

## Legal means and administrative of authorizing arbitration in the international administrative contracts (Comparative Legal Study)

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### ABSTRACT

In view of the role played by private international investment in the field of economic development, Contracting States shall take into account the need for international cooperation in this field, and the possibility of disputes from time to time relating to such investment between Contracting States and nationals of other Contracting States, Disputes are usually the subject of domestic legal procedures. International legal remedies for the resolution of such administrative disputes may be more appropriate in certain cases. This dispute it if they wish.

### Keywords:

Legal and administrative means, international administrative contract, the legality of the agreement on administrative arbitration, the effects of the conclusion of international administrative contracts.

Introduction

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### Definition of the topic:

The importance of arbitration as a system for resolving administrative disputes is not hidden, and it is the first and oldest method known to human, and the star of this system has not disappeared. Rather, it increased in prosperity and brightness day after day until it became a phenomenon of our modern era, which is characterized by the intertwining and diversity of relations and interests. Arbitration centers and its bodies spread at the local, regional and international levels, and the importance of the arbitration system lies in its being based on the agreement by the will of the parties, and this agreement is dominated by it, and it was natural for arbitration to accompany this new type of contract as it is the best way to resolve disputes arising from it, and the reference for that is that the foreign private party finds itself dealing with a sovereign state, and fearing the dangers resulting from this sovereignty represented in the possibility of undermining the impartiality of the national judiciary or acts of judicial immunity, this foreign party, other than arbitration, did not find an alternative to protect it.

### The importance of the topic:

Arbitration is considered one of the systems that spread and flourish day after day as a legal system that has its own characteristics and features that distinguish it from the rest of the legal systems in clear privacy, and it provides the disputants with means that achieve and meet the needs of the modern era, and achieve speedy settlement of disputes and simplicity in procedures, as legal systems have ensured The organization of the arbitration system for the parties to the dispute is broad freedom in this field that does not stop at the limits of choosing and appointing arbitrators and does not bypass the basic principles of litigation or violation of public order, and due to the importance of arbitration in resolving disputes and its effectiveness in resolving them, legal jurisprudence - scholars and specialists - in this field has paid great attention In studying issues of the arbitration system in most Arab countries, with the absence and scarcity of research and studies on the arbitration system in Iraqi legislation, which prompted me to choose this topic to be the field of research in this study, hoping to present the useful and novelty of the

essence and philosophy of authorizing arbitration in international administrative contracts.

### Research problem

Countries attracting investment resort to as a procedural guarantee to encourage investments on their lands, which is what prompted many countries to include explicit texts in their laws that encourage investment that benefit the acceptance of arbitration as a procedural method for resolving investment disputes. Represented by the independence of the arbitration clause from the investment contract, what is the legal basis for the independence of the arbitration clause from the investment contract? Did Iraqi law and comparative laws indicate the independence of the arbitration clause from the original contract? What is the effectiveness of arbitration as a legal guarantee for investors in Iraqi legislation? What is the situation if the parties do not agree to determine the law applicable to the entire contract or part of it? In the event that there are multiple arbitrations in the implementation of a contract, as they may conflict and conflict, which threatens the stability of economic transactions, is it possible to join the arbitrations before the courts? Does the administrative judiciary have jurisdiction over disputes arising from administrative contracts whose party is a public person of a foreign nationality?

### Research Methodology:

The comparative analytical approach will be followed for the legal and administrative means that allow arbitration in international administrative contracts, whether these methods are found in arbitration laws that are considered private laws or by referring to the civil laws of comparative countries, which are considered general Sharia and the governing reference for contract provisions, and this does not prevent referring to some Regulations, instructions and administrative laws whenever the need arises. Arbitration in the field of public international law also falls within the scope of this study.

### Search Plan:

We will present the topic of the study with two topics: In the first topic we deal with the legal

basis of international administrative contracts and their characteristics. This topic contains two requirements, the first of which includes the legal methods for concluding the international administrative contract. The second requirement is the implications of concluding international administrative contracts and it has two branches, the first of which is the rights and obligations of the administration body The second is the rights and obligations of the foreign contractor. As for the second topic we devoted it to talking about the legality of the agreement on arbitration in international administrative contracts. This topic contains two demands, the first of which is the different jurisprudential views on the legality of arbitration in international administration contracts, and it has two branches, the first of which is the trend against arbitration in international administrative contracts and the second two The trend in favor of arbitration in international administrative contracts. As for the second requirement, it is the legal conditions for the validity of the arbitration agreement in international administrative contracts and the position of comparative legislation thereof.

### The first topic

#### The legal basis for international administrative contracts

The idea of administrative contracts did not appear until at a late date not later than the beginning of the twentieth century, and the definition of the concept of administrative contracts theory and its general foundations has undergone a development that took a long period of time (1), and the French State Council contributed to this, which is credited with establishing many theories of administrative law Including the theory of administrative contracts, Egypt applied the provisions of administrative contracts after the establishment of the State Council in 1964 and the State Council was competent to consider administrative contract disputes with the issuance of Law No. 9 of 1949, while in Iraq the issue of administrative contracts remained shrouded in ambiguity and lack of clarity despite the abolition of the courts

Administrative and amending the Law of the State Council by Law No. (106) of 1989 by which the Administrative Judiciary Court was established in Iraq. The aforementioned law excluded administrative contract disputes from the jurisdiction of the court (2), and not long ago, the activities of states were limited in the external field to the diplomatic relations that govern them. The rules of public international law, and it was not imagined at that time that the state's activity would exceed this limit, so that it would include economic or commercial relations with foreign private persons (3). This situation began to take another turn in the twentieth century, especially in the aftermath of the Second World War, as the state increased its interference in economic and commercial activities, and began to use foreign capital to fill the shortfall it suffers from in various fields and to implement its economic ambitions and since then the idea of international contracts emerged(4). The French jurisprudence has called the contracts concluded between the state and foreign private persons the term *d'Etat Contrat*, which is known in English jurisprudence by the term State contracts, which translates into Arabic as the term state contracts (5), And the implementation of international contracts, especially the contracting contract, often does not depend on the parties to the original contractor and the employer relationship, but extends to other parties entrusted with the execution of part of the work that is the subject of the original contract, and this is whether due to the large size of the means used in the implementation so that it is impossible for the contractor to provide them or to acquire others Technical and technological means that the original contractor needs to implement the contract concluded with the employer, this mechanism (subcontracting) has also taken great importance in the implementation of various contracts, so that it has become an essential element, evidenced by the fact that most international contracts have become the original contractor resorting to others in completing part Contracting due to its flexibility and effectiveness (6). The current development in the field of

