[1] Similar definitions also exist in Iranian law. Arbitration is a well-established and widely used method of dispute resolution in Iranian law. It is governed by several laws, including the Civil Procedure Code,[2] the International Commercial Arbitration Act,[3] and the Arbitration Rules of the Iran Chamber of Commerce, Industries, Mines and Agriculture.[4] The Civil Procedure Code of Iran (CPC) provides the basic framework for arbitration in Iran. The CPC defines arbitration as "the process by which the parties to a dispute agree to submit their dispute to the decision of one or more arbitrators."[5] The CPC also sets out the requirements for a valid arbitration agreement, including the need for a written agreement signed by both parties that specifies the subject matter of the dispute and the number of arbitrators.[6]

The International Commercial Arbitration Act of Iran (ICA) provides for the specific rules governing international arbitration in Iran. The ICA is based on the UNCITRAL Model Law on International Commercial Arbitration. It applies to arbitrations that have a "commercial" element and provides for the enforcement of foreign arbitral awards in Iran. The Arbitration Rules of the Iran Chamber of Commerce, Industries, Mines and Agriculture (ICC Rules) are the most used rules for arbitration in Iran. These rules are based on the UNCITRAL Arbitration Rules and offer a flexible and efficient process for resolving disputes. They also provide for the appointment of arbitrators, the conduct of arbitration, and the issuance of arbitral awards.

2. The Conceptualization of Arbitrability

Arbitrability in international law refers to the determination of whether a specific dispute is eligible for resolution through arbitration. This concept is fundamental in international arbitration and is primarily rooted in the principle of party autonomy, which empowers parties to opt for arbitration as their preferred mechanism for dispute resolution. [7]

Nevertheless, instances exist where the arbitrability of a dispute may encounter challenges or be contested within the realm of international law. The following are common scenarios where arbitrability issues may arise:

1. Mandatory Legal Requirements: Certain disputes are deemed non-arbitrable due to their association with matters subject to compulsory legal requirements or considerations of public policy. [8] For instance, disputes involving criminal matters, specific

1 . United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, Art. 1(1).
2 . Civil Procedure Code: available at https://ameliarbitration.com/wp-content/uploads/2021/07/Ameli-Iranian-Civil-Procedure-Code-on-Arbitration-trans.pdf, accessed on February 19, 2024.
3 . Iran International Commercial Arbitration Act (available at https://www.international-arbitration-attorney.com/wp-content/uploads/2022/09/Iran-Arbitration-Act.pdf, accessed on February 19, 2024.)
4 . Arbitration Rules of the Iran Chamber of Commerce, Industries, Mines and Agriculture: available at https://rezvanianinternational.com/wp-content/uploads/2019/02/Arbitration-Rules-of-the-Arbitration-Center-of-Iran-Chamber-www.oveisrezvanian.pdf, accessed on February 19, 2024.)
5 . CPC, Art. 454.
6 . Ibid, Art. 454-501.
7 . See Stephen Makau, The Application of the Principle of Arbitrability and Public Policy in International Commercial Arbitration (July 29, 2022). Available at http://dx.doi.org/10.2139/ssrn.4176183, pp. 7-9.
8 . See Penny Madden, Ceyda Knoebel, Besma Grifat-Spackman, 'Arbitrability and public policy challenges' Global Arbitration Review 4-8, Retrieved from https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/2nd-edition/article/arbitrability-and-public-policy-challenges, accessed on February 19, 2024.

family law issues, or antitrust violations might be regarded as non-arbitrable in many jurisdictions due to public policy concerns.

2. 2. Third-Party Rights: Situations may arise where third parties, not signatories to an arbitration agreement, possess rights or interests in a dispute. Questions may emerge regarding the binding nature of these third parties to the arbitration agreement and the arbitrability of their rights.[1]
3. 3. Jurisdictional Challenges: Arbitrability may face challenges on jurisdictional grounds, where parties contest the validity or scope of the arbitration agreement itself. Arguments may be presented asserting the invalidity of the arbitration clause due to fraud, duress, or unconscionability.[2]
4. 4. State Involvement: When a dispute involves a state or state entity, uncertainties may arise concerning the state's consent to arbitration. Some states might assert sovereign immunity as a defense, contending that arbitration cannot be imposed upon them without explicit consent.[3]
5. 5. Public Policy Concerns: Arbitrability may be contested based on public policy grounds. Should the enforcement of an arbitration agreement contravene a fundamental public policy, a court may decline to compel arbitration.[4]
6. 6. Exclusivity of Certain Forums: Certain disputes may fall under the exclusive jurisdiction of specific national courts or international tribunals. In such instances, parties may be precluded from resolving their dispute through arbitration.

