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Settlement of disputes of build, operate and transfer contracts in specialized ports

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Abstract
These required guarantees by the investors include settlement, and thus the disputes arise between them and between the State or any of its bodies through the arbitration system because of the advantages of this system adjustable to the nature of these disputes and fulfillment the needs of the investor, and the actual and undeclared aim of the arbitration system is to exclude the law of the State.
The first thing that comes to the mind of the foreign investor and desires when investing his money inside a foreign country is his knowledge of the legal and judicial procedures of the host country, and the extent of the possibility to be governed by its internal law or nor, to settle the disputes arise between himself and between the attracted country for investment.
Due to the malformations suffered by the economic environment of the developing countries, they have to build gradual policies to enable them to change the economic type for progress to levels to enable them to avoid the passive impacts that surrounded them across from identification specific techniques. The most important techniques that may transfer the economy of the country to the economy of the legal automatic free market is representing in usage the contracts of build, operate and transfer.
This type of contract enables the government to provide a new service to the audience without payment the cost of this service, whereas the contractual party with the government, shall provide the capital, construct and operate the facility for a long term based on a contract agreement according to commercial foundations that grant the investor, the possibility to collect the paid capital in construction the facility and accomplish a profitable profit.

Keywords: operate, settlement, required

Introduction
Under the current circumstances of the world countries, especially the developing countries, which generally seek to attract foreign investments because of the direct and effective impact in accomplishment the economic development, these countries are racing to provide facilities & guarantees to investors in order to encourage them to invest inside these countries and to grant them the required privileges.
These required guarantees by the investors include settlement the disputes arise between them and between the State or any of its bodies through the arbitration system, because of the advantages of this system adjustable to the nature of these disputes and fulfillment the needs of the investor, and the actual and undeclared aim of the arbitration system is to exclude the law of the State.
The first thing that comes to the mind of the foreign investor and desires when investing his money inside a foreign country, is his knowledge of the legal and judicial procedures of the host country, and the extent of the possibility to be governed by its internal law or nor, to settle the disputes arise between himself and between the attracted country for investment.
Due to the malformations suffered by the economic environment of the developing countries, they have to build gradual policies to enable them to change the economic type for progress to levels to enable them to avoid the passive impacts that surrounded them across from identification specific techniques, the most important techniques that may be transfer the economy of the country to the economy of the legal automatic free market is representing in usage the contracts of build, operate and transfer [1].
This type of contract enables the government to provide a new service to the audience without payment the cost of this service, whereas the contractual party with the government, shall provide the capital, construct and operate the facility for a long term based on a contract agreement according to commercial foundations that grant the investor, the possibility to collect the paid capital in construction the facility and accomplish a profitable profit.
With regard to the research study, we focus on the multilateral arbitration agreement included in the investment contract, and we study the settlement of disputes of the build, operate and transfer contracts with regard to the degree of eligibility of it to arbitration and the applicable law.

1st Topic
Settlement of disputes arising from B.O.T contracts Preamble
The concept of build, operate and transfer [2], according to

([1]) B.O.T contracts are short for B.O.T, which means Build-Operate-Transfer. This type of project is the most important application of Franchise contracts, which can be used as a performance to attract investments and finance port services and other state facilities. A legal mechanism provides the state with the benefits of privatization without losing the assets of investments as it does in full privatization. This contract is described as a contract concluded by the State or one of its legal persons. The project implemented by the B.O.T contracts depends mainly in its legal and complex structure on the Franchise contracts.

([2]) Study, financing, execution, investment, maintenance and delivery are what distinguishes B.O.T contracts. In Egypt, the experiences of usufruct rights have emerged in the form of commitment rights to

the definition of the United Nations Commission on International Trade Law UNCITRAL [3] is in its most main form, a form of project financing whereby a government is granted a private financial consortium for a period of time and claims the project company a privilege to formulate a particular project. At the end of the concession period, the ownership of the project is transferred to the state [4].

The B.O.T contracts are complex and intertwined, so that besides the main contract, there are a number of contracts associated with the main contract and a number of parties interact in the implementation of these contracts [5].

