RESEARCH ARTICLE

AJEE
ACCESS TO JUSTICE IN EASTERN EUROPE
Peer-reviewed Journal

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print)
ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

Special Issue, the Second GPDRL College of Law International Conference on Legal, Socio-economic Issues and Sustainability

Research Article

SUSTAINABILITY AND CHALLENGES OF ARBITRATION IN ADMINISTRATIVE CONTRACTS: THE CONCEPT AND APPROACH IN SAUDI AND COMPARATIVE LAW

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Submitted on 12 Feb 2023 / Revised 27 Feb 2023 / Approved **10 Mar 2023**
Published online: **06 Apr 2023** / Last published: **17 Jun 2023**

Summary: 1. Introduction. – 2. Arbitrability of Administrative Contracts in Comparative Law. – 3. The Concept of the Administrative Contract in Comparative and Saudi Law. – *3.1 The Concept of the Administrative Contract in Comparative Law. – 3.1.1 The administration is a party to the contract. – 3.1.2 The contract is related to public*

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Corresponding author, responsible for writing and research. **Competing interests:** Any competing interests were included. Disclaimer: All authors declare that their opinions and views expressed in this manuscript are free of any impact of any organisations. **Translation:** The content of this article was translated with the participation of third parties under the authors' responsibility. **Funding:** The authors would like to acknowledge the support of the Prince Sultan University for paying the Article Processing Charges (APC) of this publication. This work was supported by the Governance and Policy Design Research Lab (GPDRL) of Prince Sultan University.
Managing editor – Mg Polina Siedova. **English Editor** – Lucy Baldwin.
Guest Editors of the **Special Issue:** Dr. Mohammed Albakjaji, Prince Sultan University, and Dr. Maya Khater, Al Yamamah University, Saudi Arabia

How to cite: H Shhadah Alhussein, Z Meskic, A Al-Rushoud 'Sustainability and Challenges of Arbitration in Administrative Contracts: the Concept and Approach in Saudi and Comparative Law' 2023 Special Issue Access to Justice in Eastern Europe 10–22. https://doi.org/10.33327/AJEE-18-6S004

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Keywords: Sustainability; SDG 16; arbitrability; arbitration;, administrative contracts; Saudi Arabia

ABSTRACT

Background. *The arbitrability of administrative contracts contributes to sustainable dispute resolution within the United Nations' Sustainable Development Goals 16 (SDG 16). However, different regulation of administrative contracts in comparative law affects the arbitrability of the disputes arising out of them. The question arises – is protection deserved if an administrative contract containing an arbitration clause concluded in violation of the administrative law of the governmental body or without a special approval is invalid, unenforceable, or if the company was unaware of such a requirement? This paper analyses the concept of an administrative contract and its arbitrability in Saudi Arabia and comparative law to provide for sustainable solutions.*

Methods. *The analysis of the applicable arbitration and administrative laws and rules is conducted with the normative method to establish the arbitrability of the disputes arising out of administrative contracts and the concept of the administrative contract. The case analysis reveals if the legislative approach causes difficulties in practice. The dogmatic method is applied to link the reasons for legislative and case law development to the current normative solutions in comparative and Saudi law. The conclusions on the existing problems and possible solutions shall be based on the analytical method.*

Results and Conclusions. *Government contracts are of great importance and their exclusion from arbitration contradicts the set goal of sustainable dispute resolution mechanism. Differences in comparative law in terms of the notion of the administrative contract and the arbitrability may diminish the positive effects of arbitration in administrative contracts, as they may endanger equal access to dispute resolution as part of the sustainable development goals, be enforceable, or even cause discrepancies between states that annul the arbitration awards and others that still enforce the awards despite their annulment.*

1 INTRODUCTION

Sustainable development was long linked to dispute resolution only when analysing disputes on environmental protection, but it took some time before sustainable dispute resolution became a goal in itself.[4] Equal access to dispute resolution is part of the UN sustainable development goals (SDG 16), to which most developed states, including Saudi Arabia, are committed.[5] Alternative dispute resolution mechanism, such as time and cost-effective methods interacts with some other objectives in the field of environmental sustainability

4 N Kaminskienė, I Žalėnienė and A Tvaronavičienė, 'Bringing Sustainability into Dispute Resolution Processes' (2014) 4 (1) Journal of Security and Sustainability 69, doi.org/10.9770/jssi.2014.4.1(6).