In Iran, certain legal practitioners perceive the concept of arbitrability in a broad sense, employing the term "arbitrability capability" to discuss governmental limitations arising from a lack of capacity.[5] Some have even gone further and stated that in any case where an arbitration agreement is not enforceable, there is no arbitrability.[6] However, these interpretations of arbitrability are inaccurate. Contrary to the beliefs of many scholars and experts in the field of arbitration, arbitrability is confined to the referral of specific disputes to arbitration.[7] Consequently, delving into other restrictions on the arbitrator's authority under this title is not feasible, even if similar outcomes are yielded. Comparative law scholars have categorized arbitrability into subjective and personal, further dividing subjective arbitrability into absolute and relative. [8] Arbitrability pertains to the limitations each country imposes on using arbitration to resolve particular disputes, safeguarding its unique interests. These constraints may vary over time and

1 . See Garry Born, 'Chapter 5: International Arbitration Agreements: Non-Signatory Issues' in Gary B. Born (ed), International Arbitration: Law and Practice (3rd ed.) (Kluwer Law International 2021) 116-119.
2 . William Rowley, The Guide to Challenging and Enforcing Arbitration Awards (London: Law Business Research Ltd 2019) 43.
3 . Penny Madden, op.cit, 8.
4 . Rowley, op. cit, 33.
5 . Javad Seyedi, 'Referability in International Commercial Arbitrations' (master's thesis Shahid Beheshti University 2011) 26. lleana M. Smeureanu, confidentiality in international commercial arbitration in international arbitration law library (Kluwer 2011).
6 . Javad Seyedi, op. cit, 26; Loukas A. Mistelis, Arbitrability: International and Comparative Perspectives (Vol 19, Hague: Kluwer Law International 2009) 3.
7 . Pierre Mayer, Audley Sheppard, 'Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003)19 Arb Int'1249, 255.
8 . La'ya Joneidi, Nastaran Ghiyasvand Qazvini, 'Arbitrability in the Legal System of Iran with Emphasis on Judicial Process' (2017) Vol 4 Issue 8 Journal of Comparative Law 26-31.

among communities, establishing the boundaries of free will in choosing a conflict resolution system.

In the realm of international law, jurists and attorneys have sought to define arbitrability.[1] One jurist posits that the question of arbitration referral serves as the nexus between the contractual and jurisdictional facets of international arbitration.[2] Consequently, arbitrators, irrespective of the contractual basis for their authority, may apply legal norms akin to national courts. To comprehend the origins of arbitration, the term "referring to arbitration" is employed. Though grounded in the parties' volition, this concept must not transcend the scope of legal statutes and restrictions. For the enforcement of arbitration, the parties' consent must be legitimate and legal. Two considerations arise in assessing the legality of this agreement:

1. Does the contract pertain to a matter amenable to arbitration?
2. Can the parties to the contract submit their dispute to arbitration? [3]

Thus, referability to arbitration encompasses two categories: objective (subjective) arbitrability and personal arbitrability. Objective arbitrability assesses whether the dispute can be arbitrated without violating legal rules or jurisdictional procedures.[4] Personal arbitrability examines whether the characteristics and powers of the parties permit them to refer specific disputes to arbitration.

3. Overview of Iran's New Oil Contracts

In this section we will have a brief look at two of the most important subjects in the field of oil contracts regarding Iran.

3.1. Legal Nature of IPC Contracts

The novel structure of the newly introduced oil contract model, known as the IPC, represents a paradigm shift towards a risk-based service agreement. Service contracts, recognized as one of the earliest forms of contractual engagements between individuals and communities, manifest in three distinct categories: pure service contracts, risk-based service contracts, and buyback service contracts. In the realm of risk-based service contracts, the contractor assumes the obligation of allocating financial resources, executing exploration and development operations, and bearing all associated risks during this phase. remuneration for services and loan repayments is fulfilled through cash payments or the resale of oil extracted from the field upon reaching commercial production. Consequently, given the nature of the oil company's commitment to the outcome, where commercial production does not materialize, the company is not entitled to reimbursement or cost refund. These contracts additionally stipulate the contractor's active involvement in the production phase. To facilitate the transfer of technical expertise and enhance domestic capabilities, an

1 . lleana M. Smeureanu, Confidentiality in international commercial arbitration (international arbitration law library Vol 22, Kluwer 2011).
2 . Loukas A. Mistelis, Arbitrability: International and Comparative Perspectives (Vol 19, Hague: Kluwer Law International 2009) 3.
3 . Philippe Fouchard, Berthold Goldman, Fouchard, Gaillard, Goldman on International Commercial Arbitration, (Hague: Kluwer Law International 1999) 312.
4 . Stephen W. Makau, 'The Application of the Principle of Arbitrability and Public Policy in International Commercial Arbitration' (July 29, 2022) SSRN, < https://ssrn.com/abstract=4176183>

indigenous company, endorsed by the National Iranian Oil Company, is initially designated as a technical partner alongside the foreign contractor. The principal distinguishing features of these contracts, in comparison to buyback contracts, encompass their protracted duration and the contractor's sustained presence throughout the production phase.

