

**Arbitration In International Administrative Contracts  
And Administrative Contracts With International  
Dimensions In The UAE**

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**Abstract**

This is a study on some controversial legal aspects of resorting to arbitration in disputes concerning administrative contracts with an international dimension – i.e. contracts between public authorities in the United Arab State (UAE) and foreign companies, as well as contracts concluded between local parties but indirectly generate results of international dimensions.

In this study, I have adopted a descriptive methodology, meticulously describing the legislative and judicial status in the UAE compared to those of both Egypt and France. In addition, I have also resorted to an analytical approach to provide a concise analysis of the essence of legal provisions guided by the established jurisprudence and judicial opinions. Finally, I used the comparative approach to draw parallels and difference within the legislature and the judiciary between three legal systems, with an eye at making use of relatively advanced legal systems.

According to the above, and through utilizing the three research methods mentioned, (the descriptive, analytical and comparative), we attempted to analyze the various relevant jurisprudence and judicial opinions, together with court rulings and legislative provisions. The ultimate objective is to draw scientific results from the detailed evidences drawn from the selected rulings, as well as deciding on the position of both local and international jurisprudence and judiciary on this regard. This is to consolidate the theoretical positions with existing practice.

At the outset of the thesis (chapter one) this study begins with a discussion of the main concepts of the constitutional system of the United Arab Emirates (UAE), with an explanation of the federal structure of the state and the nature of the

UAE system of government. This is important because this study is mainly concerned with the UAE.

This is followed by an illustration of the principles of administrative law within the UAE state. The study shows that the judicial system of the UAE state adopts a unitary judicial system whereby the same courts have jurisdiction on all sorts of disputes, both on disputes arising from administrative law and administrative contracts, as well as on disputes arising between private persons. This would unify the rules that apply to all disputes relating to the administration including administrative contracts with international dimensions.

(Chapter two) attempts to define the concept of the administrative contract; the main focus of this study, and the criteria for distinguishing it from other types of contracts. It is concluded that the distinctive criteria for administrative contracts in the UAE are that: (i) one party to a contract shall be a public persona (such as the state, city authorities or municipalities); (ii) the contract shall be connected to the running or organization of a public facility (such as public institutions and authorities, security organizations and educational institutions) and (iii) it shall include exorbitant conditions which are unfamiliar in private law contracts. This distinction would help determining the nature of the legal rules to be applied on settlement of disputes, whether pertaining to the rules of administrative law or those of private law.

(Chapter three) displays and critically reviews the main ideas related to arbitration in administrative contracts and shows the reservations and disadvantages that might arise from resorting to arbitration in this field.

(Chapter four) This study comes to a number of conclusions in relation to these reservations and disadvantages. Despite the great importance of resorting to arbitration in administrative contracts as a speedy and distinctively confidential instrument for protecting the interests of the contractual parties, my opinion resorting to arbitration for settlement of disputes should be followed only if and to the extent it encourages investment in the UAE and it is respectful of higher

administrative interests of the UAE state. The same limitation should apply to international administrative contracts and administrative contracts with international dimensions. Arbitration should be carried out without prejudice to the principle that a public authority in the UAE shall pursue a public interest without prejudice to private interests.

This study argues that the legislator should intervene in an unambiguous manner to achieve the following results in relation to arbitration in administrative contracts with an international dimension and formulate proposals on how best to address these issues:

1. Determine the fields in which resorting to arbitration in administrative disputes should be admitted.
2. Specify the competent authority for approval of resorting to arbitration in this field (preferably the higher administrative authority within the state, such as the cabinet of ministers, the competent minister or authorized representative among public persona. No delegation is permissible, in this regard, for public persona assuming positions inferior to the above-mentioned ones because of their distinguished expertise which brought them to shoulder highly sensitive positions. Delegation in arbitration should be restricted to a very limited domain and only endowed upon those who assume the highest executive positions and qualified to shoulder high ranking positions and responsibilities.
3. The arbitration panel shall refrain from prejudicing the nature of the administrative contract, that is to refrain from prejudicing public interests, in order not to use resorting to arbitration as a means of evading application of the rules and regulations pertaining to the established administrative contract, which are stipulated to maintain public interest and public funds without prejudice to the rights and freedoms of private persons. Hence, it is pertinent to preserve the administrative nature and enforce the substantive regulations of the administrative contract. The contract should involve provisions for including arbitration, in addition to explicitly specify that the applicable law governing the contract should be the administrative law and the

theory of administrative contract, which shall be applied in case of dispute. Arbitration should be restricted to administrative contracts with international dimensions connected with public interest projects and leading to the encouragement of foreign investment and applying the principles of arbitration for conciliation in internal administrative contracts disputes only.

The study concludes by arguing that legislative reform should be carried out to introduce legislative amendments, incorporating the above-mentioned arrangements, which are crucial to the settlement of administrative contracts disputes through arbitration. Resorting to arbitration should be restricted to certain types of contracts concluded by public authorities as an exception to the general principle of resorting to a judicial authority for looking into a legal disputes. These were put in place only to strike a balance between achieving public interests of the state and protecting the rights and freedoms of individuals.

## **Introduction**

Most countries accept the idea of promoting economic development by attracting foreign investments within national territories. Arbitration is considered as an ideal instrument for settling disputes related to such investments, because it prompts advantages which are not readily available from national judiciaries. The most important advantages are providing confidence and security to foreign investors; the ability to maintain the confidentiality of transactions and speed in resolving disputes; the simplicity of procedures and the freedom of parties to the conflict to choose arbitrators who have renowned expertise in the field of activity to which a dispute is related. For these reasons, arbitration became one of the most crucial concepts imposed by the realities of international trade within a new world system, regardless to theoretical considerations that support or are opposed to the concept of arbitration in itself.

In a context of economic openness in which there is a desire by the state to promote economic and social development, both the state and all other public law personas are compelled to get involved, among other things, in concluding administrative contracts, especially within the economic field. Administrative contracts are contracts concluded by the administration represented by a public persona with the purpose of organizing or running a public facility, using methods, means and privileges of public law. They are considered one of the most important instruments to which different countries resort to ensure a development of their functions.

Arbitration is considered the most appropriate tool. Often, it is even imposed by the other party to a contract, for settling disputes arising during the implementation of administrative contracts. When concluding administrative contracts, investors are inclined to resort to arbitration to settle any dispute that may arise during the implementation of such contracts. Sometimes, states and public law personas may opt to admit arbitration in contracts related to the running or organizing of basic public facilities within the state. If arbitration does not raise any debate or problems in settling disputes in civil or commercial contracts, the situation is very different in relation to administrative contracts, as it involves very negative impact on the idiosyncratic features of administrative

contracts which distinguish them from civil contracts, particularly in relation to the privileges bestowed upon the administrative party to these contracts.

Arbitration asks for careful and diligent study because it is important for the settlement of disputes arising from administrative contracts and because of the large number of problems ensuing from resorting to arbitration to settle such disputes, especially in the field of administrative contracts.

### **The Significance of the Study:**

The system of arbitration in commercial contracts was in place for a long time in the United Arab Emirates, and has proved to be quite appreciated in saving time, effort and money for parties to the conflict or litigation. Yet the idea of arbitration in administrative contracts within the UAE did not receive similar recognition because administrative litigation cases were associated with the government in one way or the other.

Arbitration in administrative contracts disputes has become an urgent necessity, as investors (both foreign and national) often include arbitration clauses within the administrative contracts in the field of investment. This is of primary importance for them because it ensures peace of mind in the event of a dispute with the State, due to the slow pace of the official litigation procedures and the inability to respond to the legal regulations, which are one of the international trade requirements.

However, interest in arbitration in administrative contracts is still at its beginnings in most Arab countries, including the UAE, despite their significance to legal scholars and legal practice. Specialized jurisprudence studies in this area are scarce and legal precedencies and court rulings are rare, which are limited to establishing the main principles without going into detailed explications. This situation could be attributed primarily to the fact that settlement of disputes related to administrative contracts are usually carried out through arbitration in utmost secrecy and confidentiality. Such proceedings are not published or made accessible to the public. This endows the whole issue of studying and drawing conclusions from it with increased importance but at the same time engulfs it with a lot of difficulty and ambiguity.

### **Difficulties Facing the Study:**

Conducting research on the subject of arbitration in administrative contracts in general, and in the UAE in particular, faces many difficulties which could be attributed to many reasons, including:

1. This issue is related to several branches of both public and private law, such as administrative law, public international law, civil law, private international law, law of procedures, commercial law and international trade law. There is no doubt that such intricacy leads to a huge scientific burden upon the researcher and asks for diligent efforts to encompass all the ramifications of the subject and the principle rules related to the research topic.
2. Arbitration in administrative contracts has been neglected over long periods and did not receive legislative, international or judicial attention in the past. This negligence renders research in this area extremely difficult and intricate.
3. Administrative contracts are of special nature in with regard to the rules and regulations that governs arbitration. That is why arbitration has a distinct legal system of its own. This has a great impact on the setting of rules and regulations for arbitration, such as the privileges and powers enjoyed by the administrative party to the administrative contract as well as the restrictions to which such contracts are subjected. This special nature plays a great role in determining the research plan and themes, because what hinders resorting to arbitration in administrative contracts may lead to loss of this special nature of these administrative contracts.
4. The issue of arbitration in administrative contracts as a system, or as a method for settling disputes, in addition to the special nature of administrative contracts, posits several queries and hurdles. In general, these queries and hurdles are related to the fact that arbitration has fixed mechanisms which, as a rule, apply to different legal domains. These mechanisms start with agreement to resort to arbitration, then carrying out the procedures to be followed during the arbitration process and ending with the arbitration award. The mechanisms also involve setting

the conditions for ensuring the soundness of the award, its effects and the conditions set for appeal. The initial question from which this research ensues is related to determining the criteria that make arbitration in administrative contracts special and distinctive from other types of contracts. In other words, what are the characteristics of administrative contracts, which entail specific distinction to the arbitration associated with such contracts which are not available for all other types of contracts? Hence, the research focuses on issues which reveal this distinctive nature, with brief consideration of arbitration features in other legal branches, such as disputant parties in arbitration, arbitrators' awards and the conditions for the soundness, impact, implementation and appeal of arbitrators' awards. This means that the research is not going to touch upon common arbitration issues shared in both private and public law and will be confined to topics relevant only to arbitration in administrative contracts.

5. The references, books, research and studies dealing with the issue of arbitration in administrative contracts within the UAE are rare, which makes it very difficult for the researcher to carry out a comprehensive study of the topic. Studies in administrative contracts in the UAE are quite rare, as much as studies on arbitration are rare, which make the research task more difficult.

### **Research Questions:**

This research attempts to answer the following main questions:

1. Is the existing method adopted in the settlement of administrative disputes effective?
2. Is it possible to resort to arbitration as a method for settlement of disputes relating to administrative contracts with international dimensions?
3. Is it possible to settle disputes in administrative contracts with international dimensions by resorting to arbitration, despite the

privileges enjoyed by the administration party compared to the other contractual party?

4. What are the specific special characteristics of arbitration in administrative contracts with international dimensions?
5. Does arbitration in administrative contracts enjoy the same characteristics and privileges in all comparative legal systems? Or does each legal system have its own specific special features and privileges?

### **Research Methodology:**

This research is not restricted to one specific methodology in handling all investigated themes, rather it adopts various methodologies as deemed appropriate by the nature of the study in each theme. The research methodology adopted is rather a combination of various methodologies commonly used in legal studies as detailed here:

1. The research uses multiple methodologies depending on the themes discussed. These include both descriptive and analytical research methodologies, and in other instances the research follows response method or comparative methodology at other times.
2. In this research, I will follow the method of analytical authenticating comparative study that depends on analyzing relevant documents and texts through a comparative study of both Latin and the Anglo-Saxon legal systems. This methodology will follow a realistic approach that aims at attributing each legal idea or notion to its origins in an in-depth manner that reveals the areas of weakness and shortcomings at the legislative and judicial levels from a comparative perspective with the ultimate purpose of identifying and proposing solutions for such shortcomings. This will be explicated in chapters Two, Three and Four.
3. I have also adopted the inductive approach, by drawing valid and applicable results for use and application in practical reality. I have also followed the historical approach in some aspects of the search, making use of historical studies to identify the lessons to be gleaned from human

history, and drawing inferences from truthful historical testimonies in this regard. This will be explicated in chapter One.

4. I also combined both practical and theoretical aspects, holding both aspects as equally important because purely scientific study often requires authentication in the form of general theories and general principles that bring together different applications in each branch of legal studies. This will be explicated in chapters Two, Three and Four
5. I shall also give the study of comparative jurisprudence and judiciary an equal importance as I examine Arabic and national jurisprudence and judiciary throughout this research. This is of great significance because comparative jurisprudence is very important and provides many positive and great results in interpreting some ambiguously similar questions and saves both time and efforts. In doing so, we shall always consider the special nature and regional environment of the Emirati society and the legal systems in Arab and Islamic worlds. In other words, I will attempt to explore what is deemed useful for the UAE through comparative systems. The thesis attempts to draw a special comparison between the Egyptian and French legal systems, on the one hand, and the Emirati system, on the other, based on the idea that the theory of administrative contract has originated in the French and Egyptian systems, which together have had a great impact on the Emirati legal system despite of the distinct differences in their respective judiciary systems. This issue is explicated and emphasized throughout the different parts of this thesis.

The methodologies and approaches adopted in my study are closely linked with the specific difficulty of the question of arbitration in administrative contracts with international dimensions. This difficulty stems from the fact that the studies and publications devoted to this intricate and complex field of study are very scarce.

**Thus, the plan for this study is divided as follows:**

- **Chapter One:** Basic Concepts Regarding the Constitutional and Administrative System of UAE.
- **Chapter Two:** The concept of the administrative contract and its distinguishing criterion.
- **Chapter Three:** Key problems surrounding the use of arbitration in international disputes concerning administrative contracts with international dimensions: (Analysis and possible solutions).
- **Chapter Four:** Regulations for Resorting to Arbitration in Administrative Contracts Disputes with international dimensions.
- **Conclusion.**
- **Bibliography.**
- **Table of Contents.**

# *Chapter One*

## Basic Concepts Regarding the Constitutional and Administrative System of UAE

In this chapter, we shall discuss the basic concepts of the Emirati legal system in the areas related to the subject of this study because it is closely connected with the subject and the reciprocal impact of each upon the other. The most important of these concepts shall be discussed in the following sections:

**Section One** : The structure of the UAE state and how it was created.

**Section Two** : The nature of the system of government.

**Section Three** : The general outline of administrative law in UAE (origin, sources, judicial authority competent for settlement of disputes).

## **Section One**

### **The structure of the UAE state and how it was created**

The UAE is a young state that has undergone a prolonged process of constitutional development which has eventually led to its establishment in a united form and to the issuance of its federal Constitution in 1971. The general outline of this Constitutional development can be summed up in the following stages and steps: <sup>1</sup>

#### **First: Pre-Union Era (Colonial Occupation):**

This era was characterized by several fundamental features, the most important of which are:

Britain had launched many military expeditions against Gulf Emirates (known as Oman Coast Region) in 1805, 1809 and 1819. These expeditions led to occupying the whole region by the British and several treaties were signed with the sheikhs of the coast of Oman, which started with the 1820 treaty, then 1835 treaty and finally the 1853 treaty, which is generally referred to as the “Perpetual Maritime Truce”.

As of the year 1892, Britain entered into a treaty with the Gulf Sheikhdoms, which stipulated that Britain should be responsible for the foreign affairs of the Gulf Emirates. By the end of World War 1, Britain had declared the Gulf emirates as a British protectorate by bilateral treaties between Britain and each emirate separately. In early 1967, Britain announced its intention to evacuate the area, and then declared the final withdrawal in 1971.

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<sup>1</sup> See. Majdi Midhat Al-Nahri: Principles of Political and Constitutional systems: An Applied and Analytical Study Compared to UAE Constitutional System , Gezira University Publications, Dubai, 2009 p.495. Also, . Abdul Rahim Abdul Lateef Al- Shaheen: Government System in UAE, first Edition, 1997, pp27 and after. Also, . Muhsin Khalil: Constitutional System of UAE, UAEU Publications, and 1997 pp. 49 and after.

## **Second: The Progress toward Unification Stage (The establishment of the UAE state):**

Following the declaration by Britain of its intention to leave the Gulf region in 1967, several attempts were made to reach unity amongst Gulf Emirates and here is a summary of the most important steps taken towards achieving unity:

1. Bilateral union between Abu Dhabi and Dubai emirates under one flag as provided by the 18 November 1968 Agreement. The union involved the following affairs: the official map (borders); defense and interior security in case of dire need and public services such as education, health, nationality and immigration. The union assumed the legislative power on issues entrusted to it together with inviting other emirates to join the union. Accordingly, Sharjah, Ajman, Fujairah, Umm Al Quwain and Ras Al-Khaimah emirates were invited to join the union, together with Qatar and Bahrain emirates.
2. In response to the above-mentioned invitation, a meeting involving the rulers sheikhs of the nine emirates (Abu Dhabi, Dubai, Sharjah, Ajman, Fujairah, Umm Al Quwain, Ras Al-Khaimah, Qatar and Bahrain) convened on 27 February 1968. ( The word Sheikh is a title given to the monarch ruling any of the seven emirates and his close family members "wife and children" and his clan in general "cousins and their families". The title "Ruler "is strictly assigned to the sheikh who is accepted by the people of the emirate to assume the supreme chair of government within the given emirate. I mean by word "accepted" that all the people want this Ruler because they believe in him and believe he can do the best for them and their country. The ruler is not elected but he was respected because of his reputation and the personal knowledge people have of him ).

A convention was signed leading to the establishment of what was known as the Union of the Arab Emirates. The most important features of this union were: the formation of a supreme council composed of the nine rulers of the emirates, with annual rotation of presidency between the rulers. The President in office of the union represents the Union with regard to interior and foreign affairs. The supreme council of rulers is

responsible for the development of a complete Charter for the Union, and for setting out its supreme policy [in the international, political, defense, economic and cultural issues, and any other issues related to the purposes of the Union] and the issuance of laws in matters within the union's responsibility. Its decisions and resolutions are issued by consensus.

The convention also stipulated that a union council should be established to carry out the responsibilities vested by the Supreme Council upon the union council and in accordance with federal laws. This union council represented the executive authority of the union but its resolutions would not be binding unless ratified by the Supreme Council.

The Supreme Council also established a supreme court whose composition and jurisdiction were governed by federal law. In addition, the agreement assigned certain responsibilities to each emirate separately in the areas which were not covered by federal laws or the convention as part of the responsibilities of the council.

It was also agreed that this convention had to come into force by 30 March 1968 awaiting the development of a charter delineating the permanent government system in its entirety. The Supreme council held four meetings with the purpose of activating and implementing the agreement but the meetings failed to lead to an agreement.

The mediation efforts made by Saudi Arabia and Kuwait failed to bridge the huge gap of differences between the members of the unsuccessful nine-fold union. On 14 August Bahrain declared its independence and on 1 September Qatar followed the same path. The endeavors to establish a nine-emirate strong federation collapsed altogether.<sup>2</sup>

3. After the collapse of the attempts to establish a nine-emirates strong union, the rulers of the remaining emirates met on 18 July 1971 and declared the formation of the United Arab Emirates state and agreed upon

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<sup>2</sup> see Muhsin Khalil op.cit, p. 50 and after; . Abdul Rahim Shaeen, op.cit. P.41 and after, . Majdi Al-Nahri, Op.cit, and p. 496 and after, . Najeeb Al-Rayyes: Oil and Oasis Conflicts: Worries of the Arabian Gulf between 1968-1971, 1973, p.65 and after.

an interim Constitution. The date for the official establishment of the new state was set to take place on 2 December 1971 and to commence drafting a permanent Constitution. The state was made up of six emirates at the beginning, including Abu Dhabi, Dubai, Sharjah, Ajman, Fujairah and Umm Al Quoin, then Ras Al- Khaimah applied to join the union and was accepted as the seventh member of the union on 23 December 1971. The coming into force of the interim Constitution on 2 December 1971 is considered the official birth of the UAE and the commencement of constitutional existence and international presence.

## **Section Two**

### **The Nature of Government System of the UAE:**

#### **First: The UAE Constitution and the principle of separation of powers**

By examining the constitutional provisions of the 1971 Federal Constitution of the UAE, it was evident that it did not include articles providing for the state functions in pursuit of what is adopted in most state Constitutions in most countries. Hence it appears that it does not embrace formally the traditional principle of separation of powers. The Emirati legislator has provided only for the state powers. Article No. 45 stipulates that the state is represented in five bodies:

1. The Federal Supreme Council
2. The UAE President and Vice President
3. The Federal council of Ministers
4. The Federal National Council
5. The Federal Judiciary

According to the above, the Emirati Constitution was not arranged according to the division of the functions of the state with regard to the separation of the three powers adopted by most Constitutions all over the world. This is the flexible separation between the powers based upon legislative, executive and judicial functions whereby each power is separately entrusted with carrying out the specific functions with the existence of a degree of cooperation, balance and mutual control between the three powers, Hence, it implicitly does not embrace the principle of separation of powers, at least from a technical point of view.

Therefore, the executive and legislative powers are entrusted to one authority within the Emirati system; that is The Federal Supreme Council. The rulers of each of the seven emirates represent their people in this council. The Federal Supreme Council is assisted, in the exercise of the legislative function, by the National Council and assisted, in exercising its executive function, by the Federal Council of Ministers, under the supervision and control of the President.

Accordingly, the Emirati constitution adopts the separation of the three powers; the legislative, the executive and the judicial but does not embrace the standard system of separation of powers by assigning them to competent authority but carried out by more than one authority as mentioned above.

**Legislative and executive authorities:**

No	The Federal Supreme Council (made up of seven members):
1	President of the Council (Head of state and Ruler of Abu Dhabi - the capital).
2	Vice President of the Council/ Vice President of the state, Prime Minister and Ruler of Dubai. <sup>3</sup>
3	Member of the council/ Ruler of Sharjah.
4	Member of the council/ Ruler of Ras Al-Khaimah.
5	Member of the council/Ruler of Ajman.
6	Member of the council/Ruler of Umm Al Quwain
7	Member of the council/Ruler of Fujairah.

Table1: The Federal Supreme Council

No	The National Federal Council /Made up of 40 members as follows: <sup>4</sup>
1	8 members from the emirate of Abu Dhabi.
2	8 members from the emirate of Dubai.
3	6 members from the emirate of Sharjah.

<sup>3</sup> The UAE cabinet of ministers consists of the prime minister and his two deputy prime minister and the ministers. The prime minister's position is constitutionally assigned to the ruler of the Emirate of Dubai as per Articles 54 and 59 of the UAE constitution. The prime minister presides over the sessions of the cabinet and call for meetings and follow up the performance of ministers and coordination of work between different ministries and all executive organs of the federal state. Articles 54 to 67 of the UAE constitution provide for the procedures of nomination and appointment of the prime minister, his deputies and their terms of reference. See Majdi Al-Nahri, op. cit., p. 524 and p. 534. See also Muhsin Khalil, op. cit. p. 212 and 224 and the UAE Constitution Articles 54 to 67.