5 Z Meskic et al, 'Digitalization and Innovation in Achieving SDGs – Impacts on Legislation and Practice' (International Conference on Sustainability: Developments and Innovations (ICSDI-2022), Riyadh, Saudi Arabia, 19-22 February 2022) (2022) 1026 IOP Conf Ser: Earth and Environmental Science doi: 10.1088/1755-1315/1026/1/012061.

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ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

goals of the 2030 Agenda, which concerns: access to safe water (SDG 6), access to sustainable energy (SDG 7), addressing the environmental consequences of urban development (SDG 11),[6] detaching economic growth from non-sustainable resources (SDG 12), [7] climate change (SDG 13), protection of resources of marine areas, seas, oceans, and usage of these resources based on a sustainable basis (SDG 14), protection and sustainable use of terrestrial ecosystems (SDG 15), and finally, cooperation among all entities, governmental or non-governmental, to support the achievement of the 2030 Agenda objectives (SDG 17).[8]

The state's duty of governing investments in sustainable development[9] includes sustainable dispute resolution.[10] With the development of the state's direct intervention in economic life, and its involvement in international dealings,[11] the need to arbitrate administrative disputes has become a necessity. It shortens the time of dispute resolution and achieves the reassurance sought by the other contracting party with the State.[12] Arbitration is contributing to SDG 16 as effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based dispute resolution system.[13] Nevertheless, arbitration of administrative contracts still provokes controversy in legislation and the judiciary as these contracts differ from civil and commercial contracts and are subject to a different legal regime. The reason behind that is that these contracts target primarily public interest as they are normally related to the management and of public utilities.[14] This means that under some legal regimes the administrative contracts might not be arbitrable[15] and thus may be subject to annulment or non-enforceability due to invalidity of the arbitration agreements or violation of public policy.[16] On the other hand, it has been argued that the state, with all its institutions, is authorised to conclude an arbitration agreement, and it cannot protest on the grounds of its right to sovereignty or judicial immunity to evade the arbitration agreement, if the arbitration has taken place in accordance with the legal conditions.[17] Arbitrability of government contracts is of particular importance for achieving equal access to dispute resolution within SDG 16.

6 AH Memon, AQ Memon, SH Khahro, Y Javed 'Investigation of Project Delays: Towards a Sustainable Construction Industry' (2023) 15(2) Sustainability 1457.

7 Z Yu, I L Ridwan, A R Irshad, M Tanveer, S A R Khan 'Investigating the nexuses between transportation Infrastructure, renewable energy Sources, and economic Growth: Striving towards sustainable development' (2023) 14 (2), Ain Shams Engineering Journal 101843.

8 J Alkhayer, N Gupta and CM Gupta, 'Role of ADR Methods in Environmental Conflicts in the Light of Sustainable Development' (Second International Conference on Sustainable Energy, Environment and Green Technologies (ICSEEGT 2022), Jaipur, Rajasthan, India, 24-25 June 2022) (2022) 1084 IOP Conf Ser: Earth and Environmental Science doi: 10.1088/1755-1315/1084/1/012057.

9 R Alyamani, S Long , M Nurunnabi 'Evaluating Decision Making in Sustainable Project Selection Between Literature and Practice' (2021) 13(15) Sustainability 8216.

10 MC Cordonier-Segger, 'Governing Investment in Sustainable Development: Investment Mechanisms in Sustainable Development Treaties and Voluntary Instruments' in MC Cordonier-Segger, MW Gehring and A Newcombe (eds), *Sustainable Development in World Investment Law* (Global Trade Law Series, Kluwer Law International 2011) 645.

11 Z Meskic et al, 'Transnational Consumer Protection in E-Commerce: Lessons Learned From the European Union and the United States' (2022) 13 (1) International Journal of Service Science, Management, Engineering, and Technology 1, doi: 10.4018/IJSSMET.299972.

12 S Gul, 'Alternative and Indigenous Dispute Resolution: A Legal Perspective' in A Normore, M Javidi and L Long (eds), *Handbook of Research on Strategic Communication, Leadership, and Conflict Management in Modern Organisations* (Business Science Reference 2019) 17, doi: 10.4018/978-1-5225-8516-9.

13 K Duggal and R Rangachari, 'Business, Human Rights, and International Arbitration:Family, Friend, or Foe' (2021) 75 (3) Dispute Resolution Journal 83.

