Hydrocarbon Arbitration in Tunisia: Article 21 of the Hydrocarbons Code

State Sovereignty, Contractual Stability and Investor Protection in Hydrocarbon Disputes

Hydrocarbon projects involve substantial investments, complex technical operations and long-term contractual commitments. In Tunisia, these activities are governed by a specific legal framework designed to reconcile the State's sovereignty over its natural resources with the legitimate expectations and contractual rights of investors.

In this context, Article 21 of the Tunisian Hydrocarbons Code occupies a particularly important position. It provides a legal framework for the settlement by arbitration of disputes arising from the implementation of the Special Agreement governing hydrocarbon activities.

The provision raises a fundamental practical question:

Does Article 21 itself establish a complete arbitration mechanism, or does the effectiveness of arbitration ultimately depend on the drafting of the Special Agreement?

The answer is particularly relevant where the investor is a foreign company and the parties contemplate international arbitration.

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1. Article 21 and the Arbitration of Hydrocarbon Disputes

Article 21 of the Tunisian Hydrocarbons Code provides that disputes arising from the implementation of the Special Agreement may be settled by arbitration.

The provision further entrusts the Special Agreement with determining the nature and type of arbitration, its procedures and the conditions governing enforcement of the arbitral award.

This wording is significant.

The legislator did not establish a single mandatory arbitration mechanism applicable to all hydrocarbon disputes. Instead, Article 21 creates a statutory framework within which the parties may agree to arbitration and gives the Special Agreement a central role in defining its practical operation.

Consequently, the arbitration clause contained in the Special Agreement becomes a critical component of the legal relationship between the State and the hydrocarbon investor.

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2. The Special Agreement: The Cornerstone of the Arbitration Mechanism

Hydrocarbon activities are governed by a combination of statutory, regulatory and contractual rules.

The Special Agreement forms an essential part of this framework. It determines, together with the applicable legislation and the relevant hydrocarbon title, the rights and obligations of the parties.

Article 21 therefore gives the Special Agreement a particularly important procedural function.

It may determine, among other matters:

– whether arbitration is institutional or ad hoc;
– the applicable arbitration rules;
– the number and appointment of arbitrators;
– the seat of arbitration;
– the language of the proceedings;
– the applicable substantive law;
– and the conditions for recognition and enforcement of the arbitral award.

The drafting of the Special Agreement is consequently not merely a contractual formality. It is a fundamental element of the parties' dispute-resolution strategy.

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3. What Disputes Can Be Submitted to Arbitration?

The wording of Article 21 refers specifically to disputes arising from the implementation of the Special Agreement.

This wording requires careful interpretation.

Not every dispute connected with hydrocarbon activities should automatically be regarded as falling within the jurisdiction of an arbitral tribunal.

Contractual disputes

The clearest category concerns disputes relating to the interpretation and performance of the Special Agreement.

Such disputes may concern:

– exploration obligations;
– work programmes;
– financial obligations;
– cost recovery;
– exploitation arrangements;
– contractual deadlines;
– contractual termination;
– compensation;
– or the interpretation of contractual provisions.

These matters are naturally connected with the implementation of the Special Agreement and may therefore fall within the scope of an appropriately drafted arbitration clause.

Regulatory and sovereign disputes

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

The State may act in two different capacities: as a contracting party and as a sovereign authority exercising regulatory powers over natural resources.

This distinction may become decisive when determining the jurisdiction of an arbitral tribunal.

The mere existence of Article 21 should therefore not be interpreted as granting an arbitral tribunal unlimited jurisdiction over every dispute relating to Tunisia’s hydrocarbons sector.

The scope of the arbitration agreement remains essential.

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4. International Arbitration and Foreign Investors

The practical importance of Article 21 becomes particularly apparent in transactions involving foreign investors.

International investors generally attach considerable importance to the existence of a neutral and predictable dispute-resolution mechanism.

For this reason, Special Agreements may provide for international institutional arbitration, including arbitration under the rules of the International Chamber of Commerce (ICC).

The choice of international arbitration may offer the parties a neutral procedural framework while preserving Tunisian law as the substantive law governing the contractual relationship.

This leads to an important distinction:

The seat of arbitration is not necessarily the same as the law applicable to the merits of the dispute.

An arbitration may therefore be seated outside Tunisia while the substantive rights and obligations of the parties remain governed by Tunisian law.

This distinction is fundamental in international arbitration and should be carefully addressed when negotiating a hydrocarbon agreement.

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5. Arbitration Does Not Eliminate State Sovereignty

The submission of hydrocarbon disputes to arbitration should not be confused with a surrender of State sovereignty.

Hydrocarbon resources remain subject to the sovereign authority of the Tunisian State.

The acceptance of arbitration concerns the method of resolving disputes falling within the contractual framework established by the Special Agreement.

