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The Objective Framework of the Inspection Conducted by the Arbitral Tribunal in the Arbitration Case

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Abstract

This study will demonstrate the importance of the supervision conducted by the arbitral tribunal in arbitration claims which comes as a result of the failure of the parties to present their written evidences in a given case. In fact, the study focused on approaching the inspection in the Jordanian Arbitration Law and the rules of evidences of the International Bar Association (IBA) in addition to the UNCITRAL Model Law on International Commercial Arbitration. Yet, the study showed regulatory frame work of the inspection through research and regulation of its scope, purpose and timing of the supervision conducted by the arbitral tribunal. Hence, the study concluded that there is subjective elements in the role as a result of the specialised knowledge of the arbitrators on the subject of the dispute which imposes certain burdens that must be take into account in order for the role to be valid as an evidence in proof. Further, that the rules of evidence laid down by the International Bar Association (IBA) have developed a framework for inspection that may form a reference for some national legislations that have not regulated the same after. The study concluded some recommendations which mainly include that in view of the importance of inspection in some arbitration cases, then its framework, scope and regulation must be defined in more detail in national legislations on through international references, e.g. the International Bar Association and the concerned international arbitration institutions.

Keywords: inspection; arbitral tribunal; arbitration case; evidences

Introduction

Evidences in the framework of arbitration cases constitute a certain specificity that almost differs in the general framework from evidences made before the state judiciary. In fact, and among the evidences of proof that have not been given enough attention to explanation and clarification, whether in arbitration legislations or in jurisprudential literature, is the arbitral tribunal's inspection, i.e. physical inspection by moving to the place of the subject matter of the arbitration dispute if the litigants were unable to clarify the dispute between them through

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the statements and pleas of the case or if they did not provide evidences supporting the validity of their claim before the arbitral tribunal whether those evidences were of the direct or indirect means of proof. In fact, the inspection done by the arbitral tribunal is deemed as being one of the forms of gathering evidences in many arbitration cases and stands to be one of the direct means of proof other than helping the tribunal to remove the ambiguity and circumstances surrounding the facts through what the litigants claim before it in terms of describing these facts that are the subject of the dispute. Hence, and through this inspection, it may be able to reach the truth of the dispute presented to it along with other evidentiary evidences, and then issuing a judgment thereon (Ke et al., 2022). In fact, and despite the importance of inspection in the arbitration case, yet many arbitration legislations, whether national or even international references or arbitral institutions, did not give it sufficient attention while some of these legislations did explicitly provide for the same including the Jordanian Arbitration Law as well as some international references in arbitration including the rules of the International Bar Association (IBA) but others did not provide for the same explicitly, such as the Model Law on International Commercial Arbitration as well as the UNCITRAL Arbitration Rules. This is on the one hand. Yet, and on the other hand, and whether the inspection is explicitly referred to or not, it is often meant by the one that take place by the experts whom the tribunal decides to assign to conduct the experience without the inspection conducted by the arbitral tribunal individually. Hence, this study came through which we will try to answer the main questions, the most important of which are: What is the specificity of the inspection in the arbitration case which distinguishes it from the inspection through the state's judiciary? What are the objective determinants that the arbitral tribunal must follow when conducting the inspection in order to move away from the principle that the arbitrator may not rule based on his personal knowledge? How can the inspection be used as evidence in issuing the arbitral award? Therefore, this study will be divided into the following: (Tri & Hoang, 2022)