14 C Henckels, 'Arbitration Under Government Contracts and Government Accountability' (2022) 50 (3) Federal Law Review 404, doi: 10.1177/0067205X221107407.

15 G Born, *International Commercial Arbitration* (3rd edn, Wolters Kluwer 2020).

16 H Kronke, P Nacimiento and D Otto (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) 34.

17 AAB Sheta, *Explanation of the Egyptian Arbitration Law* (2nd edn, Dar Al-Nahdha Al Arabiya 2004) 124.

This paper establishes a relationship between the concept of administrative contract and its arbitrability in comparative law and Saudi Arabia. It analyses the evolution of the arbitrability of administrative contracts in Saudi Arabia with the aim of providing solutions to the current problems of invalidity and enforceability of arbitration agreements concluded in violation of national administrative laws or without governmental approval. The analysis firstly showcases the variety of approaches to arbitrability of administrative contracts in comparative law and links them to different concepts of the administrative contract in comparative and Saudi law. The evolution of arbitrability of administrative contracts in Saudi Arabia sets the basis for the understanding of current problems in case law with regards to arbitration agreements concluded without governmental approval. The analysis aims to contribute to finding the right path for arbitrability of administrative contracts as part of sustainable dispute resolution mechanism.

2 ARBITRABILITY OF ADMINISTRATIVE CONTRACTS IN COMPARATIVE LAW

From a comparative point of view, the position of states differs in regard to the concept of an administrative contract and the resolution of its disputes. Arbitration legislation and judicial decisions may provide for certain matters to not be capable of settlement by arbitration and thus non-arbitrable.[18] As will be elaborated below, in some states some additional approvals from the ministry or even the parliament may be required.

For instance, the position in Kuwait is that the administrative judiciary is solely competent to decide disputes over administrative contracts of all types. The Kuwaiti Court of Cassation, therefore, refuses to accept arbitration in administrative contracts. In its judgment of 26 November 1989, the Kuwaiti Court of Cassation noted that, according to Art. II of the Law No. 20 of 1981, the Administrative Court alone has jurisdiction over disputes that arise between administrative bodies and other contractors in contracts, public works, supply, or any other administrative contract. In another ruling, the Court of Cassation ruled that the dispute that the arbitral tribunal has the competence to decide, in accordance with Art. II of the Law 11/1995 on Judicial Arbitration in Civil and Commercial Matters, does not extend to administrative disputes, where the Administrative Court has the sole jurisdiction in this respect, in application to Art. II of the Law No. 20 of 1981 as amended by the Law No. 61 of 1982.[19]

However, the position of Kuwait, with an absolute exclusion of all administrative contracts from arbitration, is rather an exception. In Algeria under the Civil and Administrative Procedure Code (CPCA) adopted by Law 08-09 of 12 February 2008, Art. 975-977 specifically regulate and allow for arbitration in administrative contracts.[20] In European civil law systems, it is usually accepted to allow for arbitration in administrative contracts for specific matters.[21] In Australia, it is generally common for the government to enter into contracts with an arbitration clause.[22] However, in Williams v Commonwealth the High court decided in 2012 that parliamentary approval is required for all federal government contracts except those

18 Born (n 15).

19 AM Bouresli, 'Arbitration in Administrative Disputes in the State of Kuwait' (Third Scientific Forum of the Arab Union of Administrative Judiciary: Arbitration in Administrative Contracts, Kuwait, 29-30 April 2018); K Alhamidah, 'Administrative Contracts and Arbitration in Light of the Kuwaiti Law of Judicial Arbitration No 11 of 1995' (2007) 21 (1) Arab Law Quarterly 35.

20 M Trari-Tani, 'Arbitration and Procurement Contracts New Achievements for Improving the Business Climate in Algeria' (2019) 6 International Business Law Journal 729.

21 M Portocarrero, 'Arbitration in Administrative Affairs: The Enlargement Scope of Ratione Materiae in Portugal' (2020) 18 (1) Central European Public Administration Review 204, doi: 10.17573/cepar.2020.1.10.