This type of contract is an attractive form of investment and has been subject to intensive studies by specialized international organizations and institutions [6]. The most important guarantee in B.O.T contracts, is the harmony of contracts with the laws in force in the country where the project is being implemented [7].

Add to this the extension of the implementation of these contracts for a long period of time [8], and as a result of the multiplicity of involved parties in the implementation of the contract, it is possible to have a dispute between them arising from their conflict of interest over how to implement the terms of the contract [9].

With regard to identification the jurisprudence nature of B.O.T contract, it is cleared to us that jurisprudence is different regard the identification of legal nature of B.O.T contracts, which has brought us three views, while the first view see that B.O.T contracts are administrative contracts based on arguments that they are state contracts and were subject to them [10], but the second view, which we favor, see that they are contracts of a special nature and that the legal nature of each contract must be identified separately, and the third and final view see that B.O.T contracts are contracts of private law, and we assure the necessity to identify the legal nature of these contracts, because of these contracts have an importance in identification the competent authority to consider disputes that may be impacted during the implementation of the items agreed in the contract.

Whereas recourse to ordinary courts to settle such disputes, may not provide the other parties of the contract, the reassurance and they are afraid that the judiciary may be biased towards the administration direction which had concluded the contract,

and the dispute may take a long time before the judiciary of the State, which may cause economic damage to the parties, because of all of that, it was important to search for an effective method meeting the defects of the ordinary judgment, hence, the arbitration is appeared as a mean for settlement the dispute for considering it as the best method for dis settlement the disputes of international trade contracts, since according to this law; dispute settlement is assigned to an arbitrator who has the technical and legal expertise to help to resolve the disputes associated with this type of contracts which is also characterized by rapid adjudication of disputes and confidentiality.

1st Requirement
The degree of eligibility of Arbitration in B.O.T Contracts

The most countries have stipulated in their laws to permit usage of methods for settlement disputes without recourse to the judgment, the best one is arbitration as a method of litigation, which helps to attract investment and capital, especially in the developing countries, whose economy depends on these investments, this related to the argument regarding the intervention of the state as a party in the arbitration and the enjoyable judicial immunity [11] and

public utilities management or franchising rights such as the Suez Canal project.

(3) The 1976 Uncitral Arbitration Rules are an international arbitration regulation designed for the various parties or arbitral centers to choose to apply to their arbitration. It is a standardized regulation developed by the United Nations Commission on International Trade Law, which contains many rules and provisions that are consistent with the arbitral process.

(4) That is, the B.O.T system provides a solution to the problem of financing infrastructure projects, under which the government gets a project ready without resorting to borrowing or increase government spending and burden the budget more burdens. It also offers a pragmatic approach that governments can use to achieve the privatization of the public sector in most developing countries today. This was stated in the UNCITRAL Report: Future Work on B.O.T Projects - Twenty-ninth Session - New York - 28 May and 14 June 1996, p. 3.

(5) Damietta International Ports Company (DIPCO), in which KGL International owns 35% of the capital, has the remaining share between China Shipping Company, which holds 20% and the international shipping line "CMA - CGM" by 20%, in addition to 10% of the Kuwaiti group "Aref" and similar to General Electric Company of America. The letter of Damietta Port Authority No. 2608 dated 1/6/2002 on the desire of the CMA line to participate in the capital of Damietta Company for the handling of containers, goods and management and the development of the capabilities of the terminal including deepening.

(6) http://www.unido.org/data/ida

(7) UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, p. 221 et seq.

(8) In May 2006, DIPCO signed an agreement with the Egyptian Ministry of Transport represented by the Damietta Port Authority to design, build, manage and operate a new container terminal in Damietta Port for cargo handling under a US $ 40 billion concession for investments exceeding $ 1 billion. The Company shall comply with the terms of the contract in order to solve the problem of consolidating and deepening the berths, Damietta Port Company called for signing an agreement to refer the matter to the Council of State to issue a judgment specifying who is responsible for bearing the cost of consolidating and deepening the berths to be binding on B.O.T h parties. But to no avail, this was stated in a report submitted by Major naval General Mohamed Saad Zaghloul at the ARSET Conference (7) in Alexandria on 11/10/2012 held under the auspices of the Arab Association for the Development of Maritime Trade (Inma).

