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Investment Arbitration: A Little Known Alternative Dispute Resolution Mechanism in Lebanon

By

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Investment Arbitration: A Little Known Alternative Dispute Resolution Mechanism in Lebanon

Wajih G. Abi Farraj

Abstract

Investment arbitration is an alternative dispute resolution mechanism that solves investment disputes outside the scope of state courts. This mechanism has been recognized in the Lebanese law where the Lebanese legislator adopted a liberal approach toward arbitration. Throughout this paper, the Lebanese domestic and international arbitration laws are explained along with an analysis of investment arbitration and investment treaties. This paper aims to highlight the importance of arbitration in general, and to demonstrate the effectiveness of investment arbitration. For this purpose the paper is supported by a real life investment arbitration case between Lebanon and a foreign investor that took place at the International Center for Settlement of Investment Disputes. An analysis of the whole mechanism is held at the end of the paper, and a critical analysis of investment treaties shows the disadvantages that might be associated with this mechanism when dealing with developing countries.

Keywords: Investment arbitration, investment treaties, ICSID, alternative dispute resolution, public policy, developing countries.

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List of Abbreviations

ADR	Alternative Dispute Resolution
ICSID	International center for Settlement of Investment Disputes
CCP	Code of civil procedure
BIT	Bilateral Investment Treaties
FCN	Friendship, commerce and navigation
FET	Fair and equitable treatment
MFN	Most favored nation
CEGP	Conseil Executif des Grand Project
CDR	Council for Development and Reconstruction
CCJA	Cahier des Condition Juridiques et Administratives
CPT	Cahier des Prescriptions Techniques
NYC	New York Convention
BIT	Bilateral Investment treaty
MIT	Multilateral Investment treaty
AA	Arbitral Agreement

Chapter One

Introduction

1.1 Purpose of the research

I would like to start my statement by referring to the Russian Author Leo Tolstoy who said that "Writing law is easy, but governing is difficult". I do agree that writing law is an easy mission, yet the acceptance and therefore the applicability of the law is the real and the serious challenge. With the fast evolution of the global village phenomenon and while the world is becoming more interconnected as the result of the spread of IT throughout the world, there was an unpreventable need to form a middle ground for all parties within this village that organizes and rules their transactions. One of these missions done by the international community was to find a middle ground for the majority of the countries in the globe to recognize arbitration as an ADR mechanism that may effectively substitute the work of national court system and to recognize and enforce foreign arbitral awards. These international efforts have been positively reflected on the Lebanese legal system where arbitration was recognized domestically and internationally and expressly allows natural person, moral person of public law and the Lebanese state to recourse to arbitration.

The aim of this research is to point out the liberal view of the Lebanese Law in addressing arbitration as an effective ADR mechanism. In this context the paper addresses investment arbitration and the pro-arbitration approach adopted by the Lebanese state in relation to investment treaties and the different types of protection

offered to foreign investors. I have also provided the paper with an arbitral case that took place between the Republic of Lebanon and an Italian Investor to give the reader a clear overview about the investment arbitration procedure. In addition a critical analysis on the case and an evaluation of investment treaties has been performed at the end that shows the disadvantages that might be associated with investment treaties in resolving investment disputes.

1.2 Alternative Dispute Resolution – An overview

Alternative dispute resolution or ADR is a dispute solving mechanism that may substitute state judiciary system. ADR consists of several methods, means or procedures where parties choose to settle their dispute with the aid of a third party. Arbitration, mediation and conciliation are the most common used ADR methods.

Mediation is performed by a third party who is called the mediator. The main role of the mediator is to find a middle ground for parties to settle their dispute without issuing a binding decision. On the other hand conciliation is performed by a third party who is called a conciliator. The role of the conciliator is to interpret and suggest a solution. The conciliator's decision is not binding. The academic difference between mediation and conciliation is that a conciliator has to give a suggestion to resolve disputes. In other words, the conciliator has to give his own input on the case. In order to give a solution, a conciliator has to be knowledgeable about the subject matter and has to have the needed expertise to play this role. This is not the case with a mediator where his role is only restricted on assisting parties to find their own solution.

Arbitration is a dispute solving mechanism that is similar and close to the judiciary system. In arbitration, a third party who is the arbitrator plays the role of a private judge. Arbitrator's decision is called arbitral award, and it is final and binding the same as a court decision. Arbitrators are chosen by contracting parties therefore arbitrators derive their power from the will of the parties. Contracting parties have the autonomy to choose the applicable procedural and substantial law they want, and arbitral awards are subject to several recourses in front of Lebanese state court.

Below is a table that compares litigation to the three ADR methods, arbitration, mediation and conciliation:

Table 1: Comparison between different ADR methods

Litigation	**Arbitration**	**Mediation**	**Conciliation**
- Decision issued in the name of Lebanese people - Judge is chosen by the state - Judicial court decision - Court order is final and binding - In principal is public - Applicable law is the Lebanese Law - Judge derives his power from the state	- ADR - Performed by a third party "Arbitrator" - Arbitral award is final and binding - Confidential - Seat of arbitration could be anywhere - Arbitrator authority is derived from the parties - Applicable law is chosen by the parties	- ADR - Performed by a third party - Not binding - No award - Expertise of a mediator	- ADR - Performed by a third party - Not binding - No award - Interpret and suggest solution - Knowledge of the subject matter

Chapter two

Arbitration under Lebanese Law

2.1 Overview

The Lebanese law recognized arbitration as an ADR method and dedicated sixty articles in the code of civil procedure (CCP) for this purpose. (Lebanese Code of Civil Procedures, 1983). The law differentiated between domestic and international arbitration. Article 762 to article 808 of the CCP tackle domestic arbitration. Article 809 to article 821 of the CCP deal with international arbitration. Domestic arbitration is also known as internal arbitration. It deals with disputed transactions that take place within the Lebanese borders. International arbitration deals with transactions that take place outside the Lebanese borders or cross borders transactions. Lebanon didn't use the foreign element or the legal criterion in defining transactions that are governed by international arbitration rules. The element of the legal criterion includes, but not limited to nationalities of the parties, the residence of the parties, place of signing the contract, place of business, language used, and other foreign elements. If a country is using the legal criterion and one of the elements mentioned above is related to different countries then international arbitration is applied. According to Lebanese law, any transaction that takes place within the Lebanese borders is considered "domestic" regardless of any foreign element like foreign nationalities of the parties, place of signing the contract or the used language. No foreign element is used. The only criterion that is used is the economic element.

As for domestic arbitration, the CCP differentiated between an arbitral clause and an arbitral agreement (AA). The arbitral clause is included either in the contract or attached to the contract "by reference". Arbitral clause is included by contracted parties in the main contract before the dispute arises. Arbitral agreement is signed after the dispute arises, so the parties know the nature of the dispute and agreed to declare arbitration as a way to resolve it.

The CCP specified the conditions that must be available for the arbitral clause and arbitral agreement to be valid. As for the arbitral clause, it is not valid unless it is done in writing in the main contract or in a document that refers to the contract. The latter is known as an arbitral clause by reference. "It should also include under pain of nullity the designation of the arbitrator or arbitrators in persons or qualities or the indication of the way to designate them". (Lebanese Code of Civil Procedures, 1983)

AA can be only proved by writing. "As in the case of the clause, the arbitral agreement should also include, under pain of nullity, the designation of the arbitrator or arbitrators in persons or qualities or the indication of the way to designate them". (Lebanese Code of Civil Procedures, 1983). One additional element that must be available when writing an AA is determining the subject of the dispute because the AA is done after the dispute arises. At this stage, the parties know the controversial matters and the subject of the dispute and decided to resolve it by arbitration.

It is also critical to mention that the Lebanese law permitted arbitration only for matters that may be subject to settlement. Disputes that are able to be compromised and that are caused by the interpretation, validity, or execution of contracts may be arbitrated. The law specified that matters that cannot be compromised cannot be arbitrated. Here is the

question, what are these matters? The Lebanese law gave the exclusive jurisdiction to state court for the following matters that are **not** subject to arbitration:

1. Public policy i.e. penal matter
2. Personal status i.e. marriage and divorce
3. Personal rights
4. Right to food
5. Right of inheritance
6. Bankruptcy
7. Employment contract except for collective labor contract
8. Commercial representation contract

2.2 Characteristics of the arbitrator

Article 768 of the Lebanese code of civil procedures (1983), specified that the arbitration mission should only be designated to a natural person. If the arbitration agreement specified a moral person, then the role of the moral person is restricted to arrange for the arbitration. The arbitrator shouldn't be a minor, deprived from his civil right or bankrupt.

2.3 Applicable law for arbitration

Article 767 of the Lebanese code of civil procedures (1983), specified that contracting parties may choose the procedural and substantial law they want whether Lebanese law or any other foreign law. Article 775 of the Lebanese code of civil procedures (1983), indicates "that parties may agree in the arbitral clause or arbitral agreement or in a separate agreement on the type of arbitration whether arbitration according to law or

arbitration by amiable composition". Article 776 of the Lebanese code of civil procedures (1983), indicates "that in case of doubt in defining the type of arbitration, it should be considered arbitration according to law".

As for arbitration according to law, contracting parties indicate the applicable law regarding the procedures of the arbitration and the applicable law on the merits of the dispute. As for arbitration by amiable composition, contracting parties do not indicate any applicable law. They leave the arbitrator to solve the dispute in accordance with the principal of fairness and equity.

2.4 Conservatory and Interim measures

In the case of litigation that takes place in the state court system, summary judge intervenes and takes conservatory and interim measures. Here is the questions, what is the role of the judge of summary procedures? What are these conservatory and interim measures? How they are related to arbitration?

The role of the judge of summary procedures is to protect rights and prevent damages. The summary judge interferes when there is a need for prompt and quick action. Waiting the state court to study the case, the parties to submit their documents, the deliberation to be completed and the court decision to be issued would take months if not years. The idea of the summary judge is to take actions that is not final as fast as possible that force the parties to do or to refrain from doing a certain act. To illustrate, the judge of summary procedure intervenes in a dispute at the request of one party to force the other party to take the required action to protect for example certain perishable

goods like food. Food that is the main subject of the dispute will be damaged if no appropriate measures are taken to store it in a decent manner.

