

# Legal Protection for the Investor in Iraqi Law

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## Abstract

Investment is one of the most important components of economic development, whether in economically developed countries or countries that suffer from weakness in their economies because it contributes to the transfer of capital to the countries hosting the investment as well as the transfer of modern technologies and it seems that investors are often attracted towards countries that put legal protection for investments and distancing on the part of the countries in which they find exaggeration or strictness in meeting investors or weak legal protection for investments, and among the most prominent of those concerns they have is expropriation, confiscation, and seizure of funds, as well as the strict discrimination between the national and foreign investor, who is not allowed to establish legitimate competition between them.

**Keywords:** Investment, Economically, Modern Technologies, Confiscation, Legitimate

## Introduction

From this standpoint, we find that most Arab and foreign legislations included those measures that protect investors from the concerns that we have referred to. In this regard, we find that the Iraqi legislator has put in place a set of guarantees, some of which were mentioned in the Iraqi constitution for the year 2005 and others were mentioned in the Investment Law No. 13 of 2006. Perhaps our research will focus on defining the concept of legal protection for the investor through the legal hierarchy of this protection, so it is known that the state's view of the investor is linked to the ruling political vision, which in turn is reflected on the legislative side, at a time when Iraq was looking with suspicion at foreign investments. Putting restrictions on the advent of investment to Iraq is impossible. At the present time, there is a reversal in this outlook, as today all eyes are focused on creating everything that would help in providing the elements to attract investors in order to expand the investment base in Iraq.

It is noted that the Iraqi investment law is not the only law that is created to provide investor protection. Rather, there is a legislative system that represents a package of laws that cannot be separated, in providing protection together. Among these are the Trademarks and Commercial Data Law No. 21 of 1957 and the Civil Procedure Law. (Arbitration Cases) No. 83 of 1969. Law No. 65 of 1970 on Patent Invention, Industrial Models and Undisclosed Information, Consumer Protection Law No. 1 of 2010, and a large number of other legislations. That this legislation a large part of it still stands weak to provide protection for the investor. Rather, some of these legislations waste legal protection for the investor based on the socialist theory that still dominates a number of these legislations and the philosophy of state intervention in every investment project other than

the foundations on which investment is based, and is represented by the commercial freedom to work away from these restrictions. These problems express the application of the reality of investment in Iraq, and it was a motivation for us to search for these legal protections and effective mechanisms in attracting investors and creating an investment environment in Iraq.

Based on the foregoing, we will undertake to divide our research into three topics. The first topic will be the legal protection of invested property and financial restrictions on the investment project, which is divided into two demands. The first is the legal protection of the investor's ownership and the second is for the legal protection of the investor from financial restrictions. The second topic will be for arbitration as an effective method. To protect the investor, which is divided into two requirements, the first is the nature of arbitration and the second is the role of arbitration in protecting the investor in Iraqi law. The third topic will be the jurisdiction of investment contracts disputes and then a conclusion of the findings and recommendations.

### **The first topic**

#### **Legal protection of investor property and financial restrictions on his investment project+**

The stability of legislation and the clarity of its provisions is one of the most important factors that attract investment, and in this regard many legislations have sought to provide this protection through the adoption of new investment laws related to the development of the investment process in addition to the introduction of amendments to the laws related to the topic of investment in a way that contributes to encouraging investment activity as well. Specialized bodies, offices and committees have been created to attract the investor and supervise his business, and more tax and non-tax facilities and incentives have been granted to investors in a way that enhances the profitability of their investments, as well as many restrictions have been lifted, whether with regard to ownership or sectors and activities permitted for investors, including simplifying procedures and reducing Fee<sup>1</sup>. Accordingly, the elements of attracting investment are achieved through:

- Following the policy of economic liberalization and increasing and encouraging the role of the private sector
- Non-discrimination in treatment between national and foreign investments.
- Deciding on incentives and benefits that encourage foreign investment, whether in the form of tax exemptions or what is related to the pricing of products or services necessary for the investment project<sup>ii</sup>
- Facilitating the investment project's ownership of lands and real estate necessary to conduct its activities and facilitating the establishment of foreign investors within the host country.
- Availability of infrastructure and suitable facilities such as roads, transportation, means of communication and others to facilitate the practice of investment activity
- The availability of political stability in the host country and the expansion of democratic practices in it
- Full insurance for investment projects from non-commercial risks with the determination of appropriate compensation in the event of these risks.

