The Power of Legal Persons to Conclude an Arbitration Agreement: A Comparative Study

Prof. Mansour Abdussalam Al-Sarayrah
Dept. of Private Law, Faculty of Law
University of Jerash, Jordan
E-mail: dr.mansour_saraira@yahoo.com

Dr. Ma'en Abdel-Rahim Abdel-Aziz Juwaihan
Assistant Prof. / Dept. of Private Law, Faculty of Law
University of Petra, Jordan

Dr. Hamad Sareea R. S. Al-Kaabi
Ministryof Interior
Qatar

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Abstract

This study examines the power of legal persons to conclude an arbitration agreement, in a comparative context between Jordanian and Saudi Laws. It aims to show that the power of parties to agree on arbitration differs than the legal eligibility to conclude an arbitration agreement, as this power is for whom who have the right to act their own right, where legal eligibility is required for its conclusion, while no one who has not the power to act his own rights will not be able to have the power to agree on arbitration, pursuant to article (9) of Jordanian Arbitration Law and article (10) of Saudi Arbitration Law. Throughout the research, the researcher discussed the power to agree on arbitration related to private legal persons, the rules that control the practicing of arbitration by the private legal persons, as well as the power to agree on arbitration by public legal persons, in addition to arbitration in management contracts, and applications of administrative courts for arbitration in management contracts. The study concluded that a legal person has a special eligibility different than that of a natural person, due to the different nature of each other, where the legal person is entitled to practice all rights except these inherited to the natural person.

Keywords: Arbitration - Arbitration Agreement - Legal Person - Legal Eligibility- Jordanian Law - Saudi Law.

1. Introduction

Arbitration agreement is the cornerstone of any arbitration, through which the procedures requiring issue of award of dispute are commenced, where it reflects the willingness of parties to settle the dispute through arbitration.

In the presence of a proper and valid arbitration agreement, the jurisdiction of the arbitral tribunal shall be concluded, while the court is obliged to refer the litigants agree upon arbitration agreement unless this agreement appears to be invalid and improper.

The arbitration agreement should specify the language to be applied by the parties in arbitral proceeding, the rules that should be applied, and the place of dispute settlement, as well as appointing arbiterers or determine the method by which appointment will take place. There should be a valid and proper arbitration

agreement, where many arbitration regulations are related to arbitration agreement.

The fact that arbitration is optional in accordance with the provisions of the law,[1] whether it is a requirement for arbitration or a charterparty, and it has only an impact on its parties. Therefore, the core of arbitration in its origin refers to the will of litigants, through which they can reach an agreement to bring all contentious cases before the arbitral tribunal. This means that arbitration process is the result of parties satisfaction on agreement.

Jordanian and Saudi Laws allowed the legal person to agree on arbitration, where the legal person is a group of persons involved in a particular structure, or a group of funds allocated for a particular purpose such as the state, society or company for instance.

The legal person has a special eligibility that differs than the natural person's, due to the difference of their nature, where the legal person is entitled to all rights except those inherited in the natural person such as personal status rights.

As for the non-human characteristics, it is established for the legal person such as (name, homeland, nationality, financial liability and eligibility), where eligibility of legal person is limited to the activities specified in the contract of establishment for it purpose , not exceeding such purpose. The eligibility of legal person is not approved unless he/she obtains a license from the official entity to conduct the activity, where the legal person eligibility is permanent and sustainable and is not affected by the demise of the natural person who represents it.

Therefore, the intention to examine the power of legal persons to conclude an arbitration agreement was initialized. The power of persons to agree on arbitration is different than the legal eligibility to conclude the arbitration agreement, where such power is for those who have the right to act on their own rights, while legal eligibility is required for the purpose of holding and concluding arbitration.

Anyone who doesn't have the right to act on his own rights has no power to agree on arbitration pursuant to article (9) and (10) of Jordanian and Saudi Law respectively.

There are many existed practical and judicial problems which are relevant to the topic of the study, where these problems arise, in specific, in arbitration contracts and the series and groups of contracts, where multiple contracts are concluded by multiple parties on a single transaction with one party as a legal person. Hence, the importance of the topic arises in that it discusses many theoretical and practical questions stimulated by the application of this topic, which calls for appropriate and proper solutions.

2. The Power to Agree on Arbitration by Private Legal Persons

The Method of solving disputes by arbitration among private legal persons was widely spread, whether they are natural or legal persons. This method was supported by the courts based on law, but there were problems encountered this

[1] Article 15, Jordanian Arbitration Law, and Article (1) of Saudi Arbitration Law.

setting in terms of parties disclaim the effects of the agreement through its incorrectness for any reason related to the eligibility and power of contracting party.

Although everyone is eligible for contracting unless he/she is disqualified or limited by law, but the standard of contracting and practicing in national arbitration contracts differs than that in international contracts.

