



THE ROLE OF ARBITRATION IN ATTRACTING FOREIGN INVESTMENTS ACCORDING TO LAW 22-18 ON INVESTMENT

DAHANA BACHIR

dahana-bachir@univ-eloued.dz

University of El Oued

NAIMA SEMINA

n.semina@univ-chlef.dz

University of Chlef

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Abstract:

Arbitration, as a system characterized by its speed in resolving and settling disputes, represents a departure from traditional litigation - the judiciary - or serves as an alternative for foreign investors who may lack sufficient knowledge of the host country's legal system. This makes international private parties prefer arbitration to settle disputes rather than resorting to the courts. This study aims to shed light on the role arbitration plays in attracting foreign investments under Law No. 22-18 related to investment. Among the key findings of this study is that arbitration has become a guarantee for foreign investors under investment laws. Additionally, it has contributed to alleviating the burden on the judiciary due to the lengthy litigation procedures.

Keywords: Arbitration; Foreign Investment; Guarantee; Dispute Resolution.

INTRODUCTION:

The world has witnessed significant developments across various fields, particularly in economic activity. This has prompted nations to encourage both domestic and foreign investments. Foreign investments, in particular, contribute substantially to technology transfer, job creation, and enhanced competitiveness. Since foreign investments are typically long-term, the host country is obligated to provide guarantees to sustain these investments. These guarantees may pertain to the legal framework, known today as legal security or legislative stability, or to the resolution of disputes and methods for settling them. Foreign investors often avoid navigating the corridors of the host country's courts and instead favor arbitration as an alternative to litigation.

This preference for arbitration has increased its appeal among contracting parties, especially foreign investors, due to its role in protecting investments. In response, most countries have moved to regulate arbitration. Some, like Egypt, have dedicated standalone arbitration laws, while others have integrated arbitration provisions within broader legal codes, as is the case with Algerian legislation. Algeria abolished its Civil Procedure Code in 1993 during a period marked by deep economic reforms and its accession to the New York Convention on the Recognition and Enforcement of Arbitral Awards through Presidential Decree No. 88-233 dated November 13, 1988. This marked a departure from previous reservations about arbitration and resulted in the issuance of Legislative Decree No. 93-09 concerning arbitration, which amended and supplemented Ordinance No. 66-184 on civil procedures. This was subsequently replaced by Law No. 08-09 on Civil and Administrative Procedures, which came into effect on April 25, 2009, dedicating the second chapter of Book Five to arbitration.

The study's problem revolves around the notion that foreign investments necessitate alternative dispute resolution methods that are simpler and faster than traditional litigation. Courts often lack the speed and specialized expertise required for investment-related matters. While foreign investors prioritize simplicity and speed, host countries aim to enforce their laws and assert sovereignty. Thus, the key question arises: *How can the arbitration system contribute to attracting foreign investments?* This study employs a primarily analytical approach to examine legal provisions related to arbitration and its connection to foreign investment. Additionally, a descriptive methodology is used to define arbitration, distinguish it from other alternative dispute resolution mechanisms, and outline its types. To address this problem, the study is divided into two main sections:



1. **The Concept of Arbitration:**
 - Definition of arbitration and its legal nature.
 - Types of arbitration and its distinction from other dispute resolution methods.
2. **The Effectiveness of Arbitration in Resolving Disputes Related to Foreign Investments:**
 - Justifications for resorting to arbitration in investment disputes.
 - Arbitration as a procedural guarantee for foreign investors.

Section One: The Concept of Arbitration

This section explores the definition of arbitration, its legal nature, types, and its distinction from other dispute resolution methods.

First: Definition and Legal Nature of Arbitration

In this section, I will briefly define arbitration and discuss its legal nature.

1 Definition of Arbitration

Arbitration is an agreement between parties to submit a disputed matter to an arbitrator, or arbitrators, of their choice, rather than to the competent courts (1).

