SEYBOLD Report
ISSN: 1533 - 9211
https://seyboldreport.net/

MEANS OF ARBITRATION IN ADMINISTRATIVE DISPUTES ARISING FROM ADMINISTRATIVE CONTRACTS

Hudhaifa Asim Ahmed Abbas
Near East University, Law department, TRNC, 10 Mersin, TR-99040 Lefkosia, Türkiye
20225786@std.neu.edu.tr

Assist. Prof. Dr. Ahmad Mustafa Ali
Near East University, Law department, TRNC, 10 Mersin, TR-99040 Lefkosia, Türkiye
ahmed.ali@neu.edu.tr

ABSTRACT

Arbitration is one of the most important peaceful means resorted to by the parties to a dispute to settle disputes among themselves in a way that is maintained on the friendly relations and ends the subject of the dispute with reassuring and complete consent, so as to enjoy the members of its body with experience and full knowledge in the subject matter in dispute and the presence of speed in resolving it in a manner that is consistent with the nature of the dispute, the problem of research lies in the legal organization of the Iraqi legislator on the subject of arbitration in general and resort to the means of arbitration in administrative disputes arising from administrative contracts in a way In particular, whether the legislator is successful in organizing the means of arbitration, acceptance or rejection by resorting to it in such disputes or not and proposing the necessary amendment, cancellation or addition of a new text.

Keywords: arbitration, disputes, arbitration law, legal person, public works contracts.

Introduction

Arbitration is considered one of the most important peaceful means resorted to by the parties to a dispute to settle disputes among themselves in a way that maintains friendly relations and ends the subject of the dispute with reassuring and complete consent, so as to enjoy the members of its body with full experience and knowledge in the subject matter of the dispute and the presence of speed in resolving it in a manner consistent with the nature of the dispute, regardless of whether the dispute arises between public and private persons or between private persons among themselves, The administration, as a public person, can also resort to the means of arbitration in the relations it carries out with private law persons, both national and foreign, despite the jurisdiction of the national judiciary to consider these disputes, because there are many justifications and motives behind it, the agreement of the administration in the public works contract with the other party to resort to the means of arbitration have many motives behind his behavior, such as encouraging foreign investments in the state and influencing the growth of the national economy in addition to creating An atmosphere suitable for the increase in the conclusion of contracts that achieve the public interest and other motives that lie behind it, in addition to the motives of the second party from resorting to such a means, especially if

the other party is a foreigner, because the latter acts with foreign public persons in a foreign country in exchange for a foreign law and judiciary, and thus to preserve his rights and status pushes the administration or agrees with it towards resorting to this means to achieve that protection, The task of the legislator in each country is to organize its rules and indicate its conditions and procedures after authorizing the resort to this means in administrative disputes arising from administrative contracts.

Second: Reasons for choosing the topic: We based our research topic on a set of reasons we list as follows:

1: Identify the nature of arbitration as one of the means of settling disputes and stand on the most important justifications that push the parties to the dispute towards resorting to it.

2: Identify the nature of public works contracts as one of the administrative contracts and distinguish it from the suspected contracts.

3: Standing on the legislative, jurisprudential and judicial position on the possibility of resorting to the means of arbitration to settle disputes arising from the public works contract.

4: A statement of the most important conditions and procedures necessary to be followed to legitimize arbitration.

5: A statement of the most important effects of resorting to the means of arbitration in settling such disputes.

Third: The research problem: The research problem lies in the legal organization of the Iraqi legislator on the subject of arbitration in general and resort to the method of arbitration in administrative disputes arising from administrative contracts in particular, whether the legislator is successful in organizing the means of arbitration and acceptance or rejection by resorting to it in such disputes or not and proposing the necessary amendment, cancellation or addition of a new text.

Fourth: Research Methodology: We followed in writing the subject of our research on the analytical approach by analyzing legal texts and jurisprudential opinions on the method of arbitration and the possibility of resorting to it to consider immunity arising from administrative contracts.

1. The concept of arbitration in public works contracts

Arbitration is considered one of the peaceful means of settling disputes and as alternative means to the national judiciary to be resorted to by the parties to the legal relationship designated regarding the disputes that arise on that relationship for motives and reasons that differ according to the parties that agree on them, including the agreement of the parties to the public works contract towards resorting to this means and the justifications that

push them towards this behavior and this agreement, As a result, we will study the method of arbitration in terms of the statement of its definition and the justifications of the parties to the last contract towards resorting to it by dividing the section as follows:

1.1 What arbitration is

In this requirement, we address the nature of arbitration as one of the peaceful means used to settle disputes arising from the legal relations between the parties to the litigation within the scope of the public works contract, through a statement of its linguistic and terminological definition of linguistic jurisprudence, law and jurisprudence, and then we address the most important justifications that push the parties to the litigation in general and the parties to the dispute arising from the public works contract in particular towards resorting to this means according to the following:

1.1.1 Definition of arbitration

To find out the exact meaning of the term arbitration, it is necessary first to stand on its linguistic meaning in linguistic jurisprudence and then stand on our terminological meaning in law and jurisprudence according to the following division:

First: Linguistic Definition of Arbitration

Arbitration is a source of judgment, annexation: the judiciary, c: provisions, has been sentenced by the order of judgment and government, and his judgment in the matter arbitration: ordered to rule Fathi, and arbitrate: permissible judgment, and rule Haripriya: saying: no rule but God, and the two judgments, moving: Abu Musa Ashar and Amr bin Al-Aasa [(1),] and ruled the man by tightening delegated the judgment to him and control in such and such did what he saw and tightened the thing with a thousand saved him and ruled is so [(2).]

In the legal dictionary, arbitration procedure means that it is a peaceful method of settling an international dispute through the authorization of an arbitrator or a court to adjudicate the dispute by a binding decision, and international arbitration (arbitrage international) is a method of settling international disputes by a binding decision of the parties to the dispute issued by an individual or body chosen by the parties and placed the dispute before it for adjudication[3].

Second: Terminological Definition of Arbitration

Majd1 al-Din Muhammad ibn Yaqoob al-Firouzabadi, The Ocean Dictionary, investigated by: Anas Muhammad al-Shame and Zakaria Jaber Ahmed, Dar al-Hadith, Cairo, 2008, p. 389.

