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INTERNATIONAL ARBITRATION AS AN ALTERNATIVE METHOD FOR SETTLING ADMINISTRATIVE DISPUTES IN THE KUWAITI LAW

Abstract

This study carries out research into international arbitration in disputes of administrative contracts while discussing the level of possibility of resorting to arbitration as a means of settling administrative disputes, and discussing the situation of Kuwaiti law with some references to French law in the field of administrative contracts. The French lawgiver issued laws by which he organized arbitration in some disputes to which the state or any of its public staff (industrial, commercial, and economic establishments) were a party therein, and we defined what are the cases in which it is possible to resort to arbitration in administrative contracts locally or internationally in these countries. As to the general basis, the administrative court is deemed the concerned entity in every country and it is the original competent authority to consider administrative disputes, and we clarified that the Kuwaiti did not issue a special law for arbitration in administrative contracts, however such proceedings may be conducted according to other laws, i.e., Partnership Law, and the study concluded some important results as to accepting arbitration in administrative contracts that must be provided in international legislations and agreements.

Keywords

arbitration – administrative arbitration – administrative contract – judiciary – public order

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Introduction

Arbitration is an alternative system to the litigation system, characterized by the simplicity of its procedures and its speed in settling disputes. It reduces the procedures to which the litigation system is subject, and it is an effective way to attract and encourage foreign investment. Therefore, arbitration is considered a method for resolving disputes and is binding on its parties when the litigants agree to choose, at their own will, ordinary individuals to settle the dispute that has arisen between them.

Whether included in the contract or in a separate agreement, the parties' agreement to resort to arbitration prevents the judge from considering the case when a party insists on considering it.

The State of Kuwait has known arbitration since making an oil franchise contract previously, and there are some laws to organize arbitration in the commercial field, yet since Kuwait is a state with a unified court (ordinary court) and the court is divided into multiple circuits, one of which is the administrative circuit, and since it is effected with the French law adopting the dual system – administrative court and ordinary court – so we can find some dilemmas that have provoked disputes in jurisprudence and court decisions owing to the significance of administrative contracts rather than civil contracts whether in terms of being subject to a different judicial legal system, for targeting public interest, and this is owing to being connected with operating and organizing public facilities in the state, with some references to French law in the field of administrative contracts, whereas the French lawgiver issued legislations through which he organized arbitration in some disputes where the state or one of its persons is a party therein, and we clarified that a dilemma is provoked that the Kuwaiti lawgiver did not issue a special piece of legislation for arbitration in the administrative contract as a whole.

Here we ask if international arbitration is accepted in administrative contracts in the state of Kuwait, and also if there is an organization for administrative arbitration in the state of Kuwait, and whether the arbitration is related to the type of administrative contract? All these questions were a concern of this research, through which the descriptive and

analytic method is adopted for studying the provisions of law and international agreements which the state of Kuwait adopted, in comparison with some aspects with French law in the field of administrative contracts only. So, the research is divided into two sections:

I. International arbitration as an alternative means of resolving disputes
II. International arbitration and the administrative nature of the contract

I. International Arbitration as an Alternative Means of Resolving Disputes

When investments availed of oneself are in the territory of the host country, any dispute that may arise from the application of the administrative contract can of course as a general rule fall under the jurisdiction of the local courts. However, some parties may also be dissatisfied with the proposed solutions, or fear the bias of the national judges, and therefore prefer to submit the dispute to a neutral and independent arbitral tribunal. This position is based on a very simple idea according to which the contract is concluded by "the parties in an unequal legal way."[1] Economic changes at the global level encourage many developing countries to attract foreign capital, and for this reason, they accept international arbitration as a "consensual and friendly"[2] way to settle disputes related to the contract leading to "a solution that is not imposed by any of the parties."[3]

In addition, arbitration has several advantages: It makes administrative administration closer to commercial administration and thus appears more suitable for state contracts and international projects. It also

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[1] S. Abdel Baki, *Les projets internationaux de construction menés sous la formule BOT (Build, Operate, Tranfer) Doit égyptien-Droit français*, Thèse, Droit, Université Paris I, Panthéon-Sorbonne, 2000. Les projets internationaux de construction menés selon la formule BOT, p. 546.

[2] See: C.Y. Khater, *L'arbitrage et ses règles dans les contrats administratifs*, Dar El Fikr Kanoun, 2011, p. 76.

[3] L. Richer, "Les modes alternatifs et règlement des litiges administratifs", *L'Actualité juridique. Droit administratif (AJDA)*, 1997, n° 1, p. 3.

makes it possible to reconcile the divergent interests of the participating parties. In addition, it is characterized by its flexibility, simplicity of procedures and the speed with which disputes are settled. Furthermore, it is less expensive and benefits from people who have a great knowledge of international trade.[4]

Finally, this alternative dispute resolution method makes it possible to avoid going to a competent judge in the host country[5] and thus to be relieved of administrative jurisdiction.[6]

Although the issue of arbitration in commercial contracts involving private parties does not raise any particular problem, because it is a secondary mechanism that is rarely used, the situation is completely different in the field of state contracts because there is a legally specialized judicial system for this type of contracts in which public authorities are involved. Therefore, if it is accepted to resort to international arbitration as an alternative mechanism for the internal legal system to settle disputes related to administrative contracts, this is not without some major difficulties.

It is considered that the contract constitutes "a fertile ground for alternative methods of regulating litigation." [7]

One of these methods is arbitration.[8] But what is meant by this formula? On this subject, arbitration in general is a means of settling a dispute by one or more persons (arbitrators) upon whom the parties to the contract have decided to rely.[9]

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[4] J.J. Anassar, *L'arbitrage dans les contrats administratifs*, Cairo, Dar Nahdha Al Arabya, 1997, p. 5; J. Béguin, *L'arbitrage commercial international, Montréal, Centre de Recherche en droit privé et comparé du Québec*, Publié en collaboration avec: Université McGill, Institut de droit comparé, 1987, pp. 8 et s.

[5] P. Delevolvé, "Modes alternatifs, autres modes et mode", *La revue Contrats publics est en général*, 2007, no. 64.

[6] L. Richer, F. Lichère, *Droit des contrats administratifs*, Librairie générale de droit et de jurisprudence, 10th éd., 2016. p. 325.

[7] M. Ubaud-Bergeron, *Droit des contrats administratifs*, Lexis-Nexis, 2015, p. 439.

[8] Indeed, it is agreed that "arbitration belongs to the world of the contract." L. Richer, F. Lichère, *supra* note 6, p. 223.

[9] A. Kassis, *Problèmes de base de l'arbitrage en droit comparé et en droit international*, Librairie générale de droit et de jurisprudence, 1987, t. 1, p. 13; see in the same sense, F. Wali, *Le droit de l'arbitrage entre théorie et pratique*, Mounchaa Maarif, 2007, p. 13; A.A. Salama, *Le droit de l'arbitrage en matière de commerce international et national*, Dar Nahdha Arabya, t. 1, pp. 18-19.

It is noted that parties can agree to resort to private or institutional arbitration. In either case, there is interference from a third party. This standard contributes to defining the very concept of arbitration. This is indeed the point of view advocated by Charles Jarrosson: "Institution by which a third party settles the dispute between two or more parties exercising the jurisdictional mission entrusted to it by the latter."[10]

In this sense, arbitration has the effect of removing the jurisdiction of national courts to hear disputes arising from the implementation of contracts. As Jean Robert points out, "Arbitration means the institution of private justice through which disputes are withdrawn from common law jurisdictions, to be resolved by individuals vested, for the occasion, with the mission of judging them."[11]

However, it should be noted that unlike the national judge who administers justice in the name of the state, the international arbitrator is deprived of imperium.[12]

Moreover, the arbitrator derives his authority from the will of the parties,[13] which is formulated in an agreement called the "arbitration agreement",[14] i.e., the freedom left to the parties to the contract. In other words, arbitration is acceptable by legislation with regard to resolving disputes related to the implementation of partnership projects with foreign parties. This could explain Kuwait's recognition of international arbitration, even if its approval was accompanied by some reservations.

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[10] C. Jarrosson, *La notion de l'arbitrage*, Librairie générale de droit et de jurisprudence, 1987, p. 372.

[11] J. Robert, *L'arbitrage, droit interne et droit international privé*, Dalloz, 6th ed., 1993, p. 3; H. Hoepffner, *Droit des contrats administratifs*, Dalloz, 2016, p. 491; C. Jarrosson, *supra* note 10, p. 172.

[12] S. Abdelbaki, *supra* note 1, p. 464.

[13] M. Ubaud-Bergeron, *supra* note 7, p. 447.

[14] See: A. Plantey, "*Quelques observations sur l'arbitrage administer*", Journal de Droit International, 1999, no. 3, p. 732; P. Fouchard, E. Gaillard, B. Goldman, *Traité de l'arbitrage commercial international*, Litec, 1996, p. 209; M. Ubaud-Bergeron, *supra* note 7, p. 445.

