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Administrative Contracts and Arbitrability: Obstacles and Barriers

Ahmed Aldhafeeri[1]

[1] *School of Law, Kuwait University, Kuwait bar association, Kuwait, E-mail: Aldhafeerilaw@gmail.com*

Abstract

In line with the Saudi vision 2030, the Kingdom of Saudi Arabia is witnessing a comprehensive revolution in laws and legislation with the aim of making Saudi Arabia attractive to foreign investments. One of the most remarkable laws has been issued so far is the Saudi arbitration law in 2012. This article aimed to assess the current legislative practices regarding the extent to which administrative contracts are subject to arbitration. Thus, the study concluded that despite the clear reforms and tangible actions undertaken by the Saudi legislator to attract investors, there is still difficulty in submitting administrative contracts to arbitration due to the current provisions of the laws related to this issue. Therefore, the study suggests modifying the arbitration law and the new government tenders and procurement law to explicitly state the permissibility of resorting to arbitration in administrative contracts.

Keywords: Arbitration, Administrative contracts, Arbitrability, Investments barriers

1. Introduction

Arbitration is considered one of the most adopted alternative dispute resolutions by conflicted parties. For many reasons that will be mentioned later, many countries have sought to sign agreements that regulate arbitration, such as the well-known New York Convention and the Riyadh Arbitration Agreement.(J. El-Ahdab 2011)

In Saudi Arabia, as a rentier state, government projects and contracts constitute a large portion of state expenditures. As a developing country Saudi sought to contract with foreign and international corporates in its new projects specially the enormous ones, for instance, Virgin and Amazon.(Wolff 2012)

Undoubtedly, foreign companies will not jeopardize their investments in a vague judicial environment, unless the host country provides judicial guarantees such as resorting to alternative methods of dispute settlement. Having said that, subjecting the administrative contracts to arbitration has been considered as one of the thorniest issues concerning arbitration. While the investor seeks a fair judicial environment, the state seeks to have the upper hand in disputes that may arise due to administrative contracts.(Roy 1994)

However, as has been mentioned earlier and as an initiative of goodwill, Saudi government sought to modernise the related laws and regulations to cope with foreign investors demands. Therefore, this article is divided into two main sections, firstly the Saudi position of this issue and secondly the Egyptian position.(Aldhafeeri 2020)

2. Methodology

This research is a normative legal research. Thus, in order to answer the research question, the method to be adopted in this paper is doctrinal approach. therefore, this paper is based on the interpretation of laws and courts decisions. However, although the lack of sources in terms of this topic, the author sought to present all accessible literature.

3. Scope And Limitations Of The Study

The study will be solely focused on the Saudi practices, related laws such as arbitration and government tenders and procurement law will be analysed to reach the current Saudi approach with this topic. However, some prominent legal systems such as in Egypt will be mentioned to find out whether the Saudi legislator can import and apply the Egyptian experience.

4. Aim of the Study

The study aims to answer the following questions; whether the current Saudi legislations allow the government authorities to resort to arbitration in administrative contracts? Answering the underlying question will provide a clear vision for both the Saudi legislator and the foreign investors.

5. Justifications for Resorting To Arbitration

Arbitration has many benefits that it can bring to the litigating parties, including the followings: Firstly, arbitration is distinguished by its simplicity and speed of procedures because the parties to the litigation usually determine the arbitration procedures and the date of issuance of the decision in it, unlike the judiciary that is surrounded by long and complex procedures, which leads to the prolongation of the dispute, especially if it is related to administrative contracts that confirm the practical reality that the courts take a long time until make a decision.(Noll 2017)

Secondly, arbitration is characterized for some by its low costs compared to the costs incurred by the litigants when they resort to the judiciary because it requires payment of fees, while others see the opposite, as they believe that arbitration will cost much more than the national judiciary because it usually entails paying exorbitant fees to the arbitrators.(Aldhafeeri 2020)

Thirdly, the increase in contractual relations in which a foreign party has in light of globalization, and the non-preference of each party to submit to the judgment of the other party. Finally, arbitration provides confidentiality in settling disputes, which is extremely important in international trade, as large companies seek to maintain the confidentiality of information and technologies. Which is not provided by the judiciary.(Noll 2017)