Ahmed2 bin Muhammad bin Ali al-Qayoumi al-Mari, The Enlightening Lamp, Librairie du Laban, Beirut, 1987, p. 56.

Dictionary3 of Law, Arabic Language Dictionary Foundation, General Authority for Princely Printing Affairs, 1420 AH - 1999 AD, p. 589, p. 609.

The method of arbitration received great attention to jurisprudence and law as a peaceful means through which internal and international disputes are settled peacefully, maintaining friendly relations between the parties and taking simple and easy procedures and applying the law agreed upon by the parties to the dispute, and the Iraqi legislator among those legislators that were interested in the means of arbitration, where a special part was allocated to it in the Civil Procedure Code through which this means is regulated, However, it did not define arbitration despite this regulation, but jurisprudence did not fail to define the term, some of them defined it as "the method chosen by the parties to settle disputes arising from the contract and which are decided before one or more persons called the arbitrator or arbitrators without resorting to the judiciary".[4]

It is also defined as "the agreement or willingness of the parties to submit a dispute that actually exists between them or may arise in the future concerning a relationship between them before a person or persons for adjudication without the competent judiciary".[5]

Others defined it as "a contract in which the contracting parties agree to waive the review of the ordinary judiciary and to resort to one or more private persons to adjudicate a potential dispute or dispute between them".[6]

Based on the above definitions of jurisprudence, it becomes clear to us that arbitration is only a means agreed upon by the parties to the legal relationship starting before the dispute when the relationship is concluded or later after the dispute arises, provided that they resort to this means to settle their disputes if it arises from the relationship concluded between a dispute, and as a result, arbitration can be defined as:

A peaceful means of settling disputes resorted to by the parties to the dispute, starting when carrying out a legal act represented in a legal relationship or later after the dispute arises, waiving the authority of the internal or international judiciary to decide on the subject of the dispute between them peacefully.

2.1.1 Justifications for resorting to arbitration

The resort of the parties to the public works contract, in particular the non-governmental party, whether foreign or national, is not empty without having justifications behind it that push him towards agreeing on this means to be the competent to consider the disputes that arise between him and the administration on the public works contract concluded between them, and these justifications vary according to the view of each non-governmental party in these

Dr4. Fawzi Mohammed Sami, International Commercial Arbitration, Dar Al-Thaana for Publishing and Distribution, Amman, 1992, p. 17.

Dr5. Ibrahim Deri, Internal and International Arbitration, 2nd Edition, Sudan Currency Printing Company, Khartoum, 2008, p. 15.

Rasha6 Moussa Mohamed, The Role of the Arbitration Agreement in Resolving Foreign Investment Contract Disputes, Research submitted to the Journal of Ahl al-Bayt University, No. 11, 2010, p. 186.

contracts, In general, however, common justifications can be gathered in the following points:

First: One of the justifications that push the parties to the dispute towards resorting to this means lies in the speed of resolving the dispute presented to the arbitrators far from the slowdown, as the arbitrators are usually full-time to adjudicate in one litigation, unlike the ordinary judiciary, in which the lawsuits accumulate, and arbitration avoids the slowdown of the procedures suffered by the ordinary judiciary, especially since we handed it within the scope of the public works contract, any slowdown in it would be harmful to the public interest to be considered from Administrative contracts concluded by the State by internal, foreign, natural and legal persons[7].

Second: The method of arbitration has many characteristics that make it the subject of interest to the parties to the dispute, on the one hand arbitration enjoys the property of confidentiality by preserving the important information that the arbitrators see when delving into the merits of the dispute without disclosing it, while on the other hand arbitration is characterized by the flexibility and freedom enjoyed by the parties to the dispute, because the will of the parties plays a major role in it with regard to the formalities followed in arbitration and the objectivity that enables arbitrators to delve into them[8].

Third: The method of arbitration would save expenses compared to the expenses incurred when resorting to the ordinary judiciary, such as judicial fees, housing and transport banks in the absence of the judiciary in the home country of the parties, attorneys' fees, in addition to what is required to implement the judgment issued in the dispute[9].

Fourth: The parties to the public works contract - especially the foreign non-governmental party - resort to the means of arbitration to settle their disputes instead of the national judiciary because they lack confidence in that judiciary and look at it with suspicion and suspicion as a non-neutral judiciary and will be biased towards his person, because the judge, no matter how objective and impartial, cannot get rid of the point of view of his state, which is doubtful about his capabilities towards achieving justice in areas of imbalance. This does not provide reassurance to the foreign party in light of the difference in their legal status, since the latter is a natural or legal person carrying out public works with a party with the same authority and privileges, so it will be difficult to achieve equality before the national judiciary between these different centers[10].

Basma7 Amer Omar Nazma and Muhammad Naim Omar, Arbitration in Administrative Contract Disputes in Iraq and its Legitimacy in the Light of Islamic Law, Research Published in Al-Resale Magazine, Vol. 3, No. 4, 2019, p. 32.

8 Ghassan Rabah, The Authority of the Judiciary in Controlling Arbitrators' Decisions, Research published in the Journal of Justice, No. 2, 2008, p. 484 and beyond.

Dr9. Ammar Tariq Abdulaziz, The Role of Arbitration in Administrative Contract Disputes, Research published in the Journal of the College of Law - Al-Nahrain University, Vol. 14, No. 2, 2012, p. 137.

Samia10 Abu Assaf, the effectiveness of arbitration in investment contracts according to the Lebanese and Syrian laws, Master's thesis, Applied to the Faculty of Law - Lebanese Islamic University, 2018-2019, p. 14.

Fifth: The method of arbitration would maintain friendly relations between the two opponents and avoid hatred and hatred 9 among them in most cases, because usually the arbitrators' decision is issued closer to the consent of the opponents because it was issued by arbitrators who won the confidence of the opponents for choosing them to look at their dispute and therefore there will be no quarrel between the parties and they are fully assured of the judgment that was issued[11].

