

Abed, R. (2021). Terms of Reference of The Iraqi Commercial Court. *Akkad Journal of Law and Public Policy*, 1(1), 16-23.

## TERMS OF REFERENCE OF THE IRAQI COMMERCIAL COURT

**Raghad Fawzi Abed**

*University of Kufa,*

*Najaf, Iraq*

*E-mail:*

[raghadf.altaai@uokufa.edu](mailto:raghadf.altaai@uokufa.edu)

*ORCID: 0000-0002-4120-3184*

*Received:* December 2020

*1st Revision:* January 2021

*Accepted:* February 2021

**ABSTRACT.** In light of the Iraqi Supreme Judicial Council No. (74) for the year 2000 and its influence on the economic and commercial side, this study attempts to illustrate the viability of founding the Iraqi Commercial Court. It is the whole seed. The goal is to make commercial conflicts more swiftly and efficiently resolved through establishing an expert commercial judiciary. Specialized judges with high expertise and knowledge help ensure that court judgments are successful in both processes and causes. In light of the statement published by the Supreme Judicial Council No. (74) for the year 2020, the research focuses on the efficacy of the Iraqi commercial Court in addressing commercial disputes. This article reveals that the Iraqi legislative attempts to attract international investment and the Iraqi executive branch's continued efforts to resolve investor concerns by modifying the Investment Law. The Iraqi court has successfully developed a stable legal environment for multinational firms. Commercial courts, acknowledged as fair by international businesses, were established to accomplish this. As a result of Iraq's communist past, foreign investment was viewed as a source of skepticism and mistrust for many years. These courts will undoubtedly play a significant role in advancing Iraq's progress. However, courts alone will not provide the long-term guarantees needed to transform Iraq's legal framework for domestic and foreign businesses to operate inside. Civil law countries like Iraq necessitate significant reforms to the country's intellectual property, investment, and arbitration regimes.

**JEL Classification:** K12,  
K13, K20

**Keywords:** Iraqi commercial Court, Iraqi Law, International Law

### Introduction

Jurisdiction is defined as the appointment of the judiciary authorized by law to adjudicate disputes. The rules of jurisdiction determine the cases that enter the jurisdiction of each court<sup>1</sup>. He defined the court's share of issues that may be judged. Also, He described the rules of jurisdiction as rules that show disputes that enter into the judiciary's jurisdiction in

---

<sup>1</sup> Judge Medhat Al Mahmoud, Part One, previous source, p. 44.

general and in the jurisdiction of each judicial body precisely 2. The jurisdiction was defined as the court's jurisdiction to hear the case under the Law on The Courts Formations 3. This definition is derived from article 20 of the Repealed Civil and Commercial Arguments Act No. 88 of 1956, where jurisdiction under this article was defined as the court's eligibility to see the case under the law. There is no doubt that the jurisdiction of the courts is one of the things that ensures better work in the judicial system, contributes to the preservation of the right, and provides protection to the judge the litigant at the same time.

Some believe that several reasons call for the non-concentration of the judiciary on one side. Still, it must be distributed to many on the one hand and be an independent judicial system. These reasons include religious rules of jurisprudence. For example, which calls for leaving disputes of personal rights to a spiritual jurisdiction, and the presence of the State as a party to the conflict makes it necessary to submit the dispute to an independent administrative jurisdiction. It follows Judicial proceedings are different from those of the ordinary judiciary 4. Of course, the determination of jurisdiction may relate to the court's general jurisdiction over all natural and moral persons, private and public. Therefore this jurisdiction is called functional or state jurisdiction. The type of case may determine the judiciary's jurisdiction premium. It is called a qualitative jurisdiction and is also called absolute jurisdiction. Depending on the complexity of the case, different levels of the judiciary in a jurisdiction may be named upon to handle it (Van Berkel, El Cheikh, Kennedy, & Osti, 2013). Procedural laws have decided the jurisdiction of a court based on the worth of the litigation to the right sought. The case's value is estimated on the day of the case, and the benefits, compensation, expenses, and other valuable accessories are included in this estimate (Mahdi & Radhi, 2021).

