



ELECTRONIC INSTITUTIONAL ARBITRATION IN INVESTMENT DISPUTE RESOLUTION

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Abstract:

International Commercial Arbitration serves as a safeguard for foreign investors against sudden legislative changes in the laws of the contracting party. It also reduces the lack of confidence foreign investors have in the ordinary judiciary. Institutional arbitration systems are the most widely adopted mechanism in the field of international investment dispute arbitration due to their prior and detailed organization of most arbitration matters, especially after the adoption of electronic arbitration during the Coronavirus pandemic.

This enables parties to avoid the issue of inexperience in setting arbitration rules and procedures and the time spent agreeing on these rules, as is the case in the ad hoc arbitration system. This is in addition to the administrative, financial, and executive capabilities that these bodies possess and place at the disposal of individuals, the most important of which is the International Centre for Settlement of Investment Disputes. This system is a cornerstone in strengthening the legal protection of foreign investment and contributes to creating an investment climate that stimulates economic growth by providing guarantees of legal stability and effective dispute resolution.

Keywords: International Electronic Commercial Arbitration, Institutional Arbitration, International Centre for Settlement of Investment Disputes.

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Introduction:

The world has witnessed technological advancements that have led to the development of international trade and the field of international commercial relations. However, this has also resulted in a rise in commercial disputes arising from international commercial contracts. These disputes are often exacerbated by the tendency to resolve them in favor of one party, who is frequently accused of bias. Furthermore, contracting parties may hesitate to submit their disputes to foreign courts due to the distance involved, the need for foreign mediators, or the exorbitant costs associated with litigation in a foreign country. Therefore, parties in international trade often resort to arbitration to resolve their disputes, a method characterized by speed, simplicity, confidentiality, and the high competence of the arbitrators.

International commercial arbitration also serves as a safeguard for foreign investors against sudden legislative changes in the laws of the contracting party. It also reduces the lack of confidence foreign investors often have in the ordinary courts. Resolving investment disputes requires specialized scientific and technical qualifications, as well as a thorough understanding of international commercial custom—qualifications not typically found in the ordinary courts. Furthermore, the appointment of an impartial arbitrator provides an additional layer of reassurance for foreign parties.

Arbitration is divided into ad hoc and institutional arbitration. In ad hoc arbitration, the parties are free to choose their arbitrators, but they are bound by the arbitration process and procedures of the chosen institution, as agreed upon in the contract. Institutional arbitration is arbitration conducted by international or national bodies and organizations, according to pre-established rules and procedures defined by international agreements or the resolutions establishing these bodies. Arbitration centers have proliferated, particularly after World



War II, and their importance has grown significantly with the rise of free markets and international trade. Some of these centers specialize in specific areas, such as cotton or grain trade, while others are general, handling arbitration across various aspects of commercial activity. Still others are national in scope (Javed, 2015, p. 155).

Several international institutions or bodies exist for dispute resolution through arbitration, including: the International Chamber of Commerce in Paris, the International Centre for Settlement of Investment Disputes (ICSID), the International Trade Disputes Settlement Body (ITDS) of the World Trade Organization (WTO), the Cairo Regional Centre for International Commercial Arbitration, the American Association of Arbitrators, and the London Court of Arbitration.

If these institutions specialize in dispute resolution through arbitration, How is arbitration conducted within them, especially after technological advancements and the adoption and implementation of electronic arbitration?

To answer this question, we selected one of these arbitration bodies and examined the procedures adopted by the International Centre for Settlement of Investment Disputes (ICSID), as well as some of the challenges that electronic arbitration can raise.

1 - Arbitration Procedures at the International Centre for Settlement of Investment Disputes (ICSID)

Recourse to institutional arbitration has become fundamental in the field of international trade, given the expertise of these bodies and the existence of practical and realistic rules, their proven track record of success in numerous disputes (Mouhamed, 2020, p. 11).

