Journal of Posthumanism
2025
Volume: 5, No: 5, pp. 4879–4894
ISSN: 2634-3576 (Print) | ISSN 2634-3584 (Online)
posthumanism.co.uk

DOI: https://doi.org/10.63332/joph.v5i5.1991

Legislative Vacuum Manifestations in the Amicable Settlement Provisions of Administrative Contract Disputes in Iraqi law (Arbitration as a Model)

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Abstract

Due to the economic developments, the administrative activity expansion, the public projects magnitude and their strategic importance and for investment encouragement purposes, countries often tend to organize alternative means of settling disputes arising from administrative contracts that are relatively more flexible and fast compared to judicial procedures and perhaps the most important of this means is arbitration. In Iraq, although it is a major destination for investment, especially in the oil, energy and reconstruction sectors. The legislator did not seek to find a comprehensive and clear organization for arbitration that may be applied to all types of contracts concluded by the General Administration. This study focuses on the most important manifestations of the legislative vacuum in the arbitration provisions of the administrative contracts, as it assumes the existence of a legislative vacuum in the Iraqi legal organization, which affects the arbitration's validity and the legitimacy of its procedures and weakens confidence's effectiveness in settling the dispute. The aim of this study is to present the most prominent manifestations of the legislative vacuum while proposing the necessary legislative solutions to address this vacuum in order to establish the appropriate legal environment to resolve administrative contractual disputes through alternative means. The study's most important findings are the absence of a law for arbitration in administrative contracts of all kinds and that what was organized regarding arbitration within the Public Contracts Law No. 87 for the year 2004. The Government Contracts Implementation Instructions No. 2 of 2014 applies exclusively to specific types of contracts due to the large exceptions contained therein. The Iraqi legislator, although expressed its willingness to adopt the means of amicable settlement through arbitration. The legislative capabilities were unable to meet them, as the legislator's vision is still inaccurate and ambiguous in this regard, which calls for the enactment of a special law on arbitration in administrative contracts that would ensure a fair mechanism for settling disputes and encourage confidence in contracting with the administration and then improve the national legal environment in line with international obligations, ensuring competitive advantages to attract investments and achieve economic development in the country in a manner that does not conflict with the privacy and purpose of administrative contracts.

Keywords: *Alternative Settlement, Amicable Means, Legislative Vacuum, Administrative Arbitration, Administrative Contracts, Administrative Disputes.*

Introduction

Administrative contracts are one of the most prominent legal works that the General Administration resorts to in order to carry out its tasks, as it is a basic tool through which the society needs are met in important vital areas towards the infrastructure's establishment and the public services' provision. The system of settling administrative contract disputes through the judiciary has been repeatedly criticized because of its complex procedures, length and high costs. In France, there was an urgent need to improve the efficiency of this system, which called for

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the introduction of alternative methods for settling administrative contract disputes outside the traditional judiciary's framework, one of the most important of which is arbitration "l'arbitrage", and it seemed somewhat surprising at the beginning since the two concepts (arbitration and administrative contracts) do not belong to the same legal branch in countries with a francophone legal tradition "de tradition francophone", as the activities of legal persons subject to public law are subject to exceptional rules that differ from private law persons, because they aim to give priority to the public interest at the private interest's expense and because arbitration is a consensual and equal means to settle contractual disputes within the framework of private law . However, the issue of countries' acceptance of arbitration as a means of resolving disputes in administrative contracts has gradually evolved in light of the economic relations' expansion between nations, the development of international legislation and the transformations in the rules and principles of administrative law.

Research Importance

We demonstrate this research's importance in the following:

1. The resort to arbitration in administrative contracts does not conflict with the principle of the country's legality and sovereignty whenever there is a clear legislative organization that ensures a balance between the public administration's interest and the contracting parties rights' protection.

2. The national legislator's identification of clear and effective mechanisms for the amicable settlement of disputes in line with its international obligations shall enhance confidence in the country's administrative and legal system. This confidence is directly proportional to the willingness to make contracts with the administration by motivating investors to enter into projects with state entities with confidence and safety.

3. Filling the legislative vacuum in the provisions of arbitration in administrative contracts through clear legal rules shall make it an effective means of resolving disputes quickly and efficiently away from judicial procedures, which makes contracting with the country more attractive for the existence of a stable legal environment.

Research Problem

The research problem is represented in the following axes:

1. The existence of a large legislative vacuum in the Public Contracts Law No. 87 for the year 2004 and the Government Contracts Implementation Instructions No. 2 for the year 2014 regarding the arbitration agreement in administrative contracts, which makes it very difficult to determine its concept, scope and types, thus it is forced to return to the general rules of arbitration in the Civil Procedures Law No. 83 for the year 1969 to fill this vacuum, which contradicts the privacy of administrative contracts.

2. Legal ambiguity in determining the legitimacy basis of national or international arbitration in administrative contract disputes and the harmonization mechanism between national and international laws, which affects the validity of resorting to it in some cases.

3. The absence of legal rules that determine and regulate the conditions for the arbitration agreement's validity in administrative contracts from the formal and substantive aspects.

4. The absence of legal rules that regulate the arbitration's effects decisions in administrative contract disputes, which leaves room for explanation and interpretation regarding

determining the binding force of those decisions and weakens confidence in their enforceability among the contracting parties, which reflects negatively on the investment environment.

Research Objectives

The research aims to:

1. Monitor legal gaps by revealing the manifestations of the legislative vacuum in the arbitration's subject in administrative contract disputes.

2. Review the laws and instructions of administrative contracts and analyze their texts to understand the impact of the legislative vacuum on the legality of settling administrative contract disputes in Iraq through arbitration.

3. Create a comprehensive and clear legislative system for arbitration in administrative contracts that is distinguished from what it is in private law contracts, to achieve legal stability in the management of those contracts and resolve disputes related to them quickly and fairly; as well as, to enhance the country's reputation in the field of investment.