Evaluating its value can only enhance the court's understanding of the case's worth. The distribution of qualitative jurisdiction among the courts of the first instance is mainly based on the case's value, so this is not a quality problem. Whether or not the court of the first instance accepts an appeal. The case's value is the initial determining factor. As a result of the lawmaker abolishing the Magistrate's Court, Egyptian and French Law now contravene Iraqi Law since they lack valuable case jurisdiction (Al-Qteishat, 2017). The effect of determining the court's jurisdiction in Iraq to determine the case of the Court of Intuition to be heard regardless of its value as it is the competent court qualitatively. It means that the rules of value jurisdiction are not crucial in the Iraqi judicial organization law or the Iraqi civil arguments law compared to the Egyptian civil and commercial arguments law case. The Iraqi Constitution prohibited establishing unique and exceptional courts in article 95 of it, nor did the Civil Arguments Act provide an exception in submission to the judiciary's authority. The Iraqi Judicial Regulation Act stipulates:

*The judiciary does not consider all the workers of sovereignty, which are the actions issued by the government as a governing authority and not an administrative body. The court has the power to control such decisions 5. Because of Iraq's Constitution of 2005, Article 100, it no longer has a role in fortifying a work or an administrative determination.*

---

<sup>2</sup> Dr. Ahmed Khalil, former Egypt, p. 25.

<sup>3</sup> Professor Munir Al-Qadi, Explanation of the Civil and Commercial Procedures Law, 1st Edition, Al-Ani Press, Baghdad, 1957-1376, p. 61.

<sup>4</sup> Dr. Nabil Ismail Omar and d. Ahmed Khalil, a previous source, pp. 89-90, refers to many reasons that justify the diversity of jurisdiction for judicial authorities.

<sup>5</sup> Some define acts of sovereignty as "actions issued by the executive authority, not legislative or judicial acts, and the courts have no authority over them, and it is not permissible to slander them in terms of canceling them or compensating for them." It is considered an act of sovereignty, for example, to invite voters to vote, conclude treaties with other countries, declare or end a state of war, declare martial law and liquidate the money of foreigners belonging to enemy countries in a state of war. See Professor Abdel Rahman Allam, a previous source, p. 330-332.

What are the actions carried out by the government by describing it as a moral person? It is a dispute between this righteous person. Persons subject to the ordinary judiciary and the government are subject to the courts by describing it with a general mandate. This matter is from public order, and therefore, the court may rule on its own. A court may not refrain from hearing a case of its jurisdiction because there is no text or lack of clarity. After all, the general principle is its jurisdiction over all natural and moral persons. Otherwise, this court and this judge will not do justice (Mahdi & Radhi, 2021). It is also excluded from the principle of general submission to the judiciary's jurisdiction to the employee's cases with their administrative bodies. In the eyes of such disputes and outside the jurisdiction of ordinary courts, the administrative court hears claims brought against persons with diplomatic immunity. Those persons in their conflicts are not subject to the courts' authority in civil, commercial, and penal matters, explicitly the text of article 1 of the Diplomatic Representatives Privileges Act 4 of Iraq No. 1935, out of respect for the State's sovereignty to which this diplomatic representative belongs. A person reviewed the victim or victim with diplomatic immunity. The Iraqi Foreign Ministry reviewed this person to deal with the issue through diplomatic means in many disputes between an Iraqi person and those who enjoy immunity and see if the person enjoys immunity (Sirri, 2014). Because of the Federal Supreme Court establishment, the validity of the laws is not beyond the ordinary courts. It is responsible for deciding whether or not laws are constitutional. The Iraqi Commercial Court is competent to hear particular disputes, namely investment contract disputes and disputes arising from oil contracts, and we will show these jurisdictions through the following requirements.