<sup>4</sup> See Majdi Al-Nahri, op. cit. , P. 511 and Muhsin Khalil, op. cit. P. 194.

4	6 members from emirate of Ras Al-Khaimah.
5	4 members from emirate of Ajman.
6	4 members from emirate of Umm Al Quwain
7	4 members from emirate of Fujairah

Table 2: The National Federal council

**Second: The special nature of the system of government in UAE:<sup>5</sup>**

In light of the previously mentioned considerations, I embrace most of the legal positions advocated by scholars who believe that the Emirati Constitutional legislator did not adopt any of the known systems of governance. It is not parliamentary in the sense that it does not embrace the principle of separation of powers in the common understanding of that principle. The system of the UAE state is, also, not presidential because such system also hinges upon the principle of separation of powers, where the Emirati federal Constitution does not provide for application of the principle in any form or any of its basic elements. Hence it is quite plausible to claim that the UAE political system is characterized by its own special and unique nature which is consistent with its genesis in 1971.

Although the UAE government system does not clearly adopt the worldwide known principle of separation of powers, which aims at protecting rights and freedoms, the Emirati Constitutional legislator was not blind to essential rights and freedoms. Many articles of the UAE Constitution provided for safeguarding the basic human rights and freedoms. Such attitude was evident in the most established democratic states that safeguard respect for individual rights and freedom without adhering to the principle of separation of powers.

If the logic behind providing for the system of separation of powers is to safeguard individual rights and freedoms, the UAE Constitution, though not

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<sup>5</sup> See, Majdi Al Nahri, op.cit. P.162 and after; . Muhsin Khalil, op.cit. , p. 188 and after ; Mohamed Kamil Obaid, op.cit. P.426 and after; Abdul Rahim Shaeen, op.cit. , p. 80 and after and Majdi Shuaib: Constitutional Law and the UAE Government System. Without date, p.341 and after.

directly adhering to the principle, has clearly provided for safeguarding such rights and freedoms as well as providing for health-care for individuals. In this sense, the UAE Constitution is quite progressive with regard to the question of individual rights and freedoms in tandem with the most advanced Constitutional procedures that safeguard individual freedom and the commitment of the state to provide social rights for individuals, even though it does not embrace the principle of separation of powers.<sup>6</sup>

### **Third: General Special Features of the UAE 1971 Constitution and its Amendments:**

The UAE Constitution was officially issued within an atmosphere of genuine quest for Arab freedom and unity. It embraces a set of ideals and beliefs reflected in its provisions, highlighting a package of UAE intrinsic features setting the general features of the Constitution, the most notable of which are:<sup>7</sup>

#### **1. Implicit statement of the principle of sovereignty of the people:**

The Emirati Constitution was silent with regard to the issue of sovereignty of the people or the nation but the Constitutional jurisprudence correctly indicates that although it is not clearly provided for within the text of the Constitution, sovereignty of the people is implicitly provided for in article No. 77, which reads: “A member of the Federal National Council (FNC) represents the entire people of the UAE and not only the people of the Emirate, which that member represents in the FNC.”<sup>8</sup>

According to the nature of governance system of the UAE state, the legislative power is assigned to the Federal Supreme Council, assisted by the Federal National Council in a consultative capacity. The political system is gradually changing towards adopting fully fledged parliamentary democracy whenever its inevitable requirements were fulfilled. This part of the chapter deals with the general features of the political system and is not in the essence of the topic covered by the chapter. The role of the UAE people

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<sup>6</sup> See Muhsin Khalil, op.cit, p.189 and after.

<sup>7</sup> See . Majdi Al Nahri, op.cit. , p.505 and after, . Muhsin Khalil op.cit. p. 68 and after, . Abdul Rahim Al Shaeen, op.cit. p. 80 and after

<sup>8</sup> Article No. 77 of the UAE Constitution.

resides in shaping political decisions locally and goes on to assume federal significance. This is done by members of the Federal National Council. Whenever the anticipated developments are achieved, the national legislator would, understandably, respond by providing for new constitutional amendments. The ultimate objective is to establish the desired full-fledged parliamentary democracy, as stated in the preamble of the UAE constitution.

## **2. The Federal Structure of the UAE state according to the 1971 Constitution:**

It is evident from a scrutiny of the text and provisions of the UAE Constitution that it adopts the structure of a federal state or centralized union; generally known as the Constitutional Law Union. According to the above, the Constitution, issued on 2 December 1971, has established a new state to be known as the United Arab Emirates, made up of seven constituent Emirates, namely: Abu Dhabi, Dubai, Sharjah, Ajman, Fujairah, Umm Al Quwain and Ras Al- Khaimah. It has its own Constitutional system; public authorities based upon the federal structure of the state and adopts political decentralization. In accordance with the above, the preamble of the Constitution states that the state is established involving the seven Emirates in the form of an independent sovereign federal state. The first article of the Constitution states the following: “The United Arab Emirates is an independent, sovereign and federal state hereinafter referred to as” the UAE”.

Hence, the union state retains supreme power within the domestic sphere over the seven constituent Emirates. In other words, it exercises its jurisdiction right vested by the federal Constitution over the seven Emirates directly and without the need for approval or endorsement from these Emirates. The local authorities of the emirates shall be committed to implement these policies within their own territories under the supervision of the federal authorities.

However, this does not altogether rule out that each Emirate shall exercise certain jurisdictions. Article No. 3 of the Constitution states the following: “A member Emirate shall exercise sovereignty over its own

territories and territorial waters in all matters which are not within the jurisdiction of the UAE Federal Union, under the Constitution". In other words, this local sovereignty bestowed to each emirate include all matters which do not exclusively fall under the jurisdiction of the federal authorities. Constitutional provisions emphasized the delineation of the exclusive federal powers, and whatever falls outside such powers is stipulated to be part of the jurisdiction of the member Emirates.

**3. The Constitution of the United Arab Emirates is a written and rigid Constitution:**

The Constitution of the UAE was issued in written form compiled in the 1971 Constitution document and was issued following certain procedures. The provisions of the Constitution do not proscribe permanent or temporary amendment of its provisions at any given time, pursuant to provisions of article No. 144. This arrangement is different from the standard amendment procedures adopted for amending normal legal and legislative rules. Hence, this Constitution is considered rigid, as distinct from flexible ones, which can be amended following the normal procedures.

**4. The nature of government system of the UAE is characterized by collective political leadership:**

The UAE Constitution embraces the principle of the collective political leadership of the state. It grants supreme constitutional, legislative and executive powers to the Federal Supreme council, which is comprised of the rulers of all the seven constituent Emirates, or their representatives in case of unavoidable absence. In addition to that, the council is entrusted with setting the general policy in all matters assigned to the Union in accordance to the Constitution and undertake the task of absolute supervision on the Union affairs in general. It is also the final authority for ratifying federal laws, as well as international treaties and agreements. The council approves appointment and accepts the resignation of the prime minister or his removal altogether. The council also approves the appointment of head and judges of the Supreme Court and the Federal

Supreme Court and accepts their resignations as stipulated in the Constitution.

It is quite evident that the Constitution assigns the supreme tasks in all matters to a council whose major point of strength is the collective leadership; one of the distinguishing features of the young UAE state.

#### **5. Partial application of some aspects of the parliamentary system and the progress towards full adoption:**

The UAE Constitution has provided for the application of some features of the parliamentary system as indicated by the following:

- The Federal Supreme Council elects from amongst its members the President and Vice President of the Union as stipulated in Article No. 51:  
“The Federal Supreme Council elects from among its members a President and a Vice President. The Vice President exercises all the powers of the President in the event of the President’s absence for any reason”.
- As stipulated in article No. 77, the member of the Federal National Council represents all the people of the UAE and not just the people of his/her own Emirate: “A member of the FNC represents the entire people of the UAE and not merely the Emirate which that member represents in the FNC.”
- The preamble of the Constitution affirms this propensity towards parliamentary system and the assured desire to progress toward a full-fledged parliamentary system:  
“ Desiring also to lay the foundation for federal rule in the coming years on a sound basis that reflects the reality and the capacity of the Emirates at the present time, enables the Federation to achieve its objectives, safeguards the identity of its members in a way consistent with these objectives and, at the same time, prepares the people of the Federation for a dignified and free Constitutional life while going ahead towards a full-fledged representative democratic regime in an Islamic and Arab community free of fear and anxiety.”

## **6. The UAE Constitution of 1971 regulates the mainstay of the Emirati society:**

The Constitution lays down the foundations for regulating the Emirati Society by delineating the various principles upon which the society is built in different walks of life. The most fundamental of these principles are:

- The goal behind establishing the federation is to provide better life and entrench security and stability and international renown to the state and its people (this was mentioned in the preamble and article No. 10).
- Maintain the strong drive for Arab unity and consolidate Arab identity (mentioned in the preamble and article No. 6)
- Engage and collaborate with UN state members and the international community, in general, on mutual respect bases and mutual exchange of interests (mentioned in the preamble)
- Islam is the official religion of the Union and Islamic Sharia is the primary source of legislation. The official language of the Union is Arabic (mentioned in the preamble). Sharia is what Allah has prescribed for His Muslim worshippers including rules and regulations for establishing a just and fair life within the Muslim society protecting the interests of people and establishing a safe and secure environment for observing their faith and practice their worship rites and moral wellbeing and in their transactions with each other. The ultimate objective is to organize people's relationship with their Lord and their relationships with each other and achieve happiness in this world and the Hereafter.<sup>9</sup>
- The foreign policy of the Union aspires to strengthen solidarity with Arabic and Islamic issues and strengthen friendship and cooperation ties with all states and peoples of the world, based on the principles of the UN Charter and worldwide acceptable ethical standards. (mentioned in article No. 21 of the Constitution)
- The pillars upon which the UAE society stands are equality, social justice, provision of security and peace of mind and equal opportunities for all

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<sup>9</sup> See <https://en.wikipedia.org/wiki/Sharia>

citizens of the state, built upon a spirit of compassion and collaboration (stipulated in articles from No. 14 to 25)

- The Family, built on piety, sound morality and patriotism, is the crux of society. Other pillars of social policy include mother and child-care and protection, as well as protection of minors and the disabled; provision of quality education for the advancement of the society; health insurance; safeguarding the right to work and to private property; sanctity of public funds and protection of natural resources of the society. (Stipulated in articles No. 15 to 23 in the Constitution)
- The national economy is the basis for social justice. It is based on sincere cooperation between public and private sectors and its goal is to achieve economic development, increase productivity and raise standards of living to arrive at a state of welfare for all citizens and to encourage cooperation and saving practices. (provided for in article No. 24)
- Arrange for safeguarding rights and freedoms and carrying out public duties on state of the art systems of organization (mentioned in articles No. 25 to 44 in the Constitution)

**7. The Organizational structure of public authorities in the UAE 1971 Constitution is unique and does not comply with traditional political systems:**

As previously illustrated, the UAE Constitution does not adopt the principle of separation of powers in its commonly recognized form. The relationship between the various authorities and bodies of the state is stipulated in a different format and structural hierarchy, in line with the nature in which the new state was envisioned and the nature of government system sought and in harmony with the realities and conditions of the Emirati society in the manner indicated above.

Accordingly, the UAE Constitution of 1971 stipulates the establishment of the Federal Supreme Council as the highest supreme authority undertaking both executive and legislative functions. The council presides over the executive authority assisted by a federal cabinet of ministers and exercises legislative function assisted by the Federal National Council, which is an advisory legislative body.

## **Section Three**

### **The General Outlines of the UAE Administrative Law [Genesis, Sources and the Competent Judicial Authority for Settlement of Disputes]**

The legal system in the UAE was established after independence and was greatly influenced by the Egyptian legal system because the emerging new state sought the assistance of Egyptian Law experts, who were by extension greatly influenced by the French legal system. The rulers of the newly established state also sought the help of Arab experts in administrative law, especially Egyptian experts, who were, then, the most competent in this field and because of the commonly shared Arabic and Islamic cultural background. That explains why the legal system of the UAE was indirectly influenced by the French legal system. In saying the above, we should not ignore other influences that helped shape the legal system of the UAE, namely the Islamic Arabic and Gulf intellectual legacy. The latter, as well, is part of the collective historical sources that influenced the Emeriti legal system.

The idea of the emergence of the administrative law in countries impacted by this system was influenced by the notion of establishing an independent administrative judiciary. However, the UAE state has adopted most of the principles of the administrative law recognized within the Latin law system. The Latin Law system is principally the French Law system and the other national legal systems influenced by the French Law System. It is also known as the system as the dual court system. Adopting a dual court system simply means that a given state has two types of judiciary system. The first type is the normal or unitary judiciary system which handles all types of lawsuits or cases, including civil, commercial, family affairs or even criminal cases. The second type of system is known as the administrative judiciary which specializes in considering administrative disputes specified by law, as in some countries, or handling disputes which are essentially of an administrative nature. This nature is to be determined by the competent administrative judiciary power. Some of the countries that adopt this dual court system include France, Egypt, Lebanon,

Saudi Arabia, the Sultanate of Oman and the countries of North African Arabic countries.<sup>10</sup> Despite of that, the UAE does not have an independent administrative judicial system, separate from the normal judiciary system. This means that the UAE state embraces the unitary or normal judiciary system involving several judicial circles to handle all types of lawsuits and disputes irrespective of their different natures, and of course these include administrative disputes. Some of the countries that embrace the unitary or normal judiciary system include the USA, the UK, the UAE, Iraq and Sudan. This could be illustrated as follows<sup>11</sup>:

1. The Emirati legislator has developed so many legislations that go under the administrative law in countries that apply administrative law in its narrow sense. The Emirati legislator applies the theoretical concepts, principles and rules recognized in France and Egypt. Some of these legislations are, for example, the civil service law (now goes under the name of Human Resources Law); laws pertaining to recruitment of special cadres; material and construction companies' regulations and others.
2. The federal judiciary has applied, for many years by now, many of the fundamental administrative principles and theories, which are fully adopted by countries in which administrative law, and administrative judiciary systems (in both narrow and wide senses) were embraced.
3. Article No. 102 of the UAE Constitution stipulates the formation of one federal court or more, to carry out procedures for settlement of administrative disputes arising between the federal authorities and individuals, irrespective of the side of court bench that the federal body occupies.

Article 3 of the law No. 6, on the Establishment of Federal Courts, of 1978, stipulates that federal Courts of First Instance in the capital Abu Dhabi shall be competent to consider all administrative (disputes arising between the Union

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<sup>10</sup> See Mahmoud Mohamed Hafiz; *Administrative Judiciary in Egyptian and Comparative Law*. Dar Al-Nahdha Alarrabiya, 1993, p. 122 and p.166. See also Suliman Al-Tamawi: *Administrative Judiciary: Dar al-Fikr Al-Arabi*, 1st edition, 2015, edited by Abdelnasir Abu Sumharanah and Hussain Ibrahim Khalil, p. 9. Also refer to the following web page <http://www.omanlegal.net/vb/showthread.php?t=1238>

<sup>11</sup> Refer to Majdi Al- Nahri, op.cit. P.29 and Majid Al-Hilo: *Principles of Administrative Law: A Comparative Study*. Dar Al-Qalam, Dubai, 2011, P. 26.

and individuals, whether the union is plaintiff or defendant. Such disputes involve a public persona belonging to the Public Law as a disputant party, in addition to relevance of the dispute to a public facility and embraces the patterns and methods and privileges of public authority)<sup>12</sup> The court may hold its sessions in any capital of the other Emirates, if deemed necessary.

Article No 12 of Federal Judicial Authority Law No. 3 of 1983, provides that rulings of primary courts (of first instance) shall be appealed, in general terms, before courts of appeal and that rulings issued by federal appeal courts shall be appealed before the federal supreme court, pursuant to the provisions of Federal Law No. 17 of 1978, amended by Law No. 3 of 1985, on the regulation of conditions and procedures for appeals to the federal supreme court.

Thus, it becomes clear that administrative disputes in the United Arab Emirates are considered in three judicial stages, like any other type of disputes brought before the unified federal judiciary.<sup>13</sup>

The UAE judiciary, as one of the major authorities in the state, has played a prominent role in entrenching administrative law in the UAE by shouldering the task of looking into so many disputes. The judiciary could have refused to consider such disputes under the pretext of lack of competence to handle administrative disputes. In doing so, the judiciary was driven by the desire to live up to the challenges of the modern age in laying the foundations of justice and building a competent judicial system on solid grounds. In the process, they developed rules and theories to be referred to as sources for administrative law in the UAE throughout the last four decades. The UAE judiciary appreciable endeavor was culminated in bringing stability and discipline in managing administrative transactions within a society that was in dire need for such a disciplined administration abiding by the rules and laws as a guarantee for sustainable social development.<sup>14</sup>

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<sup>12</sup> See Suliman Al-Tammawi, 2015, *op. cit.* , p. 40 and p. 92.

<sup>13</sup> Refer in this regard to . Majid Al-Hilo, *op.cit.* P.26 and Majdi Al Nahri, *op.cit.* p.29

<sup>14</sup> See, Khalifa Al-sha'ali: Introduction to Administrative Law, Ministry of Culture and Information, UAE,2005, P. 13

## **Sources of the Administrative Law in the UAE:**

The Civil Transaction Law No 5 of 1985, with various amendments, determines the sources of civil law in the following order: "... If the judge finds no provision in this law, he has to pass judgment according to Islamic Sharia, provided that the judge must have regard to the choice of the most appropriate solution from the doctrine of Imam Malik and Imam Ahmed Bin Hanbl and if none is found there, then from the doctrine of Imam Al- Shafi'I and Imam Abu Hanifa, as most befits. If the judge does not find the solution there, then he must render judgment in accordance with custom, but provided that the custom is not in conflict with public order or morals and if a custom is particular to a given emirate, then this judgment will apply to that emirate."

The four Imams are the principle Sunni scholars:

1. Imam Anas ibn Malik: Imam Anas was born in Madinah, the city of Prophet Mohamed (PBOH), in the year 93 AH / 715 CE. He was considered the Imam of Hijaz (present Saudi Arabia) of his times. He is the founder of orthodox doctrines of Sunni Islam. His doctrine is based upon several basic principles: The Quran (the holy book of Islam), the Sunna which is basically the recognized saying and deeds of Prophet Mohamed ( PBOH); then consensus (Ijma), that is what agreed upon and accepted by the majority of the first generation of Muslims, that is the close first followers of the prophet (Sahaba); analogical reasoning (Qiyas) where teachings of the Prophet are compared and contrasted with those included in the Quran; public interests whereby certain issues are allowed or prohibited on the basis of whether they serve public interest or not; customs and norms, "dam excuses" to disallow what is deemed corruptive; precedence and preference or juristic discretion (Istihsan). He died in 179 AH / 796 CE.
2. Imam Ahmad ibn Hanbal: He was born in Iraq in Baghdad in the year 164 AH/780 CE. His doctrine is based also on Quran, then Sunna and the Fatwa of the close followers of the Prophet (Sahaba), then analogical

reasoning (Qiyas), precedence; public interests and dam excuses. He died in 241 AH/ 855 CE.

3. Imam Mohammed ibn Idris Al-Shafi'i: He was born in Palestine in the city of Gaza in the year 150 AH / 766 CE. He moved with his mother to Mecca at the age of two. He embraced a compromising position with relation to other Islamic jurists and opinions. His doctrine is based upon the following principles or sources, in order of importance and preference,: The Quran; Sunna; consensus (Ijma); analogical reasoning (Qiyas); norms and customs and then precedence. He documented his works all by himself. He died in the year 204 AH / 820 CE.
4. Imam Abu Hanifa Nu'man bin Thabit: Known also as the "Great Imam, Abu Hanifa was born in Iraq in the city of Kufa in the year 80 AH / 699 CE. The sources from which Abu Hanifa derived Islamic law, in order of importance and preference, are: the Qur'an, the authentic Sunna (known as hadith), consensus (ijma), analogical reasoning (Qiyas), preference or juristic discretion (Istihsan) and the customs of the local population (Urf). He died in 150 AH / 767 CE.<sup>15</sup>

The legislation in the United Arab Emirates as a source of administrative law is represented in sporadic administrative legislations and in administrative legal texts contained in various laws.

No	Sources of the legal system of the UAE are:
1	The Constitution.
2	Legal legislation (in writing)- Civil law – administrative law.
3	Islamic Sharia.
4	Customs and norms.
5	General principle of law.

<sup>15</sup> See Mohamed Mustafa Shalaby: Introduction to the Definition of Islamic Content, Dar Al-Nahdha Al-Arabiya , Egypt, 1985, p. 27 and after.

6	Bylaws- rules and regulations.
7	Individual decisions.

The UAE Civil Law (Civil Code) and other related laws are considered among the most important sources for the subject of the administrative law in countries adopting a unified judicial system (including the UAE), in addition to legal administrative provisions issued by the legislator and the executive authority, in the form of regulations and rules. As for the relationship between civil law and administrative law, the principle is the independence of administrative law from civil law in dealing with administrative issues. This should not rule out altogether the application of civil law on some administrative law issues. **This could be the case in the existence of a legislative provision to which the administration or the competent judge must adhere, or if the administrative judge resolves that, the application of civil law provision is best for achieving a balance between protection of rights and freedom of individuals and public interests.**

The UAE judiciary has played an important and prominent role in establishing and entrenching so many legal administrative theories and regulations within the state as would be explicated later in this study, when discussing the criteria for distinguishing administrative contracts within the UAE state, in administrative responsibility and the lawsuits demanding annulling of administrative resolutions, among other topics.<sup>16</sup>

The UAE legislator has established special courts in response to the requirements of separating judicial competences, such as the authorities for Traffic, Immigration and Labor disputes, and administrative authorities, in addition to other special departments enjoying judicial competences, such as the Commercial Agencies Authority established by the Minister of Economics and Trade.<sup>17</sup>

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<sup>16</sup> Refer to the several publications and references which deal with the administrative law within the UAE state, cited in this study.

<sup>17</sup> See . Khalifa Al Sha'ali , op.cit. p. 98 and after

The Federal Judiciary of the UAE is made up of three judicial levels or authorities, namely primary courts (or courts of first instance); courts of appeal and the federal supreme court (cassation). In the following paragraphs, we will attempt to explain the competencies of administrative judiciary in brief, as follows:

**Courts of first instance:**

The UAE state has one or more courts of first instance, to be held in the capital Abu Dhabi or in any of the other emirates' capitals and these Federal Courts of First Instance, each within their geographic jurisdiction, shall be competent to examine:

1. Civil, commercial and administrative disputes between the Union and individuals whether the Union is plaintiff or defendant.
2. Crimes committed within the territories of the federal capital (Abu Dhabi), except for the issues within the jurisdiction of the Supreme Federal Court, in accordance with Article 99 of the Constitution.
3. Personal Status, and civil and commercial cases and others among individuals arising within the territories of the federal capital.
4. Crimes committed within the geographic jurisdiction of the federal court of first instance in the emirates, as well as cases of personal status and civil and commercial cases, among others, between individuals, which is provided for by the Federal Law No. 6 of 1978.