National arbitration contracts are subject to the local limitation and measures imposed by national law on the arbitration parties, whether they are natural or legal persons. International arbitration contracts are subject to the terms provided for in the international convention which arbitration contract is included in, despite that these contracts are subject to the law of will or any law decided by arbitrators in the case of disagreement, in accordance with the rule of conflict or convenience. [2]

Accordingly, based on the provisions of New York Convention, foreign jurisdiction and jurisprudence, in the subject of arbitration, , are irrelevant to the restrictions imposed by national laws on the power of natural and legal persons who agree on arbitration. [3]

Private legal persons are a group of persons or funds involved in a particular structure for purposes that individuals can carry out on their own, and these purposes are not a state subsidiary but subject to the control of the state. These groups are divided into three categories: [4]

First: Groups or Companies of Individuals:

They consist of a number of persons who meet together to achieve a particular purpose such as mutual funds, joint venture, simple limited partnership, or societies. This group is more personal to partners where each one knows and trusts other partners.

Second: Funds Groups or Companies

These are funds allocated for a particular purpose, and featured by money as the main element of their value, such as joint share company consisting of partners with financial consideration only.

Third: Mixed Nature Companies such as Limited Partnership in shares with limited liability. The legal person acts on his right to arbitration through persons who manage and represent his entity. The validity of such process is subject to the contract of establishment or the state regulations. For example, the establishment contract may prohibit arbitration so any agreement on arbitration is invalid, where the legal persons are liable to others for any damage caused, provided that they are not aware or unable to be aware of the prohibition, since it exceeds the limits of legal person power.

Article (2) of 1961 European Convention on Arbitration stated clearly that legal persons of all types should be entitled the right to conclude the arbitration agreements to resolve international trade disputes among contracting parties.

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[2] Abdul-tawab, Ahmad Ibrahim, Arbitration Agreement and Related Defensive Tools, Dar Al Nahda Al Arabia, Cairo, 2nd ed. 2018, p. 98.

[3] Qassim, Ahmad Sheikh, Arbitration Law, Dar Al Warraq, Amman, 1st ed., 2018, pp. 62-63.

[4] Al Fatlawi, Sahib, Introduction to Law, Dar Wa'el, Amman, 1st ed. 2014, pp 118-19.

Therefore, legal persons in the contracting countries are not allowed to argue the validity of agreement according to their national law if such law prohibits agreement on arbitration in national contracts. [5]

Article (2) of New York Convention provides a general perception that grants the power to natural and legal persons. Whenever the legal person is created according to the form and procedures specified by the law, and which are appropriate for its objectives, it becomes a moral personality of all elements, with independent financial power from other partners, a name, homeland, nationality, eligibility that allow him to acquire rights, fulfill obligations, make prosecution and agree to arbitrate. The legal persons vary in terms of their creation and purpose.

Private legal persons, especially commercial companies (except clearing companies since they are not entitled the legal personality), [6] are entitled full eligibility to conclude the arbitration agreement, where such eligibility is fully recognized by these companies, for the full moral personality and independent financial commitment from other partners. This personality will be completed by the legal procedures of declaration. If such procedure are not met, the company's personality is still available among the partners, but this availability can't be involved for the lack of knowledge assumed as a result of failure to complete the legal procedures of declaration, but it may still be held even the procedures were not fulfilled. [7]

The arbitration provisions established a general principle to deal with international relations, namely, that those who deal in international contracts are assumed that they are fully eligible to conclude these contracts and agree on arbitration.

The representative of a private legal person should be fully eligible, besides being consent and rational, net legally confined, and must have the necessary power to conclude such agreement. Such power is stated clearly in the contract of establishment of legal person or through contract of recruitment or by a private agency that entitles him/her to act the right of agree on arbitration on behalf of the said private legal person.[8]

Both Jordanian and Saudi Arbitration Laws provided that arbitration could only be agreed on by those who have the right to act on their rights, whether they are natural persons (or a representative) or a legal person. [9] We note that the drafting of both laws lacks precision, so it is preferable that an agreement on arbitration should be conducted only by those who have the right to act on their

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5 Haddad, Hamza, Arbitration in Arab and Foreign Laws, Part 1, Al Halabi Human Rights Publications, Beirut, 3rd ed., 2014, p. 192.

6 Al Akili, Aziz, Explanation of Jordanian Companies Law: Partnership Companies, House of Culture, Amman, 1st ed., 2008, p. 45.

7 Al Qaliuobi, Samiha, Commercial Companies, Dar Al Nahda Al Arabia, Cairo, 3rd ed., 2009, p. 96; Abdelbadi'e, Shita, Ahmad Mohammad, Commercial Companies, Egypt, 1st ed., 2011, p. 155.

8 Alnajjad, Mohammad, Arbitration in Saudi Arabia Institute of Public Administration, 1999, pp. 77-80.

9 Article (9), Jordanian Arbitration Law, and: Article (10), Saudi Arbitration Law.

rights, whether natural or legal or their representative, since the word " representative " denotes to natural or legal person.