22 Henckels (n 14).

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ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
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pertaining to routine expenditure, thus potentially limiting the use of arbitration clauses.[23] In Saudi Arabia, under Art. 10 of the Arbitration law of 2012, it is allowed for governmental entities to enter into arbitration agreements, but only upon approval by the Prime Minister, unless allowed by a special provision of law.[24] Such an approach is quite typical for Arab states.[25] In the Anglo-American tradition, an administrative contract does not exist so that the use of arbitration can be restricted in government procurement contracts, only if such restrictions are explicitly noted in the contract and they are not derived from any common law concept.[26]

3 THE CONCEPT OF THE ADMINISTRATIVE CONTRACT IN COMPARATIVE AND SAUDI LAW

Given the relationship between the right of the administration to conclude administrative contracts and resort to arbitration in case of disputes, an analysis of this topic requires a discussion of the following main points:

1- The concept of an administrative contract in comparative and Saudi law.

2- The development of arbitration clauses in administrative contracts and Provisions of the Board of Grievances related to the completion of arbitration conditions in administrative contracts.

In this section, we discuss the concept of an administrative contract and the criteria for distinguishing it in comparative and Saudi law.

3.1 The concept of the administrative contract in comparative law

The administrative contract is defined in comparative law as the concurrence of two wills, one of which is the will of the administrative authority, with the aim of organising, investing or managing a public service and achieving its interest or the public benefit.[27] Sometimes, the administration, in concluding contracts with individuals, and companies, use civil or commercial contracts when it finds that this type of contracts fits with a certain activity such as the contracts of sales and lease of private properties owned by administration. Contracts of this nature are governed by private law that regulates the relationships between individuals.[28] However, in such cases the administrative contract often includes contractual clauses granting unilateral rights to the governmental party that are unusual for private and commercial law contracts.[29]

23 *Williams v Commonwealth* (No 1) (High Court of Australia, 2012) 248 CLR 156.

24 Kingdom of Saudi Arabia, Royal Decree No M/34 'Law of Arbitration' of 16 April 2012 <https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=106647&p_country=SAU&p_count=108&p_classification=02&p_classcount=4 > accessed 10 March 2023.

25 N Blackaby et al, *Redfern and Hunter on International Commercial Arbitration* (6th edn, OUP 2015) 127.

26 J Cabrera, D Figueroa and H Wöss, 'The Administrative Contract, Non-Arbitrability, and the Recognition and Execution of Awards Annulled in the Country of Origin: The Case of Commisa v Pemex' (2016) 32 (1) Arbitration International 127, doi: 10.1093/arbint/aiv057.

27 M Al-Qaisi, 'The Eligibility of State Institutions and Bodies to Conclude an Arbitration Agreement (Administrative Contract Disputes)' in W Anani (ed), *Arbitration Lectures* (The Legal Library 2003) 237.

28 A Shafiq, *Judicial Control over the Business of Administration in the Kingdom of Saudi Arabia* (Al Jawaher Publications 2002) 216.

29 I Shehata, 'The Ministerial Approval Requirement for Arbitration Agreements in Egypt: Revisiting the Public Policy Debate' (2020) 37 (3) Journal of International Arbitration 392.

In order to distinguish between an administrative contract and other contracts, the following criteria shall be considered:[30] The administration is a party to the contract; the contract is related to public services; and the contract includes exceptional conditions that are not familiar in private law.

3.1.1 The administration is a party to the contract

The first criterion is an obvious one. If an administrative authority is not a party to a contract, this contract shall not be considered as an administrative contract. The term administration extends to every public legal personality, whether it is centralised such as the state, or non-centralised, such as the decentralised local public personalities. It is noted that this criterion, although necessary, is not sufficient to consider the contract an administrative one. Therefore, the objective criterion must be present, which is the link of the contract with the public utility.[31]

3.1.2 The contract is related to public service

Public service is every activity which is undertaken by a public legal person with the aim of achieving public benefit. On the one hand, public service includes an organisational aspect, meaning every public body which is established and managed by the ruling authority. Such bodies perform services that aim to satisfy public needs. It further includes every activity conducted by the state or any other public corporate entity, which aims to achieve public benefit as well.