2. First: the scope and concept of inspection in the arbitration case

In view of the importance of the inspection conducted by the arbitral tribunal, some arbitration legislations, including the Jordanian Arbitration Law and its amendments ⁽ⁱ⁾, were keen to provide for it explicitly through article No. (32/I) to the effect that: 'The arbitral tribunal may, on its own initiative or upon the request of one of the parties to the arbitration, decide to conduct the inspection and expertise in accordance with the provisions of article (34) of this law'. In fact, we also find that the rules of evidence in international arbitration issued by the International Bar Association (IBA)⁽ⁱⁱ⁾, which is an important guiding reference in the system of international arbitration, have provided for the same in article (7) of these rules under the title (inspection) (Awaisheh, 2023): without prejudice to article 9/2, the arbitral tribunal may, upon the request of one of the parties or on its own initiative, inspect or ask the expert appointed by it or the expert appointed by one of the parties to inspect any site, properties, machinery or any other goods, samples, systems, processes or documents as it deems appropriate'. Further, the arbitral tribunal, in consultation with the parties, determines the date and arrangements for the inspection while the parties and their representatives are entitled to attend this inspection'. In fact, and while we find that the Model Law on Commercial Arbitration issued by the United Nations Commission on International Trade Law (UNCITRAL)⁽ⁱⁱⁱ⁾, and based on the text of article (26) of the Model Law, granted the right unto the tribunal indirectly to conduct the inspection, but rather through the experts who are elected which is evident through the text of article (26/B) denoting that: 'To ask any of the parties to submit to the expert any information related to the subject or to allow him to view any documents related to the subject for examination or to see any goods or movable properties

for inspection (Muthuswamy, 2022). Likewise, the provisions of article (29/3) of the International Arbitration Rules issued by the same party (UNCITRAL) (iv) stating to the effect that: 'The parties shall provide the expert with any information related to the dispute and to provide him with documents or related goods that he may request to be examined or inspected. Yet, any dispute between one of the parties and that expert regarding the relevance of the information, documents or goods required to be provided for the dispute shall be referred to the arbitral tribunal in order to decide on it'(Kim et al., 2022).

Hence, and by analysing the aforementioned texts, we find that the Jordanian legislator has stated upon the right of the arbitral tribunal to conduct the inspection without setting any limitation of its scope as if the Jordanian legislator left it to the legal concept prevailing in the Jordanian legal system for which it did not put any other detail for the same. Yet, and by referring to the Jordanian Evidences Law No. (30) of 1952 and its amendments, (v), then we find that article (2) of the law, and under the title (evidences - means of proof), did provide that: 'The evidences are divided into 6 - Inspection and experience'. In fact, this is without separating them, i.e., inspection and experience, which is also what was provided for in the Civil Procedures Law in article (83) (vi), to the effect that: 'The court may, in any of the trial roles, decide to inspect and have experience conducted by one or more experts...'. Yet, and by referring to the Jordanian jurisprudence opinions, we also find that most of them focus on dealing with the inspection conducted by the judicial body accompanied by experts in the case only, including, for example, the judgment of the Jordanian Court of Cassation in its ruling to the effect that: 'and by reviewing the expertise conducted by the court of first instance as established in the session dated 30 -11-2020 and the court's failure to move to the location of the vehicle that is the subject of the case which means that it was not possible to conduct the expertise which renders this expertise in this case as being invalid because it violates the provisions of article 83 of the Civil Procedures Law requiring rescinding due to the fact that this part is relevant to the same' (vii) (Ahmed, 2022).

Thus, the Jordanian legal system before the state judiciary did not separate the inspection from the expertise, and although there is nothing expressly preventing the judge from conducting the inspection, yet, there is no explicit text, and perhaps this is because the judge usually may not have a reference on the subject of the dispute outside his competence. However, and at the same time, we find that the Jordanian legislator has provided in the Jordanian Arbitration Law, specifically in article (3/B), to the effect that: 'The interpretation of the provisions of this law shall take into account the legal rules and principles applied in international arbitration'. Therefore, the Jordanian legislator has referred everything that is not expressly provided for in the Arbitration Law to the rules and principles applied in international arbitration and given that the UNCITRAL Model Law on Arbitration and the UNCITRAL Rules as previously stated did not include an explanation for the scope of the inspection, being the main reference for the Jordanian Arbitration Law, yet, the rules of evidence issued by the International Association (IBA) which are international guiding rules (soft laws) approved, did provide that the arbitral tribunal has the right to conduct an inspection, either individually or through experts (Phundeamvong & Suttawet, 2022). In addition, it has indicated in the text of article (7) regarding the scope, detail and subject matter of this inspection and therefore, the arbitration tribunals, and in accordance with the Jordanian Arbitration Law, can apply this scope regarding the inspection, that is, the inspection of any site, properties, machinery or any goods, samples, systems, processes or documents that are the subject of the dispute entertained by the arbitral tribunal. In fact, these rules have clearly relied on a major and important consideration in arbitration, which is that the arbitrator, on the basis of which he was chosen

