

# Commercial Arbitration and Contractual Independence under Jordanian Law

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## Abstract

This study deals with the principle of the independence of the commercial arbitration clause and contractual independence within the framework of Jordanian law, with a comparative analysis of international agreements and arbitration bodies' regulations and rules. The research aims to determine the legal nature of the commercial arbitration clause, its importance, and the position of international agreements and arbitration judiciary in establishing this principle compared to Jordanian law. The study uses the descriptive analytical comparative approach, as it divided the research into four main sections. The first section deals with the legal nature of the independence of the commercial arbitration clause and its importance. The second section deals with an analysis of the independence of the commercial arbitration clause in light of international agreements and arbitration bodies' regulations and rules. The third section deals with studying the position of the judiciary in international arbitration on the principle of the independence of the commercial arbitration clause. The fourth section deals with a comparison of the independence of the arbitration clause according to Jordanian law and international law. The study concluded that the independence of the commercial arbitration clause is a fundamental principle in international commercial arbitration, ensuring that disputes are resolved in a neutral and unbiased manner. The research highlights the importance of the independence of the arbitration clause in Jordanian law, in line with international best practices. The study findings and recommendations can help develop more effective and efficient arbitration processes, ultimately enhancing confidence in international commercial arbitration.

**Keywords:** Commercial arbitration, contractual autonomy, Jordanian law, international agreements, arbitral tribunals, judiciary, arbitration clause autonomy.

Arbitration is one of the means of resolving disputes between the parties concerned. Arbitration has been known since ancient times, as ancient societies used it as a tool to resolve disputes and settle them between individuals, until it has now become recognized by national legislative systems and the state, and because commercial relations have become diverse between the parties, which has led to the inclusion of those contracts of the condition of commercial arbitration in order to settle disputes that may arise from those contracts

The arbitration agreement is either contained in a contract that is concluded after the disputes arise and the agreement is recorded in a document separate from the original contract that represents the legal relationship existing between the two parties before the dispute arises, which is known as the arbitration agreement, or the arbitration agreement is contained in a condition that is included in the original contract, as any dispute that arises later may be resolved through arbitration, which is known as the arbitration condition, and this form is often the most prevalent in arbitration regulation and is the one that refers to the principle of independence.

The conclusion of a commercial arbitration agreement is one of the necessary conditions for it to be valid. It is also necessary for it to include consent, capacity, subject matter, and reason for this agreement, in addition to other formal conditions such as writing and signature.

The commercial arbitration agreement is often linked to the original contract that is the subject of the dispute, and it often happens that the original contract that includes the arbitration clause may be invalidated, terminated or cancelled, which leads to a problem, which is that the arbitration clause is invalidated according to the contract or remains independent despite the termination of the original contract. Hence, and following major developments in the legal systems of the countries of the world, an

important and fundamental principle was adopted in commercial arbitration, which is the principle of the independence of the commercial arbitration agreement, which in turn leads to its adoption and the arbitration clause remaining independent and independent of the entity of the original contract, as long as the contract was concluded correctly between the two parties.

By analyzing the position of the national legal system, and in our case, and referring to the Jordanian legal system towards a subject that achieves a significant degree of coverage of the research issues, it is undoubtedly that comparing solutions and rulings is decided by another legal system that achieves another depth that is not due to the idea of comparison itself, and also due to what comparison allows in terms of a greater ability to express an opinion on the solutions of the national legal system, which is the subject of the research.

The problem of the study and its main elements are represented in determining the statement of the principle of independence of the commercial arbitration clause and contractual independence by defining the legal nature of the commercial arbitration clause, and stating its importance, as well as addressing the position of international agreements that have adopted this principle and the position of international arbitration judiciary in comparison with Jordanian law.

The researcher relied on the descriptive, analytical, and comparative approach in his study, as the study focuses on the principle of commercial arbitration and contractual independence, which is a descriptive, analytical, and comparative study. Accordingly, our study of the research topic is divided into four main sections, which are:

1. The legal nature of the independence of the commercial arbitration clause and its importance

2. The independence of the commercial arbitration clause in light of international agreements and arbitration bodies' regulations and bylaws.