international exchanges shows the dual function of subcontractors in different countries, which need projects in different spaces. On the one hand, they are considered an effective means in the implementation of contracts related to major projects, and on the other hand they are a link The convergence between the institutions of the developed countries and the institutions of the industrially backward countries, and for the implementation of this purpose, the large companies turn by legal means to the institutions that work sub-contractors, such as contracts Contained on the establishment or processing and delivery of industrial projects (7), and different forms of these contracts have emerged, including: contracts for the exploitation of natural resources such as oil contracts, industrial cooperation contracts such as technology transfer contracts, engineering contracts, technical assistance, turnkey contracts, international contracting and public works contracts, investment contracts, The question arises - always - about the legal adaptation of the contracts concluded by the state in the international sphere, and whether they are considered private law contracts or public law contracts? (8), In response to this question, one aspect of traditional jurisprudence goes on to say that contracts concluded by the state in the international sphere cannot be administered. This is because if the main task of public moral persons is to work to achieve the public good, so the common law granted them some privileges and powers that assist them in that, but these privileges and powers can only be exercised on the national territory, as for outside the borders of this region These people are not able to exercise the privileges granted to them (9), this denial trend, not to impart an administrative nature to state contracts, has been rejected by the majority of contemporary jurists who believe that state contracts are not special contracts to launch them, but rather the administrative capacity on them can be removed if they include the characteristics of the contracts In fact, it is not possible to discuss the problem of the existence or non-existence of the idea of the international administrative

contract without confronting another extremely important problem related to the application of the conflict of laws approach to areas of public law(10), as the idea of an international administrative contract is mainly related to the existence of a conflict of laws approach in the law General, so that if the administrative contract could be subject to this approach, that would undoubtedly lead us to acknowledge the existence of the idea of the international administrative contract and to search - as a result of that - for the general standard(11).

### **The first requirement**

#### **Legal methods for concluding an international administrative contract**

The general rules impose on the management man to choose the contractor through the method of bidding or auction, and in some cases the management is allowed to resort to the method of direct selection (practice) of the contractor (12), and we see within the scope of the private law that every individual, and within the limits of the contracting capacity that he enjoys He has the freedom to choose the person who contracts with him, but this choice does not find him an analogue of the management man when he concludes the contracts in which the state or one of its bodies is a party, or at least this is the common method in concluding administrative contracts and therefore in the administration's choice of contracting with it(13), The administration does not have broad freedom when contracting, as is the case in individuals entering into their contracts (14), as the legislator imposed a set of restrictions and procedures that the administration is obligated to follow in order to protect the public interest and public money (15), and if the public interest has dictated giving the administration a better and stronger position than The status of the contractor, it also required imposing restrictions on the freedom of management in contracting and in choosing whom to contract with, and if individuals are free to choose whom they wish to contract with in different forms of their contracts, provided that they do not violate the law, public order and

morals, then the administration is obligated to follow the path that the legislator has drawn up for choosing Contractor and form of its contracts (16), And the Egyptian Administrative Court confirmed this trend when it ruled "in terms of the principle of how to conclude administrative contracts, in which the restriction on the freedom of the administration is severely restricted when contracting it is due to the fact that the street is the one who is independent by showing the method of concluding public contracts and in this way he seeks to Realizing two major goals: the first is to achieve the largest financial savings for the public treasury, and this necessitates a priori commitment by the management body to choose the contractor who provides the best conditions and financial guarantees, and the second: observance of the administrative interest and requires, accordingly, enabling the administration body to choose the most efficient applicants to perform the service that it is keen to achieve (17), And those who follow Iraqi legislation see that the Iraqi legislator has added a third goal to protect the employee responsible for choosing the contractor in the reasons for the law on selling and renting state funds No. (32) of 1986 as it stipulates that "for the purpose of unifying the rules governing the sale and leasing of movable and immovable state funds. According to principles that guarantee the interest of the state and secure the safety of the employee responsible for selling and renting procedures ... "(18).

Work was carried out in the various legislations to follow the administration's various methods in concluding its administrative contracts, namely: 1- Tender. 2- Practice 3- Direct Invitation 4- One Bid (one bid) 5- General Bidding (19) It is noticed that the tender is the opposite of the auction, so the first aim is to choose the one who submits the lowest bid, and this is usually if the administration wants to perform certain tasks such as works For example (20), "the advertisement for international tenders is usually published in the commercial attaches in the Iraqi embassies outside Iraq, and it is also published on the United Nations Business

Development website (DG, MARCET) (21). As for the bidding, it is done by submitting bids or offers to buy or By calling to reach the highest prices (22), and some jurisprudence believes that the administration is not obligated to resort to the way of bidding if there is no text obliging it to follow this method as in France and Egypt, but the matter in Iraq differs as the rule is to oblige the administration to follow the method of bidding or bidding to conclude her contracts, unless there is a text that allows her to do otherwise (23), It may be noted that the methods of concluding administrative contracts in the Arab Republic of Egypt have undergone significant legislative and regulatory development since the issuance of Law No. (236) for the year 1954 AD regarding the organization of tenders and auctions and its executive regulations issued by the Minister of Finance and Economy Decision No. (542) for the year 1957 and passing Law No. (9) for the year 1983 CE. With the issuance of the Law on Organizing Tenders and Auctions and its implementing regulations issued by the Minister of Finance Resolution No. (157) for the year 1983 until Law No. (89) for the year 1998 (AD)(24), and according to the text of the first article thereof, "The contract is for the purchase of movables or business contracting .. through public tenders or practices. Generally speaking, by following either of the two methods a decision shall be issued by the competent authority according to the circumstances and the nature of the contract."(25), Whereas the French legislator required in Article (84) of the legalization of public contracts for state contracts and in Article (280) of the same codification for local contracts that public tenders be announced (26), and the instructions for implementing government contracts in Iraq No. (1) stipulated For the year 2008 to follow the methods of government contracts or the implementation of general budget projects through international or national public bidding .. "(27), and "Instructions for the implementation of government contracts in Iraq No. (2) for the year 2014 in Clause 1 of Article (3) to adopt a method Public bidding is by inviting all