as an arbitrator in the case, is to be specialised in the subject matter of the dispute and has knowledge of it as he is the chief expert in the case. In fact, and though the arbitrator is banned to judge by his personal knowledge in terms of the facts of the case entertained by him, yet the principle applies only to his previous knowledge of the facts which happened without the supervision of the parties to the case, but he can reach the truth through his own inspection of the facts in dispute, which serve as evidence to be relied upon in the presence of the litigants [2]. Thus, the Jordanian legislator, and although it formulated the arbitration law along the lines of The UNCITRAL Model Law, was keen to grant the arbitral tribunal the right to conduct the inspection directly, but, at the same time, it did not specify its scope and details as are the rules of the IBA. Yet, the arbitral tribunal must, when conducting the inspection, take into account those boundaries between what is related to the overlap between the inspection and the arbitrator's personal knowledge of specific previous facts while the analogy shall be based on the general foundations that are suitable for inspection so that it can be relied upon as evidence in the arbitration case (Aldubaikhi, 2023).

3. Second: the justifications for conducting the inspection by the arbitral tribunal

The inspection in the arbitration case has special requirements, as previously explained, imposed by the specialisation of the arbitrators who are chosen from the parties to the litigation for their precise specialisation in the subject matter of the dispute. Therefore, when the arbitral tribunal decides to conduct the inspection on the subject matter of the dispute, this is based on technical reasons through which the tribunal will form conviction and important evidence in the case which differs from the inspection at the state judiciary [1], where the judge's specialisation is confined to the study of law while it is rare for him to have knowledge of some specific types of disputes presented before him, especially if they are of a technical nature and otherwise. Therefore, he depends mainly on experience and inspection through the same. Hence, the main objective of the arbitral tribunal inspecting the subject of the dispute is to find out the truth about the subject matter of the dispute and applying the arbitrators' expertise to support it in adjudicating the incident, that is the subject of the dispute. Hence, the aim of the inspection is to verify a specific incident with its technical aspects, according to the knowledge of the arbitrators to help in forming the evidence for the tribunal concerning the matters judged by it in the case without requiring a decision to conduct a specific technical experience in order to save the time and procedures of the case [2]. In fact, what is most necessary to conduct the inspection are the disputes related to construction contracting, road contracting, disputes related to the supply and installation of factories, real estate disputes and other disputes of a technical nature, which have a specificity imposed by the problems arising therefrom. This is on one hand (Sweet, 2022). On the other hand, the arbitral tribunal, and in accordance with the requirements and nature of the dispute, may decide to conduct the inspection by the full members of the arbitral tribunal if it is composed of more than one arbitrator or to assign one of its members. In fact, this assumption is in the event that one of the members of the tribunal is specialised in the subject of the dispute, for example, if the tribunal is composed of a lawyer, a civil engineer and an electrical engineer while the subject matter of the inspection is related to a structural engineering aspect only, then here the specialist in that is the civil engineer for which this engineer may be delegated only if there is no need for the rest of the members of the tribunal to move with him to conduct the inspection due to the lack of technical need for that. Actually, this is what the Jordanian legislator authorised according to the text of article (34/C) of the Arbitration Law to the effect that: "The arbitral tribunal may conduct the inspection

in its entirety or assign one or more of its members to do so' (Olmedilla et al., 2022).