As in the case of litigations, arbitration may need a coercive power that is able to take conservatory and interim measures to protect rights and prevent damages. It is crucial to differentiate between two phases. The first phase is before the initiation of the arbitral proceedings, and the second phase is after the initiation of the arbitral proceedings.

Phase one: Before the start of the arbitral procedure, the coercive power is restricted in the hands of summary judges. As discussed before their mission is only restricted on protecting rights and preventing damages, thus they have no authority on discussing the merits of the case.

Phase two: After the start of the arbitral proceedings the coercive power to take these measures is delegated to the arbitrator. Accepting arbitration as a way to resolve the dispute is declaring the incompetency of the state court. When the state court is incompetent; it has no power over the dispute as per request of the contracting parties. Lebanon is very liberal when it comes to arbitration. When there is a valid arbitral agreement or clause, article 785 of the CCP applies. The arbitrator is the first authority to evaluate if the arbitral clause or agreement is valid or not, because the arbitrator is the judge of principal and the judge of extent. The coercive power to take conservatory and interim measures is for the arbitrator.

One exception still exist after the appointing of the arbitrator and after the start of the arbitral proceedings where the power is delegated to the judge of the summary procedures. Two elements must be available for the exception to be valid. The first

element is urgency, and the second element is the lack of coercive power by the arbitrator that is initiated either by public policy or by the contracting parties. To illustrate, arbitrators have no power over penal matter. If an urgent penal matter has been raised after the start of arbitral proceeding, the judge of summary procedure is the only authority that is allowed under the Lebanese law to take conservatory and interim measures. The reason behind it is that penal matters are considered matters of public policy. Contracting parties may also limit the work of the arbitration on specific subject of the dispute, so every matter outside the scope of work that is defined by the contracting parties is the sole responsibility of the state court therefore the responsibility of the summary judge. Another case where the responsibility is waived to the state court is when there is impossibility for arbitrator to take the necessary action, for example when the arbitrator is abroad.

Conservatory and interim measures:

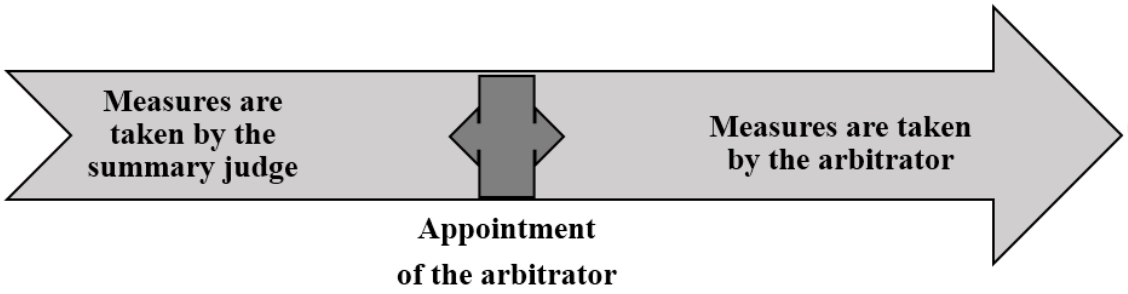

Figure 1: Conservatory and interim Measures

2.5 Competence

A remarkable doctrine that has the character of necessity in arbitration is competence – competence (C2). This generally accepted legal principle allows arbitrators to decide on their own jurisdiction without referring to state court. This doctrine exists even if there

is no available provision that protects this fundamental principle in arbitration. C2 is an inherent power given to the arbitrator based on the arbitral agreement. The importance of this principle is that in case of valid arbitral agreement, a state court cannot step in the process to give or to exclude the jurisdiction of the arbitrator. The arbitrator is the judge of principle and the judge of extent, and no party can decide over the jurisdiction of the arbitral tribunal. The arbitrator is the first to evaluate and define the jurisdiction of the tribunal.

In order the better explain the concept of C2, below is a simulation performed for three different cases that might be faced at the Lebanese courts

Scenario I

As discussed earlier in the paper that taking the choice of arbitration is a clear statement that contracting parties declared the incompetency of the state court and agreed that arbitration is the acceptable mean to settle the dispute. On top of that party autonomy is the legal doctrine that gives the contracting parties the right to freely choose the acceptable dispute resolution mechanism. It is also crucial to mention that the limit of the party autonomy is public policy. Theoretically the same doctrine that allowed parties to choose arbitration as a mean to settle their dispute is the same doctrine that allows them to retreat from arbitration and go back to state court system. Even if two parties chose arbitration to resolve their dispute, both of them can still agree to go back to court. The Lebanese law guarantees and protect the freedom of contract and the autonomy of the parties. The agreement could be expressed or tacit. Both parties could expressly agree to go to court thus waiving their right of arbitration. Tacit agreement is also valid. In case one of the parties raised the dispute in front of the state court, and the

second party didn't object rather participated in the litigation process. Then this is a tacit agreement to go to court, and it is a clear statement of the incompetency of the state court.

Scenario II

A second scenario that may face the arbitral procedure is that one parties decided to go to court and the second party adheres to arbitration. What happens in this case? Lebanon is very liberal when it comes to arbitration. One party wants the Lebanese court system to resolve the dispute, the other party clearly states to the judge that "you are incompetent". A concept called Prima Facie that is used in the legal platform that means at first sight or appearance. Because there is an opposing party, the judge cannot ignore the fact that there is an AA or clause. The role of the judge is to look at the arbitration agreement or clause without digging into the details of the contract. If the AA or clause is compliant with the Lebanese law, the judge declares the incompetency of the state court. Matters that interest the judge while looking at the contract includes, but is not limited to, the validity of the arbitral agreement or clause and the designation of the arbitrator. The judge doesn't go beyond the details of the contract except for the legal requirement of the validity of the arbitral agreement. The only case where the judge forces the opposing party to go to court is when the arbitration agreement or clause is manifestly null.

The first scenario discussed above clearly states that both parties agreed to go to court, so the judge has no Ex officio power to raise the fact that there is an AA. While in the second scenario one party opposed and clearly stated to the judge that he is not competent. If one party didn't object, the judge has no right to refuse the case on the

base of incompetency of the state court because of the presence of arbitral agreement or clause. Article 52 and 53 of the Lebanese code of civil procedures (1983), protects this right for the party opposing the litigation procedure in front of the state court. It is essential to point out that the opposition must be made by the opposing parties before any discussion related to the merit of the case. The second the opposing party submit any document or discuss any matter related to the dispute with the state court means that this party impliedly agreed to waive the rights to arbitrate.

Scenario III

A third scenario is when there is a valid AA or clause. One party insists to go to arbitration, and the other party wants to solve the dispute at the state court. As stated by article 785 of the Lebanese code of civil procedures (1983), the arbitrator is the first to evaluate if he is competent or not because the arbitrator is the judge of principal and the judge of extent. When there is a valid arbitral agreement or clause, the doctrine of competence – competence is applicable. The dispute is under the sole jurisdiction of the arbitrator, and the arbitrator has to decide if he is the competent authority to resolve the dispute or not. This doctrine that is applicable in Lebanon gives the arbitral procedure immunity against any party that for a certain reason decides to go back to state court. In the absence of such a clear article in the CCP, it would be easy for any party that may expect a losing arbitral case for example to reject arbitration.

The doctrine of competence – competence recognizes and enforces arbitration. With the absence of this principle, at many occasion and for several reasons arbitration would lose its enforceable character and render the whole mechanism useless. Finally this

doctrine protects the autonomy of the parties that agreed to go to arbitration to settle their dispute.

2.6 Severability

Severability means that in case one clause of the contract is invalid the validity of the remaining contract is not impaired. Article 764 of the Lebanese code of civil procedures (1983), clearly states that in case the arbitral clause is invalid, it is considered as if it was not present in the contract. In this case the contract remains valid. This doctrine falls under legal fiction that is created by court to enforce law. The condition of validity that is applicable to one part of the contract may not be applicable to the other parts. Also the applicable law that governs one part of the contract may not govern the rest. As mentioned before, it is a legal fiction, so one part of the contract may be detached from the main contract without affecting the rest of it. In this respect, it is important to mention two cases when it comes to severability. In the first case, when there is a valid contract; however an invalid arbitration clause or agreement exists. According to the severability rule, the contract is enforced at the state court. The second case includes an invalid contract along with a valid arbitral clause or agreement. Again according to the severability doctrine, the nullity of the contract is executed using arbitration. Another concept that is applied here is competence – competence. The arbitrator is the first to evaluate if he is competent or not. In case of a valid arbitral agreement, arbitration exists regardless of the validity of the contract. If the contract is not valid, the termination of it must be concluded by the arbitrator.

Below is a figure that summarizes the severability idea when it comes to arbitration:

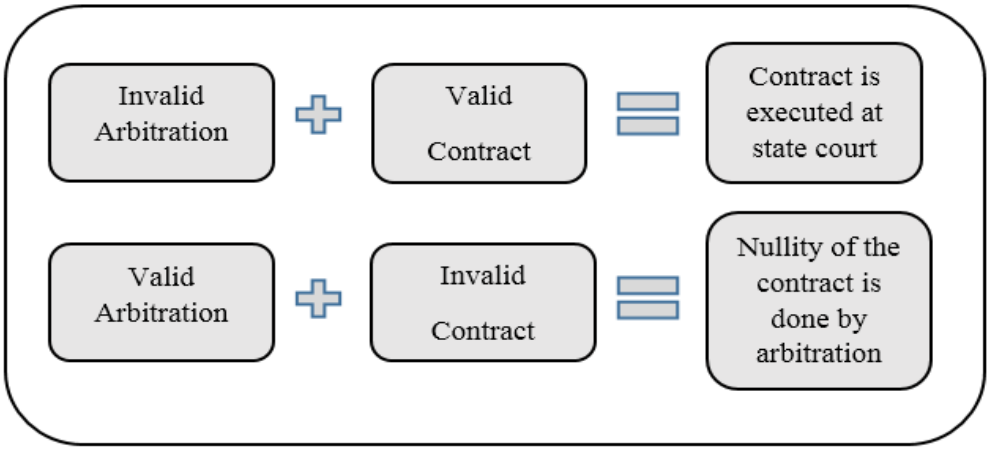

Figure 2: Severability

An exception on the rule mentioned above is the inexistence of a contract. If a contract is inexistent then arbitration doesn't exist. In this case it is not possible to apply the severability rule and separate between the contract and arbitration agreement.