The legal representative is eligible to conclude the arbitration agreement, where the manager shall conduct all normal management activities and tasks for the company, unless the company contract provides for the limitation of his/her authority in this respect, and may reconcile the company's rights or request arbitration if it is for the favor of the company. The company is committed to every act performed by the manager in its name within the limits of his/her authority, and if the manager uses the company's signature for his own, unless the person contracted with him is ill-intentioned. [10]

If the deputy is not authorized by the company contract or has a special authorization, and the arbitration agreement is concluded on behalf of the company, the validity and effect of this agreement depend on the approval of partners.

Each person who has the power to manage the private legal person may conclude the arbitration agreement with others in the name of the company without the presence of private agency.

In the mutual responsibility companies, partners are jointly responsible for conducting with others, while for actions among partners there is no mutual responsibility, where each partner is responsible for his own actions. Therefore the arbitration agreement concluded in the name of the company is mandatory for all partners.

As for the consortium of companies, a partner may request arbitration under the name of this consortium, where the verdict is mandatory for these companies though such companies didn't conclude the arbitration agreement, while others may refer to any company together or separately to apply the arbitration agreement between them and the consortium.

Arbitration clause related to the consortium, benefits all included companies, but if a company agrees to arbitrate a contract for its own business only with others, without being represented by the consortium and without contract, the agreement doesn't apply to the rest of companies while the consortium doesn't abide by it.[11]

According to the role of relative impact of contracts, any agreement between two parties is not mandatory for others who didn't conclude or agreed on the contract, so there is no obligation of arbitration agreement or verdict against other parties who are not involved in the agreement or arbitration dispute.

The International Chamber of Commerce (ICC), through arbitration panel, ruled that: with knowledge that the parent company didn't conclude the arbitration agreement between its subsidiary and a third party , but the economic relations that brought them together with the subsidiary made it the holder of arbitration agreement whose dispute was brought before the panel.[12] Therefore, the

[10] Radwan, Abu Zaid, The General Foundations of International Commercial Arbitration, Dar Al Fikr Al Arabi, Cairo, 2nd ed., 2007, p. 198.

[11] Abdel Badie' Shita, Ahmad Mohammad, op. cit., pp. 161-2.

[12] Pursuant to Case No. 4131 in 1983, published on the International Chamber of Commerce Website, - Arbitration Provisions.

provision considered that subsidiary company was the beneficiary of the concept of arbitration agreement concluded by the parent company. In the case of merger between companies, the merged company's personality is removed and all rights and obligation including arbitration agreement are transferred to the merging company.

3. The Power to Agree on Arbitration by Public Legal Partners

Public legal persons are entities that achieve society interests through managing certain utilities, intended to achieve these interests. The law grants it the legal personality like state, public institutions and departments.

The economic development led to that the state manages its utilities though establishing companies or through mixed-capital firms, where it allows the state participation in managing some utilities. Public legal persons in the Jordan and Saudi Arabia are represented by the state and its government departments. It can be classified as follows:

1. Ministries and directorates including agencies.
2. Nonprofit public institution like Universities.
3. Public institution of economic nature, such as Jordan Airlines Corporate, Saudi Airlines and General Corporate for ports.
4. Mixed capital firms such as General Corporate for Basic Industries.

Like natural person, the public legal persons have independence and the power to conclude legal conduct and eligibility within the limits set by the basis of their establishment purpose, or determined by the order. The public legal person has a deputy who represents it and expresses its will.

For this purpose, Jordanian and Saudi Laws granted the public law personalities the power to conclude the local and international contracts besides the right to conclude arbitration to settle any dispute about these contracts, under the legal terms and approval of the bodies concerned. [13]

Although jurisdictional immunity of the state is a rule of thumb towards the jurisdiction of foreign states, and it stems from the notion of sovereignty, independence and equality among countries, some parties try to uphold that in order to dissociate the arbitration agreement. But such claim is responded in that arbitration is based on the state will and not on obligation as in jurisprudence.

The fact that a state maintains its immunity against arbitration is contrary to the principle of well intention to implement the contractual obligations it has already undertaken. Therefore, it is important to keep this stability of the matter. The state, including all government agencies and institutions, can conclude an arbitration agreement and can't involve its judicial immunity, whatever the type of contract.[14] In this regard, article (3) of Jordanian Arbitration Law states that: The provisions of this law shall apply to any contractual arbitration in the Kingdom related to a civil or commercial dispute among parties of public or privates law persons, whatever the nature of legal relation that dispute revolves about, whether it is contractual or non contractual.

[13] Article (3) and (9), Jordanian Arbitration Law, and: Article (10), Saudi Arbitration Law.
[14] Al Maliki, Khalid Izzat, Commercial Arbitration, Al Nouri Foundation, Riyadh, 1st ed., 2018, p. 182.

Article (2) of Saudi Arbitration Law states that: without prejudice to the provisions of Islamic Sharee'a (Doctrine) and the international conventions in which the Kingdom is a party, the provisions of present regulations shall apply to any arbitration, whatever the nature of systemic relationship in dispute, contractual or non contracted, if such arbitration takes place in the Kingdom, or if it is an international commercial arbitration conducted abroad, and both parties agreed on it to be subject to the prevision of this regulation.