The International Centre for Settlement of Investment Disputes (ICSID) was established under the Washington

Convention, prepared by the World Bank for Reconstruction and Development on March 18, 1965. Its headquarters are located at the Bank's headquarters in Washington, D.C. The Centre possesses legal personality, financial independence, the capacity to enter into contracts, and the capacity to litigate. It also enjoys immunity within the territories of contracting states to enable it to perform its functions.

Algeria approved the Washington Convention establishing the ICSID by virtue of Ordinance 95-04 dated January 21, 1995, and ratified it by Presidential Decree 95-346 dated October 30, 1995. (Decree Presidential 95-346, 1995)

The commercial arbitration it conducts is commonly referred to as institutional arbitration, and due to its effectiveness, by June 30, 2002, the number of member states that had ratified the Convention had reached 150.

The Center exercises its jurisdiction through three main bodies: the Board of Directors, the Secretariat, and the Panel of Arbitrators.

1.1- Conditions for the jurisdiction of the International Centre for Settlement of Investment Disputes (ICSID)

For the ICSID to exercise its jurisdiction over a particular dispute, several key conditions must be met, as stipulated in Article 25 of the Convention. These conditions are mandatory and must be fulfilled. The first of these conditions is the existence of a legal dispute between the host state or one of its agencies and a foreign investor (a national of another contracting state). The dispute must be based on legal rights and obligations related to the investment, not merely a political or economic disagreement.



1.1.1- Another conditions

a-The connection to the investment:

The dispute must arise "directly from the investment," meaning that the subject of the dispute is substantially linked to an existing investment activity or project in the host state. This includes financial, real estate, or other investments that contribute to the development of the state.

b-The parties must be competent:

the first party must be a State Party to the ICSID Convention or an entity affiliated with it, and the second party must be an investor holding the nationality of a different contracting state and not a national of the host state, or a company under foreign control if agreed upon.

c- Furthermore, the requirement of explicit written consent to resort to the Centre is mandatory. There must be a prior and specific agreement:

Between the parties stipulating that investment disputes will be resolved through the International Centre for Settlement of Investment Disputes (ICSID). This agreement can be included in the investment contract or in a bilateral or multilateral investment treaty. This consent cannot be withdrawn unilaterally.

d-In addition to the temporal and territorial requirements:

The arbitration agreement must be in force at the time the dispute arises, and the investment must be located within the territory of the State party to the agreement.

2.1.1- Restrictions and Reservations

States may impose certain reservations on specific forms or subjects of disputes that the Centre accepts. Some agreements may also impose preconditions, such as exhausting domestic judicial remedies.

These conditions define the ICSID's jurisdiction, ensuring that no dispute is accepted unless all these elements are met. The ICSID system aims to provide a stable and fair environment for arbitration in international investment disputes, while ensuring a

balance between investor protection and the interests of the host state. In short, the jurisdiction of the center depends on the existence of a legal investment dispute involving a state and a citizen of another state that is a party to the agreement, with a clear written indication of referring the dispute to the International Centre for Settlement of Investment Disputes for arbitration, and requires the fulfillment of specific conditions for the parties, the investment and the subject of the dispute according to the rules of the International Centre for Settlement of Investment Disputes and the agreement.

2.1-Arbitration procedures before the International Centre for Settlement of Investment Disputes (ICSID)

Article 36 of the Washington Convention stipulates that a written application to initiate proceedings must be submitted. This application takes the form of a petition submitted by one party to the Secretary-General of the ICSID. After the Secretary-General registers the application or petition and issues a receipt, he sends a copy of the petition to the other party. He then immediately establishes an arbitration panel or tribunal, which may consist of a single arbitrator or an odd number of arbitrators appointed by agreement of the parties. In the absence of such an agreement, the tribunal shall consist of three arbitrators: one appointed by each party, and the third appointed by agreement of the arbitrators within 90 days of the Secretary-General notifying the parties of the registration of the application. It should be noted that the parties may choose arbitrators from outside the list maintained by the ICSID.

