

نظرية التحكيم التجاري الدولي وراء الاستثمارات الإسلامية الأجنبية
الفاصلة

THEORY OF INTERNATIONAL COMMERCIAL
ARBITRATION BEHIND FOREIGN CORRUPTED
ISLAMIC INVESTMENTS¹

لافي درادكة

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الملخص

تبحث هذه المقالة في الخطوط العريضة الأساسية للتحكيم التجاري وعلاقته بالفساد في عقود الاستثمار الإسلامية. ويتناول موضوع إساءة استخدام التحكيم لتغطية بعض ممارسات الفساد في مثل هذه العقود نظرياً وعملياً. يجيب لماذا قد يشجع التحكيم التجاري المستثمرين الأجانب على الانغماس في الفساد فيما يتعلق بعقود الاستثمار الإسلامية لتحقيق مكاسب خاصة. كما أنه يثبت كيف يمكن استخدام بعض قواعد ومبادئ التحكيم التجاري لتحل محل القوانين الوطنية والاختصاص القضائي للمحاكم الوطنية لتجنب مكافحة هذا النوع من الفساد. وتفحص هذه الحقائق من خلال بعض ممارسات التحكيم التي توضح سوء استخدام التحكيم في إبرام مثل هذه العقود.

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Abstract

This article examines the core outlines of commercial arbitration and its relationship with corruption in Islamic investment contracts. It deals with the issue of misuse of arbitration to cover some practices of corruption in such contracts in theory and practice. It answers why commercial arbitration may encourage foreign investors to indulge in corruption regarding Islamic investment contracts for private gains. It also proves how some rules and doctrines of commercial arbitration can be used to supersede the national laws and the jurisdiction of national courts to avoid combating such type of corruption. It examines these facts through some practices of arbitration that illustrate the misuse of arbitration in concluding such contracts.

الكلمات الدالة: تحكيم ، عقود استثمار ، فساد ، أحكام شرعية

Keywords: Arbitration, investment contracts, corruption, Islamic rules.

1.0 Introduction

The scenario of practicing arbitration in Islamic investment contracts has two parts. The first part is concerning with arbitration as reason behind attracting foreign Islamic investments. The second part is concerning with arbitration as means of settling the disputes arise over Islamic investment contracts.

Arbitration plays its role in attracting foreign investments in the hosting countries as a way by which investment disputes is resolved. Otherwise, foreign investors would not accept to invest in the hosting countries. In most cases, foreign investors could not win the investments in these countries without direct or indirect links with the decision makers therein. Such links were at the expenses of manipulating or ignoring the local laws or rules that govern investments. This fact makes foreign investors carefully aware of the legal consequences of any disputes between them and the governments of hosting countries. Therefore, foreign investors insist on not to be

litigated before the courts of hosting countries in order to avoid the corruption issue as part of domestic public policy's defence.

Practically, arbitration always plays its role in settling disputes over investments contracts under the international bodies in favour of foreign investors. This fact is reached, even though the issue of corruption was raised as a defence before the international bodies which always preferred the interests of the investors regardless the ways of obtaining investments in these countries.

There are some legal as well as practical reasons behind adopting arbitration in foreign investment contracts. These reasons create suitable legal environment for corruption in the hosting countries. Confidentiality in arbitration process plays its role in encouraging both foreign investors and the hosting government's personnel to make a deal in how to distribute the investment outcomes between them regardless the local rules that govern such investments. Moreover, the Islamic applicable law in Arbitration cannot be fixed clearly as there is no Islamic law issued by state to govern contracts in general including investment contracts. The practice of Islamic law in international arbitration depends on adopting Islamic principles and theories rather than law. As such, forum shopping may be conducting by the disputants or the arbitral tribunal in choosing the Islamic principles that support the foreign investors claims. Forum shopping may also be conducting to choose the Islamic arbitration centre that adopt Islamic principles which support foreign investors claims.

Furthermore, the adoption of international public policy doctrine in arbitration makes the issue of domestic public policy in the hosting countries meaningless. The corruption in investment contracts between the foreign investors and the local governments are contrary to the domestic public policy in way or another. Foreign investors are always protected by the shield of international public policy which overruled the domestic public policy before the international judicial bodies.

Moreover, the principle of convention supersedes local laws that is adopted in the hosting countries encourages the issue of attracting foreign investments by means of bilateral investment conventions. It becomes a pattern to make conventions as pre-investment steps to create legal environment that fits foreign investors'

needs. By this method of making investments, the applicable local laws and authorities are helpless to protect the national interests in case of corruption in investment contracts.

This article tries to explain the role of arbitration in concluding corrupted Islamic investment contracts in the hosting countries in two main sections: section one deals with commercial arbitration creates attractive legal environment for corrupted Islamic investment contracts. Section two deals with commercial arbitration rules protect corruption in Islamic investment contracts.

2.0 Commercial Arbitration Creating Attractive Legal Environment for Foreign Corrupted Islamic Investment Contracts in the Hosting Countries

There are some legal as well as practical reasons behind adopting arbitration in foreign Islamic investment contracts (Alan Redfern et al ²⁰⁰⁴) These reasons create suitable legal environment for corruption in the hosting countries, which are:

2.1 Flexibility to Meet with the Scenario of Corruption in Islamic Investment

Arbitration is based on the principle of disputants' will by which the parties to the conflict in foreign corrupted investment contract can regulate arbitration to meet with their commercial and economic needs, and to consistent with the nature of investment. The disputants can select members of the arbitral tribunal with Islamic legal backgrounds that accept such kind of corrupted contracts; they can also choose the place of arbitration where the domestic laws accept such kind of corrupted contracts. Moreover, they can choose the applicable laws that recognize such kind of corrupted contracts; they can also choose the language of arbitration which is foreign one to hide the details of the corrupted contracts from the public. They can actually agree on anything that enters into the process of arbitration to meet the scenario of the dispute concerned (Daradkeh,2013).