(9) One of the risks that can be faced by B.O.T projects, which does not come from three aspects are either risks to the economics of the project or technical or legal risks (This contract is legally complex and entails many legal obligations, and the preparation of it requires long negotiations, especially in the case of large-scale projects such as the establishment of a container terminal for the handling of goods where the items are not without a provision on the problems and cases of a contractual hypothesis of the occurrence of force majeure and sudden incidents). See clause 3 in the second paragraph of the contract for the construction and operation of a new container terminal at Damietta Port / Egypt.

(10) B.O.T contracts are defined as “the contract concluded between the State or one of its affiliates with a national or foreign private company (the project company) to establish or renew a public utility and to manage or own it for a period of time commensurate with what it has spent, in addition to making a reasonable profit, The transfer of ownership after the end of the concession period to the State or subsidiary.

(11) Whereas arbitration is of a special nature, it finds its basis in the will of the parties, where the State has resorted to including the arbitration clause in the contract of its own free will. Although the traditional jurisprudence of the inclusion of this clause in the contract

mastery which prevents it to recourse to the arbitration to settle its disputes and despite it issued a rule of Arbitration No. 27 of 199, unless, the practical reality certifies real problems including the degree of the governance of BOT Contracts to the administrative jurisdiction and the degree of the eligibility of the state to recourse to the arbitration.

whereas the State is a party of B.O.T contract, there is an inquiry regarding the degree of the governance of BOT contract to the administrative jurisdiction or not; in other words, is this type of contracts governed by the administrative judgment regard the specialization or the ordinary jurisdiction over administrative jurisdiction in the matter of jurisdiction [12].

The jurisdiction of the administrative judiciary in the State Council is limited to administrative disputes, but it should be noted that the existence of the administrative judiciary does not mean that the ordinary judiciary is no longer the body with general jurisdiction, but rather that administrative disputes emerge from this jurisdiction except what the legislator sees as a special provision for The jurisdiction of the ordinary judiciary in this dispute [13].

`This is confirmed by the Court of Cassation in its ruling that the courts -without the State Council mandate- to hear cases relating to civil administration contracts, which are contracts concluded by the Department with individuals and do not have the nature of the administrative contract [14].

We conclude that the administrative judiciary is concerned only with disputes of administrative contracts, and since B.O.T contracts are contracts of private law that have jurisdiction over disputes arising therefrom to the ordinary judiciary, therefore, if the dispute concerning the implementation of B.O.T contracts is submitted to the administrative judiciary, it has no jurisdiction over the implementation of the rules of competence relating to public order.

2nd Requirement

The degree of eligibility of recourse of the country to arbitration in B.O.T Contracts

There is no doubt that the invalidity of the arbitration clause in the administrative contract is an obstacle to attracting foreign investments [15].

In the administrative contracts, the approval of the competent minister or his representative is required to recourse to arbitration and whereas B.O.T contracts are exited from the frame of administrative contracts, the legal person may recourse to the arbitration where the contract containing the arbitration clause is not from the administrative contracts, as the same case with B.O.T contracts, without the approval of the minister, the competent person or his competent authority for public legal persons [16].

A part of the jurisprudence see that B.O.T contracts are ordinary management contracts [17] and hence they are governed by the rules of private law, while the economic character of B.O.T contracts and the requirements of international trade forces the State to come down to contract like ordinary individuals on the basis of the principle of desire, which see that the contract is the law of the contractors, so neither party may be superior to the other party with the privileges it may derive from the provisions of the Public law [18].

While others argue that B.O.T contracts are contracted through different legal systems, each contract has its own circumstances it is difficult to establish an abstract general rule that the B.O.T contract is a contract of private law, or that it is an administrative contract. Therefore, each contract must be examined separately and placed under the legal system governing it [19].

Since the results may vary from one case to another, or rather, from one project to another because of the possibility of the different nature of the relationship between the project company and the contracting body [20].