- Providing the appropriate administrative environment to facilitate the procedures for approval of the project and granting licenses for construction and operation away from red tape and bureaucratic obstacles hindering the speedy completion of the procedure.
- Creating a new environment for the host country's public policies, which makes the investor feel that the country's financial, economic and legal policy enjoys stability.
- Unifying the entity that investors deal with, whose proposals are subject to consideration in order to overcome investment problems?

## **The first requirement**

### **Legal protection of investor property**

It is known that the investor aims to achieve profit and speculation, and that this goal cannot be achieved without providing the necessary protection for the investor's ownership, which represents his largest capital. Accordingly, there must be legal texts guaranteeing the protection of this property. Therefore, we find that the Iraqi Constitution of 2005 prohibits attacks on property, which it called private property, in order to distinguish it from public ownership. Article 23/1 of the constitution stipulates that (Private property is safeguarded and the owner is entitled to use it. Exploiting and disposing of it within the limits of the law) The second paragraph of Article (23) also prohibited the expropriation of property except for purposes of public benefit) and it is evident from the above that there is a constitutional protection of ownership regardless of whether it is the ownership of an investor or the ownership of individuals, and accordingly, the existence of this provision makes the investor reassured of his money Which he transfers to the host country for investment, but it is noticeable that these texts did not at all prevent the expropriation of ownership, but if the investor's ownership conflicts with the public benefit, the constitution permits acquisition, and some may think that this may be a source of concern for the investor, but this is not the case as the acquisition will be in return for compensation Fair to the investor.

The question here is is this sufficient to protect the investor? In other words, is the constitution alone sufficient to provide this protection?

Certainly, the provisions of the constitution are the supreme legal rules that cannot be violated, but they are not considered sufficient by themselves. Rather, there must be legislative texts that represent the path that determines the executive and judicial authorities in protecting the ownership of foreign investors, and in this context we find that the Iraqi Investment Law No. 13 of 2006 stipulated in Article (12/3) of it stipulates that (it is not permissible to confiscate or nationalize the investment project covered by the provisions of this law in whole or in part, except for what has been issued a final court ruling.)

It appears from the above ruling that the legislator in his ruling was not in harmony with the constitution, since confiscation or appropriation if it is for the public benefit there is no harm, except that the aforementioned ruling omits the reference and absolutely forbids those procedures. And attract investors

The matter is not limited to the procedures related to the expropriation of ownership, but the legal protection presupposes allowing a foreigner to own real estate and movable money. The Iraqi legislator has allowed the foreign investor to own property in accordance with Article (10 / Second) of the Investment Law which stipulates that the Iraqi or foreign investor has the right to own land and real estate belonging to the state. With an allowance, the basis for its calculation is determined according to a special system, and he has the right to own real estate and lands belonging to the mixed and private sectors for the exclusive purpose of establishing housing projects.<sup>iii</sup>

It seems that the National Investment Authority has a great role in this context, as it facilitates the investor to obtain the investment license, which in turn represents a notice to the ministries to take over the ownership or allocation of lands to the investor, and some may stand before the term allocation, and it must be noted that the allocation of lands may be resorted to if it is wanted to be done. Investing the land without transferring the neck of the land to the investor, and that the allocation may extend its period, allowing the investor to achieve profits from behind his investment project.

On the other hand, achieving justice in the treatment of a foreigner is one of the elements of the strength and development of investment, and most international jurisprudence and judiciary go to the point that the rules of law required that the state, when dealing with the ownership of a foreign investor, respect the principle of equality and not distinguish between the national investor and the foreign investor. The ownership of foreign investors was expropriated.<sup>iv</sup> Those who have investment projects and not prejudice the national investors or that the security and administrative approvals are granted in a more convenient and easier way for the national investor than for the foreign investor. It appears from this decision that it made the mere delay of the repressive procedures a violation, but what is a defect in the court's position is that it did not consider the case of compensation for the investor for the delay in these procedures. The investor measures his time with a measure of profit and loss. This is an investment host.