3.2. Changes in IPC Contracts Compared to Buyback Contracts

In Iran's oil contracts, efforts have been undertaken to address the deficiencies observed in buyback contracts. The new contractual model involves contractors in all three stages of exploration, development, and production. While previous contracts typically spanned 5 to 7 years, the duration has now been extended to approximately 25 years. The profit rate for international companies is also subject to flexibility and negotiation based on field risk. However, a crucial distinction between these contract generations lies in the potential inclusion of reserves in contractors' asset lists, a privilege reserved for joint fields or those deemed high-risk. Constitutionally and under Sharia law, oil reservoirs constitute part of the public resources and are State-owned, a feature evident in buyback contracts. Yet, in the new contracts, specifically in priority projects, excluding joint and high-risk fields where time sensitivity is paramount, contractors may register reserves, not fields, in their asset lists.

In addition to these amendments, the government's resolution on IPCs incorporates further measures to mitigate the issues associated with buyback contracts:

A: According to Article 8, there is no ceiling on capital expenditures, rendering IPC an 'OPEN CAPEX.' The annual determination of capital expenditure is delegated to the joint management committee under the annual operational financial plan.

B: Article 10 of the Resolution stipulates that all costs and bonuses will commence repayment from the time of initial production, with the repayment period outlined in the contract being neither fixed nor rigid. According to Article 3(c), if the production-assigned amount for cost repayment (up to 50% of the field's products) during the contract period proves insufficient, the outstanding expenses will be repaid over an extended period defined in the contract. Moreover, according to Article 6(p), the conclusion of the contract does not preclude the settlement of remaining costs under the conditions specified in the contract. Based on Article 10, in case of initial production, the National Iranian Oil Company (NIOC) is obligated to start repaying costs. If initial production is achieved and the contractor obtains permission to invest in the annual operational financial plan to achieve additional production over the initial production, and these costs are incurred during that year but the desired production is not achieved, NIOC will still be obligated to repay them from the 50% of the initial production.

C: In IPCs, the return on investment for the contractor is not specified and therefore no limitation is imposed on the contractor in this regard. Based on Article 1, it is not clear to what items the financing costs are related. It should be noted that the government resolution is the basis for action, not the draft contracts. The Ministry of Petroleum can design and implement various types of contracts from the authorizations it receives in the government resolution. Given that the return on investment for the contractor is not specified, the bank interest rate and the costs to which the financing cost is related are crucial and have a significant impact on the

profitability of the project for the contractor. The government resolution does not specify this matter and has authorized the negotiating team to decide in this regard.

D: Bonuses are dependent on production, and based on Article 6(b) of the Resolution, even the amount of bonus is proportional to the oil price.

4. Resolving Disputes in Iran's Oil Contracts

In this part we will examine two important factors in resolution of oil disputes with regard to Iran's oil contracts.

4.1. Conditions for Arbitration in IPC Contracts

Due to the confidential nature of IPCs, comprehensive information regarding their terms is not available. Article 14 of the Iranian Council of Ministers' Resolution on Upstream Oil and Gas Contracts, known as IPC, approved in 2016 and subsequently amended, stipulates that:

"In addition to observing the explicitly mentioned matters in this resolution, the rights, obligations, and responsibilities of the parties to the contract in various areas, such as accounting and auditing processes, payment or repayment methods, technical inspection, maintenance, production measurement methods, human resources training, health, safety and environment, import and export, insurance, confidentiality, termination and cancellation conditions, force majeure, release of the contractual area, dispute resolution methods, and the language of the contract, should also be clearly defined and specified in the aforementioned texts."[1]

An examination of the published draft texts of these contracts reveals that referral of disputes to arbitration is provided for in these contracts. Accordingly:

The Parties shall make their best efforts to amicably settle any case, controversy, or claim ("Dispute") arising out of or in connection with the Contract, or its breach, termination or validity or invalidity, within ninety calendar days by referring the Dispute to the management level. This period may be extended by mutual agreement of the Parties.[2]If no such settlement is reached within ninety days from the referral of the Dispute to the management level, the Dispute shall be referred to alternative dispute resolution (ADR) tribunals. The procedures for ADR shall be mutually agreed upon by the Parties. The Parties shall settle the Dispute accordingly within ninety days of the referral of the Dispute to the tribunal. ADRs may include negotiation, reconciliation, third-party expert determination, or mediation. This period may be extended by mutual agreement of the Parties.[3]

