



Arbitration as a Mechanism for Settling Disputes Arising from BOT Contracts

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Abstract:

This research examines arbitration as a mechanism for resolving disputes arising from BOT contracts, which constitute a part of international investment agreements characterized by their long duration. Such longevity often leads to the emergence of disputes, compelling the parties to the disputed contract (BOT contract) to resort to arbitration as an effective mechanism and means for resolving contractual conflicts outside the traditional judicial system.

The central issue addressed in this study revolves around the significance of resorting to arbitration as a method for resolving disputes related to BOT contracts used in the construction and management of public facilities, as well as the potential risks it entails that may negatively affect the host state. This study seeks to shed light on this topic and highlight the importance of arbitration in resolving disputes arising from BOT contracts.

Keywords: BOT contract, arbitration, dispute settlement, public facilities.

L'arbitrage comme mécanisme de règlement des litiges découlant des contrats BOT

Résumé :

Cette étude examine l'arbitrage en tant que mécanisme de règlement des litiges découlant des contrats BOT, qui font partie des accords d'investissement internationaux caractérisés par leur longue durée. Cette longévité entraîne souvent l'émergence de litiges, obligeant les parties au contrat litigieux (contrat BOT) à recourir à l'arbitrage en tant que mécanisme et moyen efficaces pour résoudre les conflits contractuels en dehors du système judiciaire traditionnel.

La question centrale abordée dans cette étude porte sur l'importance du recours à l'arbitrage comme méthode de résolution des litiges liés aux contrats BOT utilisés dans la construction et la gestion d'équipements publics, ainsi que sur les risques potentiels qu'il comporte et qui peuvent avoir un impact négatif sur l'État hôte.

Cette étude vise à éclairer ce sujet et à souligner l'importance de l'arbitrage dans la résolution des litiges découlant des contrats BOT.

Mots clés : *contrat BOT, arbitrage, règlement des litiges, équipements publics.*



Introduction:

The **B.O.T contract** – *Build, Operate, and Transfer* represents one of the modern and significant methods adopted by various countries around the world over the past two decades, particularly developing countries, including Algeria. It serves as a mechanism for financing and implementing large-scale infrastructure and public utility projects by relying on the financial resources and expertise of the private sector, which is often foreign.

These contracts are characterized by their long duration, technical and financial complexity, and the intertwining of interests between the granting state and the investor (the project company). This complexity makes them prone to disputes and conflicts.

Given the special nature of such contracts especially since they are concluded between the host state and private entities (the project company), whether local or foreign certain disputes may arise between the parties. These disputes require swift, efficient, and confidential resolution to ensure the continuity of public services and the stability of investments. Achieving this calls for resorting to an alternative mechanism outside the traditional judicial authority to resolve or settle such conflicts hence, **arbitration** emerged as an effective means for dispute resolution.

Arbitration stands out as a primary and preferred mechanism for resolving disputes arising from B.O.T contracts. Thanks to its advantages such as the technical expertise of arbitrators, procedural speed, confidentiality of proceedings, flexibility, and neutrality arbitration offers a

more suitable environment for resolving disputes of an international and investment nature compared to conventional national courts.

Therefore, studying arbitration within the framework of B.O.T contracts becomes increasingly important, as it constitutes a genuine guarantee for investors and an effective tool for maintaining the economic and financial balance of the contract. This leads to key questions: **Does arbitration ensure a balance of interests between the host state and the foreign investor? And are there mechanisms to guarantee that the sovereign nature of the state does not compromise the neutrality and fairness of arbitration proceedings?**

To answer these questions, the study has been divided into two main sections:

- The **first section** examines the characteristics of resorting to arbitration as a means of resolving disputes in B.O.T contracts.
- The **second section** discusses the risks faced by the host country when resorting to arbitration in relation to B.O.T contracts.