### **1. The Investment Contract Disputes**

The dispute is a source of contention and contention in conflict and argument if it attracts it in adversarial, and between them is a dispute, i.e., antagonism over a right, quarrel<sup>6</sup>. The debate is a term of conflict of interest in a conflict between two wills. Thus the pre-existing legal rule has failed to resolve the dispute, which requires the intervention of the public judiciary in the State to adjudicate it relatively under the provisions of positive Law (Mahmoud, 2001). Some argue that the dispute has a formal portrayal of one of them, which is the temptations of antagonism based on the principle of confrontation between the parties, whether then there was a factual dispute or no. The other objective depiction is based on the content of the conflict (the right to be wrapped in it) and (disputed interest), and he knows it at the end of the confrontation. The judiciary is based on the criminal proceedings of the judicial antagonism (Sayed, 2004). Investment is the employment of funds in a particular asset or several assets held by an individual (investor) or institution for the next period to obtain future flows. It yields the return required by that investor to compensate for the time those funds were invested, the expected inflation rate, and the uncertainty (risk) of not achieving that return (Maginn, Tuttle, McLeavey, & Pinto, 2007).

Additionally, investment refers to capital moves between countries, whether short- or long-term, and primarily sustainable. It is frequently accompanied by the purpose of re-transferring capital to the home country in exchange for its return (profit, interest, or shares) (Broner, Didier, Erce, & Schmukler, 2013). In general, the investment dispute requires two conditions: the first is the existence of a legal argument on the one hand and that this dispute is related to an investment contract on the other. Secondly, the disagreement must stem from an investment, and a summary of what the investment entails may have been previously provided.

---

<sup>6</sup> Fakhr Al-Din Abu Abdullah Muhammad bin Abi Bakr Abdul Qadir Al-Razi, Mukhtar Al-Sahah, Al-Asriya Library, Al-Dar Al-Tamaziah, Beirut, 5th edition, 1999, p. 567.

## 2. The Oil Contract and Licensing Disputes

As a mechanism to improve the reality of the oil industry, most countries of the world, including Iraq, are resorting to allowing foreign companies to extract oil by granting oil investment licenses. The oil contract aims to rehabilitate and develop oil fields through increased oil production rates to achieve economic development. The oil license must be briefly defined to know the type of dispute considered by the Commercial Court. In Egypt, the Supreme Administrative Court described the license as valuable administrative conduct by the decision issued by the license. It is a temporary act that does not arrange a permanent right as the right of ownership. But instead entitles the licensee to a quick machine that manages and exploits the licensed activity. Oil in the language combines hydrocarbons obtained by distilling crude oil or coal tar, fast-burning, and more than fuel (Abdel-Halim et al., 2016). Arab legislation, including The Iraqi, did not define the oil contract or oil license as a legal definition. Still, it was determined that the oil investment should be made through participation or a service contract and prevented from being made by granting a concession (Dietrich, 2011). It has been defined as a contract in which a foreign oil business specializing in research, exploration, drilling, or some other technical services is accepted to offer services for the benefit of the contractual State or one of its agencies in exchange for a fixed cash amount (Haddad, 2003). The contract's negotiation and conclusion are related to an essential national wealth because of the contract's obligations. Mohammed's economic system and method to achieve the country's annual general budget are based on this fundamental principle. Iraq relied on so-called oil licensing tours in 2008 through calls for international foreign companies with financial efficiency and colossal capacity and the exclusion of unknown, unqualified, or blocklisted companies. Therefore, any dispute between a foreign oil investor in Iraq is subject to conflict with the contractor of the Iraqi Commercial Court. We do not fail to point out that these companies are not subject to the amended Iraqi Investment Act because they are subject to the laws on oil investment because of the specificity of the investment made by these companies.