2.2 Confidentiality in Arbitration Encourage Corruption in Islamic Investment Contracts

This is the main reason behind adopting arbitration in foreign corrupted Islamic investment. Commercial arbitration provides this service because arbitration proceedings are confidential to maintain the trust upon which illegal business relations is based, and that the parties seeking to keep its various aspects covered because of the sensitivity of such corrupted contracts (Daradkeh,2013).

2.3 Avoiding Domestic Judicial Jurisdiction

Arbitration prevents the domestic courts from deciding the disputes arising out of foreign corrupted Islamic investment. This reason benefits foreign investors from subjecting them to the local court's jurisdiction. It is also benefiting the local party from publishing the details of such corrupted contracts to the public of the hosting country (Daradkeh, 2013).

2.4 Absence of Judicial Supervision in Conducting Arbitration

Such absence ensures the smooth conduct of arbitration in settling disputes arising from corrupted Islamic investment. The process of conducting arbitration is fully independent from the intervention of the local courts in the place of conducting arbitration. The modern arbitration rules are distinguished in adopting such approach. Therefore, arbitration process is safe from the supervision of the local courts under any circumstances (Daradkeh,2013).

2.5 Maintaining Cordial Relationships

Arbitration secures the cordial relationships between the disputants of foreign corrupted Islamic investment. Local parties seek to maintain their relations with the foreign investors even in bad circumstances. they always looking to have more business in the future with the same investors. They do not want to ruin their relationship with the foreign investors because of the disputes. Therefore, they choose arbitration as an amicable means of settling the dispute (Daradkeh,2013).

2.6 Practicing forum shopping among Islamic Arbitration Centres or Islamic rules

Forum shopping may be conducting by the disputants or the arbitral tribunal in choosing the Islamic principles that support the foreign investors claims. Forum shopping may also be conducting to choose the Islamic arbitration centre that adopt Islamic principles which support foreign investors claims (Daradkeh, 2016).

2.7 Securing the Enforcement of Arbitral Award

Foreign arbitral award in general is enforceable in the country where the assets of the losing party are located. This is because the availability of the international and local means of enforcements. The issue of recognizing and enforcing foreign arbitral awards regarding corrupted investment contracts depends on the local rules in the enforcing country. It is not necessary to consider the corruption issue in the investment contract by the enforcing courts, they may concern only with deciding whether the arbitral award is enforceable or not according to the applicable regime. Therefore, the losing party cannot raise the issue of corruption before the enforcing courts as a ground of refusal to enforce arbitral award based on underlying illegal contract (Shore,1999).

3.0 Commercial Arbitration Rules Protect Corruption in Islamic investment contracts

Arbitration in its structure contains some doctrines and rules that can be used to protect corruption such as separability doctrine, arbitrability doctrine, applicable laws and rules in arbitration, fixing the rendering and forum place of arbitral award, public supersedes domestic public policy doctrine, and the use of more favourable right provision to enforce illegal arbitral award. This section tries to show the connection between the mentioned doctrines and Corruption in Islamic investment contract as they provide, in practice, protection to such corruption contracts.

3.1. The Separability Doctrine in Arbitration

The separability doctrine is one of the most significant developments in commercial arbitration. It is accepted in arbitration rules since 1990s to lengthen the authority of arbitral tribunal. This doctrine is accepted

also to boost the disputants to select arbitration to resolve their existing or future differences (Svernlou,1991; Marrella,1997; Rogers &Launders,1994). To the contrary, it also can be used to protect the interest of investors in illegal Islamic investment contract. This section will discuss first the effect of separability to the illegality of arbitration agreement and the underlying contracts, and second the implication of this doctrine on corrupted Islamic investment contracts.

3.1.1. The Survival of Arbitration Agreement and the Illegal Islamic Investment contract under separability doctrine

This subsection discusses the relationship between the separability doctrine and the corrupted Islamic investment contract. This doctrine considers the arbitration agreement valid even though the underlying Islamic investment contract is invalid because of corruption. The reason of such challenge is provided by all arbitration rules and particularly in articles II (2) and V (1, a) of the New York Convention. Two main matters may arise in regard to this ground. The first one, on the concept of illegality of arbitration agreement according to the applicable law, it is presented that it may mean the absence of consent to arbitrate by means of misrepresentation, duress, fraud, or undue influence (Beijing Jianlong, 2007; Berg, 1981). The second matter, what is the law applicable? According to rules of arbitration, there are two ways to determine the invalidity of arbitral agreement. Firstly, it is the law of the place where an award was made in case the parties have not agreed on a particular law. Secondly, according to the law which has been chosen by the parties.²

Yet, there are some who would raise question on this issue by saying that the parties have not agreed to subject an arbitral agreement to a certain law, but they have chosen a law to govern the contract which contains the arbitral agreement. Their question is whether or not such a law is applicable also to the arbitral agreement on the basis of the separability of the arbitral agreement? In this regard, there are two views about the law that governs the arbitral agreement (Collins, 2000; Pietro and Platte, 2001). The first view suggests the law which governs the contract also governs the arbitral clause unless the parties agreed

² For example, article (36) of Jordanian Arbitration Law of 2001.

otherwise. The second view suggests, as the applicable law, either the proper law of contract or the law of the seat of arbitration.