Any Dispute that is not settled within one hundred and eighty (180) days, as per Clauses 38.1 and 38.2, unless extended by the Parties as stated above, shall be finally settled by arbitration by three arbitrators in accordance with the "Agreement on Procedures for Arbitration, as set out in Appendix D" of even date herewith. This Agreement shall survive the termination or suspension of the Contract.[4]

The arbitral award shall be final and binding on the Parties. Either Party may seek enforce-

1 . General Conditions, Structure and Model of Upstream Oil and Gas Contracts, Cabinet Resolution No. 57225/T53367H dated 16/05/1395 (2016).
2 . Article 38.1. of IPC draft texts.
3 . Ibid, 38.2.
4 . Ibid, 38.3.

ment of the award in any court having jurisdiction over the Party against whom enforcement is sought.[1]

4.2. Challenges of Arbitration for Foreign Investors

With the exception of disputes over the commercial nature of an oil or gas project, which are resolved by experts, all issues arising in IPCs are settled through arbitration, with the arbitration proceedings based in Iran and subject to Iranian law. The lack of familiarity among many multinational oil companies with Iranian legislation poses a significant concern and risk, particularly for lenders providing project funding. It is essential to note that Article 139 of the Iranian Constitution mandates the approval of the Council of Ministers and the Islamic Consultative Assembly for any arbitration involving state assets and foreign parties. Additionally, in critical cases, the approval of the above two stakeholders is required, even if the two sides involved are Iranian. Although Iran is signatory to the New York Convention and other bilateral investment agreements, none of them necessitate such approval.

According to Article 2(2) of Iran's International Commercial Arbitration Law, "[a]ll persons entitled to file a lawsuit can refer their disputes to arbitration." Two crucial points must be highlighted. Firstly, non-Iranian nationals, including corporations, establish their legal competence based on their respective domestic laws. Secondly, the limitation on the ability of Iranian government institutions to submit their disputes to arbitration, as stipulated in Article 139 of the Constitution, remains in effect, as explicitly stated in Article 36(2) of this Law.

Article 139 of the Iranian Constitution specifies that referring disputes related to public property to arbitration requires the approval of the Council of Ministers and informing the Assembly, and in cases involving non-Iranian parties and significant domestic claims, the Assembly's approval is mandatory for arbitration referral. It is important to note that international arbitration procedures generally show little willingness to accept an objection of incompetence based on the laws of the country where the corporation is established or resides. This reluctance is justified by the principle of good faith, as objections are assessed against the principle of good faith during the initial referral to arbitration.

Legal debates exist regarding the concept of public order, which falls outside the scope of this study. However, Article 975 of the Iranian Civil Code states that the court cannot enforce foreign laws or private contracts contrary to good morals or public order.[2] Public order is closely tied to peremptory norms (jus cogens), which are enacted to protect public order. Although not all aspects of public order are addressed by executive legislation, most Law scholars consider private law principles supplementary and not related to public order.[3] Consequently, conflicts related to public order are not arbitrable. The common practice in Iran's judicial system, particularly in disputes involving public property, aligns with this perspective, as indicated in an award of the General Board of the Administrative Court of Justice.[4]

1 . Ibid, 38.4.

2 . Article 975 of the Civil Code: "The court cannot timely enforce foreign laws or private contracts that are against good morals or are considered to be contrary to public order by hurting the feelings of society or for any other reason, even though the enforcement of said laws is allowed in principle ".

3 . Nasser Katouzian, Introduction to the Science of Law (43rd edition, Paydar Publications 2005) 44.

4 . Date of petition: 11/06.2012, petition number: 138-139, case class: 376-654-90.

5. Critique of the Award of the General Board of the Iranian Court of Administrative Justice

In this section, we will examine the award of the Administrative Justice Court on the annulment of the Council of Ministers Resolution. However, before that, it is necessary to note that, while free trade zones are governed under certain laws, the implementation of Article 139 of the Constitution is also mandatory for foreign investment treaties concluded in free trade zones.[1]

The plaintiff in this case was the General Inspection Organization, and the subject matter of the complaint was the annulment of Council of Ministers Resolution 168692/ T36959H-07/03/2007. The Council of Ministers, on March 4, 2007, approved the following based on Article 139 of the Constitution: "Kish Free Zone Organization is permitted to submit any disagreements arising in the interpretation and implementation of contract number 78267/17- 16/07/2006 and its subsequent amendments, concluded with Mr. Khodayar Alambeigi, to arbitration. This authorization is granted on the grounds that such disputes cannot be addressed within the framework of commercial-industrial free zone laws and regulations, as well as other relevant laws and regulations."

