LIMES PLUS Journal of Social Sciences and Humanities
ISSN: 1820-0869
E-ISSN: 2406-2871
Vol. 23 (2) 2026

Arbitration of the International Centre for Settlement of Investment Disputes

Dr. Boutalbi Zineb[1]
[1]University M'Hamed BOUGARA of Boumerdès, Algeria. Email: boutalbi.fd@gmail.com

Received: 10.02.2026 **Accepted: 12.06.2026** **Publishing: 05.08.2026**

Abstract:
Arbitration has become a feature of the modern era. The use of arbitration as a means of resolving disputes has increased because it offers advantages that overloaded state courts cannot provide. It also benefits contracting parties from different countries by sparing them the problem of not knowing the substantive and procedural rules of foreign law. Furthermore, the significant growth in trade and investment has led to the widespread adoption of arbitration and its expansion at an international level, thereby increasing its importance and necessitating appropriate consideration.
Arbitration is clearly accepted in most countries across their legal, economic and social systems. However, this acceptance is not limited to viewing arbitration as the optimal means of resolving disputes arising solely from domestic and international relations. Rather, it also serves as a necessary incentive arising from these relations and their development, achieving benefits for both producing and consuming states.
Keywords: Arbitration, disputes, contracts, investment, independence.

Introduction:
All states, particularly those in development, strive to attract foreign investment. This investment is expected to contribute to economic development, reduce the negative impact of certain public economic institutions and support economic growth in general. In order to achieve these objectives, states update their investment legislation and conclude numerous bilateral, regional and international agreements.
Despite the legal guarantees that states seek to provide to foreign investors through the provisions of contracts and investment agreements, many disputes have arisen between foreign investors and host states.
While the parties do resort to the courts to resolve disputes arising from investment contracts, it is recognised in practice that they are entitled to take an alternative route in settling such disputes.
Including international commercial arbitration is considered one of the most important legal guarantees adopted by states to prevent foreign investors from being forced to use the host state's domestic courts. Consequently, there has been an increase in bilateral agreements that refer disputes to arbitral institutions for resolution by arbitration. In this context, the International Centre for Settlement of Investment Disputes (ICSID) is one of the most significant guarantees

for foreign investors. This raises the question: how do the features and manifestations of the parties' conduct in a dispute manifest themselves in their recourse to this international arbitral centre?

Chapter One: The Parties' Consent to Resort to the International Centre for Settlement of Disputes

As we indicated earlier in our previous study, recourse to arbitration under the International Centre for Settlement of Investment Disputes (ICSID), like other forms of international arbitration, requires the parties' agreement in writing — typically as a clause in the contract. Once such consent has been established, the Centre assumes exclusive jurisdiction to settle any legal disputes arising from the investment, thereby excluding other methods of dispute resolution unless the parties agree otherwise (see Requirement/Section One).

Furthermore, the Contracting State of which the foreign investor is a national is prohibited from providing diplomatic protection to its nationals.

The parties' intention may also be expressed explicitly. To clarify the distinctive features of consent under the Washington Convention, this topic is examined in two parts in this section:

The first part will examine the concept of consent to resort to ICSID arbitration for investment disputes,the second part...

Section One: Manifestations of the Parties' Intention to Resort to the International Centre

The authority of arbitral tribunals within the International Centre over a dispute derives from the consent provided by both the Contracting State and the foreign investor. This reciprocal legal nature of consent is reflected in the preamble of the Convention and embodied in Article 25(1), which states that '...the parties to the dispute shall give their consent in writing...'.

However, to preserve the voluntary nature of arbitration, the Convention does not impose overly strict conditions on consent. It merely requires that consent be given in writing, typically in the form of an arbitration clause included in the contract, as discussed earlier in our study. Therefore, the requirement of an arbitration agreement is not a novel development in international commercial arbitration.

Article II of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards provides that each State shall recognise the parties' written agreement to submit to arbitration. Similarly, Article 7(2) of the 1985 UNCITRAL Model Law on International Commercial Arbitration stipulates that the arbitration agreement must be in writing[1].

With respect to Algerian legislation, Article 1008 of the Code of Civil and Administrative Procedure states that the arbitration clause must be in writing in the original agreement or the referencing document, under penalty of nullity. Therefore, the Algerian legislator renders the

[1]- Muslah Ahmed Tarawna, 'Same reference', pp. 130–131.

written form of the arbitration agreement mandatory; otherwise, it may be challenged on the grounds of invalidity[2].

Although the ICSID Convention requires consent to be expressed in writing, it does not prescribe a specific form. Instead, it leaves the parties free to express their consent as they wish. However, for the Centre's jurisdiction to be established, this consent must be explicit; it cannot be presumed[3].

This was confirmed by the arbitral tribunal in the case of Cable TV v St. Kitts and Nevis. In that dispute, the respondent was not a party to the agreement that included the arbitration clause. The claimant argued that the respondent's consent to submit the dispute to ICSID could be inferred from the actions taken, specifically the proceedings initiated by the Attorney General of St. Kitts and Nevis against the claimant in the domestic courts.

However, the tribunal concluded that merely referring to the arbitration clause in the documents initiating the domestic proceedings could not be regarded as any party conferring jurisdiction on the Centre. Therefore, consent to resolve the dispute through ICSID arbitration must be explicit and expressly stipulated in the contract concluded between the parties[4].

Thus, consent must be expressed by the parties to the dispute themselves.

In the case of the host state, consent may be issued either by the state itself or by one of its authorised institutions or agencies. However, authorising such bodies is not enough to give the Centre jurisdiction unless the state also gives its consent. The only exception is where the host state has already notified the Centre of its prior consent, because in that case a further notification is not necessary[5].