2 Legal Nature of Arbitration

Arbitration consists of two processes:

- The first is the agreement entered into by the disputing parties.
- The second is the award rendered by the arbitral tribunal

This dual functional structure has led to divergent views on the legal nature of arbitration:

A. Contractual Nature of Arbitration

The central argument in this theory is that arbitration is rooted in the agreement of the parties. Proponents emphasize the principle of autonomy of will, arguing that arbitration is contractual in nature because it aims to serve private interests, unlike judicial systems, which focus on public interests.

According to this view:

- The authority of the arbitral tribunal stems from the will of the parties and their consent to arbitration and its awards (2).
- Arbitration is fundamentally based on the arbitration agreement, which highlights its contractual character (3).

B. Judicial Nature of Arbitration

This perspective views the arbitrator's role as analogous to that of a judge:

- Arbitrators apply the law or principles of justice, and their decisions constitute awards similar to judicial rulings.
- The arbitrator's task, like that of a judge, is to resolve disputes and achieve justice between the parties, thereby acquiring a judicial nature (4).

C. Mixed Nature of Arbitration

This view holds that arbitration has a hybrid or dual nature:

- It exhibits a **contractual aspect** through the arbitration agreement.
- It demonstrates a **judicial aspect** through the arbitral award and the procedures leading to that award, which resolves the dispute (5).

D. Theory of Arbitration Independence

This theory argues that arbitration is an independent legal mechanism for dispute resolution with its own unique system. Advocates contend that:

- Arbitration is not rooted in the arbitration agreement but serves as a specialized tool to achieve the parties' objective.



- Arbitration is distinct in its function, nature, and internal structure, operating parallel to judicial systems rather than as a subset of them.

Accordingly, arbitration represents a standalone system with characteristics that differ from those of traditional courts (6).

Second: Types of Arbitration and Its Distinction from Other Dispute Resolution Methods

In this section, I will address the various types of arbitration from different perspectives and differentiate arbitration from other dispute resolution methods.

1. Types of Arbitration

A. Arbitration Based on Organization

Arbitration can be classified into **ad hoc arbitration** and **institutional arbitration** depending on whether it is administered by an organization (7).

1. **Ad Hoc Arbitration:**
Also known as special or case-specific arbitration, this type of arbitration is convened to resolve a particular dispute and is dissolved after issuing the arbitral award. In this form:
 - The parties manage the arbitration process from start to finish, including drafting the arbitration agreement before or after the dispute arises.
 - They select the arbitrators or determine the method of their appointment, specify the time, place, and language of arbitration, as well as the procedural rules.
 - Once the arbitral award is rendered, the arbitration process concludes, and the parties and arbitrators part ways.
2. **Institutional Arbitration:**
Also known as organized arbitration, this is the most common type in international contractual disputes.
 - It is supervised by permanent arbitration centers or organizations established specifically to provide advisory and judicial services to international trade practitioners, industrialists, and business professionals across various sectors.
 - These centers are involved in both national and international transactions.

B. Arbitration by Law vs. Arbitration by Equity

Arbitration may follow the provisions of a specific law or operate without being bound by legal rules, which is known as **arbitration by equity**.

1. **Arbitration by Law:**
 - This involves arbitrators resolving disputes based on the application of legal rules relevant to the issues presented.
 - By default, arbitration is assumed to be conducted by law unless the parties explicitly agree to allow arbitrators to decide based on principles of justice and equity.
2. **Arbitration by Equity:**
 - In this type, the parties grant the arbitral tribunal the authority to resolve disputes based on principles of justice and equity without adhering to specific legal rules (8).

C. Domestic Arbitration vs. International Arbitration

Arbitration can also be categorized as domestic (national) or international depending on the nature of the parties and the dispute (9).

1. **Domestic Arbitration:**
 - This type of arbitration involves disputes in which all elements—such as the subject matter, parties, arbitrators, governing law, and place of arbitration—are confined to a single country.
 - It is conducted within the national territory, following the state's civil procedural laws, with no issues related to conflicts of laws or the enforcement of foreign judgments, as seen in international commercial arbitration.
 - In Algeria, the legislator has dedicated specific provisions to domestic arbitration in Chapter Two of Book Five of the Civil and Administrative Procedures Code (Articles 1006-1061). These provisions



govern all procedures, from the arbitration agreement to the issuance, execution, and appeal of awards.