There are Several critical issues surrounding this contract and its subsequent amendments:

1. Pursuant to the above contract, a piece of land measuring approximately 2,000,000 square meters located on Kish Island was transferred from the Kish Free Zone Organization to Mr. Khodayar Alambeigi for 32 billion Tomans for the implementation of the "Gol Sharq" project, as outlined in Article 1 of the contract. The payment is structured in 30-year installments, with the first installment due three years after commencement. Article 7 designates the "Paris International Chamber of Commerce" as the authority for dispute resolution.

2. According to the terms of the contract, the buyer undertakes to secure all necessary funding for the project within six months of contract signing and formally present the matter to the Organization with acceptable supporting documentation. Failure by the buyer to take appropriate measures within this timeframe may result in contract cancellation, with the parties forfeiting their right to object.

3. As stated by the Managing Director of Kish Free Zone Organization (in letter No. 46013/1187/M – 14.09.2008), the contracting party transferred its rights and obligations to a Kish-registered company in 2013. Investigations reveal that this company is owned by foreign nationals (Germans). However, Article 24(1) of the Free Zones Law prohibits the sale of lands to foreign nationals.4. The Kish Free Zone Organization terminated all contracts and addenda through notice number 460413/1187/M – 20/10/2008 (due to the passage of 6 years and three months from the date of contract conclusion), citing non-compliance with the provisions of Article 6.

5. The contracting party, Mr. Khodayar Alambeigi (Foreign-owned company), has filed an appeal with the Paris International Chamber of Commerce to resolve the dispute, citing Article 7 of the aforementioned contract.

The pivotal aspect in this matter lies in the authority designated for dispute resolution with-

1 . Abdullah Darzi Naftchali, Sajjad Soltanzadeh, 'Article 139 of Iranian Constitution and foreign investment disputes settlee ment' (2017) 32(9) Journal of Poverty, Investment and Development 11.

in the contract between Kish Free Zone Organization and Mr. Khodayar Alambeigi, namely, the "Paris International Chamber of Commerce." In the event of a disagreement, as previously mentioned, the Council of Ministers is obligated to authorize the referral of the matter to arbitration. However, first and foremost, in accordance with Article 139 of the Constitution and Article 457 of the CPC, a dispute involving public property cannot be submitted to arbitration unless it has obtained approval from both the Council of Ministers and, in significant cases, the Islamic Consultative Assembly. Due to the imperative nature of both laws and the gravity of the subject matter within its linguistic context, adherence to the aforementioned criterion is a prerequisite for accuracy, rather than an effectiveness, in both constitutional and procedural law. Moreover, the effectiveness is not applicable in this context and can only be enforced in cases explicitly identified by the law. Consequently, prior to commencing arbitration proceedings for a contractual dispute, the Board of Ministers or the Islamic Consultative Assembly must grant their approval, as the case may be. It is not reasonable to stipulate arbitration in a contract and then, after several years, request its authorization from the relevant authorities.

Secondly, as per Article 1(b) of the International Commercial Arbitration Law approved on September 17, 1997, "international arbitration" is defined as one in which at least one party is not an Iranian citizen at the time of entering into the arbitration agreement in accordance with Iranian law. Conversely, according to Article 2(1), the scope of international arbitration pertains to "disputes in international commercial relations, including the purchase and sale of goods and services, transportation, insurance, financial affairs, consulting services, investment, technical cooperation, representation, royalties, contracting, and similar activities." Consequently, the agreement involving the transfer of State lands in Kish to Mr. Alambeigi does not fall within the category of disputes arising from international commercial relations, and the contractual parties are both Iranian citizens. Therefore, their disputes cannot be subjected to international arbitration.

Thirdly, permitting a foreign authority to adjudicate disputes between the Iranian government and its residents blatantly contravenes "public order." This concern has led to the emphasis in Article 456 of the CPC: "Concerning transactions and contracts between Iranian and foreign nationals, as long as no dispute has arisen, the Iranian party cannot be obligated in any way to refer the dispute to an arbitrator(s) or a committee sharing the same nationality as the transaction party. Any transaction or contract violating this legal prohibition shall be deemed invalid and ineffective." Opting for a foreign arbitrator with the same nationality as the contracting party residing in Iran is inappropriate. In cases where appointing a foreign arbitrator with the same nationality as the contractual party residing in Iran is prohibited (based on the a fortiori argument), selecting a foreign arbitrator for disputes between an Iranian individual and the Iranian government is unacceptable. In response to the aforementioned concern, the Head of the Department of Drafting Bills and Defending Government Decisions at the Legal Vice Presidency of the Presidency under bill number 14622/144451, dated 15/01/2012, stated:

