Arbitration in Hydrocarbon Disputes in Tunisia

A Legal Analysis of Article 21 of the Hydrocarbons Code

Introduction

The hydrocarbons sector occupies a strategic position within the Tunisian economy. It concerns natural resources of significant economic and sovereign importance while requiring substantial financial investment, advanced technical expertise and long-term contractual commitments.

These characteristics inevitably create the potential for disputes between the Tunisian State, holders of hydrocarbon titles and investors.

Against this background, the Tunisian Hydrocarbons Code provides for arbitration as a means of resolving disputes arising from the implementation of the Special Agreement relating to hydrocarbon activities.

Article 21 of the Hydrocarbons Code provides, in substance, that disputes arising from the implementation of the Special Agreement may be settled by arbitration and that the Special Agreement determines the nature and type of arbitration, its procedures and the conditions for enforcement of the arbitral award.

This provision raises several important legal questions concerning the consent to arbitration, the scope of arbitrable disputes, the role of the Special Agreement, the applicable law, the seat of arbitration and the enforcement of arbitral awards.

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I. The Special Agreement as the contractual foundation of the relationship

Article 21 cannot be properly understood without considering the legal status of the Special Agreement within the Tunisian hydrocarbons regime.

Hydrocarbon activities are governed by a combination of statutory, regulatory and contractual rules. The holder of a hydrocarbon title operates within a legal framework that includes the Hydrocarbons Code, the relevant title, the Special Agreement and the applicable contractual and regulatory instruments.

The Special Agreement therefore constitutes a central instrument governing the rights and obligations of the parties.

It is within this contractual framework that the arbitration mechanism contemplated by Article 21 acquires its practical significance.

The provision therefore establishes a link between the Tunisian statutory framework governing natural resources and the contractual mechanism of international dispute resolution.

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II. Does Article 21 establish mandatory arbitration?

One of the first questions raised by Article 21 concerns the meaning of the legislative wording allowing disputes to be settled by arbitration.

The provision does not appear to impose arbitration automatically for every dispute relating to hydrocarbons.

Rather, it recognizes arbitration as a possible method of resolving disputes arising from the implementation of the Special Agreement.

This distinction is important.

Article 21 should therefore not necessarily be regarded, by itself, as a complete and autonomous arbitration clause. Its practical operation depends on the arbitration provisions incorporated into the relevant Special Agreement.

The Special Agreement is expressly entrusted with determining the nature, type and procedure of the arbitration, as well as the conditions governing enforcement of the arbitral award.

Consequently, the statutory provision creates the legal framework within which the parties may agree to arbitration, while the Special Agreement determines the concrete mechanism through which that arbitration will operate.

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III. The scope of disputes subject to arbitration

The wording of Article 21 is particularly significant because it refers to:

“disputes arising from the implementation of the Special Agreement.”

The provision does not simply refer to every dispute connected with hydrocarbon activities.

This wording suggests a distinction between contractual disputes and disputes concerning the exercise of sovereign or regulatory powers.

1. Contractual disputes

Disputes concerning the interpretation, performance or alleged breach of the Special Agreement are the clearest candidates for arbitration.

These may include disputes relating to:

– exploration and work obligations;
– financial obligations;
– cost recovery;
– production and exploitation arrangements;
– contractual interpretation;
– termination of the Special Agreement;
– financial consequences arising from termination;
– and other contractual rights and obligations.

2. Regulatory and sovereign acts

A more complex issue arises where the dispute concerns an act or decision adopted by the State in the exercise of its sovereign regulatory powers.

The existence of Article 21 should not automatically be interpreted as granting an arbitral tribunal jurisdiction over every dispute connected with the hydrocarbons sector.

The decisive question is whether the dispute falls within the scope of the arbitration agreement contained in the relevant Special Agreement.

This distinction is particularly important where a State is acting simultaneously as a contracting party and as a sovereign regulator.

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IV. The parties’ freedom to determine the arbitration mechanism

One of the most significant features of Article 21 is the substantial role it gives to the Special Agreement.

The Special Agreement determines the:

– nature of the arbitration;
– type of arbitration;
– arbitration procedure;
– and conditions for enforcement of the arbitral award.

This contractual flexibility allows the parties to regulate fundamental procedural matters, including:

– the number of arbitrators;
– the appointment mechanism;
– the arbitral institution;
– the applicable arbitration rules;
– the seat of arbitration;
– the language of the proceedings;
– the substantive law applicable to the dispute;
– and the procedure for recognition and enforcement of the award.

This flexibility is particularly relevant in the hydrocarbons sector, where the contractual relationship may involve foreign investors and international financing structures.

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V. International arbitration in the Tunisian hydrocarbons sector

The importance of Article 21 becomes even more apparent where the hydrocarbon investor is foreign.

In such circumstances, arbitration may provide an independent dispute-resolution mechanism and may contribute to the legal security of long-term investment projects.

The Tunisian practice demonstrates that Special Agreements may provide for international institutional arbitration.