On the foreign investor's side, the issue becomes more complex when multiple companies are involved. In such situations, consent may be given by the parent company while the subsidiary files the request for arbitration. An example of this can be seen in the case of Banro v. the Democratic Republic of the Congo.

In this case, the relevant company was incorporated in the United States and owned by the parent company, Banro Resources, which was a Canadian company (and Canada is not a Contracting State). A mining agreement was concluded between the Government of the Congo and the parent company, which included consent to ICSID arbitration. As the agreement was nearing its expiration date, the parties agreed to enter into a further agreement. The parent company then assigned its rights to Sakima, a subsidiary of the US company approved by the Congolese government.

---

[2]- See the text of Article 1008 of the Algerian Code of Civil and Administrative Procedure.
[3]- Al-Quran, Amer Salih Aid, 'Limits of the International Centre's Competence (ICSID) in Disputes Relating to the Settlement of Investment Disputes', a Master's thesis submitted to the Faculty of Law and Political Science, Jordan, 2016, p. 153.
[4]- Saint Kitts and Nevis, Award of 13 January 1997, pp. 328–354.
[5]- Moslih Ahmed Tarawna, Fatima al-Zahra Mahmoudi, same reference, p. 132.

The tribunal noted that a company's consent may be transferred to a subsidiary, which may then bring a dispute before ICSID provided that the agreed procedural and substantive conditions are met, particularly where consent has been granted in advance.

The issue in this case was that neither consent nor transfer had been granted by the parent company. The tribunal therefore considered that, as the parent company was not a national of a Contracting State, it had no standing to confer jurisdiction on ICSID. Consequently, the tribunal rejected the request, holding that it lacked jurisdiction to hear the dispute between the two companies.

In a similar case involving Holiday Inns, the Moroccan government argued that the centre lacked jurisdiction because the parent companies, Holiday Inns Inc. and O.P.C., had not provided written consent to submit disputes to ICSID arbitration.

However, in that case, the tribunal rejected the Moroccan government's objections and ruled that the parent companies were still parties to the agreement. This was despite the fact that they were not expressly named in the agreement that referred the dispute to the Centre. The tribunal reasoned that the parent companies had participated in the performance of the contract between the company and the State of Morocco and were therefore entitled to invoke the arbitration clause.

In general, consent may be implicit, in the sense that it may be expressed indirectly through conduct rather than explicitly through a clear textual reference. The next section will examine this type of ambiguity in consent through its interpretation.

Section Two: Consent to Arbitrate through Recourse to the ICSID

The parties' consent is the driving force behind any arbitral process. Accordingly, the Convention did not limit itself to the State merely ratifying its awards in order to confer jurisdiction upon the International Centre; otherwise, arbitration under the Centre's umbrella would be viewed as a coercive instrument for settling disputes arising from investment contracts. Instead, Article 25(1) of the Convention stipulates that the consent of the host state, or one of its constituent institutions or agencies, and the foreign investor, to submit to arbitration before the Centre, must be in writing. However, the Convention does not prescribe any specific form or wording for this written consent[6].

In the researcher's view, this requirement is defective under the Washington Convention for the Settlement of Investment Disputes. It effectively undermines the investor's right. The Convention should have left this open to interpretation: if an investor believes that a host state has treated them unfairly, they should be entitled to approach the Centre to settle any dispute or disagreement arising from their investment contract.

In accordance with the general rules of arbitration, the parties express their intention to confer jurisdiction upon the Centre with respect to the dispute by entering into a direct agreement

[6]- Al-Tarawna, Muslah Ahmad Mahmoudi, Fatima al-Zahra, same reference, p. 177.

between the host state (or one of its institutions or agencies) and the foreign investor, as previously noted. Whether this agreement concerns privileges and benefits, a loan contract or other investment contracts, the parties agree to submit disputes to the International Centre. As indicated in Article 24 of the ICSID Convention, 'consent may be expressed, for example, by a clause in the investment contract providing for the submission of future disputes arising out of that contract to the Centre, provided that a dispute has in fact arisen'.

Many countries, particularly developing states seeking to create an appropriate legal environment for settling disputes with foreign investors, provide in their domestic legislation for disputes to be submitted to arbitration before the Centre. This provides an additional safeguard for investors, assuring them that the state will comply with its investment commitments.

For example, we can look at certain national laws. The Algerian legislator, for instance, has expressly stated in the preamble to Order No. 01/03 on investment, as amended by Law No. 16/09, that it is based on three international agreements which form the basis for handling and protecting foreign investments. Among these is the 1965 Washington Convention establishing the Centre. The preamble states the following: 'Pursuant to Order No. 95/04 of 19 Sha'ban 1415 (corresponding to 21 January 1995) approving the Washington Convention on the Settlement of Disputes between States and Nationals of Other States'[7].

Furthermore, Article 22 of Law No. 16/09 on the development of investment expressly provides that: 'Any dispute between a foreign investor and the Algerian State arising from the investor or from an action taken by the Algerian State against the investor shall be subject to the competent judicial authorities. This shall apply in cases where there are bilateral or multilateral agreements concluded by the Algerian State relating to conciliation and arbitration, or in cases where there is a specific agreement including a dispute-settlement clause or a clause allowing the two parties to reach a specific settlement agreement.'

Similarly, Article 58(1) provides as follows:

'Any dispute between the National Agency for the Valorisation of Hydrocarbon Resources (Oil) and the Contractor arising from the interpretation and/or implementation of the Contract, or from the application of this Law and/or the Regulations issued to implement it, shall be resolved through an amicable settlement procedure in accordance with the conditions agreed in the Contract.' If this procedure fails, the dispute may be submitted to international arbitration in accordance with the conditions agreed in the contract. Algerian law shall apply, in particular this Law and the regulations issued to implement it, to the settlement of disputes.[8]'

[7]- alla omar, Protection of Private Foreign Investment under Domestic Legislation and International Law, a comparative study, a memorandum submitted for the Master's degree, Faculty of Law and Political Science, University of Constantine, 2008, p. 100.