Sixth: The means of arbitration is consistent with the nature of administrative contracts, in particular the public works contract, as such contracts sometimes need those with experience and know-how to look at its subject in a way that agrees with it without any delay, and therefore with the presence of such experiences when the arbitral tribunal who looks at the dispute does not need with him to seek the help of technical experts, economists or translators to translate the documents of the dispute emerged, which sometimes requires translation of a long time and high expenses, Therefore, despite the ingenuity and skill of the ordinary judicial judge in the application of the law, it is sometimes impossible for him to settle such disputes because of the special requirements of the dispute in terms of experience, knowledge and knowledge, the absence of which can cause the negation of the element of speed in such contracts in order to prolong their resolution when considering their subject[12 matter].

2.1 What is a public works contract?

In this requirement, we address the nature of the public works contract as one of the types of administrative contracts concluded by the administration to achieve the public interest through the statement of its linguistic and terminological definition of jurisprudence and law, and then distinguish it from some contracts that are similar to it in subject or goal, by dividing the requirement into two main branches according to the following:

1.2.1 Definition of public works contract

To find out the exact meaning of the term public works contract, we must first stand on its linguistic meaning by explaining the meanings of the words consisting of it, and then stand on its idiomatic meaning in jurisprudence and law according to the following:

First: Linguistic definition of the public works contract

Contract: the opposite of the solution, and the sale of the covenant is held by: tightened, and the contract: guarantee, and covenant (13), so the rope held a contract from the door of beating and held and the knot what he holds and documents from him, it was said that the sale was held

Dr11. Ahmed Abu Al-Wafaa, Optional and Compulsory Arbitration, Knowledge Foundation, Alexandria, 1978, p. 23.

Dr12. Saad Hussein Abd Melhem, The Role of Arbitration in Encouraging Oil Investment, Research published in the Journal of Petroleum Research and Studies, Issue 3, 2021, p. 67.

Majd13 al-Din Muhammad ibn Yaqoob al-Firouzabadi, al-Museet Dictionary, op. cit., p. 1119.

and so on, and the oath was held and held by emphasis and affirmation and held on such and such and held it in the sense of his covenant and complicated thing such as the council of the place of his contract, and the contract Bakir necklace and plural contracts and thought such and such held it heart and conscience ().[14]

Occupancy: Singular filled: has filled it occupies a job and work, the latter for Seaway, and occupy it and work by it and occupy it and I occupy it. It was said: It is not said that it is a bad language, and so and so has been filled, it is busy, and the fox said: filled from the verbs in which the adjective prevailed unless the actor was named.[15]

General: i.e., blindness, which is all that has gathered and many: Ammi, C: circulated as books, C: Amma: which is the most general, and the general: the thick, and the uncle of the man: the multitude of his army after his few, and the blindness of the thing in general: included the group, it is said their uncle with the gift, and he is with them (16).

Second: Terminological definition of the public works contract

The public works contract is considered as those contracts that the state concludes with natural or legal persons, national or foreign, in order to carry out a certain work for his account within the scope of achieving the public benefit, and in light of the legislative absence, legal jurisprudence came with a set of legal definitions for such a contract in their books and writings, including, it is defined as "a contracting contract between a person of public law and an individual or company under which the contractor undertakes the work of construction, restoration or maintenance against a price to be specified in the contract".[17]

Others defined it as "an agreement between management and an individual or company with the intention of constructing, renovating or maintaining real estate for a public legal person, with the intention of achieving a public benefit, in return for the agreed consideration and in accordance with the terms of the contract".[18]

It was also defined as "an agreement between management and an individual (often a contractor or contracting company) for the purpose of constructing, renovating or maintaining buildings or real estate installations for the benefit of an administrative person and for the benefit of the public".[19]

Ahmed14 bin Muhammad bin Ali al-Qayoumi al-Muqrin's, Misbah al-Munir, op. cit., p. 160.

15 Ibn Mansur al-Afridi al-Mari, Lasan al-'Arab, vol. 11, op. cit., pp. 355-356.
Majd16 al-Din Muhammad ibn Yaqub al-Firouzabadi, al-Museet Dictionary, op. cit., p. 1145.
Dr17. Masen Lilo Raid, Mediator in Administrative Law, 1st Edition, Modern Book Foundation, Lebanon, 2013, p. 334.
Dr18. Suleiman Muhammad Al-Tamai, General Foundations of Administrative Contracts, 5th Edition, Ain Shams University Press, without place of publication, 1991, p. 114.
Dr19. Ali Mohamed Bdeir and others, Principles and Provisions of Administrative Law, Al-Atak Book Industry, Legal Library, Cairo - Baghdad, 2007, p. 409.

Based on the above definitions, it becomes clear to us that legal jurisprudence limits the scope of the public works contract in construction, restoration or maintenance to real estate only, where it is a contract between the administration and one of the private persons, whether national or foreign, natural or legal to carry out these works for a certain price, and as a result, the public works contract can be defined as:

A contract whereby a private person, whether national or foreign, natural or moral, undertakes to carry out the construction, restoration or maintenance of a property, for the account of one of the public persons represented by the administration for a certain price within the scope of achieving the public benefit.

Through our definition and the jurisprudence definition of a public works contract, it is clear that such a contract is only if there is a set of certain elements in respect of it, which lie in the following[20]:

1: The subject of the contract is related to real estate: It is required for the public works contract as one of the types of administrative contracts to focus its subject matter on the property - in its broad sense - and within the scope of construction, restoration, maintenance or any other work contained therein, and therefore if the subject of the contract is movable, then it cannot be considered a public works contract in its administrative sense.

2: The work must be done for a legal person: The work or works contained in the real estate subject to the contract must be for the account of the legal person, i.e., the administration, regardless of the ownership of the property, whether its ownership belongs to private or public persons.

3: To be with the intention of achieving the public benefit: The conclusion of the public works contract carried out by the legal person must be within the scope of achieving the public interest, and therefore if the intention of concluding the public works contract is to achieve a personal benefit, then we are not in front of the public works contract within the scope of administrative law, even if the administration as a public legal person is a party to it.

2.2.1 Distinguishing the public works contract from other contracts

The public works contract as one of the administrative contracts may be suspected with other administrative or civil contracts, so it is sometimes difficult to distinguish between them and it needs such distinction, and therefore we will address here the supply contract as one of the other administrative contracts and the contracting contract as a civil contract that is similar to it so that we can stand on the similarity and difference between them according to the following:

First: Public Works Contract and Supply Contract

Dr20. Suleiman Muhammad al-Tamai, op. cit., p. 126; Dr. Masen Lilo Raid, op. cit., pp. 334-335.