**Courts of Appeal:**

The UAE legislator has rectified the omission in the Constitution for not providing for courts of appeal by establishing courts of appeal, pursuant to the provisions of the Federal Law No. 6 of 1976. This law stipulates the following: "The Courts of Appeal existing in the Capitals of the Emirates- indicating the courts of appeal in the constituent emirates which were integrated to the federal judiciary- shall be Federal Courts of Appeal" . Accordingly, there shall be courts of appeal in all constituent emirates, except for the Emirate of Dubai and the

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Emirate of Ras Al- Khaimah, in which there are local courts of appeal. The federal courts of appeal are competent in looking into appeal claims brought before such courts on judgments issued by federal courts of first instance and lawsuits against the rulings of judges of courts of first instance and the head and members of the public prosecutor.

### **The Federal Supreme Court:**

The Federal Supreme Court sits at the pinnacle of the UAE judiciary system, that is why it is also referred to as the court of all courts. It is the highest judicial authority in the land and any dispute that may arise between one or more constituent emirates and the Union shall be referred to this court for settlement. It is the only competent authority for interpreting the terms and provisions of the Constitution and ensuring that laws, decrees and regulations are not in conflict with the Constitution. It is also the competent authority to look into conflicts in federal and local jurisdictions and discipline claims. It also has jurisdiction on crimes that directly affect the interests of the Union. (The Federal Law No. 3 of 1973, with amendments, governs the rulings of the Federal Supreme Court, together with Article No. 99 of the Federal Constitution of 1971).

To ensure the absolute independence of the Federal Supreme Court and the judiciary in general, the Constitution stipulates in Article No. 96, that: “The Federal Supreme Court consists of the Chief Justice and a maximum of five judges who are appointed by decree issued by the President of the UAE after the approval of the Supreme Council. The law specifies the number of the chambers of the Supreme Court, its regulations, procedures, the conditions of service and retirement of its members, and the conditions and requirements that they must meet.”

Article No. 97 of the Constitution stipulates, “The Chief Justice and the judges of the Federal Supreme Court may not be removed from office while they administer justice. Their tenure of office may not be terminated except for one of the following reasons:

1. Death.
2. Resignation.

3. The expiration of the term of the contract of those who are appointed by contract or the completion of the term of secondment.
4. Reaching the retirement age.
5. Proved disability to perform their duties for health reasons.
6. Disciplinary dismissal for the reasons, and by the procedures, provided in the law.
7. Assign other posts to them after their consent.”

Article No. 101 of the Constitution states that “A judgment of the Federal Supreme Court is final and binding upon everyone .If the Court, when considering the constitutionality of a law, legislation or regulation, holds that a federal legislation is inconsistent with the federal constitution, or that local legislation or regulation under consideration contains provisions which are inconsistent with the federal constitution or a federal law, the concerned authority in the UAE or in the Emirate, as the case may be, shall immediately take the necessary measures to remove or correct the violation of the Constitution”

It is worth noting that imposing administrative control has occupied a very prominent place of late, after the expansion of the range of the requirements for building a modern state. Some administrative units and departments, in both federal and local government levels, exercise self-control procedures, which were dictated by the demands of the modern age. This is evident in the wide spread adoption of quality control criteria and systems within government departments. Highly advanced systems of worldwide recognition, such as the (ISO) and (SIGMA SIX) systems and the emergence of the (DUBAI STANDARDS) system as advanced quality systems, has found its way into government and local authorities as a result of a binding directive issued by the Cabinet of Ministers.

The Constitution provides for establishing a State Audit Institute to perform financial control on the Union accounts. Article No. 136 of the Constitution postulates, “There shall be established an independent department headed by a public auditor who is appointed by decree to audit the accounts of the UAE, its agencies and to audit any other accounts assigned to the mentioned department for auditing in accordance with the law.

The law regulates this department, determines its provisions and the responsibilities of its staff, and the guarantees for the department's head and staff so that they can perform their duties in the best way.”

The Federal Supreme Court has emphasized the importance of the principle of legality within the state. The very first ruling issued by the court says, “The modern state is established upon the principle of legality, which can be defined briefly as the supremacy of rule of law. The requisite for this principle is that the state shall be bound by and apply the existing law rather than acting upon whim in whatever pertains to its workings. It enables individuals to control the functional performance of the state through legitimate means and methods and rectify the situation whenever the state fails to perform outside the limits of law, be it intentionally or through negligence”.<sup>18</sup>

Article No. 41 of the UAE Constitution states that, “Every person shall have the right to submit complaints to the competent authorities, including the judicial authorities, concerning the abuse or infringement of the rights and freedoms stipulated in this Part.” Article No. 3 of the UAE Constitution emphasizes the immunity of judges, where the first Article of the Federal Law No. 3 of 1983 on the issue of the Judiciary, stipulates the following: “Justice is the basis of rule. In performing their duties, judges shall be independent and shall not be subject to any authority but the rulings of Shari’a, the laws in force and their own conscience, nor may any person or authority prejudice the independence of the judiciary or interfere in the affairs of justice.”

Article No. 99, Paragraph (5) of the Constitution stipulates: “Trial of Ministers and senior officials of the Union appointed by decree regarding their actions in carrying out their official duties on title demand of the Supreme Council and in accordance with the relevant law”. In the following, I will explain how local administrative disputes are dealt with, then I will explain the procedures for settlement of federal administrative disputes:

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<sup>18</sup> Refer to the Federal Supreme Court, ruling No (5), session dated 21/6/1978 and No (87), session dated 29/5/1978.

### **First: Local Administrative Disputes:**

According to the Constitution, the general rule is that the local judiciary has the jurisdiction on issues which were not vested by the constitution to the federal authorities. This was established by the Dubai Cassation Court: "The provision of Article No. 104 of the UAE Constitution is to be interpreted – and as exercised by the judicial practice of this court - in a manner that leads to the fact that the judiciary in the Emirate of Dubai is independent from the federal judiciary and the competence of this court , in light of this understanding of this article, include all disputes within the Emirate , to the exclusion of federal disputes of special nature, pursuant to Article No. 102 of the Constitution. Such courts should adhere to the limitation of its mandated competence and should not go beyond it or forfeit any of its assigned jurisdiction and shall not usurp the rightful jurisdiction of any other national court.<sup>19</sup>

### **Second: Federal Administrative Disputes:**

Federal Judiciary holds the competence and jurisdiction in whatever the Federal Constitution of 1971 has assigned to it. However, the interference of geographic competence has led to the amendment in the jurisdiction of courts in examining administrative disputes arising within the geographic jurisdiction of the courts of Dubai and Ras- Al-Khaimah or the other emirates, where:

1. The administrative disputes that arise between the Union and individuals within the special geographic location in any place within both emirates (Dubai and Ras Al Khaimah), shall fall under the jurisdiction of the Federal Supreme Court as both a court of first instance and an appeal court.
2. The administrative disputes arising between the Union and individuals in the other emirates (Abu Dhabi, Sharjah, Fujairah, Ajman and Umm Al-Quwain) shall fall under the jurisdiction of federal courts of first instance in accordance with geographic local jurisdiction and shall be appealed before the federal court of appeal and the Federal Supreme Court in the

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<sup>19</sup> Refer to the appeal No 265 of 1994, Dubai Cassation Court, Al-Qada' Wa Al-Tashre'a Journal, Vol. 6, December. P.100-103.

Capital Abu Dhabi, which is the court of final resort. Court rulings within the UAE frequently adopted diverse mechanisms to protect individuals in disputes against administrative authorities with the ultimate purpose of safeguarding the principle of legality. The most manifest features of this attitude could be summed up in the following:

- The UAE judiciary recognizes what could be called the Administrative Decision. The Sharjah Appeal Court has this to say in defining the concept: “It is an announcement or declaration or disclosure on the part of the administration of its binding will to create a certain legal status whenever it is both possible and legally permissible, and was driven by the objective of achieving public interest.”<sup>20</sup> Accordingly, the UAE courts have adopted the use of the mechanism of administrative decision cancellation lawsuit, justifying its decision by the faults that may transpire in the decision causing its annulment or cancellation. This attitude was quite evident in many of the rulings as we shall show in various contexts within this study.
- The UAE Federal Courts also decided that there is no immunity from revocation of an annulled administrative decision and such decision cannot establish a legal status or prejudice an existing legal status. In this regard, the Federal Appeal Court in Abu Dhabi arrived at this provision: “An annulled administrative decision is not immune from revocation and does not hold any validity or can be corrected by a future administrative procedure. The plaintiff against whom the decision was issued may submit a grievance claim. even if the proscribed deadline for submission of grievances has expired or may raise an initial lawsuit before a competent court.”<sup>21</sup> For this particular reason the Federal Appeal Court of Abu Dhabi decided to consider an administrative decision issued by a minister to terminate the services of an employee in the second grade as null and void. Termination of the services of employees in the second grade (under the provision of the laws in force at the time) could only be affected through disciplinary tribunals or a judicial judgment. Accordingly, the court ruling took into consideration the fact that the said minister has acted against law

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<sup>20</sup> Refer to Sharjah Appeal Court, civil appeal No 134 in session dated 27/10/1980.

<sup>21</sup> Refer to Abu Dhabi Appeal Court, civil appeal No 82 of 1994 in session dated 30/4/1994

by usurping the jurisdiction of disciplinary tribunals. Hence, the decision was annulled and repealed entirely.<sup>22</sup>

- The Emirati Judiciary has adopted the principle of tort liability of administration bodies based on error and distinguished between personal and administrative faults. It embraces the understanding that an administration shall be held responsible for damages caused by wrongful administrative acts in various forms including failure to act or perform, negligence or sluggishness in performing the public duty, which might cause damages to individuals or institutions. The Emirati jurisdiction has restricted the range of personal fault and widened the administrative one to ensure further protection for individuals against damages incurred by administrative faults and to encourage officers to quest for excellent performance free from fear of liability.<sup>23</sup>

### **Summary of Chapter One:**

The UAE state has gone through a process of prolonged constitutional development that culminated in the unified state of 1971. The federal constitution was issued in 1971, endorsing a unique system of governance that takes into consideration the specific features and attributes of the Emirati society at its inception in 1971. This peculiar constitutional system cannot be classified as falling under the umbrella of any of the traditional and well-recognized systems.

This system does not embrace the traditional principle of separation of powers, which aims at protecting rights and freedoms. However, this goal was not ignored by the Emirati constitutional legislator, who provided for all kinds of rights and freedoms, along the lines followed by the most established democratic countries.

The Emirati constitution implicitly establishes the principle of the sovereignty of the people and adopts the federal system for the state by a rigid and written

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<sup>22</sup> Refer to Abu Dhabi Federal Appeal Court, appeal No 63 for the year 1996, session dated 11/6/1996.

<sup>23</sup> Refer to The ruling of the Federal Supreme Court, appeal No 5 dated 29/6/1971. See . Majdi Al Nahri, op.cit. p. 461 and after.

constitution which is amendable through special procedures which are different from those for ordinary legislation. The constitution also allows for certain features of the parliamentary system and entails a general tendency of gradual introduction of elements of a parliamentary democracy.

The constitution also establishes the major social and economic pillars of the society, as well as preserving the Emirati identity and the Islamic-Arabic nature of the state. At the same time, the constitution provides for the necessity of integration and cooperation with the international community based on mutual respect and recognition of the principle of sovereignty and non-interference in the internal affairs of other states.

The UAE state has a unitary judicial system (the same courts look into both private and administrative disputes) and not a dual system (two separate systems of courts to look respectively into private and administrative disputes). However, it also applies most of the principles of administrative law recognized in countries with a dual system, such as France.

The Emirati judiciary consists of a federal judiciary, involving courts of first instance, courts of appeal (cassation) and the federal supreme court. In addition to that, local judicial courts consider local disputes, including local administrative disputes.

# *Chapter Two*

## The Concept of the Administrative Contract and its Distinguishing Criterion

To understand any system, one must have a clear knowledge of the grand system according to whose workings the given sub-system is applicable. In studying administrative contracts, it is essential to know how the underlying legal system works and informs the system of administrative contracts and arbitration. This chapter attempts to establish what is meant by the theory of the administrative contract and its criteria.

In this chapter, I will discuss the following requirements:

**Section One:** The administration shall be party to the contract.

(One party to contract shall be a public persona)

**Section Two:** The contract shall be related to the management or organization of a public facility.

(Connection of administrative contract with a public facility)

**Section Three:** Adopting the means and ways of public law.

(It shall include exorbitant conditions which are unfamiliar in private law contracts)

## **Introduction**

We cannot discuss the theory of Administrative Contracts in both Egypt and France without referring to the existence of an independent administrative judiciary, because such independent administrative judiciary in both countries was responsible for the establishment of independent administrative rules, including the theory of administrative contracts. This foundational process has commenced with the inception of the French Council of State (French: Conseil d'État) and the emergence of the administrative judiciary in Egypt. Both were the driving force behind the emergence of a comprehensive theory in this regard.<sup>24</sup>

The criteria for administrative contracts were first settled after the issuance of the (Societe des Garantis) ruling in 1912, which established the principle that the administration shall adopt public law procedures by inclusion of exorbitant conditions as distinctive features in the administrative contract, which are normally inadmissible in private law contracts. The criterion of exorbitant conditions has ever since become the distinguishing criterion for administrative contracts. The other distinguishing criterion is the connection of the administrative contract with a public facility. This was first established with the issuance of the ruling on 6 February 1903 in the Terrier case. This latter verdict was considered to be the foundation upon which the idea of administrative contracts was built.<sup>25</sup>

In Egypt, the jurisdiction of the administrative judiciary was limited and restricted to deal with private administrative disputes. Law No. 9 of 1949 has stipulated that administrative disputes shall be brought either before normal judiciary or before administrative judiciary, and if a case was brought before, any one of the two shall proscribe bringing it before the other. This duality has been finally resolved by the issuance of Law No. 165 of 1955, which stipulates that the

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<sup>24</sup> The General Theory of Administrative Contracts has ensued after the establishment of the French Administrative Judiciary in 1872 and after the issuance of Law No. 112 of 1946; Law No. 9 of 1949 and Law No. 165 of 1955 in Egypt. See Jabir Jad Nassar: Administrative Contracts, Dar Al-Nahdha Al-Arabyia , Cairo, 2004 and after.

<sup>25</sup> See Suliman Al-Tammawi: General Principles for Administrative Contracts, Fourth Edition, Dar Al-Fikir Al-Arabi Publishing House, 1984, P.39 and after; also see Mutai' Ali Hamoud Jubair: Administrative Contract between Legislation and the Judiciary, Dar Al-Nahdah Al-Arabyia, Cairo, 2006, P 70 and after; also see G. Eorges Nedelet and P. Delvove: Droit Administratif, 1984 P. 332 and after.

Egyptian State Council shall be responsible for settlement of administrative disputes.<sup>26</sup>

Before the emergence of the Administrative Judiciary in both France and Egypt, both judiciary systems did not apply administrative rules but followed common judiciary rules and applied civil law principles to administrative disputes.

Although administrative contracts, before the creation of an ad hoc judiciary, were subject to the jurisdiction of the normal judiciary, this normal judiciary applied principles and theories of administrative law also to administrative contracts (cf. supra chapter one).

The specific definition for administrative contracts, accepted in France, Egypt and the UAE, is agreed upon by the established jurisprudence and adhered to in judicial rulings. An administrative contract is (a legal act resulting from the willful desire of two parties; the will of the administration, on the one hand, and the will of a legal persona on the other hand "natural person, or a private or public artificial person". The act has the purpose of bringing about a certain legal effect, such as managing or constructing or organizing a public facility. The ensuing contract shall contain an exorbitant provision or provisions, not familiarly included in private law contracts, which are known to be the methods and conditions in public law).<sup>27</sup>

Administrative contracts concluded by a given administration, do not have the same legal nature nor are they governed by the same legal system. We have to distinguish between two types of contracts, the first of which is the civil law contracts for administration. In this type of contract, the administration adopts

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<sup>26</sup> See Suliman Al-Tammawi, op. cit. P 39.

<sup>27</sup> See Suliman Al-Tammawi, General Principles, op. cit. 1991; Ahmed Salama Badr, Administrative Contracts and BOT Contracts, Dar Al-Nahdha Al-Arabyia – 2nd Edition 2010, P. 1 and after; Abdulaziz Abdulmoniem Khalifa: General Principles of Administrative Contracts, 1st edition, the National Center for legal Publications, Egypt, 2008, P. 5 and after; Aa'ad Ali Al-Humood Al-Qais: The Administrative Contract in Accordance with the System of Administration Contract in UAE, University Bookshop, Sharjah University, 2013; Mohamed Fouad Abdul Basit: Legal Administrative Business- Second Book, The Administrative Contract, Dar Al-Nahdha Al-Arabyia, Egypt, 2012.

See also, Andre de Laubadere and F. Modernep Delvolve : Traite des Contrats Administratifs T.1.,L.G.D.J., 1983; Jean Marierrainaud: Le Contrat Administratif Volonte Des Parties, OU Loi de Service public? R.D.P.,1985; Rene Chapus: Droit Administratif General, Ed. Moncherstien, T. 1. 11e Ed. 1997, P. 1065 and M. Valine: Preccis De Droit Administratif , 1987, P. 161 et.s

private law methods, which are bound by private law provisions and any disputes arising from such contracts are to be settled by normal courts applying normal private law. Examples of such contracts include lease or rent contracts, and contracts for the sale of funds owned as a private property by an administration, and insurance contracts.

The other type of contracts in which an administration may enter, are the administrative contracts. Such contracts are prepared in accordance with the methods and ways of public law and are governed by the provisions of administrative law. Any disputes arising from such contracts shall be settled by the administrative judiciary within the state that adopts a dual judiciary systems. This type of contract is the focus of this study because such contracts call for applying the rules and principles of administrative law in the narrow technical sense of the term; that is, the set of rules distinguished from the rules of general judiciary (rules of private law).

Contracts are deemed administrative as such under two conditions:

1. Specified administrative contracts: Such contracts are explicitly specified by law provisions. Examples of such contracts are: adhesion contracts, public facility contracts, procurement contracts, public works contracts, transportation contracts and employment contracts.
2. Non-specified contracts: law provisions do not necessarily provide and regulate these contracts expressly. Such contracts are considered administrative because they include features of administrative contracts as postulated by both normal and administrative judiciary. In other words, such contracts satisfy the conditions of administrative contracts.

Accordingly, administrative contracts are deemed specified administrative contracts, which are administrative by their intrinsic nature and by their specific features. Administrative contracts are realized only when the conditions and criteria for defining a contract as administrative, set by administrative or normal judiciary, are met.

By extrapolating judicial rulings in France, Egypt and UAE, and from the writings and contributions of experts in jurisprudence specialized in this field, I may

define an administrative contract as follows: “It is the contract that is concluded by an administrative body and explicitly described as such by the legislator, or the contract that involves the intrinsic features of an administrative contract; concluded by a legal public law persona with the purpose of managing, constructing or organizing a public facility, and including exorbitant conditions unfamiliar in private law contracts, together known as the methods and conditions of public law.”

We may derive from the aforementioned definition that to assign the label of an administrative contract (in addition to specified contracts) to any contract asks for the existence of three combined conditions:

1. One of the parties to the contract shall be a public legal persona pertaining to public law.
2. The contract shall be concerned with a public facility (management, construction or organization).
3. The contract shall contain exorbitant conditions unfamiliar in private law contracts.

The following three section shall be entirely devoted to each of these three conditions:

## **Section One**

### **The administration shall be party to the contract**

#### **(One party to contract shall be a public persona)**

A contract shall not satisfy the condition of an administrative contract, in France, Egypt and UAE, unless one of the parties involved is a public legal persona.<sup>28</sup>

The Supreme Court in Egypt has illustrated this by stating that: “it is obvious that a contract whose parties do not involve an administration shall not be considered an administrative contract, because the rulings of public law were set to control the works of the administration but not the works of individuals or private bodies...”.<sup>29</sup>

The French administrative judiciary (French Council of State) has envisaged that an administrative contract shall be deemed administrative only if it involves a legal public person as party to the said contract.<sup>30</sup> Thus, contracts concluded by private persons shall not be considered administrative.<sup>31</sup>

Administrative jurisprudence establishes the condition of a public legal person involvement in a contract to consider such contract administrative in line with the nature of administrative rules, because such rules, together with the rules of public law, were created, in the first place, to govern the activities of public administrative authorities but not private ones.<sup>32</sup>

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<sup>28</sup> Refer to J.F. Prevost: *Ala Recherch du Gritere du Contrat Administratif*, R.D.P., 1971, Pp. 817-841 and L Richer, *Droit des Contrats Administratif*. L.G.D.J 1999 second edition, PP. 103-107. Also see Suad Sharghawi: *Administrative Contracts*, Dar Al-Nahda Al-Arabiya, Second edition, 2004, P.3 and after; Mohamed Saeed Amin: *Administrative Contracts*, Cairo, 2005, P.6 and after, Mohmaed Futooh Osman: *Foundations of Administrative Law for the Emirate of Dubai: A Comparative Study*. Dubai Police College Publications, 1996, P.524 and after.

<sup>29</sup> The Supreme Administrative Court of Egypt, appeal No. 1386 for the year (7) judicial, session held on 7/3/1964, the Collection of Principles settled by the Supreme Administrative Court, year (9), P 763.

<sup>30</sup> J.F. Prenoset, *op. cit.*, PP. 817-841.

<sup>31</sup> [French Dispute Court’s ruling on 16 October 2006 in case Caisse Centrale de Reassurance, refer to REC., T.P.1074]

<sup>32</sup> See, Thrawat Badawi: *General Theory of Administrative Contracts*, 1991, P. 59 and after; Mohamed Saeed Amin, *op. cit.*, P.99 and after and Mohamed Osman Futtouh, *op. cit.* P.524 and after.

The Supreme Administrative Court in Egypt justified this by saying that: “A contract in which an administration is not a party, shall not, under all circumstances, be deemed as administrative, because such rules, together with the rules of public law, were created in the first place to govern the activities of public administrative authorities but not private ones”<sup>33</sup>

Accordingly, contracts concluded between individuals shall not be considered administrative even if one of the parties involved was an authority or corporation of public interest, or intended to undertake a contract pertaining to public interest. Examples of such contracts include contracts concluded between public facilities contractors and recipients of services, which are treated as civil contracts. Similarly, contracts between public facility or public works contractors and individual assistants or auxiliary staff recruited for implementing contracts are civil contracts.<sup>34</sup>

The state, public law federal or local persons, public law government or facility persons, such as public agencies, and professional unions, such as lawyers and doctor’s unions, are good examples of public persona.

Federal Law No. 5 of 1985, on civil procedures within the UAE state (section two, chapter 3) states that the following shall be considered public personas:

- a. The state, emirates, municipalities and other administrative bodies, as per conditions specified by the law;
- b. Public departments, authorities, corporations and institutions to which the law grants the status of a public persona.<sup>35</sup>

In case an individual enters into a contract on behalf or in the interest of the administration and the said administration is not directly involved in the conclusion of the contract, such contract is deemed administrative and the

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<sup>33</sup> See its ruling in session held on 7/3/1964, The set of Principles Established by the Supreme Administrative Court in Egypt, in a session held on 7/3/1964, [ within ten years] P.1042, and its ruling issued on 21 /2/1987, Set of Supreme Administrative Court in Egypt for year(32), judicial, part 1 , principle No. (127), P. 853.