[8]- See the text of Article 53 of Law No. 13/01 relating to amending the Petroleum/ Hydrocarbons Law No. 05/07, published in the Official Gazette*, Issue No. 11, 2013.

While the Algerian legislator has included a special arbitration provision in this article, its wording is not sufficiently clear. Nevertheless, these legal provisions implicitly point to recourse to the International Centre for Settlement of Investment Disputes (ICSID). The reference to 'special arbitration' is understood to mean institutional arbitration, equivalent to submitting disputes to the International Centre for Settlement of Investment Disputes.

It should also be noted that, by virtue of Order No. 95/04 dated 21/01/1995, Algeria has acceded to the Washington Convention on the Settlement of Investment Disputes relating to investment contracts, and ratified it by Presidential Decree No. 95/346 dated 1995. This indicates that the Algerian State has permitted recourse to the International Centre through its legislation.

Similarly to what is stated in Jordanian investment legislation, specifically Article 22 of Investment Law No. 30 of 2014, it is provided that:

Investment disputes between governmental entities shall be settled amicably within six months; otherwise, either party may resort to the Jordanian courts or settle the dispute through Jordanian arbitration or alternative dispute resolution mechanisms, as agreed by the parties involved[9].

Likewise, under the Albanian Investment Law of 1993, the foreign investor submits the dispute for settlement. In this context, the Republic of Albania accepts that the dispute be submitted to the International Centre for the Settlement of Investment Disputes[10].

However, questions may arise as to whether the State's legislation properly expresses its consent to submit disputes to arbitration before the Centre. In the AMCO v. Indonesia case, the arbitral tribunal held that the provisions of the Indonesian Investment Law relate to arbitration concerning disputes over the amount of compensation for expropriation and not to arbitration before the International Centre for the Settlement of Investment Disputes. Clearly, the tribunal was not prepared to affirm the Centre's jurisdiction over the dispute on the basis of the Investment Law.

Chapter Two: The Role of Consent in Regulating the Arbitral Process at the Centre

Recourse to arbitration is an expression of consent in itself. The absence of consent means the absence of any agreement, and the agreement is an expression of party assent and freedom. Consent gives the arbitration agreement its binding character (the contract's binding force), thereby ensuring legal certainty. This is achieved by granting the parties full freedom to govern the course of arbitration, from selecting arbitrators and determining the procedures for conducting the arbitral proceedings to issuing the arbitral award. Accordingly, this section of our study is divided into two parts. The first part addresses the role of consent in the procedures for filing arbitral claims, while the second part is devoted to the following issues.

---

[9]- - http://www.ammanchamber.org.jo/node/default.aspx?id=417&lang=ar

[10]- Tradex Hellas S.A.V., Republic of Albania (ICSID) Case No. ARB/94/02, Decision on Jurisdiction (24 December 1996), pp. 173–174.

Section One: The Role of the Parties' Consent in Selecting the Procedural Law Governing the Arbitral Claim

In private international law, the general principle is that procedures are governed by the law of the court competent to decide the merits of the dispute. This means that there is no room for applying choice-of-law rules. However, this situation differs in arbitration. Unlike a state judge, the arbitrator does not have a special procedural law framework belonging to a particular court, nor do they decide in the name of a specific state to preserve public order within that state. Rather, arbitration entails a distinct judicial function. So, what procedural law governs an arbitral claim in international disputes involving a State?

Currently, the principle of party autonomy (or the 'autonomy of will') is widely recognised as playing a central role in determining the law that governs arbitration procedures. However, such autonomy must be clearly and expressly expressed, as it is difficult to rely on implied consent in arbitration, an approach commonly used to determine the applicable law to the dispute's substance.

Article 44 of the Washington (ICSID) Convention provides that the Convention's rules apply to the arbitral procedure. However, the parties may agree to apply a specific law instead. In other words, the Convention applies in the absence of an agreement between the parties on a particular procedural law[11].

Section Two: Procedures for Initiating an Arbitral Claim before the Centre

Arbitration before the International Centre for the Settlement of Investment Disputes (ICSID) must take place in accordance with the specific procedures set out in the Convention. These procedures are governed by the "institution rules", which were adopted by the Administrative Council. The parties may not agree to derogate from these rules. These rules must be followed by both the Centre and the parties, unless the Convention expressly allows the parties to depart from them[12].

To clarify how the proceedings unfold, we must address the formation of the arbitral tribunal and how the arbitral claim is initiated through the submission of a request. We will then examine the arbitration procedures followed before the Centre.

First: submission of the request

Any party seeking arbitration before the International Centre, whether a Contracting State, an individual or a company belonging to another Contracting State by nationality, must submit a request to this effect to the Secretary-General.

---

[11]- When Aḥmad Kūjān, same reference, p. 122.

[12]- Jala Wafa Mohammadin, 'Arbitration Between the Foreign Investor and the Host State Before the International Centre for Settlement of Investment Disputes (ICSID): Rules, Procedures and Modern Trends', a research paper published in the 'Journal of Law for Legal and Economic Studies', Issue Two, Egypt, 1999, p. 51.

This request must be submitted in writing. The Secretary-General will then send a copy of the request to the party against whom the claim is made. The request must contain specific information, namely:

- Indication of whether one of the parties is an institution or agency of a Contracting State.
- Precise identification of each party to the dispute, including their address.
- Refer to the date on which consent to arbitration was given and the document in which this was recorded.
- Indicate whether the other party holds the nationality of another Contracting State and, if so, specify their nationality as of the date of consent to arbitration. Also specify whether the other party is a natural person or a legal entity for the purposes of applying the Convention.
- State that the dispute between the parties is a legal dispute arising from an investment. The party submitting the request for arbitration to the Centre must comply with the relevant procedural rules and submit five copies of the request to the Centre, together with the prescribed fees[13].