A supply contract is defined as "an agreement between a legal person of public law and an individual or company whereby the individual or company undertakes to supply certain movables to the legal person necessary for a public utility in return for a certain price".[21]

- Similarities
1: The public works contract and the supply contract are concluded between a public legal person and a private law person, whether national, foreign, natural or juried.
2: The intended intention in the two contracts is based on achieving the public benefit.
3: Both contracts are for a price paid by the administration to the second party.

- Differences[22]

1: The public works contract is characterized by the fact that it focuses on real estate only, while the supply contract focuses on movables without real estate.

2: The public works contract is distinguished in terms of the scope of work, as it is based on construction, restoration or maintenance, while the scope of the supply contract is based on the supply of movable things of different diversity.

3: The public works contract is always a public contract, while the supply contract can be a public or private contract.

Second: Public Works Contract and Contracting Contract

A contracting contract is meant as "a contract in which one of the parties undertakes to manufacture something or perform work in return for a fee pledged by the other party",23 through the definition of the article contract and the definition of the aforementioned public works contract, it is possible to identify the similarities and differences between the two contracts as follows:

First: Similarities
1: Both contracts are based on doing work.
2: The work carried out through the two contracts is for a certain price.
3: Duration is an essential element of the two contracts.
4: The two contracts are subject to public law if one of the parties is a public person.

II. Differences[24]

Dr21. Ammar Awabi, Administrative Law, vol. 2, University Publications Office, 2000, p. 199.
Souad22 Qureshi, The Legal System of the Public Works Contract, Master's Thesis, Applied to the Faculty of Law and Administrative Sciences - University of Algiers, 2001-2002, pp. 35-36.

23 See article 864 of the Iraqi Civil Code No. 40 of 1951.
Dr24. Dargham Mahmoud Kazem, International Arbitration Clause in General Contracting Contracts, research published in the Journal of the Iraqi University, vol. 1, issue 1, volume 46, 2020, p. 369.

1: In the public works contract, the work is focused on immovable property only, i.e., real estate, while the contracting contract can focus on work based on real estate and movables as well.

2: The public works contract is an administrative contract that is subject to public law, while a contracting contract is considered a civil contract and is subject to civil private law.

3: The public works contract is required to be intended to achieve a public interest, while the intention in the contracting contract is to achieve a personal interest usually unless it is concluded by a public person for the purpose of achieving the public interest.

4: The work performed under the public works contract shall be for the account of a person of public law, while the work carried out under the contract of contracting may be for the account of a person of both public law and private law persons.

2. Arbitration provisions in public works contracts and its legal effects

The existence of an alternative means of settling administrative and non-administrative disputes needs with them the rules of provisions subject to this means when looking at that dispute, just as the national judge has rules and provisions committed to settle disputes filed before him, so must be arbitrators also the same rules and provisions that enable them to do so, which we will explain through this section after indicating the legality of resorting to this means in administrative disputes, This is done by dividing the subject according to the following:

1.2 Legality of resorting to arbitration in public works contracts

In this requirement, we address the legality of resorting to the means of arbitration in disputes arising from public works contracts in which the state is a party in terms of the jurisprudential position around them, and then we address the position of the Iraqi legislator by dividing the requirement into two main branches, we devote the first section to the jurisprudential position and the second to the Iraqi legal position according to the following:

1.1.2 The position of administrative jurisprudence on resorting to the method of arbitration in public works contracts

The resort to the method of arbitration in public works contracts, despite the existence of justifications that push the parties to the legal relationship towards resorting to this means, but it was not welcomed by some administrative jurisprudence for several considerations based on it, and therefore we have become in front of two different trends on the subject, a trend that refuses to resort to the method of arbitration in public works contracts and a trend in favor of that, We mention them as follows:

First: The Rejectionist Trend

Some administrative jurisprudence categorically rejects the use of arbitration to settle

disputes arising from administrative contracts in general, whether in a public works contract or in other contracts, as long as they are a public law person to which they are a party.[25]

1: Supporters of this trend believe that resorting to the method of arbitration in relations in which one of the parties is a public person contradicts the principle of state sovereignty, because arbitration collides with an important based on the immunity of the judicial state in the face of the judiciary of foreign countries, and therefore the existence of an agreement towards resorting to the means of arbitration means resorting to a foreign judiciary based on the application of a foreign law other than the law of the state by arbitrators of multiple nationalities.

2: The resort to the means of arbitration through the inclusion of the arbitration clause means the waiver of the parties to their national judiciary, and this in itself is an attack on the general jurisdiction of the national courts to which the public person is affiliated to consider such disputes, which means violating the distribution of judicial competences to the various judicial bodies and then attacking the jurisdiction of the national administrative judiciary in considering them.

3: Supporters of this trend believe that the idea of resorting to arbitration contradicts the idea of public order within the state, because administrative disputes in general and administrative contract disputes in particular are related to public order because of the presence of a public person in the legal relationship arising from the dispute, because the latter concludes such relations to achieve the public interest and therefore is supposed to be national courts based on achieving the public interest in view of those disputes and not a foreign judiciary about them.

Second: The pro-trend

In light of the rejection of the administrative jurisprudence towards resorting to this means to settle disputes arising from legal relations in which the State or a person of public law is one of the parties, another aspect of jurisprudence came out towards the support of referring to this means and resorting to it, even if the relationship exists between public persons, and they based this on a set of arguments, including[26:]

1: The resort to the method of arbitration does not mean that the assault on the jurisdiction of the internal courts or conflict with the idea of public order in light of the legislative position in favor of the existence of the idea of arbitration as one of the means of settling disputes and the

Ashraf25 Mohamed Khalil Hammad, Arbitration in Administrative Disputes and its Legal Effects, Dar Al-Fikr Al-Jamia, Alexandria, 2010, p. 34; Hamdi Yassin Okasha, Encyclopedia of Administrative and International Contracts, Knowledge Foundation, Alexandria, 1998, pp. 140-141.