Research Hypothesis

The research is based on proving the validity of the following hypothesis:

(There are clear manifestations of the legislative vacuum in the Iraqi law on the amicable settlement of administrative contract disputes through arbitration due to the lack of a respective law, which necessitates the legislator to intervene by enacting the arbitration law in administrative contracts to provide a legal framework for resolving disputes amicably more flexibly, quickly and effectively and in a way that contributes to improve the national work environment and enhancing confidence in bringing investments to it, in line with international standards and obligations).

Research Methodology

The research methodology shall be descriptive and analytical, as we shall describe the matter under study by reviewing the texts of the current laws and instructions related to arbitration in administrative contracts to reveal the manifestations of the legislative vacuum in them and then analyze those texts and evaluate them to reach legal solutions that contribute to filling this vacuum.

Research Plan

We shall divide the research into five axes:

a. Arbitration Concept

b. Arbitration Types

c. Arbitration's Legality Basis in Administrative Contract Disputes

d. Arbitration's Validity Conditions in Administrative Contract Disputes

e. Arbitration Verdict's Effects in Administrative Contract Disputes

Arbitration Concept

Arbitration is generally understood in all legal systems as a special means of resolving disputes. the French jurist Henry Motulsky has devoted an article on the legal nature of arbitration: "

Arbitration is a special justice of impairment origin, granting a person authorized by law to adjudicate a legal claim.", while others described their concept of arbitration as “Means of settling disputes represented in referring them to normal persons who have no status other than that they have been chosen by the parties". Professor David Reny sees a much broader definition of arbitration, as he considers it “A technique aimed at finding a solution to a question relating to relations between two or more persons, by one or more persons - the arbitrator(s)- who obtain their powers from a special agreement and render their judgment on the basis of this agreement, without being appointed to this task by the State". Some went to a contemporary or sophisticated definition of arbitration by saying "Arbitration is private justice, where a third party is contractually assigned to settle a dispute and performs a judicial task ", and “Arbitration is a judicial means of settling disputes without interference from the government judge; it is an alternative means that may be likened to a type of "private justice" that distinguishes it from characteristics that differentiate it from other means of settling disputes or regulating contractual relations. Arbitration is characterized by a dual nature; it is contractual and judicial and there is a mixture between the two elements. All of this is based on the will of the parties that appear through the arbitration agreement , while others believe that the term arbitration includes two meanings, one of which is the agreement of the parties to the contractual relationship to present the dispute to a neutral party other than the judiciary, whether before or after the dispute’s occurrence, for the purpose of resolving this dispute, while the second meaning is the work carried out by this neutral party according to a specific system for it in advance or as determined by the disputants, in order to resolve this dispute to reach its actual resolution and by combining these two meanings, the meaning of arbitration is achieved . National laws are often keen to develop a definition of arbitration, whether within the framework of public or private law, and the Iraqi legislator has not developed any definition of arbitration, whether within the scope of the Civil Procedure Code No. 83 for the year 1969 or within the scope of the Public Contracts Law No. 87 for the year 2004 and the Government Contracts Implementation Instructions No. 2 for the year 2014, as the Law No. 87 or the year 2004 did not contain an explicit text dealing with arbitration as a means of settling disputes related to administrative contracts , while Article (8/II/A) of the Government Contracts Implementation Instructions No. 2 for the year 2014 referred to the resort to arbitration in the event of failure to reach an amicable agreement (consensus) between the contracting authority and the contractor. We consider that the lack of a legal definition of arbitration represents a prominent manifestation of the legislative vacuum that is reproached by the Iraqi legislator in organizing this issue, since this vacuum makes the nature of arbitration tainted with ambiguity and lack of clarity for the parties to the contract and even for arbitrators or arbitral tribunals, knowing that this is a fundamental issue that cannot be ignored by the legislator, as it contributes to determining the legal nature of it accurately and distinguishes it from other means of amicable settlement such as conciliation, mediation or negotiation; as well as, it helps to determine the scope of arbitration by setting the legal basis for it, which gives it clarity, which helps to organize it duly and appropriately.

We believe that arbitration in administrative contracts should be subject to legal restrictions decided to protect the public interest and ensure compliance with the mandatory rules in administrative law and we believe that the significance of arbitration in public law does not differ from it in private law in terms of being a means of settling disputes without resorting to the judiciary. We can define arbitration within the scope of public law as a voluntary agreement between the administration and the contractor or an obligation under the law that imposes resort to arbitration to settle the dispute. It is implemented in accordance with the conditions and procedures regulated by the applicable law or in accordance with what was agreed upon by the

parties in the contract and without prejudice to considerations of public interest at any stage of the contract as long as it depends on the existence of this voluntary agreement or legal obligation for the administration and the contractor. It ends with the issuance of the arbitral ruling that determines how to settle the dispute and has the same binding force on the contracting parties as a judicial ruling has the same force as a final judgment within the limits of the administrative dispute that has been resolved .

Arbitration Types

We distinguish between the arbitration types according to the angle from which it is viewed according to different criteria: in terms of the arbitration scope (national and international), in terms of the mandatory arbitration (optional and compulsory), in terms of the arbitration body (individually and institutionally), and in terms of the arbitration board (traditionally or electronically).