The link of the contract to general service is the factor that can determine the nature of the contract. Jurisprudence in France, Egypt, Syria, Jordan, and Libya agree that not all contracts to which the administration is a party are administrative contracts. Some of the administration contracts are completely subject to private law since the administration has the right to make use of private law contracts. The criterion for distinguishing the administrative contract lies in the subject matter of the contract and not solely in the character of the contracting party. Accordingly, the contract is considered administrative if there is an intention of the public legal person to use the means available to it under public law, where there is a connection of the contract with the management of a public facility, and the contract includes certain exceptional conditions.[32]

3.1.3 The administrative contract includes exceptional conditions

Within the administrative contract the administrative body usually enjoys contractual rights different from those within civil or commercial law relationships. Exceptional clauses give the administration powers over its contracting parties, such as the right to change or terminate the contract unilaterally.[33] In administrative contracts, the authority has wide rights and powers to ensure the implementation of the contract and to make sure that everything is going according to the benefit of the public interest.[34]

30 Alhamidah (n 19) 42.

31 M Alhussein and M Noah, *Administrative Contracts* (Damascus University 2006) 17-8.

32 ibid 34; MAQ Ali Abreesh, *The Impact of Arbitration on Contractual Administrative Disputes: A Comparative Study between Jordanian and Libyan Law* (Middle East University 2016) 59.

33 AA Alanzi, 'Saudi Procurement System and Regulations: Overview of Local and International Administrative Contracts' (2021) 10 (2) Laws 37, doi :10.3390/laws10020037.

34 Alhussein and Noah (n 31) 53.

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ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
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3.2 The concept of the administrative contract in Saudi law

The concept of an administrative contract under Saudi law is much broader than the concept adopted in comparative law. The Board of Grievances, as the administrative judiciary body in the Kingdom of Saudi Arabia, is specialised in hearing and ruling all contract disputes to which the state is a party. It is the administrative court in the Kingdom of Saudi Arabia. The Law of the Board of Grievances[35] states in Art. 1 that the Board of Grievances is an "independent administrative judiciary body that is reporting directly to the King." It further provides that administrative courts have jurisdiction to hear "cases related to contracts in which the administration is a party"[36]. The term contract in the law of the Board of Grievances is general and absolute and includes all contracts to which the government or one of its bodies is a party, regardless of the type of contract, the activity that results from it, or the conditions it includes.[37]

While the Law of the Board of Grievances provides for a broad jurisdiction of the administrative courts for all contracts to which a governmental body is a party, it does not contain a definition of the administrative contract.[38] The Board of Grievances defined the administrative contract in some of its rulings in accordance with comparative law, requiring two conditions: the use of the means of public authority and the connection of the contract with public services. The administrative contract is the contract "to which the state (or one of the public legal persons) is a party in its capacity as a public authority and the dispute relates to a public property which is owned by the state" (Judgment, No. 189/1997).[39]

However, in the majority of its rulings the Board of Grievances indicated that it is sufficient to consider the contract as an administrative one if the administration is a party to that contract.[40] This is clear from several rulings of the Board of Grievances, that broadly concluded that "An administrative dispute is the dispute in which one of the administration's bodies is a party" (Judgment, No. 29/1994). The Board of Grievances, in its Judgement No.14 of 1996, defined an administrative contract as "the compatibility or association of two or more wills with the intent of achieving statutory effects that may be the creation, transfer or termination of obligations". This ruling was later confirmed in judgement No. 14 of 2002 by concluding that "the public contract is an agreement concluded by one of the administrative authorities with an individual in which the rights and obligations of each of the parties are determined in accordance with the provisions of the law." The Board of Grievances equally broadly establishes its own jurisdiction. Under its judgement No. 17 in 1995, "the Board of Grievances is an administrative judiciary body that is competent to hear cases in which the government or a public legal person is a party." This was confirmed in a later judgement, No.10 in 2007, with the reasoning "since the dispute is contractual and one of the parties is a government entity, the Board of Grievances has the right to decide it".

Therefore, the Board of Grievances is competent to hear all administrative disputes relating to contracts concluded by the administration, whether they belong to administrative contracts with their known elements and pillars or not. Based on the aforementioned, it can be

35 Kingdom of Saudi Arabia, Royal Decree No M/78 'Law of the Board of Grievances' of 1 October 2007 <https://laws.boe.gov.sa/Files/Download/?attId=40708ea3-0b40-4978-8b46-adbb0113c063> accessed 10 March 2023.

36 ibid, art 13 (d).

37 AH Alwahaibi, *The Rules Governing Administrative Contracts and Their Applications in the Kingdom of Saudi Arabia* (3rd edn, Al-Jeraisy, 2011) 70.