## 3. The Iraqi Commercial Court

The Iraqi court has made tremendous progress in building a stable legal environment for foreign corporations, despite legislative efforts to encourage foreign investment and the Iraqi executive branch's ongoing efforts to address investor concerns by amending the Investment Law. Created commercial courts, which have been accepted as fair by international firms, to achieve this. For decades, Iraq's communist background meant that foreign investment was seen as a cause for distrust and mistrust. The early track record of these courts indicates that they will play a vital role in pushing Iraq forward. However, courts alone will not give the long-term assurances required to reform Iraq's legal environment for domestic and international enterprises to prosper within. There will be extensive legislative and regulatory changes needed for Iraq's intellectual property, investment, and arbitration systems because the country is a civil law country. Without a defined set of current rules and regulations, the courts will be forced to rely on limited or inconsistent remedies to fill in the gaps in the law (Miller, 2009). To set the stage, the Iraqi Higher Judicial Council (HJC) declared in 2009 that it would begin teaching Iraqi judges on current commercial law themes to ease the worries of foreign firms as investors. The Iraqi government began its first round of oil bid rounds. The need for foreign investment and international commerce and concerns from both foreign and Iraqi companies that Iraqi courts could not reasonably handle complicated business issues were all factors taken into consideration by the HJC. Commercial courts in the United States, Britain, and the Middle East are becoming increasingly commonplace. The HJC aimed to apply these successful models to

Iraq by developing its specialized commercial courts, which well-versed judges in commercial law staffed. Letters of credit, international arbitration, and intellectual property issues play significant roles in international commercial transactions. Therefore the HJC concentrated its first training efforts on these areas. Training programs for Iraqi judges were launched in 2009 to help prepare them for the new courts finally established in Baghdad, the first of which was established in 2010. HJC's training initiatives grew to include additional regional and international technical support providers after the court was affirmed (Cavanaugh, 2010).

New commercial court's jurisdiction was confined to business disputes involving a minimum of one foreign party to fulfill its two principal purposes of efficiency and specialization. Iraq's business code (No. 301984) defines 16 unique categories for commercial activity, an illustration of how Iraq's archaic commercial regulations may stifle Iraq's judges in their efforts to resolve disputes. A modern commercial law should incorporate current transactions such as e-commerce and technology transfer in the definition of commercial activity.

If a matter falls within the Baghdad Commercial Court's jurisdiction, every Iraqi court would be obligated to send it to the HJC. Based on their specialized training programs, the HJC appointed two judges to the Baghdad Commercial Court. As a result, Baghdad's Commercial Court has decided on 1146 of the 1252 cases it has heard since its inception, according to the most recent data from the HJC. According to the HJC, these trials typically last 60 days, although many are resolved in as little as 30 days. Compared to Iraqi courts in the past, when commercial matters might take months or even years to be adjudicated due to a backlog of civil and criminal cases, the court's exceptional efficiency is a significant improvement. Most international commercial deals involve arbitration because foreign corporations operating in any country are concerned with pro-government bias. However, conventional arbitration clauses do not guarantee that foreign arbitral rulings will be enforced. National courts can still rule against a government party even if international arbitration terms are incorporated in the contract. As a result, global investment and commerce may be discouraged. Baghdad's Commercial Court was aware of the importance of showing that it could enforce contract rights, rights that are spelled out in Iraqi legislation as "the law of the contracting parties," and that it could specifically enforce the contractual right to resolve disputes outside of Iraqi courts (AL-KHikany, 2021).

The Baghdad Commercial Court has begun publishing summaries of its leading judgments in English and Arabic on the HJC website as part of its commitment to greater openness. As a result, Baghdad's Commercial Court has found in favor of the foreign company in more than 40% of cases, according to the most current statistics from the HJC. In addition, Iraq's top civil courts have acknowledged that the Baghdad Commercial Court has made substantial progress in implementing international norms to issues involving arbitration and intellectual property. Companies face the danger of their arbitration agreements and decisions not being executed in Iraqi courts because of their previous hostility to arbitration and the government's refusal to sign the UN Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention). When it came to an international arbitration case in 2011, the Baghdad Commercial Court heard it from an Italian firm and Iraq's Ministry of Finance. The Baghdad Commercial Court has chosen to reexamine Iraq's long-standing interpretation of its civil process code's arbitration rules. Now that international arbitration is recognized under Iraqi law, Iraqi judges are more likely to enforce international arbitration agreements. International arbitration and domestic arbitration are treated the same under Iraq's civil procedure legislation, according to a decision issued by the Baghdad Commercial Court in 2011 (Al-Sarraf, 2016). The court looked to the New York Convention and the UNCITRAL model legislation to complement Iraq's civil process statute in assessing whether or not an arbitration agreement was legitimate. For lower courts, this ruling is binding, creating a solid