"Respectfully, in reference to the notices dated 27/07/2011 and 11/10/2011 concerning the complaint of the General Inspection Organization regarding the annulment of approval letter No. 168692/T36959H– 07.03.2007 of the Council of Ministers under file numbers

9009980900033032 and 900991809535, the following justifications are presented in defense of the impugned legislation:

1. The first objection raised in the complaint pertains to the transfer of lands subject to contract No. 17/178267-16/07/2002 to a company registered in Kish, despite the explicit prohibition on selling land to foreign nationals as stipulated in Article 24(1) of the Law on the Management of the Commercial-Industrial Free Zone of Iran. It is argued that the substance of the complaint legislation does not logically and conceptually involve the purchase of land in free zones, and thus, it is unnecessary to address this claim.

The second objection challenges the arbitration clause included in the contract based on Article 139 of the Constitution and Article 457 of the CPC. It is contended that a lawsuit regarding public property cannot be referred to arbitration without prior approval from the Council of Ministers or the Islamic Consultative Assembly, if necessary. However, it is argued that the requirement for advance approval is a condition of validity, rather than a condition of influence. Additionally, since the contract was concluded in 2002 and the government permission for the inclusion of the arbitration clause was obtained in 2006, four years after the contract was concluded, it is asserted that the approval letter was not issued in violation of the law. This objection is deemed as unfounded as neither Article 139 of the Constitution nor Article 457 of the CPC explicitly or implicitly require that permission to refer to arbitration must be obtained before including the arbitration clause in the contract. The focus of the aforementioned legal provisions is the control of the government's referral of matters to arbitration concerning public property, rather than the timing of the permission.

Additionally, according to Article 139 of the Constitution and Article 457 of the CPC, the "practical referral of the dispute to arbitration," or in other words, the implementation of the arbitration clause, is subject to the permission of the Council of Ministers or the Islamic Consultative Assembly, rather than the mere inclusion of the clause in the contract. "Even if we assume that the objection regarding the requirement for advance approval is valid, it should be noted that in this case, the necessary permit was obtained and issued before the actual referral of the lawsuit to arbitration, thereby fulfilling the government's approval requirement. Furthermore, the inclusion of an arbitration clause in the contract, particularly when it explicitly states that the arbitration process will be conducted in compliance with the laws and regulations of Iran, does not contradict Article 139 of the Constitution. This is supported by the fact that Article 7 of the contract explicitly mentions that referring the matter to the Paris Chamber of Commerce is subject to compliance of Iranian laws and regulations. Therefore, the claim that the resolution is non-compliant with the laws and regulations lacks a basis and is unfounded.

2. In the complaint letter, it is argued that the dispute falls outside the scope of the International Commercial Arbitration Law approved on 17/091997, as the current dispute is between the government of Iran and an Iranian company, and the law specifically applies to disputes where one of the parties, at the time of concluding the arbitration agreement, is not an Iranian citizen according to Iranian laws and regulations.

Additionally, it is asserted that the dispute arising from the contract for transferring government lands in Kish to Mr. Alambeigi does not qualify as a commercial dispute, thus not falling within the purview of the mentioned law.

Firstly, it should be noted that neither the contract nor the government enactment explicitly or implicitly state that the International Commercial Arbitration Law covers the present dispute. Therefore, the application of Article 1 of the International Commercial Arbitration Law, as suggested by the General Inspection Organization, is not warranted.

Secondly, the referral of a matter to foreign or international arbitration does not necessarily imply the application of the International Commercial Arbitration Law. Under existing laws, including the provisions of the CPC regarding arbitration, Iranian parties can refer their disputes to foreign bodies such as the Paris International Chamber of Commerce. In other words, there are no limitations in terms of referring the matter to foreign arbitration, except for the prohibition stated in Article 456, which pertains to binding arbitration involving Iranian nationals and the nationals of the other contracting party. Hence, the approval letter in question does not pose any issues.

3. The final objection concerns the alleged conflict of the enactment with public order due to acceptance of an international authority to resolve a dispute between the government of Iran and its citizens, as provided in Article 456 of the CPC. However, no explicit mention of the conflict with public order is made in the complaint, and therefore, it is contended that this objection lacks substantiation.

Firstly, it is essential to establish that public order must be based on legal decrees, and its scope cannot be invoked in a general sense.