1. Kuwait's Recognition of the Role of International Arbitration

Resorting to arbitration has been a pervasive procedure in Kuwait, because most of the oil concession contracts signed by the public authority with the multinational companies responsible for the exploration and exploitation of oil fields included arbitration provisions.[15]

The State of Kuwait concluded the first concession contract for oil exploration during the reign of the late Sheikh Ahmad Al-Jaber Al-Sabah with the Kuwait Oil Company Limited (KOC) on December 23, 1934. Article 18 of the agreement stated in its first paragraph how to resolve disputes:

> a) if, during the validity of the agreement, a conflict or a dispute arises between the two parties concerning its interpretation or its execution or on other questions integrated or related to the contract, the rights and or Obligations of one of the two parties and these have not reached an agreement (…), after consultation with the British political representative in the Gulf, this conflict is transferred to two arbitrators each appointed by a contracting party, and, a third arbitrator chosen by the two arbitrators appointed before the start of the arbitration.

In fact, the search for a solution[16] begins with negotiation between the two parties to the contract with the aim of reconciling the opposing viewpoints.[17] In the event that the discussion is unsuccessful, the British

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[15] Y.Y. Sarkhou, *Les principes généraux de l'arbitrage commercial international*, Koweït, 1st éd., 1996, p. 29.

[16] "Negotiation is inherent in the conciliation procedure with a view to reaching an amicable settlement of the dispute. It involves a third party (the conciliator) chosen freely by the parties. This alternative mode of dispute resolution is optional, unless provided for by the terms of a contract." For a summary, see: D. Chabanol, "La conciliation: un autre mode de règlement de litiges", Actualité de la Commande et des Contrats Publics, 2007, no. 64, p. 30.

[17] C.R. Dupuy, "*Rappel des principes de la conciliation, une nouvelle forme de règlement des conflits*", Revue Française du Droit Administratif, 1999, p. 611; Y. Gaudemet, "Le précontentieux: le règlement non juridictionnel dans les marchés publics", Actualité Juridique Droit administratif, 1994, p. 84.

representative who plays the role of mediator[18] shall be summoned, and it is only in the event of failure of this method that the parties may start arbitration proceedings.[19]

All oil concessions contained arbitration clauses following the same model. However, some agreements brought a major innovation: the representative of foreign diplomacy in the Gulf was replaced by the President of the International Court of Justice.[20]

Since 1948, the State of Kuwait has formed arbitration committees. However, these committees have limited powers to specific types of conflict and targeted a specific class of people. The consent of the parties is required to move the matter to arbitration. The decisions of the committees become enforceable only after the approval of the President of the Courts, who also has the right to amend them.[21]

It is also important to know that the first idea of the judiciary establishing arbitration in Kuwaiti law was in Law No. 19/1959 (that regulated the judiciary) whose Article 39 states that "a judge may not, without the approval of the Judicial Council, be an arbitrator, even without remuneration, unless one of the parties to the dispute is of his relatives or in-laws up to the fourth degree." We note that the law allows the judge, in his personal capacity, and after the approval of the Judicial Council, to be an arbitrator in a dispute between a relative, for example, and oth-

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[18] In the field of contracts, the mediator acts as a third person, whose mission is to propose to the parties, who have expressed the will, to find a solution to their dispute that they are free to accept or not. See: M.G. HOFNUNG, *La médiation*, PUF, 2015; J.M. Le Gars, "*Conciliation et médiation en matière administrative*", Actualité Juridique Droit administratif, 2000, p. 507.

[19] Therefore, it is up to the two parties to implement all diplomatic, political (negotiation and mediation), and legal (arbitration) means to resolve the dispute. E.M. Al-Khayyat, *State Oil Contracts in Public International Law and Under the Kuwaiti Legal System*, Master's Thesis, Kuwait University, 1997, p. 127.

[20] Let us cite, for example, the concession contract for the Arab oil company entered into by the State with Japan on 05/07/1958 (art.33); the concession agreement with the Shell Petroleum company for investments in the exploration of oil fields, concluded on 15/01/1961 (art. 29).

[21] See particularly: H. Abdelfattah, *Les principes du droit administratif koweïtien*, Dar Al Nahda Al Arabiya, 1969, p. 82.

ers, in implementation of an agreement between them to settle disputes through arbitration.[22]

In 1960, the Kuwaiti legislator regulated the optional arbitration rules regulated by the Civil and Commercial Procedures Law promulgated by Decree Law[23] No. 6 of 1960. Arbitration must be in writing (according to Article 254 of the previous law, and it is not permissible in matters that do not permit reconciliation in accordance with Article 255 of the same law.[24]

Later, the arbitration system developed with the issuance of Law No. 3 of 1971, which added Article 264 bis to the Civil and Commercial Procedures Law No. 6 of 1960, which established an arbitration committee to consider any dispute whose parties agreed in writing to refer the dispute to it, and accordingly Article 264 bis stipulated judicial arbitration.

This text has the first appearance of judicial arbitration in the Kuwaiti legislation. It is considered institutional arbitration and is handled by an arbitral tribunal headed by a judge and the membership of two arbitrators from merchants.[25] However, in practice, arbitration remains a dispute settlement procedure[26] owing to its special justice nature.[27]

We have to know that the Kuwaiti Civil and Commercial Procedures Law No. 38 of 1980 looks at arbitration from two different angles; One is

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[22] The Kuwaiti legislator kept the provisions of that article when amending the previous law, with simple additions, as Law No. 23/1990 Regarding the Organization of the Judiciary and Amending Law No. 19/1959 in Article 26.

[23] Decree-Law No. 6/1960 promulgating the Civil and Commercial Procedure Code was published in the Official Gazette *Kuwait Today*, Year 6, Supplement No. 267, on March 21, 1960.

[24] This means that the Kuwaiti law permits arbitration in matters that permit reconciliation, which are matters that are not related to public order. The idea of public order means preserving basic public interests, whether political, economic, social, or religious, and it is a flexible idea that varies according to place and time. See: K.F. Al-Enzi, *Arbitration in Administrative Contracts in Kuwait*, PhD thesis, Cairo University: Dar Al-Nahda Al-Arabiya, 2007, p. 69.

[25] Ibid., p. 65.

[26] The Kuwaiti Court of Cassation ruled in this sense: "Arbitration is an exceptional procedure for the resolution of disputes and provided that its execution is possible", see Appeal 43/49 of 1986, hearing of the commercial chamber of 1986, *Review of Justice and Law*, p. 141.

[27] H. Hoepffner, *supra* note 11, p. 492.

obligatory and subject to the authority of the judge, and the other is optional and, therefore, consensual. According to Article 173 of that Law, "It is permissible to agree to resort to arbitration in a specific dispute, and it is permissible to resort to arbitration in all disputes that arise during the implementation of a specific contract."[28]

The Kuwaiti legislator regulated judicial arbitration in Law No. 11 of 1995 (which contains 14 articles) in civil and commercial matters. But when we look at the text of the law, we find that it is not purely judicial arbitration, because the body formed for arbitration according to the law is composed of three judges and two arbitrators chosen by each party.[29] Therefore, it is an institutional arbitration because it is handled by a national body within the country according to specific rules and procedures.[30] To expand the scope of this law, the Minister of Justice issued Resolution No. 43 of 1995 regarding judicial arbitration procedures in civil and commercial matters.

The Arbitration Chamber also deals with disputes between natural or legal persons, government agencies, and legal persons subject to public law. From this perspective, arbitration is mandatory unless the disputes have previously been submitted to the jurisdiction of the competent courts in the country. Judgments rendered by the Arbitration Chamber also have a mandatory authority and are immediately implemented once they become enforceable.[31]

Law No. 11 of 1995[32] Regarding Arbitration in Civil and Commercial Affairs stated that the principle is optional arbitration, except in some cases where arbitration is mandatory.[33] In this regard, it states that "the arbitration tribunal shall rule on disputes related to contracts concluded

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[28] A.M. Alhouari, "*La position des législations arabe à l'égard des tendance modernes de l'arbitrage*", in the *Sixth Symposium of the University of the United Arab Emirates*, under the title "Arbitration in International Commerce," Abu Dhabi, 28-30 April 2008, p. 619.

[29] Article 1 of Judicial Arbitration Law No 11 of 1995.

[30] A. Meligy, *Arbitration Rules in Kuwaiti Law*, Dar Al-Kutub, 1st ed., 1991, p. 215; O.M. Al-Mutairi, *Privatisation of Public Utilities under the Build-Operate-Transfer System*, Ministry of Information, 2011, p. 191.

[31] Article 9 of Law No. 11 of 1995 regarding arbitral justice.

[32] Law No. 11 of 1995 Regarding Judicial Arbitration in Civil and Commercial Affairs, JOK, year 41, annex no. 196, February 28, 1995.

[33] A.A. Atia, *The Law of Kuwaiti Arbitration*, Kuwait, Mou'assassat Dar El Kateb, 2012, p. 596.

within the framework of this law and in disputes submitted for arbitration, unless there are contractual or legal provisions to the contrary."

All these considerations show that Kuwait is familiar with contract arbitration and that the state is willing to entrust third parties with the task of making binding decisions on the interpretation and application of international law in the event of a conflict.