38 KAA Alkhdair, *Arbitration in Administrative Contracts* (Ministry of Justice) 68.

39 H Altahrawi, *Saudi Administrative Judiciary* (2nd edn, Office of Lawyer Kateb Al-Shammari 2017) 115.

40 SS Almutawa, *Administrative Contracts in the Light of the Saudi Procurement and Competition Law* (2nd edn, 2008) 51.

concluded that an administrative contract in the Kingdom of Saudi Arabia is "any contract to which the administration is a party". It is thereby not of importance if it is an administrative contract that relates to a public purpose, in which the administration uses the methods of public authority with clauses giving special contractual rights to the administrative body, or a private contract in which the administration and individuals are equal.

3.3 Evaluation of the Board of Grievances definition of the administrative contract

There is a difference between the concept of the administrative contract in Saudi law and its counterpart in comparative laws. The administrative contract in the Saudi judiciary does not require its connection to the public services, nor does it require exceptional powers of the administrative body within the contractual relationship. It is sufficient to consider the contract as an administrative one if the administration is a party to the contract and the Board of Grievances shall have jurisdiction to hear the cases arising from it. On the positive side, the Board of Grievances has thereby avoided the problems that may arise in some countries regarding the distinction whether the contract in question is an administrative contract, or a private contract. It considers that the purpose of the Board of Grievances is to unify the jurisdiction in administrative contract disputes.[41]

On the other hand, such understanding is very broad and causes some tensions due to the private and commercial law effects of such contracts, including their arbitrability. As discussed above, in comparative law if the relation to public services is not given and the contract does not include special provisions in favour of the administrative body, it shall not fall within the jurisdiction of the administrative judiciary. It becomes within the jurisdiction of the ordinary judiciary as a private contract, even if an administrative body is a party to it. Another reason to submit such contracts to ordinary judiciary or arbitration instead of administrative courts is that the contractual relationship between the parties will be in most part governed by contract law - for which ordinary judiciary and arbitrators have more experience and expertise - and not administrative law.[42]

4 THE EVOLUTION OF ARBITRATION IN ADMINISTRATIVE CONTRACTS IN SAUDI LAW

Under Art 10 of the Saudi Arbitration law of 2012, unless allowed by a special provision of law government bodies may not agree to enter into arbitration agreements except upon approval by the Prime Minister. This is the result of the long development of arbitration in administrative contracts in Saudi Arabia. In this chapter, we will discuss the stages of development of arbitration in administrative contracts in Saudi Arabia and analyse the most important cases of arbitration in administrative contracts.

4.1 The stages of evolution of arbitration in administrative contracts in Saudi law

Regulation of arbitration in administrative contracts in the Kingdom of Saudi Arabia has developed over time and can be summarised in six stages that will be briefly described below.

41 HS Alhussein, *Commercial Arbitration in the Kingdom of Saudi Arabia* (PSU 2015) 192.

42 Alanzi (n 33).

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The first phase was heavily influenced by the outcome of the famous case of *Saudi Arabia v Arabian American Oil Co (ARAMCO),* decided in 1963, with a negative outcome for Saudi Arabia, which nevertheless honoured the award to the full extent.[43] The Council of Ministers Resolution No. 58 dated 10/06/1963, states that "no government entity may accept arbitration as a mean of settling disputes that arise between it and any individual, company or private body, with the exception of special cases in which the state grants an important privilege, and it has a paramount interest in including the arbitration clause."

Implementing this decision, the Council of Ministers issued Resolution 1007 dated 30/09/1968 to accept arbitration in the contract concluded between the Riyadh Municipality and Inkas Company for the Riyadh Development Project, in which the two parties agreed that each of them would choose a recognised representative at the International Chamber of Commerce in Paris, and if the representative could not reach a settlement, the dispute will be referred to the Board of Grievances to decide the dispute.

In the second phase, the former arbitration law was issued by Royal Decree No. 46 dated 25/04/1983, which repealed the resolution M.58. Art. 3 of the old arbitration law of 1983 stipulating that "government bodies may not resort to arbitration to settle their disputes with others, except after the approval of the Prime Minister, and this provision may be amended by a decision of the Council of Ministers."

In the third phase, executive regulations to the former arbitration law of 1983 were issued by the Council of Ministers No. 7 dated 28 May 1985. Art. 8 of the executive regulations stipulated the following: "In disputes in which government agencies are party and consider resorting to arbitration they must prepare a memorandum on arbitration of the dispute explaining its subject, the justifications for arbitration and the names of the litigants, to be submitted to the Prime Minister to consider the approval of arbitration. A prior decision of the Prime Minister may authorise a government body in a specific contract to terminate the disputes arising from it through arbitration, and in all cases the Council of Ministers shall be notified of the judgments issued therein."