<sup>34</sup> See Majid Raghieb Al-Hilo: Administrative Contracts and Arbitration. New University Publications, Alexandria, 2004, P. 15 and after. Also see The consultations of the Department of Consultations (Fatwa) and legislations of the Ministry of Justice UAE, published in Al-Adala Journal of the Ministry of Justice, Issue (49) October 1986, pp.154-158.

<sup>35</sup> Article No. 92, of the Civil Transactions Law, No. 5, of 1985, amended by Law No. 1 of 1987.

individual who is representative to such contract serves as representative of the administration and concludes the contract on its behalf.<sup>36</sup>

The reason behind determining the public person nature depends upon the time in which the contract is concluded, neither before nor after that specific point of time. Hence, any change of the nature of the person after the conclusion of the contract does not have any impact upon the contract's legal status, if one party to the contract is a public law person. The change in the nature of a public law person to a private law person does not change the status of the contract and does not deprive it of its administrative labeling. The same applies if a private law person's status changes into a public law person. This does not entail that contracts to which such a person is party shall be deemed administrative.<sup>37</sup>

The above discussion reveals that a contract shall be deemed administrative or public law contract only if one of the parties involved [at least at the time of contract conclusion] is a public law person. In other words, we understand that it is settled in the rules created by the French administrative judiciary that the legal nature of a contract is essentially determined at the time of its conclusion, rather than at the time at which a dispute arises. The administrative nature of a contract is not affected by the change in status of the public person who was party to the contractual relationship at the time of the conclusion of the contract.<sup>38</sup>

The Egyptian administrative court has adopted, in its past rulings, the view of the French judiciary. The change in the nature of the public law person who was party to the contractual relationship into a private law person, has no effect whatsoever on the administrative nature of the contract, as long as the condition

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<sup>36</sup> See Jabir Nassar: Concise Introduction to Administrative Contracts, Dar Al-Nahdha Al-Arabiya, Cairo, 2000, P. 21. This applies to cases in which a private law person enters into a contract in the name or on behalf of a public department or a municipality, such as contracts for the distribution of commodities and other basic needs on behalf of the state during times of crises. Such contracts are considered administrative. See Ahmed Osman Ayyad: Manifestations of Public Authority in Administrative Contracts, 1973, P.43 and Mohamed Anas Ja'afer: Administrative Contracts, Dar Al-Nahdha Al-Arabiya, 2000, Cairo, P.21 and after.

<sup>37</sup> See Georgi Shafiq Sari: Criterion for Distinguishing and Determining an Administrative Contract, 1996, P. 15 and after.

<sup>38</sup> See Waleed Mohamed Abbas: Judicial Criterion for Distinguishing the Administrative Contract- a Comparative Study, Dar Al-Nahdha Al-Arabiya, 1st Edition, 2011, P.12 and after. See also the ruling of the Council of State in France C .E, 28 October 2005, Caisse Centrale de Rassurance, Rec., T.,T.P.1074

of a public law person being party to the contractual relationship at the time of conclusion was already established.<sup>39</sup>

However, the Supreme Administrative Court in Egypt has overturned the above-mentioned decision in recent rulings in which the court did not give precedence to the public law nature of the party to the contract at the time of conclusion but to the status at the time of bringing the case before the court.<sup>40</sup> Its recent rulings have adopted the latter position.<sup>41</sup>

The Egyptian jurisprudence experts correctly criticized the recent judicial ruling of the Egyptian administrative judiciary and embraced the French judiciary position in this regard. This new position of the Egyptian jurisprudence violates the principle of subjecting ongoing contractual centers to the continued impact of the old law. In addition to that, the new ruling ignores the will of the parties, who agreed to conclude an essentially administrative contract, and the surrounding circumstances that have led to the conclusion of the contract. Also, we should not forget the problems that could arise regarding the original nature of the contract and the change in the nature of the public law person who was party to the contract at the time of conclusion.<sup>42</sup>

For the above reasons, I embrace here the judicial position that call for respecting the will of the parties who originally concluded an administrative contract and call for the unchanging nature of the contractual relationship to avoid the problems that might emerge out of practical realities. I emphasize the subsection of contracts, which were in force, remained in force and still have productive effects, to judicial rulings that were effective at the time of their

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<sup>39</sup> See Egyptian Administrative Court on case No.(884) , for the year (19) judicial, session held on 5/5/1968, set of administrative court rulings in three years , October 1966-September 1969, P. 312, and case No.(287) for year(18) judicial, session held on 16/3/1969, op. cit.

<sup>40</sup> See the Supreme Administrative Court in Egypt in the appeal No. (1386) for the year (33) ,session held on 18/1/1994K and appeal No.(154) for the year (34) judicial, session held on 2.1.1997, Modern Administrative Encyclopedia, Part (49), from 1993 to 1997, Al-Dar Al-Arabiya for Encyclopedia, 1999, P.43 and P.48

<sup>41</sup> See its ruling issued on appeal No. (5544) for the year (48) Supreme Court, in a session held on 17/1/2006, the Important Rulings of the Supreme Administrative Court for the years 2005-2007, P.279.

<sup>42</sup> See Waleed Mohamed Abbas, op .cit. 2011, PP.19-22.

conclusion, regardless to any future change in the legal nature of the parties involved, be it an administrative or private contract.<sup>43</sup>

The French administrative judiciary is settled on construing the contract concluded between public persons only as administrative under the legal presumption that such a contract is originally administrative by its nature and the status of the parties involved. However, this presumption is simple enough because it does not simply apply in cases where the persons involved are private law persons.<sup>44</sup>

The opposite of the above presumption can be proved by reverting to the traditional criterion that defines a contract as administrative by the existence of the public law person, in combination with the presence of the objective criterion that necessitates the connection of the contract with a public facility or containing an exorbitant condition unfamiliar in private law.<sup>45</sup>

The previous criterion entails that when contracts are concluded between private law persons only, such contracts are deemed purely private contracts and shall be, according to their nature, governed by private law, even if the contract has a connection with a public facility. This was confirmed by rulings of the French judiciary. However, if such contracts were concluded between private law persons with one party representing or acting on behalf of a public law person, such said contracts shall be deemed administrative.<sup>46</sup>

Accordingly, the French Judiciary is settled upon considering that when a private person or body acting on behalf of a public law person concludes a contract, such contract acquires the status of an administrative contract, if the other elements that define a contract as administrative are in place.<sup>47</sup>

The Egyptian administrative judiciary has depended upon the theory of agency to assign administrative status to contracts concluded between private persons.

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<sup>43</sup> See Waleed Mohamed Abbas, *op. cit.* 2011, P. 23 and after.

<sup>44</sup> See J. Walines: *Les Contrats entre Personnes Publiques*. R.D.F.A., 2006 et.s.

<sup>45</sup> J. D. Dreyfus: *Contribution a'une-tre'orle Generale Des Contrats Entre Personnes Publiques* Collection: *Logiques* ,Ed. L'Armattan, 1997, P.P.163ET S .

<sup>46</sup> See Waleed Abbas, *op.cit* P.32 and after.

<sup>47</sup> See F. Lichere: *Les Contrats Administratif entre Personnes Prinees ese Montpellier*, 1998. See also Waleed Abbas, *op. cit.* P34 and after.

The Egyptian Supreme Administrative Court has stated, in its ruling issued on 7 March 1964 that: “whenever it was made evident that a private entity, or individual, has entered into a contract on behalf of the administration, or serving the interest of the administration; such a contract shall be deemed administrative, if the other elements of administrative contracts were also present. (Sentence issued on 7 March 1964 on Appeal No. (1558) for the year (7) judicial)

The Court of Disputes in France decided, in its famous ruling, issued on the Peyrot case, on 8 July 1963, to assign administrative status to contracts concluded by mixed-economy companies (Sociétés d'économie mixte ). These companies owned the concession right to construct and utilize roads. The Court of Disputes' decision was based on the argument that such activities are essentially carried out by the state or through the agency of other mixed-economy companies on behalf of the state (pour le compte de l' État)<sup>48</sup>. The application of the Peyrot ruling was limited to public works contracts concerned with road construction, concluded by mixed-economy companies which owned the concession to construct public facilities or works. However, the French Council of State has extended the range of application of this ruling to include contracts concluded by private companies as well, as established by the ruling on the case of A.R.E.A of 3 March 1989.<sup>49</sup>

In light of the above discussion, it can be concluded that the general principle in Egypt, France and the UAE is that contracts concluded by private persons shall be subject to principles of private law, even if such contracts are related to public facilities. This principle is countered only (i) by the exception related to the theory of agency as provided for in civil law or administrative law, and (ii) by the exception specifically linked to public works contracts concluded by mixed-economy or private companies and closely related to road construction, such as building bridges and tunnels.

It is worth noting here that the existence of the administration as party to the contractual relationship is not sufficient to distinguish between the two types of

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<sup>48</sup> See T.C., Juillet, 1963, Ste' entreprise Peyrot In Eaata P. 603.

<sup>49</sup> See C.E., 3 Mars 1989, Ste' des Autoroutes de La Region Rhone-Alpes, Rec., 69 et.s

contracts concluded by an administration. This subjective condition must be accompanied by the objective criteria of the necessary connection of the contract with a public facility and that the methods and conditions the public law shall be followed when implementing the contract.

## **Section Two**

### **The contract shall be related to the management or organization of a public facility**

#### **(Connection of administrative contract with a public facility)**

Since the beginning of the Twentieth Century, the French Council of State has adopted a criterion that depends upon the intrinsic nature of contracts to determine whether a contract is administrative or otherwise. The key element in this principle is the connection of the said contract to the activity of a public facility as a criterion for distinguishing administrative contracts from private law contracts. This was established, in the first instance, by the famous Terrier ruling, issued in 1903, when the State Commissioner Jean Romieu reported that whatever enters into the organization and operation of public national or local facilities shall fall under the jurisprudence of the administrative judiciary and shall be labeled as administrative work. Since then, the French Council of State has issued numerous rulings based upon the notion of the public facility as a criterion to distinguish administrative contracts from private law contracts.<sup>50</sup>

The Egyptian administrative judiciary has applied the criterion according to which an administrative contract must be connected to a public facility in order to qualify as administrative. The Supreme Administrative Court in Egypt stated that: "The administrative contract, as defined by this court, is a contract in which

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<sup>50</sup> See rulings of the French judiciary in this regard: C.E,6 Février 1903, S.,1903-3-25 Conclusion Romiau, Note Hauriou ,C.E., 4 Mars 1910 the rond ., Rec.,P.193 , Concl. Pichat . S. 1911.3.1917, Concl. Pichat, Note Hauriou . d.1912.3.57. Concl.Pichat., R.D.P.1910., 249, Note/Jeze. Also see, for commentary on the above, Suliman Al-Tammawi , op. cit. P.38 and after, Mohamed Abdulwahid: The Nature of Administrative Contract, Cairo, 1995, Dar Al-Nahdha Al-Arabyyia, P. 70 and after, Georgi Shafiq, Criterion for Distinguishing and Determining an Administrative Contract, Dar Al-Nahdha Al-Arabyyia, 1996 , P.36 and after.

the administration enters as a contracting party and is related to the activity of a public facility in terms of organizing or operating of the said facility and to the purpose of achieving its own objectives and meet its requirements in serving the public interest.”<sup>51</sup> The essence of the administrative contract is that: “The administration shall be party to the contractual relationship and [this relationship] shall be related to the activity of the public facility in terms of organization or operation of the said facility and to the purpose of achieving its own objectives and meet its requirements in serving the public interest and what it takes to favour it as opposed to the interest of private individuals.”<sup>52</sup>

The idea of connection to a public facility is meant to indicate that the administrative contract is concluded by a public law person and to the purpose of managing or running a public facility.

The Supreme Federal Court in the UAE has also issued a similar ruling in a contractual dispute in which the telecommunication company, Etisalat, was one of the contracting parties: “The bidding and tendering law applies only to biddings and tenders issued by the government authorities and departments to meet their requirements, in accordance with article I of the said law, whereas the “Etisalat” company is a joint stock company of private law persons...”<sup>53</sup>

Accordingly, a contract concluded by an administration, using methods and means of public authority is considered an administrative contract. These contracts shall be concluded with the purpose of managing a public facility [such as adhesion and concession contracts] or to partake in running public facilities [such as procurement, transportation or services rental contracts], or the subject of the contract is concerned with realizing one of the objectives of such public facilities [such as contracts in which an entity owns the concession to provide a

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<sup>51</sup> The Supreme Administrative Court in Egypt appeal No. (1383) for the year (35) Judicial, session held on 8/5/1995, the Modern Administrative Encyclopedia, op. cit., part (49) , P.58.

<sup>52</sup> The Supreme Administrative Court in Egypt, Appeal No. (559) for the year (11) Supreme Judicial court, session held on 24/2/1968, Set of Rulings from 1955 -1995, principle No. (2), P.91 and after.

<sup>53</sup> Supreme Federal Court in UAE, Appeal No. (486) for the year (18) , civil, session held on 21/10/1997

specific service or a commodity by virtue of contracts concluded directly with recipients of the services...etc.].<sup>54</sup>

Hence, an administrative contract must be related to a public facility, be it for the purpose of organization, management or operation or contribution to its operation. This condition is deemed essential because it is the one that justifies the connection of such contracts to the public interest, which in turn is the goal of all public facilities in general terms. The absence of this condition might be quite sufficient to deprive a contract from being classified as administrative.<sup>55</sup>

The Egyptian administrative judiciary has ruled that the existence of a connection between the contract and a public facility, in addition to adoption of methods and conditions of public law [privileges of public authority] are essential for granting the status of administrative contract. On the other hand, the French administrative judiciary is settled for the mere existence of one of the two elements to grant the status of an administrative contract, that is either the presence of the connection with a public facility or the existence of the privileges of public authority. That is why this principle is called in the French legal jargon as the alternative principle [principe alternative].<sup>56</sup>

The notion of the public facility [Le service public] represents the cornerstone [pierre angulaire] in administrative law upon which most theories and rules of

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<sup>54</sup> See Mohamed Anas Ja'afer: Administrative Contracts, Dar Al-Nahdha Alarabyia, Cairo, 2003, P. 23 and after; Tharwat Badawi, op. cit. P. 75 and after, and Waleed Mohamed Abbas, op. cit., P. 59 and after.

<sup>55</sup> See the Supreme Administrative Court in Egypt, session held on 24 February 1968 and session held on 3 April 1976, in case No. (12) for the year (14) Judicial, Set of Rulings for the year (12), P. 557 and for the year (21) judicial, P.211, and session held on 28 December 1985, in the appeal No. (182) Judicial. In the last ruling, the court has decided that the contract for the installation and usage of the telephone concluded between a certain individual and the General Egyptian Corporation for Wired and wireless communications [The Egyptian Telecommunications Company now] shall not be deemed administrative because it was not concerned with organizing, managing operating or contributing to operating or managing a public facility.

<sup>56</sup> See Mohamed Anas Ja'afer: The Reference in Public Law: Foundations and Origins of Administrative Law, 1984, P. 192 and after; Mohamed Saeed Amin: The General Principles of the Rights and Obligations of a Contractual Party with the Administration in Implementing the Administrative Contract, a PhD thesis, Ain Shams University, 1983, P. 46 and after; Waleed Mohamed Abbas, op. cit. P. 49 and after, and Ch. Eisenmann: Cours de Droit administratif L.G.J.T.,1, P.22 ETS.

public law and administrative law in France, Egypt and the UAE were established, particularly the theory of administrative contract.<sup>57</sup>

This idea has emerged since the French Council of State issued the Rothschild ruling on 6 December 1855. The principle acquired prominence after the French Court of Disputes issued the ruling on the case of Blanco, on 8 February 1873. Eventually it was widely spread after the French Council of State issued its ruling on the famous Terrier case and the Fottry case in 1908 until now.<sup>58</sup> By the advent of the twentieth century, the administrative contract became closely tied to the idea of the public facility as the criterion for distinction.<sup>59</sup>

It is well established in the rulings of the Egyptian administrative judiciary that to grant the status of administrative contract, the subject of a contract must be connected with a public facility, be it for its organization, utilization, operation, or assisting in its operation, or through exploitation of the public facility itself.<sup>60</sup>

There were various definitions put forward for the concept of public facility, but they generally agree upon two specific elements that must be available. The first element is organic, represented in the administration or the organization that carry out the activity. The second element is objective, represented in the type of service or the activity, which aims at satisfying public needs, which the public authority deems as obliged to satisfy directly or under its own supervision and responsibility. If any project involved these two elements, it satisfies the requirements for being described as a public facility and is to be governed by systems of administrative law.<sup>61</sup>

With the expansion of economic activities in different countries and the adoption of the philosophy of free economy, the role of the individual was augmented without diminishing the role of the state. Individuals were assigned the task of

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<sup>57</sup> See Ch. Eisenmann, op. cit. P.22.

<sup>58</sup> See G. Bribant: *Le Droit Administratif Francais*, Dalloz, 1988, 2nd Ed. P.125, and S.Y. Gaudemet: *Les Methodes du Juge Administratif*, L.G.D.J, 1972, PP. 264-266. See also Waleed Abbas, op. cit. P.49 and after.

<sup>59</sup> See Mohamed Saeed Amin, op. cit. P.46 and after.

<sup>60</sup> See the Supreme Administrative Court in Egypt, Appeal No. (599) for the year (11) judicial , session held on 24//1968, in the Set of Principles decided by the Court in forty years , P.119.

<sup>61</sup> See Andre De Laubadere; J. C. Venezia and Y. Gaudemet: *Traite de Droit Administratif*, L.G.D.J., 1994, T.1., 13Ed, P.37 ET S. Also, see Jabir Jad Nassar; *Administrative Contracts*, op. cit., P.35 and after.

managing public facilities under the control and supervision of the state, with the purpose of providing public needs. In the light of the above developments, the French, Egyptian and UAE administrative judiciary systems have adopted an objective criterion in defining the concept of the public facility, focusing on perceiving the public facility through the nature of the activity it undertakes and whether such activity is geared towards public benefit and satisfaction of public needs. The French Judiciary is currently settled upon this definition.<sup>62</sup>

The rulings of the Egyptian administrative judiciary have also established the adoption of the objective criterion of the public facility. It argues that works, which are not related to public interest, shall not be classified as public facility works. Accordingly, the Egyptian judiciary defines public facility as any project that the state establishes or whose management it supervises, established by the state or supervised and operated continuously, drawing upon a public authority support to meet the public needs. The main characteristic of a public facility is that the project should be pertaining to public benefit and its ultimate goal is to satisfy public collective needs or provide a public service.<sup>63</sup> The Supreme Administrative Court in Egypt has stated in this regard that the public facility is any project established by the state or whose management is under the supervision of the state to the purpose of provision of public needs for non-profit purposes and to satisfy public benefit and interests. <sup>64</sup>

The UAE legislator upholds that associations of public benefit are established to provide a public interest as they partake of the administration's obligation in satisfying public needs or the needs of a specific category of the public for non-profit purposes. The first article in the Federal Law No. 6 of 1974, regarding public welfare societies, amended by the Federal Law No 20 of 1981, stipulates that such societies are: " any assembly (group) having a regulation valid for a limited or unlimited period, comprising natural or artificial persons, for the purpose of achieving a social, religious, cultural, scientific, educational,

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<sup>62</sup> See M. Bourjol: *Droit Administratif*, P.1, L Action Administratif, Ed., Masson Et Cie, 1972, P.290 et. S.

<sup>63</sup> See The administrative judiciary court, session held on 2/6/1957, Set of principles, year (11), op. cit. P. 493; see also the supreme Constitutional Court in its ruling issued on 9 May1998 on case No. (41), for the year (19) judicial constitutional, The Complete set, op. cit. P.1302 and after.

<sup>64</sup> See the Supreme Administrative Court in Egypt, session held on 9/2/1993 regarding appeal no. (3703) for the year (33) judicial, the Encyclopedia, op. cit., part (35) P. 280 and after.

professional, feminine, innovative, or an artistic activity, or provision of humanitarian services, or for serving a charity or consolidation purpose, whether through financial or moral assistance, or by know-how, seeking in all its activities, achievement of Public Welfare without obtaining financial profit...”.

The Federal Constitution of the UAE provides in Article 60/5 that the Cabinet of Ministers shall be responsible for setting the regulations for the organization of public departments and authorities. This provision entails that the legislator has assigned a constitutional competence to the Cabinet of Ministers – as an executive authority – restricted only to setting the organization of public authorities and does not entail the competence to establish such public facilities. This is so because the establishment of public facilities is the responsibility of the legislative power. Furthermore, the UAE Federal Constitution provides for the distribution of the competence to establish public facilities between federal and local authorities within each emirate as follows:

1. The Federal authorities shall be responsible for the establishment of federal facilities, as provided for in Article No. 120 of the UAE Constitution, the most important of which include, defense, federal security, telecommunication and postal services, federal road construction, education, health, electricity supplies, and federal media... etc.
2. The local emirate authorities shall be responsible for the establishment of its own local facilities, as provided for in Articles No. 117 and 118 of the UAE Constitution. The essence of this provision is that each emirate shall be responsible for the creation of its own government instruments, including keeping law and order within its own territories, provision of public facilities and development of social and economic standards within the emirate. It is possible that two emirates may, by prior approval of the Federal Supreme Council, enter into political or administrative unity; or unify all or part of their public facilities or create a joint administration to operate any given public facility.

In light of the above, it is possible to divide public facilities, which satisfy public needs, into three categories:

- A. Activities carried out by public entities to satisfy public needs, constituting all activities that are labeled by the state as pertaining to public facilities, such as the activities of ministries and public institutions established to satisfy public needs in all fields.
- B. Activities carried out by private entities but indirectly satisfy public needs, that is to say, the main purpose of such entities is profit making. Such entities include private schools, universities, hospitals and clinics, which are essentially established for profit-making purposes through provision of educational and health services.
- C. Activities carried out by private entities by license from the administrative authority that involve certain conditions to ensure the proper, organized and regular operational practice of the facility. Such facilities are called actual, which are established by a special license known as public utilities concession.