those wishing to participate .. taking into account the financial ceilings stated in the instructions for implementing the federal budget .. "(28), and by returning to the rest of the legal methods for concluding the international administrative contract, as for a method of practice," the administration may resort to contracting with certain and limited parties to carry out With natural scientific research studies on the one hand and secrecy on the other side, industrial technical, social or economic studies, or the preparation of specific military equipment ... etc. "(29), As for the "direct invitation, this method is used free of charge to at least three of the approved contractors, suppliers or consultants for justifications set forth in Article (3) Fifth of the Instructions for the Implementation of Government Contracts No. (2) for the year 2014" (30), as for "In the one-bid method (one bid), an invitation is directed to one bidder in monopoly contracting and contracts for the purpose of equipping, implementation or maintenance." (31) Usually a third party intervenes in the implementation phase in the international contracting contract of all kinds, due to the concerted efforts of others, whether The technical or what is known as the specialization or the magnitude of the project in such a way that resorting to subcontracting is necessary for the full implementation of the contract (32), However, there is a question that arises now, which is: Does the administration enjoy, in the absence of a text, obligating it to follow a certain method for choosing whom it contracts with freedom of choice? The answer is that the rule in France is the freedom of the administration to choose the contractor unless the legislator binds it in a specific manner (33), and in Egypt the rule is also the freedom of the administration to choose the contractor unless there is a legislative text that restricts this freedom, either in Iraq, the rule is on the contrary an obligation The administration will follow the method of bidding or auctioning to conclude its contracts, unless the text permits it otherwise (34).

### **The second requirement**

### **The implications of concluding international administrative contracts**

"One of the main features that distinguish international administrative contracts is their close association with governmental public institutions in which the public interest prevails over the private interest. Therefore, administrative contracts that have an international character have a special feature, completely different from the contracts that the administration concludes with the national contractor. The foreign contractor has to write a set of conditions related to the legislative direction of what an international contract is, and in return he has obligations to implement it in accordance with international rules." (35) It is necessary to point out that a large and important aspect of the rights and obligations that these contracts create, differ in their scope according to the legal form in which the parties empty their contracts, and whether the contract took the form of a concession contract, partnership, or contracting contract, or a production contract (36), and it is known that international law cannot enter into conflict of laws, between any national law. Whatever it is, the will of the state, which is identical to the will of the other contracting party, is the basis for internationalizing the contract, and the internationalization of the contract entails that the dispute be international, and here the dispute between the state and the contracting party must be assigned to it (Private) to international arbitration, and the purpose of internationalization is to grant the private party contracting with the state the right to adhere to the rules of international law, which grants him rights in his favor vis-à-vis the contracting state (37), and there is no difference in whoever practices commercial business, whether it belongs to people of public law or to people of law. The state or one of its public persons, given the privileges of the public authority, cannot remove the international commercial character of the contract in order to give it the character of administrative contracts. The administrative contract has become incorporated in international commercial dealings,

and then it is subject to the special provisions that apply to it (38). It is noticeable that there is no longer a difference between public law contracts such as an administrative contract and private law contracts such as a commercial or civil contract, for the Anglo-American legislation deals with management contracts and individual contracts on an equal footing, and one jurisdiction, the ordinary judiciary, is concerned with looking into the disputes arising from them (39), and as a result of economic developments across the border, this led to the affirmation of the rule of will law in choosing the law that governs the contract, without being bound by the law of a particular country, for they have the freedom to choose any legal system, whether this is a national system, or the principles common to more than one national legal system, or the customs and customs of international trade. Or, general international law, or general principles of law, as a law applicable to the contract (40), and it is noticeable that the text of Article 2/1 of the recommendation of the International Law Council in its session in Athens, Greece in 1979 AD, indicated that the parties have the freedom to choose the law of the contract. A law or several internal laws, or the common principles between these laws and the general principles of law (41). When the state concludes contracts with a foreign investor, this contract is based on legal equality with the primary investor. Foreigners, the state exercises its sovereignty over its territory, but outside its territory, it stands in a position on par with the foreign contractor (42), and recognition of the approach to conflict of laws in public law would result in accepting the idea of the existence of an international administrative contract, and it is noticeable that the trends of the French administrative judiciary towards the application of criteria for distinguishing national administrative contracts to administrative contracts that contain a foreign element is divided into two standards, the first of which is: the organic standard of the international administrative contract, and this criterion is devoted to the necessity that one of the parties to the contract is a public legal person, so that it falls

out of its framework - as a general rule - contracts concluded between people (43), And if this standard does not raise many legal problems with regard to internal administrative contracts, then the case is otherwise with regard to administrative contracts of an international character, since the first contracts are always their party - the national administration - this is in contrast to the second contracts in which one of the parties is Foreign administration (44), With reference to the judgments issued by the French Council of State, we clearly see a trend towards refusing to hold its competence to consider disputes arising from administrative contracts concluded by a public legal person of a foreign nationality (45). Mr Desdame accepted the resiliation abusive of a contract to establish a school in the city of Laos that he had concluded with the State of Lithuania, given that this contract was not concluded in the interest of the French state but in favor of a foreign country (46), and the second of them is the objective criterion of the international administrative contract which is based on two elements; The first: the connection of the contract to the public utility, and the second: the contract contains exceptional conditions that are not familiar to the private law, according to what has been decided upon in Egypt and the countries of the Gulf Cooperation Council, and the judiciary in France does not require the presence of these two elements together, rather it is satisfied that only one of them exists without the other (47), Those who follow Egyptian legislation see that Law No. (47) of 1972 has indicated in Article (10) Paragraph (11) thereof that “the courts of the State Council shall have jurisdiction to adjudicate private disputes of commitment contracts, public works, supply or any other administrative contract” (48), With this text, the jurisdiction of the Administrative Court is no longer limited to the validity or invalidity of the administrative decisions issued in the matter of this complex operation, but the jurisdiction is extended to everything related to the process (the contracting process) from the first procedure in its formation to the last result in the liquidation of all

relationships, rights and obligations(49) As for the Iraqi legislation, the jurisdiction of the Administrative Judiciary Court, defined by Law of the State Council (50), No. 65 of 1969, as amended, did not include consideration of disputes. Emerging from administrative contracts, where “Article (7) Paragraph / 11 of it stipulates that the provisions of the Procedure Law No. (83) of 1969 apply to all that is not provided for in this law.” It is understood from this that the ordinary judiciary is the one that hears contract disputes. The Administrative (51), and for all the above, we will deal with the rights and obligations of the contractors in the administrative contract in two branches, the first of which is the rights and obligations of the management authority, and the second is the rights and obligations of the foreign contractor.