National Arbitration & International Arbitration:

Countries often tend in their legislation to adopt the system of double or bilateral arbitration “Le dualisme des régimes " and national arbitration is arbitration that takes place in accordance with the provisions of the national law of the parties to the dispute and within the scope of their state. It is subject to legal regulation originating from all internal procedures and rules made by the national legislator and there is no foreign element in the dispute. In addition, national arbitration is related to internal contractual relations in all its subjective elements subject, parties and reason . Despite the adoption of the Iraqi law of national arbitration, it did not know or regulate its rules for administrative contracts and only adopted the general rules of arbitration in accordance with the Civil Procedure Law No. 83 for the year 1969 or in accordance with the procedures specified in the tender or contract . However, since the nature of administrative contract disputes and their objectives differ from the nature of private law contract disputes and their objectives, leaving the regulating on the national arbitration for the terms and conditions of the tender without a specific legal system and its variation from one contract to another raises many problems, including those related to ambiguity in the rights and obligations that arise from the arbitration agreement and then weaken confidence in the national legal system of arbitration and try to settle the dispute by resorting to international arbitration, and perhaps the most influential problem due to this vacuum is the damage to the protection of public money and exposing it to danger in the event that the arbitration agreement includes clauses that harm the public interest and cause waste of public money. It should be noted that the distinction between national arbitration and international arbitration is either determined by national law or an international convention and this means that the administrative contract in dispute that is settled through arbitration may be a national contract or an administrative contract of an international nature because of the foreign elements associated with it. Although it is concluded for its implementation within the country and is sometimes called economic1 development contracts. Iraqi law did not clearly detail the rules of international arbitration in administrative contracts , as Instructions No. 2 for the year 2014 stipulate that (the contracting authority shall have the choice of international arbitration to settle disputes in cases of necessity and for major or important strategic projects and when one of the parties to the contract is a foreigner, taking into account the following...) .

Optional Arbitration & Compulsory Arbitration: Arbitration is divided according to the role of the will in its establishment into optional arbitration and compulsory arbitration. Optional arbitration “Arbitrage Facultative" is the one in which the parties to the contract choose to resort to it without being obligated to do so under the law or a previous contractual clause. They agree

by mutual consent to refer their dispute to one or more arbitrators of their choice, thus it is optional, as resorting to it was done of their own free will and they have the choice between putting the dispute before the judiciary or presenting it to arbitration . On the other hand, compulsory arbitration is resorted to in some special cases in which the law requires resorting to arbitration, thus that it is not permissible to resort to the judiciary in these cases only after taking into account what the legislator stipulated that the dispute must be submitted to the arbitration body referred to, and if one of the parties files a lawsuit to the judiciary and did not follow the path of arbitration referred to by the legislator, the other party may insist on not accepting the lawsuit. It is noteworthy that the Iraqi law adopted the optional arbitration system in administrative contract disputes. As for compulsory arbitration, there is no application within the framework of administrative contracts since there is no explicit legal text - whether in the Civil Procedure Law No. 83 for the year1969 or the Government Contracts Implementation Instructions No. 2 for the year 2014 or even the Investment Law No. 13 for the year 2006. The parties to the administrative contract are obliged to adopt arbitration to resolve the dispute and this means that arbitration in the vision of the Iraqi legislator remains an alternative option to settle the dispute in accordance with the applicable law.

Free Arbitration & Institutional Arbitration: Free arbitration means arbitration in which the parties to the contract themselves, in accordance with what the law authorizes them, choose arbitrators and arbitration rules and procedures away from any permanent center or permanent institution for arbitration, either institutional arbitration is the one in which the parties to the contract agree or under the law that arbitration is carried out by a permanent arbitration center or a national or international arbitration institution. Thus, arbitration is carried out in accordance with the system of this institution or center and their procedures .

Perhaps one of the manifestations of the legislative vacuum in Iraqi law is the absence of explicit and specific regulation of the mechanisms of free or institutional arbitration in administrative contracts. Iraqi law has not issued special legislation that determines and regulates institutional arbitration through the adoption of centers for administrative disputes locally or internationally, as it is often left to the general conditions of tenders or what is agreed upon within the contract or under an international agreement. Consequentially, this legislative vacuum shall cause ambiguity and lack of legal clarity for the administration and the contractor regarding the regulation of free or institutional arbitration provisions, This shall inevitably affect the creation of vulnerabilities and gaps that cause an increase in administrative disputes and complexity instead of resolving them.

Traditional Arbitration & Electronic Arbitration: Traditional arbitration is conducted according to the traditional means of the arbitration system, with the existence of paper and writing; as well as, the physical presence of people and listening to them until the arbitration ruling is issued in the traditional way. As for electronic arbitration, it does not differ from it except in terms of the means or mechanism used, as it relies on digital technology in its procedure "L'arbitrage en ligne" . After the widespread use of modern technologies in concluding contracts, the thought tended to settle them electronically through communication networks without the need for the movement or presence of the parties to the conflict in one place in order to achieve speed in resolving the dispute, flexibility in procedures and cost reduction.

In Iraqi law, there is no explicit legal text regulating electronic arbitration in administrative contracts, which calls for finding special rules for this type of arbitration to ensure keeping pace with technological and digital developments that allow facilitating the resolution of

administrative contract disputes and promotes safe and fair use in providing quick and effective solutions to those disputes in line with the requirements of the digital age.

Arbitration's Legality Basis in Administrative Contract Disputes

Arbitration in administrative contracts is an exception to the general rule; therefore, may not be resorted to except on the basis of an explicit legal text or when the nature of the contract so requires . The legality of resorting to arbitration in administrative contract disputes in Iraq is based on two bases: a national basis related to the internal legal system that regulates arbitration and determines its controls and an international basis related to international conventions and treaties certified by Iraq and have become part of internal law. It may be said that the manifestations of the legislative vacuum in the organization of the arbitration's internal law in administrative contracts had a significant impact in weakening the basis of the legality of resorting to this means in some cases.

Arbitration's National Basis in Administrative Contract Disputes

There is no unified national basis for arbitration in administrative contract disputes, but there is a set of legislation (laws and instructions), whose texts include separate and unclear provisions for arbitration, which represents a manifestation of the legislative vacuum that requires the unification of those provisions and their detail within one law in order to avoid the legal and practical problems that arise from this vacuum. These legislations are:

- Civil Procedure Law No. 83 for the year 1969: It is the legal basis for the arbitration legality in general, as it recognizes arbitration as a means of resolving contract disputes in general, within the provisions of Article (251) thereof: "It is permissible to agree on arbitration in a particular dispute, and it is also permissible to agree to arbitrate in all disputes arising from the implementation of a particular contract.". We believe that this law did not meet the requirements of introducing arbitration in administrative contracts to take it as a legal basis in the correct sense, until the issuance of the Government Contracts Implementation Instructions No. 2 for the year 2014, the actual application in Iraq did not witness the settlement of administrative disputes through arbitration, which indicates that the arbitration provisions in the Civil Procedure Law were not sufficient or appropriate to establish them.