Please note that the Secretary-General may refuse the request for arbitration if it is deemed to be outside the Centre’s jurisdiction due to the absence of one or more conditions for jurisdiction. Such a refusal may result in the initiation of the arbitration procedure[14].

Second: the constitution of the arbitral tribunal.

The general rule regarding the formation of the arbitral tribunal is that the parties themselves appoint the arbitrators. Under Article 37 of the Convention, the tribunal must be constituted as soon as possible after the request is registered. The tribunal must consist of an odd number of arbitrators, as agreed by the parties. If the parties fail to agree on the choice of arbitrators, each party appoints one arbitrator and the third arbitrator, who will serve as president of the tribunal, is appointed by agreement between the arbitrators chosen by the parties.

If the tribunal is not constituted within ten days from the date the Secretary-General notifies the registration of the request in accordance with Article 36, or within any other agreed period, the Chairman of the Centre shall, upon request by either party and after consulting the parties as far as possible, appoint the arbitrator or arbitrators who have not yet been appointed. Arbitrators appointed by the Chairman under this Article must not be nationals of:

(i) the Contracting State party to the dispute; or

(ii) a Contracting State of which any of the individuals involved in the dispute are nationals.

According to Article 39 of the Convention, a majority of the arbitrators must be nationals of states other than the Contracting States involved in the dispute. Likewise, the Contracting State of

---

[13]- Ibrahim Shahata, 'The Role of the World Bank in the Settlement of Disputes Relating to Foreign Investments', a research paper published in the Egyptian Journal of International Law, Issue No. 41, 1985, p. 12.

[14]- Moshe Hirsch, 'The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes', July 1993, p. 45.

which one of the parties is a national should not be represented by more than the permitted number. However, the text provides an exception to this principle where the sole arbitrator or all arbitrators have been chosen by the disputing parties themselves[15].

Furthermore, under Article 40 of the Convention, arbitrators may be selected from the Centre's lists of arbitrators, unless they are appointed by the Centre's Chairman — in which case, the requirements set out in the first paragraph of Article 14 of the Convention must be met for arbitrators appointed outside the Centre's lists[16].

Article 40 of the Convention is characterised by flexibility as it gives the disputing parties full freedom to choose arbitrators from outside the Centre's lists. This is an important advantage of the Centre because it gives the parties complete freedom in selecting the arbitrators[17].

Thirdly: Initiating Arbitration Proceedings Before the Centre

Article 41, paragraph 1 of the Convention states that the arbitral tribunal has the authority to determine its own jurisdiction. Based on this, the tribunal may decline jurisdiction if a party raises one of the following challenges: that the dispute falls outside the Centre's jurisdiction or that the tribunal is otherwise not competent. This may be considered a preliminary issue to be resolved before ruling on the merits, or the tribunal may combine this objection with the merits and decide on both simultaneously.

This is what Article 42(2) of the Convention states[18]. The arbitral tribunal is also competent to decide on all incidental and additional requests, provided that the two conditions set out in Article 6 of the Convention are met.

1. The parties agree to this, and
2. These requests fall within the Centre's jurisdiction[19].

Article 44 of the Convention states that, in arbitration, the tribunal must apply the rules agreed upon by the parties in advance. If the parties have not agreed on these rules, however, the tribunal must apply the substantive and procedural legal rules set out in this Convention from the date on which the parties approved arbitration under the Centre[20].

Article 45 of the Convention addresses the absence of one party or its refusal to attend arbitration proceedings. If one party does not attend or refuses to attend any stage of the proceedings, the other party may request that the tribunal decide on the matters submitted to it and issue a judgment. The tribunal must also notify the absent party (or the party that failed to present its

---

[15]- Shadi Hilou Abu Hilou, 'Settlement of Foreign Investment Disputes in Accordance with the Washington Convention and the World Trade Organization', a Master's thesis submitted for the degree in Law at the Faculty of Law and Political Science, Al-Al Bayt University, 2004, p. 166.

[16]- Khaled Akkasha, 'The Role of Arbitration in Resolving Investment Contract Disputes: A Comparative Study of Certain Legislation in Arab and Foreign States, Dar al-Thaqafah for Publishing and Distribution, 2014, p. 373.

[17]- Hind Mohamed Mustafa Mustafa, same reference, p. 376.

[18]- Ahmad Aichouche, same reference, p. 31 et seq.

[19]- Ghassan Ali Ghassan, same reference, p. 440.

[20]- Khalid Kamal Akkasha, same reference, p. 374 et seq.

defence) of the legal time period granted to present its defence in the case. If it is shown that the other party is delaying proceedings, the tribunal has the right to issue the award[21].

Therefore, the absence of a party or its failure to submit defences does not result in the proceedings being halted. Instead, upon the request of the other party, the arbitral tribunal will continue with the proceedings normally after notifying the absent or refusing party and granting it a period to appear before the tribunal or submit its defence. If the absent or refusing party does not respond, the tribunal will issue a default (ex parte) award[22].

Unless the parties have agreed otherwise, the tribunal may order any interim measures it deems necessary to preserve the rights of each party whenever circumstances require it.

Third requirement: The Role of Party Autonomy in Choosing the Applicable Law

One of the most important matters to which the parties pay close attention is determining the applicable law to investment disputes. This issue is also addressed in most international agreements dealing with the resolution of such disputes, the most important of which is the Washington Convention. The Convention stipulates that the arbitral tribunal must decide on the dispute submitted to it in accordance with the parties' agreement.

If the parties have not agreed, however, the tribunal is required to apply the law of the host state, as explained in Chapter One. This approach is consistent with national legislation and Algerian law, as noted in previous legal provisions emphasising the mandatory application of Algerian national law when resolving disputes between investors and Algeria.