Likewise, it is up to the parties to choose which body is to intervene[34], which may be arbitrators or an arbitration institution, and this choice is not easy because "the choice of a particular entity to settle a dispute would, in this perspective, be the practical means for the parties to choose the international law that they want to see applied."[35]

In any case, the contract will be "transferred" from the internal system of the country, i.e., the place of implementation of the project, and submitted to the international system or to a "third party"[36]: it will thus become an "internationalized contract". According to Prosper Weil, once a contract becomes part of the international legal system and the international law that applies to it, at least in part, a contract is defined as a contract under international law.[37] This idea is cited from Maxence Chambon:

> Above all, the observation of State contracts makes it possible to demonstrate the irreducible influence of international law on these contracts, of which the State party can only be one of its subjects. Furthermore, although these contracts are subject to international law, which seems to always be

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[34] M. Ubaud-Bergeron, *Droit des contrats administratifs*, *Droit des contrats administratifs*, Lexis-Nexis, 2015, p. 447.

[35] J. Fouret, M. Prost, "La multiplication des juridictions internationales: de la nécessité de remettre quelques pendules à l'heure", *Revue québécoise de droit international*, 2002, no. 15, vol. 2, p. 129.

[36] M. Virally, "Un tiers-droit? Réflexions théoriques", in *Le droit des relations économiques internationales. Études offertes à Berthold Goldman*, Librairies Techniques, 1987, pp. 373-385.

[37] P. Weil, "Droit international et contrat d'État", in M. Paul, R. Pédone (eds.), *Le droit international, unité et diversité*, 1981, p. 566. See in the same sense: P. Mayer, "La neutralisation du pouvoir normatif de l'État en matière de contrats d'État", *Journal de Droit International*, 1986, I, p. 7; by the same author: "Réflexion sur la notion de contrat international", *Mél. en l'honneur de Pierre Tercier*, Zurich, Genève : Schulthess, 2008, p. 873; J.-M. Jacquet, D. Bentolila, "Contrat d'État", *Jurisclasseur Droit International* , fasc. 571-90, 1-2013, no.14.

> the case… (they) are clearly reluctant to the classic implementation of the conflicting technique in order to determine the applicable national law.[38]

We see that this issue of the internationality of the contract is not purely theoretical or merely a matter of words, as it is subject to certain criteria to determine whether the contract is international or not, or whether the legislation provides for a specific criterion to consider it international.

In fact, any dispute arising from the contract where international arbitration is provided for is subject to a somewhat specific system in which there remains a need to avoid, as far as possible, the interference of local law in the settlement of the dispute between the State and the private contractor.[39]

It is understood that it can be asserted that there will be no impediment to the commitment of the "internationalized" contractual responsibility of the State that will take, for example, measures of nationalization in the provisions of the investment agreements signed by states.[40] This observation leads us to call attention to the fact that the criteria for considering a contract "international" are variable. Thus, in paragraph 1 of the Geneva Protocol of September 24, 1923, "international" is arbitration based on an agreement concluded "between parties subject respectively to the jurisdiction of different Contracting States."[41]

For its part, the 1961 Geneva Convention on International Commercial Arbitration states in Article 1 that it applies to arbitration agreements concluded, for the settlement of disputes arising or having arisen out of operations of international commerce, between natural or legal

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[38] M. Chambon, *Le conflit de lois dans l'espace et le droit administratif*, Mare & Martin, 2015, p. 72.

[39] P. Fouchard, "Quand un arbitrage est-il international?", *Revue de l'Arbitrage*, 1970, pp. 59ff; B. Goldman, "Les problèmes spécifiques de l'arbitrage international", *Revue de l'Arbitrage,* 1980, p. 323.

[40] P. Weil, "Problèmes relatifs aux contrats passés entre un État et un particulier", *Recueil des Cours de l'Académie de Droit International,* vol. 128, 1969-III, p. 130.

[41] Protocole de Genève du 24 septembre 1923 relatif aux clauses d'arbitrage. Société des Nations (SDN), Recueil des traités, vol. 27, p. 158, n° 678 (1924). Document available at: https://treaties.un.org/doc/Publication/UNTS/LON/Volume%2027/v27.pdf [last accessed 5.09.2023].

persons having, at the time of the conclusion of the agreement, their habitual residence or their headquarters in different Contracting States.[42]

We therefore note that the agreement combines an objective element ("operations of international commerce") with a subjective element ("their habitual residence or their headquarters in different Contracting States") contractually bound by this agreement.[43]

However, it is important to add that each country can create specific laws and regulations with respect to the state in arbitration. Thus, in the French law, arbitration is considered international if it is related to the interests of international trade. We note that the French law adopted the economic criterion when considering a contract as international.

More specifically, Article 1504 of the Code of Civil Procedure amended by Decree No. 2011-48 of January 13, 2011 reforming arbitration provides: "Arbitration is international if it involves the interests of international commerce."[44]

In the Kuwaiti Procedure Law No. 83 of 1980, arbitration is considered international if the arbitrator's ruling is issued outside Kuwait. We note that Kuwait adopted the geographical criterion to determine the internationality of a contract in accordance with Article 182/4: "The arbitrator's ruling must be issued in Kuwait; otherwise the rules prescribed for arbitral rulings issued in a foreign country will be followed in this regard."[45]

We should add that Kuwait allocates to the jurisdiction of international arbitration the settlement of disputes that may arise from contracts concluded by the state or one of its agencies with foreign companies. This commitment results from joining the New York Convention of 1958 relating to the recognition and enforcement of foreign arbitral

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[42] Convention de Genève sur l'arbitrage commercial international, Genève, 21 avril 1961. Texte in: https://treaties.un.org/doc/Publication/UNTS/Volume%20484/volume-484-I-7041-French.pdf [last accessed 5.09.2023].

[43] J.C. Rozas, "Arbitrage interne et international: la réglementation soi-disant unitaire en Espagne", in A. Bonomi, D. Bochatay (ed.), *Arbitrage interne et international*, *Actes du Colloque de Lausanne*, 2 octobre 2009, Lib. Droz, Genève 2010, p. 193.

[44] This formula is double in scope. It makes it possible to determine, on the one hand, the internationality of a contract or an arbitration and, on the other hand, the material rules applicable to international trade. P. Leboulanger, "La notion d''intérêts' du commerce international", *Revue de l'Arbitrage*, 2005, pp. 487-506.

[45] Article 4/182 the Kuwaiti Civil and Commercial Procedure Law No. 38 of 1980.

decisions.[46] We also assert that the State of Kuwait is in favour of the jurisdiction of international arbitration in adjudicating disputes that may arise from contracts concluded by the state or one of its agencies with foreign companies.

Contracts concluded by the Government of Kuwait, Kuwaiti companies, and Kuwaiti individuals with a foreign party often include a provision that disputes arising from these contracts should be resolved through arbitration. Arbitration may be local, that is, the arbitral tribunal holds its hearings in Kuwait, and its rulings shall be considered Kuwaiti rulings that are to be enforced outside Kuwait. In the absence of a treaty for the implementation of judgments between Kuwait and foreign countries, such implementation encounters many obstacles in which the rights of the Kuwaiti side may be lost. In order to avoid this situation, the State of Kuwait joined the New York Convention regarding the recognition and implementation of foreign arbitrators' judgements. The rules in the provisions of the convention include the rulings of arbitration in disputes, whatever the nature of these disputes or their parties, whether the dispute arose from contractual or non-contractual ties, and whether the dispute was between natural or legal persons, that is, whether the dispute arose from a contract where it was agreed to refer disputes to arbitration, whatever the type of this contract, whether it is commercial, civil, or administrative, and whether the relationship is between two natural persons or between two legal persons, unless the state has reservations or its law prohibits arbitration in certain issues. It is noted that although Kuwait did not show reservations about this ruling, the Kuwaiti law did not allow arbitration in matters in which reconciliation is not permissible.[47]

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[46] Décret-loi n° 10/1978 sur l'approbation de l'adhésion de l'État du Koweït à la Convention pour la reconnaissance et l'exécution des sentences arbitrales étrangères de 1958 (Nations Unies, collection des traités), JOK, no. 1186, Year 24, published on April 2, 1978, pp. 12.

[47] See: A.D. Al-Samdan, *International Arbitration and Foreign Ruling in Kuwait-related International Law*, 1999, p. 100; see also: N.A. Al-Ghais, "The Legislative regulation of the judiciary and arbitration in Kuwaiti Law", *Journal of Fatwa and Legislation*, Kuwait, pp. 142.

The State of Kuwait[48] also signed the Washington Convention[49] of 1965 on the Settlement of Investment Disputes, which established an International Centre for Settlement of Investment Disputes (ICSID). For purposes of its enforcement, the adhering countries are to declare their agreement to resort to international arbitration with foreign individuals. Its first article provides for the establishment of an international centre for the settlement of investment disputes whose purpose is to settle investment disputes between contracting states and nationals of other contracting states, through conciliation and arbitration in accordance with this Convention.

But in order to protect sovereignty, we see that the State of Kuwait distinguishes between financial and non-financial clauses of contracts. Accordingly, arbitration applies only to the financial aspects of the contract. However, Kuwait in general accepts arbitration in contracts. This is mentioned by many economic cooperation agreements. We can cite the BOT contract for the construction of the wastewater treatment plant in Sualibya concluded in 2001 and whose article 14-4 provides:

> When it has proved difficult to settle the dispute amicably within 60 days, or within a longer period agreed upon in the contract, the contracting party shall send a written notice to the other party during a period not exceeding 15 days from the expiration of the time allowed for amicable settlement. Therefore, to arrive at a solution, the means available to the parties are as follows: a) Referral to the Kuwaiti courts to resolve the dispute; b) Submission of the dispute to arbitration in accordance with the provisions of Decree 38/1980 and the Kuwaiti Law 11/1995.