In fact, and with this exception by assigning one of the members of the tribunal to conduct the inspection by the arbitral tribunal, yet we find, and with the aim of taking note of the aspects and objectives that necessitate the inspection, that it is better for the tribunal to conduct the inspection with all its members if it is composed of more than one arbitrator in order to support the specialised arbitrator in his mission and so that all the members of the tribunal have a complete perception of the subject matter of the arbitration dispute according to reality. In fact, and in certain cases, the arbitral tribunal may decide if the subject matter of the dispute is movable, then it can be brought for inspection by the tribunal at a session dedicated to that effect as the subjects of inspection differ, some of which may be related to the movable objects, even if they are among the few subjects that can be subject to adjudication through arbitration due to the lack of amounts for these movables that arbitration can be one of the options for adjudication [2].

In fact, the Jordanian legislator and the rules of evidence issued by the IBA [3], as well as the international legislator in the UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Rules on Arbitration, did not require the arbitral tribunal to justify the reasons for its decision to conduct the inspection as appreciating this matter is left for it as it deems appropriate just like the matter with the remaining proofs of evidence that does not require stating the reasons for the decision of the tribunal except in specific cases, including the cause of the tribunal's refusal, for example, for not conducting technical expertise or hearing witnesses. Yet, the arbitral tribunal, and at any stage of the arbitration case, may decide to conduct the inspection contrary to the state judiciary which some laws provide to have a justification for this inspection by the judge (viii). In fact, one of these countries is Jordan where it was provided in article (83/1) of the Jordanian Civil Procedures Law(ix) to the effect that: 'The court may, in any of the trial roles, decide to conduct inspection and expertise by an expert or more to any movable or immovable property or otherwise for any matter it deems necessary to conduct expertise thereon, and the court must state, in its decision, at the reasons for this procedure and its purpose'. In fact, and although the Jordanian legislator expanded the objective scope of the matters on which the inspection is conducted in accordance with the text of article 83/1, but, at the same time, it required the court to indicate the reasons in its decision for conducting the inspection, the expertise and the purpose thereof and to specify its details.

In fact, this is what does not oblige the arbitral tribunal to do except in terms of what the arbitration system imposes on it in terms of best practices in arbitration without the presence of a legal text to that effect. In fact, and though not being provided for in the arbitration laws, including the international legislator in the UNCITRAL Model Law or the IBA Rules, yet these practices do form a guiding reference for the arbitration tribunals which must pay attention to them and implement them in matters not expressly provided for and without any effect on the validity of the arbitration procedures.

On the other hand, the arbitral tribunal, when conducting the inspection, must abide by the limits of the dispute entertained before it as determined by the requests of the parties to the case through their pleas, statements and evidences.

4. Third: the timeframe for conducting the inspection by the arbitral tribunal.

One of the matters related to the subject of the inspection, which requires clarification of its controls, is the issue of the timing of the inspection by the arbitral tribunal. In fact, the