The distinction can therefore be expressed as follows:

State sovereignty over natural resources ≠ immunity from contractual obligations.

A State may retain its sovereign regulatory powers while accepting arbitration in relation to contractual disputes arising from an agreement that expressly provides for such a mechanism.

This balance between sovereignty and contractual stability is one of the most sensitive issues in energy arbitration.

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6. The Importance of the Seat of Arbitration

The choice of the seat of arbitration is one of the most consequential decisions made when drafting an arbitration clause.

The seat is not simply the geographical location where hearings may take place.

It determines the legal framework supporting the arbitration and may influence questions relating to the supervision of the arbitral process and the possibility of challenging the award.

For a hydrocarbon investor, the choice of seat may therefore be as important as the choice of the arbitral institution itself.

At the same time, the parties must distinguish between:

– the seat of arbitration;
– the procedural rules;
– the substantive law;
– and the law governing the arbitration agreement.

A carefully drafted Special Agreement should avoid unnecessary uncertainty concerning these different legal layers.

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7. Enforcement of the Arbitral Award

Article 21 expressly refers to the conditions governing the enforcement of the arbitral award.

This is particularly important in international hydrocarbon disputes.

Obtaining an arbitral award is only one stage of dispute resolution. The successful party may subsequently have to obtain recognition and enforcement of the award in a jurisdiction where the losing party has assets.

Accordingly, enforcement considerations should be taken into account from the beginning of the contractual relationship.

The parties should consider the legal framework applicable to the recognition and enforcement of the award, the location of relevant assets and the international conventions applicable to enforcement.

In international arbitration, an arbitration clause should therefore be drafted with the post-award stage in mind.

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8. Article 21 and the Protection of Investment

From an investor's perspective, the availability of arbitration contributes to contractual security.

Hydrocarbon investments are particularly sensitive to legal and regulatory changes because exploration and production projects require significant capital expenditure and may extend over many years.

An effective dispute-resolution mechanism can therefore contribute to the stability of the investment relationship.

However, arbitration should not be viewed as an absolute guarantee against regulatory changes or State measures.

Its effectiveness depends fundamentally on:

– the scope of the arbitration agreement;
– the rights protected by the Special Agreement;
– the applicable law;
– the jurisdiction of the arbitral tribunal;
– and the specific circumstances of the dispute.

Article 21 must therefore be read together with the contractual framework governing the particular hydrocarbon project.

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9. Drafting the Arbitration Clause: A Strategic Legal Issue

One of the principal practical lessons arising from Article 21 is that arbitration begins before the dispute exists.

The arbitration clause should be drafted with sufficient precision to minimise jurisdictional disputes.

Among the issues that should be addressed are:

1. the scope of disputes covered by the clause;
2. the arbitral institution, if any;
3. the applicable arbitration rules;
4. the number of arbitrators;
5. the method of appointment;
6. the seat of arbitration;
7. the language of the proceedings;
8. the substantive law;
9. the procedural framework;
10. interim measures;
11. confidentiality, where relevant;
12. and recognition and enforcement of the award.

A poorly drafted arbitration clause may generate a preliminary dispute over jurisdiction before the tribunal can even examine the merits.

In the hydrocarbons sector, where disputes may involve substantial financial claims, this risk should not be underestimated.

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10. A Legal Balance Between Flexibility and Certainty

Article 21 reflects a flexible legislative approach.

Rather than imposing one arbitration model on all hydrocarbon projects, the Tunisian legislator leaves considerable room for the parties to design a dispute-resolution mechanism adapted to their particular contractual relationship.

This flexibility can be advantageous.

Different projects may involve different investors, financing structures, technical risks and international contractual arrangements.

However, flexibility also creates a responsibility for the parties and their legal advisers.

The more important the contractual freedom, the greater the need for precise drafting.

For this reason, the arbitration clause should be considered an essential part of the negotiation of the Special Agreement, rather than a standard clause to be inserted at the end of the contract.

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Conclusion

Article 21 of the Tunisian Hydrocarbons Code provides an important legal basis for the use of arbitration in disputes arising from the implementation of Special Agreements.

Its significance lies in the balance it seeks to establish between State sovereignty over hydrocarbon resources, contractual stability and the protection of investment interests.

The provision does not, by itself, provide every procedural detail necessary for an effective arbitration. Instead, it gives the Special Agreement a central role in determining the nature, type and procedure of arbitration and the conditions governing enforcement of the arbitral award.

For this reason, the effectiveness of Article 21 ultimately depends to a significant extent on the quality of the contractual drafting.

In international hydrocarbon projects, the arbitration clause should therefore be treated as a strategic legal instrument.

The real strength of arbitration does not begin when the dispute arises. It begins when the Special Agreement is negotiated and the arbitration clause is drafted.