2. International Arbitration:

- In Algeria, arbitration is deemed international when it involves disputes related to the economic interests of at least two states.
- It applies in cases arising from commercial relationships based on the modern economic criterion, which includes the transfer of funds, economic values, and services across borders (10).
- This is stipulated in Article 1039 of the Civil and Administrative Procedures Code, emphasizing arbitration in disputes involving transnational economic interests (11).

2. Distinguishing Arbitration from Other Dispute Resolution Methods

In this section, I compare arbitration with some well-known dispute resolution methods, including litigation, conciliation, expertise, and mediation (12).

A. Arbitration vs. Litigation

- **Arbitration:** A consensual and temporary procedure where the arbitrator derives their authority from the will of the parties. The parties also select the applicable law, and the arbitrator does not possess enforcement power.
- **Litigation:** A function of the state, where the judge is a public official with continuous judicial authority derived from the law and enjoys enforcement power.

B. Arbitration vs. Conciliation

- **Similarities:** Both arise from agreements between the parties and aim to resolve disputes.
- **Differences:**
 - Arbitration ensures that the dispute is not brought before the courts, whereas conciliation involves a commitment by the parties to resolve the dispute themselves or with court assistance.
 - In arbitration, the arbitrator issues a binding and enforceable award, which may favor one party while dismissing the other's claims. In conciliation, the process ends with each party relinquishing part of their claims to reach a mutually agreed settlement.

C. Arbitration vs. Expertise and Mediation

- **Similarities:** All aim to resolve disputes between parties.
- **Differences:**
 - **Arbitration:** Results in a binding and enforceable award.
 - **Mediation:** Offers non-binding proposals to reconcile differing viewpoints but does not impose enforceable outcomes.
 - **Expertise:** Produces a report with an expert opinion on technical matters, which is non-binding and does not result in an enforceable decision.

Section Two: The Effectiveness of Arbitration in Resolving Disputes Related to Foreign Investments

This section examines the role arbitration plays in resolving investment disputes and the extent to which this mechanism alleviates the burden on judicial systems. It focuses on the justifications for resorting to arbitration in investment disputes, the unique characteristics of arbitration, and its effectiveness as a procedural guarantee for attracting foreign investors (13).

As stipulated in Law No. 22-18 on Investment, arbitration is a possible method for dispute resolution (14).

1. Key Advantages of Arbitration for Foreign Investments

Arbitration in foreign investment disputes offers several advantages that make it a preferred option for investors:



A. Freedom of Will in Arbitration

- Freedom of will is a critical element in arbitration, as the disputing parties' agreement forms the foundation of the arbitration process.
- Parties' intentions take precedence unless explicitly stated otherwise, as outlined in UNCITRAL Arbitration Rules (15) and the Model Law (16).

B. Speed of Procedures

- Arbitration procedures are simplified and determined by the disputing parties, ensuring faster dispute resolution compared to litigation.
- This speed is attributed to two factors:
 1. Arbitrators are obligated to resolve disputes within a specified time agreed upon by the parties.
 2. Arbitration operates as a single-tier adjudication system; the arbitrator's award is binding, final, and not subject to ordinary appeals. However, annulment can be sought, but such appeals do not suspend enforcement of the arbitral award (17).

C. Confidentiality of Arbitration

- Arbitration sessions are non-public, and awards are not published unless all parties and arbitrators consent.
- This is particularly appealing to foreign investors who wish to maintain privacy regarding their financial status (18).

D. Specialized Nature of Arbitration

- Arbitration offers legal, technical, and practical expertise for resolving investment disputes.
- Arbitrators are often professionals with technical proficiency and comprehensive knowledge of international trade customs and norms, providing informed decisions (19).

E. Flexibility in Arbitration

- Arbitration's flexibility allows disputing parties to structure the process to suit their needs:
 - They can choose between ad hoc arbitration or institutional arbitration.
 - Parties can decide on the location, timing, governing law, and procedural rules of arbitration.
- Articles 1041 and 1043 of the Algerian Civil and Administrative Procedures Code permit parties to appoint arbitrators, adopt arbitration rules, or create their own rules to govern disputes—options unavailable in other dispute resolution methods (20).