- Dissolved Coalition Provisional Authority Order on Public Contracts No. 87 for the year 2004: Although this law did not explicitly address arbitration. It allowed the use of "principles of alternative dispute settlement to the maximum extent possible" .Perhaps the most prominent manifestations of the legislative vacuum that made the law marred by ambiguity and lack of clarity is the lack of a clear definition of alternative settlement and what are its principles; as well as, the text did not specify or enumerate alternative settlement methods to avoid confusion and confusion in them (arbitration - mediation - conciliation – negotiation, etc.), and arbitration did not emerge as a way to resolve administrative disputes under this law until the issuance of the Government Contracts Instructions No. 2 for the year 2014.

- Government Contracts Implementation Instructions No. 2 for the year 2014: These instructions explicitly stipulate arbitration, as Article (8) of which referred to the resort to national and international arbitration in the context of settling administrative contract disputes, and we believe that the organization of arbitration based on administrative instructions shall make it lacking solid fixed legal foundations that support it and enhance the confidence of the parties in its strength, so its provisions are subject to variation, change and diligence. On the other hand, these instructions did not allow arbitration except in specific types of contracts and within the

narrowest limits (the most important contracts for works, general contracting and equipment). Therefore, they exclude from their scope many contracts towards investment and internationally financed contracts and there are contracts that do not include arbitration concluded by the administration under the State Money Sale & Rent Law No. 21 for the year 2013. In this matter, there are clear indications of the restriction of resorting to amicable settlement through arbitration.

Arbitration's International Basis in Administrative Contract Disputes

The international basis for the arbitration legality in administrative contracts is derived from the main sources represented by international treaties and conventions that regulate international arbitration in general, provided that Iraq certifies it by law and becomes part of its national legal system . It aims to regulate the provisions of international commercial arbitration in particular to ensure the implementation of arbitral verdicts in a consistent manner at the national and international levels. Nonetheless, despite the importance of these treaties and conventions in organizing international arbitration, we find that the Iraqi legislator did not take into account when certifying them establishing a mechanism to implement and activate them by incorporating their texts or principles into national law.

Among the most important of these conventions: Convention on the Foreign Arbitral Verdicts Recognition & Enforcement (New York Convention of 1958), which Iraq certified by Law No. 14 for the year 2021, according to which contracting states are obliged to recognize arbitral ruling as binding and implement them in accordance with the procedural rules followed in the territory in which the decision is invoked and shall not impose on the recognition or enforcement of arbitral verdicts to which this Convention applies any more stringent conditions or any fees or charges that are significantly higher than those imposed on the recognition or enforcement of national (local) arbitral verdicts. The question here is how international arbitration verdicts shall be implemented in the light of the Civil Procedure Law No. 83 for the year 1969 or the laws related to administrative contracts if they first suffer from a legislative vacuum in regulating the arbitration at the national level?

On the other hand, and returning to Law No. 14 for the year 2021, we find that the scope of application of the agreement was determined according to the type of contractual relationship, " the agreement shall not be applied by the Republic of Iraq except to disputes arising from contractual legal relations, which are commercial under Iraqi law". Does the agreement mean that all types of administrative contracts do not apply? We see that the text is tainted by ambiguity leading to the legislative vacuum and then allowed the meaning of the text and its interpretation in an extensive manner, which leads to a variation in application according to the nature of the contract, as it did not specify accurately the criteria that distinguish the commercial contract from the administrative contract, especially for modern administrative contracts of an international commercial nature "Les contrats administratifs à caractère international" in light of the convergence between management and international trade imposed by the repercussions of economic globalization on countries .

It is worth noting that there are many important agreements in the field of arbitration, including the Investment Disputes' Settlement Convention between countries and nationals of other countries (Washington of 1965 ICSID), which Iraq certified by Law No. 64 for the year 2012 and the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention on Transparency) of 2014 and certified by Law No. 25 for the year 2020, which obliges country parties to apply the rules of UNCITRAL for transparency in treaty

arbitration including publication of arbitral verdicts. There are also a number of Arab charters and conventions, including the Arab Commercial Arbitration Convention of 1987, certified by Law No. 30 for the year 1994.

It is clear to us that international treaties and conventions constitute an international basis for the legality of resorting to arbitration in Iraq, but they need to activate their clauses and integrate them into national legislation to avoid potential conflict between national and international law, as arbitration in these contracts is still carried out through the basic general rules to which all types of contracts are subject, although the specificity of the administrative contract and the challenges related to it require the existence of a special system in which priority is for considerations of protecting the public interest, in line with the international obligations imposed by these arbitration treaties and conventions.

Arbitration's Validity Conditions in Administrative Contract Disputes

Arbitration is an alternative means of settling administrative disputes, which requires the availability of formal and objective conditions to ensure its validity and legitimacy . However, the principal is that the legislator regulates these conditions to protect the rights and interests of the administration in the first place and then the rights of its contractors, as it is not possible to deal with these contracts as contracts are treated within the scope of private law, and with the importance of this issue, Article Eight of the Government Contracts Implementation Instructions No. 2 for 2014 did not explain in detail, as it mentioned arbitration as a means of resolving the dispute, but did not indicate the conditions for the validity of resorting to it, whether for formal or substantive conditions , which created legal ambiguity that would raise legal problems about the validity of those conditions.

1. Arbitration's Formal Conditions: which relate to the procedural aspect of arbitration and are represented in proving the arbitration agreement, determining the place of arbitration, selecting arbitrators and determining the applicable law.