Moreover, other suggestion provided that, according to the doctrine of separability, the law which governs the contract should be different from the law that governs the arbitral agreement as this agreement is separated from the contract. Pietro and Platte refuse this argument on the ground that the doctrine of separability is only important in a case where the underlying contract is invalid, it does not make the arbitral agreement as a separate entity from the underlying contract for the purposes of the applicable law (Pietro and Platte, 2001). This situation becomes more applicable in applying Islamic law as it raises the question of the meaning of Islamic law and according to which jurists (Daradlkeh,2016).

Yet, it can be concluded that the enforcing court has the power to determine which law governs the invalidity of the arbitral agreement since such an argument arises before it. For example, under New York convention, it will be the law of the place where an award was made, if the parties have not chosen the law to govern the arbitral agreement.³ As a result, it can be assumed that the award will be examined by the law of the place where it was made when there is no agreement about the law of arbitral agreement. Under Islamic rules, this approach can be applied where the parties have not agreed about the governing law. Mustill adopts this approach In *Channel Tunnel Group v Balfour Beatty Ltd*,⁴ by saying that ‘the parties when contracting to arbitrate in a particular place consented to having the arbitral process governed by the law of that place is irresistible’. Moreover, Mr Justice Toulson in *XL Insurance Ltd v Owens Corning*,⁵ reached the same conclusion that the arbitral clause is governed by English law since the parties choose to conduct arbitration in London under Arbitration Act 1996.

From these precedents, it can be reached that the enforcing court will examine the validity of arbitral award according to the law of forum place once the law governing the validity of an arbitral agreement becomes questionable such as in Islamic rules. This

³ According to article V (1, a) of the New York Convention.

⁴ [1993] A.C 334, 357.

⁵ [2000] 2 Lloyd’s Rep 500.

conclusion is compatible with Arbitration laws⁶ which speak to apply the law of the place where an award was made in the absence of the parties' agreement (North and Fawcett, 1992).

Berg argued that the invalidity of an arbitral agreement is also governed by article II of the New York convention and not only by article V (1, a) of the same Convention. Article II of the New York convention is about the existence or the absence of arbitration agreement, while article V (1, a) of the same Convention is about the validity of arbitration agreement. According to Berg, article II (2) of the New York Convention should apply with article V (1, a) of the said convention regarding the invalidity of arbitral agreement (Berg, 1981).

Applying Berg's above interpretation on Islamic corruption contract, there is a difference application between article II of the New York convention and article V (1, a) of the same Convention. The objection of illegality, because of corruption, under article II (2) of the said convention will be based on the existence or on the absence of arbitration agreement. Meanwhile, the objection of illegality, because of corruption under article V (1, a) of the said convention, it will be based on the invalidity of the arbitral agreement. This means that the arbitral agreement in corrupted Islamic investment contract has existed according to article II (2) of the said convention as 'The term "agreement in writing" provided by this article shall be interpreted to include an arbitral clause in Islamic investment contact or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams' regarding Islamic investment contact. Yet, in applying Islamic rules for example, this agreement is invalid as they do not provide such judgement. however, the validity of such agreement in this case is governed by the ordinary principle of contract law, which governs the parties' expression of consent, its form, and its scope (Arfazadeh, 2001; Daradkeh, 1998).

So, the validity or invalidity of the arbitration agreement in corrupted Islamic investment contract shall be determined under the law to which the parties subjected it or, failing any indication thereon such as, in applying Islamic principles, under the law of the country where the award was made. If the parties to corrupted Islamic investment contract subjected the validity of the arbitration agreement

⁶ Such as section 103(2, b) of English Arbitration Act 1996.

to the New York Convention, then it can be invalid under article V of the said convention, or not existing under article II of the said convention. In both situations, there will be no arbitration regarding corrupted Islamic investment contract as the result will be either illegal arbitration agreement or unexciting arbitration agreement.

The validity or invalidity of the arbitration agreement in corrupted Islamic investment contract under New York convention shall be raised carefully by the party concerned. It can raise the question with respect to article II (2) of the said convention in case an arbitration agreement regarding corrupted Islamic investment contract does not meet article II (2) of the Convention. The purpose it can achieve in this case not to arbitrate the dispute of corrupted Islamic investment contract. Meanwhile, it can raise the question with respect to article V (1, a) of the said convention in case an arbitral award does meet article V (1, a) of the convention and the result will be refusing the enforcement of arbitral award.

Therefore, the illegality of corrupted Islamic investment contract can be raised on two grounds. First, under the existence or the absence of the arbitral agreement as provided by article II (2) of New York convention. Such approach is reached in *Excomm Ltd V Ahmed Abdul-Qawi Bamaodah (the St. Raphael)*⁷ the Court of Appeal held that: "For an agreement to be a written agreement to arbitrate it was unnecessary for the whole of the contract including the arbitration agreement to be contained in the same document; it was sufficient that the arbitration agreement was itself in writing and it was sufficient if there was a document which recognized the *existence* of an arbitration agreement between the parties." The same approach is also reached by the Court of Appeal in *Zambia Steel & Building Supplies v James Clark & Eaton Ltd*.⁸ In this case, the court was dealing with article II (2) of the New York Convention as it is enacted by sections 1 and 7 of the Arbitration Act 1975. The question was whether the terms of sale printed on the reverse of a contract quotation and containing the arbitral clause were properly incorporated into a purchase order, made pursuant to the quotation. The court held in this case that the requirements of sections 1 and 7 of the Arbitration Act 1975 are

⁷ [1985] 1 Lloyd's Rep 403.