According to article (10) of Saudi Arbitration Law:

1. An arbitration agreement may be concluded only by those who have the right to act on their rights, whether natural, representatives, or legal persons.
2. Government authorities may not agree on arbitration without consent by Prime Minister, unless there is a special statutory provision that permits it. [15]

Hence, according to the previous provisions, it is clear that the agreement on arbitration is no longer controversial, whether it is about domestic or international trade.

Through authorizing the government, by arbitration law, to agree in advance to apply arbitration prior any dispute, through including the contract, a clause of arbitration is subject to the requirement of prior permission of Prime Minister. It may be said: the Arbitration Law has taken a middle-level approach that provides an opportunity to benefit arbitration by not taking it off at all but by having the prior approval to ensure that it doesn't harm the public interest or violate public order.

4. The Relationship between the Power of Management to Conclude Management Contracts and Appeal to Arbitration

Due to the close relationship between management power to conclude management contracts and appeal to arbitration, it is necessary to define the meaning of management contract, criteria of distinguishing it and the constraints against management to conclude its contracts.

The management contract is defined as: "an agreement between two wills, one of which is the will of the management authority that aims to organize, invest, manage and achieve public benefit; and it consists of extraordinary or unusual provisions not found in the private law". [16]

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[15] Article (8.1) of regulation of Saudi Arbitration Law, identified the procedures that should be applied by public agencies when requesting the approval for adopting arbitration, and prepare a memorandum for approval the adoption of arbitration, clearing the subject of arbitration and justifications; besides the names of litigants for approval of prime minister, who may decide to authorize a government entity to create a specific contract to solve the disputes arising through arbitration. In all cases, the Council of Ministers should be notified of the verdict.

[16] Alqaisi, Mohieddin, Eligibility of State Institutions and Entities to Conclude an Arbitration Agreement, Management Contract Disputes, and Paper Presented to the Conference of Arab Arbitration Centers, Faculty of Law, University of Beirut, 1999. Published in a book "Arbitration Lectures", Prepared by Lawyer Walid Anasi, Legal Library, Damascus, 2003, p.237.

The Jordanian administrative court defined the management contract in one verdict as "a public contract is an agreement concluded by an administrative body with a natural person, in which the rights and obligations of each party are determined in accordance with the provisions of the law".[17]

Saudi Board of ombudsman defined it as: " It is a contract to which the state or a public legal person is a party as a public authority, and the dispute is related to a state-owned property. [18]

Based on the above, the management contract can be defined as: "The contract to which the management is a party, whether this contract is related to the public utility in which the management applies the approaches of public authority, or a private contract in which the management and the natural person are equal.

The concept of management contract in both Jordanian and Saudi laws doesn't contradict with the same concept in the comparative law, since the management contract are distincted from the civil and commercial contracts in a special feature, based on the needs of the utility which the contract will manage or fulfill its needs, and give priority to the public interest against the individual one. The management makes contracts to secure the good managing of utility besides regular and continuous performance. Therefore, in the management contracts, it has rights and authorities wide enough to secure implementation of contract according to the public interest requirements.

The administration is not limited to applying the management contracts only, when contracting with individuals and companies, but sometimes it uses the civil or commercial contracts whenever it will fit the activity in concern, as the case of sale or lease contracts related to funds of administration, so these contracts are usually called the private contracts of management, or the private law contracts concluded by the administration, which are often subject to the same legal rules applied to the contracts concluded among individuals. [19]

In order to distinguish the management contract from other types it is necessary to assure the following standards:

1. The administration should be a party in the contract, or the conclusion of contract should be performed by a public legal person (the organic standard).
2. The contract should be related to a public utility.
3. Apply the common law tools, where the contract should include exceptional terms that are unusual to private law, where (2 and 3 are objective standards).

- **The organic Standard**: ***(Administration is a party of contract)***

The contract in which the administration is not a party is not considered a management contract. The administrative rules are set to govern the activities of administrative authorities, not individual activities. The term "administration" extends to every public legal person, whether it is centralized, such as the state, or

[17] Judgment No. 156/2020 dated on May 16, 2021, Adalah Legal Publications.
[18] Judgment by the Cases Audit Committee, First Region, No. 189 in 1418 h, Unpublished.
[19] Shafiq, Ali, Judicial Control on Administration Activities in Saudi Arabia, Riyadh, 2018, p. 216.

decentralized, such as local public persons, and utility decentralized legal public persons such as public corporate and institutions.

The contracts concluded by the persons of private law are not considered management contracts, unless these contracts are concluded for the interest of a public person, according to the theory of agency. Therefore, we should note that organic standard, despite it is necessary, is not sufficient to give the contract an administrative form, so objective standards should be available. [20]

- **Objective Standard**

The character of contract in the public utility is the criterion that can determine the nature of contract through its relation with the subject of contract on one hand, and by including different terms than that included in contractual relations among individuals on other hand.

In Jordan and Saudi Arabia, jurisprudence has settled to that management contracts don't mean contracts in which administration is a party, since some of these contracts are completely subject to private law.