question that arises here is whether the arbitral tribunal is obligated by a specific timeframe for conducting the inspection in the case entertained before it? The answer to this question, and in light of the fact that the Jordanian Arbitration Law does not provide for a specific time range for conducting the inspection as well as the UNCITRAL Model Law on International Arbitration and the INCITRAL Rules as well as the short mentioning of the IBA Rules on Evidence in article (7) only to arrange for its date in consultation with the parties. Further, and in light of the absence of the international references under study here of this timeframe, then it is necessary to refer to the procedural bases in which the arbitral tribunal extends its control over the case, which are procedural bases that vary between different legislations. Actually, and according to the text of article (26/A) of the Jordanian Arbitration Law, we find that the arbitration procedures begin from the date of the completion of the formation of the arbitral tribunal and ends with the issuance of the award ending the entire dispute while we find that the UNCITRAL arbitration rules have considered, according to the text of article No. (2/3), that the arbitration procedures begin on the date on which the respondent receives the notice of arbitration. In fact, a number of arbitration laws for some countries have applied these rules. However, and whatever the duration of the commencement of the procedures, the timing of the arbitral tribunal's inspection is usually after the completion of its formation if it consists of more than one arbitrator, and most importantly is the completion of the parties to the case from the exchange of statements and pleas between them as well as the submission of each of them the evidence that supports his/its claims in the case when the tribunal reviews these evidences and, if it finds that there are justifications for conducting an inspection of the subject matter of the dispute by it, then it decides to do it, that is before deciding on the rest of the other evidences, as such an inspection may shorten the authorisation (approval) to accept other evidences, including conducting technical expertise or hearing witnesses. In fact, this is often the appropriate time for inspection by the tribunal, but there are other cases that may require inspection, including the urgency and having one of the litigants requested the tribunal to take a quick provisional action that cannot be delayed [2] including inspecting a wall that may fall in a building or other things that the tribunal is required to speed up the inspection before its decision to take interim measures and even before the stage of exchanging statements which is what was provided for in the UNCITRAL Model Law in article (17/H/1) as well as the UNCITRAL Arbitration Rules in article (1/26) to the effect that: 'The arbitral tribunal may issue provisional measures at the request of one of the parties' and article (23/A) of the Jordanian Arbitration Law which is close to what was provided for in the UNCITRAL Rules.

Also, the arbitral tribunal may decide to conduct the inspection in other stages of the case, for example, after the stage of the tribunal taking decisions on other evidences where the tribunal finds, after hearing personal evidence and/or conducting technical expertise, that there are certain issues that have been clarified by the witnesses or the experts that require the arbitral tribunal to conduct a physical inspection on the subject matter of the dispute in order to prove certain facts that have been raised by witnesses or experts [3] while they were unable to convey a specific perception to the tribunal through what they presented to it. Yet, and despite these two hypotheses regarding the timeframe for the inspection, however, and in all cases - as previously discussed - regarding the absence of a text specifying a specific time for the tribunal to conduct the inspection, yet it has the right to conduct it throughout the duration of the arbitration procedures until the issuance of the award ending the entire dispute according to what it deems appropriate. However, the

arbitral tribunal, and regardless of its decision to conduct the inspection, and in order to achieve the principle of confrontation, the principle of impartiality and the best arbitration practices, is obligated to inform the parties of the case of the date of the inspection that it will perform as well as its timing in accordance with the provisions of article (7) of the IBA Rules and to enable the parties or their attorneys to attend it as well as submitting any plea regarding the same and expressing their opinion regarding it in relation to a procedure and discussing it upon their request. However, the arbitral tribunal is not obligated to respond to what is contained in these pleas unless it finds that there is a right of defense that must be made available to the parties while, if it finds otherwise or if afraid to express its opinion in the dispute, then it may not respond to what is stated in these pleas.

5. Conclusion

After completing the study of the topic of the substantive framework for the inspection by the arbitral tribunal and the specificity of this inspection, this study concluded with a set of findings and recommendations which are the following:

5.1 First: The Findings

1. The inspection conducted by the arbitral tribunal is one of the forms of evidences gathering in arbitration cases and is one of the direct means of proof.
2. The substantive framework for the inspection conducted by the arbitral tribunal on its own differs from that conducted by it accompanied by the experts elected in the case.
3. The UNCITRAL Model Law for International Commercial Arbitration as well as the UNCITRAL Arbitration Rules did not explicitly provide for the authority of the arbitral tribunal to conduct inspection as is the case in the Jordanian Arbitration Law and the guiding rules regarding evidences issued by the International Bar Association (IBA).
4. Having the international legislator in the Model Law on Arbitration not expressly provided for the authority of the arbitral tribunal to conduct the inspection directly by it, but rather through the experts, does not result in the inability to conduct it if it finds that there are reasons and justifications that serve the case by virtue of the fact that the arbitrator is considered as the chief expert in the subject of the dispute.
5. The discretion of the inspection procedure is up to the arbitral tribunal and it has a wide discretionary power to accept or reject it.
6. The decision of the arbitral tribunal to conduct the inspection in the Jordanian Arbitration Law or the IBA rules does not require reasoning its decision and mentioning its justifications, but if its decision includes refusing to conduct the inspection sought upon the request of one or both of the parties to the case, then it must state at the reasons of the same as with the rest of the evidences as required by international arbitration practices.
7. The UNCITRAL Arbitration Rules, the IBA Rules and the Jordanian legislator did not provide that the inspection be conducted by all members of the arbitral tribunal, and in case the tribunal is composed of more than one member, then it can delegate one of its members.
8. The absence of a text specifying a specific time for the arbitral tribunal to conduct the inspection as it may decide to conduct the inspection at any stage of the arbitration case procedures until the issuance of the award ending the entire dispute.
9. The timeframe for the inspection procedures is a regulatory matter that is arranged by the