In this section, however, we will examine what the Convention provides regarding the applicable law to the arbitral claim. First, we will discuss the freedom of the parties to choose the applicable law (Paragraph One). Secondly, we will address what happens in cases where the parties have not chosen the applicable law.

First: Freedom of the parties in choosing the applicable law

Most international agreements and national legislation regulate applicable law, devoting specific provisions to it. One such agreement is the Washington Convention on the settlement of investment disputes between Contracting States and nationals of other States[23].

The Convention addresses this issue in detail by setting out rules that govern the extent to which individuals can choose the rules applicable to the resolution of their disputes. The applicable law for the dispute must be considered from two perspectives: first, the law applicable to the procedure; and second, the law applicable to the dispute's subject matter[24].

This has raised questions about the Convention's provisions on the applicable law for disputes, and more specifically, the extent to which parties can choose the applicable law under this Convention.

---

[21]- Ghassan Ali Ghassan, same reference, p. 442.
[22]- Kamal Ibrahim, International Commercial Arbitration, Dār al-Fikr al-Arabi, Cairo, 1991, p. 141.
[23]- Kamal Ibrahim, International Commercial Arbitration, Dār al-Fikr al-Arabi, Cairo, 1991, p. 141.
[24]- Lamma Ahmad Koujan, same reference, p. 133.

A review of the Washington Convention's provisions reveals that the rules relating to the procedures available at the Centre are highly flexible. There is also a distinction between the procedures for initiating a claim under Article 36 and those for a claim under Article 44. These procedures are carried out according to the Centre's system and the arbitration rules in force on the date that the parties consent to arbitration, unless the parties agree otherwise.

The researcher believes that, in all cases, international commercial arbitration must be subject to certain rules that cannot be departed from by any party or by the Washington Center, regardless of whether the procedure is initiated and structured by the parties, whether it is based on domestic law or on an agreement of a State, and whether the applicable law is the law of the place of arbitration or the law chosen by the parties.

These rules concern the fairness and legality of the proceedings (due process), equality between the parties, and the requirement that arbitrators base their decisions on their personal convictions. Confidentiality of arbitration is also a key rule, unless the parties agree otherwise.

For this reason, it can be said that the Washington Convention on the settlement of investment disputes has not departed from or undermined the principle of party autonomy. Nevertheless, it requires the application of its procedural rules in cases where the parties have not agreed on rules to govern the proceedings[25].

Articles of the Convention Dealing with Applicable Law

Upon reviewing the text of the Convention, it was observed that it addressed the applicable law for arbitration procedures in several articles — namely Articles 36, 37, 43, 44 and 45 — while setting out the applicable law for the dispute itself in Article 42[26].

Accordingly, it is necessary for us to discuss certain aspects concerning:

1. the law applicable to arbitration proceedings before the Washington Centre;

2) the applicable law to the substance of the dispute according to Article 42 of the Convention.

What Article 42 Provides (Applicable Law to the Merits)

The tribunal decides the dispute in accordance with the rules agreed upon by the parties. If there is no such agreement, the law of the Contracting State party to the dispute applies, including its conflict-of-laws rules and applicable rules of international law.

The tribunal may not issue an award that does not resolve the dispute on the basis of the law's silence or ambiguity.

The provisions of paragraphs (1) and (2) do not prevent the tribunal from deciding the dispute in whatever way it considers most favourable, without being bound by those provisions, if the parties agree otherwise.

---

[25]- Hassan al-Jounaydi, The Legal System for Settlement of Investment Disputes in Light of the 1965 Washington Convention, Dār al-Nahda al-Arabiya, Egypt, 2001, p. 169.

[26]- Koujan, ibid., pp. 182 et seq.

Article 42 of the Washington Convention on the Settlement of Investment Disputes presents us with two key scenarios regarding the law applied by the arbitral tribunal to the merits of the dispute.

The first scenario is where the parties have chosen the applicable law.

The second scenario is where there is no agreement between the parties. In this case, the tribunal applies the law of the Contracting State and takes into account its conflict-of-laws rules and relevant rules of international law.

We will therefore examine these two scenarios as follows:

1) The parties' express agreement to choose the applicable law

The Convention grants the parties the authority to determine the legal rules that will be applied in deciding the dispute. Accordingly, Article 42 provides that:

The tribunal decides the dispute in accordance with the agreed-upon rules of law. In the absence of such an agreement, the tribunal applies the law of the Contracting State party to the dispute, including its conflict of laws rules and the rules of international law[27].

In this situation, the parties have the right to select a whole legal system to govern the dispute (or to require the application of a specific category of laws).

This raises the question: does Article 42 require the parties' choice of applicable law to be express, or can it be implied based on the overall circumstances of the contract?

It can be noted that Article 42 merely states that the tribunal is bound to decide in accordance with the law agreed upon by the parties, without clarifying whether that agreement must be express or may be implied. This has led to a lack of consensus among legal scholars on the matter[28].

Some difficulties may arise in this regard. For example, if the parties choose the law of a particular state, the question becomes whether this refers to the law as it was when the contract was concluded or as it stands at the time of the arbitration.

The answer to this question depends on whether the parties included a clause freezing the legal relationship between them in their contract. As explained earlier in Chapter One, a foreign investor can determine the applicable law by including a legislative stability clause. In that case, the arbitral tribunal must apply the national law agreed upon by the foreign investor and the host state in the form it had when the investment agreement was concluded[29].

An example of this is the case ACP v. Congo. In this case, an agreement was reached between the investor and the Government of Congo. A related clause in the contract stipulated that the legal

---

[27]- 'Akkasha, M. A., The Law Governing the Subject Matter of the Dispute in Commercial Arbitration and the Effect of Failing to Observe It by the Arbitral Tribunal in Egyptian Law, Lebanese Journal of International Commercial Arbitration, Issue 23, 2002, p. 10.

