INTERNATIONAL JOURNAL OF ACADEMIC RESEARCH IN BUSINESS & SOCIAL SCIENCES

Vol 14, Issue 2, (2024) E-ISSN: 2222-6990

Judicial Control Over Arbitration in Administrative Disputes (Comparative Study)

Hilal Hamed Hilal Alqassabi, Dr. Ahmad Irdha Mokhtar

Associate Fellow in The National University of Malaysia

To Link this Article: http://dx.doi.org/10.6007/IJARBSS/v14-i2/20790 DOI:10.6007/IJARBSS/v14-i2/20790

Published Date: 10 February 2024

Abstract

The aim of this article is to demonstrate the mechanisms of judicial control over arbitration in administrative disputes (comparative study). What is the requirement to present the general provisions of arbitration in administrative contract disputes? The analytical and comparative approach has been relied upon in the texts of international agreements and Omani law. Identifying administrative contracts that are excluded from resorting to national and international arbitration and linked to the sovereignty of the state and devoting the principle of separation between the arbitration agreement and the fate of the original contract to ensure the independence and effectiveness of the arbitration agreement.

keywords: Judicial Control, Arbitration, Administrative Disputes

Introduction

The administrative contract is distinguished from the civil contract in that it is subject to a special legal system, which is the system of public law, and its disputes are concerned with the administrative judiciary. During the process of concluding and executing the contract.

If contracts in private law are based on the principle of the contract, the law of the contracting parties, and the principle of the authority of the will, then the field of application of these principles is narrow within the framework of administrative contracts, especially since administrative contracts are based on the principles of ensuring the regular and steady functioning of the public utility, and the principle of the public utility's ability to change and alteration, which restricts Management freedom in contracting.

There is no doubt that disputes related to administrative contracts are reserved for the administrative judiciary, and this is what the judiciary has settled on, whether it is related to the formation of the contract, its validity, or its implementation, whether it is related to a claim for annulment of separate decisions or a case for a full court, but it is often preferred by the contractor with the administration to resolve the dispute through arbitration Administrative contract disputes.

Arbitration is intended to present the dispute to a specific person or several persons to adjudicate the dispute without resorting to the competent court in its various forms, civil arbitration, commercial arbitration and administrative arbitration according to the nature of

the dispute, despite the importance of arbitration in resolving administrative disputes as an alternative way to eliminate and prove practical applications and experiences its effectiveness in resolving administrative disputes The debate was jurisprudential and still is about the legality of arbitration in administrative contract disputes, due to the conflict of arbitration with the principle of state sovereignty, and as an assault on the jurisdiction established for administrative judiciary and its conflict with the idea of public order. Arbitration is also considered a violation of the principle of separation of powers. In administrative contract disputes?

The First Requirement: The concept of arbitration in administrative contract disputes

Arbitration is a means of resolving disputes whose special nature requires prompt settlement by a binding ruling on the parties to the dispute. It is characterized by simplicity of procedures. It is an agreement to submit a dispute to a specific person or persons concerned to settle it without the competent court.

Section One: Definition of Arbitration

Arbitration is a complex legal process based on the agreement of the parties to a specific dispute to present their dispute to one or more arbitrators for adjudication in the light of its general rules and principles that govern litigation procedures, or in light of the rules of justice in accordance with what is stipulated in the rules of the agreement, with the parties to the dispute undertaking to accept the ruling issued. On behalf of the arbitrators, who holds the authority of the final order and issues the order of the judicial authority in the country in which it is intended to be executed (Abdullah, 2016)

As for administrative arbitration, it is a legal means that the state or one of the other public legal persons resort to to settle all or some of the current or future disputes arising from legal relations of an administrative nature, contractual or non-contractual, between them or between them and one of the national or foreign private law persons, whether the arbitration is optional. or compulsory in accordance with the rules of jus cogens (Al-Faraji, 2019)

Administrative arbitration was also defined as an exceptional system for litigation according to which the state and other public law persons may remove some administrative disputes arising from a national or foreign contractual or non-contractual legal relationship from the jurisdiction of the State Council to be resolved by arbitration based on a legal text that permits this, and a departure from the principle The general prohibition on the capacity of the State and other persons of public law to resort to arbitration. Article 1006 of the Code of Administrative Civil Procedures stipulates that: “Every person may resort to arbitration in matters related to public order or the status and capacity of persons. Public legal persons may not request arbitration, except in their international economic relations or in international transactions.”