According to the rulings of the French and Egyptian administrative judiciary, a contract is deemed administrative if it contains implementation of the public facility itself on the part of the contractual party other than the administration; constitute part of the different ways in which the public facility is to be implemented or is based upon participation or contribution to the implementation of a public facility.<sup>65</sup> The French administrative judiciary was quite specific about the idea of connection of the administrative contract with a public facility because the French judiciary upholds the idea of a public facility as an objective standard for the distinguishing criterion for administrative contracts, independent of the other condition of exorbitant conditions. On the other hand, the Egyptian administrative judiciary has adopted a broad conception of the idea of the connection between the administrative contract and the public facility. It does not set any conditions on how this connection should be realized, as it is possible that such connection may be achieved through several means including organizing, exploiting, operating or contributing to its operation. This is attributed to reliance of the Egyptian administrative judiciary

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<sup>65</sup> See Waleed Abbas, *op. cit.*, P.69

upon the criterion of exorbitant conditions as complementary standard for distinguishing criterion.<sup>66</sup>

The Egyptian administrative court has confirmed this understanding by ruling that the distinguishing criterion for administrative contracts, as opposed to other types of individual and private law contracts concluded by the administration, is not the status of the contractual party but rather the subject of the contract itself, whenever it is connected to a public facility and in whatever way, be it organization, exploitation, operation or contribution to operation or utilization through the contract. Thus, this criterion stands at an equal degree of importance with the exorbitant conditions one in defining the administrative contract.<sup>67</sup>

The engagement of the state in economic activities, with the participation of individuals in many fields using methods and conditions of the public law, has led to the emergence of industrial and commercial public facilities. Even if such institutions were governed originally by the private law and were based upon civil contracts, yet this did not preclude their acquiring some of the features of administrative contracts and being governed by provisions of public law. This is the case if such contracts contained some exorbitant conditions or being subject to a system, which is unfamiliar in normal law<sup>68</sup>; their subject contained implementation of public works; implementing the public facility itself by the contractual party or implementing works in the public domain.<sup>69</sup>

The rulings of the Egyptian administrative judiciary are settled upon the understanding that contracts concluded between economic facilities and those who benefit from their services are considered private law contracts for the absence of the distinguishing features of administrative contracts in such contracts.<sup>70</sup> The Supreme Administrative Court in Egypt has ruled that the

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<sup>66</sup> See Waleed Abbas, *op. cit.* P.69

<sup>67</sup> Rulings of the Administrative Court in case No (222), session held on 2/6/1957, and case No. (3480) mentioned earlier, and in session held on 25/6/1961 in case No (1184) for the year (14) judicial, *The Complete Set of Rulings in 15 years*, *op. cit.* P. 1853

<sup>68</sup> See J. M. Rainaud: *Le Contrat Administratif , Volonte des Partiesoul oi de Service Public. R.D.P., 1985, Pp. 1183-1203.*

<sup>69</sup> See Waleed Abbas, *op. cit.* PP. 70-71.

<sup>70</sup> The Supreme Constitutional Court in session held on 19 January 1980, in case No (7) for the year No (7) Judicial, disputes, *The Complete Collection*, P. 244.

relationship between economic facilities and those who benefit from their services is a contractual relationship governed by the provisions of private law in accordance with the nature of such facilities and the commercial bases upon which they operate... “And that the distinguishing features of administrative contracts are not available in such contracts.”<sup>71</sup>

From the discussion above, it is evident that the French administrative judiciary has adopted, since its inception, the connection with a public facility as the sole distinguishing feature for defining administrative contracts, irrespective of the other elements or conditions contained in the contract. However, in both Egypt and the UAE, this standard is not held sufficient, in itself, to determine the administrative status of a contract, unless it is accompanied by a complementary standard based upon following the methods and privileges of public law.

### **Section Three**

#### **Adopting the means and ways of public law**

#### **(It shall include exorbitant conditions which are unfamiliar in private law contracts)**

Jurisprudence associates the necessity of adopting the methods and privileges of public law, as a distinguishing criterion for administrative contracts, with the idea of exorbitant conditions (*Les clauses exorbitantes du droit commun*), which are unfamiliar in private law provisions. This idea has started in France with respect to its administrative relation in the theory of administrative contracts as early as the time when the French Council of State issued its ruling in the *Vosges’s* case on 31 July 1912.<sup>72</sup>

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<sup>71</sup> Also see the Supreme Administrative Court in its ruling issued on 18 November 1989, appeal No (2644) for the year (30) judicial Supreme, the Complete Collection of Principles in 40 years, op. cit. P.120.

<sup>72</sup> See I. Richer, op. cit. P.87 and after. See also Mohamed Saeed Amin, *Administrative Contracts*, op. cit. P. 68 and after.

Jurisprudence establishes that administrative contracts must contain exorbitant conditions unfamiliar in private law provisions as an interchangeable distinguishing criterion in France but complementary in Egypt and the UAE.

It is possible to claim here that the judiciary, both in France and Egypt, did not arrive at an all-embracing definition of the exorbitant conditions and restricted the concept to its being unheard of in contracts concluded under the provisions of private law. The French scholar M-Waline argues, in this regard, that the exorbitant conditions are the ones that are not usually included in private law contracts. That is either because such conditions are deemed void, if included in private law contracts, or because such conditions are included in contracts by the public authority by virtue of its role in preserving public interest. This feature is alien to contracts concluded by private law persons among themselves.<sup>73</sup>

Due to the difficulty of providing an all-embracing definition for exorbitant conditions, and due to the rapid and continuous change in this field, jurisprudence in France, Egypt and UAE incline to make do with pointing out some forms of exorbitant conditions derived from judicial rulings, the most important of which include<sup>74</sup>:

1. Conditions that involve practice of public authority's power which include:
  - A. The conditions which involve the privileges enjoyed by the administration compared to the other contractual party. In other words, the administration decides to make use of its public law privileges and rights to impose procedures and methods, provided for by public law, in such contracts. In the following part of the chapter, I will give some examples of the above. The first is the power of administration to implement the contract directly, such as having the right to set a debt executive deed (bond or policy) by its own decision

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<sup>73</sup> See M. Waline: *Precis de Droit Administratif*, Ed., Mont Chrestien, 1969, P. 349; J. D. Preyfus, *Note Souec. A. de Paris*, 11 Octobre, 2005, *Ban Asbestos France C etat Francis A.J.D.A*, 2006, PP. 45-46.

<sup>74</sup> See Jabir Jad Nassar, *Administrative Contracts*, op. cit. P. 42 and after; Mohamed Saeed Amin, *Administrative Contracts*, op. cit. P. 69 and after and Waleed Abbas, op. cit. P.81 and after.

and implement such policy upon the assets of the other contracting party. Another example is when contracts contain conditions that force the other contracting party to submit to administration supervision, guidance and control, throughout the period of implementation of the contract. It also includes cases involving the right of the administration to levy penalties on the contracting party in case the latter violates his contractual obligations. It also includes the right of the administration to amend contractual obligations against fair compensation to the other contractor and the right of the administration to take over all or part of the insurances as compensation for damages incurred upon the administration by the other party's violation of contractual provisions.

- B. Conditions that include granting the other contractual party powers with regard to third parties include concession contracts. Such conditions involve provisions that grant the contracting party the right to collect fees from users of the public facility. They also include the right to practice some of the police functions; the right to seize properties for constructing buildings for public facilities; the right to obtain benefit from non-possessory easement rights; as well as contracts pertaining to public works, including giving special privileges to contractors, such as temporary usurpation of real estates.
2. Conditions that can only be interpreted or implemented in light of the administrative contract theories, which include<sup>75</sup>:
- A. The right of the other contracting party to receive compensation for damages incurred by inversion of the economies of the contract, which could only be interpreted through administrative contract theories and the theory of financial balance for administrative contracts.
  - B. Conditions relating to the review of agreed upon prices in light of the fluctuations that may take place during the implementation of the contract. This may be understood as direct application of the theory of force majeure in administrative contracts.

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<sup>75</sup> See Mohamed Saeed Amin, *Administrative Contracts*, op. cit. PP. 70-71.

3. Conditions derived from the document of terms and conditions:

These are the conditions set by the administrative authority in administrative contracts. These conditions are usually unified, prior and typical conditions, for each separate type of administrative contracts the administration wishes to conclude. These conditions are included in the terms and conditions document (Cahier Des Charges), which is stipulated as an integral part of the contract and complementary to the contractual provisions.

It is established in the French administrative judiciary that referral to this document (Cahier Des Charges) does not necessarily indicate affecting exorbitant conditions, unless the document includes exorbitant conditions, which are unfamiliar in private law provisions.<sup>76</sup>

The question arises concerning to what extent we can consider the provision that assigns the right of termination solely to the administration as an exorbitant condition. The French Court of Disputes, as well as the French Council of State, has envisaged that the termination of contract provision by the sole discretion of the administration represents an exorbitant condition in relation to ties with private law.<sup>77</sup>

Similarly, the Egyptian administrative judiciary has established that the provision that permits the termination of contract by the sole discretion of the administration is considered an exorbitant condition which assigns administrative status to the contract containing such a provision. The Supreme Administrative Court issued a ruling on 22 April 2003 with this understanding. The Court's decision stated that the contract under scrutiny "was concluded by a public authority, which enjoys the nature of a public law person. The contract, furthermore, is connected with a public facility ... The contract also contained exorbitant conditions, whereby it is stipulated in the contract that the administrative party has the right to terminate the contract by its own sole discretion, without need for prior

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<sup>76</sup> See Waleed Abbas, *op. cit.* P.85 and after.

<sup>77</sup> see Waleed Abbas, *op. cit.* P. 87 and after.

consent of the other party".<sup>78</sup> Hence, it is considered an administrative contract.

**The Extent to which legislative stability condition is considered as a familiar condition:<sup>79</sup>**

The condition of legislative stability means the freezing of the national law of the state entering into a contractual relation as it was perceived at the time of contract conclusion. It indicates that the state shall refrain from affecting any amendment or change on the provisions of its national law, which might prejudice the ongoing valid contractual relation between the state and the private contractor. The concept of legislative stability is multifaceted, including:

1. Legislative stability condition may take a general form; that is, if the state covenanted to non-application of all recent legislations upon the contractual relationship in some types of administrative contracts.
2. The legislative stability condition may be partially construed, that is, the pledge is restricted to the non-application of some internal laws to the exclusion of other laws, such as the non-application of legislations pertaining to taxation policies.
3. The legislative condition may be of absolute nature, such as when the state pledges the non-application of any new legislation on the contractual relationship, which is the most common feature of all administrative contracts.
4. It may take a relative form, such as when the state pledges to avoid disruption of the economic balance and, hence, prejudice the interests of the private contractor.
5. It may take the extended character, such as when the pledge is valid throughout the term of the contractual relationship.
6. It may have a temporary nature, such as when the validity of the pledge is limited to a specific period and by the expiry of that period the state may

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<sup>78</sup> The Supreme Administrative Court in Egypt, appeal No (4063) for the year (45), judicial. Also see its ruling issued on 21/12/2004, on the appeal No. (1482) for the year (45), judicial, The Collection of Important Principles 2005-2007, op. cit., P. 619.

<sup>79</sup> See N. David, *Les Clauses de Stabilité dans les Contrats Petroiliers*, Questions D un Praticien, J.D.I., 1986, Pp. 79-107. Also see Waleed Abbas, op. cit., P. 91 and after.

revert to applying state laws on the contractual relationship with the private contractor.<sup>80</sup>

Most countries embrace the condition of legislative stability, especially in contracts related to investment, to protect and encourage investors. This position was recommended by the International Law Forum in its session held in Athens in 1979. The forum resolved that "it is possible for the parties to agree that the provisions of the local law which govern the contract are the laws in force at the time of contract conclusion."<sup>81</sup>

The Egyptian jurisprudence indicates that the condition of legislative stability and contractual stability are exorbitant conditions compared to general rules and principles. Hence, its existence is a proof of the administrative nature of a contract.<sup>82</sup> The Egyptian jurisprudence recognizes that the main idea behind administrative contracts resides in the choice on the part of the administration of the methods and means of public law. This implies that contracts shall contain exorbitant conditions unfamiliar in private law, which is an evidence for the willingness of the administration to apply the methods and conditions of private law.<sup>83</sup>

According to the above, the presence of the administration as party to a contract, or the direct connection of a contract to the activity of a public facility, does not make such a contract administrative. The contract must contain exorbitant conditions, unfamiliar in private law, to be distinguished as administrative, that is, in addition to the existence of the previous conditions. The rulings of the French Council of State and the French Court of Disputes recurrently confirmed

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<sup>80</sup> See T. Walde: *Stabilité du Contrat, Règlement des Litiges et Renégociation Mécanismes en Faveur d'une Communauté d'intérêt dans la coopération internationale pour le développement des ressources minérales* Rev. Arb, 1981 PP. 293-210. See also Waleed Abbas, *op. cit.* P.93 and after.

<sup>81</sup> See *Annuaire De L'Idi*, 1979, Vol. 58, T.2., P.192, Article 3.

<sup>82</sup> See Jabir Jad Nassar: *B.O.T. Contracts and The Modern Development of Concession Contracts: Critical Study of the Traditional Theory of Concession Contracts*, Dar Al-Nahdha Alarabyia, 2002, Cairo, P. 52 and after. Also see Waleed Abbas, *op. cit.* P. 97 and after.

<sup>83</sup> See Tharwat Badawi, *op. cit.* 1995, P. 91 and after; Mohamed Abdulwahid Al-Jimaili, *op. cit.*, P.117 and after; Waleed Abbas, *op. cit.*, P. 76, Mufitah Khalifa Abdulhameed : *Termination of the Administrative Contract*, Alexandria, University Publications House, 2007, P. 43 and after. See also Mutai' Ali Hamood Jubair: *The Administrative Contract between the Legislation and the Judiciary*, Dar Al-Nahdha Al-Arabyia, 2006, P.133 and after. See also Abdulla'ouf Hashim: *The Development of the Criterion for the Administrative Contract*, 1998, P.35 and after.

this condition.<sup>84</sup> The criterion of exorbitant conditions is the distinguishing criterion for administrative contracts and its absence in any contract deprives it of being deemed administrative.

The Egyptian Supreme Administrative Court has established this condition in its rulings. It stated that: "This contract involves some aspects of public authority. Article No. 5 of this contract provides for the right of the administration to terminate the contract ... Hence, the postulation that it is an administrative contract is correct."... And that "if a contract contained unfamiliar (exorbitant) conditions, it is considered administrative, even if it is connected to a private project..."<sup>85</sup> The essential elements of the administrative contract involve the administration being party to the contract; connected to a public facility and following principles and methods of public law, inclusive of the embedded exorbitant conditions. The latter may be either provided for in the contract or applicable by power of the effective laws and regulations governing the contract.<sup>86</sup>

Jurisprudence has put forward numerous definitions for the concept of exorbitant conditions. Some argue that exorbitant conditions are the conditions that do not maintain equality with regard to the parties to the contract, by granting the public law person the upper hand over the private law person. Others go on to say that these conditions embody the administrative nature that grants the administration the unfamiliar right to supervise and control. Another opinion puts forward the claim that these conditions are not typically found in contracts and transactions governed by private law, whether because of its violation of public systems or because the administrative authority is the party that uses such provisions for procuring public interest. Other opinions define these conditions as giving one of the contractual parties more privileges and

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<sup>84</sup> See C.E. 31 Juillet 1912, SOC.,Des Grantis Polphyroides Des Voyages „G.VedeL et P. Devolve Droit Administratif 1984, P. 332 et S.

<sup>85</sup> The Supreme Administrative Court, appeal No (1571) for the year (41) supreme judicial, session held on 25/2/1997, The Encyclopedia, Part (49), P. 63. See also its ruling issued on 2/1/1997, Unification of Principles Circle and its ruling on the appeal No., (1889) for the year (6) Supreme judicial, in a session held on 31/3 1962, the Encyclopedia, Part (18), P.672. Also see the comment on this ruling by Jabir Jad Nassar, op. cit., P. 45 and after, Abdulla Hanafi, Administrative Contracts, 1999, P. 61 and after.

<sup>86</sup> The Supreme Administrative Court in Egypt in session held on 24/2 1968, in relation to appeal No. (559) for the year (11) supreme judicial, op. cit.

rights than the other party, or burden one of the two parties with heavier obligations. The most commonly endorsed and embracing opinion maintains that all the above-mentioned opinions are examples of exorbitant conditions and could correctly be deemed so. Hence, it is more appropriate to leave the question of providing an all-embracing definition of exorbitant conditions to the judiciary systems to decide on each case separately.<sup>87</sup>

It is evident that the judiciary system defines exorbitant conditions as the existence of provisions in the contract that grants the administration more rights than the other party and burdening the other party with more obligations to accomplish public interest, which makes the other party the weaker partner, submitting to a sort of adhesion contract. Examples of exorbitant conditions determined by the judiciary that give a contract its administrative nature depend on granting the administration the following privileges and powers in the contract:<sup>88</sup>

1. The right to carry out inspection and supervision on the implementation of the contract.
2. The right to determine the fees to be collected against the services provided by the public facility during implementation.
3. The right to terminate the contract by the sole discretion of the administration without the need to refer to judicial procedures.
4. The right to levy fines.
5. The right to introduce amendments on the contract on the sole discretion of the administration (amendment power).

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<sup>87</sup> For a review of all the mentioned opinions and definitions, see Mohamed Anas Ja'afar, *op. cit.* P. 25 and after; Tharwat Badawi, *op. cit.* P. 91 and after; Abdulwahid Al-Jimaili, *op. cit.* P. 117 and after and Mohamed Saeed Mohamed Amin, *op. cit.* P. 95

<sup>88</sup> The supreme administrative court in Egypt in the appeal No (1571) for the year (41) supreme judicial, in session held on 27/2/1997, the Encyclopedia, Part (49), P. 63. See also appeal No. =(1889) for the year (6) for the year (6) in session held on 31/3/1962, the Encyclopedia, Part (18), P. 672. See also session held on 20/5/1967, The Collection, for the year (12), P. 1094, its ruling in session held on 11/5/1968, The Collection, for the year (13), P.874, also in session<sup>held 24</sup> January 1995, the Collection year (40) Part One, P.1011. Also see rulings of French administrative judiciary in this regard, Rene Chapus, *op. cit.* P. 1065 et s; M. Waline, *op. cit.* 161 et s and G. Vedel, *op. cit.* P.527 et s. See also Suliman Al-Tammawi, *op. cit.* 1992, P.20 and after. The UAE Supreme Administrative Court rulings include the ruling in appeal No (3) judicial in session held on 7/4/1976, Al-Adala Journal, Issue No (103), July 2000, P.11

6. The right to control and guide the activities carried out by the other contractual party.
7. The right to impose penalties upon the other contractual party in case of violation of his contractual obligations.
8. The right of the administration to directly implement the contract in case of failure on the part of the other party to carry out its obligations and at the expenses of the other contractual party.
9. The right of the administration to confer upon the other contractual party (in public facility concession contracts) some policing powers or the right to expropriate property and the right to collect fees from recipients of public facility services.
10. The right of the administration to confer upon the other contractual party (in public works contracts) the power to temporarily occupy private real-estate against the will of its owners and the right to forced seizure of movable assets ...etc.<sup>89</sup>

The jurisprudence goes on to say- and rightly so- that the presence of one or more articles pertaining to exorbitant conditions in a contract amounts to a departure from the principle of equality between contractual parties in favour of the administration. It is also a departure from the principle of *pacta sunt servanda* (agreements must be kept) of the private law. Therefore, these conditions or provisions are known as the privileges of the public authority or the means and methods of public law.<sup>90</sup>

The exorbitant conditions or provisions are contained in the text of the contract as articles; provided for in the appendix of terms and conditions as an integral

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<sup>89</sup> See Suliman Al Tammawi: *Administrative Contracts*, op. cit. P. 92 and after; Tharwat Badawi, *Administrative Contracts* op. cit. P. 99; Abdualla Hanafi, *Administrative Contracts*, op. cit. P. 61 ; Mohamed Anas Ja'fer, *Administrative Contracts*, op. cit. P. 27 and after; Jabir Jad Nassar, *Administrative Contracts*, op. cit. P.39 and after; Sameer Sadiq: *The Administrative Contract in the Principles of the Supreme Administrative Court*, General Egyptian Book Authority, Cairo,1991; Ahmed Osman Ayyad: *Manifestations of Public Authority in Administrative Contracts*, Cairo, Dar Al- Nahdha Al- Arabyia, 1973 , P.69 and Waleed Abbas , op. cit. P 81 and after.

<sup>90</sup> See Rene Chapus, op. cit. P. 1066 and after; M. Waline, op. cit. P.161 and after and C. Vedel, op. cit., P.527 and after. Also see Suliman Al- Tammawi, op. cit., P.20 and after and Ismat Abdualla Al-Sheikh, op. cit., P. 44 and after.

part of the contract; prescribed under the laws and regulations governing the contract or generally derived from the nature of public facility.<sup>91</sup>

The Supreme Federal Court in the UAE has decided, regarding the issue of the power of the administration to amend a contract that: “The basic principle is that the employee’s relation to the administration is organizational in essence, but the latter may, by exception to the rule, resort to a contractual relationship regarding certain jobs of special nature. As for the obligations contained or the laws referred to in such contracts is left to be organized by the governing laws.”<sup>92</sup>

In this regard, the Supreme Federal Court of the UAE stated that: “A contract concluded between a public law person and an individual does not, in itself, give the contract the status of an administrative contract. The criteria that distinguish administrative contracts from other types of private law contracts are not in the character of the contracting party but contained in the subject of the contract itself; its connection with operation of a public facility; the manifest intention of the administration to adopt methods and means of public law in implementing the contract and the contract text containing exorbitant conditions unfamiliar in private law contracts. The last criterion is the most prominent in distinguishing administrative contracts system from civil law contracts. The administration usually includes certain provisions or conditions in administrative contracts that preserve its right to amend the obligations of the other contractual party or terminate a contract by the sole discretion of the administration, before the prescribed natural expiry of its term. Also, the administration preserves the right to levy penalties upon the other contracting party if the latter violates his stipulated obligations without the need to take the matter to court...”<sup>93</sup>

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<sup>91</sup> See Ismat Abdualla Al-Sheikh, *op. cit.*, P. 44 and after.

<sup>92</sup> See The Supreme Federal Court in the UAE, appeal No (75), for the year (6), judicial, in the session held on 4/6/1985, Al-Adala Journal, Issue No. (46) January 1986, P.88.

<sup>93</sup> The Supreme Federal Court in UAE, appeal No (3), judicial, session held on 7/4/1976. See the comment on this ruling in a research paper published in Al-Adala Journal, issue No (103), July 2000, P.11 under the title: “New Judicial Trends in Arbitration as a Measure for Settlement of Dispute Relating to Government Departments in Dubai, UAE”. The Supreme Federal Court has stated in its ruling that “such exorbitant conditions were not included in the concluded contract, accordingly, it is not considered as an administrative contract in the common understanding of public law jurisprudence, Therefore the administration has no right to amend the provisions of, or terminate, the contract at its own discretion before the stipulated expiry of its term, under the pretext of safeguarding public interest requirements. Such powers are embedded in the nature of

The wisdom behind granting the administration such exceptional power (the power to amend a contract) in administrative contracts rests on the connection of such contracts with public facility regularly and constantly, and due to the flexibility and scalability, which entails giving priority to achieving public interest without jeopardizing the interest of the other contracting party. This later point is safeguarded by providing the right for compensation to the other party, in case the administration resorted to exercising its right to affect amendments and restrict resorting to it by certain controlling measures.