- Arbitration Agreement Proof: The principle is that the arbitration agreement must be proved in written form to legalize it and prove it, thus writing is an essential condition for the conclusion of the arbitration agreement and ensure its clarity and the inevitability of adhering to it . However, instructions No. 2 for the year 2014 did not stipulate that writing must be a prerequisite for proving it and did not specify the image or formality in which this agreement appears, so whether it is part of the original contract or separate from it under another contract attached to it and did not indicate the provision of oral agreements between the parties to resort to arbitration in terms of the extent to which they may be relied upon or not to prove the arbitration agreement.

- Arbitration Place: The determination of arbitration place and its confirmation in the agreement is an integral part of the arbitration process, and is essential to determine the applicable law and ensure the stability of arbitration procedures, and as the Government Contracts Implementation Instructions No. 2 for the 2014 did not contain any organization of the arbitration place, whether national or international, but it did mention (determining the place and language of arbitration) and (choosing one of the accredited international arbitral tribunals), without stipulating the procedures governing this issue, which created a legislative vacuum that would cause future disputes between the parties over the choice of the place of arbitration.

- Arbitrators' Selection: The Government Contracts Implementation Instructions No. 2 for 2014 did not provide for an explicit rule that sets objective criteria regarding determining the number of arbitrators, the mechanism of their selection and their qualifications, whether it is a free

arbitration or through an arbitration institution, which shall leave the options open to the parties to the contractual relationship, which means the possibility of disputes on this issue and its repercussions on achieving justice in settling the dispute in the event that the arbitrators are chosen subjectively and without legal control.

- Applicable Law Determination: Each agreement in any contractual relationship must be governed by a law that governs it and shows its conditions and limits, and the arbitration agreement is one of the contractual forms governed by this rule and although the Government Contracts Implementation Instructions No. 2 for 2014 stated that Iraqi law is applicable for international arbitration , it did not mention the competent law specifically and did not develop a clear mechanism to settle the potential dispute due to the conflict between national and international laws, which made the text ambiguous and shall undoubtedly open the field wide for legal problems that shall arise between the parties due to the different laws and how to adapt them to the nature of the administrative contract in dispute.

2. Arbitration's Objective Conditions: Since it is decided that the arbitration agreement is a contract like other contracts, it requires in order to be valid, that it has the foundations of its existence, i.e. its pillars, namely capacity, place and reason .

- Eligibility: The arbitration agreement is valid only for those who have the legal capacity that gives them the authority to act in terms of acquiring rights or bearing obligations, whether a natural or legal person and the Government Contracts Implementation Instructions No. 2 for the year 2014 did not address the issue of the contracting party's eligibility as a condition for concluding an arbitration agreement in administrative contracts and the impact of its default; as well as the lack of clarity of the legislative position of the extent of parties' participation possibility in the arbitration agreement through proxy and authorization.

Due to the dispute nature in the administrative contract and the consequences of the administration being a public authority that may only be judged through its official judiciary and national laws, the state system may sometimes require what restricts the administration's eligibility to resort to arbitration, especially in contracts of an international nature, through the need to obtain prior permission issued by another administrative authority higher than it and arrange a penalty on the administration in the event that it resorts to arbitration without obtaining permission and no a reference in the Government Contracts Implementation Instructions No. 2 for the year 2014, regarding obtaining prior approval for the arbitration agreement, while it was more appropriate to organize it with an explicit text since arbitration in administrative contracts is an exception to the general rule, especially since resorting to international arbitration is a direct violation of the sovereignty of the country and its sovereign decisions related to administrative contracts, as facilitating recourse to it in administrative contracts threatens the special nature of those contracts and violates the guarantees of the public interest to be achieved.

- Arbitrability: The arbitration agreement arbitrability or what is known as "l'arbitrabilité": this term means the extent to which the dispute may be settled through arbitration, i.e. the cases in which it may be resorted to, and on this basis the arbitrability is linked to the development of the general rules of administrative contracts, the arbitration clause is not accepted unless expressly permitted by law, or not prevented from following it, or deduces its authorization through the powers granted by law to the authority of the public administration.

The prominent appearance of the legislative vacuum in the Government Contracts Implementation Instructions No. 2 for the year 2014 is the lack of a clear and specific legal

regulation of the ability of administrative contracts to arbitrate instead of resorting to the judiciary . There is no accurate direction of the legislator for disputes that are subject to national arbitration as the text came with an absolute judgment without restriction, except what it mentioned regarding the choice of international arbitration to settle disputes in cases of necessity and major or important strategic projects and when one of the parties to the contract is a foreigner . However, it did not set the criteria that are adopted to determine the amount of necessity and the degree of importance for administrative contracts and who is the competent authority to estimate this issue, which shall affect the validity of a basic condition of arbitration conditions. This legislative vacuum shall lead to ambiguity in determining arbitrable disputes because the subject of arbitration should be determined, specific and legitimate, and then these legal loopholes may be exploited by contracting parties to achieve private interests and gains at the expense of the public interest, by rejecting or accepting arbitration in some types of administrative contracts without others to prevent submission to the provisions of a particular law in the event of resorting to the judiciary.

- Reason: arbitration finds its reason in the agreement of the parties to exclude the submission of the dispute to the judiciary and delegate the matter to the arbitrators, which is always a legitimate reason as long as permitted by law and may not be imagined illegality in this case, unless it is proven that the purpose of choosing arbitration is to evade the provisions of the law that must be applied if the dispute is settled through the judiciary, due to the restrictions and obligations it contains to be dissolved from, then the reason for resorting to arbitration is illegal . The Government Contracts Implementation Instructions No. 2 for the year 2014 did not include an explicit text in which it is required to indicate the reason for resorting to arbitration as an objective condition for the arbitration agreement's validity, meaning when the choice of arbitration is justified, since arbitration in administrative contracts is an exception to the general original. So it is imperative for the legislator to determine the fundamental reasons that are a real justification for considering arbitration as the most appropriate means of settling the dispute in certain cases required by considerations of public interest, towards the willingness to speed up the settlement of the dispute to reduce financial costs, thus avoiding the possibility of misinterpretation and exploitation of this legislative vacuum by the contracting parties to procrastinate and achieve illegal interests.