Thus, the State of Kuwait encourages foreign investment and accepts the arbitration system in resolving disputes. However, this acceptance is not absolute.

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[48] Kuwait ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States on February 2, 1979, which entered into force on March 4, 1979 (Decree Law 1/1979).

[49] The text of the Convention is available at: https://treaties.un.org/doc/Publication/UNTS/Volume%20575/volume-575-I-8359-French [last accessed 5.09.2023].

2. The Limited Applicability of International Arbitration

It is possible to argue that international arbitration contributes to the international character of the contract. The authors in favour of this thesis maintain that the contracting parties, under the principle of autonomy of will inherent in the right to contracts and their ability to submit their contracts to the legal system of their choice, and in particular to international arbitration, accept the restrictions imposed upon economic sovereignty and concessions of the state in exercising its prerogatives of public power in contractual matters.[50]

However, this orientation did not happen with the consensus of the countries. For example, a country like Libya prohibits resorting to international arbitration in contracts concluded by the state with foreign private companies. In this sense, Law No. 76 of 1970 states: "Any clause stipulating the settlement of disputes by arbitration in contracts which are concluded between ministries, departments, institutions, public bodies and public bodies, or which give jurisdiction to a jurisdiction other than the Libyan judiciary) is invalidated."[51]

In Kuwait, the Council of Ministers Decision No. 11 of 1988 regulating how to settle disputes arising from contracts concluded between government agencies and foreign contractors states that contracts concluded by ministries, public institutions, and companies wholly owned by the state should not stipulate resorting to international arbitration or local arbitration,[52] that it must be clearly stated in the terms of the contract that the Kuwaiti judiciary has the jurisdiction to adjudicate any

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[50] This argument can be based on the arbitration sentence rendered in 1958 in the case of *Aramco v. Saudi Arabia*, in which it is said that "nothing prevents that a State, in the exercise of its sovereignty, binds itself irrevocably by the concession clauses and attributes to a concessionaire irretraceable rights", *RGDIP* (Revue Générale de Droit International Public), 1963, p. 315.

[51] According to the law, recourse to arbitration will be null and void "because the national jurisdiction alone has jurisdiction in contractual disputes" (*Libyan Official Journal*, no. 46, August 1970, p. 120). This results in the prohibition of inserting an arbitration clause in State contracts. See: A. El-Ahdab, *L'arbitrage dans les pays arabes*, Économica, 1988, p. 595.

[52] It should be remembered that arbitration results either from an arbitration clause contained in the contract, or from a compromise, that is to say from an agreement by which the parties to a dispute agree to refer it to arbitration.

dispute arising from the contract, and that the Kuwaiti law is the applicable law.[53] However, international arbitration is permitted as an exception after the following conditions are met:

- the existence of a case of extreme necessity that arises from the nature and circumstances of the contract and imposes acceptance of the international arbitration clause;
- the signing government agency that wants to include international arbitration must submit a memorandum including the opinion of the Fatwa and Legislation Department;
- the memorandum shall be presented to the Council of Ministers to decide what it deems appropriate.

Thus, in order to accept international arbitration, this memorandum must be submitted to the Council of Ministers for approval. Finally, in the event that the government accepts the international arbitration clause, the selection of arbitrators of competence, practical experience, and international reputation should be preferred. This selection must also be approved by all parties involved, including the lawyers appointed to defend the interests of the state during all stages of the case.

With regard to contracts, including the international arbitration clause, Decision no. 11 of 1988 indicates that the government entity must conduct an amicable settlement[54] of any dispute arising between it and the contractor, taking into account the achievement of justice, the application of the terms of the contract in good faith on both sides, the preservation of the public interest, carrying out this settlement in a firm and decisive manner that leaves no room for doubt to raise the dispute before international arbitration, and the referral of the settlement to a committee formed by the Ministries of Planning and Finance and the Department of Fatwa and Legislation before deciding on it. If the contractor

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[53] Decision no. 11 of 1988, Council of Ministers, Meeting no. 14/88 of March 13, 1988.

[54] In France, the desire to reach a negotiated settlement of the dispute has led to the establishment of committees for the amicable settlement of disputes, which have undergone numerous reforms (A.D. Laubadère, F. Moderne, P. Delvolvé, *Traité des contrats administratifs*, Librairie générale de droit et de jurisprudence, 1984, t. 2, no. 1705) before decree no. 2016-360 of March 25, 2016 set the conditions under which the parties to a public procurement contract may have recourse to these committees called "*Committees for the Amicable Settlement of Disputes (CCRA)*". For more information on these committees, see: https://www.economie.gouv.fr/daj/reglement-amiable-des-differends [last accessed 5.09.2023].

does not accept this settlement and insists on resorting to international arbitration, the aforementioned procedures and rules are followed.

Accordingly, the State of Kuwait has indicated its willingness to implement foreign arbitral awards, while setting its conditions. Thus, in order to protect its powers, sovereignty, and authority, it conditions the acceptance of the implementation of the arbitral award on important reservations, including the application of the principle of reciprocity, respect for public[55] order,[56] and the non-conflict of the foreign arbitral award with a ruling or order previously issued by a court or body in Kuwait, in order not to prejudice the national judicial authority, which is considered an infringement of a manifestation of the sovereignty of the state that cannot be accepted because of its political dimensions.[57]

It should be added that in the event that arbitration is included in the contract (arbitration clause), the Kuwaiti law provides, in Article No. 199 of the Kuwaiti Civil and Commercial Procedures Law promulgated by Decree Law No. 38 of 1980 and its amendments, several restrictive measures[58] to implement the arbitration award.

The New York Convention[59] for the Enforcement of Arbitral Awards, in accordance with Article 5, paragraph 2, permits refusal to recognize and enforce the arbitral award if the competent authority in the country

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[55] The notion of public order is not really defined by Kuwaiti law, but, in practice, it merges with moral order, equity, or the right to protect its natural resources.

[56] Thus, an award that would be contrary to public order cannot be enforced. H. Hoepffner, *supra* note 11, p. 499.

[57] To be compared with the theory of the "act of government" in the French legal system, covering both the acts which concern the relationship between the Executive and the Parliament (decisions taken by the Executive within the framework of its participation in the legislative function, decree of the promulgation of a law, decision to use the exceptional powers provided for by article 16 of the Constitution, etc.) and those relating to the external relations of France (protection of persons and property abroad, refusal to submit a dispute to the International Court of Justice, signature and execution of international treaties, etc.). Because of their political nature, these acts escape, in principle, judicial review. For an overview of this question, see: S. Salama, *L'acte de gouvernement, contribution à l'étude de la force majeure dans le contrat international*, Bruylant, 2001, p. 200; P. Duez, *Les actes de gouvernement*, Dalloz, 2006, p. 195.

[58] Decree-Law No. 38/1980 promulgating the Civil and Commercial Procedures Law was published in the Official Gazette (Kuwait Al-Youm) on June 25, 1980 in Issue No. 1307, Official Gazette Year 26.

[59] To read the text of the New York Convention for the recognition and enforcement of foreign arbitral awards, 20 May-10 June 1958, in French: https://uncitral.un.org/

in which recognition and enforcement are requested finds that, according to the law of the country, the subject matter of the dispute is not fit to be settled by arbitration, or that the recognition or enforcement of the arbitration award is contrary to the public order of that country.

As for the State of Kuwait, it did not reserve the provision of Article 1, Paragraph 3, of the New York Convention, which is related to the reservation on the nature of the dispute (administrative, civil, commercial, etc.). However, Kuwait has the right, according to Article 5, Paragraph 2, of the Convention, to rely on it not to recognize and enforce foreign arbitration awards, if the arbitration court's ruling is contrary to the law of Kuwait, because the subject matter of the dispute may not be settled by arbitration in accordance with the Kuwaiti law. For example, the Kuwaiti law, in Article 173 of the Kuwaiti Procedures Law, does not allow arbitration in matters in which reconciliation is not permissible, and therefore it is not permissible to acknowledge the enforcement of the arbitral award if the subject of the dispute is in a matter that is not permissible to be reconciled according to the Kuwaiti law.

Thus, all arbitration provisions, whatever the nature of the dispute might be, are subject to recognition and enforcement in Kuwait, except for issues in which reconciliation is not permissible.

Apart from these observations, it seems that Kuwait is more inclined to optional arbitration, which leaves much room for negotiations for the state. The basis for optional arbitration is "compromise."[60] This is evident in the extent to which arbitration clauses are included in state con-

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sites/uncitral.un.org/files/media-documents/uncitral/fr/e-book-f.pdf [last accessed 5.09.2023].