### **First branch**

#### **Rights and obligations of the management authority**

The fact that the administration is a party to the administrative contract, as well as the administrative contract's attachment to the public utility, entails granting the administration a set of powers and privileges that we do not find equivalent in private law contracts (52), although administrative contracts are consistent with private law contracts in that they establish between the parties mutual rights and obligations. However, it differs in that it is not recognized by the principle of equality between the contractors, so the administration enjoys rights and privileges similar to which the contracting does not have a preponderance of the public interest over the private interest of the contractor (53). The contract is by unilateral will and its amendment, and on the other hand, there is a package of obligations that falls upon it, one of which is to lift the obstacles facing the foreign project. ”(54) The administration imposes penalties on the contractor if he violates his contractual obligations by himself without the need to resort to the judiciary, and the reason for that is that the contractor lax In carrying out his obligations or refraining from doing so, he may seriously damage the facility,

and in order to avoid this, the administration directly imposes penalties on the contractor itself (55). The administrative judiciary in France and Egypt promised in many of its provisions the conditions that include this right as exceptional conditions as a privilege of the public authority. In this, the French Court of Appeal decided in its ruling on 14/11/1960 in the Societe Vandroy-Jaspar case, "The stipulation of penalties in the contract is considered In and of itself are exceptional conditions .." (56) The penalties for breaching the contractor's obligations to complete the works differ, especially the failure to reach the results to be achieved in international contracting contracts contained in the key contracts in the hand and the product in the hand, and these penalties that are applied in the case of Lack of effectiveness, and the penalties applied to delay in implementation and what follows in this case, raising the problem of force majeure as a reason to get rid of responsibility(57),

It is noted that "Article (65) of the conditions of contracting contracts for civil engineering works referred to the withdrawal of the work from the contractor in the event of breaching the contracting terms" (58), and this article corresponds to "Article 869 of the Iraqi Civil Law which also indicated that the contract may be terminated if it appears To the employer that the work performed by the contractor is inconsistent with the contractual conditions .." (59) Her contracts are of her own free will, as her judgment number 21774 was mentioned on 2/2/1967, The Court of Cassation in Iraq granted the authority of the administration to terminate its contracts by its own will. (60), The Iraqi law gave the engineer the right to supervise and monitor works in public works contracts, but considered it one of his duties (61). In this regard, Article (2) Paragraph / 1 of the general conditions for civil engineering contractors in its first and second sections for the year 1988 indicated that one of the basic duties of the engineer is supervision. And supervising business ... "(62), as well as" the administration enjoys developing policy plans for the general national strategy for investment, monitoring and

evaluating the performance of investment projects ... "(63), and" monitoring the extent to which production standards and production processes conform to the covered projects with the specifications and standards applied in the Republic of Iraq and at the International Standards Organization (ISO) or the local standards of the European Union and in accordance with Iraqi laws "(64)," "The administration issues a warning to the investor to settle the dispute within thirty days in the event that work on the project stops with the lagging investor being charged a delay fine commensurate with the delay period, provided that no The cumulative total exceeds (10%) ten percent of the project cost (65). As for the reality of investment in the Kurdistan region of Iraq, "the administration warns the violating investor and gives him a period commensurate with the nature of the violation to remove its effects" (66), and "the administrative judiciary has approved the administration's authority to supervise and direct the implementation of administrative contracts, as the Supreme Administrative Court in Egypt went to say (... while the interests of the two parties in civil contracts are balanced and equal, but in administrative contracts they are unequal .. It follows that the administration has the authority to supervise and direct the implementation of contracts ...) "(67), and the French legislation allows the administration in many cases to The contractor has the right to appeal compensation before the court, and the contract judge may decide to exempt him from it whenever it becomes clear to him the validity of the basis on which it is built, and he may reduce it if it is an exaggeration in it (68), as for the obligations of the administration, the employer is obligated Enabling the foreigner (the contractor) to complete the work of greater importance in international contracting than in internal contracting, since enabling the foreigner to complete the work agreed upon is often the empowerment of the contractor in internal contracts. It is called commitment to cooperation (69), and whatever it is, the employer, after signing the international contracting contract and



its entry into force, is obliged to inform the contractor about everything that would facilitate his work, such as providing the contractor's implementation engineers with the necessary information, which means that the contracting parties assume the existence of an element of mutual understanding and trust between them To reach the achievement of cooperation between them to achieve the final result, which is the full implementation of the contract (70).

### The second branch

#### The rights and obligations of the foreign contractor

Determining the rights and obligations of investors within the territory of the investing country by organizing them within a legislative and agreement framework in an organized and accurate manner, this is not sufficient to reassure investors and encourage them to invest in them, so there must be means to protect these rights in the event of breaching them (71), and one of the most important rights of the contracting party Administrative contracts, is to obtain the financial compensation (the price), so the first goal of the contractor in the conclusion of the administrative contract is to obtain profit, which is often cash, so obtaining the monetary return is one of the most important goals of the contractor with the administration (72), and the contractor also has the right In the case of full compensation, if it has a requirement based on the theory of the prince's action. If the administration resorted to unlawful measures while exercising its authority in the amendment, the contractor may resort to the judiciary to cancel the decisions that dealt with these procedures, and the amendment shall be null and void. Modification Authority Familiar (73), And "the Iraqi civil law referred to the compensation of the contractor for the obligation arising from the contract due to the loss of his right or due to the delay in fulfilling it .." (74) "And the follower of the Egyptian civil law believes that the judge has the right to estimate the compensation of the injured person if the compensation is not estimated in the contract Or in the text of the law "(75), as the French civil law

in Articles 1150, 1149 corresponded to the Iraqi and Egyptian laws in its reference to the importance of compensation, as it is a means to remove the harm from the injured and compensate him in proportion to the loss and lost earnings he suffered(76).