Going further with the interpretation an exception on the exception still exists in the case where parties went through a negotiation process and agreed to resolve their dispute using arbitration. Even if the pre-contractual phase did not reach a signed contract or agreement, the injured party can solve any dispute resulting from the pre contractual phase using arbitration. In order to do so, the party must have a proof like an email conversation during the preparatory phase.

Chapter three

Investment Arbitration

3.1 Introduction

Arbitration is a form ADR where the parties solve their disputes outside the scope of state courts. Parties in conflict designate third party or parties called Arbitrator. Arbitrator takes the function of a private judge to solve the dispute. Parties have the freedom and autonomy to appoint the arbitrator/s, to choose the law of arbitral procedure and the law to be applied to the merit of the case. The award issued by the arbitrator is final and binding on the parties to the dispute.

Accepting arbitration as an ADR method is a clear declaration of the incompetency of the state court by the parties. Here is the question, why do parties prefer to settle their dispute through arbitration and not through the state court system? Many factors makes the arbitration a trend nowadays. One, Individuals and legislators are now more familiar and knowledgeable with arbitration compared to the past. Two, many countries around the globe acknowledge arbitration in their law and protect the right of parties who prefer to solve their disputes through arbitration. Third reason is that there are several convention signed by several counties around the world that recognize and enforce international arbitral awards. Fourth reason is that unlike litigation, parties have greater control on choosing their "private" judge and the applicable law. Another reasons that are crucial for the decision is the special expertise associated with the arbitrator in addition to the speed and confidentiality of the arbitral procedure. When a binding

decision is needed, arbitration is the preferable resort as compared to other alternative dispute resolution.

Investment arbitration is a mechanism that is designed to settle disputes between foreign investors and host-countries. The objective of this mechanism is to protect foreign investors from the sovereign power that may be used by the host state against the investment. In this regard, studying investment arbitration cannot be performed without studying investment treaties that are signed between countries. Investment treaties provide fundamental protection elements not only in case of disputes, but also throughout the whole investment phases in the host countries. An essential part of investment treaties is the dispute resolution mechanism in case a conflict arises between the parties. Agreeing on arbitration to resolve investment disputes is a clear declaration and consent of waiving the right to go to national state court and consider that arbitration is the agreed mechanism to resolve possible future disputes.

Several questions arise in this respect. What is arbitration? What is the definition of Investment? What is the role of treaties in investment arbitration? What are the protections afforded to investors? What is the role of arbitral tribunals and national state courts? How is the arbitral award recognized and enforced?

3.2 Definition of investment

A broad explanation of the term investment is commonly associated with the process of acquiring assets to generate future returns. Investment from a banking perspective for example contains a bundle of services offered by the investment banks that include, inter alia, services like raising additional capital. On the other hand investment from an

economic perspective means expenditure on capital spending like buying machine or building new factories that boost aggregate demand and help in growing the economy.

It is very crucial to understand what activities are considered investment in the respect of investment arbitration. Having a clear definition is a clear indication for the arbitral tribunal to consider its jurisdiction over investment dispute. ICSID convention, in article 25 indicated that "the jurisdiction of the center shall extend to any legal disputes arising directly out of an investment" (p.18). The issue is that the convention did not define the term investment. According to ICSID convention, the report of the executive directors on the convention point 27 states that "no attempt was made to define the term investment given the essential requirement of consent by the parties, and the mechanism through which contracting states can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the center" (p.44).

In the U.S. Model Bilateral Investment Treaty (2012), "investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk" (p.3). In addition the model also provided a list of what investment may include suchlike shares, bonds, construction, production and much more.

3.3 Stages in Investment arbitration

Most investment arbitration agreements allow for multi-tier dispute resolution mechanism. Tier one encourages the investor and the host-country to participate in

negotiations to resolve the dispute amicably. Frequently the given time for this stage is six months, and it is usually referred to it as cooling-off period. If the two parties are not able to find an amicable treatment, they move on to the next level that is tier two. At this stage the investor may either choose to refer to national state court or choose arbitration as a dispute resolution mechanism.

If the investor's choice is arbitration, then there are two options. One is ad-hoc arbitration, and the second is institutional arbitration. In institutional arbitration, the arbitration is organized and managed by an institution that has its own regulations. Investment treaty arbitration is governed by several arbitration institution like SIAC, SCC, ICSID, UNCITRAL, CIETAC and PCA.

As for ad-hoc arbitration, parties choose in the arbitration agreement or clause the arbitrator/s, the way of designating the arbitrators, the applicable law, etc., so rules governing the arbitration are selected by the parties.

3.4 ICSID

The international Centre for Settlement of Investment Disputes known as ICSID is an organization of the World Bank Group and was established in 1966. Lebanon is a member state of ICSID convention. The convention was signed by Lebanon and entered into force on April 25, 2003. (Database of ICSID Member States, 2019).

ICSID provides two services, conciliation and arbitrations. Once a dispute is brought to ICSID and the latter declares its jurisdiction over the dispute, the national state court has no role in having its own input on the dispute except for recognizing and enforcing the award. In case one of the parties doesn't agree with the result, a request to annul the

award is possible only at ICSID. As per section 5, article 52 of ICSID convention there are limited grounds that allow parties to file for the annulment of the award. If the requirements for annulment are met, an ad-hoc committee is formed at ICSID. Again no interference of state court is allowed, and the committee plays the role of the appellate court.

3.5 ICSID Arbitration Cost

There is an expensive cost in return of enjoying all the attractive features of arbitration. ICSID schedule of fees (2019) posted on ICSID website shows the following:

- ICSID arbitration request fee; $25,000

- Yearly administrative charge: $42,000

- Daily ICSID arbitrators charge $3,000 per working day

According to Aceris Law LLC (2017), on average Arbitration proceedings at ICSID needs between 3,000 and 5,000 hours and that depends on the complexity of the disputes.

Using also the cost calculator provided on International Arbitration Information website on the following link “https://www.international-arbitration-attorney.com/icsid-arbitration-cost-calculator-2/” shows that the cost of arbitration of a 36 million USD dispute, with three arbitrator, 4,000 hours of legal work and average lawyer hourly rate costs 2.34 million USD per party.

3.6 Derived power of arbitration

Several theories exist when it comes to the existence and validity of the arbitration itself and to the recognition and enforcement of the arbitral award. The first theory states that arbitration is purely contractual because it is derived from the contract signed between the parties in a dispute. Accordingly the source of obligations of the arbitrator are present in the contract, and the tasks of the arbitrator are to be performed according to the arbitration agreement. The second theory is jurisdictional theory where arbitrators derive their powers from the law thus giving the state a supervisory role over the work of the arbitrators. A third theory is the hybrid one where both contractual and jurisdictional characters exist. Another theory is the delocalized arbitration where arbitration is valid by itself. Consequently the effect of delocalization is that arbitration is detached from its local context because it has an international character governed by international commercial law. More specifically arbitration would be detached from local public policy but still bound by international public policy.

Chapter Four

International treaties

4.1 Introduction

With regard to the continuous need for countries, especially developing ones to outsource required services and products, there was an inevitable need to organize these dealings and to form a legal framework that protects both parties. Procedural law, substantive law, and even the interpretation of laws differ between countries based on economic, social and political development of the systems. When it comes to national laws, countries develop these laws based on former and current needs. It is very possible that certain national law may either omit certain legal topics or address legal topic in a way that doesn't suit foreign parties. When addressing national law, sovereign power of the countries is always on the spot. When the government is part of the contract, it is very possible that the government uses its sovereignty in drafting the contract and in managing the possible future dispute that may arise out of this contract. It is very possible that this power would be used in a discriminatory manner in favor of the government. In order to manage these international cooperation and to mitigate several risks that may threaten it, treaties are signed between countries to regulate international dealings.

"As defined by the Vienna convention, Treaty means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation". (Vienna Convention on the law of treaties, 1969, P.333). Treaties

are either bilateral or multilateral. A bilateral treaties is signed by two states while a multilateral treaty is signed by more than two states.

“Treaties are commonly called agreements, conventions, protocols or covenants, and less commonly exchanges of letters”. (The University of Melbourne, 2019, p.1). A treaty is effective when it gets the consent of parties. A state may point out a reservation on certain clauses of the treaty. A reservation is an exclusion or a modification for certain clauses of the treaty that leads to a change in the application.

4.2 History

When discussing the history of Investment treaty, it is essential to mention the fact that International Investment agreements are the basis of the International Investment Law. Originally treaties were created, tailored, and amended based on the needs of contracting countries. Drafting the agreement is affected by country’s national laws, International laws and accepted worldwide norms. Every time a dispute arises, a need to create a more tailored treaty that mitigate risks is created. Contracting parties tend always to adopt terms that facilitate their defense against possible future claims, and investors always tend to get the best terms that protect their investment against the sovereign power of the contracting state. This is how treaties are developed through years. The importance of treaties, agreement or conventions is that they draw the path of makings laws. Alschner (2017) states that “International investment law is primarily based on over three thousand international investment agreement” (p.1).