judicial stance for enforcing international arbitration agreements through the Court of Cassation. As crucial as this judgment is for its interpretation of arbitration-related rules, it shows that Iraqi courts can enforce contract rights against a government party.

## Conclusions

Judicial applications are the only way to demonstrate the viability of a commercial court. To a greater extent, Court decisions reflect the quality of the design, rationale, and simplification of procedures used to gain traders' agreements to collect their rights as swiftly and inexpensively as possible (27). It establishes the commercial Court, as proven by its judicial decisions. In one of the court cases involving trademark registration, it was revealed that he acted as an agent for the American corporation (Westinghouse Electric Corporation). On 9/26/2011, their clients filed an application to register their trademark in Iraq called (Westinghouse) under the number (56019). The Trademarks Registrar, despite this, prohibited the registration of some items because they were registered in the names of other parties. Other people registered the trademark in Iraq after copying the design. As one of the world's best-known trademarks and registered in the corporation's name for a long time, it is not protected by law. As a result, the second defendant imported supplies and items from unknown sources. Iraq is covered in anti-competitive behavior, forgery, and commercial fraud. It results in consumer harm.

Thus, under article (21/2/1) of the Trademarks Law No. 21 of 1957 and the Paris Convention on Industrial Property, the second defendant was urged to file a lawsuit and have the trademark (Westinghouse Classic) registered in the second defendant's name canceled. It was ratified by Law No. 212 of 1976. As outlined in the petition, the defendants were ordered to register the trademark (Westinghouse), make it public in the Trademarks Bulletin, and assess their fees. Following the lawsuit is filing, the plaintiff's mark achieved worldwide fame and proliferation, and it is registered in the plaintiff company's name in more than (51 nations) worldwide. As a result, the plaintiff corporation, which originated the trademark idea and derived its name from its founder (George Westinghouse), is authorized to register the trademark.

Given that it was registered in the country of origin (the United States of America / Pennsylvania) in 1932, the second defendant's mark is a copy of the plaintiff's mark (28). As a result of the judgment above, it is possible to establish a commercial court dedicated to commercial cases. Specialist judicial knowledge of economic transactions, particularly those involving the trade name, is required to resolve the dispute, as mentioned earlier, as is familiarity with well-known trademarks. Additionally, the judge must be made aware of the Paris Convention for the Protection of Industrial Property, which Iraq accepted in 1976 with Law No. (212). It obligated the organizing nations (Paris Union countries) to refuse or invalidate the registration of a mark that is a copy of a famous mark registered in one of the Union's member countries. Thus, the more competent and experienced the judge is in commercial transactions and international trade agreements, the more feasible it is to establish a commercial court specialized in resolving commercial disputes by obtaining the appropriate conclusion and expediting disputes. In another court ruling, the plaintiff's counsel stated his client's corporation. On 11/5/2004, the defendant signed a contract to transport several petroleum products from the Kingdom of Saudi Arabia to Iraq for seven months. For just (24) days, the defendant did not execute the contract above, and despite repeated guarantees, he halted implementation and refused to return the monies owing. An arbitration for which a ratification petition was submitted with the Dubai Court of First Instance. It is a recognized judgment under the Riyadh Arab Agreement for Judicial Cooperation, which the Republic of Iraq approved by law No. Decisions like this illustrate the judge's expertise and range of

experience, who issued a judgment dismissing this particular case. Even if the patient is now pending in the Commercial Court of Dubai, it is unnecessary to re-file it because an arbitral award was issued and ratified by the Dubai Court of First Instance. In another decision within the framework of the contracting contract, the Federal Court of Cassation stated that the maintenance period must end, and the final acceptance certificate for the works of the company to which the contract was awarded must be issued before the contracting works can be settled in total (30).

