Means for the Settlement of Commercial & Investment Disputes In the light of the International Treaties and Conventions

By
Prof. Dr. Mohyedin Al-Kaissi

Although the 1983 Lebanese Code of Civil Procedure contains very modern provisions, yet Lebanon, being aware of the need to regain foreign investors' confidence after all the regrettable events which occurred during the 1975-1990 war, found it necessary to ratify multilateral and bilateral treaties and conventions giving investors a sense of protection and security.

Amongst the most significant International Conventions ratified by Lebanon are the 1958 New York Convention and 1965 Washington Convention.

Indeed, Law nº 629 dated 23-4-1997[1] authorized the Lebanese Government to ratify the 1958 New York Convention on the recognition and enforcement of foreign arbitral awards, which was ratified on 11-8-1998.

Also, Law nº 403 dated 5-6-2002[2] authorized the Lebanese Government to ratify the 1965 Washington Convention on the settlement of investment disputes between states and nationals of other states (ICSID), which became effective for Lebanon on April 25, 2003.

In addition, Lebanon has entered into numerous bilateral treaties for the promotion and the protection of foreign investments.
We particularly mention the Bilateral Agreement between Lebanon and the Kingdom of Spain, signed in Madrid on February 22, 1996 and ratified by Law nº 632 dated 23-4-1997[3].

This Agreement was signed, on behalf of the Lebanese Republic by the Lebanese Minister of Foreign Affairs, Fares Bouez and on behalf of the Kingdom of Spain by the Spanish Minister of Foreign Affairs, Carlos Westerdorp.

With regard to disputes concerning an investment that may arise between one of the Contracting Parties and an investor of the other Contracting Party, Article 11 of this Agreement stipulates that:

- The parties concerned shall, as far as possible, endeavor to settle these differences amicably.
- If these disputes cannot be settled amicably within six months from the date of the written notification, the dispute shall be submitted, at the choice of the investor, to:
    - The competent court of the Contracting Party in whose territory the investment was made; or
    - An ad hoc court of arbitration established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or
    - The International Centre for Settlement of Investment Disputes (ICSID) set up by the "Convention on Settlement of Investment Disputes between States and Nationals of other States", opened for signature at Washington on 18 March 1965.

- The arbitration awards shall be final and binding on the parties to the dispute. Each Contracting Party undertakes to execute the awards in accordance with its national law.

Now, the objective of this Agreement being to create favorable conditions for investments made by investors of each Contracting Party in the territory of the other Contracting Party, it is essential therefore to know who is considered as an "investor", and what is considered as an "investment"?

To avoid any confusion or uncertainties, the Lebanon-Spain Bilateral Agreement has put forward definitions for those terms.

Concerning the term “investor”, Article 1 paragraph 1 of the BIT states that it refers, with regard to either Contracting Party, to:

a) Natural persons who, according to the law of that Contracting Party, are considered to be its nationals;
b) Legal entities, including companies, corporations, business associations, branches and other organizations incorporated or constituted, or otherwise, duly organized under the law of that Contracting Party and having their seat, together with real economic activities in the territory of that same Contracting Party.

It is worth mentioning that, despite the fact that it is not expressly mentioned in paragraph b), the Bilateral Agreement also applies to Holding and Off-Shore companies registered in the territory of any of the Contracting Parties.

As for the term “Investments”, Article 1 paragraph 2 of the BIT states that it shall include every kind of assets and particularly, but not exclusively:

a) Shares in and stocks and debentures of a company, or any other form of participation in a company;
b) Claims to money or to any activity having an economic value;
c) Movable and immovable property and any other property rights such as mortgages, liens, pledges and similar rights;
d) Industrial and intellectual property rights, including patents, licenses, trademarks and trade-names, as well as technical processes, know-how and goodwill;
e) Rights to engage in economic and commercial activities conferred by law or by virtue of a contract, including concessions to search for, cultivate, extract or exploit natural resources.

It is also specified that any change of the form in which assets are invested or reinvested shall not affect their nature as an investment.

In fact, making an investment means entering into a project in order to realize returns, which is also a term defined in Article 1 paragraph 3 of the Spanish-Lebanese Agreement which states that “returns” means amounts yielded by an investment and includes, in particular, though not exclusively, profits, dividends, interests, capital gains, royalties and fees.

Moreover, the presence of returns suggests the presence of Users and therefore of financial liability and risks that have to be borne by the person in charge of executing the project.
In other words, the concept of investment is clearly based on two factors:

1- The presence of Users
2- A Financial liability related to risks borne by the investor.

At this point, having gone through some of the most interesting particulars of the Spanish-Lebanese Agreement, allow me to raise some more general questions in relation with the application of the Washington convention as well as the bilateral treaties for the promotion and the protection of investments.