[28]- Jalal Mohammadin, same reference, pp. 60–61.

[29]- Ahmed Would al-Jilali, 'Arbitration as a Means for the Settlement of Investment Disputes in Domestic Legislations and the 1965 Washington Treaty', a Master's thesis submitted for the degree in Law, Institute of Arab Research and Studies, 2004, p. 222.

rules applicable to the agreement would be frozen, meaning that no changes or amendments could be made to the investment laws issued by the State in question.

The tribunal held that, in general, the host state has the right to change its internal laws based on its sovereignty. However, if the host state agreed to a clause freezing the relationship as of the time the contract was signed, the new laws would not affect the agreement or terminate the host state's contractual obligations.

Based on this, it can be concluded that the Centre's Convention allows the parties to choose the applicable law for the dispute. In practice, this is an exception to the general idea that arbitration, like any contract, derives its framework from the parties' intent.

Based on this, the will of the parties involved plays a decisive role in this field. According to the provisions of the Convention, 'will' refers to the true intent of the parties, whether expressed explicitly or implicitly[30]. This is because the Convention allows the contracting parties to choose the applicable law on the basis that their intent was directed towards that law[31].

Algerian law also recognises the role of party autonomy in determining the applicable law for arbitration procedures under the Civil and Administrative Procedures Code. Article 1043(1) of Law No. 08/09 states that:

'The arbitration agreement may determine the procedures to be followed in the dispute directly or by reference to an arbitration rules system. It may also submit these procedures to the procedural law chosen by the parties in the arbitration agreement.[32]'

However, questions may arise if the parties fail to choose the applicable law. This issue is addressed in Paragraph Two of the Centre's Convention, which we will examine next.

Second: absence of an agreement by the parties on the applicable law

The wording of Article 42 of the Washington Convention on investment contract disputes between Contracting States and nationals of other Contracting States makes it clear that this article requires the arbitral tribunal to apply the law of the host state of the investment, including its rules on conflicts of laws and the relevant rules of international law.

Accordingly, in this situation, the article prevents the tribunal from applying any other law through the host state's conflict-of-laws rules (i.e. reference rules). The reason for this is that, by investing in a specific country, the parties are deemed to have implicitly accepted the application of that country's laws with respect to the investment.

In practice, applying this rule can create difficulties, particularly if the host state's law contains gaps. In such cases, the arbitral tribunal at the International Centre must search for the appropriate fundamental rules to resolve the submitted dispute.

Therefore, if the parties have not agreed on the applicable law, the tribunal may apply either the law of the host State or the rules of international law, depending on the circumstances. However,

---

[30]- For more details, see Khālid Kamāl 'Akkasha, same reference, p. 402.
[31]- 'Akkasha, Abd al-Al, same reference, p. 7 et seq.
[32]- See the text of Article 1043 of the Algerian Code of Civil and Administrative Procedure.

the tribunal may refuse to apply the host State's national law if doing so would harm the foreign investor or conflict with applicable international legislation.

The Convention preserves the tribunal's freedom to decide issues not resolved under Article 42(1) by using fairness rules or applying international trade usages, commonly referred to as lex mercatoria. This is because the tribunal cannot refrain from deciding a submitted matter by claiming that there is no specific rule or that the law is ambiguous[33].

In short, the Washington Convention followed prevailing legal developments in international commerce, incorporating provisions to facilitate arbitrators' resolution of investment disputes. This positively impacts investment flows to states, in line with the World Bank Group's objectives for reconstruction and development, supported by the application of Article 42(1) of the Convention[34].

In this regard, we will discuss some practical applications of Article 42/1 after analysing it from a theoretical perspective. By way of example, we will cite two cases: AGIP S.p.A. v. the Government of the Congo, and the dispute between the Eastern Timber Company (Liberian) and the Republic of Liberia.

1. AGIP S.p.A. v. the Government of the Congo

The dispute concerns the fact that AGIP established a company for the distribution of petroleum in the Congo in 1962. AGIP retained 90% of the shares, while the remaining 10% belonged to the Swiss company Hydrocarbons. The company began operating in petroleum distribution in 1965.

A deal was then made between the government and the company, whereby the company would sell 50% of its shares to the government. In return, the government committed itself to various obligations, the most important of which were: ensuring that the government would bear 50% of the company's debts, and taking all necessary measures to market the company's petroleum products and lubricating oils needed by state agencies through the company. The parties also agreed to fix the company's legal regime and not change it[35].

In their contract, the parties agreed that any disputes or disagreements arising between them would be referred to the International Centre for the Settlement of Investment Disputes for arbitration. They also agreed that Congolese law would apply, supplemented by principles of international law.

During the performance of the investment contract, the Congolese law of nationalisation was issued in 1974. Under this legislation, all financial matters relating to the nationalised petroleum companies were transferred to the National Petroleum Company, HYDRO CONGO. The government excluded AGIP S.p.A. from the scope of this legislation. AGIP then faced intense competition from the national company, resulting in the loss of a large number of its customers.

---

[33]- Lammā Ahmad Kūjān, same reference, p. 43.
[34]- Jalal Mohammadin, same reference, p. 63 et seq.
[35]- Hadjira Boumanad, p. 217.

Subsequently, in 1975, AGIP S.p.A. was also nationalised. The army seized all of the company's branches, financial assets, documents, and files[36].

AGIP S.p.A. submitted a request to the International Centre for the Settlement of Investment Disputes for arbitration, attaching the protocol signed between the company and the Government of the Congo. This protocol provided for recourse to the Centre in the event of a dispute arising between the two parties. The request was filed with the Centre's General Secretariat and legal proceedings began.