3. The position of the judiciary in international arbitration on the principle of the independence of the commercial arbitration clause.

4. The independence of the arbitration clause according to Jordanian law and international law.

### Literature review

The study of Musab Muhammad Al-Qatawneh (2011) addresses the issue of the independence and integrity of arbitrators in international arbitration. It consists of an introduction, two chapters, and a conclusion with recommendations. The study begins by shedding light on the process of selecting arbitrators and the nature of their role, highlighting the importance of this aspect in international arbitration. In addition to exploring the legal requirements for the independence and integrity of arbitrators, the basic conditions that must be met to ensure a fair and unbiased arbitration process were examined, in addition to analyzing the legal consequences that arise when an arbitrator lacks independence and integrity, and how this can affect the entire arbitration case.

The study of Salim Zuhair Salim Abbasi (2023) refers to the principle of the independence of the arbitration clause from the contract, and explores its concept, importance and justifications in arbitration law, including Jordanian law. The study aimed to clarify the principle, adopt it in international legislation and agreements, and the position of Jordanian law and judiciary on it. The researcher used the descriptive approach, reviewing the legislative frameworks and jurisprudential and jurisprudential opinions to achieve the goal of the study. The study concluded that the independence of the arbitration clause is based on considering it a separate contract within the original contract, with distinct topics. The

subject of the arbitration clause is procedural, focusing on settling disputes, while the subject of the original contract is the agreement of the parties to establish a legal relationship.

The study of Omar Nouri Abdullah Ababneh (2006) explains the commercial arbitration clause in terms of its validity and independence under Jordanian arbitration legislation. This study also aimed to clarify the commercial arbitration clause, its validity and independence under Jordanian arbitration legislation No. 31 of 2001 and compare it with other national legislations and international agreements. The researcher conducted a comprehensive review of the existing literature on the subject, and extracted the relevant basic concepts and principles to achieve the study's objective. The study also focused on the commercial arbitration clause, examining its validity and independence under Jordanian arbitration legislation No. 31 of 2001, and comparing it with other national legislations and international agreements.

1. The legal nature of the independence of the commercial arbitration clause and its importance

The legal opinions of the arbitration clause differed, as some considered it a condition among the conditions regulated by civil law. The condition in civil law is a future matter that is likely to occur, as the existence of the judgment or its termination depends on its fulfillment. It has two types: the first condition is the condition upon whose fulfillment the emergence of the obligation depends, while the second condition is the condition upon whose fulfillment the termination of the obligation depends. The arbitration clause is similar to the condition in civil law in that the dispute agreed upon for arbitration is a future matter that is likely to occur, and does not violate public order, and is related to a matter that is legally permissible, as the settlement of the dispute is through arbitration. This condition is considered a suspensive condition because the use of arbitration is conditional upon the occurrence of the dispute, which is a condition for enforcing

the obligation to resolve the dispute through arbitration.

The principle of independence of the commercial arbitration clause means that the arbitration clause contained in a contract remains independent of the contract itself, i.e. challenging the original contract does not affect the validity of the arbitration clause contained therein. In the event of invalidating the original contract, it is possible to adhere to the condition of validity of arbitration contained therein. In the event of invalidating the original contract, it is also possible to adhere to the conditions of validity of arbitration, which is what is stipulated in the new Jordanian Arbitration Law No. 31 of 2001 AD, where the Jordanian legislator explicitly approved the principle of independence of the arbitration clause from the original contract contained therein, in Article (22), which states that “the arbitration clause is considered an agreement independent of the other terms of the contract, and the invalidity, termination, or dissolution of the contract does not have any effect on the arbitration clause it contains, if this condition is valid in itself.”