1 - What are the reasons that led to what is today known as “Investment Arbitration”?

In the fifties, it was found necessary, in order to encourage the development of third-world countries, to create incentives for foreign capital to be invested in those countries, as well as guarantees protecting those investments, especially with regard to dispute resolution mechanisms.
Indeed, when it comes to a dispute between the Host-State and a foreign investor, the latter will rarely be satisfied by submitting its dispute to local courts.

Naturally, arbitration was regarded as an acceptable alternative; however domestic arbitration taking place in the Host-State was still not offering enough security and confidence to the foreign investor.

This situation gave rise to the idea of "transnational arbitration" and ultimately to the creation, in 1966, by the World Bank, of the International Centre for the Settlement of Investment Disputes (or ICSID) under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (or the 1965 Washington Convention).

In addition to the Washington Convention, ratified today by 155 States, there has been in the last decade, a substantial increase of multilateral and bilateral Treaties (more than 2300) aiming to promote and protect foreign investments and referring disputes to transnational arbitration under ICSID or UNCITRAL Rules.

2 - What are the characteristics of the arbitration process under ICSID Rules?

Amongst the main characteristics, we note the following:

1 – Arbitration under ICSID Rules is governed only by the provisions of the Washington Convention as well as the ICSID Arbitration Rules. No other national arbitration law is applicable.

2 – There is no intervention by any local national court to control the arbitration process, as ICSID is totally independent from any State or national court of law.

3 – For the Centre to retain its jurisdiction, 3 conditions must be fulfilled (Article 25 of the Convention):

- The existence of a legal dispute arising between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State,

- The existence of an investment, which presupposes the following elements:
    - A contribution, whether financial or in assets
    - The existence of a return or profit
    - Sharing of operational risks between the parties
    - A certain duration over which the project is implemented
    - A contribution to the development of the Host State

- The existence of a written consent, by the parties to the dispute, to submit to the Centre, with the observation that when the parties have given their consent, no party may withdraw its consent unilaterally.

It is also to be noted that it has been considered that the reference to ICSID Arbitration in a BIT constitutes an offer or acceptance by the Host-State of the Center's jurisdiction (in other words, the necessary consent in writing) while the investor's consent is materialized in his request for arbitration submitted to the Center.

3 - What is the law applicable to a dispute submitted to arbitration under ICSID Rules?

According to Article 42 of the Washington Convention, the applicable law to the dispute shall be the one agreed upon by the parties and in the absence of such agreement, the law of the Contracting State party to the dispute (including its rules on the conflict of laws) as well as rules of international law.

However, one should differentiate between arbitration on the basis of a contract - where parties could agree on which rules of law should be applicable – and arbitration on the basis of a treaty – where such agreement will generally be absent and therefore rules of

international law will be applicable, in conformity with Article 42 (1) *in fine* of the Convention.

In other words, when arbitration is initiated on the basis of a BIT, the tribunal will apply rules of international law, comprising treaties, customary international law, international case-law and general principles of law.

4 - What are the means of recourse against arbitral awards rendered in arbitration under ICSID Rules?

Awards rendered in arbitration under ICSID Rules must be respected by the ratifying States as if they came out of their highest courts, as such awards are "binding on the parties and shall not be subject to any other appeal or to any other remedy" (Article 53 of the 1965 Washington Convention).

However, there are means within the Convention to question/revise the award, for example in cases where there has been an omission or a minor error in the award that need to be completed or rectified (Article 49 of the Convention) or in cases where interpretation of an ambiguous award (Article 50 of the Convention) or revision of the award, when new facts affecting it are brought forward, is needed (Article 51 of the Convention).

In addition, the Convention indicates that either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the five following grounds (Article 52 of the Convention):

- The Tribunal was not properly constituted;
- The Tribunal has manifestly exceeded its powers;
- There was corruption on the part of a member of the Tribunal;
- There has been a serious departure from a fundamental rule of procedure; or
- The award has failed to state the reasons on which it is based.

The request for annulment of an award is submitted to an ad hoc committee composed of arbitrators appointed by the Center.

In conclusion and in view of all of the above, it clearly appears that the Investment climate in Lebanon is more than appropriate for foreign investments, and particularly for Spanish investors, as both the Lebanese Law and the numerous bilateral investment treaties, including the 1996 Spanish-Lebanese Investment Agreement, offer investors all necessary incentives, guarantees and security.

[1] Published in the Official Gazette nº 21 dated 8-5-1997

[2] Published in the Official Gazette nº 34 dated 13-6-2002

[3] Published in the Official Gazette nº 21 dated 8-5-1997 p. 1669. It should be observed that the Arabic version of the Spanish-Lebanese BIA published in the Lebanese Official Gazette contains some discrepancies in comparison with the original English version.