The same article in Paragraph (b) also stipulated the exemption of the residential investment project from parceling and registration fees, including fees for moving housing units to citizens. This law also granted the National Authority the authority to increase the number of years of exemption from taxes and fees in a proportional manner, commensurate with increasing the Iraqi investor's participation in the project to reach fifteen years if the Iraqi's participation rate in the project is more than 50%. We believe that this trend, if it was successful in the permissibility of exemption through what the National Investment Commission assesses, is unsuccessful in the distinction that he placed between the Iraqi investor and the foreign investor, as we previously indicated that one of the elements of attracting investment is the foreign investor's feeling that there is no distinction between him and the investor. In addition to attracting foreign investment, that means, of course, the transfer of foreign capital to the host country for investment, and its positive reflection in many aspects.

On the other hand, the Investment Law in the aforementioned article granted the Council of Ministers the power to propose draft laws to extend or grant exemptions in addition to the

exemptions stipulated, or to provide incentives or guarantees for any project, sector or region, and the terms and percentages it deems appropriate according to the nature of the activity, its geographical location and the extent Contribution to the employment of manpower and the advancement of economic development for considerations required by the public interest.

It is noted on the position of the Iraqi legislator that he was unsuccessful in establishing the aforementioned ruling that authorized the Council of Ministers to propose the draft law, as this originally does not represent an element of attraction to the investor and does not lead to the implementation of what has been referred to because this requires the adoption of a law in the way specified by the Iraqi constitution, which is of course The situation is already contained in the powers of the Council of Ministers referred to in Article (60 / First) of the Constitution.

As for the limits of the exemption granted to investors in light of what has been referred to above, that these exemptions are granted to investors, whether they are or foreigners, as the Iraqi or foreign investor enjoys all the advantages, facilities and guarantees and is subject to the obligations stipulated in this law<sup>v</sup>

Likewise, all investment projects are covered by the exemption according to the aforementioned, except for investment in insurance and oil and gas extraction, as it is excluded from the investment law. Of course, the investment project may be followed by an increase or expansion, as the investment law included this increase by exempting the imported assets needed to expand, develop or modernize the investment project if it leads to an increase in the design capacity, provided that it is entered within three years from the date of the commission's notification.<sup>vi</sup>

Also, tax exemption may be decided according to international agreements, and this is confirmed by domestic legislation, including the Iraqi Income Tax Law, which excluded incomes exempt from taxes, which is incomes received by law or under an international agreement<sup>vii</sup>.

And the simplicity of the procedure, far from wasting time in litigation procedures before the courts<sup>viii</sup>, according to arbitration, litigants in the investment contract relegate to resorting to the judiciary with their obligation to submit the dispute to one or more arbitrators in order to decide on it by a ruling binding on the litigants, and this agreement may be according to a specific contract mentioned in its core and called The arbitration clause may be on the occasion of a specific dispute that already exists between the litigants, and in this case it is called the arbitration charter or the arbitration agreement (<sup>ix</sup>).

Accordingly, we will divide this topic into two requirements. The first will be the nature of arbitration in investment contracts, and the second requirement will be the role of arbitration in protecting the investor in Iraqi law. Another country that is originally competent to hear the dispute, or they may agree to waive the dispute.

If the arbitration begins with a contract, then it ends with a ruling, and if it is subject to the rules of civil law in terms of its holding, then it is subject to the rules of the law of pleadings in terms of its procedures, and the jurisprudence has differed in looking at arbitration. <sup>x</sup>This will has authority over the authority and jurisdiction of the arbitrator and in the matter of his application of

the rules of law or the rules of justice or determining the dates for consideration of the dispute. Whoever said that arbitration occupies a middle position between contracting and the judiciary, and who said that arbitration has a special nature and that it must be viewed independently and cannot be interpreted in light of the traditional principles of trying to link it to the contract or the judicial ruling.