2. Foreign Investors' Adherence to Arbitration Clauses

Large foreign investment contracts are typically concluded between two unequal parties:

- The host state, exercising sovereignty, and
 - The foreign investor, representing private interests.
- Foreign investors often prefer not to litigate in the host state's courts due to:
- Potential challenges in navigating the judicial system.
 - Concerns over impartiality when the state is a party to the dispute.
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- Foreign investors insist on including arbitration clauses in investment contracts to mitigate the risk of the host state exploiting its sovereign powers in domestic courts.
 - Arbitration ensures an impartial forum for dispute resolution, alleviating concerns about the fairness and neutrality of host state courts.
 - The state's sovereignty and independence complicate adjudication when it is a party to a dispute.
 - Although modern legal frameworks distinguish between sovereign acts and ordinary commercial or administrative activities, states generally retain immunity in judicial matters.
 - This creates difficulties for foreign courts to adjudicate disputes involving states, potentially undermining the rights of foreign investors.



Consequently, arbitration clauses are essential for foreign investors to safeguard their rights and ensure impartial and just resolution of disputes, free from the influence of host state sovereignty (22).

Second: The Effectiveness of Arbitration as a Procedural Guarantee for Investors

Host countries seeking to attract foreign investments often adopt arbitration as a procedural guarantee to encourage these investments on their soil. Many countries have explicitly incorporated provisions within their investment-promoting laws that affirm the acceptance of arbitration as a procedural tool for resolving investment disputes (23).

1. The Specificity of Arbitration Agreements in Investment Contracts

Most bilateral and multilateral investment agreements include provisions and annexes addressing dispute resolution. These often include clauses for arbitration after negotiations between the parties fail.

Some agreements require preliminary mandatory procedures before initiating arbitration, while others set specific timeframes for arbitration to begin. Frequently, arbitration clauses refer disputes to international institutions and centers, such as the International Centre for Settlement of Investment Disputes (ICSID).

These institutions impose conditions related to:

- The investor, such as nationality or legal standing.
- The investment, ensuring it meets certain criteria for arbitration to proceed (24).

Algerian law explicitly allows arbitration in investment disputes under Article 12, which states:

"In addition to the provisions of Article 11 above, any dispute arising from the application of this law between the foreign investor and the Algerian state, whether caused by the investor or by measures taken by the Algerian state against the investor, shall be subject to the jurisdiction of the competent Algerian courts unless bilateral or multilateral agreements ratified by the Algerian state provide otherwise, including provisions on conciliation, mediation, and arbitration, or an agreement is concluded between the agency mentioned in Article 18 below, acting on behalf of the state, and the investor, allowing the parties to resort to arbitration."

This provision demonstrates Algeria's commitment to facilitating arbitration as an alternative mechanism for resolving disputes, reinforcing its appeal to foreign investors while providing procedural safeguards for both parties (25).

The principle in dispute resolution is to resort to national courts in accordance with the principle of state sovereignty. However, there is also the possibility of resorting to alternative dispute resolution methods, such as conciliation and mediation, explicitly provided for in the law, in addition to arbitration. Arbitration is applicable in cases of disputes between foreign investors and the Algerian state, provided there is a bilateral or multilateral agreement explicitly permitting arbitration, accompanied by an arbitration agreement in one of its forms—an arbitration clause, a submission agreement, or a clause by reference.

2. Independence of the Arbitration Clause from the Investment Contract

The independence of the arbitration clause refers to the autonomy of the agreement stipulating arbitration, which is included in the terms of the investment contract, from the contract itself. This means that the validity or invalidity of the investment contract does not affect the arbitration clause included within it, and vice versa. For instance:

- The nullity of the investment contract does not impact the validity of the arbitration clause .
- Similarly, the nullity of the arbitration clause does not affect the validity of the investment contract. This principle ensures the effectiveness of arbitration as a guarantee for investors in resolving disputes arising from their investments (27).