26 Ashraf Muhammad Khalil Hammad, op. cit., pp. 54-55.

existence of the freedom of the parties to the dispute to resort to it without default or deliberately, and therefore there is no embarrassment or conflict towards resorting to this means.

2: The policy of economic reform and investment promotion adopted by each country at the present time is based on attracting investors and foreign capital in order to create a good economic climate for the state, and this can only be achieved through the creation of a judicial legislative climate for that, including the acceptance of arbitration as a means of settling disputes arising from legal relations, especially since the foreign investor is not assured of his rights in light of the place, time and place of the public works contract in the foreign state under rigid legislation. which prevents him from resorting to such means.

3: The means of arbitration is no less important than the means of reconciliation as it does not affect the competences of the competent court in view of the dispute originally, especially in light of the legislative position in favor of the method of arbitration as one of the means of resolving disputes and the legal organization that exists on it.

4: Nor is there any justification for preventing or prohibiting the recourse of persons of common law to this means, since it preserves the power and superiority enjoyed by every public legal person[27].

Based on the above direction of jurisprudence of administrative law regarding the resort to arbitration in disputes in which a public person in the state is a party, we support the trend in favor of this idea as long as the legislator and the administrative judiciary in the state do not prohibit at all the idea of resorting to the method of arbitration in such disputes, especially if the method of arbitration has a legal organization within the state, The justifications exceed all the arguments of the jurisprudential opinion rejecting this idea because the existence of a legal organization eliminates with it the idea of assault on sovereignty or the jurisdiction of the national judiciary, as well as the absence of an explicit impediment that eliminates the idea of objection to public order, and therefore resort to arbitration is permissible, even if one of its parties is a person of public law

2.1.2 The position of the Iraqi legislator on resorting to the method of arbitration in public works contracts

Iraq is one of the countries that have legislated the method of arbitration and allocated a special section in its pleadings law through which this method is regulated to be a peaceful means that individuals can resort to settle their disputes arising from their legal relations, because of its great importance in resolving disputes in terms of speed, confidentiality, lack of costs, experience and know-how required to resolve disputes and other advantages enjoyed by

27 Sabrina Jabalia, Arbitration Procedures in Administrative Contract Disputes, Master's Thesis, submitted to the Faculty of Law and Political Science - Larbi Ben Mahdi University, 2012-2013, pp. 34-35.

arbitration, However, the Iraqi legislator did not come up with a separate law on the means of arbitration, in addition to that, it did not include in its legal regulation of this means in its pleadings law any text that prevents persons of common law from resorting to this method[28].

In international administrative contracts, public persons in the State can resort to the means of arbitration to settle disputes arising from them upon obtaining the approval of the Planning Council, and in internal administrative contracts as well, public and private persons can also resort to this means to settle disputes arising from internal administrative contracts, based on the text of article 251[29]. From the Iraqi Code of Procedure No. 83 of 1969, which allowed resorting to arbitration to consider all disputes arising from the implementation of a particular contract without excluding any contract, and the text of Article (69) of the general conditions for civil engineering contracting issued by the Ministry of Planning, which allows the employer and the engineer upon non-acceptance of the decision to resort to the means of arbitration to settle the dispute arising from the interpretation or implementation of the company in which the state is a major party, Since the first is absolute and is at all, the second is private and the private restricts the public, this means that resorting to the means of arbitration in Iraqi law is permissible and there is nothing wrong30 with it.

As for the position of the Iraqi judiciary, I went in Berjaya matter towards opposing the idea of resorting to the method of arbitration to settle disputes arising from administrative contracts and considered arbitration as a matter of foreign judiciary and therefore resorting to it means prejudice to the sovereignty of the state, but the Federal Court of Cassation supported the position of the Iraqi legislator towards the approval of the authorization to resort to the means of arbitration to settle disputes arising from administrative contracts, Among them are public works contracts, which have been established in many of their decisions concerning the validity of arbitration or not in relations between public and private persons, and there is nothing that can be inferred from them for the invalidity of the arbitration procedure in administrative contract disputes[31].

2.2 Rules of arbitration in public works contracts

In this requirement, we address the rules of arbitration in public works contracts, by explaining the most important conditions that are required to be met in the means of arbitration, arbitrators and parties to legitimize the latter's resort to this means, with an indication of the

Dr28. Ali Mohsen Towai, The Role of Arbitration in the Field of Administrative Contracts in Iraq, Research published in Mayson Journal of Comparative Legal Studies, Mayson University - College of Law, Volume 1, Issue 2, 2020, p. 225 and beyond.

29 The article provides that "arbitration may be agreed upon in a particular dispute, and arbitration may be agreed upon in all disputes arising from the performance of a particular contract".

30 Dr. Fawzi Mohamed Sami, op. cit., 118-120.

Dr31. Ahmed Khurshid Hamidi, Arbitration in Administrative Contracts and the Permissibility of Adopting it in Iraqi Legislation, Research published in the Kirkuk University Journal for Humanitarian Studies, No. 1, Vol. 4, Year 4, 2009, pp. 102-103.

most important procedures followed for this by dividing the requirement into two branches that do not have a third according to the following division:

1.2.2 Conditions required for arbitration

The permissibility of resorting to the method of arbitration in disputes arising from administrative contracts in general, and public works contracts in particular by the Iraqi legislator requires the availability of a set of formal and objective conditions for the means of arbitration to give legitimacy to resort to it and enable it to carry out its work in settling the dispute as follows:

First: Formal Conditions of Arbitration

The Iraqi legislator requires in the means of arbitration that a set of conditions of formality required for the method of agreement on arbitration and the qualities required in the personality of the arbitrators and the parties to the dispute are as follows:

1: The Iraqi legislator requires in the means of arbitration to be written without orality, that is, the parties must agree on the arbitration clause when they conclude the public works contract, and therefore there is no room to take the means of arbitration if it comes orally, and there is no difference whether the arbitration agreement came in the form of an arbitration clause by adding a clause in the contract, or the arbitration party through a previous agreement on the contract that was made between them to resort to the means of arbitration ().[32]

2: The personality of arbitrators is required not to be magistrates except with the permission of the Judicial Council (33), because the judges assumed his judicial task in addition to the task of arbitration would impede his work and contribute to delaying the adjudication of cases before national courts.[34]

3: The number of arbitrators must be a chord so as to the possibility of weighting in the event of a split of the opinions of the arbitrators in the dispute before them, as stipulated in Article (257) of the Iraqi Code of Procedure that "**when there are multiple arbitrators, their number must be a chord except in the case of arbitration between spouses**[35]".