Another of the rights of the contractor is to ensure the financial balance of the contract. If the management is to modify the obligations of the contractor, this corresponds to the contractor's right to amend his corresponding financial rights, and this is expressed by the "idea of the financial balance of the contract" (77), and the reason for the idea of balance is to protect interest Financial rights for the contractor with the administration to encourage individuals to contract with the administration by guaranteeing their financial rights if external events occur that would increase their financial burdens (78), in implementation of the rules of justice, as if we recognize the right of the administration always to intervene to achieve the public interest, this does not mean wasting the interests of the contractor Financial (79), and the French state council has approved this idea in many of its provisions, especially in the field of commitment contracts, as indicated by many state commissioners (80), and the Egyptian Administrative Court has been allowed to simplify the idea of the financial balance of administrative contracts and put them in Its rightful place, in its lengthy ruling issued on June 30, 1957 (81). The court also says, "From the nature of administrative contracts, they strike a balance, as far as possible, between the burdens that the contractor bears with the administration and the advantages that He benefits from it .. it is neither fair nor in the public interest itself for the contracting party to bear those burdens alone. Rather, he may, in return for that, maintain the financial balance of the contract .. "(82),

Observers of Iraqi legislation believes that "he has permitted the foreign investor to own lands belonging to the state allocated for housing projects in addition to the permissibility of purchasing land belonging to the mixed and private sector in order to establish housing

projects exclusively ..” (83), and “among his other rights is the permissibility of renting and leasing for real estate or flat. From the state .. in order to establish investment projects for a period not exceeding (50) years and are renewable subject to the approval of the authority .. “(84),“ He is also entitled to transfer the investment project to another contractor subject to the approval of the Investment Authority .. and that the completion rate is 40% The new contractor replaces him with all contractual rights and obligations arising from him(85).

Whereas, “Article (3) of the Investment Law in the Kurdistan Region - Iraq No. (4) of 2006 referred to treating a foreign investor as an Iraqi investor while giving him the right to fully own the capital of the project that he establishes in the region” (86), in addition to the right to own And the lease of agricultural lands and productive cars, he is entitled to rent or buy for the benefit of his investment project non-productive cars and residential real estate for the account of his investment project, subject to the approval of the Investment Authority in the region .. ”(87), and also“ the contractor has the right to import what is necessary for his project of needs such as machinery, equipment, equipment and machinery with exemption All imports of customs duties that enter from the region's border crossings, provided that they are used exclusively for the purposes of the project ”(88), Regarding obligations, “If the contractor breaches his obligations after thirty days have passed since his warning, he will be excluded and replaced by the partner in rights and obligations or someone else after the approval of the investment commission that granted him the license without prejudice to the right of the commission to withdraw the license from him ..” (89), and “in case If the contractor commits a violation, he is obligated to remove it within a period determined by the Investment Authority, after which he sends the contractor a final warning within thirty days, and at its end, a late fine will be imposed on him commensurate with the time limit, provided that it does not exceed 10% of the project cost. ”(90), While“ the contractor is bound

in a region Iraqi Kurdistan states a statement of the financial situation and the contracts executed by it, and informs the Investment Authority in the event that the project requirements are completed .. and provides facilities with the Commission’s employees, especially in aspects of collecting information related to the project .. ”(91), and the contractor is obligated to“ inventory all materials that have been imported for the project and are exempted. From customs duties ..., preserving public health, security and environmental safety, and adhering to all standardization systems and means of quality control in accordance with international standards, while qualifying and training local workers ”(92), and the investing company is committed to liquidating To Iraqi crude oil by employing Iraqi personnel, with no less than 75% of the total number of workers(93). In Egyptian legislation, the administration often resorted to the judiciary by requesting that the contractor be bound by its dues prior to him resulting from the execution of the contract according to his responsibility. Among these dues are delay fines. (94), And “The contractor is obligated to take care to prevent injuries and accidents of death to workers or damage to government property .. And in the event of a breach of those obligations, the administration shall have the right to implement it at its expense. ”(95) As for the French legislation, the French Council of State applied the principle of the contractor’s obligation to ensure the regular and continuous operation of the public utility in a very strict and regular manner. Cairo, which can rise to justify it in that, but even in this case also asks the contractor to make his best efforts to continue the facility (96).

### **The Second topic**

#### **Legality of the agreement on arbitration in international administration contracts**

The legal trends differed regarding the legality of resorting to arbitration in adjudicating administrative contract disputes. In Egypt, a major dispute arose in jurisprudence and the judiciary regarding the legality of arbitration in these contract disputes until the legislator entered into

Law No. 9/1997 which authorized the agreement on arbitration in administrative contract disputes, provided that That this agreement has been concluded with the approval of the competent minister or whoever assumes his jurisdiction with respect to public legal persons and it is not permissible to delegate it (97), but in France it was prohibited to resort to arbitration in administrative contracts, but this situation was amended according to a law issued in 1986 where the prohibition was limited Arbitration in internal contracts with some exceptions, and arbitration is permitted under certain conditions in international administrative contracts, i.e. contracts concluded with foreign institutions and companies (98).

As for the position of the Iraqi legislator on the arbitration agreement, he explained it with the text: "It is permissible to agree on arbitration in a specific dispute; it is also permissible to agree on arbitration in all disputes that arise from the implementation of a specific contract" (99). A specific dispute in a specific contract or disputes that will occur in the future as a result of the contractual relationship and this is a clear evidence of the types of arbitration also (100). The arbitration agreement is considered a basis for arbitration, whether it is national or international arbitration, and the latter raises a problem when an agreement is concluded between two or more countries to encourage And the protection of foreign investment from nationals of the other country, and this agreement includes a provision obligating its parties to include the investment contracts that the State party concludes with the foreign investor a clause stipulating that the disputes that arise between the state and the foreign investor shall be settled by means of arbitration, which is called mandatory international arbitration (101).

It is clear that because the arbitration agreement between the two parties to the dispute is the basis for arbitration between them, and the source of the arbitrator's authority, the agreement between the two states is not suitable alone as a basis for arbitration that takes place between the state and the foreign investor, as the arbitration agreement

must be concluded between the parties to the dispute, that is, between the state and the foreign investor. The provisions of the International Center for Settlement of Disputes have been implemented Emerging from investment by the "ICSID" (102), provided that if there is an agreement to encourage investment between two countries that includes such an obligation to agree on arbitration before the center, the citizens of the country who have investments in the country in which the investment may request the resolution of the dispute through the Oxide Center even if the agreement does not contain Between the state and the investor on the arbitration clause before the Center (103), and in one of the cases before the Oxide Center (104), the Jordanian judiciary revoked the requirement to resort to arbitration (Oxide) contained in an investment agreement between the state and the investor. From the Jordanian judiciary violating the bilateral investment agreement between the two countries, because the arbitration clause is in itself considered investment, and it is prohibited for any country to invoke its domestic law to evade its international obligations imposed by treaty or in accordance with general international law (105).