⁸ [1986] 2 Lloyd's Rep 225.

satisfied if the document containing the arbitration clause to which reference is made in the main contract is written, even though unsigned. That appears to be consistent with article 7(1) of the Arbitration Act 1975 which defined the arbitral agreement as ‘an agreement in written’ omitting the words ‘signed’ by the parties as contained in article II (2) of the New York Convention.

Moreover, objection under article V (1, a) of the New York Convention regarding corrupted Islamic investment contract can be raised under invalidity of the arbitral agreement according to the law which governs the incapacity of a party, or under the invalidity of the arbitral agreement according to the law which has been chosen by the party or by the rendering place law (Berg,1981). The party against whom enforcement is sought in corrupted Islamic investment contract should prove the invalidity of the arbitral agreement and not the original contract under separability doctrine of the arbitral agreement in arbitration rules (DSJ Sutton and J Gill,2003).

Secondly, under invalidity of the arbitral agreement as provided by article V (1, a) of the said convention. The same approach is reached by Mr. Justice Steyn in *Rosseel NV v Oriental Commercial & Shipping Co. (O.k.) LTD and Others*⁹, he said that ‘The grounds of refusal set out in s. 5 are exhaustive. If none of the grounds for refusal are present, the award “shall” be enforced’. In *Dardana Ltd v Yukos Oil Company*,¹⁰ Judge Chambers defined ‘not valid’ as ‘simply means that the agreement is of no legal effect under the relevant law’. In *Dalmia v National Bank*¹¹ Mr. Justice Kerr, assumed that the validity of the arbitral agreement ‘can include continuing validity and is not limited to initial validity’.

To sum up, applying Islamic principles in corrupted Islamic investment contract supports the difference between the meaning provided by article II (2) and article V (1, a) of New York Convention. Thus, the objection under article II (2) concerns the existence of the arbitral agreement in corrupted Islamic investment contract, but the objection under article V (1, a) concerns the invalidity of the arbitral agreement in corrupted Islamic investment contract.

⁹ [1991] 2 Lloyd’s Rep 625, 628.

¹⁰ [2002] 1 Lloyd’s Rep 225, 229.

¹¹ [1978] 2 Lloyd’s Rep 223, 238.

3.1.2. The Application of Separability Doctrine on Corrupted Islamic Contracts of Investment

The concept of separability or autonomy of the arbitration clause is interesting in practices as it means that arbitration clause in corrupted Islamic investment contract survives the termination of that contract. This is because separability considers the arbitration clause to be separated from the main corrupted investment contract of which it forms part. It also means that the main corrupted Islamic investment contract to be survived the termination of the arbitration clause that it contains.

Separability doctrine survives arbitration, even though one party to the corrupted Islamic investment contract claims illegality of that contract. The arbitration clause remains valid regardless the invalidity of the main contract. Arbitration, therefore, has to be conducted regarding the disputes that arise over corrupted Islamic investment contract. This doctrine is endorsed by most, if not all, domestic and international arbitration laws and rules.

This doctrine encourages corrupted Islamic investment contracts as it prevents the national court of the host country of investment from raising this issue as part of national public policy. The foreign investors through the separability doctrine secure their business in the hosting countries from being affected by the intervention of the national court. The foreign investors therefore guarantee that any disputes arising out of investment contract will be decided by arbitration under the umbrella of the international arbitral institution.

3.2 Arbitrability Doctrine in Corrupted Islamic Investment Contracts

As regard to the corrupted foreign Islamic investment contracts, the question arises as whether or not the disputes arising out of such contracts are capable of settlement by arbitration? The illegality of arbitration agreement has been discussed above in corrupted Islamic investment contract. Under New York Convention, it can be raised either under article II (2) or article V (1, a) of the said Convention. Thus, the application of arbitrability doctrine under article II (2)

concerns the existence of the arbitral agreement in corrupted Islamic investment contract, but the objection under article V (1, a) concerns the invalidity of the arbitral agreement in corrupted Islamic investment contract.

In theory, arbitrability doctrine means that any dispute or difference regarding Islamic investment contracts shall be referred to be settled by arbitration. This doctrine provides two tests regarding the arbitrability of corrupted Islamic investment contracts. The first test is whether the dispute regarding Islamic investment contracts falls within the scope of arbitration clause, if yes then the second test will be whether or not such dispute is capable of settlement by arbitration. arbitrability doctrine differs from illegality doctrine as arbitrability doctrine is based upon the illegality doctrine. Furthermore, answering the question of difference between illegality and arbitrability draws the line between the jurisdiction of the arbitral tribunal and the jurisdiction of the national court. National court has jurisdiction as there are some kind of disputes belongs exclusively to the domain of courts. This is because that each country lists the issues which may or may not be resolved by arbitration on the basis of its own social, economic, religious, and political policy (Hanotiau,1997; Sornarajah,1988). Meanwhile, the arbitral tribunal has jurisdiction under arbitrability doctrine in other cases, and this doctrine can be used as ground of challenging the arbitral award under article V (2, a) of the New York Convention.