The origin of modern treaties regarding foreign investments can be related to the first commercial treaty signed between France and the United States. It was followed by

several treaties in the nineteenth century between the Unites states, European countries, and Latin American States. These early agreements included clauses related to trade disputes and compensation regulations related to expropriation. After the year 1919, the United States entered in several agreements' negotiations on friendship, commerce and navigation that were known as FCN. Modern investment treaties started in 1959 with Germany and Pakistan when they signed a BIT. Germany then signed a series of agreement with several countries to protect its investors in foreign countries. Early treaties specified ad hoc state to state arbitration as a mean to settle disputes. In 1969, Chad and Italy was the first to sign a bilateral investment treaty allowing arbitration between host states and investors. After 1982 there was an evolution in bilateral investment treaties worldwide, and it is estimated that close to 3000 BITs are in existence worldwide. (Dolzer & Schreuer, 2012)

4.3 Protections offered by Investment treaties

4.3.1 Protection from expropriation

Before starting the discussion of the protection given to investors with regard to expropriation, it is worth to note that expropriation is a right that is protected by international law. Expropriation or nationalization have both the same fundamental meaning where the state takes privately owned properties, legally transfer their title and gain full control over them. In nationalizations the taking is massive in the sense that the state takes privately owned property in all economic sectors, or it takes all privately owned company in a specific sector or industry. In expropriation, the taking is very selective, where the state decides to expropriate a certain company for example in a certain industry. Notably in addition to directly taking the property by transferring its

title and gaining full control over it, expropriation can be done indirectly. It happens when the state heavily interferes in the usage and enjoyment of the investment, deprive the investor from managing and controlling the investment, and causing severe depreciation to the economic value of the investment. For example, physical seizure of the asset without transferring the title is considered an indirect expropriation. According to the secretary general of UNCTAD Panitchpakdi (2012) "states have a sovereign right under international law to take property held by nationals or aliens through nationalization or expropriation for economic, political, social or other reasons" (p.1). With that being said, a protection for the investment in the host-country to prevent the investment from the sovereign power of the state is a must. This protection takes the form of giving compensation at the fair market value of the investment in case expropriation or nationalization measures are taken. For instance article four of the "Agreement between the Lebanese republic and the Italian republic" (1997) discusses expropriation and compensation. The article clearly prohibit the contracting state from taking expropriation or nationalization or other similar measures, unless the action is taken in the public interest, effective and adequate compensation that is given at the fair market value of the investment, and with no discrimination. The article added that in case the asset is not used for public or national interest, the owner have the right to repurchase the asset at market value. This article went a step further in providing compensation, indemnification or other valuable remuneration to the investor in case of the investment suffer losses or damages during a war, revolution, or any armed conflict.

4.3.2 Fair and equitable treatment

A broad interpretation of the fair and equitable treatment (FET) involve the obligation of the host state to act consistently, clearly, adequately, with no discrimination. However the concern when it comes to FET is what conduct performed by the host state is considered not consistent with FET. The answer is complex since some treaties uses an unqualified FET provision where countries only provide that the investment should be given a FET. On the other hand, other treaties refer FET to the source of obligation found for example in international law. (Panitchpakdi, 2012).

According to Panitchpakdi secretary general of UNCTAD, (2012), "In terms of the standard's content, there are two relevant aspects: (a) the principles of good governance, against which the conduct will be assessed (due process, absence of arbitrariness in decision-making, non-frustration of legitimate expectations and so forth) and (b) the threshold of liability, that is, how serious the breach must be in order for a violation to be found" (p.12).

In the "Agreement between the Lebanese Republic and The Italian Republic" (1997), article 3 states that each party shall be accorded fair and equitable treatment within its territory of the investment of the other contracting party" (p.4).

4.3.3 Most favored nation

The most favored nation (MFN) included in treaties are meant to stress the fact that the treatment given to a foreign investor shall not be less favorable than the treatment granted to a foreign third investor or to a national investor.

According to Panitchpakdi (2010), in United Nations Conference on Trade and Development Most Favored nation Treatment UNCTAD, "it requires a comparison between the treatments afforded to two foreign investors in like circumstances. It is therefore, a relative standard and must be applied to similar objective situations" (p.1).

In the "Agreement between the Lebanese Republic and The Italian Republic (1997), article 3 states that each party shall be accorded fair and equitable treatment within its territory of the investment of the other contracting party. This treatment shall not be less favorable than the treatment given to a national investor or to an investor of any third state". The treaty added that MFN should not be interpreted as forcing the contracting state to give the foreign investors advantages derived from economic union, international multilateral economic agreement, double taxation agreement etc. So the MFN protects the right of the investors and promote FET between foreign investors and national investors. At the same time, countries may declare a reservation and limit the scope of the MFN interpretation in a manner that does not extend to the benefits granted by specific agreements signed by the contracting state.

4.3.4 Full protection and security

It is the duty of the contracting state to promote the investment in its territory. The host-country has to confess and to acknowledge the foreign investment in accordance with its laws and regulations. The investor should have the right to choose the management and technical personnel of the investment without any intervention of the host state, and the latter is required to grant them work permits.

The host state should protect the investment within its territory, and at the same time it should create favorable economic and legal conditions. The state is prohibited from impairing the investment by exercising measures that are discriminatory in using, expanding, selling or liquidating the investment.

Chapter Five

Case Study

5.1 Bilateral treaty between Lebanon and Italy

Lebanon signed several BITs that gives the right to arbitrate in case a dispute arises. According to IDAL the Investment Development Authority of Lebanon (2012), Lebanon signed 54 bilateral agreements for the promotion and protection of investment with 50 countries. In the section below we are going to discuss the bilateral Investment Treaty also referred to as BIT that was signed in 1997 and was effective in February 9, 2000 between Lebanon and Italy. The treaty includes twelve articles in addition to an attached protocol.

According to the "Agreement between the Lebanese Republic and the Italian Republic on the promotion and reciprocal protection of investments" (1997), the signed treaty includes twelve articles as follows:

Article 1 defines four main terminologies investor, investment, returns and territory.

Article 2 discusses the obligation of the contracting party in its territory to promote and protect the investor. The article emphasizes the obligation of the contracting state to take reasonable and non-discriminatory measures toward the investor in addition to ensure a favorable economic and legal conditions in applying the treaty.

Article 3 states the obligation of the contracting party to ensure FET of the investments in its territory and discusses the most favorable treatment principle.

Article 4 regulates the expropriation of the investment done by one contracting party and the method to fix the relevant compensation.

Article 5 affirms the obligations of the contracting state to grant investors working on its territory the free transfer of the payment related to the investment, to allow investor access to foreign exchange market to buy the required currency before transferring the money, and to give all needed facilities to transfer the money with no delay.

Article 6 discusses principle of subrogation.

Article 7 organizes the settlement of dispute that might happen between the contracting state and the investor of another contracting party. The clause clearly states that in case of dispute, consultation must be held between parties to amicably resolve the dispute. If this step does not lead to a solution within six months, the investor may send a request to resolve the dispute to:

- State court where the investment is held
- ICSID
- Ad hoc arbitral tribunal

Articles 8 regulates the work of the arbitral tribunal. It specifies the number of arbitrators, the way to nominate them, and the required majority to issue the final and binding award. This article also regulates the allocation of arbitral fees and expenses on the parties.

Article 9 obliges the contracting state to apply a more favorable treatment if it exist in its law. It clearly states that more favorable provisions toward foreign investors prevail over this treaty.

Article 10 discusses the application of the treaty in regard to *Ratione Temporis*

Article 11 states that the agreement must be applied regardless of the existence of diplomatic relation between contracting parties.

Article 12 state the date the treaty enters into force and the period in which this agreement remains applicable.

5.2 Case of republic of Lebanon v. Toto Costruzioni

Below is a summary of the chosen case "Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon, ICSID Case No. ARB/07/12". All the details were obtained from the case uploaded on the following website "https://www.italaw.com/cases/1108". It is crucial to mention that the below summary may not contain all facts and details of the case as I highlighted the facts that serve the purpose of this paper.

According to Toto Costruzioni Generali S.P.A. v. The Republic Of Lebanon (2012) below are the details of the case.

5.2.1 The parties

"The Claimant in this arbitration is Toto Costruzioni Generali S.p.A., (**Toto** or the **Claimant**). Toto is an Italian joint stock company registered at the commercial register of the Chamber of Commerce of Chieti and incorporated under the laws of Italy. The Claimant is represented in these proceedings by Mr. Bechara S. Hatem and Professor Hadi Slim of *Messrs. Hatem, Kairouz, Messihi & Partners* Law Firm.
The Respondent in this arbitration is the Republic of Lebanon (**Lebanon** or the

Respondent). The Respondent is represented in these proceedings by Mr. Nabil B. Abdel-Malek, Mrs. Mireille Rached and Mr. Joseph Bsaibes of *Messrs. Nabil B Abdel Malek Law Offices".* (Toto Costruzioni Generali S.P.A. v. The Republic Of Lebanon, 2012, p.4).

5.2.2 History of the dispute

On April 12, 2007 Toto filed a request for arbitration in front of the International Center for Settlement of Investment Disputes knowns as **ICSID** against the Lebanese state following the BIT that was signed between Lebanon and Italy.

Toto signed a contract on December 11, 1997 with the Lebanese Republic – Conseil Executif des Grand Project **"CEPG"** to build the Saoufar - Mdeirij section which was part of the Arab highway.

Toto declares that CEGP and its successor the CDR "مجلس الانماء والاعمار" caused damages to the company because of various actions and various omissions committed while executing the projects.

As per Toto's say, these actions and omissions led to delay in the constructions, threatened Toto's investment in Lebanon and caused several negative consequences that affects directly the reputation of the Toto group.

Toto relied on articles 2, 3 and 4 of the BIT where they affirmed that the Lebanese state endangered and caused damage to the mentioned investment. Toto requested the following compensations:

Table 2: Toto's requested compensations

Damage	Requested compensation in US Dollars
1. Additional cost incurred due to delay in expropriation and failure to secure the use of expropriated land.	$10,694,000
2. Additional cost incurred by the change of legislation.	$545,590
3. Interest on payment received after due date.	$538,000
4. Compound interest on the claimed amount in front of the arbitral tribunal.	$11,769,590
5. Loss of opportunities.	$5,980,000
6. Moral damage.	$4,010,877
Total	**$33,538,057**

In addition to the above mentioned compensations, the claimant requested that the arbitration fees and expenses must be paid by the respondent.