The Second Subsection: The distinction between arbitration and judiciary

First: In terms of the basis: the basis for resorting to arbitration is the will of the parties to the dispute, while resorting to the judiciary does not require the agreement of the parties to the dispute (Bonduq, 2019)

Second: In terms of the scope of jurisdiction: The jurisdiction of the judiciary is wider compared to the jurisdiction of the arbitral tribunal, as the judiciary has general jurisdiction in all disputes.

Third: In terms of impact, the judicial rulings issued in the real-world case have absolute authority, while arbitration rulings have relative authority, and their impact is limited to the parties to the dispute.
Fourth: In terms of the enforceability of the ruling: Judicial rulings are considered enforceable immediately after their issuance once the appeal deadlines have expired, while arbitration rulings require the issuance of enforcement by the judicial authority (Matlab, 2013)
Fifth: In terms of the goal: The aim of resorting to arbitration in the dispute through an amicable way by a third party, while arbitration aims at a private interest, while the judiciary aims at achieving the public interest.
Sixth: In terms of the applied rules: the judge applies the rules of the law, but the arbitrators do not apply them, so they can resort to reconciliation (Al-Qayloubi, 2007)
Thus, arbitration has several advantages that distinguish it from the judiciary, the most important of which is the simplicity of the procedures and the speed of issuance of the decision in the arbitration, as it is a ruling that is not subject to the degrees of litigation and is not subject to any form of appeal, and the arbitration procedures are confidential, unlike the judiciary, whose procedures are characterized by publicity, which is preferred by the parties Arbitration to preserve their professional secrets and financial positions, in addition to that they choose arbitrators who have knowledge of the disputes from a technical point of view unlike the judges.
Arbitration also differs from conciliation in that conciliation is an agreement system from the beginning of its procedures to its end. As for arbitration, it is consensual whether it is accepted or not, and this is despite the fact that both are alternative methods for resolving the dispute consensually.

The third section: forms and types of arbitration

Arbitration is divided in terms of the will of the parties to the dispute into optional arbitration and compulsory arbitration, and in view of the geographical aspect, national arbitration and international arbitration. As for the forms of arbitration, they are the arbitration clause and the arbitration agreement (AlDarrasi, 2008)

First: the arbitration photos.
The settlement of the dispute by arbitration shall have two forms: the arbitration clause and the arbitration agreement. Arbitration Clauses: According to the provisions of Article 1007 of the Civil and Administrative Procedures Code, the arbitration clause is the agreement under which the parties to a contract related to available rights are bound to submit disputes that may be raised in connection with this contract to arbitration (Abdullah, 2016)
Article (10/2) of the Omani Arbitration Law states that “arbitration may take place in the form of an arbitration clause prior to the emergence of the dispute contained in a specific contract or in the form of a separate agreement concluded after the emergence of the dispute, even if it was evaluated in the form of a lawsuit before a judicial authority.” In this case, the agreement must specify the issues covered by the arbitration, otherwise the agreement is void.
The arbitration clause establishes, under pain of nullity, the appointment of the arbitrator or arbitrators, or the determination of the modalities of their appointment. Or it is an agreement contained within the texts of a specific contract, according to which the parties decide to resort to arbitration to settle future disputes that arise around the contract and its

implementation, and the arbitration clause is independent of the contract, except that it may be included in the original contract or as an appendix to it (Al-Tahiwi, 2014)
With the arbitration agreement, the arbitration agreement stipulated in Article 1011 of the Code of Civil and Administrative Procedures, the arbitration agreement is the agreement under which the parties accept to submit a dispute they previously created to arbitration.
It is defined as an agreement concluded by the parties, separate from the original contract, according to which arbitration is resorted to to settle an already existing dispute in connection with this contract, and accordingly the arbitration agreement at a later stage of the dispute reverses the arbitration clause (Al-Faraji, 2019)