Upon examining the case file and verifying the existence of an investment agreement between the company and the host state, AGIP S.p.A. claimed damages from the Congolese government. The claim was based on the government's failure to comply with legal obligations agreed upon, particularly its failure to fulfil contractual obligations towards the company, including the stabilisation of its legal status.

In 1979, the International Centre issued an arbitral award recognising AGIP S.p.A.'s entitlement to compensation. The Centre based this on the Congolese State's failure to comply with its legal obligations. This failure was due to the fact that the parties had agreed to stabilise the legal regime, meaning it could not be replaced or altered[37].

The arbitral tribunal applied Congolese law in the manner agreed by the parties.

Analysing the dispute's requirements, the parties' agreement and the tribunal's application of Congolese law leads to the following conclusion: the legal relationship between the company and the state included a legislative/stabilisation clause. This was also the subject of our study in the first chapter, namely that the investor intends to stabilise the applicable law. If that law is changed, the investor may obtain compensation as a result of the host state breaching one of its obligations. This is a logical outcome.

2. The dispute between Eastern Timber Company (Liberia) and the Government of Liberia.

Sometimes, the parties' agreement on the applicable law to a dispute may be vague or unclear. In such cases, they may only refer to it generally within an unclear clause. This is what happened in the arbitral proceedings concerning the dispute between the timber company and the Government of Liberia.

The dispute concerned the conclusion of an investment concession contract between the State and the company, under which the company would exploit and market timber and forest products for a period of 20 years from the date on which the company examined the concession area, with the option of renewing the contract for an additional 15 years. The parties agreed to the jurisdiction of the International Centre for the Settlement of Investment Disputes over any dispute arising between them during the performance of the contract.

---

[36]- AGIP S.p.A. v Government of the People's Republic of the Congo (ICSID), AGIP S.p.A. v People's Republic of the Congo, ICSID Case No. ARB/77/1. See more at: http://www.italaw.com/cases/3500#sthash.UfIlUIFj.dpuf

[37]- Hocine al-Jounaydi, same reference, pp. 194–199.

Initially, when the company began exploiting timber in the concession area, the relationship between the parties was normal. However, in 1980, a dispute arose concerning the exploitation and pricing terms. The company requested that the dispute be submitted to the Centre, and an arbitral tribunal was constituted to decide the dispute.

Among the company's requests were claims for compensation for the losses it suffered and the profits it missed (foregone gains).

Upon examining the dispute, the arbitral tribunal found that it concerned an investment agreement between the company and the Government of Liberia regarding the exploitation of forest products, concluded on 12 May 1970. During the performance of this agreement, a dispute arose between the parties, leading to the submission of the dispute to arbitration in accordance with the provisions of the concession contract.

Regarding the applicable law, the arbitral tribunal found that the agreement between the Government and the company did not specify any particular law to govern procedural matters. Consequently, the tribunal held that the ICSID Convention's procedural provisions were applicable in this case. Accordingly, Article 44 of the Convention was applied.

Regarding the law applicable to the merits (the substance of the dispute), the tribunal considered that the contract was based on the general law governing business affairs, as stated in the agreement's preamble. This means that the parties had implicitly chosen Liberian law to govern the contract. Therefore, the tribunal applied Article 42(2) of the Convention. This provision states that:

'If the parties have not agreed on the applicable law, the Tribunal shall apply the law of the Contracting State party to the dispute, including the rules on conflict of laws, and such rules of international law as may be applicable.[38]'

It should be noted that the arbitral tribunal's approach was correct in applying Liberian law to the merits of the dispute in both situations. Even if we assume that the wording in the preamble stating that Liberian law is applicable as the law of the Contracting State with the company was relied upon, this remains consistent with the second paragraph of Article 42 of the Convention.

Conclusion:

Investments are a vital part of developing countries' economies. It is therefore only natural that appropriate mechanisms are provided to attract and encourage such investments, thereby creating job opportunities, opening up to global markets and improving economic and social conditions in host states. Furthermore, it is essential to provide sufficient guarantees to foreign investors.

Due to the unique nature of investment contracts and the numerous parties involved, disputes may arise concerning the application or interpretation of the contract terms. This has made it necessary to provide effective legal means of resolving investment disputes.

Based on the foregoing, we arrive at the following findings:

---

[38]- See the text of Article 42(1) of the 1965 Washington Convention on the Settlement of Investment Disputes.

- The Washington Convention was concluded to provide the necessary facilities to ensure the settlement of disputes arising from foreign investments between states and the nationals of other states, through recourse to the most significant available mechanism in this context: arbitration before the International Centre.

The International Centre for the Settlement of Investment Disputes (ICSID) is a recognised international institution with the authority to resolve investment disputes between states and the nationals of other states.

- The ICSID is widely recognised internationally as the only specialised body for resolving investment disputes. For this reason, it enjoys substantial international acceptance. In particular, the Centre seeks to settle disputes that arise, or may arise in the future, between a foreign investor and the host state.

The Centre's objective is to achieve equality and find a resolution to the dispute between the parties.

Recourse to the Centre is permitted only with the parties' explicit and written consent.

- The applicable law is that chosen by the parties; if they have not agreed, the law of the host state applies. The rules of equity and fairness may also be applied if the parties agree.

- The ICSID is one of the most important international legal guarantees for protecting both the host state and the foreign investor.

To submit disputes to arbitration before the Centre, a set of conditions relating to the parties to the dispute must be met, as well as conditions concerning the form through which the parties submit their request for arbitration. Additionally, the dispute must have a legal character arising out of an investment contract.

- The arbitral tribunal issues an international arbitral award through the ICSID, which has the authority of res judicata (i.e. it is binding and final).

The following recommendations were also reached:

- The contracting parties should include an arbitration clause or a separate arbitration agreement in their contracts.