Administration has the right to apply the private law, and that the standard of distinguishing the contract lies in the subject of contract not the character of contractor. Accordingly, the contract is considered a management one if the intention of public legal person appeared to adopt the approaches of common law, which is the emergence of unfamiliar conditions, and relation of contract to running a public utility.[21]

The public utility is any activity undertaken by any public legal persons that aim to achieve the public benefit. It has two meanings:

- Organic meaning related to organization, which means any public organization established and managed by ruling authority that is a body which performs services and satisfies public needs.
- Objective meaning related to the activity made by administrative person and is directed to every activity undertaken by the state or a public legal person, or which it is responsible for organizing or supervising that aim to achieve the public benefit.[22]. Or that the contract is a tool to implement the public utility, through its participation in managing it, where such utility can't perform its duties and tasks without such contract.[23] French jurist Wallen mentions that contractor is an assistant to administration of public utility.[24]

- **Exceptional Terms**

Placing exceptional terms in the contract means that parties choose to place acting under the public law, which means that this measure highlights the parties' choice between public administration's acting and the private management acting.

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[20] Hussein, Mohammad and Noah, Mohannad, Management Contract, Damascus University, Dept. of Legal Studies, 2005-6, pp. 17-18.
[21] Ibid, p. 18.
[22] Qbilat, Hamdi, Management Contracts, Dar We'el, Amman, 2nd ed., 2018, p. 84.
[23] Hussein, Mohammad and Noah, Mohammad, op. cit., p. 4.
[24] Abbas, Abdelhadi, Management Contracts, Part 2, Dar Al Mustaqbal, 1st ed., 1993, p. 11.

These terms are defined as: "the conditions that objectively give the parties of contract rights, and create a burden of obligations different in nature than those rights and obligations that can be related to the relations between Civil and Commercial Law.[25]

The exceptional terms provide the administration with powers against contractors, or provide contractors with power against each others , such as the term that provides administration the right to use executive decision against implementation of contract, especially in the scope of imposing penalties against the contractor in case of failure to implement. Another exceptional term is represented by the right of administration to modify the contract unilaterally. It is distinguished from the legal point of view with characteristics different than those presented in the framework of contractual relations between individuals.[26]

For restrictions imposed on the administration when concluding its contracts, all public works and purchases are presented into general competition, except for what is excluded from competition under the provisions of Law.[27] Procedures adopt the following pattern:

a. All public tenders are announced in the official gazette, two local newspapers, and by electronic advertising means as determined by the executive regulations of the law. The invitation for offers should specify the date and place of submitting offers and opening session of documents.
b. Works or projects of a special nature which have no local contractor shall be advertised outside the Kingdom besides advertising internally, in accordance with the contents of paragraph (a). [28]

There shall be one or more committees for the public entity to open offers, with members not less than three besides the head whose rank is not less ten or its equivalent. There should be a reserve member to complete the quorum if one member is absent, where the committee is re-created every three years. [29]

Offers shall be opened in the presence of the members of bid opening committee at the time and place specified for such purpose. The bidders or their representative who attend the session shall be acknowledged by the committee the prices mentioned in all bids, where the committee shall submit its session minutes and competition documents to the bid examining committee within seven days from the date of opening of offers [30]

In regard to examining bids and contract validity, the public entity shall have one or more committees, that consist of at least three members besides the head, where rank not less than thirteen or equivalent, provided that financial comptroller and those who are legally qualified are among them, in addition to a reserve

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25 From what was mentioned in the definition of exceptional conditions, that "clause that imposes, on other construction party with administration, terms and obligations outside the scope of terms and obligations that can be imposed in an ordinary contract by a person on another person even if his term statement was invalid. "Lebanese Court of Cassation, Decision No. 11 dated on Feb 27, 1952, mentioned in: Alqaisi, Mohiedin, op. cit., p. 224.

26 Hussein, Mohammad and Noah, Mohammad, op. cit., pp. 28-53.

27 Article (6) of Public Procurement and Competition Law.

28 Article (7), Ibid.

29 Article (14), Ibid.

30 Article (15), Ibid.

member who completes the quorum in the absence of one member. This committee shall submit its recommendations according to the provisions of law and regulations, and attach a technical report, if needed, with the recommendations.[31]

The authority to decide on competition, award and implementation of works rests with the minister or the director of independent entity, and he/she may delegate officials a sum of no more than three million Jordan Dinars, provided that the delegation is included in the responsibility of authorized person.[32]

Another method to meet the needs of public entity is the direct purchase, where it is permissible to provide the needs of public entity and carry out its works through direct purchase in urgent cases, provided that the purchase value should not exceed one million dinars.[33]

Direct purchase requires obtaining at least three offers, examined by a committee formed by the minister or head of the independent department, provided that the costs shouldn't exceed the current market price.

The authority to decide on the direct purchase shall be given to the minister or the head of independent department, and he/she may not delegate him/her except within the limits of five hundred thousand dinars. As for works and purchases whose value doesn't exceed thirty thousand dinar, it shall be provided according to the method that public entity deems appropriate.