By exercising the right to amend a contract, the administration does not actually violate the provisions of administrative contracts but exercises its stipulated right, which cannot be waived because it is related to public order.<sup>94</sup> The Supreme Federal Court also established that the powers of the administration go further to the extent of terminating the contract, as it is not acceptable to compel the administration to continue implementing a contract after it was made evident that the needs of public interests have changed and require the termination of a contract that works against such interests. The power of the administration in this regard is restricted by targeting public interest.<sup>95</sup> The Department of legal Consultation (fatwa) and Legislation of the UAE Ministry of Justice states that the settled opinion (in both administrative jurisprudence and jurisdiction) “is to establish the right of the administration to amend and terminate its administrative contracts at its own discretion against compensation to the other contractual party, if deemed legally appropriate...”<sup>96</sup>

The department of legal consultation has specified in the above legal advice (fatwa) that the “administration has the right to terminate the contract in certain cases, which does not rule out using this right bestowed to the administration in accordance with general rules and regulations applicable on administrative contracts. These applicable general rules and regulations give the administration

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the contract, if it is administrative, the administration can exercise such powers, but if it is proved that the contract under question is civil and not administrative belonging to private law, then it would not be possible at all to apply the rules and principles of administrative law.

<sup>94</sup> See Hussain Darwish: “Powers Delegated to the Administration in the Administrative Contract”, *Al-Adala Journal*, issue No. (14), April 1977, P. 63 and after.

<sup>95</sup> See previous note.

<sup>96</sup> See the advice (Fatwa) file No. (1518) on 5/4/1993.

the right to terminate a contract even if the other contracting party does not commit any violation and without having to explicitly include such provision in the text of the contract. This is so because administrative contracts are distinguished from civil contracts by the special nature of being connected to the public facility operation and giving priority to public interest over the interests of private contractual parties. This entails that the ministry has the power of supervision and guidance on the implementation of the contract and has the right to change the provisions and conditions of the contract, by adding new conditions which are more conducive to achieving the public interest. Furthermore, the administration has the right to terminate the contract if it was evident that its implementation works against the idea of achieving the public interest. The other contractual party has the right to be compensated if such compensation is legally provided for.”<sup>97</sup>

### **Summary of Chapter Two:**

I conclude from the above discussion that the criterion for distinguishing the administrative contract from other types of contracts, in France, Egypt and the UAE, is based upon three main elements. The first of these elements is the idea that the administration must be a party to the contract. The second is that such contract must be connected to a public facility in the form of establishing, operating or organizing the said facility. The third element is the presence in the contract of exorbitant conditions, which are unfamiliar in private law contracts. It is worth noting here that the administrative jurisprudence in both France and Egypt and the Department of Consultation and Legislation of the UAE Ministry of Justice have played a significant and innovative role in creating, formulating and establishing the principles and foundations of the criteria that have elucidated the concept of the administrative contract. They have established the principles and rules of the general administrative law by recognizing special powers of the administration to conclude administrative contracts in perfect balance with the rights of other private law contracting parties.

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<sup>97</sup> The Supreme Federal Court in the UAE has emphasized the principles explicated in this advice (fatwa). See its rulings in appeal No (462), civil, for the year (18), session held on 17/2/1998, The Collection of Rulings, Year (20), Issue No. (1), Principle No. (39), P.189. See also its ruling on appeal No (89) for the year (10) Supreme judicial civil, session held on 10/12/1988, Aladala Journal , Issue No. (59) The year No. (16) July 1989, P. 71.

**Regarding the conditions and criteria for distinguishing administrative contracts, I can identify the following points:**

**First:** For a contract to be considered administrative, it must satisfy all these three conditions combined; that is, if one or more of these conditions is not satisfied, the contract will not be deemed administrative, but rather pertaining to private law contracts. France considers the connection with a public facility interchangeable with the presence of exorbitant conditions.

**Second:** putting a contract into a written format or not, does not affect the description of a contract as administrative or private. The same applies to the manner in which the selection of the other contracting party or explicitly stating in the text of contract the judicial authority competent in looking into disputes arising from the contract.<sup>98</sup> The same applies to the association of the contract with a document of terms and conditions, in case such document does not include exorbitant conditions, unfamiliar in private law contracts.<sup>99</sup>

**Third:** the description allotted to a contract by the two contracting parties does not affect the nature of the contract, such as stating that their contract is administrative or civil. What really counts is the presence or otherwise of the conditions of an administrative contract as embodied in the main elements described above. If a given contract satisfies all three main elements, such a contract is deemed administrative, irrespective of the description given to such a contract by the two contractual parties. The Emirati jurisdiction has established this principle when it asserts that it is settled, as a general principle, when deciding on the nature or legally interpreting contracts is not what description the contractors bestow on their contract but what really matters is what the real intentions of the two contracting parties were when they concluded their contract as revealed in real terms by the contract. It is pertinent, when interpreting contracts, to try to recognize the combined willfulness of the two contracting parties and try to verify their real intention behind concluding the contract in question... without harping on the literal meaning of phrases and words used in drafting and expressing their intention by concluding their

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<sup>98</sup> See Majdi Midhat Al-Nahri: Principles of Administrative Law. 2009. Op. cit. P 269

<sup>99</sup> see Majdi Midhat Al-Nahri, op. cit. P 269.

contract. It is possible to apply this decision of the Emirati Supreme Federal Court on administrative contracts as one of the general rules whose nature is readily applicable to contractual relations. This is so because it is established that the rules of private law are readily applicable to the relationships arising out of public law...including administrative contracts, as long as the latter are not in contradistinction with such relationships.<sup>100</sup>

In this regard, the UAE Supreme Federal Court has reached the following understanding: "It is of the established judicial opinion of this court that the key to determining the nature of a contract and assign to it the correct legal description is the joint agreement to which the intention of the two contracting parties has arrived and which was concluded in the format of contract at the time of conclusion. Identifying this intention falls within the competence of the court responsible for the judicial proceedings. If the said court has proven this intention by evidence which is based on solid grounds that leads to proper and sound application of the law.<sup>101</sup>

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<sup>100</sup> The Supreme Federal Court regarding the two appeals No (188 and 144) for the year (14) judicial, in session held on 23/2/1993, Collection of Rulings, Year (15), Principle (69), P. 450.

<sup>101</sup> The Supreme Federal Court in UAE, appeal No (506) for the year (19) judicial civil, session held on 26/10/1999, the Collection of Rulings, year (21) Second issue, P.1061, Rule No. (185)

# *Chapter Three*

## **Key problems surrounding the use of arbitration in international disputes concerning administrative contracts with international dimensions (analysis and possible solutions)**

This chapter attempts to explicate the idea of arbitration in administrative contracts and whether it is admissible in such contracts or otherwise. If admissible, then the study will proceed to determine the domain within which arbitration is applicable in administrative contracts.

This Chapter will focus on the analysis of key problems relating to resorting to arbitration in international disputes and with international dimensions, namely:

**Section One:** Advantages and disadvantages of arbitration in administrative contracts with international dimensions.

**Section Two:** The different forms and types of arbitration in administrative contracts.

**Section Three:** Distinguishing arbitration from other similar legal regulations.

**Section Four:** The scope of permissibility of resorting to arbitration in administrative contracts with international dimensions.

Each of the above issues will be discussed in a separate section:

## **Section One**

### **Advantages and Disadvantages of Arbitration in Administrative Contracts with International Dimensions**

Arbitration is one of the alternative methods of dispute resolution as it results in a binding decision for the parties involved in the dispute. It shares similarities with judicial settlement of disputes. It results in reaching settlement of disputes by a decision or a verdict that is binding for the disputant parties. The same result is normally pursued by resorting to judicial settlements. However, scholars consider arbitration as a means of dispute settlement characterized by several features that make it preferable to referral of disputes to the judiciary. Arbitration is also preferable to other alternative dispute resolution mechanisms, such as reconciliation, settlement committees and referral to expertise and agency. Arbitration is the best-recommended alternative method for dispute resolution. These features can be summed up as follows:<sup>102</sup>

1. Arbitration is characterized by simplicity of procedures compared to referral to the judiciary because its procedures do not involve prolonged and complicated processes. Arbitration panels usually enjoy more flexibility than the national judicial litigation procedures. Parties to a dispute decide upon procedures, timing and phases leading to a final judgment, which shall not be subject to objective appeal and should be immediately implemented<sup>103</sup>. The speedy and prompt carrying out of arbitration procedures make it the most preferred method for dispute settlement in administrative contracts with international dimensions.

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<sup>102</sup> See Mohamed Ali Sikaikir : Arbitration Legislations in Egypt and Arab Countries. New University Publishing House, 2007 pp. 5 and after; Mustafa Mohamed Al-Jammal and Akasha Abdulaal: Arbitration in Private International and Local Relations, Part One, First Edition , 1998 pp.18 and after.

<sup>103</sup> See Husham Khalid: Feasibility of Resorting to International Commercial Arbitration, Al-Maarif Corporation, Alexandria, 2006; Mustafa Mohamed Al-Jammal and Akasha Abdulaal, op.cit. p.18; Muhsin Khalil: International Commercial Arbitration: A Study in International Trade Law, Dar Al-Nahdha Al-Arabiya, 1977, pp 16 and after; Nariman Abdulqadir: Arbitration Agreement according to Arbitration Law in Civil and Commercial Provisions No.27 of 1994, Dar Al-Nahdha Al-Arabiya, 1996, pp 68 and after and Ahmed Abu Alwafaa: Optional and Mandatory Arbitration, Al-Maarif Corporation, 1987, pp. 94 and after.

2. Another advantageous feature of arbitration is restricting the time allowed for arbitrators to deliver their verdict. For example, Paragraph One of Article 18 of the Arbitration Regulation of the Paris Chamber of Commerce stipulates that the arbitration verdict should be issued within six months, as of the date of receiving the compendium of the dispute subject, as per Article 13 of the Regulation. Article 7 of the Abu Dhabi Commercial Conciliation and Arbitration Centre Regulation stipulates that the arbitration panel shall issue its verdict within six months, as of receiving the documents pertaining to the case brought before the arbitrators, unless the two parties agree on a longer period. Article 210/1 of the Civil Procedures Law of UAE stipulates the following: “If the parties to the dispute did not specify, in the arbitration agreement, a date for the issue of the award, the arbitrator shall pass his award within six months from the date of the first arbitration session; otherwise any of the parties shall be entitled to refer the dispute to the court or, if a suit has already been filed, to proceed with the same before the court”.

There is no doubt that the speedy carrying out of arbitration procedures and its being restricted by a time limit play a significant role in international trade relations, which does not allow for the slow and complicated procedures of litigation before courts. The speediness is one of the most important and necessary factors in conducting international transactions, which are usually, affected by fluctuation in exchange rates and raw material prices. The need for growth of international trade and oil and investment relations between industrial and oil producing countries, as well as developing countries, requires efficient neutral resolution of potential disputes, avoiding international political considerations as much as possible while economic considerations assume the upper hand.<sup>104</sup>

3. Arbitration in the field of administrative contracts with international dimensions is also characterized by maintaining non-disclosure of the information pertaining to disputant parties, unlike what happens when a

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<sup>104</sup> See Ahmed Sharaf Al-Deen : Studies on Arbitration in International Contracts Disputes, no publishing house , No date , p. 23

dispute is brought before a court of justice, which is governed by a general major principle of the public nature of court sessions as one of the guarantees of fair litigation. Publicity is a major feature of judicial procedures while non-disclosure is a major feature of resorting to arbitration.

Non-disclosure is of key importance within the field of international trade and contractual relations of international and administrative nature because the latter are mainly concerned with professional and economic secrets, which, if disclosed, may result in serious damages befalling parties to disputes, which may impel some parties to opt for losing a case instead of divulging their secrets. Such threat may force dispute parties within the field of international economic investment to resort to arbitration to maintain confidentiality of their transactions; contractual relations; professional expertise and the nature of concluded deals.<sup>105</sup> This is because arbitration sessions are normally held privately, attended only by the parties to the dispute brought before the arbitration tribunal and their representatives and the arbitration verdict may be made public by the mutual consent of the disputing parties.

4. Another advantage of arbitration in disputes arising from administrative contracts with international dimensions is that it provides security and trust for the disputing parties, as they are directly or indirectly involved in the selection of arbitrators. Normally, the arbitration panel consists of three arbitrators. Both the plaintiff and the defendant have the right to nominate or appoint one arbitrator and either mutually agree on the third arbitrator or leave it to the two nominated arbitrators to appoint a third, who would normally be the president of the arbitration panel<sup>106</sup>, in accordance with the laws applicable to the dispute under examination.

There is no doubt that the right to nominate the arbitration panel by the parties to the dispute engrains trust and confidence in the two parties in contrast to referral to the judiciary and state-appointed judges. It also enables the concerned parties to choose arbitrators who are renowned

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<sup>105</sup> See Nariman Abdulqadir: Arbitration Agreement in the Law of Arbitration in Civil and Commercial Matters No. (27) for the year 1994: A Comparative Study, 1st Edition, 1996, p. 65.

<sup>106</sup> See Mohsin Shafiq, *op.cit.*, pp. 28 and after.

for their distinguished technical and legal expertise and who would be able to grasp the nature of the dispute.

This advantageous feature is clearly evident in disputes relating to international trade and private oil investments, where the disputes are of a technical nature. Hence, it would be easier and better to bring it before arbitration where the parties to the conflict may choose arbitrators endowed with necessary technical specialized expertise.

5. The permissibility of resorting to arbitration in administrative contracts with international dimensions encourages international entities to enter contractual relations of administrative nature. It also enables the administration to pick the best contractual offers on both local and international levels, those who may refrain from being obliged to carry out transactions which fall within the jurisprudence of local national judiciary. This is particularly applicable in case of foreign contractors who, in this manner, are not forced to appear before the judiciary of a foreign state<sup>107</sup>.
6. Arbitration is carried out in one direction in the local laws of many countries, including UAE, as the verdict issued by the arbitration tribunal is not subject to appeal, which is not the case with resorting to state judiciary. Hence, resorting to arbitration may save time and would be cost-effective<sup>108</sup>.

Some scholars claim that the system of arbitration has some disadvantages, such as being incompatible with the principles and foundations of administrative law and the principles and rules that govern administrative contracts for the following reasons<sup>109</sup>:

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<sup>107</sup> See Ismat Abdulla Al-Sheikh: Arbitration in International Administrative Contracts. Dar Al-Nahdha Al- Arabiya, 2000, pp. 43 and after.

<sup>108</sup> Article No. 217/1 of the civil procedures law in the UAE stipulates that the verdicts of arbitrators are not subject to appeal altogether.

<sup>109</sup> See Ibrahim Ahmed Ibrahim: Private International Arbitration. Dar Al- Nahdha Al- Arabiya, 1997, pp. 121 and after; Mohamed Abdulaziz Bakr: The Administrative Contract Across Borders, Dar Al- Nahdha Al- Arabiya, 1st edition, Cairo, 2000, pp. 470 and after; Najla Hassan Sayed Ahmed Khalil: Arbitration in Administrative Disputes, Dar Al- Nahdha Al- Arabiya, 2nd edition, 2004. P. 445 and after and Hafeiza Al-Sayed Al-Haddad: Contracts Concluded with Foreign States and Individuals, 1st edition, 1996, pp.277 and after.

1. Resorting to arbitration, particularly if it eventually resulted into resorting to foreign competent judiciary or authorities, is in clear conflict with the concept of judicial immunity of the state, as it is not allowable to subject disputes in which the state is a party to a judiciary other than that of the concerned state.

Other jurisprudence scholars, who support arbitration in administrative contracts refute the above claim by stating that when a state willfully concludes a contract allowing arbitration, it does not entail contradiction with the sovereignty or the judicial immunity with which the state is endowed. On the contrary, by agreeing to resort to arbitration, and at the same time clinging to sovereignty and immunity, is in direct contradiction with the principle of good faith in implementing international obligations. This may entail that admittance of arbitration with private law parties constitutes a sort of partial relinquishment of immunity in itself <sup>110</sup>.

I partially agree with this point of view in that admissibility of arbitration does not necessarily entail violating the immunity and sovereignty enjoyed by the state under the condition that it does not prejudice the higher interests of the state as will be pointed out later in this thesis.

2. The system of arbitration in local administrative contracts and those with international dimensions conflicts with the legal system of administrative contracts because it subjects the administrative contract to different rules and provisions, as compared to those applicable to civil contracts. Furthermore, the administration is exceptionally endowed with more privileges and powers than the other contractual party, which is not permitted in private law contracts. On a different level, the legal system of arbitration, having in mind its different rules and provisions from normal judiciary systems, impels the administration to stand on equal terms with the other contractual party before the arbitration panel, stripped of all the privileges and powers. The choice of arbitration to settle disputes may entail subjecting administrative contracts to a legal system which is

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<sup>110</sup> See Mohi Eldeen Ismail Alam Al-Deen: International Commercial Arbitration Platform, 1996, p.172 and after,

different from the legal system of the national judiciary<sup>111</sup> and that may entail destroying the theory of administrative contracts altogether.

The theory of the administrative contract is essentially based upon empowering the administration party to achieve public interests through negotiation and agreement with the other contractual party. For a contract to be labeled administrative, it must satisfy three conditions, which are: at least one party to the contract must be a public persona of public law; the contract must be connected with the management or operation of a public facility and it must embrace the ways and means of public law by including exorbitant conditions, unfamiliar in normal civil contracts. However, the inclusion of the arbitration clause in an administrative contract with international dimensions would eliminate the privileged powers of the administration party in the management of the contract through the exorbitant conditions. This would prejudice achieving public interests, which is the cornerstone of the power of the administrative party. Examples for application of the privileged powers include the right to terminate the contract, on the sole discretion of the administrative party, for reasons of maintaining public interests with paying damages to the other contractual party. The exorbitant conditions are mainly included to ensure achievement of public interests, usually overseen by the administration party.

In addition to the above, bringing administrative contracts before arbitration may lead to the application of a law that does not distinguish between administrative and civil contracts. Alternatively, it may lead to the application of the law by arbitrators who do not have sufficient knowledge of the nature and principles of administrative law<sup>112</sup>.

3. Another disadvantage of resorting to arbitration resides in its costly procedures, compared to resorting to the state judicial system. The latter does not entail paying litigation fees on the part of disputing parties and the plaintiff have to bear a very small fee initially while the losing party

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<sup>111</sup> See Georgi Shafeeq Sari: *The Scope of Resorting to Arbitration to Settle Disputes in Administrative Contracts*, Dar Al- Nahdha Al- Arabiya , 1999, pp. 111 and after.

<sup>112</sup> See Ismat Abdulla Al-Sheikh, *op. cit.*, p. 237 and after and also see Ibrahim Ahmed Ibrahim, *op. cit.*, p. 339 and after.

has to bear the total litigation fees on the issuing of the final verdict. On the other hand, in case of resorting to arbitration, especially international one, the total cost of the whole procedure could be very expensive. This is so because arbitrators, disputing parties and lawyers may be from different countries or residing in different countries. This may result in a huge increase in the expenses that include traveling, accommodation and sessions venue rental, let alone the costly fees paid to arbitrators and lawyers, in addition to other administrative expenses due to the arbitration center, in case of resorting to institutional arbitration. The parties to the dispute will have to bear all these expenses<sup>113</sup>.

4. The arbitration tribunal sometimes lacks legal expertise and knowhow, that is in case the task is assigned to businessmen who are not specialized in the legal field of arbitration in disputes. Contrary to that, resorting to the judiciary insures bringing the dispute before a competent professional judge with sufficient expertise and knowhow and more qualified to look into the subject of dispute<sup>114</sup>.
5. Finally, in some if not most, of the legal systems, resorting to arbitration entails depriving those who lose their case of bringing a fresh lawsuit before the judiciary. Even worse, losing a disputed case also deprives the losing party in the dispute of submitting any sort of appeal, be it normal or exceptional, such as in the Egyptian legal system. A verdict issued by a competent judge in a dispute brought before a court of justice is open to be examined by different stages of litigation and could be appealed through all types of allowable appeals, which will help to arrive at a fair settlement of disputes<sup>115</sup>.

In light of the above discussion, it appears that the main advantage of resorting to arbitration is the speediness in reaching a settlement of a dispute (as the Emirati legislator does not allow appealing against arbitration verdicts (Article

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<sup>113</sup> See Isam Ahmed Al-Bahji: Arbitration in B.O.T. Contracts, New University House, 2008, p.49; Georgi Shafeeq Sari op. cit., p. 78 and after; Fathi Wali: Fundamentals of Civil Judiciary Law, Dar Al- Nahdha Al- Arabiya. 2001, and Arbitration Law in Theory and Practice, 1st edition. Al- Maarif, Alexandria, 2007. P. 17 and after.

<sup>114</sup> See Fathi Wali: Arbitration Law in Theory and Practice, op. cit., p. 17

<sup>115</sup> See Fathi Wali, op. cit., p. 18 and after.

1/217 of the Law of Civil Procedures). Disallowing appeal against arbitration verdicts represents a serious flaw in arbitration because it may be an obstacle in the face of reaching a just settlement to the dispute through the possibility of rectifying an erroneous verdict. This is the opinion of jurists opposed to admitting arbitration in administrative contracts, which I endorse as an evidence against the unconditional application of arbitration in administrative contracts with international dimensions. In contrast, a judicial ruling is normally subject to appeal and cassation or petition for review, unless otherwise provided by the legislator.

For the above-mentioned reasons, the majority of jurisprudence scholars believe that the nature and the legal system governing the administrative contract is in clear contradiction with the legal system governing arbitration<sup>116</sup>. Based on the above argument, I believe that the best choice is to restrict resorting to arbitration in administrative contracts with international dimension by setting out a number of conditions and restraints which will be explicated in chapter four of this thesis.

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<sup>116</sup> See Ismat Abdulla Al-Sheikh, *op. cit.* p. 237 and after and Ibrahim Ahmed Ibrahim, *op. cit.*, p. 339 and after.

## **Section Two**

### **Forms and Types of Arbitration in Administrative Contracts**

Some scholars define arbitration as the agreement on the part of the disputing parties to assign the task of settling the dispute to an arbitrator<sup>117</sup>, that is both the plaintiff and the defendant agree to nominate an expert person to issue a judgement to settle the subject of their dispute<sup>118</sup>.

Idiomatically, jurisprudence defines arbitration as "one or more persons settling disputes entrusted to him/them by mutual agreement, for reaching a decision to settle such disputes"<sup>119</sup>. Another definition of arbitration is "a Legal system by virtue of which a binding verdict is passed to settle a legal dispute between two or more parties by a third party who derive their authority from the mutual agreement of the parties to the dispute"<sup>120</sup>, or " a special legal system in which parties to a dispute choose their own judges and entrust them, by a written agreement, with the task of issuing a settlement of the disputes that may arise, or actually emerged, between them, with regard to their contractual or non-contractual relationship, which may be settled through arbitration in accordance with the requirements of law and justice and the issuance of a judicial decision binding upon them"<sup>121</sup>.

The Supreme Constitutional Court in Egypt defines arbitration as "Arbitration is to bring a certain dispute arising between two parties before a third party arbitrator, to be nominated by the mutual agreement of the parties to the dispute or through delegation from the two parties or in light of certain conditions determined by the two parties. Such arbitrator shall be entrusted with the task of issuing a final and binding verdict to settle the said dispute. The settlement verdict should be unbiased, devoid of fraud and uprooting the causes of dispute

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<sup>117</sup> See Luai Azmi Al Ghazawi: The Validity and Necessity of the Arbitration Verdict in Islamic Jurisprudence, research presented to the Sixth Academic Conference, held at the UAE University under the title "International Commercial Arbitration and the most Important Alternative Solutions for Settling Commercial Disputes" in Abu Dhabi, during the period 28-30 2008, Vol 3, p.1121 and after.