4: The legislator also requires arbitrators to be adults and therefore it is not correct for the arbitrator to be a minor, interdicted, deprived of his civil rights, or bankrupt who has not been rehabilitated, according to the text of Article (255) pleadings by saying, "The arbitrator may

---

Rami32 Ahmed Al-Ghalib, Arbitration in Administrative Disputes, research published in the Journal of the Faculty of Law for Legal and Political Sciences, Vol. 9, No. 33, 2020, pp. 114-115.

33 Article 255 of the Iraqi Code of Procedure stipulates that "an arbitrator may not be a magistrate except with the permission of the Judicial Council ...".

Dr34. Fathy Wali, Arbitration Law in Theory and Practice, 1st Edition, Knowledge Foundation, Alexandria, 2007, p. 237.

35 See the Iraqi Code of Procedure.

not be ... He may not be a minor, interdicted, deprived of his civil rights or bankrupt who has not been rehabilitated3637", because the said persons have the right to dispose of their rights only through another person and therefore how he will have the right to dispose and decide on the actions and affairs of others.

Second: Substantive Conditions of Arbitration

The availability of formal conditions in arbitration and its body does not mean that the law does not require other objective conditions, as the legislator must when resorting to the means of arbitration to meet some objective conditions also in addition to the formal conditions, lie in the following:

1: Disputes arising from public works contracts must be one of the disputes in which reconciliation is permissible, because the legislator limited the scope of arbitration to the scope of disputes in which reconciliation is permissible, otherwise there is no room for resorting to the method of arbitration in disputes that do not accept reconciliation in the text of Article (254) pleadings by saying, "**Arbitration is not valid except in matters in which reconciliation is permissible ...**"[(38)]".

2: The validity of the arbitration agreement requires that the conditions to be met for the validity of the agreements in general, such as consent, place and reason, as the parties to the arbitration agreement are required to have their agreement stemming from the will of Hour issued by the parties without any coercion, and that the place of arbitration is not contrary to public order and morals, considering that issues related to public order and morals may not be reconciled, The parties shall have the required legal capacity to express their will without any defect or deficiency in the presence of the capacity to perform by the private person and the consent of the competent authorities of public persons according to the parties to the public works contract[39].

2.2.2 Procedures for resorting to arbitration[40]

Referring to the Iraqi Code of Procedure, we find that arbitrators are required to follow the same legal procedures required of the judge when considering a dispute submitted to the judiciary without those agreed upon by the parties, and does not bind the parties to the same procedures that oblige the litigants in the case before the judiciary in terms of the formal

36 See the Iraqi Code of Procedure.
Etidal37 Abdul Basi Youssef and Zaman Fawzi Kati, guarantees of the parties to the arbitration contract, research published in the Journal of the Message of Law, the issue of the Second International Legal Conference of the College of Law - Al-Muthanna University in cooperation with the College of Law, University of Karbala and the College of Law, Warith Al-Annia University, Year 14, 2022, p. 80.
38 See the Iraqi Code of Procedure.
Dr39. Abdulaziz Abdel Money Khalifa, Arbitration in Internal and International Administrative Contract Disputes, 1st Edition, Knowledge Foundation, Alexandria, 2006, p. 35.
40 Rami Ahmed al-Ghalib, op. cit., pp. 125-128.

procedures required to file the lawsuit or means of proof except within the limits of basic procedures related to public order, Thus, the parties to the dispute may agree on the procedures followed to submit the dispute to the arbitrators without all the procedures, and the arbitrators are obliged to follow the conditions and procedures in the Code of Procedure except to the extent that the parties to the dispute have not agreed to take[41].

The legislator requires the issuance of the express acceptance of the arbitrators in writing unless appointed by the court or by accepting it by signing the arbitration contract, which is supposed to be a chord as previously mentioned [(42),] and then the arbitrators set a date to consider the dispute after informing the parties about it in accordance with the prescribed procedures, When the parties are present and each of them presents evidence and proofs in his possession, the adjudicator shall be adjudicated on the basis of the arbitration contract, the arbitration clause and the advanced documents[43].

Originally, arbitrators are bound to resolve the dispute before the lapse of six months from the date of filing the dispute before them and accepting arbitration, but nevertheless the parties may agree on a period less than the prescribed period or extend it, and then the arbitrators shall be bound by that period[44], otherwise the parties shall have the right to resort to the competent courts to reconsider the dispute[45].

In addition to the foregoing, the arbitrators issue their decision by agreement or with the approval of the majority of opinions after the deliberation that took place between them, the decision includes a summary of the arbitration agreements and the statement and statements of the litigation recorded in the minutes of arbitration with the documents submitted by them, in addition to a statement of the reasons on which the arbitrators relied for the issuance of the decision with the date and signature of the arbitrators[46], and each party gives a copy of the decision with the delivery of the decision with the original arbitration agreement to the competent national court within three years from the date of its issuance to be ratified. The decision issued and thereafter enters into force[47].

3.2 Effects of Asylum Arbitration in Public Works Contracts

The resort of the parties to disputes arising from the public works contract to the means of arbitration to settle it entails a set of legal effects related to the parties to the dispute and

41 See article 265 of the Iraqi Code of Procedure.
42 See article 259 of the Iraqi Code of Procedure.
43 See article 266 of the Iraqi Code of Procedure.
44 See article 262 of the Iraqi Code of Procedure.
45 See article 263 of the Iraqi Code of Procedure.
46 See article 270 of the Iraqi Code of Procedure.
47 See Article (272) of the Iraqi Code of Procedure, Dr. Adam Wahab Al-Nadawi, Civil Pleadings, 3rd Edition, Al-Atak for the Book Industry, Cairo, 2011, p. 307.

members of the arbitral tribunal and the decision issued on the case, we address these effects by dividing the requirement into three branches, we allocate each branch to a specific aspect of the aspects that arrange arbitration effects on them or them according to the following division:

1.3.2 Regarding the parties to the conflict

One of the effects of the arbitration process when settling disputes of public works contracts is that its effects are limited to the parties to the litigation only, that is, the decision issued by the arbitrators is of relative argument that does not enrich its impact only for the parties to the dispute who concluded the arbitration agreement and signed it, they alone benefit from the arbitrators' decision, unlike the ordinary judiciary, which sometimes the judgment issued is valid on people other than those who were a party to the litigation when that judgment becomes a judicial principle Binding[48].