And we believe in our turn if we look at arbitration from the angle that it is a compulsory judiciary that is binding on the litigants in the investment contract when they agree on it, and that evading it does not help in the aforementioned manner to clarify it and that it replaces the compulsory court of the state, and that the arbitrator does not act by the will of the litigants alone when we see that the judicial capacity prevails over the arbitration and that The arbitrator's ruling is a judicial act similar to the judicial work issued by the judicial authority in the state.

In another phrase, when the arbitration is agreed upon, the compulsory means to protect the right is through interference from the public authority and compulsion on its part. Therefore, the power to compel the arbitration comes from the agreement of the litigants on it and the approval of the public authority. The arbitration agreement is the source of compulsory arbitration jurisdiction.

As the arbitration judiciary replaces the state's judiciary in protecting rights, and it is mandatory for the state's judiciary.

## **The second requirement**

### **The role of arbitration in protecting the investor in Iraqi law**

We are not interested in discussing the issue of arbitration as much as arbitration is addressed as a means to protect the investor, and that which organizes arbitration provisions is the Civil Procedure Law, as this law did not include any text regarding the eligibility of the state or the legal persons affiliated to it, whether it has the right as a party to the arbitration agreement, but it is by reference to The Iraqi Investment Law, we find that it stipulates in Article (5/27) that disputes arising between the Authority or any government agency and any of those subject to the provisions of this law in matters other than those related to violating the provisions of this law are subject to the Iraqi law and courts in civil matters either in commercial disputes. The parties may resort to arbitration, provided that this is stipulated in the contract regulating the relationship between the parties).

At first glance, we conclude that it is permissible to agree to arbitration as a procedural safeguard for settling investment disputes. However, the regulation of arbitration issues was mentioned in the Civil Procedure Law Articles (251-276). However, these provisions contained in the aforementioned law are nothing but a regulation for internal commercial arbitration and they did not regulate international arbitration issues even though the Investment Law indicated in Article (27/4) that it (If the parties to the dispute are subject to the provisions of this law, they may, upon contracting, agree on a solution mechanism, including resorting to arbitration in accordance with Iraqi law or any other internationally recognized body).

It is evident from the foregoing that there is no treatment in the Iraqi Procedure Law that regulates international commercial arbitration. In addition, the text of Article (27/4) of the Investment Law is interrupted by issues of implementing foreign judgments <sup>(xi)</sup>. Where the provisions of this law require that the foreign judgment to be executed must be issued by a specialized foreign court composed outside Iraq. In addition, Iraq's accession to the Arab conventions that deal with the implementation of arbitration provisions, including the unified agreement for the investment of Arab capital in Arab countries for the year 1980, as well as the Riyadh Agreement Judicial Cooperation for the year 1983 and the Arab Agreement on Commercial Arbitration for the year 1987. However, these agreements were not working to activate arbitration provisions, especially since the issue of arbitration in Iraq is closely related to the need for Iraq to enter the New York Convention of 1958, which represents the basis for the work of arbitration, and some may imagine that the problem of arbitration in Iraq is related to the issuance of the arbitration law, which is still legitimate before The government has not yet been referred to the Council of Ministers. <sup>(xii)</sup> However, as long as Iraq is not a party to the aforementioned convention, there is no point in legislating this law, as we have indicated that international arbitration requires entering Iraq with international obligations in order to implement the provisions of the arbitration law upon its issuance.

In any case, arbitration has two effects, one of which is negative, which is the denial of the parties to the contract from resorting to the judiciary in connection with the litigation that they have agreed upon in order for them to withdraw from resorting to the court.

In application of this principle, it has been ruled that if a lawsuit is filed against one of the third parties before the ordinary courts, this litigant may not sue another arbitrator before this court on the pretext that he is his guarantor because the dispute between them must be resolved through arbitration <sup>(xiii)</sup> and therefore some objected to the direction of irrigation The applicant argued that arbitration, even if it prevents the ordinary judiciary from examining direct lawsuits between the two parties of whatever kind, does not prevent this judiciary from examining insurance claims and lawsuits arising from interference by others in their relationship, and the matter requires that the agreement on arbitration be respected in all cases as long as the litigation has occurred. It was agreed to be settled by arbitration and it was present among its parties, regardless of the third party's position on this dispute, even if he made requests related to it, as long as that is acceptable for division.