Definition of the Arbitration Clause in Algerian Law

Article 1007 of the **Civil and Administrative Procedures Code** defines the arbitration clause as:

"The arbitration clause is an agreement by which the parties in a contract related to freely disposable rights, as defined in Article 1006 above, commit to submitting any disputes that may arise regarding this contract to arbitration." (28)

The arbitration clause can be defined as an agreement between the parties to a specific legal relationship, whereby they agree to refer any potential disputes arising from this relationship to arbitration. The arbitration clause may be included as a provision within the original contract or as a separate agreement independent of the original contract.

3. Principle of Competence-Competence

The principle of competence-competence refers to the arbitrator's authority to determine their own jurisdiction. The arbitrator has the power to decide whether a valid arbitration agreement exists, as their jurisdiction is contingent upon the existence of a valid arbitration agreement.

If one of the parties challenges the jurisdiction of the arbitral tribunal or disputes the validity of the arbitration agreement, the arbitral tribunal itself has the authority to rule on the validity of its jurisdiction.

This principle prevents a party from delaying or obstructing the arbitration process by raising objections regarding the tribunal's jurisdiction. It grants the arbitral tribunal the authority to address disputes concerning the arbitration agreement or the main contract without referring the matter to national courts.

However, while national laws allow arbitrators to provisionally determine their jurisdiction, they do not grant arbitrators absolute authority to make a final decision on their jurisdiction. Any rulings by arbitrators regarding their jurisdiction remain subject to subsequent judicial review (28).

CONCLUSION

Given the critical role arbitration plays as a guarantee for resolving disputes arising from foreign investments, this study explored the significance of arbitration in the economic landscape. It highlighted its procedural speed, the freedom it offers parties in appointing an arbitral tribunal, and other advantages. These attributes underline arbitration's effectiveness in attracting foreign investments and fostering their retention in host countries.

Key Findings:

1. Arbitration has evolved from being a mere alternative dispute resolution mechanism for foreign investment disputes into a procedural guarantee for attracting such investments. Its speed, confidentiality, and the expertise of arbitrators make it more appealing than other dispute resolution methods.
2. The unique nature of foreign investments necessitates the application of international trade customs, which arbitration accommodates through its flexibility in determining the applicable law for disputes.
3. Arbitration reduces the burden on national courts, as foreign investment disputes are often lengthy and complex, requiring cross-border considerations and specialized expertise unavailable in many national judicial systems.

Recommendations:

1. There is a need for a dedicated law on arbitration, separate from the Civil and Administrative Procedures Code, to reassure investors and emphasize arbitration's independence from national judicial systems.
2. When drafting investment contracts with foreign parties, careful consideration must be given to arbitration, as unfamiliarity with rules governing dispute resolution centers for investment cases could harm the host country—such as the example of the Algerian Airlines dispute with the Canadian consortium "S.M. International."



3. Arbitration clauses should be explicitly included in all investment contracts, particularly those involving foreign investments. These clauses should be drafted by specialists in arbitration and investment law to ensure their robustness and enforceability.

REFERENCES:

Books:

1. Ibrahim Ismail Ibrahim Al-Rubaie, *Arbitration as a Procedural Guarantee for Resolving Investment Disputes: A Comparative Study*, Faculty of Law, University of Babylon, Iraq, undated.
2. Khaled Kamal Akasha, *The Role of Arbitration in Resolving Investment Contract Disputes: A Comparative Study of Legislation in Arab and Foreign Countries and International Agreements, with Specific Focus on the Washington (ICSID) Center*, 1st Edition, Dar Al-Thaqafa for Publishing and Distribution, Jordan, 2014, pp. 166-167.
3. Khaled Mohammed Al-Qadi, *International Commercial Arbitration Encyclopedia*, Dar Al-Shorouk, Cairo, 2002.
4. Farah Menani, *Arbitration as an Alternative Dispute Resolution Mechanism: According to the Latest Amendments to the Civil and Administrative Procedures Code*, Dar Al-Huda, Algeria, 2010.
5. Alaa Mohiuddin Mustafa Abu Ahmed, *Arbitration in Administrative Contract Disputes in Light of Positive Laws, International Treaties, and Arbitral Court Rulings: A Comparative Study*, New University House, Egypt, 2008.
6. Omar Saadallah, *International Trade Law: Contemporary Theory*, 2nd Edition, Dar Houma, Algeria, 2009.
7. Lazhar Ben Said, *International Commercial Arbitration: According to the Civil and Administrative Procedures Code and Comparative Laws*, Dar Houma, Algeria, 2012.