<sup>118</sup> See Luai Azmi Al Ghazawi, op. cit., p. 1122, footnote 16.

<sup>119</sup> See Fathi Wali, op. cit., p. 13.

<sup>120</sup> See Fathi Wal, op. cit., 2007, p. 13, Majid Raghil Al-Hilo: op. cit., p.162.

<sup>121</sup> See Ahmed Abdulkareem Salamah, op.cit., p. 18 and after.

within the aspects referred to the arbitrator by the parties, after both parties present their points of view in detail through the main litigation guarantees "<sup>122</sup>. The supreme court describes arbitration as "a technical instrument with a judicial nature to the purpose of reaching a settlement to a specific dispute."<sup>123</sup>

The Egyptian Court of Cassation defines arbitration as "an exceptional way for settling disputes based on departing from the normal means of litigation and the guarantees enjoyed therein, hence, it is inevitably limited to what willfully presented by the disputants before the arbitration tribunal"<sup>124</sup>.

The French legislator defines the provision on arbitration in Article 1442 of the law of civil proceedings as "The agreement under which the parties to a given contract to subject the disputes that may arise between them in the future to arbitration". The French legislator also defines the stipulation of arbitration in Article 1447 of the same law as a type of contract under which the parties to a dispute which has already arisen agree to refer such dispute to an arbitrator or many arbitrators for settlement."

The Egyptian legislator defines arbitration in Article 10 of Law No. 27 of 1994 on Arbitration in Civil and Commercial Matters as "an agreement between two parties to resort to arbitration to settle all or some of the disputes which have arisen or may arise between them based on a particular legal contractual or non-contractual relationship" ... "The agreement on arbitration may be arrived at prior to the occurrence of the dispute, whether concluded independently or provided for in a specific contract and the parties may reach an agreement on arbitration after the dispute has arisen". Paragraph 1 of Article 4 of the said law stipulates that "in the ruling of this law, the term arbitration entails the arbitration which the two parties agree upon willfully, whether the entity that carry out the arbitration procedure under the agreement of the two parties is an organization, a permanent arbitration center or otherwise..."<sup>125</sup>.

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<sup>122</sup> The Supreme Constitutional Court in Egypt, in 17 December 1997, case No. (13) for the year (15) Judicial.

<sup>123</sup> The Supreme Constitutional Court in Egypt, on 3 July 1999, case No. (104) for the year (20) Judicial, and in a session held in January 2001 No. (65) for the year (21) judicial.

<sup>124</sup> The Egyptian Court of Cassation, cassation, civil, on 16 February 1976, in appeal No. (275) for the year (36), judicial, The Collection of Verdicts, year (22) Issue 1, p. 179

<sup>125</sup> See Nariman Abdulqadir op.cit., p.65

Article 203/1 of the Law of Civil Procedures in the UAE defines arbitration as follows: “Contractual parties, in general terms, may stipulate in the main contract, or in a supplementary agreement, to bring any dispute that may arise between them, in the process of implementing a certain contract, before one or more arbitrators and it may be agreed to arbitrate a particular dispute under special conditions”.

With regard to arbitration, the Emirati Federal Law stipulated in Article 1, designated to definitions, that “arbitration is the agreement between the parties to a dispute, on their own free will, to refer the dispute to arbitration” and that “it is the agreement of the two parties to resort to arbitration to settle all or part of the disputes that have arisen or may arise between them based on a certain legal contractual or non-contractual relationship”.

The Supreme Federal Court of the UAE has established that “arbitration is considered an exceptional means of dispute settlement based on departing from the normal methods of litigation before normal judiciary endowed with public competence, with all the guarantees entitled therein and is limited to the free will of the disputants to refer the matter to an arbitration tribunal”<sup>126</sup>.

We can determine that the previous definitions of arbitration, both in jurisprudence, judiciary, or legislations, share a range of common qualities or elements as follows:

1. Arbitration is considered an exceptional legal system for the settlement of disputes because it differs from litigation procedures before ordinary judicial courts or administrative public jurisdiction with its ensured guarantees.
2. The parties to the contractual (or non-contractual) legal relationship prefer to resort to a third-party person, persons, center or institution, known as the arbitrator or arbitrators, in order to settle the disputes which have arisen, or may arise, between them, in order to resolve the dispute by virtue of a decisive and conclusive verdict.

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<sup>126</sup> The Supreme Federal Court, Cassation, civil, appeal No (308) for the year No. (2011 in session held on 30 October 2011, The Collection of Rulings issued by Civil and Commercial departments from January to December 2011, Appeal, civil in appeal No. (22) judicial in session held on 3 March 2002, The Collection of Rulings issued from January to December 2002, p. 539 and after.

3. The litigation guarantees, recognized in the legal system for carrying out litigation procedures before courts, should be taken into consideration, such as: causation, the right to defense, etc.

### **First: Forms of Arbitration:**

The different forms of arbitration show, to a large extent, the legal regulations for each separate form of arbitration. This explication helps significantly in presenting my position with regard to arbitration in administrative contracts with international dimensions.

Agreement on arbitration could be done in two forms:

#### **1. The Arbitration clause:**

The arbitration clause (in French La Clause Compromissoire) means an agreement whereby the two parties agree that disputes arising between them, with regard to a particular legal relationship, shall be settled by means of arbitration. It means that agreement on arbitration is prior to the occurrence of the dispute<sup>127</sup>.

This form of arbitration agreement is labelled as “clause” because in most cases it is included in the main text of the original main contract, be it a civil or commercial or an administrative contract. The two parties to a contract agree that any dispute that may arise regarding the implementation or interpretation of the said contract shall be brought before an arbitration tribunal and this must be included in the main text of the contract, as an integral part of the contract provisions.

However, there is nothing that precludes an agreement on arbitration prior to the arising of the dispute in a separate written agreement, independent of the original contract. Accordingly, what distinguishes the arbitration clause is not its being included in the main original contract or in a separate agreement in writing, but it is being arrived at prior to the occurrence of any dispute. It is deemed a separate agreement in itself and

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<sup>127</sup> See Majid Raghieb Al-Hilo, *op. cit.*, p. 169 and after; see Ahmed Ibrahim Abdultawwab : *Arbitration Agreement and Related Arguments*, New University House, 2009, p. 191 and after also see Fathi Wali, *op.cit.*, p.

binding to the two parties. It is independent of the original contract, a contract within another contract concluded by the same parties<sup>128</sup>.

The independence of the arbitration clause from the main original contract gives rise to several important results, including<sup>129</sup>:

- a. In case the original contract is rendered null and void, dissolved, terminated or rendered illegal due to violation of public order, the arbitration clause shall not be affected. Similarly, if the arbitration clause is rendered null and void, the original contract shall not be affected, unless the two parties to the contract stipulate that the arbitration clause is considered one of the fundamental provisions of the original contract and that their acceptance of the other provisions is hinged upon the inclusion of the arbitration clause. In such case, the annulment of the arbitration entails that the whole contract shall be rendered null and void.<sup>130</sup>
- b. The arbitration tribunal shall examine the annulment of the original contract based on the valid arbitration clause stipulated in the contract.<sup>131</sup>
- c. It is possible to subject the original contract and the arbitration clause to a law different from the law of the state in which the contract is concluded. The arbitration clause may be recognized by referral; in case it is not included as part of the original contract. This could be done by reference to a previous contract concluded by the same two parties or to an optimal contract or general provisions, well recognized in the transaction between the two parties. The previous contract or the general provision referred to should explicitly include agreement on referral to arbitration. Thus, this condition applies to

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<sup>128</sup> See Fathi Wali, *op. cit.*, p. 94 and after; Isam Alqasabi: *International Arbitration and Maintaining Economic Balance of Investment Contracts*, Vol. 1, p. 244, research paper presented to the Sixteenth Annual Conference, UAE University, held in Abu Dhabi, April 2008.

<sup>129</sup> See Fathi Wali, *op. cit.*, p. 98 and after and see also X. Boucoza: " la Clause Compromissoire par Reference em Matiere d'arbitrage Commercial International ", *Ren. Arb.*, 1998, p. 495 ets .

<sup>130</sup> See Samia Rashid: *Arbitration in Private International Relations: Arbitration Agreement*. Cairo, Dar Al-Nahdha Alarabyia , 1984 , p. 75 . See also Majid Mohamed Nihad Tarban: *Arbitration in Administrative Contracts Disputes; A Comparative Study*. Dar Al-Awadhih, UAE, 2013, P. 126. See also Majid Raghieb Al-Hilo: *op. cit.*, P. 169 .

<sup>131</sup> See Samia Rashid, *op. cit.*, P.75, Majid Tarban, *op. cit.*, P. 127 and P. 131 and Majid Al-Hilo, *op. cit.*, P. 170.

the original contract, and is binding for the two parties, so that the settlement of disputes arising from the original contract is carried out through arbitration<sup>132</sup>, if the condition of the referral is mentioned in the new contract.

The following conditions must be satisfied for the application of the arbitration clause by referral<sup>133</sup>:

- a. The document to which the referral is made must be concluded prior to the conclusion of the original contract that contain the referral condition.
- b. The referral to the arbitration clause should be mentioned in the document as an integral part of the contract and the arbitration clause must be explicitly stated.
- c. Finally, the contract or the document to which the referral is made must be well known to the party challenged by the arbitration clause and well known to the circles to which the two disputant parties belong.<sup>134</sup>

## **2. Arbitration Stipulation:**

Arbitration Stipulation (Le Compromise in French) means the agreement that is concluded between the parties to a legally binding relation, after a dispute arises between them, to resort to arbitration. Accordingly, it is an agreement which could only be concluded after the occurrence of dispute, provided that the dispute is yet to be settled and is a genuine or real dispute. It is very much similar in nature to lawsuit petition because it is normally initiated after the emergence of the dispute. Hence, it should contain a comprehensive and detailed statement of the subject of the dispute, the parties to the dispute, location, language and the applicable law, as well as the power assigned to the

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<sup>132</sup> See Fathi Wali, op. cit., p. 98 and after and see X. Bouchoza op. cit.,1998, p. 495 ets . See Jean Robear: Arbitrage, Droit, Interne, Droit International Prive, P.4. See also Majid Tarban, op. cit., P. 126 and P. 131; Isam Al-Qasabi, op. cit., P. 244,

<sup>133</sup> See Fathi Wali, op. cit., p. 98 and after

<sup>134</sup> See Samia Rashid, op. cit., P.75; Majid Tarban, op. cit., P. 127 and P. 131 and Majid Al-Hilo, op. cit., P. 170.

arbitrators, the number of arbitrators and other essentially required data relating to the dispute<sup>135</sup>.

The position of the Emirati law with regard to this differentiation is provided for in the regulations stipulated for arbitration. Article No. 203, of the Emirati Law for Civil procedures states the following:

“The parties to a contract may generally stipulate in the basic contract or by a supplementary agreement that any dispute arising between them in respect of the performance of a particular contract shall be referred to one or more arbitrators and may also agree to refer certain disputes to arbitration under special conditions... The subject of the dispute shall be specified in the terms of reference or during the hearing of the suit, even if the arbitrators were authorized to act as amiable compositors; otherwise the arbitration shall be void.”

What is to be understood from the above stated provision is that agreement on arbitration is allowed prior to the occurrence of the dispute; that is what is called “arbitration clause” or after the occurrence of the dispute, which is known as the “arbitration stipulation”, either before or after bringing the dispute before a court of justice, in accordance with the generally accepted rules. However, in case of agreement on arbitration after bringing the dispute before court, the arbitration stipulation must include specification of its place and obliges the parties to specify the subject of their dispute brought before arbitration, together with the formation of the arbitral tribunal. It should also include determining the limitations of the jurisprudence of the arbitrators, the procedures to be followed during the arbitration process and the substantive rules to be applied on the issues subject to arbitration.

### **Second: Types of Arbitration in Administrative Contracts:**

The statement of the types of administrative contracts shows, to a large extent, the legal rules and regulations for each type. This will significantly impact the way I adopt for presenting my point of view regarding the possibility of resorting

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<sup>135</sup> See Ahmed Abdulkareem Salamah, op. cit., p.71 and after, Fathi Wali, op. cit., p.103 and after

to arbitration in disputes arising from administrative contracts with international dimensions.

The types of arbitration vary according to perspectives or distinguishing criteria, as in the following<sup>136</sup>:

1. Voluntary and mandatory arbitration
2. Institutional and ad hoc arbitration
3. National (Domestic) and International Arbitration
4. Ordinary arbitration and arbitration with power of conciliation

### **1. Voluntary and Mandatory Arbitration<sup>137</sup>**

Voluntary arbitration is based upon the ability of the disputants to choose either resorting to arbitration to settle disputes arising between them; resorting to judicial litigation before a court of law or resorting to any other means of dispute resolution of their choice. The two parties agree, by virtue of mutual contractual relation, to resort to arbitration and have the right to nominate arbitrators and the applicable law as well as arbitration procedures<sup>138</sup>.

Currently, a different type of voluntary arbitration is practically witnessed in which one of the two disputant parties may be compelled to succumb, due to the economic strength of the other disputant party and the dire need of the weaker party, to conclude the original contractual relationship with the stronger party who offers financing. Thus, the weak party accepts to enter into a contractual relation involving resorting to arbitration with all its provisions, such as conducting arbitration in a foreign country or in accordance with the system prescribed by a costly arbitration center or agreeing to assign the task to an unwelcome arbitrator imposed by the other powerful party or by the arbitration

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<sup>136</sup> See Ahmed Hassan Hafiz Mutawia: Different Types of Arbitration in International Construction Contracts, Ph. D. thesis presented to the faculty of Law, University of Bani Sewaif, 1998, p. 49.

<sup>137</sup> See Mohamed Sami Al-Shawa: Legal Nature and Different Forms of Arbitration. Paper presented to the 16th UAE University Conference, Abu Dhabi, April 2008, p. 15. See Mohamed Hussain Mansour: International Contracts, New University House, no date, p. 478, and after; Muneer Abdulmajeed : The General Foundations of International and Local Arbitration , Dar Al-Maarif, Alexandria , 2000 p. 12 and after; Yusri Al- Assar, op. cit., p. 53 and Ismat Abdulla Al-Shiekh, op. cit., p. 29 and after.

<sup>138</sup> See Imad Aldeen Al- Mohamed: The Nature and Forms of Arbitration Focusing on Online Arbitration, research paper presented to the 16th UAE University Conference, Abu Dhabi, April 2008, p. 1031.

center. Yet, it is considered a voluntary type of arbitration because still the weaker party has the right to decline agreeing to the condition of resorting to arbitration<sup>139</sup>.

Mandatory arbitration is organized by the legislator under a legal provision that obliges the disputants to resort to arbitration in the event of a dispute arising between them. The disputants have no right to decide on their own volition to choose resorting to arbitration in the event of a dispute arising between them. Here are some examples of this type of arbitration: The Egyptian legislator intervened by issuing special laws imposing arbitration in some disputes such as the Faisal Islamic Bank disputes (Law No. 48 of 1977 on the establishment of Faisal Islamic Bank, article No. 18) and the disputes pertaining to general taxation on sales (Law No. 95 of 1992 on the Capital Market, article No. 10).

The Supreme Constitutional Court in Egypt has issued constitutional rulings concerning the unconstitutionality of the mandatory arbitration referred to above<sup>140</sup>. This ruling is based upon the understanding that the essence in arbitration in matters in which conciliation is admissible is derived from agreement, be it local, international, civil or commercial in nature, and established upon willful mutual agreement in all its forms and types.

Mandatory arbitration is incompatible with comparative regulations, such as the Model Law on International Commercial Arbitration, endorsed by the United Nations Commission on International Trade Law (UNCITRAL) in 21 June 1985; the European Convention on International Commercial Arbitration, concluded on 21 April 1961; the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, endorsed by the UN on 10 June 1985 and the convention signed by the member states of the Organization of American States, on 30 Jan 1975 in addition to the laws endorsed by Arab countries among others). These conventions recognized the volitional, free will nature of the act of resorting to arbitration as an alternative dispute resolution. The Abu Dhabi

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<sup>139</sup> See Fathi Wali, *op. cit.*, p. 32.

<sup>140</sup> See the rulings of Supreme Constitutional Court in Egypt issued on 17 December 1994 in appeal No. (13) for the year (15) judicial and its verdict issued in session held on 3 July 1999 in the appeal No 104 for the year (20) judicial and in session held on 6 January 2001 in appeal No. (65) for the year (18) judicial and in session held on 13 January 2002 in appeal No. (55) for the year 23, judicial.

Court of Cassation deemed null and void an arbitration award which was based on the mandatory arbitration system (Abu Dhabi Court of Cassation in appeal No. (554) for the year 2008 Judicial Year 2, judicial – commercial in a session held on 25 December 2008). The court deemed null and void the arbitration award issued based on arbitration in disputes arising from securities trading regulated by the resolution of the Board of Directors of the Abu Dhabi Securities and Commodities Authority No. 1 of 2001.

## **2. Institutional versus “ad hoc” arbitration**

Arbitration carried out under the umbrella of arbitration centers and established arbitration organizations is known as institutional arbitration. Disputants agree to bring their dispute before arbitral tribunals formed by such established local or international arbitration center<sup>141</sup>. Examples of such institutes include the International Centre for Dispute Resolution (ICDR) in Washington, the International Court of Arbitration of the International Chamber of Commerce in Paris, Regional Center for International Commercial Arbitration in Cairo and the International Commercial Arbitration Center for the GCC countries<sup>142</sup>.

Resorting to institutional arbitration has increased significantly in recent times for the reason that arbitration centers provide special services in the venues designated for arbitration, in addition to qualified and distinguished arbitrators, as well as providing other administrative and technical facilities to disputants. However, it is criticized for being very expensive, demanding very high arbitration fees. The established arbitration centers are blamed also for their inclination to protect the interests of advanced industrial countries<sup>143</sup>.

“Ad hoc” arbitration means that the disputants nominate and choose the arbitrators and the system to be followed in carrying out the arbitration process on each dispute separately. This type of arbitration instills confidence and trust on the parties to the dispute.

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<sup>141</sup> See Majid Raghieb Al-Hilo, op. cit., p. 169 and after and Mohamed Hussain Mansour, op. cit., p. 478 and after.

<sup>142</sup> See Fathi Wali, op. cit., p. 39 and after; Imad Aldeen Ahmed, op. cit., p. 1030 and after and Ahmed Abdultawab, op.cit. 2008 p. 142.

<sup>143</sup> See Imad Aldeen Almohamed , op.cit., p. 1030 and Ahmed abdultawab, op.cit., p. 142 and after.

Resorting to any of the above described types of arbitration is decided by the free will of the disputants. If there is any reference in the arbitration agreement to referring the dispute to established institutional arbitration centers, therefore, any dispute arising should be brought before any recognized center of institutional arbitration, otherwise it would be understandable to choose ad hoc arbitration. Article 4 of the Egyptian Law No. 27 of 1994 on the issue of arbitration and Article No. 1493 of the French law of legalization of civil and commercial procedures admitted resorting to ad hoc or institutional arbitration<sup>144</sup>

### **3. National (Domestic) and International Arbitration<sup>145</sup>:**

Domestic arbitration is carried out within the sovereign territories of a given state and upon which the national laws of that state are applicable while international commercial arbitration is engaged in settling international trade disputes and closely connected with trade business as its subject matter. That means it is concerned with a relationship of contractual or non-contractual economic nature and whether it is of civil, administrative or commercial nature. It must be of international significance in at least one of its main aspects<sup>146</sup>.

Article No. 1492 of the French Law of Commercial and Civil Proceedings defines international arbitration as an arbitration that observes the interests of international trade regardless of the place in which the arbitration award is issued<sup>147</sup>.

The Emirati legislator has embraced the location criterion for defining the type of arbitration as foreign (international). Article No. 236 of the Civil Procedures Law provides that "Provisions of the preceding Article shall apply to the

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<sup>144</sup> Several arbitration centers were established in the United Arab Emirates, including Abu Dhabi Commercial and Arbitration Center ( established 1993) and Dubai International Arbitration Center ( established in 1994 successively developed and reorganized through the years from 2004, 2007 to 2009 ), Sharjah International Commercial Arbitration Center ( established in 2009) and Ras Al-Khaimah Commercial arbitration Center ( established in 2008 ) and finally Ajman Center for Commercial Conciliation and Arbitration ( established in 2004)

<sup>145</sup> See Fathi Wali, op. cit., p. 927 and after.

<sup>146</sup> See Nasir Othman Mohamed Nasir: Criteria of Arbitration Internationality. Research paper presented to the 16th International UAE University Conference, 2008, p. 47 and after. Also see Raheemah Rashid: Role of Arbitration in the Internationalization of Contracts, Dar Al-Nahdah Alarabyia , 1990.

<sup>147</sup> See Fathi Wali, op.cit., p. 47 and after.

arbitration decision passed in foreign countries. Arbitration decisions must be passed on a matter which may be decided on by arbitration according to the law of the country and must be enforceable in the country it was passed in". Article 212/4<sup>148</sup> of the same law stipulates that "The arbitrators award shall be issued within the United Arab Emirates; otherwise, the rules applicable to arbitration awards passed in foreign countries shall apply thereto". Hence, and according to this location criterion, the arbitration award issued outside the UAE is deemed foreign, irrespective of the nationality of the arbitrator and that of the disputants, as well as the place of the contract that contains arbitration clause and that is regardless of the place in which the arbitration stipulation is concluded.

#### **4. Normal Arbitration and Arbitration with Conciliation Authorization:**

Normal arbitration takes two distinct forms according to the power endowed to the arbitrator/tribunal. The first is normal arbitration or arbitration conforming to the provisions of law or litigation. The other is arbitration in which the arbitrator is authorized to reconcile the dispute or free arbitration. Normal arbitration, or the one that conforms to the provisions of law and the judiciary, referred to by the Emirati legislator as arbitration, denotes arbitration in which the arbitration tribunal is bound to apply the provisions which the substantive law agreed upon by the disputants. The other form, designated as arbitration with authorization for reconciliation (free arbitration), is arbitration in which the arbitrator applies the principles of justice and fairness and shall not be bound by the principles of the substantive law, except in matters pertaining to public order.

The Emirati legislator stipulates in Article No. 212/2 that "The arbitrators award shall be in conformity with the provisions of law, unless the arbitrator was authorized to reconcile the dispute, in which event, he shall not be bound to comply with such rules except in matters which concern public order."

The Emirati legislator admits arbitration with authorization of reconciliation in a number of provisions such as Article No. 203/ 3 of the above-mentioned law, which states that "The subject of the dispute shall be specified in the terms of

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<sup>148</sup> [http://www.zayedshamsi.ae/english/law.php?news\\_id=379](http://www.zayedshamsi.ae/english/law.php?news_id=379) (Accessed on 12 January 2016)

reference or during the hearing of the suit, even if the arbitrators were authorized to act as amiable compositors; otherwise the arbitration shall be void.” Article No. 205 stipulates that “Unless their names are specifically mentioned in the arbitration agreement or a subsequent document, arbitrators may not be authorized to act as amiable compositors.”