Secondly, as previously mentioned, Article 456 of the CPC relates to the prohibition of Iranian parties from accepting arbitration by individuals who have the same nationality as the opposing contracting party. This provision is not relevant to the present case since the nationality of the arbitration authority, namely the Paris Chamber of Commerce, does not align with the nationality of the opposing contracting party. Furthermore, Article 456 primarily pertains to disputes between Iranians and foreign nationals, which is not applicable to the present dispute involving the government of Iran and Iranian citizens. In addition, Article 456, when interpreted through fortiori analogy, deems the appointment of a foreign arbitrator in lawsuits between an Iranian individual and the Iranian government as unacceptable due to the lack of legal basis and documentation. However, Iranian laws do not impose any further limitations on referring matters to arbitration beyond those stipulated in Article 456 of the CPC and Article 139 of the Constitution. As long as the content of the aforementioned article is not violated, there are no issues with the proposed approval letter. Consequently, the complaint is rejected based on the above rationale.

The decision of the General Board of the Administrative Court of Justice Court states:

Based on Article 139 of the Constitution of the Islamic Republic of Iran, it is decided that settlement of disputes regarding public and government property, or their referral to arbitration, necessitates the approval of the Council of Ministers and notification to the Islamic Consulta-

tive Assembly. Furthermore, in cases where one party to the dispute is a foreigner and the case if of significant domestic importance, approval from the Assembly is also required. The law determines the relevant terms. When concluding an arbitration agreement, government officials are required to obtain the approval of the Council of Ministers or the approval of the Islamic Consultative Assembly. Considering that the objected resolution was issued subsequent to the conclusion of the arbitration agreement and did not comply with the provisions of Article 139 of the Constitution, it is declared illegal and terminated by referring to Articles 19(1) and 42 of the Law of Administrative Court of Justice.

5.1. The Status of the Arbitration Clauses in Contracts Concluded Prior to the Ratification of the Constitution

In accordance with the aforementioned decision under Iranian law, the approval of the Board of Ministers or notification to the Islamic Consultative Assembly must be obtained before concluding an arbitration agreement.[1] Another crucial aspect of Iranian law concerns the differing opinions regarding the retroactive application of Article 139 of the Constitution. In response to a request for an interpretive award on this matter, the GC declared that, according to Article 139, even pre-Revolutionary agreements foreseeing the referral of disputes to arbitration must adhere to the provisions of the Article.

As this opinion is not deemed an official interpretation of the Constitution due to insufficient member votes, a subsequent interpretative opinion was sought from the GC. In this instance, the GC, acting as a problem solver, proclaimed that as long as the it has not provided an interpretive opinion on the inclusion of any constitutional principles in existing laws, those laws may be implemented without prohibition, and their implementation remains unchanged. With respect to the inclusion of Article 139 of the Constitution the relevant contract, since the GC has not provided an interpretation, the government's referral to arbitration without obtaining permission from the Islamic Consultative Assembly does not violate the Constitution.

Generally, prevailing theories tend to reject the significant impact of this principle on contracts or arbitration clauses concluded before the approval of this principle. In arbitration cases involving the government of Iran, where the issue of non-compliance with Article 139 of the Islamic Penal Code in contracts predating the approval of this principle was raised, the arbitration courts opined that this principle should not be retroactively applied to contracts concluded before its approval. For instance, this was observed in Framatome[2] claim against the Atomic Energy Organization of Iran. Despite acknowledging Iranian law as the governing rule of the contract, the Iranian side did not accept the argument that Article 139 of the Constitution should apply to the arbitration clause concluded prior to the 1979-Revolution since this principle was not explicitly stated in the earlier contracts.

However, under Chapter 7 of Article 454 of the CPC, "all individuals eligible to file a lawsuit can resolve their dispute through arbitration, regardless of whether it has been filed in the courts of law." Alternatively, Article 178 of the same law states, "[a]t any stage of civil proceedings, parties can settle their dispute through compromise." Consequently, parties can choose

1 . La'ya Joneidi, Nastaran Ghiyasvand Qazvini, op cit, 28.
2 . Framatome v. Atomic Energy Organization of Iran. ICC case 3986 (1982).

to resolve contract disputes by referring them to the court, opting for arbitration, or reaching a compromise. If the disputant is a domestic citizen, resolution occurs through internal courts or authorities, including conciliation or arbitration. If the party is foreign, the dispute is resolved by referring to internal courts or authorities acceptable to both parties and, under certain conditions, by resorting to international courts (with the diplomatic protection of the foreign party).