5.2.3 Procedural History

5.2.3.1 Constitution of the arbitral tribunal

Below are the chronological order of constituting the arbitral tribunal

In 2007:

- June 8, Mr. Fadi Moghaizel, Lebanese nationality appointed by the Lebanese state.
- July 27, ICSID informed Lebanon that nationality of the arbitrator cannot be the same nationality of a party to a proceeding without taking the consent of the adverse party in this dispute.
- August 21, Toto nominated Mr. Feliciani, Italian Nationality.
- August 21, Toto declared that it would not refuse the appointment of the Lebanese arbitrator Mr. Moghaizel by Lebanon as long as Lebanon does not oppose the appointment of Mr. Feliciani who hold the same nationality of Toto.
- September 24, Lebanese state affirmed no objection on Toto's appointment of Mr. Feliciani.
- October 19, ICSID approved the appointment of the third arbitrator Dr. Hans van Houtte, Belgian nationality as the president of the arbitral tribunal.
- October 30, the three arbitrators accepted their appointment, and ICSID declared the starting of the arbitral proceeding.
- November 9, both parties nominated Paris as the seat of arbitration.
- December 13, parties attended their first session at the World Bank headquarters in Paris. They also agreed to divide the proceedings into two parts. Part one targets the issue of jurisdiction, part two targets the merits of the case.
- The tribunal declared that it has jurisdiction over the mentioned disputes.
- October 15, 2009 parties agreed on the calendar related to the proceedings on the merits of the case.
- As per the agreed time table, claimant and respondent filed the below submission:

a. January 29, 2010 claimant submitted memorial on merits

b. May 3, 2010 Respondent submitted Counter memorial on the merits.

- December 16, 2010 the tribunal requested additional submission regarding the merits of the case.
- March 24, 2011 witness statement and the expert report in accounting and finance were submitted by the claimant.
- June 2011 Witness statement related submitted by the respondent
- July – August 2011 Additional statement submitted by both parties
- October 17 to 21, 2011 a hearing took place at the World Bank in Paris related to the merits of the case in presence of the three appointed arbitrators, ICSID secretariat, representative of both parties in addition to the witnesses and experts appointed by claimant and respondent.
- February 12, 2012 Mr. Alberto Feliciani resigned from his mission as arbitrator. As per ICSID arbitration rules, the arbitral proceeding must be suspended. The other two arbitrators did not consent on his resignation based on the given reasons. These reasons were not documented in the case.
- March 6, 2012, ICSID notified both parties that Judge Schwebel replaced Mr. Feliciani. Judge Schwebel was appointed by ICSID administrative council.

According to ICSID convention (2006), "Rule 11 (2) In addition to filling vacancies relating to arbitrators appointed by him, the Chairman of the Administrative Council shall appoint a person from the Panel of Arbitrators: (a) to fill a vacancy caused by the resignation, without the consent of the Tribunal, of an arbitrator appointed by a party; (b) at the request of either party, to fill any other vacancy, if no new

appointment is made and accepted within 45 days of the notification of the vacancy by the Secretary-General." (p.108 - 109).

After he was appointed, the new arbitrator obtained a copy of all documents related to the case and deliberated with the other members of the tribunal.

- May 1, 2012 the tribunal announced the termination of the proceedings.

5.2.3.2 Decision on the jurisdiction

In deciding the jurisdiction, ICSID considered the following:

- CEGP and CDR are acting on behalf of the Lebanese republic,
- The project which is the subject of the dispute meets the qualifications of an "investment" as per the signed treaty and ICSID convention.
- The disputes arose after the treaty entered into force, so the disputes fall under the jurisdiction of the tribunal.
- The tribunal has jurisdiction to decide its scope and competence relevant to the dispute based on ICSID convention and the signed treaty between Lebanon and Italy. For this reason the tribunal considered the below disputes are under the tribunal jurisdiction:
    a. Delay in expropriation
    b. Failing to evacuate army troops from the working site
    c. Change in regulatory framework
- The tribunal declared its incompetence and clearly stated that it has no jurisdiction over other disputes submitted by the claimant like erroneous instructions and design, disruption of negotiation, delays of two law suits and lack of transparency in the cases filed with the Conseil d'etat.

- Finally the tribunal declared that it will include in the final award the party who will be charged of paying the arbitration fees and expenses.

5.2.4 Factual Background

5.2.4.1 The project

In March 1997, the Lebanese government decided to execute the highway project that was planned in the seventies. The highway is 62 kilometer long and links Lebanon with the Arab world. The Saoufar – Mdeirej zone that is the subject of the dispute extends over a total length of 5.5 kilometers. This section was granted to Toto for an amount of USD 35,352,667.

5.2.4.2 The contract

The execution of the project is controlled by legal conditions found in CCJA and technical conditions found in CPT in addition to other documents attached to the tender. Toto was required to perform the below duties:

- The highway and links roads
- Mdeirej intersection
- Retaining concrete walls
- Mdeirej bridge
- Grand Hotel in Saoufar bridge
- Saoufar linking road bridge

The parties agreed in the contract that CEGP would appoint an engineer where his role is to control the work and the implementation of this project and provide Toto with advices on the field. They also agreed that Toto should maintain a daily record. The

contract required that periodical meeting in the site must be done between Toto, the appointed engineer, and CEGP. The minutes of the meetings should be signed by all parties and should include the comments and decisions of the engineer.

The main contract stated that the work must be delivered within a period of 18 months. Because of the bad weather and rainy season in Saoufar, December, January and February were counted as one month as a compensation for Toto. On February 10, 1998, CEGP asked Toto to start the work. The completion date of the project as per the contract is October 24, 1999. The parties agreed in the contract that the contractor should provide a period of maintenance and guarantee of one year after delivering the work. The work is planned to be completed on October 24, 2000.

It is worth to note that the CCJA clearly states that part of the working site will be handed over to the contractor as early as these lands are expropriated by Lebanon. It was obvious that the Lebanese state has not finished the land expropriation when the contract was concluded. In November 1997, a month after the issuance of the tender document Toto accepted without any reservation the execution of the project for the price and the execution time as per the prescribed term of the contract.

5.2.4.3 Modification after the execution of the contract

Below is a list of events that took place after the works had begun:

- Toto suggested the following modification:
  - To the structure of all bridges;
  - Modification of the alignment of bridge 25.1;
  - Adjustment of Saoufar's intersection at the entrance;

- Elimination of west Mdeirej intersection;
- Adjustment of the east Mdeirej intersection; and
- Correction of the route next to the Grand hotel to prevent the costly destructions of several houses.

- Following the proposal of Toto, two addendum to the contract have been signed. One to construct a retaining wall in reinforced earth, and the second includes the acceptance of Lebanon of the project modification proposed by Toto. The second addendum took place on December 23, 1998.
- Because the path of the road was altered, new expropriation had to be made.
- The work has been concluded in December 2003.
- Between 1997 and 2003, the contractor requested several claims to the CEPG and its successor the CDR. These claims included the following:
    - Increased cost caused by changes in tax, diesel price, fees on cement and change in aggregate price level.
    - Addition works caused by misleading information
    - Loss of productivity caused by unexpected circumstances
    - Increased cost caused by the grade and quality of the soil that failed to fulfill the specifications indicated in the main contract
    - Additional work caused by changing the path and design of the road
    - Delay in expropriation of the lands that falls within the scope of work of Toto
- In 2001, two legal cases were filed by Toto before the Conseil D'etat in Lebanon requesting a compensation for additional works because of the change in the

design and indemnification for unexpected work caused by the nature of the terrain that did not match the specifications included in the main contract. The tribunal declared its incompetency regarding the above claims submitted to the conseil d'etat as it cannot proceed with a claim that is being resolved by a state court.

5.2.5 The Tribunal Decision on Preliminary Issues

Lebanon has established four objections to the tribunal that are not strictly related to the substance of the work. These objections that are going to be discussed in details are: Toto's *Locus Standi, Ratione Temporis*, applicable law, and waivers signed by Toto.

5.2.5.1 Toto's Locus Standi

"In law, locus standi means the right to bring an action, to be heard in court, or to address the Court on a matter before it. Locus standi is the ability of a party to demonstrate to the court sufficient connection to and harm from the law or action challenged to support that party's participation in the case". (airSlate Legal Forms, Inc., n.d., P.1)

According to Toto Costruzioni Generali S.P.A. v. The Republic Of Lebanon (2012), "Lebanon contends that, while the Contract was entered into with the company named *Toto S.p.A.*, the Claimant in this arbitration is a different entity named *Toto Costruzioni Generali S.p.A.*, which therefore lacks *locus standi*. Toto replied that the company is the same and supports its argument by the submission of a certificate from the Italian Registrar of Companies evidencing that its name is *Toto Costruzioni Generali S.p.A.* or, in short, *Toto S.p.A.* In this regard, the Tribunal finds that the certificate and

clarifications submitted by Toto give satisfactory evidence that the legal entity is the same and therefore rejects the Respondent's *locus standi* objection" (p.18).

5.2.5.2 Applicable Law

From the Lebanese standpoint, the Lebanese national law should be applied when the matters are not covered by rules of international law pursuant to article 42 (1) of ICSID convention.

According to ICSID convention (2006), "Article 42 (1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable" (P.23).

From the viewpoint of Toto, international law must be applied even in the case where the BIT and principle of international law are silent with this regard.

The tribunal decision did not see a need to address the issue of applicability of the Lebanese National Law, and it decided that the BIT and the principle of international law are enough to resolve the disputes. No further information was provided in this respect.

5.2.5.3 Ratione Temporis of jurisdiction:

"Jurisdiction Ratione Temporis or temporal jurisdiction refers to the jurisdiction of a court of law over a proposed action in relation to the passage of time. The court can either lose temporal jurisdiction because the deadline for litigation of the particular

action has expired or gain temporal jurisdiction because it was launched within the prescribed time limitations". (airSlate Legal Forms, Inc., n.d., P.1)

As a principal, treaties do not have a retroactive effect. Moreover, the treaty can indicate how the Ratione Temporis is applied. As per the signed "Agreement between Lebanese Republic and the Italian Republic Article 2", 2000, P.10), "article 10 clearly states that the treaty is not applicable to disputes that arose before the treaty entered into force". In principle all disputes that took place before February 9, 2000, the date of the execution of the treaty, fall outside the sphere of the treaty. Lebanon raised the point to argue that the claims submitted by Toto between 1997 and 2000 shouldn't be covered by the arbitral proceeding as they occurred before the execution of the treaty.