Certain Tunisian hydrocarbon agreements have, for example, referred disputes to arbitration under the rules of the International Chamber of Commerce (ICC), with a three-member arbitral tribunal and a seat of arbitration outside Tunisia.

Such arrangements illustrate an important legal distinction:

The seat of arbitration and the substantive law governing the dispute are not necessarily the same.

An arbitration may have its seat in a foreign jurisdiction while the substantive rights and obligations of the parties remain governed by Tunisian law.

This distinction is fundamental in international arbitration.

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VI. Arbitration and State sovereignty

The submission of hydrocarbon disputes to arbitration raises an important question concerning State sovereignty.

The fact that Tunisia accepts arbitration in the context of a Special Agreement does not mean that the State relinquishes its sovereignty over its natural resources.

Nor does arbitration prevent the State from exercising its legitimate regulatory powers.

The essential distinction lies between:

the State’s sovereign authority over natural resources

and

the contractual obligations undertaken by the State within a specific legal and contractual framework.

When the State agrees to arbitration in a Special Agreement, it accepts a particular mechanism for resolving disputes falling within the scope of that agreement.

Arbitration therefore does not necessarily constitute a waiver of sovereignty. Rather, it represents a form of contractual commitment concerning the settlement of disputes.

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VII. Enforcement of the arbitral award

Article 21 expressly refers not only to arbitration but also to the conditions for enforcement of the arbitral award.

This is an important aspect of the provision.

An arbitral award is not necessarily the end of the legal process. Where the award must be enforced in another jurisdiction, questions may arise concerning recognition, enforcement and the applicable procedural requirements.

The choice of the seat of arbitration and the applicable arbitration rules may therefore have significant consequences at the enforcement stage.

In international hydrocarbon disputes, enforcement considerations should consequently be taken into account at the time the Special Agreement is drafted, rather than only after a dispute has arisen.

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VIII. The importance of drafting the arbitration clause

From a practical perspective, the most important consequence of Article 21 may be the importance it places on the drafting of the arbitration clause.

An ambiguous arbitration clause may generate a preliminary dispute concerning the jurisdiction of the arbitral tribunal before the merits of the case are even considered.

The arbitration clause should therefore address, as precisely as possible:

1. the disputes covered by the clause;
2. the number of arbitrators;
3. their method of appointment;
4. the arbitral institution, where applicable;
5. the applicable arbitration rules;
6. the seat of arbitration;
7. the language of the proceedings;
8. the substantive law;

9. the procedural law;
10. and the mechanism for recognition and enforcement of the award.

In the hydrocarbons sector, arbitration drafting is therefore not merely a procedural exercise. It is an essential component of legal risk management.

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IX. Article 21 between Tunisian law and international arbitration

A particularly interesting feature of the Tunisian system is that the use of international arbitration does not necessarily remove the contractual relationship from the application of Tunisian law.

The parties may agree to international arbitration, select a foreign seat and adopt institutional arbitration rules while simultaneously providing that Tunisian law governs the substantive rights and obligations arising from the Special Agreement.

A hydrocarbon dispute may therefore involve several interconnected legal layers:

Tunisian statutory law + contractual law + international arbitration + private international law + technical and economic rules governing the energy sector.

This combination explains why hydrocarbon arbitration requires not only knowledge of arbitration law but also a strong understanding of energy law and the technical structure of exploration and production agreements.

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X. A critical assessment of Article 21

Article 21 provides a flexible legal framework, but that flexibility also creates important drafting challenges.

The provision does not itself determine all of the essential elements of the arbitration mechanism.

Questions concerning the precise arbitral institution, seat, procedural rules, language and detailed jurisdictional scope are largely left to the Special Agreement.

This approach may be justified by the highly technical and international nature of hydrocarbon projects.

However, contractual flexibility also creates a corresponding need for precision.

The more freedom the parties have to design the arbitration mechanism, the greater the importance of drafting a clear and comprehensive arbitration clause.

In this context, the arbitration clause should not be treated as a standard contractual provision.

It should be regarded as a strategic legal instrument designed to manage the risks associated with a long-term investment in a highly regulated and capital-intensive sector.

Finally ,

Article 21 of the Tunisian Hydrocarbons Code constitutes an important legal gateway for the arbitration of disputes arising from the implementation of Special Agreements.

Its significance lies not merely in recognizing arbitration as a possible dispute-resolution mechanism, but in allowing the parties to construct a contractual arbitration framework adapted to the specific characteristics of each hydrocarbon project.

The provision also illustrates the delicate balance between State sovereignty over natural resources, on the one hand, and contractual and investment protection, on the other.

The Tunisian framework allows international arbitration to coexist with the application of Tunisian substantive law. The choice of a foreign seat of arbitration does not, in itself, imply the application of foreign substantive law.

Ultimately, Article 21 should therefore be understood as more than a procedural provision. It forms part of the legal architecture governing the relationship between the Tunisian State and investors in the hydrocarbons sector.

For practitioners, the principal lesson is clear:

In hydrocarbon projects, the effectiveness of arbitration begins long before the dispute arises. It begins with the drafting of the Special Agreement and, above all, with the drafting of the arbitration clause.