[60] It should be noted, however, that Kuwait willingly accepts mandatory arbitration when it comes to Arab cooperation. Kuwait accepted, for example, the Unified Agreement for the Investment of Arab Capitals in Arab Countries by Law No. 26 of 1982 in which Article 25 states that "Disputes arising from the application of this agreement shall be settled through conciliation, arbitration, or resorting to the Arab Investment Court." Article 29 of the Unified Agreement adds that the award issued by the arbitral tribunal is final and not subject to appeal. It also has the power of enforcement in the party states and may be implemented therein directly as if it were a final enforceable ruling issued by its competent judiciary. For more, see: T. S. Al-Shammari, "Arbitration in Kuwaiti Investment Agreements with Other Countries" a research paper presented to the *Kuwait International Conference on Commercial Arbitration* held on 27-29 April 1997, published by the Judicial Arbitration Department of the Kuwaiti Ministry of Justice, p. 227.

tracts, all of which have provisions for the agreement of the parties to resort to arbitration and leave the methods of appointing arbitrators to the will of the contracting parties. It follows from this position that Kuwait always seeks to combine consent and independence in the application of international arbitration. However, taking into account the emphasis on sovereignty and maintaining public order, this can cause many practical problems.[61]

II. The Collision of International Arbitration with The Administrative Nature of the Contract

International arbitration is an alternative dispute resolution method of "traditional or customary"[62] origin to settle disputes outside the jurisdiction of the judicial system and entrust dispute resolution to third parties. This question raises no problem in civil contracts. However, problems arise when it comes to the jurisdiction of the administrative judiciary or the nature of the administrative contract.

1. The Establishment of a Competent Internal Administrative Judiciary

The Kuwaiti constitution guarantees the right to litigation for every person, by having the means to appeal before a judicial court if his rights are violated, whether by persons or by public authorities.

Article 166 of the Constitution states that the right to litigation is guaranteed to everyone. The law specifies the procedures and conditions necessary to exercise this right.[63]

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[61] On this point, see: S. Pautot, *L'arbitrage international dans les marchés de travaux publics internationaux*, thèse, Droit, Université D'Aix-en- Provence, 1976, p. 149.

[62] See especially: C. Jarrosson, D. Bureau, "Arbitrage", in D. Alland, S. Rials (eds.), *Dictionnaire de la culture juridique*, PUF, 2003, p. 76; Conseil D'État, Régler autrement les conflits: Conciliation, transaction, arbitrage en matière administrative, Les études du Conseil d'État, 4 février 1993, Paris La Documentation française, 1993. p. 22.

[63] For more information on the Kuwaiti Constitution of 11 November 1962, see: https://www.kna.kw/Dostor/Dostor/15/37 [last accessed 5.09.2023].

This right is one of the natural human rights enshrined in the Universal Declaration of Human Rights, published on December 10, 1948, in which Article 10 states that "Everyone has the right, in full equality, to have his case heard fairly and publicly by an independent and impartial tribunal, which will decide, either his rights and obligations, or the merits of any criminal charges brought against him."[64]

Accordingly, any deprivation of the right to litigation is considered an illegal act, and any legislative text that affects this right is null and unconstitutional because it departs from the constitutional texts that affirm this right.

In Article 164, the Kuwaiti constitution states that the law defines courts of different types and degrees, and clarifies their functions and jurisdiction.[65] This is a very important stage in Kuwaiti law. After the issuance of the Judicial Regulation Law[66] No. 19 of 1959, important laws followed, namely the issuance of the Civil and Commercial Procedures Law No. 6 of 1960, the Law Establishing the Fatwa and Legislation Department No. 12 of 1960, and the issuance of the Constitution of Kuwait on 11/11 /1962.

Article 171 of the Kuwaiti constitution indicates that it is possible to establish a state council to be concerned with the functions of the administrative judiciary and issuing fatwas.[67] However, the Kuwaiti legislator chose to establish the administrative department specialized in administrative disputes (establishing administrative chambers) within ordinary courts. The legislator considered that there is no need to establish an independent administrative judiciary, adding that the chosen method corresponds to the situation of the country that is going through the experiment for the first time,[68] by applying Article 169 of

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[64] For more information on the "Universal Declaration of Human Rights" see the website: https://www.un.org/fr/universal-declaration-human-rights/index.html [last accessed 5.09.2023].

[65] For more information on the Kuwaiti Constitution of 11 November 1962, see: https://www.kna.kw/Dostor/Dostor/15/37 [last accessed 5.09.2023].

[66] Revised and completed by Law No. 23 of 1990 and the Law No. 10 of 1996.

[67] For more information on the Kuwaiti Constitution of 11 November 1962, see: https://www.kna.kw/Dostor/Dostor/15/37 [last accessed 5.09.2023].

[68] However, the legislator left the door open for such a possibility if circumstances required it. If the experiment succeeds and to the extent that there will be an increase in requests for administrative cases, it is possible to return to the application of the text of

the Constitution, which is related to the establishment of a specialized judicial body for administrative issues. The law organizes the settlement of administrative disputes by means of a special chamber or court whose system and manner of exercising administrative jurisdiction are specified by the law, including cancellation jurisdiction and compensation jurisdiction as regards administrative decisions that violate the law.[69]

The Kuwaiti legislator implemented Article 169 of the Constitution in 1981, by Decree Law No. 20 of 1981, which was amended by Law No. 61 of 1982 Regarding the Establishment of the Administrative Department in the Full Court,[70] whose jurisdiction was assigned in Article 2 to some administrative disputes related to final administrative decisions, including administrative contract disputes related to concession contracts, public works contracts, supply contracts, and any other administrative contract.

The Parliament voted on Law No. 37 of 1964 regarding tenders and the establishment of the Central Tenders Committee tasked with putting in place the arrangements to be taken with regard to concluding public works and supply contracts.[71]

In a broad sense, administrative law refers to the rules and provisions applicable to administration. In the classical and narrow sense, it is part of the set of standards that govern the relations between the administration and individuals.[72] As such, it gives rise to specific stand-

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Article 171 by finding another, more appropriate solution (Commentary on Law No. 20 of February 17, 1881). In other words, there will be dual jurisdiction: separate administrative and civil judiciaries.

[69] For more information on the Kuwaiti Constitution of 11 November 1962, see: https://www.kna.kw/Dostor/Dostor/15/37 [last accessed 5.09.2023].

[70] It was published in *Al-Kuwait Al-Youm* newspaper, Issue No. 1344, the twenty-seventh year, and amended by Law No. 61 of 1982 published in *Al-Kuwait Al-Youm* newspaper, Issue No. 1499, the twenty-ninth year.

[71] It was amended by Law No. 49 of 2016 of Public Tenders.

[72] For an overview of the criteria defining administrative law, see: J. Riviero, "Exist-il un criterion du droit administratif?", in A.D. Laubadère, A. Mathiot, J. Rivero, G. Vedel (eds.), *L'Administration et le droit. Regards sur la société international*, LGDJ, 1980, p. 187; Y. Gaudemet, "Le critère du droit administratif: une question nécessaire, une réponse impossible", in M. en. l'honneur, J.-P. Boivin, Éd. La Mémoire du Droit, 2012, p. 3; J.F. Lachaume, "La définition du droit administrative", in P. Gonod, F. Melleray, P. Yolka (eds.), *Traité de droit administratif*, t. 1, Dalloz , 2011, p. 10.

ards that differ profoundly from private law, which is practiced between individuals.[73] This right has evolved through all the standards applied by the administrative judge to deal with disputes that fall within his jurisdiction.[74] It opposes rules that require the intervention of the ordinary judge.[75]

In Kuwait, it was finally established that the administration could enjoy, at least in part, a kind of judicial privilege, in the sense that certain administrative disputes should be withdrawn from the jurisdiction of the ordinary courts so that they could be assigned to the courts set up for that purpose.[76] This explains the acceptance by Kuwaiti law of some elements of the French concept of the administrative nature, including in particular the prohibition of ordinary courts from interpreting administrative decisions, or their annulment or suspension of their implementation when the administration acts as a legal person with authority before the public.[77]

In the same sense, the judgment of the Court of Cassation, Appeal No. (444, 450/98 Commercial on 14/3/1999) stated that the competence

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[73] BLANCO Judgment of 1873, T. of conflict, February 8, 1873, Blanco, R., 1st supplement 61, Concl. E.M. David; GAJA, No. 1.

[74] From this perspective, the administrative law, particularly in France, has been "constructed through a contentious prism: its primary purpose is to promote control of administrative action and to resolve the conflict of public and private interests arising from such activity." B. Plessix, *Droit administratif général*, Dalloz, 1968, p. 376; see also: P. Chrétien, N. Chifflot, *Droit administratif*, Sirey, 2012, p. 13.

[75] This duality is explained historically by the fact that the administrative jurisdiction comes from the Administration, evolved within it, before being totally emancipated to become its main censor, after having been its servant. On the evolution of the administrative law, see in particular: G. Bigot, *Ce droit qu'on dit administratif. Étude d'histoire du droit public*, Éd. La Mémoire du Droit, 2015; G.J. Guglielmi, "L'histoire du droit administratif français érigée en objet", *Annuaire d'histoire administrative européenne*, 2007, No. 19, p. 299.