The importance of the independence of the arbitration clause from the original contract contained therein lies in the desire to achieve economy in time and procedures, since the existence or nonexistence of the arbitration clause is linked to the original contract that includes it, and it results in the inability to proceed with the arbitration procedures, so that the national judiciary decides on disputes related to the jurisdiction of the arbitration body, or the lack of its jurisdiction. I can explain this by saying that the link between the arbitration clause and the original contract leads to the arbitrator being removed from the arbitration, as soon as any party raises the issue of the invalidity of the original contract, and the arbitrator may then be obligated to declare his incompetence, and because the subject brought before him may put him in a position to simultaneously consider the validity of the original contract and the validity of the arbitration clause contained

therein, and it is unacceptable for the arbitrator to decide on the validity of a contract that is the source of his authority, and challenging the original contract leads to the natural judiciary taking control of the arbitration itself and stopping the procedures until the judicial authority decides on the validity of the original contract.

2.The independence of the commercial arbitration clause in light of international agreements and the systems and regulations of arbitration bodies.

French jurisprudence has tended to require the subordination of the arbitration clause to the original contract, and arbitrators are not permitted to consider the issue of the invalidity of the original contract. However, in another interpretation, the French Court of Cassation changed its previous interpretation and adopted the principle of the independence of the arbitration agreement from the original contract in relation to international commercial arbitration, and in its decision issued in 1958, the French judiciary was influenced at that time by the Dutch judiciary, which is considered the first to decide this principle in the ruling of the Dutch court in 1935, as the French Court of Cassation of 1972 is considered the first to refer to the arbitration agreement in the subject of international arbitration and represents complete independence.

Following the issuance of the French Code of Civil Procedure in 1981, Article (1446) thereof stipulated that “...if the arbitration clause is void, it is deemed not written...” This text indicates that in the event of the voidness of the arbitration clause in the original contract, the clause does not exist and the contract remains valid. From the concept of the violation of this text, we conclude that if the original contract is void, this does not affect the validity of the arbitration clause.

In the United States of America, the Supreme Court of the United States established the rule of independence of the arbitration clause from the original contract in the “Lawrence” case of 1959, but jurisprudence usually refers to the “Prima

Paint” case issued in 1967, and to confirm the rule of independence in the American judiciary, where the independence of the arbitration clause from the original contract that includes it was explicitly recognized, and this comes in accordance with matters subject to federal law, as a simple presumption was placed on the rule of independence and also accepts proof of the opposite, as the American judiciary has since settled on adopting the rule of independence.

The credit for establishing the rule of the independence of the arbitration agreement from the original contract and determining its legal framework goes to the French judiciary, where the French Court of Cassation’s ruling in the “Gosset” case of 1963 stated that “in the framework of international arbitration, the arbitration agreement, whether concluded separately or incorporated into the legal act related to it, always has, except in special circumstances, complete legal independence that prevents the possibility of it being affected by the potential invalidity of this act.” Then the same court returned and confirmed the rule of independence in the framework of international arbitration, while dropping the expression.

Referring to the first of the agreements, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, did not include any text explicitly referring to the principle, and was satisfied in the first period of Article 5 with referring to it. German jurisprudence concluded from this text that the arbitration agreement can be subject to a law different from that which regulates the original contract, and it reached its conclusion that the New York Convention had implicitly approved the principle of independence, while some jurisprudence responded to this interpretation and described it as bold, as the reality, it seems, is that the treaty left each of the applicable laws free to decide the validity of the agreement.

Although the treaty did not refer to the principle of the independence of the arbitration agreement from the original contract in a direct manner, it was concluded from this text

“gaillard” that the arbitration agreement may be subject to a law other than the law of the original contract, and thus the New York Convention may be subject to a law other than the law of the original contract, and thus this treaty has implicitly accepted that the arbitration agreement has a legal system independent of the original contract, i.e. it is possible to include it within the framework of the trends of the principle of independence, and if the text of Article 02 of this agreement obliges member states to recognize the arbitration agreement.