arbitral tribunal and imposed by the international arbitral practices. Yet, non-compliance or breach of the same does not have any effect on the inspection or the evidence derived from it.

5.2 Second: The Recommendations

- In view of the importance of the inspection by the arbitral tribunal in the arbitration case, we recommend the legislators of the countries to expressly provide for the authority of the arbitral tribunal to conduct it in their arbitration laws or when amending them.
- We recommend that the legislators of the countries, when regulating the inspection by the arbitral tribunal legislatively in the laws, to make a distinction between the inspection that is conducted by the arbitral tribunal individually and that which takes place with the experts who are elected to perform expertise in the case.
- In order to achieve the main goal of the parties resorting to arbitration through arbitrators with experience in the subject matter of the dispute, it is also necessary to expressly stipulate in the arbitration legislation the reliance on the knowledge of the specialised arbitrator when he conducts the inspection, and considering that this does not enter into the knowledge of the personal arbitrator who is prohibited by international arbitration principles as long as this is in the presence of the two parties and his knowledge of the aspects of the fact that is the subject of the arbitration dispute.
- The arbitral tribunal must enable the parties to the dispute to view and obtain a copy of the minutes of the inspection conducted by the arbitral tribunal and to make any notes to them regarding it, if any, and to discuss with them what is contained therein.
- The arbitral tribunal, when writing the inspection report, must not indicate therein any prior opinion it has in the matter of the dispute, but rather formulate it by describing the material facts that it witnessed during its inspection of the subject matter of the dispute.
- The arbitral tribunal, when conducting the inspection, must adhere to the limits of the disputed spatial facts between the two parties, which are contained in their statements and pleas submitted by them in the case.
- The arbitral tribunals, when making a decision to conduct the inspection, must take into account the basic principles of litigation and arbitration practices for all procedures related to the inspection, the most important of which is the presence of the parties to the case, setting a date for the inspection in sufficient time and writing a minutes of it.

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ⁱⁱ Rules of Evidence of the International Bar Association (IBA) - Third Edition 'Revised' – of 2020, which kept the text of article (7) without modification www.ibanet.org.

ⁱⁱⁱ The International Commercial Arbitration Model Law of 1985 and its amendments of 2006 issued by the United Nations Commission on International Trade Law (UNCITRAL) published on the Commission's website www.uncitral.org

^{iv} The UNCITRAL Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) Revised 2010 published on the UNCITRAL arbitration website www.uncitral.org

^v The Evidences Law No. (30) of 1952 and its amendments, published on page No. 200, in the Official Gazette No. 1108 dated 17/5/1952.

^{vi} The Jordanian Civil Procedures Law No. (24) of 1988 and its amendments, published on page No. 735 in the Official Gazette No. 3545, dated 2/4/1988.

^{vii} Judgment of the Jordanian Court of Cassation, civil No. 6376/2022 dated 26-12-2022, published on Qastas website, Jordanian Bar Association.

^{viii} For more on inspection through the state's judiciary and its procedures, see Salah [4].

^{is} The Jordanian Civil Procedures Law No. (24) of 1988 and its amendments, published on page No. 735, in Official Gazette No. 3545, dated 2/4/1988.