6. Justification for Arbitration in Administrative Contracts

Another issue to bear in mind when it comes to administrative contract which is “should the administrative contracts be subject to arbitration, to answer such a question it is significant to mention that there was a considerable debate among scholars about this issue. However, like other controversial topics, arbitration in administrative contracts as an argument has two different sides, between for and against.(Sheppard 2003)

The justifications for resorting to arbitration in international administrative contracts can be seen in the foreign investors’ fear of the state’s adherence to judicial immunity. The state, with its sovereignty and independence, makes it on an equal footing with other countries. In order to ward off the dangers arising from the state’s adherence to its judicial immunity in the case that the foreign party contracting with it raises its claim against it, and as for the national judiciary of other countries, which leads to wasting the investors rights in respect of this immunity. Thus, foreign investors seek to include their contracts with the states and public authorities arbitration clause to protect their rights and investments.(Cabrera, Figueroa, and Wöss 2016)

Likewise, the absence of a judicial body with international jurisdiction to settle disputes in administrative contracts has increased the justifications for the foreign party in the contract to adhere to resorting to arbitration as an alternative dispute resolution. Furthermore, the desire of countries to encourage investment and attract foreign capital needed to finance economic development - and for this to be achieved, adequate protection must be provided to secure the investments of the foreign party.(Hanotiau 2014)

7. Egyptian Legislator Position

By referring to the rulings issued by the administrative judiciary, we clearly see the instability of this judiciary and its volatility between permitting and preventing resorting to arbitration to settle disputes arising from administrative contracts in the period prior to the issuance of Law No. (27/94).(J. El-Ahdab 2011)

In some of its provisions and some of its “fatwas”, the State Council has tended to support resorting to arbitration in administrative contracts, as the Administrative Court approved the permissibility of resorting to arbitration to settle disputes arising from administrative contracts - before the Egyptian Arbitration Law No. (27) for the year 1994 was issued in its judgment issued on May 18, 1986. In the lawsuit filed by the Egyptian Joint Stock Company for Reconstruction, Construction and Tourism against the Minister of Housing and Utilities and others, based on that the contract concluded between the plaintiff company and the Ministry of Housing and Construction is a contract for the exploitation of the “Montazah” area and the reclamation and reconstruction of the “Mokattam” Mountain area, which stipulates in Article 5 that "every dispute between the two parties On the interpretation or implementation of the provisions it contained the agreement shall be settled by arbitration”(A. H. El-Ahdab 1995)

A side of Egyptian jurisprudence was supported before the issuance of the Law Regulating Arbitration No. 47 of the year 1994 the idea of the permissibility of agreeing to settle administrative contract disputes through arbitration; According to its rules contained in the Civil and Commercial Procedure Law; They are based on the following arguments:

First, the provisions of the Law of Procedures authorized by the current State Council Law in Article 3 of the articles of its promulgation shall be applied to administrative contract disputes unless there is a specific provision for this law and in a manner that does not conflict with the ties of the public law; which authorize agreement to arbitrate; Article 501 of the Egyptian Procedure Law stipulates that "it is permissible to agree on arbitration in all disputes that arise from a specific contract.". Additionally, supporters of this opinion relied on the generality of the word “specific contract,” where they indicated that the text was general and not specified whether it applies to administrative or civil contracts.(A. H. El-Ahdab 1995)

Second, the absence of an explicit provision in the State Council Law prohibiting arbitration to settle administrative contract disputes: The researcher believes that this point of view is not suitable as a basis for authorizing arbitration in administrative contract disputes as the exceptionalism of this system requires the text to authorize contracting parties to agree to settle disputes by arbitration Hence, the silence of the legislator on this shall not be construed as permission for arbitration. Whereas the absence of the text in this case means that the will of the legislator did not go to approve the approval of this system for settling administrative contract disputes.(Berger 2005)

In addition, the text of Article 10 of the State Council Law, which pertains to a trial hearing administrative contract disputes; intended to indicate the boundary between the jurisdiction of the ordinary judiciary and the administrative judiciary; Hence, it is not permissible to violate this purpose to say that this text prohibits resorting to voluntary arbitration. Otherwise, we load the text with more than we can possibly afford. If the legislator wanted to decide this ban, it would be explicitly stated.(A. H. El-Ahdab 1995)