[76] Decree law No.: 20/1981 as to establishing a circuit at court of first instance provided as to considering administrative disputes and it is not an independent judicial court, but a specialized circuit from circuits of court of first instance with a qualitative competency and a special procedural system that is different from what is established before other circuits of court of first instance. For more info about judicial organization in Kuwait: M.S. Almeligi, *Encyclopedia of Administrative Judicial Organization in France, Egypt and Kuwait,* Dar Alnahdha Alarabiya, 2022, p. 271.

[77] See: R.I. Mechari, *Le champ de compétence du tribunal administratif au Koweït*, Publication de l'Université du Koweït, 2008.

of the administrative judiciary in administrative contracts is based on their links with areas of public law, and not every contract concluded by the administration is an administrative contract that can be subject to that law. In other words, the jurisdiction of the administrative judiciary is limited to disputes related to administrative contracts in their technical sense. In order for the contract to be considered an administrative contract, one of its parties should be a public legal person who contracts as a public authority, the contract should relate to the activity of a public utility in connection with its administration or organization, and it should be characterized by the distinctive nature of administrative contracts, which is the adoption of the general law method in the exceptional conditions contained in these contracts.[78]

One of the important rulings of cassation in the State of Kuwait states that exclusive jurisdiction to consider the administrative contract disputes falls under the competence of the administrative department of the Full Court, unless the constitution or the law assigns the jurisdiction to consider these disputes to another body, and the text of the ruling of the Court of Cassation was as follows:[79]

> We find that there is always a text in these contracts confirming the competence of the Kuwaiti judiciary in considering disputes that may arise from or because of the contract. For example, Clause 24[80] of a contract for investment, generalization, establishment, management, operation, and maintenance of the craft industries complex in the Fahaheel area states, "This contract was concluded in the State of Kuwait and Kuwaiti laws and regulations apply to it. Kuwaiti courts have jurisdiction over any disagreements or disputes that might arise therefrom."[81]

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[78] *Encyclopedia of the Principles of Administrative Judiciary* approved by the Kuwaiti Court of Cassation and issued by the Council of Ministers, Fatwa and Legislation, first ed., 2000, Part VIII, pp. 139-140.

[79] Judgment of the Court of Cassation in Appeal No. (202/2000) commercial / administrative, session 11/20/2000, *Encyclopedia of the Provisions of the Kuwaiti Ministry of Justice*, Year 28, Part 2, p. 156.

[80] The same text was included in the contract for the design and construction of a slaughterhouse and livestock market project for the Capital Governorate in Clause 27 and in the contract for the design and construction of a university in Clause 31 thereof.

[81] We find the same text in the contract of the solid waste treatment project of the Municipality of Kuwait specifying in its Article 31 that "this contract was signed in Kuwait and is subject to the laws and regulations of the country. The Kuwaiti courts have

It should be noted that franchise or partnership contracts are administrative contracts by nature.[82] The granting authority can unilaterally modify or terminate a contractual situation for reasons of public interest. Therefore, it must be concluded that the legislator means by the "Kuwaiti judiciary" the administrative jurisdiction, which alone has jurisdiction over disputes between a public person and a party contracting with him.

According to this logic, the judicial judge is competent as a judge of common law in all matters which have an administrative nature only (administrative decisions or administrative contracts), and any action that does not fall within the predetermined scope of the administrative circuits in accordance with the law falls in principle within the jurisdiction of the ordinary courts, unless expressly stated otherwise. The Judiciary Organization Law No. 19 of 1959, in Amended Law No. 23 of 1990 Article 2, excludes issues of sovereignty from the consideration of the judiciary in general (administrative or civil judiciary), and accordingly the acts of sovereignty are excluded from the jurisdiction of courts in general. Also, the Kuwaiti legislator did not define the acts of sovereignty. The Kuwaiti Court of Cassation endorsed that "acts of sovereignty have a prominent political character because of the political considerations that surround them. They are issued as a ruling authority and not as an administrative authority. Because of the scope of their political function, a supreme authority is assigned to them to take what they deem to be good for the homeland and its security and integrity without a comment from the judiciary or the extension of their control over them."[83]

Thus, it can be emphasized that the administrative judge has jurisdiction over all contracts entrusted to the private sector to manage, develop, or provide a public service. In any case, this applies to partner-

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jurisdiction over any type of disagreement or dispute that may arise therefrom". See also the: Contract for the design and construction of the Al Assimah district slaughterhouse and livestock market project (Art. 27).

[82] M.H. Sinkondo, "La notion de contrat administratif: acte unilatéral à contenu contractuel ou contrat civil de l'administration?", *Revue Trimestrielle de Droit Civil*, 1993, pp. 239-262.

[83] Court of Cassation Judgment No.176 of 2002 Civil, issued on 10/04/2004 AD, published in the *Journal of Judiciary and Law*, Year 32 of 2007, Part Three for the period 1/7/2004 to 31/12/2004, p. 285.

ship contracts in their various forms. Here we touch on this "main idea" that justifies the administrative nature of the contract, about which the authors note; "in a dispute between the administration and an individual, there are not only face-to-face litigants; there is a third person, i.e., the public interest."[84]

The public person has great means to achieve a national interest.[85] For this reason, the contracts that the state, as a public authority, concludes with the private sector and that achieve public benefit, are assigned to a competent judge (the administrative judge).

The Partnership Law No. 116 of 2014, amending the provisions of Law No. 7 of 2008 Regarding BOT contracts, confirmed the principle that the Kuwaiti judiciary is the competent authority which has jurisdiction, as Article 35 states the jurisdiction of the Kuwaiti judiciary. In Article 29, the Law states that arbitration may be agreed upon after the approval of the Supreme Committee for Partnership.[86]

2. The Problematic Nature of the Administrative Contract

The arbitration agreement means taking the dispute out of the jurisdiction of the judiciary and assigning it to the arbitration tribunal. No problem arises about the permissibility of arbitration in civil and commercial contracts. However, the arbitration agreement in administrative contracts raises a great jurisprudential controversy. Some jurisprudents argue against recourse to arbitration in such disputes, while others allow recourse to arbitration in administrative disputes. In addition, there are many judicial judgments whose rulings differed regarding the permissibility of non-permissibility of arbitration in administrative disputes.

Administrative disputes are considered to be those disputes arising between administrative authorities and the third party vendor in

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[84] J. Caillosse, "Les justifications du maintien actuel du dualisme juridictionnel", in A.V. Lang (ed.), *Le dualisme juridictionnel: limites et mérites*, Dalloz, coll. 2007, p. 182. For more elaboration of this point, see: *supra*, pp. 332f.

[85] See: G. Braibant, "Monisme (s) ou dualisme (s)", *Revue européenne de droit public*, 2000, vol. 12, no. 2, pp. 371–384.

[86] Article 29, Law No. 116 of 2014 on Public-Private Partnership.

hiring contracts and public works and supply or any other administrative contract, and the administrative jurisdiction has therein full judicial guardianship.[87]

The administrative contract may raise disputes between its two parties or between them and third parties, given that the third parties are affected by the administrative contract, so it is necessary to know which authority has jurisdiction to resolve these disputes. Undoubtedly, the administrative judiciary has jurisdiction over all disputes arising from an administrative contract. Those contracts which are considered administrative in Kuwaiti law, are contracts specified by law such as public utility concession contracts, supply contracts, and public works contracts. As for the judicial standards of administrative contracts, a contract is administrative when it meets three cumulative criteria: First, the public person must be a party to the contract. Second, the contract must include outstanding (exceptional) clauses that do not exist in private (civil) law, such as the administration's control and amendment authority or the authority to terminate the contract by unilateral will. Third, the objective of the contract must be the implementation of public service (The ruling of the Kuwaiti Court of Cassation in Appeal No. 43/87 Commercial, on 8/12/1997).[88]

Since the administrative contract has distinctive characteristics because of its connection to the regular and steady functioning of public utilities, and owing to the long period of judicial settlement of disputes arising from that contract, which may impede the achievement of the public interest that is to be achieved by the administrative contract, it is necessary to find a way easier in procedures and shorter in time to end the administrative dispute, and that way lies in arbitration.

However, some national legislation, owing to the administrative nature of the contract, prohibits recourse to arbitration by the state and the various legal persons of common law.[89] On this point in particular, the Kuwaiti legislator issued Law No. 11 of 1995 Regarding Arbitration,

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[87] G.S. Sari, F. Aljadie, *Rules and Provisions of Law and Administrative Court,* 1st ed., 2019, p. 388; A.H. Alrashidi, *Administrative Contracts,* 1st ed., Dar Alkuwait Est, 2017, p. 493.

[88] *Encyclopedia of the Principles of Administrative Justice*, 2000, Volume 8, p. 16; Court of Cassation, Administrative Chamber, Commercial judgment no. 41/92 of 13/01/1993.