Accordingly, the B.O.T contract may be considered as one of the private law contracts at times and administrative contracts at other times if it summons its elements. We can say that the B.O.T contract is of a special nature that falls within the circle of the state contracts in the field of investment where its specificity derives from its subject matter and its association with the development plans of the host country.

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does not mean that the state waives its judicial immunity, the tendency in modern jurisprudence is that the state is implicitly waived if it accepts the arbitration clause. See in detail Dr. Mohamed Abdel Fattah Turk, Arbitration clause by reference, New University House, Alexandria, 2006 edition. ibid. P. 180 et seq. See also Article 21 of the contract for the construction and operation of a new container terminal in Damietta Port in paragraph 4/13/21, which states that the Authority does not enjoy any judicial immunity when participating in any arbitration in accordance with item (21-13) and in the implementation of any decision or judgment of the Authority Arbitration.

(12) According to Article 15/1 of the Judicial Authority Law, except for administrative disputes to which the Council of State is competent, the courts shall be competent to adjudicate all disputes and crimes except as provided for in a special provision. Accordingly, ordinary courts of justice shall have general jurisdiction over disputes arising from private law relations. With regard to administrative contracts, article 10/11 of the Law of the Council of State provides for "disputes concerning contracts of obligation, public works, procurement or any other administrative contract".

(13) Dr. Fathi Wali, Mediator in the Law of Civil Justice, Cairo University Center for Printing and Publishing, Cairo, 1998 edition, p. 187.

(14) May 2, 1967 - 49, cassation, civil cassation - set of cassation provisions - Technical Office.

(15) This is what was confirmed by the Cairo Court of Appeal in its judgment of 19/3/1997, where it stated in the grounds of its ruling that "attempting to break the arbitration clause after it was agreed in the contract concluded with a foreign party on the pretext that the arbitration clause in administrative contracts may hummer the confidence of the contracted parties with public persons in its credibility and consequently harms the chances of foreign investment opportunities "- ruling in the case No. 94 Q 113.

(16) According to clause 4 of the contract for establishing and operating a new container terminal in Damietta Port in Egypt on May 8, 2006, any (basic and secondary) legislation, decisions, provisions or approvals of any government authority or other authority in the Arab Republic of Egypt is required to approve this contract and conclude the first party thereof. (Represented by the Port Authority of Damietta) and the performance of its obligations in accordance with it has been granted or issued or enacted so as to be effective and productive for its legal effect, in particular the decision of the Egyptian Council of Ministers to grant the obligation subject of this contract, as well as the approval of the Minister of Transport on the arbitration clause contained in this contract.

(17) Dr. Gaber Gad Nassar - B.O.T contracts and the modern development of the contract of commitment - Dar Al-Nahda Al-Arabiya, Cairo, 2002 edition, p. 50.

(18) Dr. Essam El-Bahgy- Arbitration in B.O.T contracts- New University House- Alexandria - 2008 edition, p 100.

(19) Dr. Mohamed Hamed, Legal System for Construction, Operation and Transfer Contracts, Dar Al Nahda Al Arabiya, Cairo, 2005 edition, p. 182.

(20) Research paper entitled Public- Private Partnership- Department of Economic and Financial Studies- Department of Finance, Government of Dubai, April 2010.

2nd Topic
The Law Applicable to Disputes

Despite updating the contrast means of settling disputes for the judiciary of the state, there are several criticisms directed at national arbitration as directed at the national judiciary [21], the most important of which is the sudden legislative changes [22], which affects the presence of the investor within the host country and the extent of the state's influence in influencing the fairness of the arbitration [23].

The international jurisprudence certified the freedom of parties to select the applicable law [24], the arbitration commissions and big investment companies were enabled to identify a limit to the law of desire, considering it as a reference to the application of the national law, and its direction towards the contracts of investment or application a law serve with the first degree to favor of the investor, the state may work to get rid of the arbitration clause, which is the main guarantee for the investor and resort to adherence to the provisions of national law, which was amended after agreement on the arbitration clause. At most times, the state cancels the contract or withdraw the private license of the investment contract, and because of the seriousness of this procedure, the idea of internationalizing of investment contracts was prominent and governed by the international law.