Arbitration Verdict's Effects in Administrative Contract Disputes

Arbitration in administrative contract disputes leads to legal effects for its parties represented in issuing arbitral verdicts to resolve the dispute and the ratification of this decision by the competent judiciary.

- Dispute Resolve by the Arbitration Ruling Issuance: The purpose of arbitration is to settle the dispute and the arbitral ruling may be effective as soon as it is issued, as is the authority of the res judicata, like the judgment issued by the judiciary, according to which a final solution to the dispute is found and cannot be re-presented to the arbitration body that issued it again . However, despite the fact that the Government Contracts Implementation Instructions No. 2 for the year 2014 acknowledges arbitration as a means of settling disputes, it did not accurately regulate the effects of the arbitration ruling and its authority for the parties to resolve the dispute, and the need to take into account the administrative dispute's subjectivity, which may allow the administration to refrain from complying with the arbitral ruling, especially for international arbitration verdicts that may affect the country's sovereignty and public order, which represents a serious manifestation of the legislative vacuum that requires careful legislative treatment, as

the lack of a clear legal text showing the legal force of the arbitral ruling in administrative contract disputes may push one of the parties to refrain from implementing it under the pretext of the lack of a law basis that requires the binding authority for it. This would weaken confidence in the effectiveness of this method of settling disputes and the extent of its seriousness since there are no sufficient legal guarantees to resolve the dispute through the arbitration ruling.

- Judiciary Ratification on the Arbitration Ruling: The arbitration verdicts themselves are not enforceable until after their ratification by the official judiciary in the country and the order is issued by it to implement them, and some justify this saying that it is a realization of the legislator's will to control the arbitration decisions from the formal and objective aspects to avoid that the arbitration ruling has been issued contrary to a provision of the law, and at the same time gives it the force of the executive bond that the official judiciary guarantees its forced implementation . This task is often entrusted to the jurisdiction of the administrative judiciary.

It is worth noting that the Government Contracts Implementation Instructions No. 2 for the year 2014 did not set the provisions on the issue of certification of arbitration verdicts, thus the text did not mention about the extent to which certification and procedures must be certified and the extent to which it can be objected to, while also not specifying the competent judiciary for certification. However, the practical reality indicates that the certification of the arbitration ruling is linked to the decision of the judge of the Court of First Instance pursuant to the provisions of Article (272/1) of the Civil Procedure Law No. 83 for the year 1969, which is subject to consideration , as we believe that the arbitration verdict should be certified by itself without the need for judicial certification if there are strict legislative restrictions that ensure the public interest's protection. The purpose of settling the dispute amicably through arbitration is to adjudicate it as soon as possible away from the litigation procedures and that the legislator when it adopts arbitration means that it has considered it a way to resolve disputes away from the courts and there is no need to impose judicial control on it, especially since the idea of certification stipulated by the law is not limited to the formalities of the issuance of the arbitral ruling only , but shall interfere with the content of the decision and its consequences and shall have the authority to cancel it or adjudicate the dispute itself if it is valid for adjudication, which means returning the parties to the dispute again to the corridors of justice, where the judiciary shall have its final word, which shall reduce the effectiveness of arbitration and weaken confidence in it. However, if this ratification is necessary, it is not permissible to involve the civil judgement as the administrative judgement is the worthiest of protecting the public interest and promoting the rule of law.

Conclusion

It has been proven to us, beyond any doubt, the inadequacy of current national legislation in organizing arbitration as an alternative friendly means to resolve administrative contract disputes and that the manifestations of the legislative vacuum in legal texts may reflect to us a deeper problem that exceeds the mere shortcomings or lack of those texts, which is the lack of clarity of the legislator's philosophy of the idea of resolving administrative disputes by arbitration, as it oscillates between the concerns of national sovereignty and its attempts to adhere to the traditional concepts and principles of administrative contracts by limiting the effectiveness of this means. Between what is imposed on it by international laws and the urgent need to keep pace with the international community and enact legislation in harmony with its international obligations, in light of the economic transformations taking place in the countries of the world, this ambiguity in the legislative position made the legislator's vision suspended between the need

to consider arbitration as an exceptional means of resolving disputes in administrative contracts, in order to preserve the principle of the country' sovereignty and the separation of powers, and its response to the requirements of economic reality and the willingness to make the country a suitable environment to attract local and foreign investors and motivate them to contract with the administration, which greatly affected its legislative role in this matter. Nonetheless, instead of drafting an integrated law in which arbitration is clearly adopted to achieve a balance between these two visions, the legislator went to set sporadic rules vague and inconsistent applicable to certain administrative contracts and excluded others from them or cut provisions from civil laws, which embodied private interests without taking into account the nature of administrative contracts, contributing to weakening the role of this means and reducing its effectiveness to a large extent.

We believe that the choice of arbitration as a means of settling administrative contract disputes has its advantages in addition to the reservations contained therein. But, perhaps, there is a boundary that the legislator may set between achieving these advantages and the reservations associated with it, through the enactment of a comprehensive law for arbitration in administrative contracts that ensures a balance between the public interest's protection and the country's sovereignty protection, and the requirements of achieving economic development and encouraging investment by making the resolution of administrative contract disputes more effective and flexible, which is what we hope the Iraqi legislator shall give attention to.

References

Arabic Books

Abu Al-Wafa, A. K. (1988). Voluntary & compulsory arbitration. Knowledge Foundation.

Al-Jubouri, M. S. A. (2019). Transformations of administrative law in light of globalization (1st ed.). Dar Wael for Publishing and Distribution.

Al-Mahrouqi, S. I. M., & Naji, A. M. A. (2012). Arbitration in administrative contracts (1st ed.). Law and Economics Library.