1.2.1- The Agreement Stipulates That The Tribunal

Regarding the replacement of arbitrators, the agreement stipulates that the tribunal, once established, cannot be altered. If an arbitrator resigns, they will be replaced by another member from the list of arbitrators, selected by the Chairman of the Board of Directors. As for challenges to the tribunal, the other arbitrators will decide on the challenge without the intervention



of the party seeking recusal. If a challenge is filed, or if a majority of the tribunal members are found to be recusal, the challenge will be decided by the Chairman of the Board of Directors.

When convened, the tribunal has jurisdiction over disputes falling within its purview, according to the rules agreed upon by the disputing parties. They may choose a comprehensive legal system or stipulate the application of a specific set of legal rules. They may also agree to apply the legal system of one of the parties or even the law of a third country. In the absence of such an agreement, the tribunal may apply the domestic law of the contracting state party to the dispute (the host state of the investment), including its rules on conflict of laws. The tribunal may not refuse to adjudicate on the grounds of the absence of applicable legal provisions.

After it has finished considering the dispute, it decides on each issue by a majority vote of its members, and the ruling must be reasoned. Each arbitrator may attach his own personal opinion to the ruling and explain the reasons for the disagreement. From a formal standpoint, it is required that it be issued in writing and signed by the members of the court who agree to it, and the Secretary-General shall notify the parties to the dispute immediately upon its issuance. It may also be published at the Center with the consent of the parties. This ruling shall be binding on them and shall have the force of *res judicata*, and it may not be appealed in any way except in special cases stipulated in the agreement.

2.2.1-Electronic Arbitration Agreements

Electronic arbitration agreements can be made between the parties themselves or between them and an arbitration body or center. This is done through an exchange of emails between the parties initially, and then between them and the electronic control center, or by completing a form specific to the arbitration center.

The center, in turn, notifies the parties directly via email and provides them with a response form.

Therefore, electronic arbitration can be defined as "arbitration proceedings conducted via the internet, according to specific rules, without the need for the disputing parties and arbitrators to meet in a specific location." International legislation has addressed this type of arbitration and referred to it in numerous texts and recommendations. The aim of e-arbitration is to purify and secure the electronic work environment and related matters by settling existing electronic disputes and providing advisory services that prevent disputes from arising, thus fostering a healthy digital society. The center enjoys significant independence: no foreign entity can interfere, even in matters within its jurisdiction. This is based on:

- The principle of jurisdiction
- The exclusion of domestic laws from application. Conversely, the arbitrator is obligated to apply several peremptory principles:
- The principle of equality between parties
- The principle of respect for the rights of the defense
- The principle of incompatibility
- The principle of transparency. Unlike litigation before ordinary courts, arbitration is usually conducted behind closed doors. Arbitral awards, unlike other forms of litigation, are not required to be made public. It should be noted that the specific nature of the arbitration agreement is among the main reasons for the confidentiality of arbitration proceedings. The rules governing international arbitration sometimes explicitly state that arbitral awards are not published without the consent of the parties. Examples of this can be found in Chapter 29 of the UNCITRAL Arbitration Rules.



However, confidentiality is no longer the defining characteristic of arbitral awards in investment matters today, as they are increasingly public. What distinguishes an arbitral award issued by the International Centre for Settlement of Investment Disputes (ICSID) is that, for example, it is, in principle, public unless the parties agree otherwise (Chapter 48).

The reasons for transparency stem primarily from the unique nature of investment arbitration in general. Dispute resolution in this field typically involves the participation of non-governmental organizations (NGOs) in the litigation process, demanding greater transparency from all parties—including investors' countries, their groups, and arbitration bodies—during arbitration proceedings. Given that foreign investment impacts several vital social, economic, and cultural sectors, these NGOs have become a means of exerting pressure on the parties to publish the content of arbitration awards issued in investment matters, including those issued by the International Centre for Settlement of Investment Disputes (ICSID) (Farhat Harashani, 2022).

3.1-Advantages and disadvantages of electronic institutional arbitration.

Institutional arbitration is the primary form of adjudication in all countries worldwide. It provides a secure legal environment for investment and trade. There are virtually no drawbacks as long as the arbitration panel is carefully and thoroughly selected. The commonly discussed disadvantages of arbitration pertain to ad hoc arbitration, not the institutional arbitration conducted by centers. Ad hoc arbitration lacks the necessary controls, and the courts of appeal appoint the arbitration panel unless it is already specified in the contract at the heart of the dispute.