Public entity may provide its needs that are made by direct purchase through electronic means.[34] As an exception of the general competition, the following businesses and procurement needs of public entity may be provided in accordance with the specific method of purchasing, even the cost exceeds the authority of direct purchase, which are:

a. Weapons: Military equipment and spare parts are purchased directly from the manufacturing company, where the best offers are selected in a way that achieves the public interest, by a ministry committee created by a royal decree for this purpose that consists of at least three members besides the head. The recommendations of committee are submitted to the Prime Minister for approval.
b. Consultancy and technical works, studies, setting specifications and plans, supervising implementation, and the services of accountants, lawyers and legal consultants, are provided through invitation of at least five specialized licensed offices to submit their offers within a period specified by the authority.
c. Spare parts for mechanical, electrical, and electronic machinery and equipment, are provided through invitation of at least three specialized companies to submit their offers with the period specified by the authority, where the minister or director of independent entity heads the committee to select the best offer.

[31] Article (16), Ibid.
[32] Article (26), Ibid.
[33] Article (44), Ibid.
[34] Article (45), Ibid.

d. Commodity, constructions, or services that are only available by one contractor or producer and have no equivalent alternative, are provided by direct purchase with the approval of the related minister or the head of independent entity in accordance with the procedures set in the executive regulations.
e. Medical supplies needed urgently in cases of epidemic or pandemic disease.[35]

When public agencies want to purchase goods, construction or services referred to in article (47/D) of the law, they should take into account the following procedures:

1. There is an urgent need by the entity for goods, services or construction, and that there is no suitable alternative sources of supplies.
2. Announcement is made in accordance to the procedures for tender's invitation, in order to ensure availability of goods, services or supplies, through official sources, databases and information available at public entity or other relevant authorities.
3. The price of supplies should be appropriate, where entity should search for acceptable alternatives if it is high.[36]

Executive regulations of the competition and procurement law states that there are other approaches should be applied to secure the needs of public entity such as rent, carryout on its own, or act on behalf of some entities to fulfill the procedures of contracting.[37]

Taking into account the international agreements and treaties in force to which Jordan is a party, this law and its executive regulations shall be applied to all government agencies, ministries, directorates institutions and bodies that have independent public legal personality, except for those that have a special systems applied by them unless they are unregulated in their systems.[38]

5. Arbitration in Management Contracts in Jordan and Saudi Arabia

Arbitration is stated on in article (9) and article (10) of both Jordanian and Saudi Arbitration Law respectively. These articles allow adapting arbitration either prior to the outbreak of disputes or by an agreement subsequent to disputes provided that it should be in written form.

In Saudi arbitration law the agreement should get the approval of prime minister, where the term related to solving dispute by arbitration requires the approval of Prime Minister is a must, and parties can't dispense except by a mutual agreement between them.

Administrative arbitration is the arbitration conducted to solve the dispute on management contracts between the state represented by its administrative person

[35] Article (47), Ibid.
[36] Article (70), Ibid.
[37] Article (67) and Article (68), Public Procurement Law.
[38] Article (69), op. cit.

and private law persons (natural or legal), that aims to implement an obligation for the public interest.[39]

Arbitration administrative contracts in Saudi Arabia have undergone the following phases:

First: Cabinet decision No 58 of January, 17, 1995 which stated that: "No public entity may accept arbitration as a means to settle disputes, that may arise between it and any individual, company or private body, with the exception of irregular cases in which the state grants an important privilege, and there is an interest prospected to grant such privilege including the clause of arbitration".

Second: The repealed arbitration law of 1982.

Article (3) stated that public agencies may not adopt arbitration to settle their disputes with others unless having approval of the Prime Minister, and this provision may be amended by a decision of Council of Ministers.

Third: The new Arbitration Law of 2012.

Article (10) states that:

1. It is not valid to agree on arbitration except for those who have the right to act their own rights, whether they are natural persons or their representative or legal persons.
2. It is not permissible to public agencies to agree on arbitration without approval of the Prime Minister, unless there is a special legal text that authorizes it".

It appears that considerations of Saudi Law towards arbitration haven't been changed, in contrary to Jordanian arbitration law in 1953 which didn't address the issue of permission for legal persons to adopt arbitration, while the new law in 2001 allowed this matter.

6. Attitude of Saudi Administrative Judiciary System regarding Arbitration in Management Contracts

The administrative court tried the case No 235/Q/2008 filed by (x) against (y)

Case facts:

Company (x) contracted with a university (y) to design and construct utilities for the amount of RS 112,652,077. The contract was concluded between them and stated that all kinds of dispute or disagreements, if any, in which the engineer decision didn't become final and binding, shall be referred to arbitration, which consists of three members.

During implantation period, a dispute occurred between both parties, and by applying the clause of arbitration. The arbitral tribunal issued the following decision:

1. University (y) pays the company (x) an amount of RS 77,566,199.
2. University (y) should release the bank guarantees provided by company (x) for the amount of RS 553,031,22.
3. University (x) submits a request to the Ministry of Finance to exempt the fine from delay penalties.