In addition to that, Article 501 of the Egyptian Procedure Code stipulates that arbitration is not permissible in matters where conciliation is not permitted. Having said that, the Egyptian legislator made the subject of arbitration the same as issues of conciliation; Therefore, arbitration, like conciliation, does not constitute a prejudice to the competence of the competent court to hear the dispute. (Brower and Sharpe 2003)

7.Saudi Legislator Position

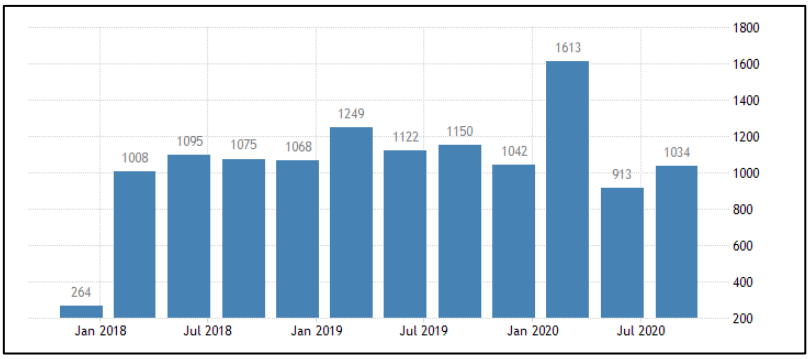

Figure 1: Foreign Direct Investment in Saudi Arabia increased by 1034 USD Million in the third quarter of 2020.
source: Saudi Arabian Monetary Agency

The great importance of arbitration in promoting and encouraging the proper environment for investment in the Kingdom of Saudi Arabia has made the legislator sought to make crucial steps towards modernising arbitration provisions in line with the up-to-date international trends of the concept of arbitration.(Aldhafeeri 2020)

Recently, the Saudi legislator amended the arbitration law which has been issued in 1983 and replaced it with the new arbitration law for the year 2012. The new arbitration law and its implantation regulation came as a respond to the current economic and legislative developments in the Kingdom of Saudi Arabia, especially after acceding to the World Trade Organization. Furthermore, the Kingdom worked to amend many legal systems and replace them with new regulations that fit with the new crucial era of Saudi Arabia.(Cabrera, Figueroa, and Wöss 2016)

As for the Saudi system, Article 10 of the new Saudi Arbitration Law issued in 2012 stipulated that “government agencies may not resort to arbitration to settle their disputes with others except with the approval of the Prime Minister ...” It is clear from the text that the permissibility of government agencies to resort to arbitration is with the approval of the President Council of Ministers, which includes arbitration in internal administrative contracts and administrative contracts of an international character. The Saudi system is considered among the Gulf systems that explicitly approved the permissibility of resorting to arbitration to settle administrative contract disputes, which are considered by the Board of Grievances - but it did not reach this development in one go, but rather it went through two basic stages, the first is the issuance of Cabinet Decision No. 58 in 1963, then the issuance of a regulation Arbitration is pursuant to Royal Decree No. M / 46 of 1983 as well as its executive regulations issued pursuant to Cabinet Resolution No. 192 of the year 1985, and the second phase is the issuance of the new arbitration system 2012 in its final form.(Wakene 2009)

The Saudi regulator confirmed the position of the Egyptian regulator and authorized arbitration in contract disputes with the difference in the authority concerned with the approval of the administration's resort to arbitration. Saudi arbitration law which has been issued in (2012) stipules in its second article, which states "Without prejudice to the provisions of Islamic Sharia and the provisions of international agreements to which the Kingdom is a party; the provisions of this system shall apply to every arbitration, Whatever the nature of the legal relationship around which the dispute revolves, if this arbitration takes place in the Kingdom or if it is an international commercial arbitration that takes place abroad and the two parties have agreed to subject it to the provisions of this system. The Saudi legislature also permitted international arbitration, as Article 3 of the new arbitration system 2012 stipulated that the arbitration be international if its subject matter is a dispute related to international trade, and that for the following conditions:

Firstly, if the main centre of the activities of each of the parties to the arbitration is located in more than one country at the time of the conclusion of the arbitration agreement, and if one of the parties has several business centres, then the point is the centre that is most related to the subject of the dispute, and if one or both parties to the arbitration do not have a specific business centre, then it is considered his usual place of residence.(Langrod 1955)