In the fourth phase, the new arbitration law No. M-34 dated 16 April 2012 was issued, which abolished the previous arbitration law of 1983. Article 10 (2) of the Arbitration law of 2012, which is still in force, states the following: "Government bodies may not agree to enter into arbitration agreements except upon approval by the Prime Minister, unless allowed by a special provision of law." This provision makes it clear that arbitration is not a matter of controversy anymore. Regardless of its relation to international or domestic trade, it is subject to approval of the Prime Minister.

In the fifth phase, the new Government tenders and procurement law of 16 July 2019 was issued, which allows recourse to arbitration with the approval of the Minister of Finance. Art. 92 of the Government tenders and procurement law stipulates the following:

1. A government agency shall fulfil its contractual obligations. If it fails to do so, the contractor may file a claim for compensation with the Administrative Court.

2. A government agency may, following the Minister's approval, agree to resort to arbitration, in accordance with the Regulations.

3. The Regulations shall specify other methods for settling disputes that may arise during the execution of contracts.

In the sixth and final phase thus far, Art. 154 of Executive regulations of Government tenders

43 AT Martin, 'Aramco: The Story of the World's Most Valuable Oil Concession and Its Landmark Arbitration' (2020) 7 (1) BCDR International Arbitration Review 3, doi: 10.54648/bcdr2021015.

and procurement law was issued, as amended by provisions of Ministerial Resolution No. (3479) of 05 April 2020, which states:

"Taking into account what is stated in paragraph (2) of Art, 92 of regulation, The following conditions are required to agree to arbitration:

1. Arbitration shall be restricted to the contracts whose estimated value exceeds one hundred million Saudi Riyals. The Minister may amend such limits as he deems proper.

2. The laws of the Kingdom of Saudi Arabia shall apply to the subject-matter of the dispute. Arbitration before international arbitration panels outside of the Kingdom and enforcement of procedures thereof shall be inadmissible except for the contracts concluded with foreign persons.

3. The arbitration and its terms shall be set forth in the contract documents. The provisions of Government tenders and procurement law make it clear that arbitration is allowed upon approval in both national and international cases, but in both of them the contract needs to provide for the application of Saudi law.

4.2 The supervision of the Saudi judiciary on the completion of arbitration clauses in administrative contracts

Among the cases heard by the Board of Grievances is case No. 235/sq/2/1995, which was filed by the Dutch company (Ogem BV) against King Abdulaziz University.

The Dutch company Ogem PV contracted with King Abdulaziz University to design and implement facilities for the university in return for the payment of an amount of 112,652,077 Riyals. The contract concluded between them stipulated that "all kinds of disputes or disagreements, if any, in which the engineer's decision has not become final and binding... shall be referred to arbitration, which consists of three members."

During the implementation, a dispute arose between the two parties, and by honouring the arbitration clause, the arbitral tribunal issued the following award:

1- King Abdulaziz University shall pay to OGEEM 7,779,566.77 Riyals.

2- King Abdulaziz University shall release the bank guarantees provided by OGEM, the value of which is 22,031,553 riyals.

3- The King Abdulaziz University submits to the Ministry of Finance a request to exempt the plaintiff from delay fines.

Based on this ruling, the university released the bank guarantees, and paid the Dutch company an amount of 6,499,377.26 Riyals and declined to pay the rest of the required amounts according to the arbitration decision.

OGEEM Company filed a suit in the Board of Grievances, requesting a ruling to oblige King Abdulaziz University to pay the amount of 1,280,189,50, which is the difference between the amount due according to the award of the arbitration tribunal and the amount paid. After the case was referred to the Ninth Administrative Circuit, the representative of the university attended and responded to the Dutch company's request, "that if we accept what the arbitration committee decided, resorting to arbitration in the dispute of this contract is illegal, because the Board of Grievances is the only judicial body that has the right to hear cases." This is in accordance with Cabinet Resolution No. 58 - Date 10-06-1963, which stipulated that: No government entity may accept arbitration as a mean of settling disputes that may arise between it and any individual, company, or private body, with the exception of special cases in which the state grants a general privilege, and shows its utmost interest granting

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ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

the concession, including the arbitration clause. Likewise, paragraph (b) of the same resolution states that "in cases where contracts concluded by any ministry contain texts that violate the government's procurement regulation and the implementation of its projects and works, the contract is referred to the Board of Grievances for decision in a manner that achieves justice."