Returning to the question posed in the problem of searching for the effectiveness of arbitration as a legal guarantee for investors in Iraqi legislation? It can be said that the Iraqi Law of Procedure No. (83) of 1969 (amended) allocated (26) articles to arbitration (251-276) to regulate matters of arbitration from the time it was agreed upon until the judgment was issued and executed, but these advanced articles deal with internal arbitration only and did not regulate matters of international arbitration. Although the Iraqi investment law in force has permitted internal arbitration in accordance with Iraqi law or international arbitration by resorting to any internationally recognized arbitration body (106), and "with regard to joining arbitrations before the courts, we find that the International Chamber of Commerce in Paris always ends its rulings to Inclusion of arbitrations ... in light of the absence of legislation and the Egyptian legislator's disregard for this

problem. "(107) The instructions for implementing Iraqi government contracts No. (2) for the year 2014 also failed to address the annexation of arbitrations for consideration before one party, ensuring the proper functioning of justice and avoiding conflict of provisions (108). As for the situation in the event that the parties do not agree to determine the applicable law, the court shall apply the law of the Contracting State party to the dispute (including the rules on conflict of laws) as well as the principles of international law that must be applied in this regard. "(109).

### First Requirement

#### **Different jurisprudential opinions on the legality of arbitration in international administration contracts**

The jurists were divided over the extent of the permissibility of resorting to arbitration in administrative contracts in general and PPP partnership contracts in particular, from a supporter of arbitration to opponents of it in these contracts. Supporters of the opinion in favor of arbitration in administrative contracts and PPP partnership contracts have based on several arguments (110), the first of which is That there is no legislative text prohibiting arbitration in administrative contracts, and the principle in matters is permissible, and as long as there is no legislative text that provides for resorting to arbitration, the state has to resort to any means it deems appropriate to settle its disputes, including resorting to arbitration, and secondly that resorting to arbitration does not mean in any way The conditions waiving the right to resort to the judiciary, and if any reasons prevented the implementation of the arbitration award, this would restore the right to the judiciary to settle the dispute (111), as the legislator gave the judiciary the right to monitor the arbitrators' decisions and approve the ruling Arbitration, just as resorting to arbitration does not mean that the national judiciary is not competent to consider such disputes as it means that the national judiciary does not keep pace with nor achieve the speed required by the public interest,(112) .

As for those who oppose resorting to arbitration in administrative contracts in general and partnership contracts in particular, they have presented several arguments, the first of which is that resorting to arbitration requires a legislative text that recognizes the right to resort to it. The state, as arbitration robs the national judiciary of its competence to settle disputes arising from such contracts and thus this is considered a violation of the state's sovereignty, and resorting to arbitration may lead to the application of the provisions of a foreign law to the dispute if the parties to the dispute agree on this, which constitutes a violation of the sovereignty The state is likewise (113), and the provisions of international arbitration tribunals have established that the state that accepts the arbitration clause in the contracts it concludes with foreign parties cannot uphold its judicial immunity before the arbitration tribunal because the state, by accepting the arbitration clause, has waived its immunity, and then it is not yet possible to accept The arbitration clause and upon the commencement of its procedures for the state to push back the arbitration lawsuit based on its judicial immunity, because that contradicts the principle of good faith in implementing international obligations,(114)

On the other hand, a rule has been established in international jurisprudence and judiciary according to which the arbitration clause remains in effect after the state terminates the contract by its own will, and this rule affirmed the Washington agreement concluded in 1965 concerning the settlement of investment disputes between the state and the other country's nationals, as Article 25 of this stipulated The convention states that if the parties agree to arbitration, then it is not permissible for any party to withdraw its consent unilaterally. In addition to that, United Nations General Assembly Resolution No. (1803) dated 12/21/1962 stipulated that "... must emphasize the obligation of states to respect arbitration agreements (115).

### First branch

#### **The trend against arbitration in international administrative contracts**

The hard-line position in France, which rejects the idea of public persons resorting to arbitration (116), has been demonstrated through many legislative texts, as the French Civil Procedure Law for the year (1806) stipulated in Articles (83); (1004) that the arbitration attendance in disputes that arise Administration (the state is a party); With the promulgation of Law No. 626 of 1972 Articles (83) and (1004) were canceled, and a new article No. (2060) was added to civil regulation, stating: "It is not permissible to resort to arbitration in matters of civil status, the capacity of persons, and what is related to divorce and physical separation, as well as in the matter of community disputes. Public and public institutions; and in general all matters related to public order "(117),

The French jurist Fouchard goes, in the course of the discussions that took place on expanding the field of arbitration (the dimensions of the evolution of the French arbitration law), to say that: "The main problem with the State Council is that its judiciary is based on the distinction between private law and administrative law before the distinction between domestic law and international law, which results Moreover, it is considered administratively that which is not considered international, and that what is related to public utility or the privileges of public authority in France cannot be considered Internationally (118), and accordingly, the difficulty of submitting administrative contracts to the field of international arbitration lies mainly - as portrayed by the jurist Gaudemet - in the content of this arbitration and its relevance to the idea of international trade, which the State Council refuses to associate with administrative contracts (119), while the French judiciary was the first to reject the idea of arbitration In administrative contracts; Whereas in the nineteenth century, the State Council decided that public person's disputes should be removed from the framework of arbitration, considering that they are the core competence of the French administrative judiciary; Hence, it cannot be

departed from because it conflicts with public order,(120)

As for Egypt, "the dispute arose over the legality of arbitration in administrative contract disputes prior to the issuance of Law No. (27) for the year 1994, and two opinions emerged in this. The first - which is the weak opinion - has denied the permissibility of resorting to arbitration in administrative contracts .. and the second - which is the most correct opinion - has been authorized. The agreement to arbitrate in administrative contract disputes was based on what was included in Article (58) of State Council Law No. (47) for the year 1972 A.D .. "(121) The jurisprudence opposed to arbitration promised that arbitration is a violation of the state's sovereignty, and also resorting to arbitration in it is an assault on The jurisdiction of the national judiciary and the basis for this is the text of Article (10) of the Egyptian State Council Law in accordance with Paragraph (11) which stipulates the following: "The State Council Courts are exclusively competent to adjudicate disputes related to commitment contracts, public works and supply; or any other administrative contract,(122) ".