[89] S. Abdelbaki, *supra* note 1, p. 478.

which led to a great jurisprudential controversy.[90] The legality of this procedure is questionable. Arbitration has already been challenged before the Kuwaiti Court of Cassation on the grounds that the legislator has granted national courts the exclusive right to settle disputes related to administrative contracts. There are multiple judicial applications of this principle, such as the ruling issued by the Court of Cassation on March 15, 1998 which decides the incompetence of arbitral tribunals with regard to disputes related to administrative contracts.[91] The court justified its decision by stating that "the administrative court has exclusive jurisdiction to settle disputes related to contract cancellation or compensation.[92]

The Kuwaiti Court of Cassation later upheld its position of refusing arbitration in disputes related to administrative contracts.[93] This attitude of refusing to arbitrate seems to have characterized French law in particular for a while. Indeed, the French legislator prevented the state and public legal persons from resorting to arbitration to resolve disputes concluded by public authorities.[94] This prohibition resulted from Articles 1004 and 83 of the previous Civil Procedure Code, which reject any compromise in matters relating to public persons (the state, do-

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[90] D.A. Al Baz, "Les courants jurisprudentiels au Koweït sur l'arbitrage dans les contrats administratifs", Conférence annuelle *The Sixth International Commercial Arbitration*, Université des Émirats arabes unis, 2008, p. 324.

[91] Kuwaiti Court of Cassation, Appeal No. 51 of 1997, Commercial, *Collection of Administrative Jurisprudence for 1982-1999*, Published by the Department of Fatwa and Legislation, Book 1, Part One, p. 274.

[92] See in this context, the interpretation made by Y. Al-Assar "Arbitration in disputes arising from administrative contracts in Egypt, France and Kuwait", *Revue de l'Union des Universités Arabes*, 2001, pp. 13–14.

[93] Court of Cassation, judgment of 19/12/1999, Appeal no. 368/99, Commercial; judgment of 05/03/2000, Appeal 431/1999, Commercial.

[94] J.-M. Auby, "L'arbitrage en matière administrative", *Actualité Juridique Droit administratif*, 1955, I, p. 81; J. Morand-Deviller, *Droit administratif des biens*, Montchrestien, 2012, p. 617; P. Delvolvé, "L'arbitrage en droit public français", in D. Renders, P. Delvolvé, T. Tanquerel (eds.), *L'arbitrage en droit public*, Bruylant, 2010, p. 208; D. Foussard, "L'arbitrage en droit administratif", *Revue de l'Arbitrage*, 1990, p. 33; Y. Gaudemet, "L'avenir de l'arbitrage en droit public", *Mél. J. Moreau*, Économica, 2002, p. 165; M. Ubaud-Bergeron, *supra* note 7, p. 446.

main, municipalities, and public institutions).[95] This was a general principle of the (unwritten) law,[96] supported by the opinions of jurists and judicial precedents.[97]

To justify this prohibition, reference is often made to the inability to bargain with public persons over the distribution of powers. As jurist Édouard Laferrière asserted:

> Compromise cannot find a place among the contracts of the State because it is a principle that the State cannot submit its cases to arbitrators, both because of the uncertain consequences of arbitration and the considerations of a legal order which want the State to be judged only by courts established by law.[98]

Laurent Richer pointed out that arbitration is an abuse of jurisdiction, arguing that "the arbitration agreement concerns jurisdictional competence, insofar as the arbitrator is a jurisdiction; however, the distribution of competences between orders of jurisdiction is in the domain of the law."[99]

Thus, as defined in Article 2060 of the French Civil Code, there is no recourse to arbitration in matters of the state, in disputes relating to public authorities and public institutions, and in general in all matters relating to public order: "We cannot compromise on matters of the State

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[95] "On ne peut compromettre sur aucune des contestations (qui) concernent l'ordre public, l'état, le domaine, les communes, les établissements publics" (*Concl. Gazier* sous CE 13 décembre 1957, Société nationale de vente des surplus, Lebon 678; D. 1958, 517).

[96] F. Lichère, B. Martor, G. Pedini, S. Thouvenot, *Pratique des partenariats public-privé*, LexisNexis, 2009, p. 217; D. Vidal, *Droit français de l'arbitrage interne et international*, Gualino, 2012, p. 23.

[97] G. Teboul, "L'arbitrage international et personnes morales de droit public: brèves remarques sur quelques aspects de contentieux administratifs", *Actualité Juridique Droit administratif*, 1997, p. 25; C. Jarrosson, "L'arbitrage en droit public", *Actualité Juridique Droit administratif*, 1997, p. 16.

[98] É. Laferrière, *Traité de la juridiction administrative et des recours contentieux*, t. 2, Paris : Berger-Levrault, 1888, p. 152; see also: C.Y. Khater, *Le contrat de concession de service public ou BOT en droits français et égyptien*, thèse Droit, Université Paris 1, 2004, p. 594; O. Fille-Lambie, J.-M. Loncle, "L'arbitrage dans les grands projets en concession de service public: Aspects de droit français et de droit OHADA", *Revue des Droits des Affaires Internationales*, no. 1, 2003, p. 3.

[99] L. Richer, F. Lichère, *supra* note 6, p. 324.

(…) on disputes concerning public authorities and public establishments and more generally in all matters concerning public order".[100]

Also, it should be taken into consideration that it is permissible to resort to arbitration if it is expressly permitted by the French law or approved by the provisions of international agreements, and therefore any disregard for the principle of prohibition of arbitration is "affected by the nullity of public order."[101]

However, Law No. 186-972 of August 19, 1986 expressly states, in Article 9 thereof, that the state, local authorities, and public institutions may adopt arbitration clauses with regard to contracts concluded jointly with foreign companies to achieve operations of national interest.[102]

Dr. Georgy Sari sees that there are no deterrents or constitutional or legal obstacles hindering the resort of administration to arbitration in the field of administrative contracts. He believes that allowing arbitration in administrative disputes does not represent aggression to the competency of the official court of the state, as he sees that there are controls and limits, whether by the resorting of the administration to such a way so as to settle parties' disputes, or whether by the powers of the arbitrator himself in considering the dispute related to administrative contracts. Dr Sari is of the opinion that resorting to arbitration has its benefits, and he uses as evidence for this the fact that the French Council of State has stated that arbitration maybe a more flexible alternative to referral to the administrative judge.[103]

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[100] Law of July 5, 1972 replaced Articles 1004 and 83 of the Civil Code with two new articles: Article 2060 and Article 2061. The former takes up the prohibition of arbitration provided for by the former Code of Civil Procedure, but in a clearly stated manner. On its part, Article 2061 provides for the nullity of any arbitration clause unless it is authorized by law.

[101] CE, ass. gén. 6 mars 1986, avis no. 339-710, *GACE*, Dalloz, 3e éd. p. 161, comm. D. Labetoulle; CE 23 déc. 2015, Territoire des îles Wallis et Futuna, n° 376018, *BJCP* no. 106, p. 205, concl. B. Bourgeois-Machureau; *AJDA* 2016, p. 1182, A. Gras.

[102] J.O., 22 août 1986, loi no. 86-972 du 19 août 1986, p. 10190; see also the Law on Orientation and Programming for Research of July 15, 1982 which authorizes certain establishments to resort to arbitration; Law No. 2011-617, 1 July 2011, relating to the construction and renovation of sports venues to host Euro 2016.

[103] G.S. Sari, "Resorting to arbitration to settle disputes of administrative contracts in French law", *Magazine of legal and economic researches, Mansoura University*, June 2021, vol. 76, p. 73.

A controversy arose in jurisprudence in Kuwait, and judicial rulings differed regarding the permissibility of resorting to arbitration to settle disputes arising from administrative contracts. However, economic developments and the need to encourage private national and foreign investments by organizing an easy and fast method for settling disputes that arise from the contracts in which the administration or a public legal person is a party prompted the Kuwaiti legislator to intervene and issue legislation that permitted, in explicit texts, resorting to arbitration in some administrative contract disputes. Among these laws, we mention the Partnership Law No. 116 of 2014. As the subject matter of partnership contracts is generally related to managing or achieving a work of public importance, it necessarily involves the state or one of its members. A private contracting partner may tend to settle disputes by the procedure of arbitration, and the law allows resorting to arbitration with the approval of the Partnership Higher Committee.

But some other national laws, because of the administrative nature of the contract, prohibit the use of arbitration against the State and many other legal persons under the Common Law.[104] Regarding this specific point, the Kuwaiti legislator issued Law No. 11 of 1995 Regarding Arbitration, which sparked jurisprudential and judicial controversy.[105]

According to Dr Sayed Ahmed Mahmoud the competency of judicial arbitration authorities should be extended to consider the administrative contract disputes, as the law of establishing administrative circuit does not prohibit such extension under an explicit provision.[106]

The Kuwaiti Court of Cassation asserted the impermissibility of administrative contracts being subject to arbitration, and established the principle that arbitral tribunals do not have jurisdiction over disputes related to administrative contracts. "The disputes that the arbitral tribunal has jurisdiction to adjudicate are according to what is established in the court's judiciary. According to Article 2 of Law No. 11 of 1995 Regarding Judicial Arbitration in Civil and Commercial Matters, regarding the disputes arising from administrative contracts, the Administrative Department of the Full Court has the exclusive jurisdiction to adjudicate

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[104] S. Abdelbaki, *supra* note 1, pp. 478.

[105] D.A. Al Baz, *supra* note 90, p. 324.