The Geneva Convention of 1961 and the Washington Convention of 1965 explicitly referred in their rulings to the arbitrator’s jurisdiction to consider his jurisdiction “jurisdiction by jurisdiction” and they are connected in a documented manner to the subject of the independence of the arbitration clause, considering that this principle is within the arbitrator’s jurisdiction to consider his jurisdiction and is considered one of the most prominent effects of the principle of the independence of the arbitration agreement.

The Geneva Convention in particular did not include an explicit text establishing the principle of the independence of the international commercial arbitration agreement from the original contract. However, some have argued that Article 3, which states that “the arbitrator has the power to determine his jurisdiction and to determine the validity of the arbitration agreement or the validity of the contract that is a condition of arbitration and part thereof,” grants the arbitrator the power to decide on his jurisdiction and on the existence or validity of the arbitration agreement or the contract of which the arbitration agreement is a part, and thus enshrines the principle of the independence of the arbitration agreement only implicitly by enshrining the principle of the arbitrator’s jurisdiction to decide on his jurisdiction.

The Rome Convention of 1980 on the law applicable to contractual obligations excluded the arbitration clause from its scope of application, considering it a distinct part from the

other obligations contained in the contract, and allowed the contracting parties and the judiciary to subject it to a different law based on the contract. The arbitration regulations derive their authority from the will of the parties referred to, which includes the principle of the arbitration clause, which confirms that the will of the parties is directed towards the arbitration agreement being treated separately from the treatment received by the contract.

The Washington Treaty, which was signed on March 18, 1965, which established the International Centre for Settlement of Investment Disputes, where Article 41, paragraph one, was limited to emphasizing that “the arbitral tribunal shall have jurisdiction over the matter of its jurisdiction,” meaning what was previously explained in the previous agreement, namely that the arbitrator has jurisdiction to determine his jurisdiction.

3. The position of the judiciary in international arbitration regarding the principle of independence of the commercial arbitration clause.

The international arbitration agreement is intended to settle a dispute related to an issue of intervention according to the cases of jurisdiction of the state judiciary, and this arises due to the conflict of jurisdiction between the state judiciary, and the arbitration judiciary is addressed by jurisprudence because the mandatory or obligatory jurisdiction of the state courts is established, and given that they are cases related to public order, and therefore individuals may not agree to violate them, and the opposite of permissive jurisdiction is what individuals can do in it, and in light of it, the existence of an international arbitration agreement is linked to one of the cases of deprivation of the jurisdiction of the state judiciary and its attribution to the arbitration judiciary, and the resolution of this conflict must be by implementing the effect of the international arbitration agreement by recognizing the will to deprive the jurisdiction of the judiciary.

Referring to the position of the English judiciary, which initially categorically rejected the principle of the independence of the arbitration clause from the original contract that included it, but soon retreated from this approach and explicitly acknowledged the independence of the arbitration agreement, and went on to say that if the contract is rescinded or terminated for any reason, this does not affect the arbitration clause, and if the original contract is tainted by relative invalidity or a dispute over the parties' will in interpreting the original contract, this also does not affect the arbitration clause, while the arbitration clause takes the ruling of the original contract if the original contract was not concluded at all or did not have a legal existence in reality, as if it were absolutely invalid.

The new Swiss law stipulated more clearly in the third paragraph of Article (178) that “the validity of the arbitration agreement cannot be challenged due to the invalidity of the original contract or because the agreement relates to a dispute that has not yet occurred.”

The Jordanian judiciary's position on international arbitration stems from the principle of the independence of the commercial arbitration clause. In Jordan, arbitration is considered a special form of binding dispute resolution, which takes place before a neutral court, and stems from the agreement of the parties. The Jordanian judiciary has consistently supported the principle of the independence of the commercial arbitration clause, recognizing the independence of the parties in agreeing on the terms of their arbitration agreement.