1. Characteristics of resorting to arbitration as a means of resolving disputes arising from bot contracts

Resorting to **arbitration** as a mechanism for resolving disputes arising from **Build-Operate-Transfer (BOT)** contracts is distinguished by several characteristics and advantages that make it the preferred option for the parties especially the foreign investor. These features make arbitration one of the most important methods for settling disputes that may arise at different stages of implementing public utility projects.



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The characteristics that highlight the importance of arbitration can be summarized in the following sections:

1.1. Speed and Efficiency of Procedures

Arbitration procedures are generally **faster and more flexible** than national judicial proceedings, which tend to be lengthy and constrained by rigid procedural rules. Under arbitration, the disputing parties find themselves in a better position than if they were to resort to national courts, as the dispute can be resolved more quickly and at a lower cost ⁱ.

The procedural flexibility inherent in arbitration significantly reduces the time required to reach a final decision, in contrast to the slow and complex processes of traditional judicial systems, which are bound by multiple levels of appeal. Judicial systems primarily aim to protect individual rights, whereas arbitration allows the parties to determine their own procedures, the time frame for issuing an award, and other aspects ⁱⁱ.

Hence, the **speed of arbitration** helps avoid the suspension of vital projects and reduces the economic losses for both parties.

1.2. Confidentiality of Arbitration

Arbitration ensures **complete confidentiality** of dispute resolution proceedings, unlike public court hearings, which are open to the public. Arbitration sessions are private, and awards are not published. The confidentiality extends to all aspects of the contract and related proposals.

Parties to BOT contracts prefer to keep disputes and their causes undisclosed, as public knowledge could harm their **financial and commercial standing**. Confidentiality also

helps to prevent escalation and promotes the possibility of **amicable settlement**, ensuring the continuity of cooperation between the parties ⁱⁱⁱ.

Thus, arbitration takes place **behind closed doors**, guaranteeing the protection of **sensitive financial, technical, and commercial information** related to the project and both parties. Arbitration awards are also disclosed only with the consent of the parties, minimizing any negative reputational effects on investors or their other business dealings.

1.3. Specialized Judiciary

Arbitration allows the parties to appoint **highly qualified arbitrators** with expertise in fields relevant to BOT contracts such as civil engineering, finance, administrative law, and international commercial law.

This ensures that decisions are based on a **deep understanding of the technical, legal, and economic complexities** of the project, unlike national courts, which may lack such specialization.

Arbitration thus provides the **necessary legal and technical expertise** to resolve disputes arising from BOT contracts, which often require advanced knowledge of finance, construction, and international investment practices. Arbitrators usually possess both **academic and practical competence**, as well as familiarity with **international customs, trade usages, and the language** in which the contract and related correspondence are drafted.

The ability of the parties to select their arbitrators enhances confidence in the fairness and quality of the award ^{iv}.



1.4. Arbitration as a Procedural Guarantee in BOT Contracts

Arbitration serves as one of the **most essential procedural guarantees** in BOT contracts, providing an appropriate legal framework for resolving disputes between the host state and the foreign investor. Its importance stems from the **complex, long-term, and international nature** of such contracts, which typically involve the financing and management of critical public utilities.

The **project company** seeks to invest its capital in the host state with the assurance of maximum **security and stability**. Arbitration provides such a guarantee, and therefore, companies often insist that any future disputes be referred to **arbitration panels** for settlement ^v.

Similarly, the **host state** aims to attract foreign capital by offering guarantees to investors, including the right to resort to arbitration. Without this assurance, investors especially foreign ones may hesitate to commit their funds due to the perceived lack of protection under domestic law. Thus, developing countries, in particular, have little choice but to **accept arbitration** as a means of building investor confidence and attracting foreign investment.

1.5. The Project Company's Requirement to Resort to Arbitration

Relying solely on **national courts** in the host country to resolve disputes arising from BOT contracts often **alarms the project company**. Investors may distrust the efficiency, impartiality, or fairness of the local judicial system. They also fear potential bias in favor of the host state or differences in legal systems and procedures.