In its turn Toto argued that the tribunal had decided that the disputes fall under its jurisdiction. The disputes that are subject matter of the previous mentioned claims developed on June 30, 2004. As per Toto these claims took place after the year 2000 where the treaty entered into force.

Lebanon replied that the disputes and the breaches that cause the disputes must have arisen after February 2000.

The Tribunal in its decision considered that a mere demand is not a dispute. In September 2002 Toto demanded to be compensated for the extra work performed because of the delay that has already occurred. However the breach occurred before year 2000. Accordingly the subject matter of the dispute that occurred between 1997 and February 9, 2000 falls outside the tribunal jurisdiction.

5.2.5.4 The extension and validity

As per the signed contract, the work must be completed by the end of October 1999; however several time extensions were given to Toto as follows:

- First time extension was given to Toto to postpone the completion of works until December 2000. Lebanon agreed on this extension provided that it does not constitute any ground for any future claim. Toto did not object.
- Second time extension was given to postpone work until September 2001. Toto expressly waived all claims against the Lebanese republic. Lebanon approved the time extension provided that the contractor Toto waived any claim related to the date of starting the work until the date of the second extension.
- The third extension was given to postpone work until November 2001 taking into consideration that Toto waived any rights caused by such extension. Toto did not object.
- Fourth extension was given to Toto until August 2002 for the additional works that have to be executed.
- On August 12, 2002 Lebanon accepted Toto's request for time extension until end of December 2002 provided that Toto waives any right in advance related to the time extension. Toto submitted a letter to the engineer requesting 15 billion Lebanese Pounds one day after Toto accepted the time extension. Toto indicated that it is impossible to waive in advance any claim resulting from the time extension.

Both parties agree on the time extension; however they disagreed if the waiver of rights related to these time extensions are valid and binding.

Lebanon position

Lebanon states that for the first four time extensions, the contractor Toto repeatedly waived its right for compensation. Moreover Toto failed to claim any compensation. Moreover Toto failed to claim any compensation during the period that extended from the first till the fourth request for time extension. Also Toto failed to contest the engineer's decision within 60 days as required by the contract. Lebanon also declared that the contractor had committed not to ask for damages for late hand over of the site under Article 2 and 3 of CCJA.

Lebanon Also declared that the waiver of right to any claim applies to both the contract and the treaty since Toto in his explicit waiver during the second extension stated the following "It concerns only the extension of time, but covers any recovery whatever its origin and nature".

Toto's Position

Toto denied the waiver of their rights for claiming compensations because a waiver cannot be implied. As for the waiver signed expressly upon agreeing on the second time extension, Toto replied that it did not have any legal justification as it is a routine procedure implemented by CDR at any time an extension of time is requested. Also Toto considered that it had to accept the waiver of compensation because there was no any other available option. For this reason such a waiver is in breach of the FET and are inconsistent with article 3 and 4 of the signed treaty.

Toto considered that the signed waiver has effects on the contract itself but not on the treaty. Contract's claims are different from the treaty's claims. By waiving Toto's right

to claim related to contractual time extension does not waive Toto's right to claim compensation for treaty breaches.

Tribunal decision

The tribunal decided the following:

- No proof that Lebanon exercised duress to obtain the waivers
- No evidence that the waivers were not given under the main contract
- When the same damage for the same act has been waived under the main contract, it cannot be reclaimed under the BIT.

5.2.5.5 The Work

It was very obvious that the working site was not ready before signing the main contract as the government was in the process of expropriating the lands. Also the CCJA expressly stated that the handover of the site to the contractor would be done progressively as soon as the parcels were expropriated. Moreover, after signing the contract Toto proposed to change the path of the highway, so new expropriations had to be made. Below is a summary of Toto, Lebanon and the tribunal decision on the accomplished work:

Toto's Position

Below are the argument used by the claimant Toto regarding the actual work on the site:

- Toto declared that the work in the first Lot was postponed to more than seven months as the parcels were occupied by army troops.

- Toto informed Lebanon that the army prevented any work adjacent to them.
- Toto was not allowed to work on the assigned sites, and additional costs have been incurred by the company as all the equipment remained idle for a long time.
- Toto did not get the lands in a progressive manner. They declared that the CCJA clearly mentioned that the site will be delivered *progressively* to Toto as early as the parcels of the project are expropriated. They added that progressively means by continuing successive step, one following the other.
- Toto claimed that even though the CCJA did not clearly mention the date of site delivery, Lebanon must deliver the site within a reasonable timeframe.
- Soil in lot 2 was unsuitable for building the viaduct, so additional lands have to be expropriated.
- Toto declared that some owners did not receive a compensation for their expropriated land, so they completely refused the access of Toto to the working site. Toto declared that at least six times the internal Security Forces had to intervene with the land owners but without success. Their opposition was very serious that CEGP had to extend the time to complete the project.
- Toto added that the company was ordered by the Municipality-of-Saoufar to cease their work on lots three because of a water way.
- Toto informed Lebanon that there is a mandatory slope protection in Lot 6. It took Lebanon several months to approve Toto's request and deliver the required extra parcels.

Position of Lebanon

- Lebanon argued that Toto inspected the working site before signing the main contract, and Toto knew about the existence of the army troops. Lebanon also declared that Toto started the work on this specific land several months after the army left the place.
- Lebanon stated that Toto didn't start the work shortly after the order to start was given.
- Toto proposed the change of the path of the road after signing the contract.
- As for the successive delivery of land, Lebanon referred to the CEGP in which it is clearly stated that Lebanon will hand over the lands based on the progression of the expropriation.
- Toto did not object on the progressive hand over of the land.
- Toto had enough time to examine and analyze the geography of the site.
- Lebanon stated that modifying the path needs additional time for the Lebanese government to study the newly proposed structure before approval.
- Toto failed to file a certified report by the engineer about the obstruction faced by landowners as required. Verbal opposition of land owners is being used as an excuse.
- For extended time line caused by the amended project proposed by Toto, Lebanon states that Toto can't refer to the original deadline of the project.
- Lebanon argues that Toto should have verified the sliding nature of the soil when the company tendered for the project and took appropriate measures.

- Lebanon declares that seven months after signing the original contract, 90% of the lands were delivered to Toto as per the original project.

5.2.5.6 Claims of breaches of party provision

According to Toto Costruzioni Generali S.P.A. v. The Republic Of Lebanon, 2012, P.41, "the arbitral tribunal decided that it has jurisdiction over the following disputes:

a. Delay in expropriation
b. Failure to remove army troops
c. Changes in regulatory framework

The tribunal has the competence to decide whether these disputes consist breaches of article 2, article 3.1 and article 4.1 of the bilateral investment treaty signed between the Lebanese Republic and the Italian Republic". Following are the detailed articles of the BIT:

Article 2

"(1) Each Contracting Party shall in its territory promote investments by investors of the other Contracting Party and admit such investments in accordance with its laws and regulations. (2) …. (3)Each Contracting Party shall protect within its territory investments made in accordance with its laws and regulations by investors of the other Contracting Party and shall not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, sale or liquidation of such investments. In particular, each Contracting Party or its competent authorities shall issue the necessary permits mentioned in paragraph 2 of this Article. (4)Each Contracting Party shall create and maintain, in its territory favourable economic and

legal conditions in order to ensure the effective application of this Agreement". (Agreement between Lebanese Republic and the Italian Republic Article 2, 2000, P.3)

Article 3.1

"Each Contracting Party shall ensure fair and equitable treatment within its territory of the investments of the other Contracting Party. This treatment shall not be less favorable than that granted by each Contracting Party to the investments made within its territory by its own investors, or than that granted by each Contracting Party to the investments made within its territory by investors of any third State, if this latter treatment is more favorable". (Agreement between Lebanese Republic and the Italian Republic Article 3.1, 2000, P.4)

Article 4.1

"Investments by investors of either Contracting Party shall enjoy full protection and security in the territory of the other Contracting Part". (Agreement between Lebanese Republic and the Italian Republic Article 4.1, 2000, P.4).

5.2.6 Tribunal Final Decisions

- The Tribunal has noted that Toto didn't provide evidence showing that there was an unreasonable delay in the actual expropriation proceedings.
- The tribunal noted that a delay in expropriation only is not enough to constitute a breach of article 2. It should be caused by Lebanon otherwise there is no breach of article 2. Also the tribunal found that Lebanon took adequate measure to protect Toto' investment.

- The tribunal noted that Toto didn't evidence that Lebanon failed to take preventive measures regarding the owner's obstruction. Also Toto failed to note the measures that had to be taken by Lebanon to prevent owner's objection on the project. In addition Toto failed to mark the effect of the temporary obstruction on the contractual completion date.
- With respect to the BIT in the first part of its second article, the tribunal noted that Toto failed to present proof that Lebanon did not act in a diligent manner.
- With respect to the BIT in the third part of its second article, the tribunal noticed that Toto didn't claim that Lebanon behaved in a discriminatory manner and failed to point out how Lebanon had to work in a reasonable manner.
- In reference to the BIT in the fourth part of its second article, the tribunal noted that Toto accepted the time extension to finalize the work and waived its right to claim damages. Such acceptance contradicts the allegation that Lebanon was unsuccessful in protecting the investment.
- In reference to article 2 and 3.1, the arbitral tribunal noted that Toto failed to prove that the initial design of the project was wrong, or that Lebanon used its sovereign authority to implement such safety standard. Therefore the claim that the inappropriate project design constitutes a breach of the BIT is inappropriate.
- In reference to article 3.1, the tribunal noted that Toto did not submit evidence regarding the complaint sent to CEGP about the delay in expropriation. The tribunal was not able to note the basis used by Toto that made them expect an earlier hand over of expropriated lands. In addition, the tribunal interpreted FET with international and domestic standards. Toto failed to submit evidence that

Lebanon behaved in discriminatory manner. It was only allegations about breaching the FET that Lebanon would have carried out the work differently if the investment was its own.