[39] Mansour, Yasir Abdussalam, Egyptian Arbitration Law, Dar Al Nahda Al Arabia, Cairo, 2nd ed., 2012, p. 130.

Based on this verdict the university released an amount of RS 66,377,499 and declined to pay the rest of the accrued amount according to the verdict of arbitration.

Company (x) submitted a request to the administrative court to issue a verdict to obligate university (y) to pay the amount of 56,189,280 which represents the difference between the amount due according to the verdict of court and the amount already paid.

After the case was referred to the 9th administrative region, the university representative attended and responded the company request, in that if arbitration committee made decision adopting of arbitration in the dispute is illegal, because the body who is authorized to investigate this dispute is the administrative judiciary in accordance to the decision of cabinet No. 58 dated on 17/1/1383 H, which stated that: No public body may agree on arbitration as a means of settling disputes that arise between it and any individuals, company or private body, with the exception of cases in which the state grants a general privilege, and it appears to it a paramount interest in granting the concession, including the arbitration clause, as well as part (b) of the same decision, which states that "in cases where contracts concluded by any ministry contains texts that violate the public procurement system and the implementation of its projects and works, then the contract is referred to the Board of Grievance to take decision in a manner that accomplishes justice".

Based on the above mentioned, the department issued its decision that obligates the university to pay the accrued amount. This decision was objected, so the case was submitted to the Cases Audit Authority (first region), which didn't agree with the decision regarding the permissibility to adopt arbitration on the management contract.

Based on the fact that arbitration is prohibited in settling disputes between public agencies and any authority or company, pursuant to cabinet decision No 58/1383 H.[40]

7. Arbitration for International Management Contracts in the light of Arbitration Decisions

The decision on the dispute between Saudi Arabia and ARAMCO is one of the first arbitration decisions issued on such case.[41]

The case can be briefed in that "in May 25, 1933 Saudi Government concluded a contract with Standard Oil Company for exploiting of oil, where the latter was entitled a sixty-year concession in the eastern region of the Kingdom.

Pursuant to article (33) of concession contract concluded CASCO company was established, where Standard Oil waived all rights and privileges arising from the concession contract, to CASCO, while Saudi Government agreed on that waiver.

[40] Al Khdair, Khalid bin Abdullah, Arbitration in Management Contracts in Saudi Arabia, Judical Journal, No. 1, 1432 h. p. 146.

[41] Ibid, p. 147.

In January 31, 1944, CASCO changed its name to ARAMCO, while in January 20, 1954, Saudi Government concluded an agreement with Onassis Group to establish a private company, called Saudi Naval Tanker Company, SATCO, where the Saudi flag would be raised on it. SATCO had to perform oil shipping from Saudi ports on Arab Gulf to its ports on Red Sea.

The Contract concluded between both parties included that SATCO had the right of preference (priority) for shipping oil and its products exported by sea from Saudi Arabia to abroad.

ARAMCO objected the agreement concluded between Saudi Arabic and SATCO, since it contradicted the concession contract granted to it in 1933.

To resolve this dispute arising between them, Saudi government suggested to submit this dispute to arbitration.

On February 22, 1955 an arbitration agreement had been concluded between Saudi government and ARAMCO, in which article (4) stated that the arbitral tribunal shall settle the dispute in accordance with Saudi Law.

What had been meant by Saudi Law was the law based on Islamic doctrine applied in Saudi Arabia, which was the doctrine of Ahmad bin Hanbal, when related to issues of jurisdiction in Saudi Arabia, but for issues not related in such law, the decision had been made in accordance with the law that arbitral tribunal deemed to apply.

The dispute had been presented to the arbitral tribunal, which considered that, in order to determine the law applicable to solve the dispute, it had to adapt the legal relationship in the contract concluded between both parties on the subject of dispute, to determine whether concession contract concluded between both parties had been an act of unilateral action, a general contract, management contract, or a private law contract.

After the arbitral tribunal hearing to both parties and legal arguments submitted by them, it found that Saudi law hadn't known the common law or the theme of administrative law included in French law, and that the jurisprudence of Imam Ahmad bin Hanbal hadn't include any rule related to concession to excavate minerals, where a fortiori excavating oil.

Accordingly, the arbitral tribunal rejected the Saudi arguments, in that Islamic jurisprudence based on Ibin Tymiah books, doesn't distinct between treaties concluded between states, public law contracts, management contracts, and civil and commercial contracts, where the contract is the will of contracting parties.

In adapting the concession contract concluded between Saudi government and ARAMCO, through a memorandum submitted by Saudi government and by oral discussions that took place, the arbitral tribunal found that the contract had been concluded between both parties was indefinite contract that couldn't be included in the usual legal categories, and refused to consider it a management contract, because Saudi law hadn't known such type of contracts.