For this reason, project companies typically insist on **including arbitration clauses** in BOT contracts. Arbitration provides them with an **independent and neutral forum** for dispute resolution and allows the parties full freedom to select arbitrators and determine the **applicable law** governing the contract ^{vi}.

Arbitration also allows the parties to choose the **law applicable to the dispute**, which may be that of a **neutral country**, or **the principles of international commercial law**, or even **equitable principles**, thus overcoming potential constraints imposed by the host state's domestic public law.

Conducting arbitration in a **neutral and international environment** alleviates concerns about national bias, thereby **strengthening investor confidence** a crucial factor in ensuring investment stability.

Hence, including an arbitration clause in major contracts, especially BOT agreements, has become **a common and expected practice** in international project financing and infrastructure development.

2. The risks that arbitration poses to the host state in bot contracts

Despite the importance of adopting arbitration as a means of resolving contractual disputes arising between the parties to a BOT contract, as previously explained, resorting to it is not without risks for the host state. This has been confirmed in practice, as some risks are directly related to environmental protection, while others are linked to the modern principles applied in arbitration that may negatively affect the host state. Additionally, the influence of international public order in arbitration has also had its



impact. These aspects will be addressed in this chapter as follows:

2.1. How Arbitration Mechanisms Protect the Project Company from Environmental Consequences Resulting from the Construction of Public Facilities in the Host State

Project companies have frequently used arbitration mechanisms against host states to protect themselves from the consequences of their investments in BOT projects that have caused environmental harm particularly in contracts related to industrial, extractive, and processing facilities. Many of these disputes presented before arbitral tribunals have been decided in favor of the project companies, leaving host states with two choices: either to allow the continuation of the project despite the environmental damage caused, or to terminate it and pay compensation.

It is worth emphasizing that environmental risks have come to be recognized as part of the disputes arising from the implementation of BOT contracts, and arbitral institutions are now expected to take such considerations into account when resolving disputes.

Moreover, the UNCITRAL Model Law on International Commercial Arbitration (1958), through its Article 1, included environmental protection among the economic activities subject to arbitration, affirming the relevance of such concerns in arbitral proceedings.

2.2. The Expansion of Modern Principles That Directly Affect the Host State in BOT Contracts

Among the modern principles consolidated in arbitration is the principle of party autonomy. Under this principle, the contracting parties have the freedom to determine the legal rules applicable to the arbitral dispute. They control the conduct of arbitration, choose the governing law, and even designate the language of arbitration, which may not be the language of the host country.

They may also choose a foreign law to govern the dispute, rather than the law of the host state. This principle serves practical purposes it accommodates the diversity and complexity of international contractual operations by allowing the parties to select the law most suitable to their needs ^{vii}.

Furthermore, the seat of arbitration can be established in another country, depriving the host state of the financial benefits that arbitration might otherwise bring as a local economic activity. Party autonomy also allows the contracting parties to choose arbitrators from pre-established institutional lists, as BOT disputes are generally subject to institutional arbitration ^{viii}.

A second principle is the doctrine of the separability of the arbitration agreement from the BOT contract itself. This means that the validity, nullity, or termination of the BOT contract does not affect the arbitration agreement, whether it is contained within the main contract or established as a separate clause ^{ix}.

Accordingly, if the arbitration agreement remains valid despite the invalidity of the BOT contract, or vice versa, each retains its own legal existence. Modern arbitration trends also grant arbitral tribunals the authority to decide on their



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own jurisdiction, including challenges to their competence. However, this procedural autonomy may be exploited by foreign project companies to serve their private interests at the expense of the host state.

Another principle is the prohibition of invoking state sovereignty to avoid arbitration. Under this principle, a host state cannot escape arbitral proceedings by invoking its sovereign powers. Once a state has agreed to arbitration, it waives the right to rely on sovereignty to avoid compliance with the process. Yet, arbitral tribunals when examining such disputes may effectively assess and review actions taken by the state. As a result, international arbitral bodies indirectly engage with issues that may be considered core matters of domestic policy, thereby limiting the host state's sovereign discretion ^x.