[106] S.A. Mahmoud, *Litigation of Judicial Arbitration according to Kuwaiti Law*, No.: 11 for 1995, Dar Alnahdha, 1st ed., 1997, p. 152.

them through cancellation and compensation, pursuant to Article 2 of the Administrative Circuit Establishment Law No. 20 of 1980."[107]

The Kuwaiti Court of Cassation[108] disclosed its rejection of arbitration in administrative contracts, without distinguishing between financial or non-financial rights.[109]

Accordingly, a jurisprudential debate arose about the extent to which administrative contract disputes can be subject to arbitration in Kuwait. The jurisprudential opinion that rejects arbitration[110] in administrative contract disputes is based on the fact that the legal nature of the administrative contract is not relevant to arbitration because its nature grants the administrative authority unparalleled powers in private law contracts. In addition, it is the competent administrative judiciary that has the jurisdiction to adjudicate these disputes,[111] and arbitration is considered an exception. Accordingly, the exception cannot be resorted to in the presence of the original. Finally, the recourse of any administrative authority in the event of a dispute to the competent administrative judiciary is consistent with legal logic to guarantee the right to litigation. The administrative authority cannot resort to arbitration because these contracts are related to the functioning of public facilities and achieving public benefit. If it wants to resort to arbitration, it must obtain explicit

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[107] Ruling of the Kuwaiti Court of Cassation in Appeal No. 51 of 1997 issued on March 15, 1998, Commercial / 2, see *Encyclopedia of Administrative Judiciary*, published by Fatwa and Legislation, Part One, p. 274.

[108] We mention, for example, the following rulings: Ruling of the Kuwaiti Court of Cassation in Appeal No. 368/99 Commercial, issued on 12/19/1999; Ruling of the Kuwaiti Court of Cassation in Appeal No. 431/1999 Commercial, issued on 5/3/2000; Ruling of the Kuwaiti Court of Cassation in Appeal No. 40/1998 Commercial, issued 8/11/1998.

[109] See: A. Abdel-Fattah, *Kuwaiti Arbitration Law*, 2 ed., Dar Al-Kutub, 2012, p. 113. Also see: K.F. Al-Anzi, *The Permissibility of Arbitration in Administrative Contracts in Kuwait*, PhD thesis, Cairo University, 1 ed., Dar Al-Nahda Al-Arabiya, 2007, p. 313.

[110] M.A. Ismail, *Works Contracts and Arbitration Therein*, Al-Halabi Human Rights Publications, 2003, p. 43; A.A. Khalifa, *Arbitration in National and International Administrative Contract Disputes*, 1st ed., 2006, p. 56; D. Albaz, trends of Kuwaiti court as to judicial arbitration in administrative contracts, a study submitted to the 16th annual conference *international commercial arbitration*, p. 347.

[111] Refer to supporters of this opinion, A.S. Alenzi, in his study about the possibility of using arbitration in administrative contracts in Kuwaiti law, commenting on the decision of the Kuwaiti court of cassation, second commercial circuit in appeal No.: 51/1997-commercial/9.

permission from the legislator. The conclusion of this opinion is that it is not permissible to resort to arbitration in administrative contract disputes, without a legislative text that decides and allows it.

As for the jurisprudential opinion supporting arbitration in administrative contract disputes, some jurists supported the opinion that arbitration is permissible in administrative contract disputes. Dr. Aziza Al-Sharif and others argued that it is permissible to resort to arbitration to settle administrative disputes, as it saves effort, time, and money, especially in disputes involving a foreign party, where it is often preferable to resort to arbitration to resolve the dispute arising from an administrative contract.[112]

As for the jurisprudential opinion, it took a middle position when it permitted arbitration in the financial and due rights of the parties to an administrative contract, and arbitration should not be extended to cover the conditions related to the state's powers in the contract, because these conditions are related to public order.[113]

Accordingly, we see that the Kuwaiti Arbitration Law No. 36 of 1980 provides in Article 173 that arbitration is not permissible in matters in which reconciliation is not permissible, and the Kuwaiti Civil Law also provides in Article 554 that reconciliation is not permissible in matters related to public order, but only on the financial rights arising therefrom.

On the basis of the foregoing, we see that the administrative contract contains special conditions in terms of the administrative privileges and powers in which it is not permissible to resort to arbitration. However, with regard to financial rights, it is permissible to resort to arbitration, owing to what the economic development has imposed in the field of economic administrative contracts. On the other hand, it is illogical to prohibit the inclusion of an arbitration clause in national administrative contracts and to include it in international contracts, especially

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[112] On this opinion in favour of arbitration in administrative contracts, see: O.M. Al-Mutairi, *supra* note 30, p. 203; A. Ash-Sharif, *Administrative Arbitration in Egyptian Law*, Dar Al-Nahda Al-Arabiya, 1993, p. 119; J.N. Al-Nassar, *Arbitration in Administrative Contracts*, Dar Al-Nahda Al-Arabiya, p. 67.

[113] On this opinion, see: Y. Al-Assar, *supra* note 4, pp. 87; A.S. Al-Otaibi, Les contrats de privatisation des biens publics et leurs expériences au Koweït, thèse, Université du Koweït, 2002, p. 185.

since Kuwait signed the Washington Convention on the Settlement of Investment Disputes of 1965. This Convention stated the ability of public legal persons to resort to arbitration to settle their investment disputes related to concession contracts, economic development contracts, contracts for the exploitation of natural wealth, or other international contracts that are concluded between a public legal person and foreign investors. In this regard, we note that the Washington Convention allows the contracting parties to agree to settle their disputes by arbitration. Hence, we see that it is *a fortiori* to allow arbitration in national administrative contracts, since the applicable law is the Kuwaiti law and when it is limited to financial rights, there are no strong justifications that prevent arbitration as long as it is limited to financial rights without interfering with the administration's powers and the privileges of the public authority. Accordingly, we conclude that economic necessities and the encouragement of foreign investment to participate in public projects made the legislator expressly state the permissibility of arbitration in BOT contracts and partnership contracts between the public and private sectors by Law No. 116 of 2014. The contract must have a legitimate objective of public importance that justifies the use of arbitration. The approval and authorization of the Partnership Higher Committee to resort to the inclusion of the arbitration clause in the partnership contract must be obtained.[114]

Furthermore, in article 26 of the Law of Direct Investment Encouragement in Kuwait No. 116/2013, the Kuwaiti courts are the ones solely competent to consider any disputes arising between the investment projects and third parties, whoever they maybe. The parties may also agree to refer such disputes to arbitration.

Conclusions

The research dealt with the subject of arbitration in administrative disputes, where the extent of the permissibility of applying international arbitration as an alternative method for settling administrative disputes was discussed. We tackled the position of the Kuwaiti law in this

[114] Article 29 of Law No.116 of 2014.

regard, with some references to French law. We identified the issues in which arbitration is permissible for administrative contracts nationally or internationally in these countries.

Accordingly, the fact remains that the parties to a contract can provide for the application of international law in the event of disputes by introducing the condition of settlement through arbitration. The parties to the contract are left free to determine that. We find that in a country such as Kuwait, although international arbitration is acceptable, some conditions must be fulfilled: seeking an amicable settlement first, so as not to cause interruption of work, respect for public order, the prohibition of resorting to a single arbitrator, the presence of a provision for resorting to arbitration in the concluded contract, and the necessity of the principle of reciprocity for the countries signatory to international conventions.

For the foregoing reasons, although resorting to administrative arbitration in Kuwait is permissible, it is not strictly organized to include all administrative disputes. It is indirectly present in texts and the articles of some laws (Laws of Pleadings, Arbitration Law No. 11 of 1995 on Civil and Commercial Disputes, Law of Partnership between the Public and Private Sectors, the decision of the Council of Ministers regarding international contracts that are concluded with a foreign party, the Foreign Direct Investment Law). What is stated in all these cases requires the approval of the supreme authority (the Council of Ministers or the Higher Committee for Partnership).

Finally, it was necessary for the Kuwaiti legislator to intervene and issue a special regulation and legislation on administrative arbitration that allow resorting to arbitration and organizes its provisions in such a way as to resolve disputes related to contracts, including administrative contracts, to benefit from the UNCITRAL model law, to take into account the relevant international agreements, and to determine the applicable law and whether acceptable arbitration is the institutional or the individual.

Ultimately, the general principle in the State of Kuwait is to prohibit the use of arbitration in administrative contracts concluded by

persons under common law unless it is permitted in regulatory,[115] international,[116] or legislative[117] provisions.

I conclude that the gradual acceptance by the Kuwaiti legislator of international arbitration is considered a positive development in matters of partnership contracts between the public and private sectors, which is undoubtedly considered an implicit recognition of the concept of the international contract. However, the will of the parties plays an important role in choosing the applicable law. Also, the rules contained in Kuwaiti national laws must be taken into account, such as the impermissibility of conciliation in matters related to public order and the limitation of arbitration to matters of financial rights.

What follows from the above research, is that Law No. 11/1995 is the arbitration law for considering civil and commercial disputes in Kuwait. Furthermore, arbitration in administrative contracts shall not be allowed unless otherwise stipulated in law, i.e., Partnership Law No. 116/2014 and Investment Law No. 116/2013, or in international conventions.

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[115] Obtaining the approval of the Council of Ministers in accordance with Decision No. 11 of 1988.

[116] If the contract was concluded with a foreign person and in accordance with the Washington Convention, and the contract was for oil investment, natural resources, or a concession.

[117] Partnership Law No.116 of 2014, which permitted recourse to arbitration with the approval of the Higher Committee of the Partnership Authority.