Al-Tahawi, M. S. (1999). Arbitration in civil and commercial matters and its permissibility in administrative contract disputes. New University Publishing House (Dar Al-Jameaa Al-Jadida).

Al-Tamawi, S. (1975). The general theory of administrative contracts (3rd ed.). Dar Al-Fikr Al-Arabi.

Amin, M. S. H. (1999). Administrative contracts. University Culture House.

Ghmija, A. M., & Louah, N. (2015). Arbitration in commercial, administrative, and civil matters (1st ed.). Dar Al-Afaq Al-Maghribia for Publishing and Distribution.

Ismail, M. A. (2018). Arbitration in public works contracts of international nature (1st ed.). Dar Al-Qarar; The Commercial Arbitration Center of the Gulf Cooperation Council.

Matar, E. A. F. (2009). Electronic arbitration. New University House.

Omran, S. (2017). Judicial control of arbitration in administrative contract disputes (1st ed.). Center for Arab Studies for Publishing and Distribution.

Sari, G. S. (1999). Arbitration & the permissibility of resorting to it to settle disputes in the field of administrative contracts. Dar Al-Nahda Al-Arabiya.

Wael Ezz El-Din Youssef, Arbitration in Administrative Contracts of an International Nature, Dar Al-Nahda Al-Arabiya, Cairo, 2010.

Wali, A. F. (2007). The law of arbitration in theory and practice (1st ed.). Maktabat Al-Ma'arif.

Wali, F. (2014). Arbitration in national and international commercial disputes: Theory and practice. Monshaat Al-Maaref, Alexandria.

b. Arabic Research & Journals:

Ahmed Abu Al-Wafa, Optional Arbitration, research published in Journal of Law for Legal & Economic

Research, College of Law – Alexandria University, Article 2, Volume 1954, Issue 2.1 January 1954. https://doi.org/10.21608/lalexu.1954.306704

Ahmed Dhaen Alsamdan, Applicable Law in Commercial Arbitration, Research Published in the Journal of Law, Scientific Publishing Council – Kuwait University, Volume 17, No. 1 and 2, 1993. https://doi.org/10.34120/jol.v17i1%20&%202.2969

Ahmed Khurshid Hamidi, Arbitration in Administrative Contracts and the Permissibility of Taking it in Iraqi Legislation, Research published in the Kirkuk University Journal for Human Studies, Issue 1, Volume 4, Fourth Year, 2009.

Al-Arabawi, Nabil Saleh, 2016, Arbitration Agreement, Books of Politics & Law, vol. 2016, p. 15, pp. 361-371. https://search.emarefa.net/detail/BIM-721367

Ali Ahmed Saleh Al-Mahdawi ،an analytical study in arbitration and its legal nature compared to Islamic jurisprudenceJournal of Law for Legal & Economic Research, Alexandria University, No. 1, January 2009. https://doi.org/10.21608/lalexu.2009.272197

Ali Ibrahim Ibrahim Shaaban, the extent to which arbitration is affected by the principle of state sovereignty by application to the Saudi system, research published in the Yearbook of the Faculty of Islamic and Arabic Studies for Girls, Alexandria, Volume 7, Issue 33, 2017. DOI: 10.21608/pfda.2017.22039

Ali Mohsen Towaib, The Role of Arbitration in the Field of Administrative Contracts in Iraq, Research Published in Maysan Journal of Comparative Legal Studies, Maysan University – College of Law, Volume 1, Issue 2, 2020. http://dx.doi.org/10.61266/mjcls.v1i2.41

Ali Sulaiman Al-Tamawi, Controls of the validity & existence of the arbitration agreement in administrative contracts, research published in the Legal Journal, Legislation and Legal Opinion Authority in partnership with the University of Bahrain, Issue 9, January 2019. https://www.lloc.gov.bh/QTopics/Q09T05.pdf

Al-Moussawi, Ali Fawzi. 2019. "International Commercial Arbitration and the Possible Application Thereof in Iraq." Journal of Legal Sciences 30 (1). https://doi.org/10.35246/jols.v30i1.230.

Atiyah, Ruaa Ali. 2017. "The Legal System of Arbitration as a Means of Settling Foreign Investment Disputes in Iraqi Legislation and the Kurdistan Region: A Comparative Legal Study." Journal of Legal Sciences 32 (2). https://doi.org/10.35246/jols.v32i2.50.

Issa, Lubna Abdul-Hussein, and Jalil Hassan Bishat. 2024. "Smart Arbitration in DAOs Disputes." Journal of Legal Sciences 39 (1): 408-451. https://doi.org/10.35246/h7jwbq41.

Asst. Prof. Dr. Lubna Abdul Hussein Issa Al-Saeedi. (2023). Judicial Security and Digital Justice: A Comparative Study. Al-Hiqouq Journal, (8th International Conference).

Kuder, Seba. (2022) 2023. "Tax Breaks and Investment". Journal of Legal Sciences 37 (2): 571-88. https://doi.org/10.35246/jols.v37i2.560.

Mohamed Ibrahim Moussa, Electronic Arbitration, International Commercial Arbitration Conference Research: The Most Important Alternative Solutions for Resolving Commercial Disputes, Special Issue of the Sixteenth Annual Scientific Conference, Volume 1, Emirates Center for Strategic Studies and Research, 2008.