In this regard, if a dispute arose in connection with the implementation of a contract that included the arbitration clause and one of the two parties filed a lawsuit before the regular courts, the other party may adhere to the condition in the form of a payment to be presented before the court. It is very accurate to determine the nature of this defense and whether it is a plea of lack of jurisdiction or a plea of non-acceptance, in other words, does the agreement to arbitrate a subject matter strip the court's jurisdiction in this matter or prevent it from hearing the case as long as the arbitration is in place?

The importance of this issue is clear, because the plea of lack of jurisdiction is formal and begins when the lawsuit is first considered, while the plea of inadmissibility is not considered a formal defense and begins at any time during the consideration of the case.

## **The third topic**

### **The jurisdiction of investment contracts disputes in Iraqi law**

The Iraqi legislator has dealt with the controls of international judicial jurisdiction in a number of legislations, including Civil Law No. 40 of 1951, Law of Execution of Foreign Judgments No. 30 of 1928, Law of Judicial Organization No. 160 of 1979 and Iraqi Investment Law No. 13 of 2006. Among the conditions for resorting to litigating the foreign investor before the Iraqi judiciary in the event of failure to resort to arbitration in the manner mentioned above are:

First: That the foreign investor is present in Iraq and that is in the event that the foreigner is sued before the Iraqi courts while he is in Iraq on the occasion of an investment dispute, even if it is incidental, as it is sufficient to hold the jurisdiction of the Iraqi judiciary and the presence of the foreign investor in Iraq at the time of filing the case <sup>(xiv)</sup>.

Second: If the foreigner's prosecution is related to a real estate right existing in Iraq or to a movable property that is also present in it, and this means that the movables owned by the foreign investor, such as machinery and equipment, are present in it at the time of filing the lawsuit, that is, it does not matter if they were not present before the lawsuit was filed or if he transferred them after the lawsuit was filed, what is important is the existence of Movables at the time the opponent filed a lawsuit against him <sup>(xv)</sup>, as for the real estate right, the Iraqi legislator excluded real estate outside Iraq because it was not possible to issue binding decisions for implementation regarding those real estate outside the country.

Third: That the investment contract was concluded in Iraq or was enforceable in it: This is intended to conclude an investment contract in Iraq with the intention of including it within the Iraqi judicial jurisdiction, as this judiciary shall be competent regardless of the nationality of the parties to the investment contract or the presence of the investor in Iraq as long as The contract was concluded in Iraq or was obligatory for execution therein, i.e. it was concluded outside Iraq, but implementation is required inside Iraq, in such a case the Iraqi judiciary will have jurisdiction over the case.

Fourth: That it is about an incident that occurred in Iraq: When the foreign investor causes harm to another person inside Iraq, as in the case of work injuries or the fall of buildings and establishments, the foreign investor shall sue before the Iraqi courts, and this is not required for him to be present at the time of filing the case <sup>(xvi)</sup>.

There is another case in which jurisdiction is held to the Iraqi judiciary, and that is in the case of voluntary submission to the Iraqi judiciary by the foreign investor when the parties agree that the

The Iraqi judiciary is the competent authority, whether that agreement is an explicit agreement in the contract or implicitly perceived through the external circumstances and circumstances of the contract.

What was mentioned was related to the Iraqi civil law and the provisions of civil procedures, either with regard to the law for the implementation of foreign judgments (it was considered that the foreign court has jurisdiction over the dispute when the case is related to funds or real estate located



in the foreign country, or that the lawsuit arises from a contract signed in or was It is intended to implement it there in whole or in part thereof related to the protection or that the lawsuit arises from actions that occurred in whole or in part in foreign countries or the convicted person residing in foreign countries or was engaged in trade in them on the date on which the lawsuit was filed or that he voluntarily attended the case or agreed On the judiciary of a foreign court (<sup>xvii</sup>).

With reference to the Iraqi Investment Law, we conclude from the text of Article (27) of it that it specified the cases of jurisdiction of the Iraqi Court for Investment Disputes when considering disputes that are subject to the provisions of this law and looking into disputes arising from the work contract as well as disputes arising between the National Investment Commission or any government agency and between Subject to the provisions of this law.