1.3.1- Advantages of Electronic Institutional Arbitration

The advantages of institutional arbitration are numerous, such as the confidentiality of sessions, unlike traditional courts which conduct trials in public. Another advantage is the

achievement of justice. If a center does not prioritize justice, it will not survive. This will motivate everyone working within it to exercise extreme precision and prevent even the slightest error or manipulation. Furthermore, institutional arbitration offers cost-effectiveness, as the centers' internal regulations include a schedule specifying fees, expenses, and costs if these are not agreed upon with the parties.

Electronic arbitration arose as a result of the spread of cyberspace and the internet. However, it is still possible to use electronic means and information technology to solve many of the obstacles facing alternative solutions to commercial disputes arising in the real world. If arbitration is characterized by its particular importance in resolving international disputes, given the ease of its procedures and the speed in settling disputes compared to ordinary judicial procedures, this is because the arbitration panel usually includes an arbitrator who is technically specialized in the field of arbitration, enabling him to find appropriate solutions to disputes in a faster and better way than ordinary judges, because he lives the profession or work, which makes him more capable of solving the dispute in a practical and realistic way (Radwan, 1999).

Arbitration is also characterized by confidentiality, sparing parties the drawbacks of presenting their dispute to the public, unlike ordinary courts which are subject to the principle of open court proceedings.

In addition to the aforementioned advantages, electronic arbitration offers further benefits, most notably the elimination of the need for parties to travel from one country to another to attend hearings and exchange documents. Documents are exchanged electronically, instantly, via the internet or fax, which aligns with the crucial importance of time in economic transactions.



Furthermore, the issuance of rulings is expedited due to the streamlined procedures, as documents are submitted electronically, and direct communication with experts is possible, including online discussions. It is noteworthy that the numerous advantages of electronic arbitration have contributed to the effectiveness of users' individual rights in the virtual world.

Some add that resorting to electronic arbitration prevents parties from encountering legal challenges related to electronic contracts, whether legal or judicial. It avoids the potential for legal non-recognition of such contracts or the difficulty in determining the applicable law and the competent court, a complex matter that can be challenging in traditional courts when disputes are referred to them. Electronic arbitration is also characterized by its low cost, which is commensurate with the generally modest size of the electronic contracts concluded. Multimedia systems are sometimes used, enabling the use of audio-visual means for online arbitration sessions for the parties and experts, thus reducing travel expenses (Ibrahim, 2000).

Furthermore, there is an international agreement on the recognition and enforcement of arbitral awards, namely the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards. This contrasts with court judgments, where there is still no international arbitration agreement on recognition and enforcement like the aforementioned New York Convention, although regional and bilateral agreements exist for their implementation. It should be noted that in electronic arbitration, the arbitrator may apply rules that serve broader interests than those stipulated in national legislation. These rules may be found in the law of the other party or in the nature of commercial customs within a specific category of commerce. Moreover, the arbitrator aims to achieve the interests and objectives of the international community, and the means available to them to respect and protect the interests of the weaker party or consumers are greater than those granted to a

national judge. The arbitrator can choose from several legal systems to determine the one that.

3.3.1- Obstacles to Institutional Electronic Arbitration

Despite the numerous advantages of electronic arbitration, there are some problems and obstacles that hinder it, which are as follows:

a- Eligibility:

All arbitration systems and legislation stipulate the necessity of legal capacity for both parties to the dispute and the arbitrators. Of course, the issue of arbitrators' eligibility is unnecessary, as the arbitration process is generally conducted online by major centers that ensure accuracy in all aspects, especially the fundamental ones. The remaining point of discussion is the legal capacity of the disputing parties.

If either party lacks legal capacity, the arbitration agreement is invalid due to the deficiency or absence of capacity of one of the parties at the time of signing, resulting in the invalidity of any arbitration award issued in the commercial dispute.