According to arbitrability, answering the question arises as to whether the differences of Islamic investment contracts are capable of being settled by arbitration? Two main points are to be examined. Firstly, what are the common factors which determine in-arbitrability regarding Islamic investment contracts? General speaking, the attempt to draw a list of the factors which determine in-arbitrability has failed and there is no body of authority which suggests how and where the line should be drawn (Mustill and Boyd, 2001; Reddy and Nagaraj, 2002).

Secondly, by what law the question of arbitrability is to be examined in case of choosing Islamic principles or rules? In literature, a number of laws can be suggested in academic writing with respect to this point (Pietro and Platte, 2001). In practice, national courts have

been considering arbitrability alternatively or cumulatively by the forum law, the law that has been chosen by the parties' agreement, and the law of the rendering place (Arfazadeh, 2001). Yet, New York Convention mentioned in article V (2, a) the law of the country where recognition and enforcement are sought (Berg, 1981, Pietro and Platte, 2001).

Furthermore, applying Islamic rules empower the enforcing court under article V (2, a) of the New York Convention to decide whether or not the dispute of corrupted Islamic investment contracts is capable of settlement by arbitration and under which law. The enforcing court can refuse enforcement by its own motion on the bases of arbitrability. It does not need a request to be made by the party against whom recognition and enforcement are sought.

Mustill and Boyd interpreted the arbitrability under English law for example, as 'any dispute, or claim concerning legal rights which can be the subject of an enforcement award, is capable of being settled by arbitration (Mustill and Boyd, 2001).

As regard to the corrupted Islamic investment contracts, the question arises as whether or not the disputes arising out of such contracts are capable of settlement by arbitration?

The answer of this question in theory is different from the answer in practice. In theory, all legal systems share that the same fact regarding the illegality of corrupted investment contracts; they all consider it as against their public policy. Therefore, such kind of dispute must remain within the exclusive jurisdiction of the national court. Meanwhile the practice shows contrary answer, the separability doctrine, as shown above, has moved the illegality issue from the jurisdiction of national court to the jurisdiction of arbitral tribunal. Under the separability doctrine the claim of illegality regarding Islamic investment contracts due to bribes or any other fraudulent claims should be settled by the arbitral tribunal rather than by the national court.

The developments in commercial arbitration are important for the foreign investors as it would not accept to involve in such illegal Islamic investment unless it is sure that any disputes that may arise out of such investment contracts will be settled by arbitration and not by national courts.

3.4. Fixing Rendering Place and Forum Place of Arbitral Award Regarding Foreign Corrupted Islamic Investments

It is an important issue for *parties in corrupted Islamic investment contracts* to fix the rendering place and the forum place of arbitral award. This is because legal issues such as, place of rendering the arbitral award, the applicable laws, the recognition and enforcement of arbitral award will be determined upon fixing rendering place and the forum place of arbitral award. This section shows the important of choosing such places as it has many legal consequences in favour of corrupted Islamic investment contracts.

3.4.1. Fixing Rendering Place and Foreign Corrupted Islamic Investments.

There are different criteria to determining the rendering place regarding arbitration of foreign corrupted Islamic Investments. Generally, such criteria are provided by the jurist and by legal arbitral rules. As regard to the jurist, they adopt the criteria of the place where the arbitral award is deemed to be made (Mann, 1992; Baker and Davis, 1992; Verbist, 1996; Chukwumerije, 1992). This is because as one jurist noted in this regard that: ‘If a place other than the seat is held to be decisive, unacceptable consequences could ensure’ (Mann, 1992). The same approach is adopted by arbitral rules; for example, article 31(3) of the model arbitration law of 1985 provides that (The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall *be deemed to have been made at that place*). Moreover, article 16 (4) of UNCITRAL 1976 Rules provides that (The award shall be made at the place of arbitration).

The statement expressed by both jurist and arbitral rules as (place where arbitral award is deemed to be made) is a debatable matter. It raises the question how does the place where the arbitral award is deemed to be made can be fixed? (Sammartano, 1990) Jurist derived number of criteria from arbitral rules as an answer to this question. It can be fixed either by the applicable procedural law criterion or by the geographical criterion (Pryles, 1993; Contini 1959).

As to the applicable procedural law criterion: an award is made, for example, in Jordan since the applicable procedural law is Jordanian law, regardless of where the award is made. Meanwhile, the geographical criterion considers an arbitral award is made, for example, in UAE since UAE is the place where an award is made; regardless the applicable procedural law is UAE law or foreign law. However, it should be noted that places of where the arbitral award is signed, despatched or delivered does not affect the place where the arbitral award is deemed to be made.

Yet, the jurists and rules of arbitration agreed that place of arbitration is normally decided either by the governing arbitral rules or by disputants' will (A Tweeddale and K Tweeddale, 1999).¹² Disputants are free to choose directly the place where the arbitral award will be made and failing such agreement the rendering place will be determined by an arbitrator or an arbitral tribunal. In this regard, article (20) of model arbitration states that (The parties are free to agree on the place of arbitration). In case the parties do not agree on the rendering place, the applicable rules of arbitration fix the rendering place. Article (20) of model arbitration also states that (Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties).¹³

Article (1) of New York Convention of 1958 adds another criterion in addition to the geographical criterion. It refers to the application of the convention to an arbitral award which is not considered to be a domestic award in the State where recognition and enforcement are sought.