Second: Types of arbitration.
Optional arbitration and compulsory arbitration: Resorting to arbitration is optional with regard to the parties to the dispute, as they choose by their will the arbitrator, the applicable law, and the arbitration procedures, and arbitration is compulsory when the legislator imposes it on the parties to settle some disputes due to their own nature, so it is not possible to resort to the judiciary in these disputes.
There has already been a discussion about the constitutionality of compulsory arbitration, and the Supreme Constitutional Court in Egypt ruled that compulsory arbitration imposed by the legislator on natural persons is unconstitutional, because it deprives them of their right to resort to the judiciary, just as arbitration is by its nature a voluntary act (Saqr, 2019)
Accordingly, we believe that arbitration is an alternative and exceptional method for adjudicating disputes, does not contradict the existence of compulsory arbitration as an exceptional method specified by law in order to resolve disputes, and that specifying arbitration does not deprive the parties of choosing arbitrators, in addition to benefiting from the advantages of arbitration from the simplicity of procedures and the speed of adjudication (Fattah, 2019)
National arbitration and international arbitration With reference to jurisprudence and comparative legislation, three criteria have been identified to distinguish between national and foreign arbitration
1) The geographical criterion is related to the place of arbitration, the nationality of its parties and their place of residence. It was adopted by some comparable legislations, such as the English legislation. This criterion was adopted in the International Commercial Arbitration Model Law of 1985 amended in 2006 (Qaminas, 2005)
(2) The legal criterion is based on the association of arbitration with more than one legal system. If the law applicable to the place of arbitration, or the procedures and subject matter of arbitration, the nationality of the parties, and the nationality of the arbitrators are related to one country, the arbitration is national, but if these elements are related to more than State the arbitration was international.
(3) The economic criterion: It relates to the connection of the contract subject of the dispute to international trade. This criterion was adopted by the French legislation in the French Civil and Administrative Procedures Code of 2011, which stipulated that: “Arbitration is international if it includes interests related to international trade.” In the Civil and Administrative Procedure Code, the law relied on distinguishing between national arbitration and international arbitration on the combination of economic standard, geographical standard, and legal standard, as stated in the text of Article 1039 of it: “Arbitration is international in the sense of this law, arbitration that concerns disputes related to the economic interests of two countries (Al-Nasiri, 2013)

The second requirement: Judicial control over the terms and procedures of arbitration in administrative contract disputes

Section One: Arbitration Terms and Procedures for Administrative Contract Disputes:

The Omani legislation specified the general framework of the state and public legal persons, and public legal persons may not request arbitration, except in their international economic relations or in international transactions, as stipulated in Article 975 of the Civil and Administrative Procedures Law that public legal persons (the state or The state, municipality or public institutions of an (administrative) nature may conduct arbitration except in cases stipulated in international agreements ratified by Oman and in the article on public contracts. (Matlab, 2013)

Article 976 of the same law stipulates the application of provisions related to arbitration before the administrative judicial authorities by stating that: "When the arbitration is related to the state, this procedure is resorted to at the initiative of the concerned minister or ministers." On the initiative of the President of the Municipal People's Assembly or the Governor.