As for Iraqi legislation, it is noted that there are no legal texts in the Law of Procedures in force that regulate international commercial arbitration. In addition, the text of Article (27 / P4) of the applicable investment law collides with another obstacle that is represented by the Law of Execution of Foreign Judgments in Iraq No. (30) of 1928, where no In it there is any text referring to the implementation of foreign arbitration rulings in Iraq. "(123) As for the position of the Iraqi judiciary, we see that it opposes resorting to arbitration because that affects the jurisdiction of the Iraqi judiciary on the one hand, and infringes on national sovereignty on the other hand. The state sovereignty (124) .

## Second Branch

### **The trend in favor of arbitration in international administrative contracts**

The study of the provisions of the International Chamber of Commerce in Paris reveals its

reliance on the idea of international public order and the principle of good faith to establish the principle of the impermissibility of public legal persons holding onto any presence contained in its internal law that prevents them from resorting to arbitration (125), and the judgment issued in 1971 in the arbitration case No. 1939 is the reference. The basis for other arbitration judgments that took this principle into account, in this ruling the Arbitration Court made clear at the outset that: If some of the legislations whose provisions were inspired by French legislation have prohibited the state or one of its public persons from resorting to arbitration, then this prohibition does not extend to international contracts (126).

The position of the French legislator was not strict in prohibiting resorting to arbitration. Rather, it intervened more than once to justify the permissibility of resorting to arbitration as a means to settle disputes in administrative contracts, and to reduce the tough stance of the State Council regarding this matter; the reason for this is the development of international investment that enabled the transfer of utility services technology. This is done through several legislations, the most important of which are Law (17) April 1906, Law (9) July 1975; Law (69) August 1986 (127), as well as Law (2) July 1990 on With the French Post and Telecommunications Authority in Article (28) thereof that authorized arbitration as a means to settle contract disputes in which the administration is a party (128), and through the law (12) July of 1999, the French legislator realized that resorting to arbitration would not undermine the historical reputation of the French administrative judiciary as long as. In that, there is a public interest and a century of resorting to arbitration with specific conditions, such as that the other party in the administrative contract is a foreigner; and when the contract relates to an administrative project of public benefit, and that it is accompanied by the issuance of a decree by the Council of Ministers that the contract includes the arbitration clause (129). From this, we infer that the French legislator has realized the importance of foreign investment and

the need for public utilities to renew in their services, and his desire to expand investment and encourage him, as arbitration is the primary method for resolving his disputes(130).

As for the Egyptian legislation, the Egyptian constitution in force referred to the terms of reference of the State Council, stating that "the State Council shall be competent to settle administrative disputes ... and review draft contracts in which the state or one of the public bodies is a party, and the law defines its other competencies" (131), and when a law was issued Business Sector Companies No. (203) for the year 1992 AD to reorganize public project relations. Article (40) of it stipulates that "it is permissible to agree on arbitration in disputes that occur between companies subject to the provisions of this law or between them and public legal persons .. whether they are national or Foreigners,(132)"

The Egyptian legislator issued Law No. 9 of 1997 amending Article 1 of the Arbitration Law No. 27 of 1994, adding a second paragraph to it, and this paragraph states that "With regard to administrative contract disputes, the agreement on arbitration is with the approval of the competent minister or whoever is in charge of his jurisdiction. Concerning public legal persons, it is not permissible to delegate in that "(133), and it is clear from this that the Egyptian legislator has not excluded a specific contract that is pertaining to the permissibility of arbitration, and therefore whether it occurred at the stage of concluding the contract or its implementation or resulting from it, and also includes all administrative contracts, whether National administrative contracts or of an international character or character (134).

As for Iraq, the Iraqi constitution of 2005 referred to "the establishment of the State Council to be specialized in the functions of the administrative judiciary .. It is understood from this text that there is no objection to the administration from resorting to arbitration to settle administrative contract disputes" (135), in addition to the existence of other legislation that allows arbitration, such as the Iraqi Procedure Law No. 83 of 1969 in its articles from (251-276) (136), the

Iraqi Investment Law No. (13) of 2006 in Article (27) (137) thereof, and the Law on Governmental Contracts and Instructions for their Implementation No. (1) of 2008 in Article (11) First / Paragraph - D- (138), and the Instructions for Implementing Government Contracts No. (2) of 2014 in Article (8) Second / Paragraph -2 of it (139), as indicated by the "Instructions for Executing Government Contracts in the Kurdistan Region of Iraq in Article 77 Sixth paragraph of it states that the contracting authority has the right to choose international arbitration to settle disputes when the contractor is a foreigner (140) .. In administrative contract disputes, this is what the Iraqi Court of Cassation has settled on." (141).

### Second Requirement

#### **The legal conditions for the validity of the arbitration agreement in international administrative contracts and the position of comparative legislation thereof**

The form in the arbitration agreement is based on the necessity of writing this agreement, and it is one of the common obligations in various national legislations and international treaties. Most legislation refers to the necessity of writing the arbitration agreement, so it is rare to find legislation that does not require writing the arbitration agreement (142), and is required for the validity of the arbitration agreement - whether it is A condition or stipulation - that it fulfills the conditions necessary for the validity of any contract in general, which are determined by the general theory of the contract in civil law, which is the availability of the elements of the contract from mutual consent, locality and reason, and that the compromise is valid so that the will of each of the parties is issued by someone who is competent and free from error Fraud, coercion and exploitation, and that the subject of the contract is possible, specified or capable of being specified and capable of dealing with it, and that the cause is present and legitimate,(143)

Article (1443) of the current French set of pleadings - and added to the French decree issued on May 14, 1980 - pertaining to amending the texts of internal arbitration in France states that:

"The arbitration clause is invalid if it is not written, either in the original contract paper or in another paper. This contract refers to it "and the advanced French legal text indicates that writing is a cornerstone of the arbitration clause - without stipulating it - and it must be provided, otherwise it is void, so that the arbitration clause is void, if it is not in writing, and if this is the case, writing is necessary. Not only is the arbitration clause not fixed, but it is necessary for its validity as well, so there is no way to prove it except by writing (144), and it is clear in the apparent meaning of the phrase text of Article (1005) of the previous French group of pleadings, that the positive legislator the French wanted to add to the substantive conditions you demand for the validity of the agreement on arbitration a formal condition, which is the emptying of the agreement in the ecrit editor,(145)

The stability of the French judiciary is noted ... provided that writing is not a condition for proving it, and if the arbitration stipulation is written in this way, it is not necessary that this be in one of the situations mentioned in the text of Article (1005) of the previous French group of pleadings, then proof of stipulation is subject to the general rules,(146)

As for Egyptian legislation, Article (12) of the Egyptian Arbitration Law No. (27) of 1994 stipulated that "the arbitration agreement must be in writing, otherwise it is void and the arbitration agreement is in writing if it includes a document signed by the two parties or if it includes the letters or telegrams exchanged by the parties. Or other written means of communication "(147), and" with regard to administrative contract disputes, the agreement on arbitration shall be with the approval of the competent minister or whoever assumes his jurisdiction with regard to public legal persons, and it is not permissible to delegate that "(148), as indicated in Article (42) of the Tender Law And the Egyptian Bid No. (89) for the year 1998 to "the possibility of settling disputes arising from the contract through arbitration, with the approval of the competent minister ..." (149), "In a dispute over a contract

for the supply of a shipment of German wheat to Alexandria and including the arbitration clause, the Egyptian Court of Cassation decided that The workers of the arbitration clause cannot make it possible. As for mere agreement to conduct arbitration in England, it makes the implementation of the arbitration clause impossible.(150)” ..

As for the Iraqi law, we find that the applicable Iraqi pleading law did not differentiate between the arbitration clause or the arbitration stipulation, as it permitted the agreement to arbitrate in a specific dispute or in all types of disputes that arise from the implementation of a specific contract, but we find that the Iraqi Court of Cassation has referred to the forms of arbitration. Within the folds of the decision issued by the Court of Cassation No. 363 Civil First 74 on 5/2/1975 where he indicated ((that arbitration in the law is one type according to Article (251) pleadings and that the only condition for its existence and arranging its impact is that it be fixed in writing according to Article (252) As amended from the Law of Procedures, it is equal to whether the agreement on it was made at the time of the contract or it was done by separate written agreement or it was agreed upon during the pleading( 151)...

Returning to the question raised about the legal basis for the independence of the arbitration clause from the investment contract in the research problem, we can answer it. Regarding the Iraqi law, it did not indicate within the law of pleadings the independence of the arbitration clause from the original contract. As for the Egyptian law, the Egyptian arbitration law in force indicated the independence of the condition. Arbitration for the original contract in the text of Article (23) thereof (152), and the French pleadings law in force did not refer to the independence of the arbitration clause from the original contract, "but the French judiciary has approved it .. in the judgment issued by the French Court of Cassation in the case (Cosset) issued on May 7, 1963, where it was stated in the merits of the judgment that (in the field of international

arbitration, the arbitration agreement ... enjoys complete legal independence ..)"(153).

Conclusion-:

After completing our study marked legal and administrative means to authorize arbitration in international administrative contracts (a comparative legal study), we reached a number of results and recommendations, hoping that it would be a positive and correct step for settling international administrative contract disputes Despite Iraq's lack of an administrative judiciary to specialize in administrative contract disputes.

### Research results-:

1 -The study revealed the deficiencies of Iraqi law (the arbitration law) in relation to the provisions of international arbitration, although the pleading law referred to the provisions of foreign arbitration, but it did not regulate the provisions of international arbitration, either in terms of the procedure or the statement of the court competent to consider nullity claims against it or its implementation.

2 -Reviewing the value of arbitration within the framework of investment and administrative contracts and getting acquainted with the means of arbitration has become an urgent necessity in order to be able to invest time and develop alternative methods for resolving disputes away from the traditional methods that are still getting more difficult and slow.

3 -Resorting to the international judiciary is not without legal difficulties. As for the International Court of Justice, it is clear to us that the investor cannot resort to it unless his state supports him in his case in accordance with the principle of diplomatic protection. As for the permanent arbitration court, the investor's resort to it is required that each of the state be Of whose nationality and the country hosting the investment is a party to its founding agreement.

4 -The effectiveness of arbitration as a procedural guarantee for the settlement of investment disputes is not at the level required in Iraqi legislation, as there are many Iraqi legislations that provide for the permissibility of resorting to



arbitration as a means of settling contractual and non-contractual disputes, due to the absence of a unified Iraqi arbitration law that brings together this legislative diaspora.

5 -Arbitration is distinguished by the simplicity of the procedures and the distance from the formalism required by the judiciary, and it is the best way to resolve disputes with a foreign component, given that it is not possible to present these disputes to a neutral arbitration body that may not end up with the countries to which the parties belong, as it is known that there is no international judiciary to resolve such dispute.

### Recommendations- :

1 -We call on the Iraqi legislator to codify the international legal rules and to reflect them on internal legislation that regulates the cross-border administrative contract, that is, the administrative contracts concluded between the state and foreign persons, in order to familiarize the contracting parties with the international contracting terms and conditions for concluding such contracts.

2 -We suggest to the Iraqi legislator to amend the Foreign Judgments Execution Law No. (30) for the year 1928 to include the implementation of arbitration awards as well, according to the conditions it requires.

3- We propose to the Iraqi legislator to prepare a draft law called the Arbitration Law that takes the most recent texts contained in the laws of the countries that are the first in issuing arbitration laws, with the need to be guided by the Model Law on International Commercial Arbitration prepared by the United Nations Committee for the year 1985 and amended in 2006, in order to take judgments Corresponding to the reality of economic policy in Iraq.

4 -We suggest that the Iraqi legislator join international conventions joining arbitration, in particular the New York Convention of 1958 relating to the recognition and implementation of foreign arbitration awards, as well as the Washington Convention for the Settlement of Disputes Related to Investments between States and Citizens of Other Countries of 1965.

5- We recommend the Iraqi legislator to collect the scattered legislation and review and renew it through the introduction of an Iraqi arbitration law that keeps pace with developments in the field of arbitration. In the international and Arab world.

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