The legal consequences of fixing rendering place, as mentioned above, on corrupted Islamic investments disputes is important at the stage of recognition and enforcement of arbitral award. As adopting one of the above criteria may lead to different conclusion, an award may be enforced or not the bases of illegality. In that, the enforcing court verifies whether this award is legal or illegal award according to the local applicable rules. The enforcing court refuse to enforce the

¹² Article 31 of model arbitration law of 1985, article 27 of Jordanian arbitration law of 2001.

¹³ Article (27) of Jordanian Arbitration

award resulted in corrupted Islamic investments disputes as it is illegal award. However, the local laws have territorial effect and they do not affect the recognition and enforcement of the same award in other places (J Hill, 1998). It means that an arbitral award regarding corrupted Islamic investments can be recognised and enforced in more than one place (forum shopping). The enforcing courts in these places may have different approach regarding the illegality of corrupted Islamic Investments contract depending on the local rules. An award regarding foreign Islamic investment disputes may be recognised and enforced in one place, but it may not be in the other place.

3.4.2. Forum Place and Corrupted Foreign Islamic Investments.

It is also important for disputes arising out of corrupted foreign Islamic investment contracts to determine the forum place to secure the recognition and enforcement of arbitral award. Therefore, they have to consult qualified people in arbitration to achieve such target.

The winning party should carefully choose the place of recognition and enforcement of foreign Islamic investment arbitral award. It should seek recognition and enforcement in the place where the assets of the losing party are located. It should also seek recognition and enforcement in the place where the assets of the losing party meet the merits of the award in case the assets are located in more than one place.

The enforcement of foreign corrupted Islamic investment arbitral award depends on whether such arbitral award is enforceable according to the applicable rules. The applicable rules provide a number of conditions to be met in order to enforce the arbitral award; it also provides a number of grounds upon which the enforcement of a foreign award may be refused. Accordingly, such an award may or may not be recognised and enforced according to the local rules.

It is important to refer to the New York Convention of 1958 regarding recognition and enforcement. It refers to the application of the convention to an arbitral award when the rendering place and the forum place are party to the convention. It also refers to the application of the convention to an arbitral award which is not considered to be a domestic award in the State where recognition and enforcement are sought. UNCITRAL Model Law also provides rules for the

recognition and enforcement of an arbitral award, regardless of the country in which it is made.

This approach leads to the principle that the forum place should not recognise and enforce foreign corrupted Islamic investment arbitral award as far as such award is illegal according to the applicable law.

3.4.3. The Importance of Fixing the Rendering Place and the Forum Place on Corrupted Islamic Investments.

It is important for recognition and enforcement to fix the rendering place and the forum place as regard to foreign corrupted Islamic investment award. This is because there is no guarantee of a uniformity of solution in both places. The rendering place and the forum are considered in cases of international arbitration as always neutral vis-à-vis the parties to avoid any national legal bias. The parties of arbitration in corrupted Islamic investments normally take into account some legal considerations when they choose the rendering place and the forum place. This is because they want to secure recognition and enforcement of foreign corrupted Islamic investment award. The main considerations are (Reymond, 1992, Delaume, 1995; Paulsson, 1981; Delaume, 1995; Tutun,1994; Paulsson, 1981):

- 1- State party to New York convention: to secure recognition and enforcement of foreign corrupted Islamic investment award, it is important to know in advance whether the rendering place and the forum place are parties to the New York Convention. Applying such convention that deal with recognition and enforcement depend on knowing whether or not the rendering place and the forum place are contracting States to the New York convention. The rendering place should be indicated in order to implement article V of the said convention that give consideration to the law of the place where the arbitral award is made. Furthermore, fixing rendering place is important to indicate the law governing the validity of the arbitration agreement under article V (1, a) of the said Convention. Finally, it is important to fix the rendering place in order to indicate which national court has jurisdiction to set aside or suspend such an award under article V (1, e) of the said convention.

- 2- Attitude of the court in rendering place and in the forum place: In rendering place, the attitude of national court concerns the validity of the arbitral award and its finality, whereas in the forum place it concerns whether or not the award should be recognised and enforced.
- 3- Attitude of applicable rules in rendering place and in the forum place: The applicable rules in rendering place concern with the review and challenge issue of an award, meanwhile the applicable rules in forum place concern with the enforceability of illegal arbitral award.
- 4- Reservation right: the law of the forum place may refuse to recognise and enforce an arbitral award made in a particular place (Verbist, 1996). For example, any award made in a state adopt an Islamic vision is not enforceable in a state that adopt different Islamic vision. This Islamic political obstacle can be avoided in advance in choosing the right rendering place and forum place.
- 5- Fixing the nationality of the arbitral award: it is important to fix the nationality of the arbitral award in international arbitration to identify the applicable procedure on recognition and enforcement (Mann, 1992).
- 6- Reciprocal right: to apply reciprocal right provided by the local laws in rendering place and forum place, it is important to fix both places. For example, Art I (3) of New York Convention provides that: ‘When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.’

Therefore, the parties to corrupted Islamic investment contracts seek the help of highly qualified experts in arbitration to choose the place of arbitration which best serve their targets.

3.5. International Public Policy (public order) of Arbitration Sheltering the Corrupted Islamic Investments.

Theoretically, no unified concept has been reached to determine the scope of public policy or public order. Different meanings for public policy have been reached by different States depending on their national interest. This matter is controversial at international level and at local level especially in regard to applying Islamic rules or principles.