As we mentioned before that B.O.T contracts are likely to be concluded between several parties and each of them has a different nationality, and this difference may raise the problem of how to determine the law applicable to disputes that may arise during the implementation of the terms of the contract [25].

In most international commercial contracts, the foreign investor fails to persuade the contracting State to select a legal system other than its national law or even to accept that the contract to be governed by a national law other than that of the contracting State, the foreign investor could only prevent State to prejudice the contract and prevent it from changing the contract at its sole discretion and to ensure that the contract is not subject to any amendments or changes made by the State to its national law during the contract period. Usually, the parties are not inclined to freeze the selected foreign law applicable to their contractual obligations in this respect on the one hand. On the other hand, the host State and the contracting party undertakes not to issue new legislation applicable to the contract in such a way as to prejudice the economic or financial balance of the contract and harm the foreign contracted party.

And in order to solve this problem, we find some laws make the law of the State granting the obligation, is the governing law of the project agreement and this is contrary to the meaning of arbitration and the purpose of resorting to it without the ordinary judiciary [26].

The problem is limited to the extent of the State's commitment not to change the contract between it and the foreign party, whether it is not to change the contract directly or indirectly by amending the law governing the contract [27].

Accordingly, the requirement is divided into two requirements, the first one is allocated for the freedom of the parties to select the applicable law and the second one to the situation of Washington Agreement on the identification of the applicable law.

1st Requirement
Parties' Freedom to select the Applicable Law

The political changes that may occur in the state, may affect the existence of the contract or cancellation it, so, it is necessary to take into consideration to the proper time schedules for implementation the project and identification the general frame and the management methodology under the market forces that govern the partnership process and due to the economic expansion, international commercial law granted an important role to the disputed parties in resolving the problem of conflict of laws, as their selection of the applicable law to the dispute [28], and there is a significant difference between identification the law applicable to the arbitration agreement and the law the arbitrator is obliged to be applied upon the arbitral proceedings or the applicable law in the subject matter of the dispute.

It is fixed according to the international trading contracts that the parties enjoy the wide freedom to select the applicable law, which is identified either by frank or implied express and the selection of the parties to the applicable law isn't relied upon a free opinion of the contractors that superior than the law, but it becomes one of the principles of the private international law, the matter which pushed the arbitration commission for compliance to the agreed law by the parties [29].

The principle of desire is reflected in the issued decisions from the arbitration centers and international conventions as well as the national legislation.

([21]) Legal Consultant. Reda El Mallah - Working Paper on Arbitration as a means of Settlement of Investment Disputes- Presented at the Specialized Course in International Commercial Arbitration - Giza Lawyers Syndicate, 2011.

([22]) Therefore, we see the need to shorten the duration of the B.O.T contracts system or the application of the principle of the relative impact of the contract on their contracts.

([23]) We believe that arbitration is an effective way to attract foreign investment because of its advantages that are commensurate with the specificities of B.O.T contracts. As an inevitable consequence of relying on this means of =settling disputes, the State shall waive its national jurisdiction and immunity against the enforcement of arbitral resolutions.

([24]) Among the definitions and interpretations stated in the contract for the construction and operation of a new container terminal in Damietta Port are that the Egyptian laws are generally applicable and the legislation, regulations and ministerial decisions related to the provision of services or operation of the terminal. Therefore, it is clear from the text of the contract that the law applicable to the contract concluded between the Kuwaiti company and the Damietta Port Authority is the Egyptian law, i.e. the law of the host country of investment.

([25]) The arbitration system requires the arbitrator to settle the dispute in accordance with the law applicable to the contract as defined by the Egyptian Arbitration Law of 1994 and the French Decree on International Arbitration of 1981. While disintegrates planer amicably of this commitment in the chapter in the conflict, according to the rules of justice and fairness.

([26]) Dr. Hafiza El Haddad - Agreement on Arbitration in State Contracts of Administrative Nature and their Impact on the Applicable Law- University Press, Alexandria, 2001 Edition, p. 20.