- Care should be taken when selecting the arbitral tribunal to ensure that it is impartial, independent and honest, in order to guarantee a fair arbitral award.

Finally, we agree with Professor Kabaili Al-Tayeb's conclusions in his thesis, 'Arbitration in Investment Contracts between States and Nationals of Other States in the Light of the Washington Convention'. He argues that by acceding to the Washington Convention, states have made concessions of the utmost importance because they have placed complete trust in the International Centre to decide disputes relating to foreign investments impartially and independently.

References (Bibliography)

A) References in Arabic

1. Ahmed Aichouche, Arbitration as a Means of Resolving Investment Disputes: A Comparative Study, Youth of the University Institution, Egypt, 1990, p. 31 and following.
2. Ahmed Weld el-Jilali Arbitration as a Means of Resolving Investment Disputes in National Legislation and the Washington Convention of 1965, Master's thesis in Law, Arab Research and Studies Institute, 2004, p. 222.
3. Ibrahim chahata, The Role of the World Bank in Resolving Disputes Concerning Foreign Investments, a paper published in the Egyptian Journal of International Law, Issue No. 41, 1985, p. 12.
4. Jilaa Wafa Mohammadin, 'Arbitration between the Foreign Investor and the Host State before the International Centre for Settlement of Investment Disputes: Rules, Procedures and Modern Trends', a paper published in the Journal of Law for Legal and Economic Research, Second Issue, Egypt, 1999, p. 51.
5. Hassan al-Janidi, 'The Legal System for Resolving Investment Disputes in Light of the Washington Convention of 1965', Dar al-Nahda al-Arabiya, Egypt, 2001, p. 169.
6. Khaled Kamal Akkacha, 'The Role of Arbitration in Resolving Investment Contract Disputes: A Comparative Study of Certain Legislation in Arab and Foreign Countries, Dar al-Thaqafa Publishing and Distribution, Amman, Jordan, 2014, pp. 374 and following.
7. Hind Mohamed Mostafa Mostafa, 'Means of Resolving Foreign Investment Disputes', PhD dissertation, Faculty of Law, Commercial Law Department, Cairo University, 2015, p. 376.
8. Shadi Hilou Abu Hilou, 'Resolving Foreign Investment Disputes in Accordance with the Washington and WTO Agreements', Master's Thesis in Law, Faculty of Law and Political Science, Al-Albayt University, 2004, p. 166.
9. Mohamed Abd El All Akkacha, 'The Law Governing the Merits in Commercial Arbitration and the Effect of Failure to Observe It by the Arbitral Tribunal in Egyptian Law', Lebanese Journal of International Commercial Arbitration, Issue 23, 2002, p. 10.
10. Ilat Omar, 'Protecting Private Foreign Investment in National Legislation and International Law: A Comparative Study', Master's thesis, Faculty of Law and Political Science, University of Constantine, 2008, p. 100.
11. Amer Saleh Aid, 'The Scope of the International Centre (ICSID) in Resolving Investment Disputes', Master's thesis, Faculty of Law and Political Science, Jordan, 2016, p. 153.
12. Ghassan Ali Ghassan, 'Foreign Investments and the Role of Arbitration in Settling Disputes That May Arise in Connection Therewith', PhD dissertation in Law, Faculty of Law and Political Science, 'Ain Shams University, Egypt, 2004, p. 440.
13. Kamal Ibrahim, International Commercial Arbitration, Dar al-Fikr al-'Arabī, Cairo, 1991, p. 141.

14. Lamia Matawi Youcef Marsi, 'International Investment Regulation within the Framework of the Multilateral Investment Agreement', PhD dissertation, Faculty of Law, 'Ain Shams University, Cairo, 2006, p. 131.
15. Mislah Ahmad al-Tarwani and Fatima al-Zahra Mahmoudi, 'Arbitration in International Investment Disputes between the Host State and the Foreign Investor: The Scope of Jurisdiction of the International Centre for the Settlement of Investment Disputes', Dar Wail Publishing, Beirut, 2013, pp. 130–131.
16. Hadjira Boumanad, Resolving Investment Disputes under the Washington Convention 1965, PhD dissertation in Law, Faculty of Law and Political Science, University of Mostaganem, 2016, p. 217.
17. Hind Mostafa, 'Means of Resolving Foreign Investment Disputes', PhD dissertation, Faculty of Law, Commercial Law Department, Cairo University, 2015, p. 376.

B) Foreign references (English):

1. Cable Television of Nevis Ltd. and Cable Television of Nevis Holdings Ltd. v Federation of St. Kitts and Nevis, ICSID Case No. ARB/95/2, Award of 13 January 1997, 13 ICSID Review – Foreign Investment Law Journal (1998), pp. 328–354.
2. AGIP S.p.A. v. People's Republic of the Congo, ICSID Case No. ARB/77/1.
3. Moshshe Hirsh, The Arbitration Mechanism of the International Centre for Settlement of Investment Disputes, Dordrecht: Martinus Nijhoff Publishers, 1993.
4. Tradex Hellas S.A. v. Republic of Albania, ICSID Case No. ARB/94/02, Decision on Jurisdiction, 24 December 1996, pp. 173–174, ICSID.

C) Laws and International Agreements

1. Law No. 13/01, dated 20 February 2013, relating to the Hydrocarbons Law and amending Law No. 05/07. Published in the Official Gazette, Issue No. 11, dated 24 February 2013.
2. Law No. 08-09, dated 18 Safar 1429 AH (25 February 2008) containing the Civil and Administrative Procedures Law, Official Gazette of the People's Democratic Republic of Algeria, Issue No. 21, dated 23 April 2008, as amended and supplemented by Law No. 13-22, dated 12 July 2022.
3. The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID/Washington Convention), signed in Washington on 18 March 1965 and entered into force on 14 October 1966 under the auspices of the World Bank (ICSID).