- The tribunal noted that FET does not constitute a guarantee to Toto that taxes and customs cannot not be altered.
- As per the first part of article 4 of the treaty, the arbitral tribunal noted that the temporary obstruction of the owners did not deteriorate the investment, and no existed proof that Lebanon was negligent or failed to take preventive measures.

The arbitral tribunal decided that no compensation is owed by Lebanon to the Italian contractor Toto as the Lebanese Republic did not breach the bilateral investment treaty, and all the claims for compensation requested by Toto are dismissed. Toto and Lebanon must equally bear the arbitral tribunal fees and expenses.

Chapter Six

Analysis on the case

Before I start in analyzing different part of the case I would like to stress the fact the arbitral tribunal is similar in terms of form to state courts. Claimants and respondents are both represented by lawyers that have the responsibilities to file submissions on the merits of the case and represent the parties at the hearing. Below are some of the main points that need to be highlighted and analyzed because they represent essential challenges that face arbitration procedures and might lead to the inefficiency of the process in case no appropriate measures are taken.

6.1 Resignation of the arbitrator

One of the main challenges that may face the arbitration process is the resignation of the arbitrator during the arbitral proceedings. In the case of Toto v. Lebanon, all three arbitrators accepted their appointments, and ICSID declared the starting of the proceedings on October 30, 2007. After more than four years of appointing Mr. Alberto Feliciani as an arbitrator, he informed ICSID of his resignation. After the arbitrators accept their mission, they are under a general obligation to carry the whole arbitral proceedings and issue an award within the given time limit. At the same time arbitrators are under a specific obligation that prohibits resignation without a valid reason. In principle an arbitrator is assigned based on the Curriculum Vitae, knowledge, experience, cultural background, personal profile, legal expertise and much more general and specific characteristics that affect the selection process. Replacing a

resigned arbitrator is not an easy mission. Parties may waste time and money looking for someone else with the same profile. Adding to that and based on the selected technique for appointing arbitrators, one party may refuse the appointment of the newly replaced arbitrator, and that requires additional time and money looking for a replacement that suits all parties in a dispute. Moreover if I want to go to an extreme case where both parties don't agree on any arbitrator to replace the one who resigned, the intervention of the state court is an option. Allowing the state court to step in the assigning process means additional time that is being wasted. Parties might delay the appointment of the new arbitrator as a dilatory tactic to gain more time and delay the progress of the arbitral proceedings.

If appointing a new arbitrator is not an issue, the real threat is the additional waste of time that is needed by the newly appointed arbitrator to study the case, to participate in the deliberations and in issuing the award. Success in choosing a new arbitrator is not the end of the challenge. A final resort that may be possible for both parties in case they don't want to waste time in the process of appointing a new arbitrator and then giving additional time for the arbitrator to study the case is to agree on proceeding with arbitration without appointing a new arbitrator. This form of arbitration is called truncated tribunal that is allowed based on parties' consent in order not to obstruct and frustrate the arbitral proceedings. It is very logical, one of the party can object the appointing of a new arbitrator in order to save time simply because the resigned arbitrator had the opportunity to participate, yet he decided to resign.

Furthermore this is not the end of the problematic that arose out of the resigned arbitrator. In case of a truncated tribunal, executing the award might be the serious

problem in the country where the successful party intend to execute. The purpose of the arbitration is not only to issue and arbitral award, but the most important value is to issue an executable award. In case of a truncated tribunal, the court may refuse to issue an execution order simply because the award lacks the third signature for the third arbitrator in the case of three arbitrators' tribunal.

In case of institutional arbitration and in case of resignation of one of the arbitrators, the rules of the institution apply. These rules minimize the dilatory tactics that may be used by one party to delay the proceedings. In the case of Toto v. Lebanon, the report did not mention the reason of resignation, and ICSID appointed an arbitrator within one month of the resignation. Parties did not object on the appointment, and the remarkable fact is that the arbitral proceedings were closed on May 1, 2012 that is one month and a half following the assignment of the new arbitrator. The arbitral award was issued at the end of May 2012. The Newly replaced arbitrator Mr. Schwebel was the first to sign the arbitral award on May 24, 2012, and then it was followed respectively by the signature of the second arbitrator and chairman on May 28 and May 30, 2012. Here is the question, did the replaced arbitrator had enough time to restudy the case and participate in issuing the award? Or ICSID had the upper hand over the tribunal were it replaced the resigned arbitrator in order to facilitate the issuance of the award and minimize the risk of recourses against the award? A main legal doctrine in arbitration that is of great importance is party autonomy. Parties have the rights to select their arbitrators. Starting with the fact that parties did not object is a clear tacit agreement that they accept the appointment of the new arbitrator. On the other hand, "A quick research on the profile of Judge Stephen M. Schwebel I found that he was appointed as a Judge of the

International Court of Justice between the years 1981 and 2000. He also served as Court President between the years 1997 and 2000. He has been President of the Administrative Tribunal of the International Monetary Fund since the year1994, and he is currently an international arbitrator and counsel" (United Nations Audiovisual, p.1) Here I am not evaluating the competence of Judge Schwebel, yet a high profile legal expert with such experience and qualifications has the capability and the skills to study a case during a month and half and sign the award. Adding to that, a month and half is a reasonable time for an experienced arbitrator to review a case and participate in issuing the award.

I believe that in case the decision to replace the arbitrator is taken, the history, qualifications and profile of the newly appointed arbitrator are of great importance. This arrangement must be studied on a case-by-case approach, so it may succeed in one case and fail in the other. When an arbitrator resigns for whatever reasons whether valid or not, the institution, the parties and the remaining arbitrators have to assess the risks associated with the needed decision and take the required action taking into consideration three parameters, time, money and execution. One resort that is left for the party that suffered damages from the resignation is to sue the resigned arbitrator for damages.

6.2 Impartiality and Independence of the Arbitrator

A general principal in arbitration that is of great essence for the effectiveness of the arbitral process is the independence and impartiality of the arbitrators. Here is the question, how is it possible for an arbitrator who is appointed by the parties and who is

getting paid by the parties in a dispute to be impartial and independent? Before discussing these two principles, it is worth to indicate that in ad-hoc arbitration, arbitrators are being paid directly by the parties in a dispute; however in institutional arbitration, arbitrators are getting paid by the institution. The institution in its turn gets money from the parties, so even in this latter case the arbitrators are getting paid indirectly by the parties.

There is an ongoing obligation on the arbitrators to remain independent and impartial throughout the whole arbitral proceedings. Regardless if this duty is mentioned in the terms of reference, procedural order, applicable procedural or substantive law, independence and impartiality are universally accepted principle of international arbitration. They must be applied even if there is no text that requires the application of these two principles.

Impartiality requires the arbitrator neither favor one party in the dispute nor to be predisposed to a specific subject matter or to a specific person. Impartiality is very subjective, and it is hard to be proved. Impartiality is always a question when it comes to the influence of the arbitrator's nationality on the proceedings. In principle the mere fact that an arbitrator and one of the party share the same nationality doesn't mean that the arbitrator is impartial unless parties agree to the opposite. As we can find in the case of Toto v. Lebanon, Mr. Fadi Moghaizel who holds the Lebanese Nationality was appointed by Lebanon. ICSID refused to proceed without the approval of the other party to the dispute. Same scenario applies to Toto when the company appointed Mr. Feliciani, an Italian national. There is a common practice in a three arbitrator's tribunal where the chairman has to have a different nationality from the parties to the dispute.

As for the principle of independence, the way of testing this principle is very objective as it does not include the state of mind of the arbitrator. Dependence could be financial or moral. If I want to summarize the two concepts, I would put them as follows:

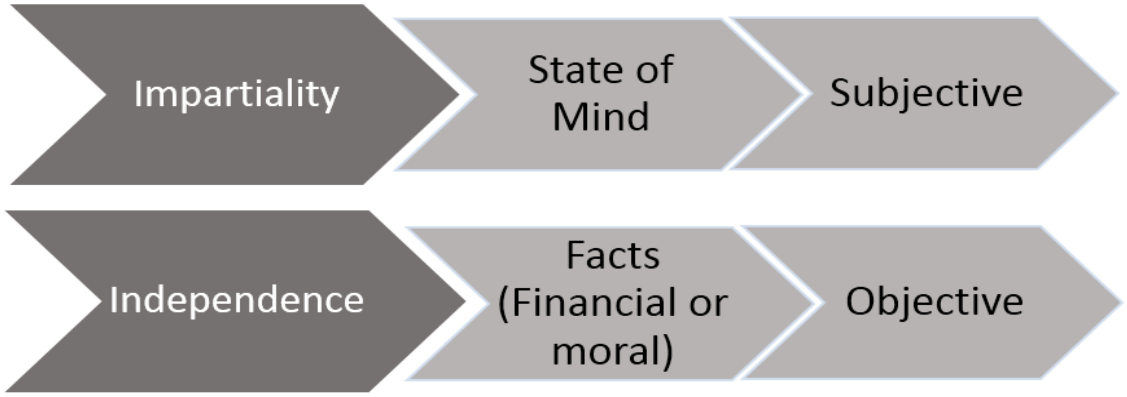

Figure 3: Impartiality and independence

Basically the arbitrator should not be relying financially on either parties, and at the same time there should be no moral dependency between the arbitrators and the parties like being for example a close relative to one of them. On the other hand the arbitrator should not prejudge the case or act as a consultant for either parties. The arbitrators has an ongoing duty to disclose any relevant fact that might be considered as incompliant with the requirement of independence and impartiality. Another factor that usually makes arbitrators apply these two principles is the risk that the arbitrator may not be appointed by anyone in the future because of breaching these two essential requirements. After having said all of the above, the risk of being partial and dependent can be mitigated, but for sure it cannot be absolutely eliminated.