8. Theses:

9. Mouna Boukhtala, *Arbitration as a Means of Resolving Disputes in Investment*, Master's Thesis in Public Law, Economic Regulation Branch, Faculty of Law, University of Constantine 1, Algeria, 2012/2013.
10. Mohamed Mejoul, *Arbitration in International Investment Contract Disputes*, Master's Thesis in International Relations Law, Faculty of Law and Political Science, Kasdi Merbah University, Ouargla, Algeria, 2015.

11. Legal Documents:

12. Law No. 08-09 dated February 25, 2008, containing the Civil and Administrative Procedures Code, as amended, Official Gazette No. 21 dated April 23, 2008.
13. Law No. 22-18 dated 25 Dhu al-Hijjah 1443 (corresponding to July 24, 2022), concerning investment, Official Gazette No. 50 dated 29 Dhu al-Hijjah 1443 (corresponding to July 28, 2022).

Websites:

- <http://www.uncitral.org/uncitral/ar/about/origin.html>

Footnotes:

1. Lazhar Ben Said, *International Commercial Arbitration*, Dar Houma, Algeria, 2012, p. 16.
2. Ibid, p. 19.
3. Khaled Mohammed Al-Qadi, *International Commercial Arbitration Encyclopedia*, Dar Al-Shorouk, Cairo, 2002, p. 111.
4. Ibid, pp. 112-113.
5. Lazhar Ben Said, *International Commercial Arbitration*, pp. 21-22.
6. Ibid, p. 24.
7. Mouna Boukhtala, *Arbitration as a Means of Resolving Disputes in Investment*, pp. 30-31.
8. Alaa Mohiuddin Mustafa Abu Ahmed, *Arbitration in Administrative Contract Disputes*, pp. 45-46.
9. Farah Menani, *Arbitration as an Alternative Dispute Resolution Mechanism*, pp. 52 ff.
10. Lazhar Ben Said, *International Commercial Arbitration*, p. 28.



11. Article 1039 of Law No. 08-09 states: "Arbitration is considered international under this law if it pertains to disputes involving the economic interests of at least two states."
12. Lazhar Ben Said, *International Commercial Arbitration*, pp. 42 ff.
13. Article 1006 of Law No. 08-09 states: "Any person may resort to arbitration for rights they have full discretion over..."
14. See Article 12 of Law No. 22-18, dated July 24, 2022.
15. United Nations Commission on International Trade Law (UNCITRAL) established in 1966, Resolution 2205 (XXI) dated December 17, 1966. See: <http://www.uncitral.org/uncitral/ar/about/origin.html>
16. Omar Saadallah, *International Trade Law*, p. 297.
17. Khaled Kamal Akasha, *The Role of Arbitration in Resolving Investment Contract Disputes*, pp. 166-167.
18. Ibid, p. 168.
19. Ibid, p. 168.
20. Ibid, p. 169.
21. See Articles 1041-1043 of Law No. 08-09.
22. Mouna Boukhtala, *Arbitration as a Means of Resolving Disputes in Investment*, pp. 82-83.
23. Ibrahim Ismail Ibrahim Al-Rubaie, *Arbitration as a Procedural Guarantee for Resolving Investment Disputes*, p. 9.
24. Mohamed Mejoul, *Arbitration in International Investment Contract Disputes*, p. 9.
25. Law No. 22-18.
26. Ibrahim Ismail Ibrahim Al-Rubaie, *Arbitration as a Procedural Guarantee*, p. 9.
27. Law No. 08-09.
28. Khaled Kamal Akasha, *The Role of Arbitration in Resolving Investment Contract Disputes*, p. 188.