This problem can be overcome by implementing a system on the same website that requires any party intending to refer their dispute to an online arbitration center to disclose their identity and age. Failure to provide this information would prevent them from proceeding with or completing their agreement, thus lending credibility to the agreement and mitigating any suspicion of invalidity (Matar, 2000).

b- Ensuring the confidentiality of the arbitration process:

Maintaining and preserving the confidentiality of arbitration – as previously mentioned – is one of the essential conditions for the success of the electronic arbitration process and its acceptance. Electronic arbitration centers have worked to maintain this by including texts that preserve the confidentiality of any information related to the dispute, to confirm that everyone who sees it pledges not to publish what he has seen,



especially witnesses and experts. However, the problem lies in imposing another challenge, which is the intrusion coming from the outside through intruders; those who invade the privacy of others just to satisfy curiosity, as well as saboteurs who look for victims to ensnare, such as stealing credit card numbers or electronic payment cards and exploiting them. The solution currently proposed lies in encrypting the data that is stored and exchanged in a way that prevents it from being read except by the recipient (Matar, 2000).

2- The Validity of Electronic Institutional Arbitration Procedures at the Investment Disputes Settlement Center and the Binding Nature of its Awards

If institutional arbitration refers to the use of electronic means by the competent institution to conduct the arbitration process, especially given the increased use of electronic means following the spread of the Coronavirus pandemic, and if traditional arbitration raises numerous legal issues concerning the arbitration award, then what about when this award is issued electronically.

2.1 The Nature of Institutional Arbitration at the Investment Disputes Settlement Center

Some opinions suggest that technological development has led to development in everything, such as messages becoming electronic and eliminating the need for paper, fax, or mail. Others believe that arbitration cannot be conceived without traditional requirements such as written documents, physical meetings (i.e., the personal attendance of all parties and the panel at arbitration sessions), which are among the daily aspects of arbitration.

A third viewpoint asserts that traditional arbitration should not adopt an electronic format, and that the electronic environment should not be used for traditional arbitration (Nassir, 2018).

Some argue that the role of traditional arbitration rules and principles in the emergence of e-arbitration cannot be denied. However, the existence of new rules and customs that have established a degree of independence for this new type of arbitration should not be overlooked.

These should be studied as a distinct form of alternative dispute resolution. Online arbitration agreements arose before the issuance of the rules governing e-arbitration, and they have had undeniable consequences despite the lack of reference to any agreements (Nassef, 2005).

Furthermore, the arbitral award can be invalidated in its entirety if the rules of international agreements (predating the emergence of e-arbitration) that remain in force in this regard, such as the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, are applied.

2.2- The Validity of International E-Arbitration

Proceedings before the International Centre for Settlement of Investment Disputes (ICSID). Holding arbitration proceedings and meetings is a result of technological advancements. Therefore, it is inaccurate to limit the definition of e-arbitration to arbitration conducted solely through the exchange of documents. E-arbitration may be conducted entirely or partially via the internet or other electronic communication methods.

Arbitration proceedings are conducted electronically, such as holding sessions online using audio or video equipment, or even exchanging emails among the arbitration panel members. In more advanced stages, it becomes possible to hear witness testimony and issue the arbitral award electronically.

Therefore, some argue that the concept of electronic arbitration is no different from the conventional concept of arbitration as a procedure for resolving international trade disputes, although it differs in the mechanism by which this procedure is carried out from beginning to end using the internet



and other modern communication methods such as computers, fax machines, and so on. In other words, the entire procedure is conducted electronically, starting with agreeing to arbitration by filling out the form, which is then sent to the other party. This constitutes an invitation to arbitration if the other party accepts to participate by accepting the claim filed against them. The process continues through the exchange of documents, the hearing of witnesses and experts, and ends with the issuance of an award that the parties pledge to respect, regardless of applicable laws and treaties. The party in whose favor the award is issued has the right to obtain enforcement of this award.