Secondly, if the main centre of the activities of each of the parties to the arbitration is located in the same country at the time of the conclusion of the arbitration agreement - If the two parties to the arbitration agree to resort to an organization, permanent arbitration body or arbitration centre whose headquarters are outside the Kingdom.(Wisner 1987)

Thirdly, if the parties to the arbitration agree to resort to an organization, permanent arbitration body, or arbitration centre located outside the Kingdom. Fourthly, if the subject matter of the dispute covered by the arbitration agreement is related to more than one country.(Homsy 1982)

Finally, the new Saudi arbitration system issued in 2012 in its ninth article allows the arbitration to be prior to the establishment of the dispute, whether it is independent or stated in a specific contract. However, article 10 states that government agencies may not agree to arbitration except after the approval of the Prime Minister, unless a special statutory text is provided that allows this.(Miller et al. 2019)

However, by revising the related laws and provisions it can be seen that the Saudi legislator followed Egyptian legislator steps by adopting such a requirement. Article 1 of law No. 27/1994 of Arbitration in Civil and Commercial Matters states that "with regard to disputes relating to administrative contracts, agreement on arbitration shall be reached upon the approval of the competent minister or the official assuming his powers with respect to public juridical persons. No delegation of powers shall be authorized in this respect."(Aldhafeeri 2020)

Similar to the Egyptian law, article 10 of the Saudi arbitration law of 2012 states that "it is not permissible for governmental authorities to agree on arbitration only after the approval of the Prime Minister, unless there is a text of the special laws that allows it."(Alrashidi 2017)

On the other hand, in line with Saudi Vision 2030, a new Government Tenders and Procurement Law was issued by the Saudi government in 2019 and replaced the previous one which was issued in 2016. the new law promotes economic development and encourages foreign investors by promoting equality, increasing transparency and preventing the abuse of power.(Aldhafeeri 2020)

One of this law aims is to ensure effective allocation and management of the financial resources of the Kingdom of Saudi Arabia. Also, it aims to promote the national economy by giving priority to local small and medium sized enterprises in the bidding process and offering them various advantages.(Miller et al. 2019)

However, regarding the administrative contracts, the new government tenders and procurement law went further by stipulating more requirements to subject the administrative contracts to arbitration. Article 92 of the underlying law explicitly states that "the government agency - after the approval of the minister - may agree to arbitration according to what is explained in the regulations of this law." In addition, article 154 of the executive regulations of the government tender and procurement law states that "arbitration is limited to contracts whose value exceeds 100 million riyals, and the minister may amend this limit as he deems appropriate" it continues that "the laws of the Kingdom of Saudi Arabia are applied to the subject matter of the dispute, and it is not permissible to accept arbitration with international arbitration panels outside the Kingdom and apply its procedures except in contracts with foreign contractors".(Alrashidi 2017)

Thus, it can be said that arbitration law, new government tenders and procurement law and the recent reforms did not achieve what the foreign investors sought and hoped. Therefore, the state still holds the upper hand in administrative contracts which definitely will have a significant impact on the investors' confidence. It seems that the state still has doubts about the extent of the damage it will inflict if it waives this condition in favour of the foreign investor.

8.Conclusion

Although there is widespread disillusionment among foreign investors about Saudi's position on this issue. Saudi Arabia should be praised for its attempts to enhance related laws and regulations to comply with the Saudi Vision in terms of turning Saudi Arabia to attractive destination for the foreign investors.

It can be seen that the Saudi legislator has showed significant attempts to update the current regulations in line with Saudi Vision to attract more foreign investments by modernizing all related legislations. However, regarding the extent to which Saudi administrative contracts are subject to arbitration there are still more efforts could be made towards providing appropriate legal environment for disputes resolution.

However, in respect of this particular issue, there is no doubt that the lack of clarity will negatively affect the portrayal of the Saudi economy. Thus, although the huge developments take place in Saudi Arabia at the legal and legislative levels have received the favor of many national investors, if the Saudi legislator aims to attract a foreign investor, he should provide the appropriate legal environment.

Therefore, Saudi legislator must be clear on this issue. Urgent amendments must be made to the arbitration law and the government tenders and procurement law. Hence, articles that stipulate the need for approval by the Minister should be cancelled, as well as articles that stipulate a specific amount to subject the administrative contracts to arbitration. All restrictions that prevent a foreign investor from resorting to arbitration in the administrative contracts must be banned.

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