Some may ask to which court the jurisdiction is in session, is it the court of first instance or another?

The basic principle in the rules of conflict is that jurisdiction is seated at the court of first instance in all cases, unless the investor is, and the jurisdiction shall be in the commercial court that was formed according to a decision issued by the President of the Supreme Judicial Council.

## **Conclusion**

In the conclusion of this discussion, we will address the most important findings and proposals that we believe are important, and we call for their adoption.

First: Results:

1. The investment is of great importance in building economies, especially in countries that need to rebuild and build their economy, since the investor contributes to the transfer of technical knowledge and expertise that he possesses to the country in which his investment project was established, in addition to being a contributor to attracting and transferring foreign capital, which in turn helps in the movement Economy
2. Iraq today needs to open up in the field of investment away from adding restrictions on investment projects as well as investors, especially since there is a reconstruction stage required by the reality of the country, which requires giving investment to the utmost importance.
3. It is evident that the legislation concerned with the subject of investment in Iraq was fluctuating in the treatment of investment, and this is reflected in the Iraqi Investment Law No. 13 of 2006, which was followed by amendments, noting that each amendment aims to create elements that attract investors to carry out their investment work in Iraq.
4. The advancement of investment in Iraq is not only through the investment law, but there is a great and urgent need to amend the various legal systems that govern investment and have a direct or indirect relationship with the subject of investment, including not limited to the Iraqi Income Tax Law No. 113 of 1983 and the Law Expropriation No. 12 of 1981, Coalition Authority Order No. 40 of 2003, Commercial Companies Law No. 21 of 1997, Trademarks and Commercial Data Law No. 26 of 1957 and Civil Procedure Law No. 83 of 1969 that these laws represent a joint

package that contributes to the development of investment in Iraq if desired. That the amendments be reflected in a new philosophy consistent with the modern concepts of investment.

5. One of the risks that leads to the investors' reluctance to invest is the risks of expropriation in all its forms. Therefore, the Iraqi legislator provided protection for the investor from these actions when it was prohibited in the Iraqi constitution for the year 2005 to expropriate property except for public benefit with fair compensation, as well as prohibited in the investment law Procedures for expropriation that lead to expulsion of investments.

6. Arbitration has an effective role in investment because it contributes to settling disputes quickly, in secrecy, and with less costs, as well as being the will of the parties to the legal relationship and resolving the dispute by mutual consent that agree on the terms of arbitration in the beginning. However, the Iraqi legislator has not yet regulated the arbitration provisions by an independent law, noting that putting this law in place is not sufficient unless Iraq is a party to the New York Convention on Commercial Arbitration of 1958, so Iraq needs to join this agreement in addition to the legislation of the Commercial Arbitration Law.

7. The legislator has not paid any attention to the issue of equality. Owning real estate by the foreign investor compared to the national investor. If the real estate belongs to the state, then he has authorized its ownership with an allowance that determines the basis for its calculation according to a special system.

For lands exclusively for the purpose of establishing housing projects, and this is a restriction of the foreign investor's right to own land and real estate necessary for his investment project.

## **Second: Proposals:**

1. Reconsideration of the investment law with regard to protection of foreign ownership and equality between the national and foreign investor alike
2. Establishing an integrated legislative system aimed at simplifying procedures and providing the appropriate legal environment to attract investors. The role is not limited to investment law only.
3. Accelerate the accession to the New York Convention on Commercial Arbitration and enact the commercial arbitration law after joining this agreement.
4. Inclusion of insurance in the investment law, so it is known that any investor, when he undertakes his investment activity, searches for insurance on the investment project, as well as the workers in this project, since the national insurance company does not perform the intended purpose, which has brought the investor's interest, so investment must be encouraged with insurance.
5. Providing an integrated banking system by amending the Banks Order No. 40 of 2003 for the purpose of protecting the investor by giving full confidence in the banking business, which will push the investor to leave dealing with banks outside Iraq and to conduct his banking transactions with Iraqi banks.

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