The principle of independence of the commercial arbitration clause The principle of independence of the commercial arbitration clause is the cornerstone of international arbitration, meaning that the arbitration agreement is a separate and independent agreement from the main contract. This principle is recognized in Jordan, where the judiciary has consistently confirmed that the arbitration agreement is an agreement distinct from the main contract.

The Jordanian judiciary's position on international arbitration The Jordanian judiciary has consistently supported the principle of the independence of the commercial arbitration clause. In doing so, it has recognized the autonomy of the parties in agreeing on the terms of their arbitration agreement. This is evident in the Civil Aviation Law No. 41, which provides for compulsory arbitration between the investor in Jordan and the Jordanian Civil Aviation Organization. Key Features of International Arbitration in Jordan Some of the key features of international arbitration in Jordan include:

- Arbitration is a special form of binding dispute resolution, conducted before a neutral court, and stems from the agreement of the parties.
- The arbitration agreement is a separate and independent agreement from the main contract.
- The Jordanian judiciary has consistently upheld the principle of the independence of the commercial arbitration clause, recognizing the autonomy of the parties in agreeing on the terms of their arbitration agreement.

As for the principle of the impossibility of judges to be removed as a basic guarantee of the most important guarantees that ensure the independence of the judiciary, it has been stipulated in all constitutions, including the constitutions of America, France and Egypt. In America, the first paragraph of Article III of the American Constitution issued in 1789 and amended in 1992 states that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish; and the Judges both of the supreme and inferior Courts shall hold their offices, especially if distinguished for good behavior, and shall receive at stated times, for their services, compensation, which shall not be diminished during their continuance in office."

In France, the third paragraph of Article 64 of the French Constitution states that "... judges

cannot be removed" and Article (4) of Decree No. 58-1270 on the Basic Law on the Status of the Judiciary states that "judges cannot be removed."

Among the most prominent international legal instruments that stipulate the principle of the inadmissibility of removing judges in the independence of the commercial judiciary are:

1. UN Basic Principles on the Independence of the Judiciary (1985)

Principle 12: "The independence of the judiciary shall be guaranteed by the State and provided for in the constitution or the law of the country."

2. International Bar Association Minimum Standards on Judicial Independence (1982)

Standard 2: "Judges shall be protected from removal from office except for reasons of incapacity or misconduct, and then only by a competent authority and in accordance with fair procedures."

3. European Convention on Human Rights (Article 6 (1950))

Article 6 (1): "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, in the determination of his civil rights and obligations or of any criminal charge against him."

4. Constitution of the Republic of South Africa (1996)

Section 165(3): "The courts shall be independent and subject only to the Constitution and the law, which they shall apply impartially and without fear, favour or prejudice."

5. Constitution of the United States of America (1787)

Article III, Section 1: "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time order to establish."

6. Constitution of Canada (1982)

Section 11(d): "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according

to law in a fair and public hearing by an independent and impartial tribunal.”

#### 7. Constitution of Australia (1900)

Section 72: “The Governor-General in Council shall appoint the Justices of the Supreme Court and of such other courts as Parliament may establish.”

These constitutions and international legal instruments emphasize the importance of the impeachability of judges in ensuring judicial independence, particularly in the context of commercial disputes. By protecting judges from removal except in exceptional circumstances, these instruments aim to ensure that judges are able to make decisions impartially and without fear of reprisal.

#### 8. Constitution of Jordan (98)

The Constitution of Jordan guarantees the principle of the irremovability of judges, which ensures their independence and impartiality in the administration of justice. Article 98 of the Constitution stipulates that judges may not be removed from their positions except in accordance with the law, and may not be removed except by a decision of the court.

4. The independence of the arbitration clause according to Jordanian law and international law.

The Jordanian law’s position on the principle of independence was not implemented at the beginning, as the repealed Arbitration Law of 1953 did not refer to the principle of the independence of the arbitration clause from the original contract. However, the legislator did well in the new Arbitration Law of 2001 by including it and the ruling of Article 22: “The arbitration clause is considered an agreement independent of the other terms of the contract it includes if this condition is valid in itself.” Thus, the legislator went to protect the arbitration clause and make it independent from the original contract.