The Ninth Circuit of the Board of Grievances issued a ruling in which it concluded that "Pursuant to Council of Ministers Resolution No. 487 dated 11-07-1978, which held the Board of Grievance's right to hear cases resulting from contracts that contain texts that violate public policy, and in order to achieve justice, it requires the adoption of the arbitral tribunal's decision, because its legal ground is to fulfil contracts so they should respect their obligations agreed by them. Also, it is in accordance with Sharia's rule that stated that Muslims are bound by their conditions. Therefore, it is not possible to overturn the arbitrators' ruling except with what invalidates the ruling of the judge, and therefore the obligation to do so is compatible with the requirements of justice, and the administrative body has the right to refer to the one who caused the violation of public order from among its employees. Based on the foregoing, the court issued its ruling enforcing the university to pay the required amount.

Again, an appeal was filed to the Cases Audit Committee (First Circuit), which eventually did not agree with the ruling of the Ninth Circuit of the Board of Grievances regarding the permissibility of resorting to arbitration in the administrative contract signed between a public authority, and individual, or company, pursuant to Cabinet Resolution No. 58/1963.[44]

The contradictory decisions of Saudi courts and arguments in the case of Ogem BV against King Abdulaziz University showcase that the requirement of ministerial approval for the arbitration agreement is not easily enforceable in practice. In civil and Shariah law countries, the principle of good faith and the provisions of the contract laws on agency would take into consideration to which extent the foreign company was aware of such a requirement, and if it impacted the validity of the arbitration agreement. Thereby it would possibly also allow for annulment of the arbitral award, or it would only create obstacles for enforceability of the award in the state to which the governmental party belongs, in this case Saudi Arabia. Should it only impact the enforceability of the award in the state of the governmental body, the award would still remain enforceable in other states where the governmental body would have assets.

The case of Commisa v PEP, ICC Case No 13613/JRF shows that even awards on administrative contracts which have been annulled in a state to which the governmental body belongs might remain enforceable in other states where this body has assets. In this concrete case, in 2011 the Mexican appeals court annulled the ICC award of 2009, however the district court in New York confirmed the ICC Award, paving the way for Commisa to begin executing on Pemex's assets in the USA.[45]

5 CONCLUSION

Governmental contracts are of great importance and their exclusion from arbitration contradicts the set goal of a sustainable dispute resolution mechanism. However, the arbitrability of administrative contracts is very diverse in different legal cultures and ranges from general acceptance in the Anglo-American legal tradition to a requirement of governmental approval present in the Middle East and Latin America under the influence of French tradition, with the possibility of the government also revoking their

44 Alkhdair (n 38) 146; JH AlSharif, *The Judicial Principles and Jurisprudence of the Saudi Courts in Arbitration* (Dar Al Ejadah 2020) 159.

45 Cabrera, Figueroa and Wöss (n 26) 126.

approval unilaterally or having unilateral rights to terminate the contract. Such a situation in comparative law causes legal insecurity for companies entering into international commercial contracts with a foreign government, where they might be unaware of such administrative requirements while entering into a contract and would potentially face obstacles for enforcement of the international arbitration awards in the state in question.

The development in Saudi Arabia reveals that it has a long tradition of entering into arbitration agreements and honouring them even in the case when the award was eventually decided against it, as was the case in the famous Aramco case of 1963. The recent arbitration legislation allows resorting to arbitration upon the approval of the Prime Minister, while the new government competition and procurement regulation only requires the approval of the Minister if the value of the contract exceeds one hundred million riyals and provided that Saudi law is applied. On the other hand, the Saudi judiciary defines the administrative contract by merely having the administration as a party to the contract. This leads to exclusive jurisdiction of the administrative courts for administrative contracts, which may create tensions in cases arbitrated without governmental approval. Such tensions might be even more important in international disputes, considering that in comparative law a contract will be considered administrative only if it is related to public services and if it gives some special powers to the governmental body. Such differences in comparative law in terms of the notion of the administrative contract and the arbitrability may diminish the positive effects of the arbitration in administrative contracts, as they may endanger equal access to dispute resolution as part of the sustainable development goals, be enforceable, or even cause discrepancies between states that annul the arbitration awards and others that still enforce the awards despite their annulment.

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