3.2- The binding nature of electronic arbitration awards

It is noted that legal systems do not legislate for these electronic transactions and commerce in their laws. Furthermore, the existing legal rules in many countries regarding traditional litigation and arbitration procedures are rigid in recognizing arbitration proceedings conducted electronically. Existing legislation has not been amended to recognize electronic arbitration awards. This raises questions about the binding nature of electronic arbitration awards, especially given the widespread perception of inequality between parties and the relative impartiality of arbitrators. This stems from the financial relationships between professionals and arbitration institutions, which can lead arbitrators to favor professionals due to the volume of work these professionals handle. For clients, this may be their first or only interaction with an arbitration center, as they have no prior relationship with it.

Moreover, the weaker party in a contract is hesitant to resort to arbitration in general, and electronic arbitration in particular, due to concerns about the non-application of mandatory rules stipulated in their national law, especially if they are a consumer. This could result in the invalidity of the arbitration award and its inability to be implemented or enforced in practice.

In addition, there is the risk of denial of justice, especially since the person or the other party to the agreement is deprived of recourse to the national judiciary without a guarantee that the dispute will be resolved through non-judicial means. This results in a violation of the rights of defense, and this risk is based on the fact that electronic litigation or arbitration negates the spirit of the law, as it often negates the rights of defense by reducing the opportunities required to benefit from the procedural and substantive defenses that are the basis of the legal profession, as well as negating his right to benefit from human feelings that are by their nature forgiveness, tolerance and mitigating circumstances.

Conclusion:

Technological advancements have led to the development and diversification of international trade, including e-commerce. Consequently, dispute resolution has evolved in tandem with this development, leading to the emergence of electronic arbitration as a mechanism. This arose due to the inability of traditional courts to resolve disputes related to international trade and the reluctance of parties to choose them as a means of dispute resolution. Arbitration found a suitable environment for its development, especially after the world witnessed disasters and crises, most recently the COVID-19 pandemic, which impacted international trade and the obligations of parties. As a result, disputes in this area became more prevalent due to the repercussions of the health crisis.

Traditional commercial arbitration may not differ from electronic commercial arbitration in terms of its importance, procedures, nature, and even some of the issues it raises, except for the electronic medium through which it is conducted. Therefore, online arbitration is considered a modern method that emerged alongside the technological developments the world is witnessing, and it has been activated and established within the



context of international trade thanks to the health crisis. The Algerian legislator, like other international legislation, adopted international commercial arbitration due to its importance in international trade and its role as a guarantee for encouraging foreign investment. However, it still needs to address certain gaps that could hinder its efforts towards international commercial arbitration.

After studying the importance of electronic institutional commercial arbitration and the most significant issues it may raise, this study leads to the following recommendations:

- Revising national arbitration laws and enacting legislation more consistent with international agreements, bringing its rules in line with the laws of investing countries.
- Training experts in international legal systems and legislation to represent the state in concluding arbitration agreements with foreign investors and multinational corporations, thus ensuring the avoidance of legal loopholes and the application of national laws.
- The Algerian legislator has not clarified its position on the enforcement or recognition of international arbitration awards, particularly electronic ones, accepted by a foreign state. Therefore, the Algerian legislator should stipulate the acceptance of recognition and enforcement of electronic international arbitration awards by granting confidence to the judiciary of the state that accepted the award, and by stipulating its rejection only in cases where it violates public policy.
- The legislator must rectify the oversight in specifying the competent authority for enforcing arbitration awards issued abroad by designating the competent judicial body as the court in which the international arbitration award was issued, or the place of enforcement if it was issued or is to be enforced in Algeria. This is necessary to avoid increasing the burden on the party in whose favor the award was made and to facilitate obtaining an enforcement order.

- The Algerian legislator must remove the ambiguity and explicitly specify the body authorized to review appeals in cases of cassation challenges against a judge's order refusing recognition, enforcement, or annulment of an international commercial arbitration award, as stipulated in Article 1061 of the Code of Civil and Administrative Procedure. This should be done by explicitly stating that the Supreme Court is the sole authority empowered to do so.
- National laws specific to electronic arbitration should be enacted, encompassing its various elements and topics.

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