2.3. The Impact of International Public Order in Arbitration on Host States in BOT Contracts

Emphasizing the independence of the arbitration agreement from domestic law and the underlying contract does not mean disregarding international public order, which encompasses shared legal norms among nations and peoples ^{xi}.

However, in practice, international public order has often been interpreted through the values and interests of developed countries, creating an imbalance in favor of investors from these states. Consequently, developing host countries in BOT contracts frequently find themselves in a weaker position when facing multinational project companies before arbitral tribunals.

Many arbitral awards confirm this observation. For instance, in a case between Algeria and a foreign investor concerning a BOT contract for the sanitation of Algiers, a third party had acted as an intermediary to conclude the contract in exchange for an agreed payment. After partial payment, the contracting authority refused to pay the remainder, leading to two rounds of arbitration. Ultimately, the arbitral award was submitted for enforcement before English courts, despite the fact that the original contract was illegal and contrary to Algerian public policy. Nevertheless, the arbitral tribunal did not consider this a violation of international public order, and the award was upheld in favor of the foreign investor ^{xii}.

This example illustrates how international arbitration, under the guise of neutrality and global standards, can sometimes undermine national public policy considerations and tilt the balance in favor of foreign investors at the expense of the host state's regulatory sovereignty.

Conclusion:

Through the study of arbitration as a mechanism for settling disputes arising from BOT contracts, the following conclusions have been reached:

- The arbitration clause in BOT contracts is more than just an alternative means of dispute resolution; it is a fundamental procedural safeguard for the foreign investor, equally important as substantive guarantees (such as protection against nationalization or expropriation). It is a key factor that encourages



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foreign capital to engage in infrastructure and vital public service projects.

- Arbitration in BOT contracts plays a decisive role in risk allocation and in building the necessary trust between the host state and the project company, making it a non-negotiable element in most large international contracts such as BOT.
- Resorting to international arbitration reduces the foreign investor's fear of potential bias from the host state's judiciary and ensures a neutral and professional framework for dispute resolution.
- Arbitration allows for the selection of arbitrators specialized in international commercial law, engineering construction contracts, and project finance, ensuring that decisions are accurate and objective, in line with the technical and financial complexity of these contracts.
- Arbitration represents the ideal mechanism for resolving BOT contract disputes thanks to its characteristics of specialization, flexibility, and procedural speed compared to litigation before ordinary courts, as well as the ease of enforcing international awards – a crucial factor given the long-term nature of BOT projects and the need for quick dispute resolution to ensure the continuity of public service.
- Arbitration provides confidentiality regarding the sensitive commercial and financial information of both the project company and the state, which is not available in ordinary judicial proceedings.

- Arbitration succeeds in overcoming the doctrinal controversy over the legal nature of BOT contracts whether administrative or private as both the state and the project company agree to submit their disputes to arbitration, often choosing a neutral law or the principles of international commercial law to govern the contract.
- Arbitration ensures the enforceability of arbitral awards against the state's assets and properties located outside its borders, representing the strongest guarantee for investors.
- National courts and administrative authorities, however, may feel a loss of control over disputes involving vital public utilities as a result of resorting to international arbitration.

Recommendations:

- States should allow disputes arising from BOT contracts to be resolved through legal means that provide greater guarantees to project companies, particularly foreign ones, in order to protect their funds and investments. International commercial arbitration remains the most effective and reliable means for resolving such disputes.
- It is essential to clearly and explicitly regulate recourse to arbitration in national legislation regarding BOT contracts to ensure its compatibility with public law and to avoid the risk of annulment of arbitral awards.
- Emphasis should be placed on activating alternative dispute resolution (ADR) mechanisms such as negotiation, mediation, and conciliation before



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resorting to arbitration, in order to resolve less complex disputes amicably and more efficiently.

FOOTNOTES:

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