After considering all minutes of dispute, the arbitral tribunal issued its decision on August 23, 1958 that Saudi government's contract with Onassis Group hadn't prejudice any acquired rights of ARAMCO, because the concession contract between Saudi Arabia and ARAMCO hadn't restrict the freedom of Saudi Arabia to choose how to ship oil exports.

The following are comments on this decision:

First: what arbitral tribunal concluded in adapting the contract to the fact it hadn't been an administrative contract was incorrect, as it began by studying the applicable law, then applied the contract accordingly. It found that since Saudi law hadn't known administrative law, the contract was not considered a management contract.

The arbitral tribunal hadn't study to find out whether the contract was a management contract, then the rules of administrative law would have been applied to it or it was a private contract. We note that the contract between Saudi Arabia and ARAMCO was considered a management contract since it was a concession contract, and was one of the well-known contracts in administrative law.

Second: What the arbitral tribunal mentioned about the lack of knowledge, by Saudi law, on administrative law is rejected. Rather, it had been made out of ignorance by arbitral tribunal of the reality of Saudi law which is based on Islamic Sharee'a, with all orders and regulations, as the provisions of Islamic jurisprudence are full of effective solutions to settle any dispute, whether a management contract or a private contract, where Saudi government indicated to the arbitral tribunal but the latter hadn't agreed the Saudi arguments.

Third: Saudi law suggest the permissibility of adopting the arbitration to resolve dispute of management contract a long time ago, as it offered arbitration to solve the dispute between Saudi government and ARAMCO. What assured this attitude is that oil contracts concluded between Saudi Arabia and oil companies included the adoption of arbitration option in case of dispute between the parties. Such contract included one contract concluded between Saudi Arabia and Japanese Oil Company (JOC) on December 20, 1955, which contained a provision stated that: "in case of that both parties are unable to get amicable settlement on their dispute or unable to agree on referring the dispute to a court, the dispute is referred to a council of arbitrators that consists of five members where the tribunal decision is issued by the majority of opinions.

Saudi law, in newly issued laws, excluded the obligation of preliminary approval on arbitration, and authorized the administrative entity to adopt arbitration on the disputes of administrative contracts directly without obtaining the consent of Council of Ministry, according to the following:

First Exclusion:

The Mining Investment Law issued by royal decree No. M/y7 dated on 8/20/1425 H, where article stated that: "It is permissible to agree on settling any dispute or disagreement arising between a licensee and ministry, through adopting arbitration in accordance to the provisions of arbitration law in Saudi Arabia.[42]

Second Exclusion:

In the Electricity Law issued by royal decree No. M/56 dated on 10/20/1926 H, article (13/8) stated that: "It is permissible to agree on settling any dispute or

[42] Licensee is a Natural or Legal Person who is Granted Certain Rights under this law.

disagreement that may arise between any licensee [43] and the commission[44] by arbitration in accordance to the arbitration law. [45]

8. Results

1. It is not appropriate to agree on arbitration except by one who has the right to practice his rights, whether he/she is a natural or legal person or their representatives, though Jordanian and Saudi Legislators didn't include the term "or their representatives" in the articles (9) and (10) of Jordanian and Saudi laws respectively, despite the importance of this term.
2. Jordanian and Saudi legislators permitted, in general, the adoption of arbitration, by private and public legal persons, in civil, commercial and administrative disputes. Saudi legislator stated that "government agencies willing to agree on arbitration should obtain the approval of Prime Minister, which differs than Jordanian legislation.
3. Arbitration provisions established a general principle for dealing within the scope of international relations. It is assumed that those who deal in the international contracts, whether private or public persons, have full eligibility to conclude those contracts and then agree on arbitration.
4. It is necessary to have the legal controls for the practice of arbitration by a private legal person.
5. There is a close relation between the power of administration to conclude management contracts and adopting arbitration to show its compatibility.

9. Recommendations

1. There is a need to reformulate article (9) and (10) of Jordanian and Saudi Arbitration Laws respectively, to include the term: "or whoever represents them", so that articles become as follows: "natural or legal person or their representative"; since the word "representative" refers to both natural and legal persons.
2. There is a necessity for an integrated legal organization with the authority of legal persons to conclude arbitration agreement that commensurate with its subjective nature, rather than subjecting it to the general rules contained in arbitration law, to settle any controversy in this regard.
3. It is necessary to address the issue of extending arbitration within the scope of legal persons to include other persons to become parties of the arbitration even though they didn't conclude its agreement, as the case of management concession contract.

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[43] Article (1) of the law states that licensee is any person who holds a valid license issued by the authority that authorizes him/her to practice any electrical activity.

[44] According to Article (1) of the Law, Authority is the Electricity Cogeneration Regulatory Commission.

[45] Al Khadir, Khalid bin Abdullah, op. cit., p. 154 and beyond.

4. There is necessity to state clearly on the idea of tacit acceptance, in the arbitration agreement, of legal persons, due to the practical need in order to limit the arbitration problems.
5. There is a need to state a clear standard that resolves the issue of power of will role and practical considerations regarding the conclusion of arbitration agreement between legal persons and other parties, and stay away from the mandatory arbitration.

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