One of the other effects of arbitration and concerns the parties is that the issuance of the decision by the arbitrators ends the litigation to acquire the decision the authority of res judicata, and therefore may not be presented to the judiciary or arbitrators after the issuance of the arbitrators' decision except with regard to the ratification of the decision in order to implement it before the executive departments in Iraq, because the acquisition of the authority of res judicata does not mean the acquisition of executive power, but lies in the latter's need for the approval of the competent court ().[49]

2.3.2 Regarding arbitrators

One of the effects that the arbitral tribunal entails is that it deposits a copy of its decision with the original arbitration agreement to the competent court within three days from the date of its issuance, with a copy50 of it given to both parties, so that the competent court is aware of its decision [and] has an archive when the parties ratify it before it, and so that the parties to the dispute are aware and informed of what is written in the arbitrators' decision and they can submit their objection or file a ratification lawsuit before the competent court fulfilling its conditions. Required formality[51].

3.3.2 Regarding the arbitrators' decision

One of the effects that result from the means of arbitration is that it has an impact similar to the impact of the judicial judgment for the parties to the dispute, where the parties to

48 See article 272/2 of the Iraqi Code of Procedure.
49 See Article (272/1) of the Iraqi Code of Procedure; Dr. Khairi Al-Din Kazem Al-Amin and Hussein Matara Noman Al-Sultana, Arbitration as a means of resolving disputes of international model trade contracts, research published in the Journal of the College of Basic Education for Educational Sciences and Humanities, Issue 56, Volume 14, 2022, p. 21.
50 See article 271 of the Iraqi Code of Procedure.
Dr51. Khairi al-Din Kazem al-Amin and others, op. cit., p. 20.

the dispute are committed to the judgment issued by the arbitral tribunal and are obliged to implement it, unlike other peaceful means that lack this mandatory, but the Iraqi legislator did not mean the force of implementation of the arbitrators' decisions until after the ratification of their decision by the competent court, This is through the submission of a request by the litigants to the competent court in view of the arbitration award and the judgment to ratify or invalidate it and when the issuance of the last judgment returns the case to the arbitrators for adjudication again52 (), as stated in Article (274) of the Code of Procedure by saying, "The court may ratify the arbitration award or invalidate it in whole or in part, and in the case of annulment in whole or in part, it may return the case to the arbitrators to fix what marred the arbitration award or adjudicate the dispute itself if the case valid for adjudication".[53]

However, the legislator has enabled the court on its own initiative to invoke the invalidity of the judgment without standing at the request of the litigants, and specified the cases in which it may do so as follows:

"1: If it was issued without written evidence or on the basis of a void agreement or if the decision went beyond the limits of the agreement.

2: If the decision violates a rule of public order or morals or a rule of arbitration based on this law.

3: If one of the reasons for which a retrial may be retried is realized.

4: If there is a material error in the decision or in the procedures affecting the validity of the decision."[54]

When the judgment is issued by the competent court, whether ratification or invalidity, the judgment acquires the authority of res judicata and therefore the parties to the litigation may not challenge it by way of objection, but rather require them to take the legal methods of appeal provided for in the Iraqi Code of Procedure.[55]

The end

After we finished writing the topic of our research, we came to the following:

First: Conclusions

1: Administrative jurisprudence differed among themselves about the permissibility of

52 Rami Ahmed al-Ghalib, op. cit., p. 128.
53 See the Iraqi Code of Procedure.
54 See Article (273) of the Iraqi Code of Procedure; Dr. Ali Ahmed Hassan Al-Lahiri, Arbitration in Administrative Contracts, Research published in the Journal of Legal Sciences, University of Baghdad - College of Law, Vol. 22, No. 1, 2007, p. 300.
55 See article 275 of the Iraqi Code of Procedure.

resorting to the method of arbitration or not to settle disputes arising from administrative contracts in general and public works contracts in particular between the supporter who allows this because there is no explicit provision of the ban, and the rejectionist who believes that resorting to it opposes the jurisdiction of the national judiciary in addition to its conflict with the sovereignty of the state and public order in it.

2: There is no explicit legal text in the Iraqi legislation related to the subject of administrative or related to the organization of the peaceful means, the administration is prohibited from resorting to the means of arbitration in the settlement of administrative disputes arising from administrative contracts, but based on the text of the year in the law pleadings and the direction of the last administrative judiciary, it becomes clear to us that there is no objection to resorting to this means after taking approvals from the necessary official authorities.

3: The Iraqi administrative legislator did not regulate the means of arbitration in the administrative laws related to the subject of the dispute, but rather organized this method as one of the alternative means of the judiciary in the Code of Procedure under a special chapter and included its own rules that are subject to it in some detail.

4: The means of arbitration and resorting to it must have a set of formal conditions, including - in terms of writing, selection of members of the tribunal, its conditions, conditions related to the parties - and objectivity - such as the scope and conditions required to conclude the arbitration agreement - to be done in accordance with the written legal bases, in addition to the necessary procedures to take the path of doing so according to what the legislator indicated in the Code of Procedure without the laws related to management.

5: The agreement of the parties on the means of arbitration and resorting to it to settle the dispute entails a set of legal effects, some of which relate to the parties to the dispute - from relative examples of the impact of the decision on the two opponents and not others, in addition to preventing the establishment of a lawsuit again by the parties after the issuance of the decision to do so - and related to the two arbitrators - such as their commitment to deposit a copy of the decision with the original arbitration agreement to the competent court and give each party a copy of it - which relates to the arbitration award itself - in terms of its enjoyment of mandatory force and acquisition Res judicata is authentic.