When arbitration is related to a public institution of an administrative nature, this procedure is resorted to at the initiative of its legal representative or the representative of the guardianship authority to which it belongs. (Matlab, 2013)

The legislator agreed to grant the possibility of resorting to arbitration from public moral persons with restrictions taking into account the balance on the public interest, maintaining public order and leaving a space of freedom for it, in response to the requirements of the regular and steady functioning of the public facility, the principle of its susceptibility to change and alteration on the one hand, and commitment and in line with agreements and obligations International, especially that the settlement of disputes through arbitration is one of the most important guarantees for the foreign investor, and reality has imposed it.

The second section: arbitration conditions in administrative contract disputes.

First: Arbitration Terms.

Formal conditions for arbitration

1- Writing the arbitration agreement, as Article 1008/1 of the Code of Civil and Administrative Procedures stipulates a writing condition. The arbitration clause shall be established under penalty of nullity by writing in the original agreement or in the document on which it is based, as Article 1012/1 stipulates, "The agreement on arbitration shall be obtained in writing." Then it was stated in the text of Article 1040/2 of the same law that: "In terms of form, and under penalty of nullity, the arbitration agreement must be concluded in writing or by any means that permit proof in writing, and therefore the Omani legislator required writing in arbitration to protect the rights of the parties and arranged for its violation The nullity. (Shafiq, 1997)

2- Appointing arbitrators with an odd number: According to the Civil and Administrative Procedures Law, especially Article 1008/2, the arbitration clause must include, under penalty of nullity, the appointment of the arbitrator or arbitrators or specifying the methods of their appointment. "The arbitral tribunal shall consist of an arbitrator or several arbitrators with an odd number."

Objective conditions: The arbitration agreement requires the fulfillment of the conditions necessary for the validity of obligations and in the field of civil contracts such as consent, place and cause.

(1) Satisfaction: Arbitration requires the consent of the parties to the dispute to settle it through arbitration
(2) The place: is the subject of arbitration, and the legislator stipulated that arbitration is not permissible in matters related to public order.
(3) Reason: Agreement on arbitration parties. It must be a legitimate reason. It is noted that the legislation is keen to organize the arbitration process by explicitly stipulating the application of its national laws (administrative law) to administrative contracts in order to preserve the characteristics of administrative contracts and ensure the implementation of arbitration provisions. Freedom for the parties to organize the arbitration procedure. (WahabLutfi, 2019)

Second: Arbitration applications in the field of international administrative contracts:

The New York Convention of 1958 relating to the recognition and enforcement of foreign arbitral awards, along with the Geneva Convention of 1961 relating to the organization of the arbitration process between the signatory countries, is considered one of the most important agreements related to arbitration. It should be noted that in administrative contracts of an international nature, the rules of arbitration of the International Chamber of Commerce in Paris required that The arbitrator shall be of a different nationality than the nationality of the parties. Arbitration is applied in disputes of internal administrative contracts and international administrative contracts. The international administrative contract is distinguished by the nationality of its parties, so one of its parties is a foreigner. International administrative contracts are economic in nature, but one of the most important problems is the difference between the internal public order and the international public order. (WahabLutfi, 2019)

It is noted that countries accept arbitration in international administrative contract disputes to bring in foreign investments, but the problem remains with regard to arbitration in international administrative contracts is the high financial costs resulting from settling the dispute through arbitration, and among the most important areas are arbitration in oil contract disputes, and arbitration in works contract disputes International Public, and arbitration in bot contracts (B.O.T).

The third section: Arbitration and settlement of disputes of electronic administrative contracts

There is no doubt that the conclusion of administrative contracts through the information network requires resolving disputes in different ways and procedures than resolving ordinary disputes.

First: the definition of electronic arbitration: It is the arbitration that takes place through an international communication network without the need for the physical presence of the parties to the dispute, that is, the agreement and its procedures are completed electronically by using electronic means of communication (Al-Jubouri, 2019)

It is noted that international arbitration centers are keen to use the electronic communications network, and that electronic arbitration passes through the agreement, procedures, issuance of the judgment and its implementation, and the agreement is sufficient to give the status of electronic arbitration.