6.3 Force Majeure

While reading the BIT that was signed between Lebanon and Italy and in connection with the severe economic recession in Lebanon that has started at the end of 2019, a few articles in the mentioned treaty caught my attention. Before we dig into the details of these articles, it is essential to note that the articles of this treaty is standard in almost every investment treaty signed by Lebanon. In other word, this treaty is kind of a model that is being signed by developing countries to protect foreign investors.

According to article 4 (6) of the Agreement between Lebanese Republic and the Italian Republic on the promotion and reciprocal protection of investment (2000), states that if the investment in the host country suffers losses because of war, armed conflict, revolution or revolt, the host country must give compensation or indemnification to the foreign investor.

It is very clear that the above mentioned event in article 4 including revolutions are not considered force majeure. Force majeure represents unforeseeable events outside the control of both parties, and that the parties of a contract were not the cause of these events. In principle events like revolution, wars, armed conflicts are considered force majeure in economically and socially stable countries. These events may be considered foreseeable and expected in countries that are politically unstable or country with low peace index. In this perspective, Global Peace Index (GPI) measures the safety and security of countries around the globe. The most important part in the case of force majeure events is that neither party is considered in breach of a contract.

Lebanon is politically unstable, yet the country was not expected to have a sudden revolution that causes radical changes in different aspects. Here is the question, is the revolution in Lebanon considered a force majeure or not? Going back to the signed BIT, Lebanon should compensate the foreign investors for any suffered loss in its territory caused by the previously mentioned events including revolution or a national emergency. A Key issue that is fundamental to Lebanon and to developing countries in relation to investment treaties that impose essential questions. Should these types of treaties be amended to consider these events as force majeure thus exempt Lebanon from paying huge amount of indemnifications that may be beyond its financial capacity? Or may this amendment be viewed as unfair from a foreign investor's perspective that are working in high risk countries? My opinion is that the mere fact that the foreign investor knows that the investment is being held in a high risk country impose certain responsibility that must be held by the investor. In case the risk is unforeseeable or unexpected, an assessment of the risk must be performed, and a fair allocation of these risks must be distributed between the investor and the host-country. It is unfair to allocate 100% of the risk on the host-country because the foreign investor knew about the risk. Yet the investor agreed to invest in a high risk environment.

Definitively, Lebanon must review and amend all treaties in relation to compensation that must be paid in case of force majeure events. Assessment and allocation of risks must be done on a project by project basis. The purpose of a treaty is to organize the relation between the foreign investor and the host-country and to protect the foreign investment from the sovereign authority of the state. It is unreasonable to allocate risks in advance to the host country. A treaty cannot release the investor from the possible

unfair sovereign power of the state and gives the investor the upper hand in contracts with developing countries. A treaty must stand in the middle as it should not favor one party over the other. Finally it is crucial to mention that the treaty represents the substantive law in case parties decided to solve their dispute through arbitration.

6.4 Execution challenges

After discussing different aspects of arbitration and highlighting the advantages of this effective mechanism where parties want to resolve their dispute outside the traditional national court system, it is inevitable to mention the most serious challenge that may affect the arbitral process. The value of this mechanism is to issue an executable arbitral award that is recognized and therefore enforced at the place where the parties intend to execute the award. Having a confidential, specialized and flexible arbitral tribunal is of great value, yet an award that cannot be executed due to a legal loophole in the arbitral process or simply because a country does not want to recognize or enforce arbitral awards renders the whole arbitral process useless.

While agreeing on arbitration as an ADR mechanism is in the hand of the parties, the execution of the award is in the hand of state courts. In other words once the award is issued and sent for the next stage which is execution, arbitration leaves its private sphere. So what can make state courts recognize an arbitral award and therefore enforce it? I would like to address this issue using two different scenarios. In the first scenario, where the arbitral award is issued in the same country where parties intend to enforce. Such type of arbitration are considered local or national arbitral awards that are protected by the laws of the country. If the arbitral award meets all requirements

defined by the national laws for validity and enforceability, national courts of execution enforce the award in its territory. In the second scenario, where the award is issued in a country other than the country of execution, the risk of not executing the award is a possibility. To mitigate this risk, countries signed several bilateral and multilateral agreements on recognizing and enforcing foreign arbitral awards. The most recognized convention that is considered the backbone of recognizing and enforcing foreign arbitral awards is the NYC. According to article 3 of "The convention on the recognition and enforcement of foreign arbitral awards (1958), each contracting state shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon" (p. 9).

With all the harmonization efforts for recognizing and enforcing arbitral award, the act of refusing execution of foreign awards still exist. According to article 5 (2) of "The convention on the recognition and enforcement of foreign arbitral awards (1958) a state may refuse the recognition and enforcement of foreign arbitral awards in case the subject of the dispute cannot be resolved by arbitration as per its national law, or simply because the award contradicts the state's public policy" (p.10). The Convention also added that an award may be refused at the request of the party in case one party has some incapacity, the agreement is not valid as per the agreed law, violation of due process, or in case of extra and ultra petita work performed by the arbitrator. Talking about the grounds for refusal, it is worth to mention that the arbitrator has the duty ex-officio to raise the issue of non arbitrability. Because the arbitrator is supposed to render an executable award, an arbitrator must deny jurisdiction over a dispute that cannot be arbitrated. In conclusion, the grounds for refusal can be assessed and mitigated from the

beginning of the arbitral tribunal, so the parties can either decide to continue with process or just refer to national state court. One major challenge that overrides all risks mitigation procedures is in the case of investment arbitration where the state is a party to a dispute. The state may simply use its sovereign power and refuse to execute. In this case, it is hard to execute over the local assets of the government, but execution over the foreign assets of the state is a possibility.

6.5 The trap of reciprocity

Looking at the BIT between Lebanon and Italy that was given as an example or looking at any other treaty or convention, reciprocity is always on the spot. The principle of reciprocity consists of duties and obligations owed by one party to another and vice versa. In other word it is an agreement that equally binds all parties in an agreement. In case one party excluded the application of a certain clause in an agreement, the other party is not bound by this clause. At first sight reciprocity represents the highest level of fairness, impartiality, and justice; however this principle may not be as it appears. The reason behind this assessment is strictly related to reciprocity agreement with developing countries. Developing countries represent less developed countries that are seeking to become more advanced in different economic and social aspects. In principle these countries need to outsource different foreign expertise simply because these expertise are not locally available. Starting from the standard that says "You cannot give what you don't have", the trap of reciprocity is set. Developed country may agree with developing countries on fair clause or even on more harsh terms that regulate the investment in the host countries. The developed country agrees on reciprocity, so if an investor of the developing country invest in a developed country same terms apply. It

looks very appealing, just and fair, yet what is the possibility of an investor from a developing country to invest in developed country? I do not want to generalize, but the possibility that developed countries are having the upper hand in investment agreements is always on the table.

Chapter Seven

Conclusion and recommendations

7.1 Conclusion

Lebanon is a friendly arbitration state. Its national court system is familiar with arbitration, and the latter is acknowledged by the Lebanese code of civil procedures. Lebanese Arbitration law is based on the French arbitration law. With regard to the international arbitration rules found in the Lebanese Code of Civil procedures, the Lebanese legislator translated the international arbitration law word by word from the French law. It was very clear that the Lebanese legislator wanted to adopt the delocalized arbitration approach adopted by the French law where arbitration exists by itself regardless of any other national law and away of national public policy. It is crucial to mention that when it comes to international arbitration, Lebanese law acknowledges international norms. This privilege is not given in domestic arbitration. Giving a wider margin for international arbitration is a clear sign that the law recognizes arbitration as an effective ADR mechanism, yet there is some restrictions when it comes to domestic arbitration to make it suitable with the Lebanese national law and the Lebanese court system. Adding to what have been said, the Lebanese legislator went further in adopting domestic arbitration in an extensive manner by allowing the state to refer to arbitration to resolve a dispute that arises out of an administrative contract, but arbitration in this case is valid but not operative until approved by the relevant regulatory authority for public law entities. Internationally, the government is

considered a merchant when it enters in an international contract or transaction, and the contract is no more considered an administrative contract. In this respect Lebanon signed several treaties, whether BITs or MITs, which allow parties to a contract with the Lebanese state to resolve their dispute by arbitration. The friendly arbitration approach adopted by Lebanon has many advantages. The primary advantage is that it encourages foreign investors to inject huge capitals in the Lebanese economy. There is no doubt about the privileges offered by arbitration like speed, flexibility and confidentiality of the arbitral proceedings. This legislative development in Lebanon fits the requirements of investment in oil and gas and encourages public private partnership.

Referring to the investment arbitration case that took place between Lebanon and the Italian investor, a clear view is given regarding the investment arbitration proceedings. Above all an explanation is given regarding the BIT that was signed between the two countries and the types of protections provided in respect of expropriation, FET, MFN and full security and protection of the investment in the host country. The importance of BIT was highlighted as investment arbitration cannot be addressed independently. At the end of the paper an analysis has been done on critical issues that faced the investment arbitration case addressed in the paper and that may be common challenges in arbitration. The first issue was the resignation of the arbitrator throughout the arbitral proceedings, and the risk associated with it. The second issue was the impartiality and independence of the arbitrators that are designated by the parties and that are being paid either directly or indirectly by them. The third issue is the definition of a force majeure events, and the question was whether to consider a revolution as force majeure or not. The fourth issue was the execution challenge, and for that purpose an analysis of

different article of the NYC has been performed. The fifth and final issue, is the trap that might be associated with the principle of reciprocity. In conclusion, Investment arbitration is a little known alternative dispute resolution mechanism, yet it manages and controls huge investments around the world. Lebanon recognized this mechanism, and the Lebanese legislator adopted a pro-arbitration approach. This Mechanism has many advantages that affords protections to the foreign investors and the host countries. Nevertheless this mechanism may hide some forms of injustice in respect of risk allocation when dealing with developing countries.

7.2 Future researches

Future researches can be conducted on the factors that may jeopardize the investment arbitration proceedings and the possible solutions to override different challenges that take place either throughout the proceedings or during the execution phase. On the other hand, it would be of great essence if a future research will be carried out on the possibility to create an updated version of the New York Convention that matches the arbitration requirements of 2020 and gets the consent of the majority of countries around the globe.

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