Second: Recommendations

1: We recommend that the Iraqi legislator organize the method of arbitration in a better orderly manner that is present in the Code of Procedure through an independent law or in the same law in a form that can be relied upon to settle all disputes without any default.

2: We recommend that the Iraqi legislator unify his position on the possibility of resorting to the means of arbitration on the consideration of disputes related to administrative contracts to avoid objecting to positions in the judiciary and coming up with a single judgment for all cases

to bridge the door to jurisprudential and judicial differences on that.

List of sources

First: Language Books

1. Ahmed bin Muhammad bin Ali Al-Qayoumi Al-Mari, Al-Misbah Al-Munir, Librairie du Laban, Beirut, 1987.

2. Majid al-Din Muhammad ibn Yaqoob al-Firouzabadi, The Ocean Dictionary, Investigation: Anas Muhammad al-Shame and Zakaria Jaber Ahmed, Dar al-Hadith, Cairo, 2008.

3. Dictionary of Law, Arabic Language Dictionary Foundation, General Authority for Princely Printing Affairs, 1420 AH - 1999 AD, p. 589.

Second: Law Books

1. Ashraf Mohamed Khalil Hammad, Arbitration in Administrative Disputes and its Legal Effects, Dar Al-Fikr Al-Jamia, Alexandria, 2010.

2. Dr. Ibrahim Deri, Internal and International Arbitration, 2nd Edition, Sudan Currency Printing Company, Khartoum, 2008.

3. Dr. Ahmed Abu Al-Wafaa, Optional and Compulsory Arbitration, Knowledge Foundation, Alexandria, 1978.

4. Dr. Adam Wahab Al-Nadawi, Civil Pleadings, 3rd Edition, Al-Atak for the Book Industry, Cairo, 2011.

5. Dr. Suleiman Muhammad Al-Tamai, General Foundations of Administrative Contracts, 5th Edition, Ain Shams University Press, without place of publication, 1991.

6. Dr. Abdel Aziz Abdel Money Khalifa, Arbitration in Internal and International Administrative Contract Disputes, 1st Edition, Knowledge Foundation, Alexandria, 2006.

7. Dr. Ali Mohamed Bdeir and others, Principles and Provisions of Administrative Law, Al-Atik for the Book Industry, Legal Library, Cairo - Baghdad, 2007.

8. Dr. Ammar Awabi, Administrative Law, Part 2, University Publications Office, 2000.

9. Dr. Fathy Wali, Arbitration Law in Theory and Practice, 1st Edition, Knowledge Foundation, Alexandria, 2007.

10. Dr. Fawzi Mohammed Sami, International Commercial Arbitration, Dar Al Thaana for Publishing and Distribution, Amman, 1992.

11. Dr. Masen Lilo Raid, Mediator in Administrative Law, 1st Edition, Modern Book Foundation, Lebanon, 2013.

1. Made Yassin Okasha, Encyclopedia of Administrative and International Contracts, Knowledge Foundation, Alexandria, 1998.

Third: University theses and theses

1. Samia Abu Assaf, the effectiveness of arbitration in investment contracts according to the Lebanese and Syrian laws, Master Thesis, Applied to the Faculty of Law – Lebanese Islamic University, 2018-2019.

2. Sound Qureshi, The Legal System of Public Works Contract, Master Thesis, Applied to the Faculty of Law and Administrative Sciences – University of Algiers, 2001-2002.

3. Sabrina Jabalia, Arbitration Procedures in Administrative Contract Disputes, Master Thesis, submitted to the Faculty of Law and Political Science – Larbi Ben Mahdi University, 2012-2013.

Fourth: Research

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

2. Tidal Abdul Basi Youssef and Zaman Fawzi Kati, guarantees of the parties to the arbitration contract, research published in the Journal of the Message of Law, the issue of the Second International Legal Conference of the College of Law - Al-Muthanna University in cooperation with the College of Law, University of Karbala and the College of Law, Warith Al-Annia University, Year 14, 2022.

3. Basma Amer Omar Nazma and Muhammad Naim Omar, Arbitration in Administrative Contract Disputes in Iraq and its Legitimacy in the Light of Islamic Law, Research published in Al-Resale Magazine, Volume 3, Issue 4, 2019.

4. Dr. Khairi Al-Din Kazem Al-Amin and Hussein Matara Noman Al-Sultana, Arbitration as a means of resolving disputes of international model trade contracts, research published in the Journal of the College of Basic Education for Educational Sciences and Humanities, Issue 56, Volume 14, 2022.

5. Rami Ahmed Al-Ghalib, Arbitration in Administrative Disputes, Research published in the Journal of the Faculty of Law for Legal and Political Sciences, Volume 9, Issue 33, 2020.

6. Rashi Mousa Mohamed, The Role of Arbitration Agreement in Resolving Foreign Investment Contract Disputes, Research submitted to Ahl al-Bayt University Journal, Issue 11, 2010.

7. Dr. Saad Hussein Abdel Melhem, The Role of Arbitration in Encouraging Oil Investment, Research published in the Journal of Petroleum Research and Studies, Issue 3, 2021.

8. Dr. Dargham Mahmoud Kazim, International Arbitration Clause in General Contracting Contracts, Research published in the Journal of the Iraqi University, Part 1, Issue 1, Volume 46, 2020.

9. Dr. Ali Ahmed Hassan Al-Lahiri, Arbitration in Administrative Contracts, Research published in the Journal of Legal Sciences, University of Baghdad - College of Law, Vol. 22, No. 1, 2007.

10. Dr. Ali Mohsen Towai, The Role of Arbitration in the Field of Administrative Contracts in Iraq, Research published in Mayson Journal of Comparative Legal Studies, Mayson University - College of Law, Volume 1, Issue 2, 2020.

11. Dr. Ammar Tariq Abdulaziz, The Role of Arbitration in Administrative Contract Disputes, Research published in the Journal of the College of Law - Al-Nahrain University, Volume 14, Issue 2, 2012.

12. Ghassan Rabah, The Judiciary Authority in Controlling Arbitrators' Decisions, Research Published in the Journal of Justice, Issue 2, 2008.

Fifth: Laws

1. Iraqi Civil Code No. 40 of 1951.

2. Iraqi Code of Procedure No. 83 of 1969.