5.2. 5.2. The Status of Arbitration Clauses Following the Adoption of the Iranian Constitution

In this context, it is imperative to acknowledge the following:

A: In accordance with the regulations of the Iranian government, contracts concluded subsequent to the ratification of the Iranian Constitution, particularly those falling within the purview of Article 139 of the constitution, must comply with the tenets of international law and prevailing arbitration precedents, and obtain approval of the Iranian Consultative Assembly at the time of their formation. In instances where Iranian law governs the arbitration process or when a foreign entity seeks the intervention of Iranian courts to enforce the arbitration award, the impact on foreign investment shall be subject to evaluation.

B: From an international legal perspective, it is presumed that governments possess knowledge of their domestic laws and diligently adhere to them in contractual agreements. Therefore, the absence of parliamentary approval does not represent a valid justification for not invoking the stipulated arbitration clause in the contract.[1] This interpretation is grounded in the principle of good faith in contract negotiation and execution, which categorically rejects any assertion that a government would violate its own laws during contract formation. Moreover, this interpretation finds support in the doctrine of estoppel,[2] which precludes the acceptance of contradictions, actions, or claims that run contrary to prior statements or actions. Furthermore, the concept of good faith[3] in contract formation and execution vehemently opposes any contention that a government, having allegedly violated its own laws during contract formation, subsequently disputes the agreement during contract execution.[4] This approach has also been confirmed in numerous awards, in which the Iranian party has invoked the lack of a government order and the international arbitral tribunals have rejected this argument.[5]

5.3. Conclusion

Despite the absence of an explicit arbitration clause in the Iranian Cabinet Resolution regarding Iranian Petroleum Contracts (IPCs), Article 14 of the Resolution mandates the inclusion of a dispute resolution mechanism in each contract, With Arbitration being identified as one of the permissible methods. In light of this provision, the oil-related disputes mentioned above can be

1 . Philippe Fouchard, Berthold Goldman, Fouchard, Gaillard, Goldman on International Commercial Arbitration, (Hague: Kluwer Law International 1999) 322; La'ya Joneidi, Nastaran Ghiyasvand Qazvini, op. cit, 32.

2 . Ian C. MacGibbon, 'Estoppel in International Law'(1958) Vol. 7 No. 3 The International and Comparative Law Quarterly 473.

3 . Bernardo Cremades, 'Good Faith in International Arbitration' (2012) 27(4) American University International Law Review 761; Andreas R Ziegler, Jorun Baumgartner, Introduction, in Andrew D. Mitchell, Muthucumaraswamy Sornarajah, Tania Voon, Good Faith and International Economic Law (Oxford University Press 2015) 11.

4 . Jason Webb Yackee, 'Pacta Sunt Servanda and State promises to Foreign Investors before Bilateral Investment Treaties: Myth and Reality'(2008) Vol. 32 (5) Fordham International Law Journal.

5 . Hamidreza Nikbakht, Ahmad Hemati Kolvani, 'Article 139 of the Constitution in the Light of Judicial and Arbitral Precee dent' (2020) 8(30) Private Law Research 10.

referred to arbitration, with the contractual terms delineating the procedures for such referral. An illustrative instance of such arbitration was also scrutinized.

it has been determined that, under domestic law, issues that fall within the framework of the Constitutional rules outlined in Article 139 require approval from the Islamic Consultative Assembly before they are referred to arbitration, and foreign parties should take the necessary precautions in this regard. In such cases, Article V(2)(a) of the New York Convention has a broader impact than its application scope, and it supports the lex fori (the law of the forum) even when the issue of arbitration admissibility arises at a stage other than the enforcement stage before the national court.

The lex fori, particularly in the context of national court proceedings, play a significant role in assessing the admissibility of arbitration since the majority of national laws on litigation reflect Article V of the New York Convention and thus explicitly refer to the lex fori. During the dispute referral phase, national courts may also consider the admissibility of arbitration.

Under International law, it is presumed that countries are aware of their domestic rules and uphold them when entering into treaties. This approach is also founded on the principle of good faith in contract formation and implementation. Contradictions and acts that contradict previous statements are not tolerated. The principle of estoppel does not tolerate government violations during contract execution. Furthermore, the current international trade system requires that the agreement between commercial parties on all issues, including the dispute resolution method, be stable and, to the greatest extent possible, immune to the invalidation of the arbitration agreement, contract, or the final annulment of the arbitrator's decision, particularly for procedural reasons.

On the other hand, Article 139 of the Constitution does not have retroactive effect and does not apply to arbitration conditions adopted prior to the adoption of the Iranian Constitution. As a result, the arbitrability of disputes is the prevailing principle in Iranian law, and the limitations of Article 139 of the Constitution should be considered exceptional. Given the nature of the IPCs described above, the dispute should be submitted to arbitration following parliament authorization, as supported by the unanimous ruling of the Court of Administrative Justice and the interpretation of Article 139 of the Constitution.

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