In summary, the presence of a court dedicated to the resolution of commercial issues and judges with significant experience in commercial affairs. International accords relating to them are a beneficial move, as evidenced by their impact on Commercial Court decisions. It will be effective decisions in draftsmanship and reasoning that will ultimately result in the practical feasibility of establishing commercial courts.

## References

- Abdel-Halim, A. M., Aly-Eldeen, M. A., Fattah, L. M. A., Fahmy, M. A., Abo-El-Khair, E. M., Khaled, A. M., . . . Shreadah, M. A. (2016). Environmental studies on the Aqaba Gulf coastal waters during 2011-2013. *Journal of Environmental Protection*, 7(10), 1411-1437.
- AL-KHikany, M. M. A. (2021). The effectiveness of the Iraqi Commercial Court in settling commercial disputes Legal study in light of the statement issued by the Supreme Judicial Council No.(74) of 2020. *AL-Mouhaqiq Al-Hilly Journal for legal and political science*, 13(3).
- Al-Qteishat, K. A. H. M. (2017). Temporary Release in the Saudi Criminal Procedures & Jordanian Law: A Comparative Study. *JL Pol'y & Globalization*, 65, 204.
- Al-Sarraf, A. (2016). Specialized Commercial Courts in Iraq. *Lexis Nexis-2016 Fourth Quarter*, 4.
- Broner, F., Didier, T., Erce, A., & Schmukler, S. L. (2013). Gross capital flows: Dynamics and crises. *Journal of monetary economics*, 60(1), 113-133.
- Cavanaugh, J. M. (2010). Helping those who serve: Veterans treatment courts foster rehabilitation and reduce recidivism for offending combat veterans. *New Eng. L. Rev.*, 45, 463.
- Dietrich, C. R. (2011). "Arab Oil Belongs to the Arabs": Raw Material Sovereignty, Cold War Boundaries, and the Nationalisation of the Iraq Petroleum Company, 1967–1973. *Diplomacy & Statecraft*, 22(3), 450-479.
- Haddad, E. (2003). The refugee: The individual between sovereigns. *Global Society*, 17(3), 297-322.
- Maginn, J. L., Tuttle, D. L., McLeavey, D. W., & Pinto, J. E. (2007). *Managing investment portfolios: a dynamic process* (Vol. 3): John Wiley & Sons.
- Mahdi, A. S., & Radhi, I. A. (2021). Attendance And Absence According To The Iraqi Civil Procedure Law No. 83 Of 1969 And Its Amendments. *Psychology and Education Journal*, 58(2), 9085-9092.
- Mahmoud, M. (2001). Mahmud Muhammad Taha and the rise and demise of the Jumhuri movement. *New Political Science*, 23(1), 65-88.
- Miller, S. (2009). Revisiting extraterritorial jurisdiction: a territorial justification for extraterritorial jurisdiction under the European Convention. *European Journal of International Law*, 20(4), 1223-1246.
- Sayed, A. (2004). *Corruption in international trade and commercial arbitration*: Kluwer Law International BV.

- Sirri, O. (2014). Dividing a nation: the politics of constitution making in Iraq. *Middle East Law and Governance*, 6(3), 347-360.
- Van Berkel, M., El Cheikh, N. M., Kennedy, H., & Osti, L. (2013). *Crisis and Continuity at the Abbasid Court: Formal and Informal Politics in the Caliphate of al-Muqtadir (295-320/908-32)*: Brill.

---

(i) Judge Medhat al-Mahmoud, ‘ Part First ‘ Former source, p. 44.