At international level, when recognition and enforcement of an award based on corrupted Islamic investment are sought in any place, the national public policy considerations in this place will deal with the matter. The effect of national public policy considerations is territorial and does not affect the recognition and enforcement process in other places. Consequently, refusing recognition and enforcement of an arbitral award in one place because of public policy considerations does not prevent it from being enforceable in other places. This means that an arbitral award can be recognised and enforced in more than one place depending on the national public policy considerations. One can imagine that if recognition and enforcement of corrupted Islamic investment award are sought in A State, the enforcing court in this State will verify whether this award is legal or illegal award based on its national public policy considerations. If it is legal award, it will enforce it. Meanwhile, in case it is illegal award, it will refuse to enforce it. On the other hand, if an award is sought to be recognised and enforced in two places that have adopted the same public policy considerations, the result will be the same. However, in cases where each place adopts different public policy considerations, the result will be different. An award regarding in Islamic investment disputes may be recognised and enforced in one place, but it may not be enforced in the other place depending on the national public policy considerations.

At national level, the concept of public policy is applied relatively by the national courts in the same state. The corrupted Islamic investment contracts may be challenged before the national court because of public policy considerations. Other courts are not bound to follow the same judgment because of public policy considerations. Yet, it should be noted that the same considerations of

public policy no longer exist. Therefore, the same court may not apply the same public policy considerations in other cases that contain the same circumstances as the previous one (Riad, 1992, Bardan, 2004).

In the light of the cases decided, this section will attempt to discuss the following matters in respect of public policy regarding corrupted Islamic investment Contracts.

3.5.1. The concept of public policy doctrine for the purposes of corrupted Islamic investment contracts?

The concept of public policy doctrine is controversial as no unified concept has been reached to determine its meaning.¹⁴ National and international rules have not been defined or categorised it within a particular definition or a particular act or principles. It is easier to exemplify the doctrine of public policy than it is to identify. Therefore, different States may have different considerations for public policy especially in regard to apply Islamic rules or principles. The relativity concept of public policy means that it differs from time to time and from state to another (Bardan, 2004; Enterria, 1990; Shaleva, 2003; Bockstiegel, 1986; Junker, 1977). Yet, in the state of art, it can be defined as ‘Broadly, principles and standards regarded by the legislature or by the courts as being of fundamental concern to the State and the whole of society’ (Black’s Law dictionary).

The jurists have defined it in different ways, one jurist defined it as it concerns with the fundamental moral and convictional policies of the place of arbitration (Riad, 1992; Bardan, 2004, Enterria, 1990; Junker, 1977). Another jurist described it as ‘open-textured and encompasses a broad spectrum of different acts’ (Tweeddale, 2000). It is also defined as ‘public policy like national interest to which it is inseparably related is a nebulous concept hardly capable of precise definition or explanation at any one point in time. It is a fluid concept and the contents of which are determined by the changing mod of society’ (Okekeifere, 1997).

The concept of public policy doctrine has been identified domestically and internationally (Okekeifere, 1997; Riad, 1992;

¹⁴ In Civil Law legal system, the term public order is used instead of public policy

Bardan, 2004). At a domestic level, it concerns any act that contradicts the mandatory rules of local laws or infringes the high and invaluable morality of the local society. Meanwhile, at international level, it concerns the interests or principles which are applied in international relationships, any infringement of which is considered as international public policy, such as bribery, corruption, drug trafficking, and terrorism.

Yet, the Committee on International Commercial Arbitration in its final report on public policy recommended that (Mayer, 2003): “1- the expression ‘international public policy’ is used in these recommendations to designate the body of principles and rules recognized by a State, which, by their nature, may bar the recognition or enforcement of an arbitral award rendered in the context of international commercial arbitration when recognition or enforcement of said award would entail their violation on account either of the procedure pursuant to which it was rendered (procedural international public policy) or of its contents (substantive international public policy)”.

By analogy, each State has its own fundamental interests within which it has to measure the illegality of corrupted Islamic investment contracts. Such contracts should be considered against its public policy as it involves bribery or corruption. On the other hand, other authorities may consider corrupted Islamic investment contracts as an action against the interests of State under some circumstances or at particular time.

3.5.2. *When do National Courts Regard Corrupted Investment Contracts as being Against Public Policy?*

Illegal foreign award should be enforced or not according to public policy considerations in the place where recognition and enforcement are sought. In *Soleimany v Soleimany*,¹⁵ the English Court of Appeal held that: “[An] English court exercised control over the enforcement of arbitral awards as part of the *Lex fori* whatever the proper law of the arbitration agreement or the place where the arbitration agreement was conducted, and if a claimant wished to enforce the award in his favour,

¹⁵ [1998] 3 W.L.R 811.

he could only do so subject to English law; that an award, whether domestic or foreign, would not be enforced by an English court if enforcement would be contrary to public policy.”

It is seen in the above case that the national court in the forum place exercises control over illegal arbitral award regarding corrupted underlying Islamic investment contract. accordingly, the enforcing court may refuse to enforce foreign award on the grounds of corruption that it is contrary to its Islamic public policy. On this basis, the local courts may refuse to enforce such foreign award as it is contrary to local public policy.

By analogy, the question arises if the corrupted underlying Islamic investment contract is against the domestic public policy, does this mean that the arbitral agreement and the award are contrary to domestic public policy? It is mentioned above that an arbitral agreement is separable from the underlying contract. However, it is not always the case that if an underlying contract is annulled, the arbitral agreement is not annulled on the basis of the separability of the arbitral agreement. However, the national courts may face cases in which foreign arbitral awards were based upon illegal contracts and the courts will be requested to refuse enforcement on the basis that such awards were contrary to domestic public policy under Islamic vision. They would not adopt a coherent position in these cases; their positions will be based on a case-by-case (Riad,1992, Bardan, 2004).