([27]) With regard to legislative amendments, which increase the investor's concerns in dealing with the host country and contribute to the destabilization of investment; some States have been forced to introduce a clause on the legislative validity of investment agreements that the State undertakes not to apply any new legislation to the contract with the foreign party, which differs from the condition that the contract not be affected.

([28]) It is the responsibility of the parties or the arbitral tribunal to determine the legal rules applicable to the subject matter of the dispute.

([29]) Dr. Atef El-Feky, Arbitration in Maritime Disputes, Dar Al-Nahda Al-Arabiya, Cairo, 2007 edition, p. 478 et seq.

The Article No. 39/1 of the Egyptian Arbitration Law No. 27 of 1994 stipulates that "the arbitral tribunal shall be applied to the dispute, which agreed by the parties if they agree to apply the law of a particular State where the substantive rules are followed without the rules concerning the conflict of laws unless otherwise agreed".

This article is similar to Article 28/1 of the UNCITRAL standardized Law of 1985, and Article 13.3 of the International Chamber of Commerce in Paris stipulated that the parties are free to determine which law the arbitrator should apply to the subject matter of the dispute.

But after increasing recourse to arbitral institutions, there is no longer field for the will of the litigants to formulate the rules of procedure governing the dispute, and the matter needs compliance to the stipulated procedures in the regulations of the Center for Arbitration, however, the problem arises in the assumption that there is no agreement of the parties and there is no indication of the tendency of the parties to implement a particular law. The question that arises here is: What is the law applicable to B.O.T contracts in the absence of the law of will? There are jurisprudential views that the arbitrator should be given the power to directly choose the law applicable [30], but there are trends against this view.

There are those who believe the necessity for application the law of the host State, considering it thee law of the State and scope of conclusion [31]. Others see that the rules of international law should be applied in accordance with the theory of internationalization of investment contracts by subjecting them to the rules of public international law and freeing them from the control of the national law of the host State to enable the latter to amend or terminate its contracts on its own volition as a public authority [32].

Others see to apply the general principles of law, known as general and fundamental rules that dominate legal systems [33]. Another group argued that international trade laws should be applied and that the host country investment law should be excluded because they were not appropriate for international trade transactions and that such contracts concluded by the State were within the framework of international trade relations and appropriate law of application must be a business norm [34].

In addition, many judgments of arbitral tribunals have tended to consider contracts concluded by the State with foreign persons as private law contracts. The arbitration court in the case of Aramco refused to consider the concession between the Saudi government and Aramco an administrative contract on the grounds that the Saudi law applicable to the process of adjustment and applicable to the contract does not know this range of contracts [35].

2nd Requirement

Situation of Washington Convention on Selection the Applicable Law

The Washington Convention is the main key to identify the ability of the persons of public law to enter as a party into the arbitration agreements related to investment disputes, whereas its role is basically represented in the main law of arbitration between the investor state and the foreign investor.

The investment laws are interested for legislation arbitration in its contracts to settle the host country disputes with the foreign investor, which enables to ensure a type of harmony between the arbitration institution and the investment mechanism to rapidly take the decision in the presented dispute by a direction, and more neutrality to face of the State and management on the other hand, so we find most states have therefore changed their arbitration laws and acceded to international treaties, including the Washington Convention [36]. Arbitration clauses refer disputes to the International Center for Settlement of Investment Disputes (ICSID) in Washington, and are contained in legislative text, often in investment promotion laws.

The importance of facing Washington Convention 1965 for settlement of investment disputes between Member States and nationals of other Member States and whereas Article 7 of Investment Law No. 8 of 1997 stating that " the related investment disputes to the implementation of the provisions of this Law, may be settled within the framework of the Convention on the Settlement of Emerging Disputes concerning investments between countries and among nationals of other countries to which the Arab Republic of Egypt has joined by Law No. 90 of 1971. In addition to, Egypt concluded a number of bilateral investment agreements such as the agreement between the Government of the Arab Republic of Egypt and the Government of the French Republic on September 22, 1974 regarding the encouragement and mutual protection of investments, while the previous article stipulated to "Any of the contracting Parties accept to recourse any dispute that will be arise between him and between any of the citizens or the affiliated companies to the other contractual party to the International Center for the Settlement of Disputes arising from Investment".