Raed Jamal Salman Mohammed Al-Zaghrati –Ahmed Mohamed Al-Baghdadi, Arbitration & Dispute Resolution, research published in the Benha University Journal for Human Sciences, Egypt, Volume 1, Issue 2, October 2022, https://doi.org/10.21608/bjhs.1999.275513

RAJ Ali, M Almanasrah,Power of Arbitratio Agreement, J. Pol. & L. 12, 71, 2019.https://doi.org/10.5539/jpl.v12n2p71

Sadeghi Abbas - the extent to which administrative contract disputes may be settled through arbitration and the effects of resorting to it –A comparative study, research published in the Academy Journal for Research in the Social Sciences, Volume 4, Issue 2, 2022. https://asjp.cerist.dz/en/article/208968

Zibar El-Shazly, Concept of arbitration agreement and the extent to which it is embodied as a means of resolving investment disputes, research published in the Journal of Legal Studies, Université Yahia Farès de Médéa ،Algérie, Volume 4, Issue 1, 2018. https://asjp.cerist.dz/en/article/58716

Dr. Ahmed Remo Group, Implementation of arbitration verdicts, United Arab Emirates as a model, research published in the Journal of Mediation and Arbitration, Issue 3, 2023.https://actadr.org/cached_uploads/download/2024/04/17/%D8%AA%D9%86%D9%81%D9%8A%D8%B0-%D8%A3%D8%AD%D9%83%D8%A7%D9%85-%D8%A7%D9%84%D8%AA%D8%AD%D9%83%D9%8A%D9%85-%D8%A7%D9%84%D8%A7%D9%85%D8%A7%D8%B1%D8%A7%D8%AA-%D8%A7%D9%84%D8%B9%D8%B1%D8%A8%D9%8A%D8%A9-%D9%86%D9%85%D9%88%D8%B0%D8%AC%D8%A7-1713384848.pdf

C. National Legislation:

Constitution of the Republic of Iraq of 2005

Civil Procedure Law No. 83 of 1969.

Public Contracts Law (dissolved CPA Order No. 87 of 2004).

Government Contracts Implementation Instructions No. 2 of 2014.

Law No. 14 of 2021 - Law of Accession of the Republic of Iraq to the Convention on the Foreign Arbitral Verdicts' Recognition & Enforcement (New York, 1958).

Investment Law No. 13 of 2006.

Law No. 21 of 2013 on State Funds' Sale & Rent.

E. Foreign Sources:

Emma Picard. Le contrat administratif dans la sphère internationale et les méthodes de droit international privé. Droit. 2023. ffdumas-04158463fhttps://dumas.ccsd.cnrs.fr/dumas-04158463v1

Alhousseini MOULoul, L'arbitrage dans l'espace OHADA, Conférence Internationale sur le Droit des Affaires de l'OHADA, Maison du Droit Vietnamo-Française, Hanoï (Vietnam), le 28 janvier 2010

Ancel, M.-E. (2011). Le nouveau droit français de l'arbitrage: le meilleur de soi–même . Arbitraje. Revista de arbitraje comercial y de inversiones, 4(3).

Chambon, Maxence. « L'arbitrage international en Droit Administratif, où l'impossible conciliation de deux phénomènes antagonistes ». Civitas Europa, 2013/2 N° 31, 2013. p.261-284. CAIRN.INFO, droit.cairn.info/revue-civitas-europa-2013-2-page-261?lang=fr.

Ching-Lang Lin, L'arbitrage dans les contrats administratifs : étude comparée, droit français-droit libanais, Thèse de doctorat, Institut d'Etudes Politiques de Paris ECOLE DOCTORALE DE SCIENCES PO ,2014.https://theses.hal.science/tel-03512739/file/2014IEPP0023-Lin-Ching-Lang-resumeFR_annexe.pdf

Jean-Louis Delvolve, Gerard H. Pointon, Jean Rouche, "French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration", Kluwer Law International, 2009.

JOURDAN-MARQUES (J.), Le contrôle étatique des sentences arbitrales internationales, préf. CLAY (Th.), LGDJ, 2017

MOTULSKY (H.), « La nature de l'arbitrage », in MOTULSKY (H.), Écrits : Études et notes sur l'arbitrage, rééd., Dalloz, 2010.

Pour plus de détails, voir: Tricoit, J. (2019). Fiche 46. L'arbitrage. In Fiches de Culture juridique: Rappels de cours et exercices corrigés (pp. 301-306). Ellipses. https://droit.cairn.info/fiches-de-culture-juridique--9782340029897-page-301?lang=fr

Priscilla merabti. La notion de sentence arbitrale : étude de droit de l'arbitrage commercial. Droit. Université Panthéon-Sorbonne - Paris I, 2022. Français. ffNNT : 2022PA01D045ff. fftel-04654690f.

Schultz, T. (2002) Online dispute resolution (ODR) : résolution des litiges et ius numericum. Revue interdisciplinaire d'études juridiques, Volume 48(1), 153- 203 https://doi.org/10.3917/riej.048.0153.p160-161

Hamza JABIR, & Kamal LAGTATI. (2023). Le règlement en ligne des litiges du commerce électronique : cas de l'arbitrage électronique. Revue international du droit des affaires, Avril et Mai 2023(45), 17. https://doi.org/10.5281/zenodo.7872435

Hirsch, Laurent (Hrsg.); Imhoos, Christophe (Hrsg.) Arbitrage, médiation et autres modes pour résoudre les conflits autrement (PrintPlu§),2018 ,Schulthess Verlag.

Deffains, B. et Gabuthy, Y. (2008) . La résolution électronique des litiges favorise-t-elle le développement de nouvelles stratégies de négociation ? Négociations, n° 10(2), 9-2 https://doi.org/10.3917/neg.010.0009

Charles Vautrot-Schwarz. L'arbitrage et le droit public français. 2022. ⟨hal-04512282⟩

D. Websites:

Convention on the Recognition and Enforcement of Foreign Arbitral Verdicts (New York Convention of 1958):https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/ar/new-york-convention-a.pdf

Washington Convention of 1965 (ICSID):https://icsid.worldbank.org/sites/default/files/documents/ICSID_Convention.pdf

United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (2014):https://uncitral.un.org/sites/uncitral.un.org/files/media- documents/uncitral/en/transparency-convention-a.pdf

Guide to drafting an arbitration clause in contracts Iraq Guide for Drafting International Arbitration Clauses https://cldp.doc.gov/programs/cldp-in-action/iraq-guide-drafting-international-arbitration-clauses