3.5.3. Do National Courts Apply the Concept of International Public Policy in Regard to Corrupted Islamic Investment Contracts?

In international law and practice of arbitration such as in the *Westacre* case,¹⁶ The criterion of degree of offensiveness was suggested to distinguish between the international public policy and the domestic public policy. In that, international public policy relates to a situation in which the illegality is offensive at the highest level and universally condemned, such as terrorism, drug trafficking, prostitution, paedophilia, and fraud.¹⁷ Since international public policy involves the interests or principles which are applied in international

¹⁶ [1999] 3 W.L.R 811

¹⁷ *Westacre* [1999] 3 W.L.R 811, 822-823.

relationships, such as bribery, corruption, drug trafficking, and terrorism.

The Committee on International Commercial Arbitration in its final report on public policy recommended that (Mayer, 2003): “2- The international public policy of any State includes: (i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned, (ii) rules designed to serve the essential political, social or economic interests of the State, these being known as ‘lois de police’ or ‘public policy rules’; and (iii) the duty of the State to respect its obligations towards other States or international organizations. 3- An example of a substantive fundamental principle is prohibition of abuse of rights. An example of a procedural fundamental principle is the requirement that tribunals be impartial. An example of a public policy rule is anti-trust law. An example of an international obligation is a United Nations resolution imposing sanctions. Some rules, such as those prohibiting corruption, fall into more than one category.”

By analogy, it means that if the corruption regarding Islamic investment does meet the criteria of international public policy, it would not be considered corruption, even though it is considered corruption in the meaning of domestic public policy in the country where corruption been practiced. Therefore, corrupted Islamic investment contracts will be protected under the umbrella of international public policy and cannot be combated by national courts on the basis of domestic public policy.

3.6. The Use of More Favourable-Right-Provision to Enforce Foreign Arbitral Award Based on Corrupted Islamic Investments.

Local laws normally provide the winning party with legal means in order to recognise and enforce legal foreign arbitral award. It also should provide the losing party with legal means to resist the recognition and enforcement of illegal arbitral award. This subsection deals with the relationships between the two legal means provided and the consequences of these relationships on the recognition and enforcement of arbitral awards based on corrupted Islamic investment contracts.

In practice, the place where recognition and enforcement are sought provide the winning party with several legal methods to recognise and enforce foreign illegal arbitral award. This is because the local rules provide the winning party to apply what is called the more favourable-right-provision.

According to the more favourable-right-provision, the winning party can choose the best local legal means to recognise and enforce foreign illegal arbitral award. By analogy, in case there is more than one legal way of enforcement in the forum place, the winning party, by means of the more favourable-right-provisions, can choose the legal way which best represents his interests regarding arbitral award based on corrupted Islamic contracts.

In practice, the more favourable-right-provision is provided in local laws. Accordingly, the winning party can practise forum shopping among these local laws. It can, for example, rely on one legal way as gateways to pass from the law that prevent enforcement to another one when the other law is more favourable to the recognition and enforcement of arbitral award based on corrupted Islamic contracts. Therefore, the more favourable-right-provision provides the winning party the way to pass from one regime to another. Meaning that, he can bypass the provisions under which the losing party can resist enforcement of an award based on corrupted Islamic contracts (Daradkeh, 2018).

4.0 Conclusion and Recommendations

4.1. Conclusion:

This article has discussed the possible role of commercial arbitration in encouraging to involve in corrupted Islamic investment contracts with foreign investors. This role of arbitration occurs because the rules of arbitration have been developed recently to encourage foreign investments. Such developments regarding arbitration can be misused in favour of foreign investors to attract corrupted Islamic investment contracts. The conduct of arbitration by international arbitral institutions in such contracts were in favour of the foreign investors, the arbitral precedents prove that such institutions are established to conduct business of arbitration regardless the illegality of the

underlying Islamic investment contracts. The aim of this article is to play as platform from which a call is made to alert the hosting countries to combat the misuse of arbitration as a shelter to cover corrupted investment contracts. This article concludes that:

- 1- It is possible to apply Islamic rules or principles in arbitration as the applicable law, but the misuse of arbitration may occur in the interpretation of these rules or principles regarding Islamic investment contracts in four of the foreign investors.
- 2- The practice of forum shopping among arbitration centres allows the foreign investor to choose arbitration centre that adopt rules which best serve its interest regarding corrupted Islamic investment contracts.
- 3- Modern arbitration rules adopt provisions create suitable legal environment for corruption in the hosting countries regarding Islamic investment contracts. Such as Confidentiality in arbitration process, international public policy doctrine, The separability doctrine, arbitrability doctrine, and of more favourable-right-provision.

4.2. Recommendations

In order to enhance the role of arbitration in Islamic investment contract and to combat corruption, this article suggest that:

- 1- Islamic jurists should adopt a model of Islamic law to be the applicable law in arbitration as well as to adopt Islamic arbitration rules to be adopted by Islamic arbitration centres.
- 2- Establishment of an Islamic committee consist of different Islamic branches in order to unify the interpretation of Islamic rules and principles.
- 3- Establishing an Islamic training centres to graduate new generation of Islamic arbitrators with modern skills and qualifications to conduct arbitration in professional manner.

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