If the parties have a written agreement to recourse the arise dispute between them and between the International Center and when this agreement was issued, neither party may not withdraw it unilaterally [37], and thus Article 25/1 requires

(30) Dr. Mohamed Abdel Fattah Turk - Maritime Arbitration - New University House - Alexandria - 2005 edition, p. 434 et seq.

(31) See in detail Dr. Mustafa Mohieddin- Arbitration in International Administrative Contract Disputes- New University House- Alexandria- 2008 edition- p. 365. This is what happened in the contract of the Kuwaiti company DIPCO and Damietta Port Authority.

(32) See in detail Dr. Mohammed Al-Asaad - Investment Contracts in Private International Relations - Al-Halabi Publications - Beirut - 2006 Edition, p. 231.

(33) See in detail Dr. Mustafa Mohiuddin, ibid.

(34) See in detail Dr. Mohammed Al-Asaad, ibid.

(35) See in detail Dr. Ibrahim Ahmed Ibrahim, International Arbitration, Dar Al-Nahda Al-Arabiya, Cairo, Fourth Edition, 2005, pp. 224-227

(36) Arbitration clauses often refer investment disputes to the International Center for Settlement of Investment Disputes (ICSID) in Washington, where there are more than 700 bilateral investment agreements out of 2,000 agreements that refer disputes to it. It is worth mentioning that thirteen Arab countries have ratified the Washington Convention. Settlement of investment disputes of 1965, including Egypt. Adherence to the 1965 Washington Convention is instrumental in protecting investments and taking disputes over them from the scope of domestic law of the countries where the investment takes place, the majority of which are developing countries. The Center shall not be competent to deal with disputes in which the State itself is a party, but its competence extends to disputes in which one of the parties is a public body or a State body that determines it before the Center. As a specified and designated organ that replaces them in contracting at the level of international economic relations.

(37) The center for settlement the international investment disputes "EXIDE" affiliated to the international bank in USA at Washington, had announced his acceptance of the lawsuit submitted by Dimata International Ports Company "DIBCO" against the Egyptian government representing in the general authority of Dimata port and

two conditions in order to held the specialization to the International Center for Settlement of Investment Disputes:

1. The host State of investment shall be a Party to the Convention and also, the investor belongs to a State Party to the Convention.
2. It is necessary to ensure the written consent of the host country and the investor to recourse to the center.

And with regard to the situation of the Convention on the applicable law, we find article 42/1 stipulates that: "The Court shall settle the referred dispute before in accordance with the legal rules agreed by the parties. If there is no such agreement, the Court shall apply the law of the Contracting State Party to the dispute, including rules of conflict of law and applicable rules of international law".

From the previous text, it is clear that the agreement devoted the arbitrations of the International Center for Settlement of Investment Disputes in Washington to the supremacy of the rules of private law over the rules of public law.

Thus, the origin according to this agreement deemed that the arbitral tribunal shall apply the law agreed by the parties that meant the Convention has devoted the principle of the desire power, whereas we find the Convention has given the parties full and wide freedom to select the substantive legal rules applied by the arbitral tribunal to the dispute.

Thus, the parties can select an integrated legal system to be applied to arbitration, whether this system is related to the host country of investment or the investor or related with a third country.

Finally, in accordance with the text of article 42/1 of the convention (the court of arbitration shall settle the dispute in accordance with the rules of the selected law by the parties).

Conclusion

This study gives a simple idea about the arbitration system as a mean for settlement the disputes between the state and between the foreign investor, and indicates the reasons which led the arbitration system as one of the best means for settlement the investment disputes, which pushed us to discuss some of the problems that stand in front of this mean in the settlement of this type of disputes, representing in referral to the arbitration clause and the law applicable to the contract, in addition, it examines the effectiveness of this system in the settlement of these disputes, and this was through exposure to one of the real problems arising from the application of B.O.T contracts in the dispute between Damietta Ports International Company for the handling of containers and goods in Damietta Port, represented by the Kuwaiti company DIPCO and Damietta Port Authority.