Jordanian legislation is one of the modern legislations that dealt with matters of international arbitration, as stated in a ruling of the Jordanian Court of Cassation, “The dispute relates to the invalidity of the contract itself. If

the invalidity is decided, no clause of the agreements shall be applied.” It based its decision on Article (231) of the Jordanian Civil Code, which states that “If something is invalidated, what is included in it is invalidated.” Accordingly, the invalidity of the original contract leads to the invalidity of the arbitration clause contained in the aforementioned contract. It is possible to establish the principle of the independence of the arbitration clause from the original contract, based on the theory of contract diminution.

Article (169/1) of the Jordanian Civil Code stipulates that “If a contract is void in part, the entire contract is void unless the share of each part is specific, in which case it is void in the void part and remains valid in the rest.” This theory assumes that the original contract is not void in its entirety, but in part, even if the void part remains valid. We can say, according to this theory, that if the original contract that includes the arbitration clause is void, the arbitration clause may remain valid, if its conditions are met, which represents an independent agreement, and if the aforementioned clause is not affected by the voidness of the original contract, and the opposite is permissible, the arbitration clause may be void, but the original contract remains valid.

With the issuance of the new Arbitration Law No. 31 of 2001, the Jordanian legislator explicitly approved the principle of the independence of the arbitration clause from the original contract contained therein, by stating in Article 22 thereof that “the arbitration clause is considered an agreement independent of the other terms of the contract, and the invalidity, rescission, or termination of the contract shall not have any effect on the arbitration clause it contains if this clause is valid in itself.”

## Conclusion

In conclusion, this study addressed the concept of commercial arbitration and the independence of international contracts, with a focus on the independence of the commercial



arbitration clause. The research was divided into four sections, each of which addresses a distinct aspect of this topic.

The first section of the study addressed the legal nature of the independence of the commercial arbitration clause and its importance. It was shown that the independence of the arbitration clause is a fundamental principle in international commercial arbitration, ensuring that disputes are resolved in a neutral and unbiased manner.

The second section analyzed the independence of the commercial arbitration clause in light of international agreements and the systems and regulations of arbitration bodies. It was noted that many international instruments, such as the United Nations Commission on International Trade Law (UNCITRAL) Model Law and the Arbitration Rules of the International Chamber of Commerce, emphasize the importance of the independence of the arbitration clause.

The third section addressed the position of the judiciary in international arbitration on the principle of the independence of the commercial arbitration clause, and it was shown that the judiciary plays a crucial role in enhancing the independence of the arbitration clause, allowing arbitrators to rule on their jurisdiction and ensuring that the arbitration process remains neutral and independent.

The fourth section compared the independence of the arbitration clause according to Jordanian law and international law. It was noted that the Jordanian Constitution guarantees the principle of the impossibility of dismissing judges, which guarantees their independence and integrity in the administration of justice. In

addition, Jordanian law recognizes the importance of the independence of the arbitration clause, in line with international best practices.

## Results

1. The independence of the commercial arbitration clause is a fundamental principle in international commercial arbitration, and ensures that disputes are resolved in a neutral and fair manner.

2. International agreements and arbitration bodies' regulations and rules emphasize the importance of the independence of the arbitration clause.

3. The judiciary plays a crucial role in supporting the independence of the arbitration clause, and ensuring neutral and independent arbitration processes.

4. Jordanian law recognizes the importance of the independence of the arbitration clause, in line with international best practices.

## Recommendations

1. Parties to international commercial contracts should ensure that their arbitration clauses are drafted to ensure the independence of the arbitration process.

2. Arbitration bodies and international organizations should continue to promote the importance of the independence of the arbitration clause in their rules and regulations.

3. The judiciary should continue to play a proactive role in supporting the independence of the arbitration clause, and ensuring that arbitration processes remain neutral and independent.

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