Electronic arbitration is characterized by the availability of information expertise of the two arbitrators, facilitating communication between the parties, arbitrators, and experts, and reducing economic costs, especially transportation expenses. international.

The third section: Judicial control over the arbitration ruling in administrative contract disputes

Arbitration derives its effectiveness from the authority of the judiciary. The judiciary alone has the power to compel enforcement. Arbitration rulings do not have the power of enforcement. Judicial oversight has a preventive and remedial role to ensure the validity of the ruling.

First: Judicial oversight prior to the issuance of the arbitration award in administrative contract disputes

Article 1045 of the Code of Civil and Administrative Procedures stipulates: "The judge is not competent to decide on the subject matter of the dispute if the arbitration dispute exists or if it appears to him that there is an arbitration agreement to be raised by one of the parties." It is also possible for the judiciary to intervene in assisting the arbitrators, according to Article 1048, which states: "Therefore, it was necessary to assist the judicial authority in providing evidence or extending the mission of the arbitrators if the procedures were confirmed, or in other cases, the arbitration court or the parties in agreement with the latter, or the party that interests him Acceleration, after being authorized by the Arbitration Court, to request, according to a petition, the intervention of the competent judge, and the law of the judge's country shall apply in this regard. (Abdel Qader, 2019)

In addition to the intervention of the judiciary, "if the difficulty of forming the arbitration court arises, due to the action of one of the parties or on the occasion of the implementation of the procedures for appointing the arbitrator or arbitrators, the arbitrator shall be appointed by the president of the court located within its jurisdiction the place of concluding the contract or the place of its implementation, if the arbitration clause is null or insufficient to form The arbitration court, the president of the court examines it and declares that there is no reason for the appointment." This is according to the provisions of Article 1009 of the Civil and Administrative Procedures Law. Or the parties did not seek to settle the recusal procedures, the judge shall decide on that by order based on the request of those interested in expediting (Al-Faraji, 2019)

The legislator has set restrictions and controls for arbitration procedures and granted powers to the judiciary to intervene. However, there are some issues related to the judge's intervention in the arbitration that have not been resolved, such as the deadline and the arbitrator's response.

Second: Subsequent judicial oversight of the issuance of the arbitral award

The administrative judiciary has been given scope for oversight of the arbitral award by appealing against it. Article 1058 of the Code of Civil and Administrative Procedures stated that the international arbitration award issued in Oman could be the subject of an appeal for invalidity stipulated in Article 1056. " (AlDarrasi, 2008)

Arbitration provisions accept appeal through the objection of third parties outside the litigation before the competent court before submitting the dispute to arbitration. The appeal is accepted within a period of one month from the date of the pronouncement.

Article 1035 of the Code of Civil and Administrative Procedures states that

- "The final, partial or preparatory arbitral award shall be enforceable by order of the president of the court in whose jurisdiction it was issued, and the original award shall be deposited in the court's control secretariat from the party interested in expediting.

- The parties shall bear the costs of depositing the petitions, documents, and the origin of the arbitral award. (Al-Jubouri, 2019)
- The litigants may appeal the order refusing the execution within fifteen (15) days from the date of rejection before the Judicial Council.

It is noted that the provisions related to appeal are not related to the provisions of administrative arbitration, so the general rules apply, and this requires the intervention of the legislator to set legal controls related to the intervention of the judiciary in ensuring the legality and effectiveness of control provisions in the field of administrative contracts, and the organization of appeal against judgments and mechanisms for their implementation. (Bonduq, 2019)

Conclusion

Despite the regulation of the general provisions of arbitration, the principle in resolving administrative disputes remains the judiciary, and arbitration is the exception, just as resorting to arbitration does not mean giving up the right to resort to the judiciary, and we conclude the following results:

- The necessity of organizing arbitration provisions in a special codification and setting preferential rules related to the conditions, procedures, and controls of arbitration in administrative contract disputes.
- Expanding the areas of application of arbitration in administrative contract disputes, especially considering the modern trends of investment and the partnership between the private sector and the public sector.
- Activating texts related to electronic arbitration in the field of electronic administrative contracts.
- Activating judicial oversight over arbitration in administrative contract disputes within the framework of compliance with the provisions of international agreements, by organizing oversight over internal and international administrative arbitration provisions.
- Ensuring a balance between public and private interest in arbitration in administrative contract disputes, by defining administrative contracts that are excluded from resorting to national and international arbitration and are linked to state sovereignty.
- Devoting the principle of separation between the arbitration agreement and the fate of the original contract to ensure the independence and effectiveness of the arbitration agreement.
- Accurately adjusting the jurisdiction of arbitration disputes in administrative contract disputes.

References

Abdel Qader, A.-A. (2019). Arbitration in Internal Administrative Contracts Disputes, a Comparative Study,. *Master's Thesis in Law, Abd al-Hamid IbnBadisMostaganem University, Faculty of Law and Political Science*.

Abdullah, H. M. (2016). Judicial Supervision of Arbitration in Disputes Related to Administrative Contracts, Comparative Study, 2016. *Master Thesis - College of Law - Al-Mustansiriya University*.

AlDarrasi, A. B.-W. (n.d.). The Legal System of Arbitration Agreement, a Comparative Analytical Study, Modern University Office, Second Edition, 2008.

Al-Faraji, B. A. (2019). Administrative Legitimacy and Exceptions to which a Comparative Study is Presented. *Al-Wafa Legal Library, First Edition,Alexandria*.

Al-Hamdani, S. H. (2012). The Impact of the Administrative Contract on Others. *Modern Book Foundation, 1st Edition, Lebanon*.

Al-Jubouri, M. S. (2019). Principles of Administrative Law, a Comparative Study. *The Legal Library, Baghdad, without a year of publication*.

Al-Nasiri, M. N. (2013). International Commercial Arbitrator (a comparative study). *Modern University Office, Faculty of Law, University of Mosul*.

Al-Nasiri, M. N. (2013). International Commercial Arbitrator (a comparative study), Modern University Office. *Faculty of Law, University of Mosul*.

Al-Qayloubi, S. (2007). Arbitration Problems in Arab Countries, Preliminary Session of the Arab International Arbitrators, Session, . *Giza Governorate.*

Al-Tahiwi, M. E.-S. (2014). The Pillars of the Agreement on Arbitration and its Conditions of Validity, 2014. *University Thought House, Alexandria*.

Ashraf, A. A. (1998). Public System and Arbitration in Private International Relations. *Ph.D. thesis, Ain Shams University*.

Bonduq, W. A. (2019). Arbitration Encyclopedia (International Agreements and Laws of Arab Countries. *Al-Wafa Legal Library, Alexandria*.

Fattah, S. A. (2019). Settlement of disputes through international arbitration. *Al-Wafa Legal Library, Alexandria, 1st Edition*.

Magdy, H. M. (1997). The Role of the Arbitrator in the Arbitration Dispute and the Limits of His Authorities. *Dar Al-Nahda Al-Arabiya*.

Mohamed, M. M.-M. (2012). The Technical Structure of the Arbitration Award and the extent of the Court of Cassation's oversight over it, a comparative study. *Arab Renaissance House, Cairo,*.

Munir, A. (1995). Arbitration Judiciary in International Trade Disputes. *University Publications House, Alexandria*.

Qaminas, I. M. (2005). Judge's Power over the Executive Force of Judgments. *PhD thesis, Cairo University*.

Saqr, A. A. (2019). Arbitration within the framework of administrative and investment contracts. *Al-Wafa Legal Library, Alexandria, First Edition*.

Shafiq, M. (1997). International Commercial Arbitration, A Study in International Trade Law. *Arab Renaissance House*.

WahabLutfi, A. (2019). Management Contracts in the Framework of Arbitration across Arab Countries. *Al-Wafa Legal Library*.