In order the countries accomplish their developmental goals, the countries, especially the developing countries, including Egypt, entered B.O.T contracts which are known state contracts because they are a party in them.

And because of the importance of B.O.T contracts, and because they are concluded on an international level between the country and between other nationalities and may be between other States, so, it was necessary to create a method other than the internal jurisdiction of the country for settlement disputes that may be arise during the implementation of the obligations contained in the contract, so the arbitration was cleared as a system for settlement arise disputes from B.O.T contracts, because, it achieved advantages which treat the defects and shortcomings of the internal judiciary of the state on the one hand, and on the other hand, because of the spirit of reassurance and confidence in the judgment issued by the arbitral tribunal.

We have also discussed clearly the settlement of disputes arising from such contracts, by indication the degree of the legislation of arbitration in B.O.T contracts as well as applicable law, and we assured the freedom of parties to select the applicable law to the dispute between them and the situation of the Washington Convention on the selection of the applicable law.

Finally, one of the distinguishing features of this contract, is the interaction of many parties to the contract, as well as the conclusion of many other contracts in the variable stages of the implementation of the original contract that have a link and cannot be partially, the matter which pushed us to refer to the scope of the arbitration agreement and after that refer to the extension of the arbitration agreement in its variable status.

Conclusions & Recommendations

Conclusions

1. There are variable differences in the contracts of specialized ports and they enjoy attractive forms of investment in general, and projects of infrastructure projects in particular.
2. We need an arbitration center to govern the occurred disputes at home with the foreign investor.
3. The problems of B.O.T contracts appear in the lack of sufficient experience to deal with this system and the existence of a national legislative space to adjust with it, and it will recourse to international legislation to address the shortcomings and challenges of investment problems.
4. B.O.T contracts are attractive formulas for financing investment in general and port infrastructure projects in particular.
5. Identification the periods and interested not to prolong the duration of these contracts, in order not to result cases and be difficult for dealing with them at the future, representing in making use of the foreign investor to the economic and social activity, the matter that permits impact in taking decision inside the host country and to exert pressure on the developing country.
6. The issue of the certified international commercial arbitration as a tool for settlement disputes at this contract, became a pressure paper and calculated for favor of the foreign companies that enjoy the right to file a lawsuit directly against the country before an international tribunal, which effect the international economic relations.
7. The current stage of the country now, needs to dismantle the administrative restrictions that impede the

the Ministry of Transport because the government had imposed fines 72 million Dollars to the company without a prior caution, regarding the lawsuit of none compliance of the company with the items of its contract with the country in the execution, and this is in contrary to what was mentioned in article 21 of the contract, that both parties agreed for settlement the arise dispute across from the arbitration and in accordance with the applicable rules of arbitration with the international commercial chamber in Paris and this is pushed us to say the non-specialty of EXIDE Center for arbitration and whereas to understand from this push the long-term of dispute and enter in negotiations and discussions for favor of the investor which put the dispute in the Egyptian government in front of the committee of settlement disputes at the council of ministers.

institutions from performing their work in order to raise the efficiency suffered by the state institutions and business sector companies.

Recommendations

1. The importance of creation the balance between the interest of investors and the interest of the host country of investment through an effective cooperation between them, and consideration taking advantage of the advantages of these projects and not excessive concessions.
2. The non-slack of the governmental direction in its responsibility in the supervision and follow-up of the projects which are constructed on its lands.
3. Treatment the dis-advantages rapidly without delay, and preparation the specialized cadres to be enable to work in the field of settlement disputes.
4. For the success of this system, the state should review the legal legislation in all areas while seeking to develop a unified law governing the participation of the private sector in the provision of infrastructure services for specialized ports.
5. We recommend to approve this type of contract legally by the attached country of investment, and taking into consideration to its privacy and work for recruitment its mutual abilities and possibilities to create a strong economic environment to enable it to impose its conditions upon others and participate in the positive change all over the international level.

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