The main differences between normal arbitration and that with authorization to reconcile can be summed up in the following:

1. The arbitrator in normal type of arbitration should conform to the provisions of the law, while in arbitration with authority of conciliation, the arbitrator should only abide by the principles and procedures related to public order and apply the principles of justice.
2. The rule is that arbitration is the normal one described above and resorting to the other type of arbitration with authority of conciliation is permissible only if the disputants clearly and explicitly agreed to that by their own free will and their willfulness should be interpreted with caution and prudence<sup>149</sup>.
3. It is not permissible to contest the award by approval or request of nullification in the case of arbitration with the power to reconcile. However, the Emirati legislator has permitted contesting the ruling issued by a court on the arbitrators’ award by endorsement or nullification. Article No. 217/2 of the Federal Law of Civil Procedures stipulates the following:
  1. The award of the arbitrators may not be contested by any manner of appeal.
  2. The judgment approving the arbitrators’ award may be contested in any of the appropriate manners of appeal.
  3. Notwithstanding the preceding paragraph, the award shall not be appealable if the arbitrators were authorized to reconcile the dispute, or, if the parties have expressly waived their rights to file an appeal, or if the disputed amount was not in excess of ten thousand Dirham.

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<sup>149</sup> See Abdulhakeem Al- Ahdab: Arbitration with Power to Reconcile. Research paper presented to the 2nd Islamic Conference on Sharia and Law, under the title “Ad Hoc Arbitration in Light of Sharia and Law” 2000, Tripoli Institute for Islamic Studies, Tripoli, Lebanon, p. 191 and after.

4. The arbitrator with authorization to reconcile does not carry out reconciliation but decide on disputes according to the rules of justice without having to abide by the rules of substantive law which are not related to public order. Hence, such said arbitrator may issue an award granting a party to a dispute all the demands pleaded by that party.
5. The names of arbitrators with authorization to reconcile shall be specifically mentioned in the arbitration agreement or in a subsequent document; otherwise the arbitration is rendered null and void. The Emirati legislator's aim is to provide disputants who resort to arbitration with authorization to reconcile with adequate safeguards to verify that the arbitrators have been appointed by the free will of the disputants and that the interests and rights of the disputants are safeguarded. This entails that once an arbitrator is disqualified for any reason (such as demise, legally incapacitated, dismissed or deemed unfit for passing judgment, negligence of work or withdrawal) the award given by arbitration with authorization to reconcile is deemed null and void because it lacks a fundamental element.
6. Finally, it is allowable to grant authorization to reconcile to an arbitrator who has already being engaged in the arbitration procedures.

## **Section Three**

### **Distinguishing Arbitration from other Similar Legal Systems**

The concept of arbitration is sometimes mixed up with other legal systems, which are similar in meaning or goal. Hence, it is of prime importance to differentiate between them because each of these systems is subject to a different legal system. Perhaps, the most important other legal instruments for dispute resolution without resorting to judicial courts are reconciliation, mediation and expertise.<sup>150</sup> Here, I deem it opportune to clarify my position on resorting to arbitration in disputes arising from administrative contracts with international dimensions and to distinguish these from other systems and concepts which might give rise to confusion because of the similarities. By drawing such a comparison, it would be possible to decide on its status among similar systems and its ability to resolve disputes relating to such type of transactions.

#### **First: Arbitration and Conciliation<sup>151</sup>:**

Conciliation can be defined as an agreement through which parties to a dispute resolve an already existing dispute or as a preventive measure against a potential dispute. The two parties, in juxtaposition, drop part of their claims. Conciliation presumes an existing or potential dispute and aims at settling such dispute by making each party relinquish part of their claims.

Conciliation contract is considered a form of compromise agreement binding to both disputant parties and entails mutual settlement of the dispute between the parties by relinquishment of each party of some of their claims or demands. The disputants may agree, in whatever method they deem appropriate, to settle their dispute through conciliation, which should be evidenced in official written minutes.

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<sup>150</sup> See Mustafa Mohamed Al-Jammal and Ukasha Mohamed Abdulaal, *op. cit.*, p. 24 and after and Ahmed Hassan Hafiz Mutawi, *op.cit.*,1998, p.23 and after.

<sup>151</sup> See J. Moneger: Conciliation, Mediation Arbitrag et Baus, L.P.A., 26 Aout 2001 No. 170, p. 21

The Emirati legislator defines conciliation in article 722 of the Law of Civil Procedures as follows: “An accord is a contract whereby a dispute is removed and litigation between the two opposing parties ceases by mutual consent.”

Article No. 730/2 of the same law stipulates the following: “An accord shall be binding upon both disputant parties, and it shall not be permissible for either of them or their heirs to rescind it thereafter.”

Conciliation may be carried out in cases of private individual contracts as well as in contracts concluded between individuals and the administration or with public persona. It is permissible in disputes of all kinds, whether civil, commercial or administrative, since the rules of civil law can be applied within the scope of administrative law whenever it was valid for application<sup>152</sup>.

Based on the above, conciliation and arbitration agree in that both are alternative dispute resolution tools, as an alternative to the cumbersome courtroom litigation procedures. Both are arrived at on mutual bases according to the absolutely free will of the disputants and both are limited to resolving financial disputes which admit conciliation and waiver and are not related to public order<sup>153</sup>.

Despite the similarities between arbitration and conciliation, mentioned above, they differ in many ways, the most important of which are the following<sup>154</sup>:

1. Conciliation contracts derive from willful action involving the parties to a dispute themselves while the settlement of a dispute in arbitration is carried out through an arbitration tribunal who are nominated by virtue of the arbitration system adopted.
2. The conciliation process takes place between the parties to a dispute based on each party relinquishment of part of their claims while the award in arbitration is issued on the basis of the extent of the eligibility of each party. It could result in passing a sentence to the favor of one party, even if the arbitrator is endowed with the power of conciliation.

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<sup>152</sup> See Yusri Mohamed Al-Assar: Arbitration in Contractual and Non-Contractual Administrative Disputes: A Comparative Study, Dar Al- Nahdha Alarabyia, 2001, p. 42.

<sup>153</sup> Arbitration shall not be permissible in matters, which are not reconcilable as stipulated in Article No. 203 of the UAE Federal Law of Civil procedures.

<sup>154</sup> See Fathi Wali . op. cit., p. 20 and after.

3. The conciliation contract does not have res judicata. It can be contested, like any other contract, with an authentic claim for nullification for the existence of one of the defects that may be in the contract. The arbitration award, on the other hand, has res judicata and inviolable, except through one of the methods of appeal prescribed by the applicable law. Therefore, the arbitration award has authentic res judicata. It is not permissible to submit a suit regarding a claim, which has already been adjudicated through arbitration. However, conciliation does not prevent resorting to arbitration or litigation to demand granting rights based on conciliation decision.

According to the above, arbitration is very much different from negotiation for conciliation, as the latter does not involve referral of the dispute to a third party, independent of the disputant parties, as evident in arbitration, where the dispute is referred to a third neutral person or persons known as the arbitrators. Conciliation could be negotiated between the disputant parties themselves, or through the agency of their respective representatives, to arrive at resolving or settling the dispute, but it does not necessarily arrive at conclusive solutions. This is the case when the disputant parties fail to arrive at a settlement and thus are left with either resorting to arbitration or bringing the dispute before the competent judiciary. If the conciliation negotiation succeeded in arriving at an acceptable solution to the disputant parties, it would be considered a willful or voluntary contract, unlike the settlement through arbitration which is deemed binding, irrespective to the agreement of the disputant parties.

### **Second: Arbitration and Mediation:**

Mediation is defined as a process in which the disputants agree to ask for the services of a neutral and impartial third party, the mediator, to help the parties reach a conclusive and mutually satisfactory agreement to resolve a dispute

arising from contractual or non-contractual legal relation or a dispute related to this legal relation<sup>155</sup>.

According to the above, mediation entails the intervening of a neutral and impartial third party, the mediator, to facilitate dialogue in a structured multi-stage process to help parties reach a conclusive and mutually satisfactory reconciliation or settlement. A mediator is not an arbitrator. The mediator presents ideas and proposals to the disputants bringing the opposing points of view closer without having the power to impose any sort of settlement upon disputants, as arbitrators do. A good example here is the Egyptian Law No. 83 of 2002 on economic zones of private nature, which regulated a system for voluntary mediation through a center for dispute resolution established in the private economic zone. Mediation, according to this law, is done through voluntary agreement between the disputants to resort to the said center. Resorting to mediation is deemed mandatory in the event that the place of residence; the location of business or the administrative headquarters or branch of one of the disputants falls within the premises of that private economic zone. Only suits of urgent matters and claims on administrative resolutions pertaining to non-execution petitions (urgent claims brought before cancellation judge) are exempted from the stipulations of the said law.

According to the above, mediation is like arbitration in that both are alternative methods of dispute settlement instead of resorting to litigation and both are voluntary methods.

Despite areas of similarities between arbitration and mediation, mentioned above, there are certain difference, the most important of which are:

1. Arbitration system is a legal system endowing the arbitration tribunal with a judicial power to issue binding and enforceable decisions, while in mediation the decision arrived at is not binding and the task of a mediator

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<sup>155</sup> Refer to the following with relation to issue of arbitration and mediation, Ahmed Al-Sayyed Al-Sawi: Duplicity of the Jurisprudence of Mediation Committees and that of the State Commissioner, Egyptian State Council Journal, Year (20), 2003; Jabir Jad Nassar: Mediation in some State Disputes, a Comparative Study, Dar Al-Nahdha Alarabyia, 2002 and Tharwat Ahmed Abdulaal: Mediation in Public Persona Disputes according to the Provisions of Law No. 7 of 2000, Dar Al-Nahdha Alarabyia, 2004.

is limited to helping the disputant parties to reach a mutually satisfactory resolution.

2. The mediator follows all possible non-binding means to help disputants to reach a resolution to their disputes while an arbitrator must adhere to specific legal procedures and methods of certain applicable legal rules to be followed in resolving the dispute brought before arbitration.
3. Arbitration begins as a voluntary agreement but, as a general rule, ends up with an award binding to the disputant parties who voluntarily agreed to resort to arbitration. However, mediation begins and ends as a voluntary choice of the disputant parties as a general rule. What is to be understood from the above is that if resorting of individuals to both methods of alternative dispute settlement is voluntary, arbitration ends in what is known as the arbitration award, which, if deemed correct, would be binding to the disputant parties, as a general rule, regardless to their willfulness. Mediation, on the other hand, depends entirely upon the results to which the disputant parties arrive as they decide on the result in the case of mediation.

### **Third: Arbitration and Expertise**

Expertise is a system whereby disputants or entities with jurisprudence assign an expert to give technical opinion in a specific issue within the sphere of his/her expert specialization, the opinion of such an expert shall not be binding to the disputants or entities<sup>156</sup>.

Article No. 69 of the Emirati law of Evidence in Civil and Commercial Transactions stipulates the following: “The court, if deemed necessary, may decide to appoint one or more expert from among state officials, or experts from among experts enrolled in the roster of experts, to be consulted in matters that require adjudication in the lawsuit by the discretion of court.”

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<sup>156</sup> See Ahmed Abdulkareem Salamah: The Law of International and Domestic Commercial Arbitration: Theoretical and Applied Comparison. 1st edition Dar Al-Nahdha Alarabyia. No publication date.

Article No. 70 of the same law stipulates the following: “If the disputant parties agreed upon selecting one or more expert, their agreement shall be endorsed by the competent court, other than that, the court shall appoint the suitable expert from among experts acceptable to appear before the concerned court, unless otherwise required by special circumstances and the court shall explain such circumstances.”

Article No. 90 of the same law stipulates the following: 1. The expert’s opinion is not binding to the court. 2. If the court ruled contrary to the expert’s opinion, the court shall have to explain the reasons for its judgement for not endorsing part or all of the expert’s opinion.”

Accordingly, expertise is similar to arbitration as in both the disputants agree on resorting to the system and assign a third party with the task of giving opinion with regard to an existing dispute arising between the disputants. However, there are many differences between resorting to arbitration and tapping expert opinion, which could be summarized in the following:

1. The nominated expert gives just a non-binding opinion on the required question at stake, unlike the arbitrator, who issues a binding and final decision on the dispute rather than giving merely an opinion or a personal point of view with regard to the question under examination.
2. The expert examines a factual issue of technical nature, which entails examining, appreciating or estimating its condition and deciding on the actual status of the subject of dispute. In doing that, the expert relies on technical expertise and personal assessment experience and present a report on the subject of dispute to the disputants to help in reaching either conciliatory, arbitrational or judicial resolution to the dispute. On the other hand, the role of the arbitrator in the arbitration system involves examination of legal claims to be investigated in accordance with specific procedural rules in order to reach a decision that abide with the rule of law or principles of justice in the issue that gave rise to the dispute<sup>157</sup>.

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<sup>157</sup> See Ahmed Abdulkareem Salamah, *op. cit.*, p. 65.

**Summary: Distinguishing Arbitration from other similar alternative dispute resolution methods:**

From the above discussion, we may conclude that arbitration is distinguished from other alternative means of dispute resolution in that the nature of the task assigned to a third party arbitrator, by virtue of an agreement between disputant parties, is to intervene to settle the dispute by issuing a judicially binding award. In this sense arbitration is an alternative dispute resolution method but it is not amicable because the arbitration award shall be binding to the parties to the dispute unlike the case with other alternative dispute resolution methods like mediation or conciliation.

The main features that distinguish arbitration from other alternative means of dispute resolution are<sup>158</sup>:

1. The arbitration award is deemed binding to the disputants and for this reason the decision arrived at by an arbitrator is also known as arbitration verdict.
2. The arbitrator carries out the task of dispute settlement alone without engagement of the disputants in reaching a resolution, in contrast to other methods of alternative dispute resolution which actively engage the disputants to play positive and effective roles in reaching out for a resolution of the dispute.
3. Arbitration path or process of dispute resolution is binding in that the person who commences the process is bound to continue to the end while in other alternative dispute resolution methods there is no such restriction whereby disputants may decide later to resort to other means of dispute resolution such as arbitration or judicial litigation.

Accordingly, arbitration leads disputant parties toward resolution of the dispute, which is guaranteed because the arbitration award shall be binding to all parties, and in this regard it is considered as a way to end a feud between the disputant parties.

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<sup>158</sup> See Ali Barakat: Arbitration Disputes, op. cit., p. 57 and after and Huda Majdi: The Role of the Arbitrator in Arbitration Disputes and the Limits of his Powers, Dar Al-Nahdha Alarabyia, 1997, p. 53 and after.

## **Section Four**

### **The Scope of Permissibility of Resorting to Arbitration in Administrative Contracts with International Dimensions**

Arbitration is used in administrative and individual disputes with the purpose of alleviating the burden on the judiciary and in respect to the free will of the parties to a dispute who prefer arbitration to the national judiciary as an alternative tool of dispute resolution, whether arising between individuals or between individuals and the administration in relation to economic, investment, commercial, financial or administrative state contracts.

Therefore, legislators, in most countries, must issue laws to organize arbitration including several provisions that keep up with the current international trends relating to economic and global issues and the requirements of investment in recent times. Arbitration has become a legal reality with its advantages and disadvantages. Currently, it occupies a special position in handling administrative disputes, in particular, in the area of administrative contracts. It has become an urgent regulatory issue for national legislators, such as the French and particularly, the Egyptian legislations referred to in many parts of this thesis. Many countries started to resort to arbitration as a means of settlement in disputes arising from administrative contracts under the provisions of the administrative law applicable in these countries. As mentioned in different parts of this thesis, some countries which embrace the dual judiciary system, like France and Egypt, have a separate independent administrative judiciary system to handle lawsuits of administrative nature, along with the other ordinary judiciary system. These legal systems allow the administration to resort to arbitration in contracts concluded between the administration and private and public law persons.

The United Arab Emirates embraces a unified/ unitary judicial system. In other words, there is no independent administrative judiciary system yet. Hence, the rules and provisions employed to handle the issue of arbitration in the area of administrative contracts are derived from some of the provisions included in the Federal Law for Civil Procedures No. 11 of 1992 and the Decree No. 2 of 1994,

together with other federal and local resolutions, which embrace arbitration in the area of administrative contracts. There are also some rulings of the Federal Circle within the Supreme Federal Court and the rulings of the competent arbitration authorities in Abu Dhabi, Dubai, Sharjah, and Ras Al-Khaimah, regarding some contractual disputes.

The Federal Law for Civil Procedures No. 11 of 1992 was issued with the purpose of simplifying procedures for disputant parties and allowing for a speedy settlement of disputes. It provides for the admissibility of arbitration under the condition of adhering to the legislative provisions. Arbitrators should not depart from the ambit of the prescribed legal provisions for the organization of arbitration procedures and the conditions for nominating arbitrators. The Abu Dhabi Chamber of Commerce has established the Abu Dhabi Centre for Commercial Conciliation and Arbitration in 1993. Then, the Dubai Chamber of Commerce and Industry (DCCI) has established the International Arbitration Center followed by the issuance of the Decree No. 5 of 2009 on the issue of the establishment of the Sharjah Center for International Commercial Arbitration, affiliated to the Sharjah Chamber of Commerce and Industry (SCCI).

Articles 203 to 218 of the Emirati Federal Law for Civil Procedures No. 11 of 1992 provide for resorting to arbitration, the regulation of the arbitration procedures and the conditions for selecting arbitrators, as well as the procedures for appeal against awards and determining the competent court authority regarding arbitration award and granting executive capacity.

The Dubai cassation court has established that “any agreement between two disputant parties on arbitration entails disallowing the two parties from resorting to the judiciary for the settlement of the dispute which they agreed to subject to arbitration. The disputant parties may agree to abandon their agreement on arbitration jointly but not on the sole discretion of one of them, otherwise, the arbitration clause remains valid. When disputant parties, by their free will, forsake the right to resort to litigation by agreeing on arbitration, the lawsuit loses one of the conditions for being accepted and the competent court of justice would refrain from allowing such a lawsuit to be brought before it. It is possible to say that as long as the arbitration clause is not rescinded, the court

shall refrain from accepting the lawsuit, though the said case falls under its normal jurisdiction. Thus, invoking the existence of an arbitration clause in a dispute before a court of justice amounts to a plea for not accepting the lawsuit by that court from a procedural point of view. Article 102 of the 1971 UAE constitution stipulates that “The Union shall have one or more Union Courts of First Instance which shall sit in the permanent capital of the Union or in the capitals of some of the Emirates, in order to exercise the judicial powers within the sphere of their jurisdiction in the following cases: Civil, commercial and administrative disputes between the Union and individuals whether the Union is plaintiff or defendant...”<sup>159</sup> This entails that Law No. 11 of 1992 on Civil Procedures does not restrict or identify the contractual parties as such, leaving the term open for different interpretations including both public and private persona.<sup>160</sup>

Some scholars rightly argue that the arbitration system contradicts and is incompatible with the principles and foundations of the administrative law. The contradiction resides in “the rules and principles that strike a balance between the rights and freedom of individuals and the privileges, powers and limitations bestowed upon the administration, which are independent of the rules and principles of private law, whether those prescribed by the administrative law, in countries which embrace dual judiciary system, or those applied in the unified judiciary system, where the rules of administrative law are enforced through the ordinary judiciary within the administrative judicial circles, such as the UAE, which govern and determine the general theories for administrative contracts as follows<sup>161</sup>:

1. Resorting to arbitration in the area of administrative contracts, especially if it led to being subjected to the jurisdiction of foreign judiciary or foreign authorities, is incompatible with the judicial sovereignty bestowed upon the state. Judicial sovereignty indicates protecting the national competent

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<sup>159</sup> See [https://www.constituteproject.org/constitution/United\\_Arab\\_Emirates\\_2004.pdf](https://www.constituteproject.org/constitution/United_Arab_Emirates_2004.pdf). Accessed on 2nd January 2017.

<sup>160</sup> See Majid Tarban, *op. cit.*, P. 161- 163. Also, see Dubai Cassation Court, appeal No. 282 for 1993 on the session held on 13/2/1994; Mahmoud Atif Al-Banna: *Administrative Contracts*, *op. cit.*, Suliman Al-Tammawi: *The General Principles for Administrative Contracts*, 5th Edition, Dar al-Fikir Al-Arabi, 1991 and Suad Al-Sharqawi: *Administrative Contracts*, Dar Al-Nahdha Al-Aarabyia, 2003.

<sup>161</sup> See Ibrahim Ahmed Ibrahim: *Private International Arbitration*, Dar Al-Nahdha Alarabyia, 2nd edition, 1997, p. 121 and after; Mohamed Abdulaziz Bakr, *op. cit.* p. 2000, p. 470 and after and Hafizah Al-Sayed Al-Haddad, *op. cit.*, p. 277 and after.

jurisdiction from any intrusion from foreign jurisdiction. It is not permissible to subject disputes in which the state is a party to a judicial power other than that of the concerned state. In other words, no foreign judiciary is competent to consider such disputes, be it through official judiciary or arbitration. Examples of the intrusion of a foreign jurisdiction of a state is when such state does not recognize the principles and theories of administrative law or such intrusion may be incompatible with the application of Islamic Sharia. The intrusion of foreign jurisdiction, in such cases, represents an assault on the competence of the national jurisdiction in the opinion of the proponents of this position.

2. Some scholars challenge the above argument by stating that when the government or the administration concludes an arbitration agreement by its own free will, it entails acceptance of the outcome of the arbitration process and that does not represent a contradiction to its sovereignty or its immunity. On concluding a contract, the state has the opportunity, not to resort to arbitration and may hold intact its sovereignty and immunity and it is not possible to force the state into being subjected to arbitration. But holding sovereignty and immunity after agreeing to the arbitration clause or resorting to arbitration would be contradictory to the principle of good faith in implementing international obligations. This is because when the state agrees to resort to the arbitration system by its own free will with a private law person represents in itself a waiver of its immunity<sup>162</sup>.
3. The system of arbitration in local administrative contracts or administrative contracts with international dimensions is in contradiction with the legal regulation of administrative contracts because the legal regulation of the administrative contract subjects the contract to rules and provisions different from those to which civil contracts are subjected. In addition, the administration is endowed with privileges and powers which are not possibly available in private law contracts. The legal system for arbitration, which is different from the regulations of ordinary

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<sup>162</sup> See Mohi Aldeen Ismail Alam Al- Deen 1996, op. cit., p. 172 and after.

judiciary, places the administration on an equal footing with the other contractual party deprived of all the privileges bestowed upon the administration through the exorbitant conditions. In addition, the choice of arbitration to pass a verdict on a dispute may entail subjecting administrative contracts to a legal system different from the legal system of the national judiciary<sup>163</sup>.

According to the above, resorting to arbitration means depending on the joint will of the disputants who opt for resorting to arbitration and jointly determine and agree to the law to be applied on the subject of the dispute, as well as the procedures to be followed before the arbitration tribunal. All these arrangements are carried out on equal footing between the parties. The administration stands on equal footing with the other contractual party without being endowed with any exceptional powers and privileges. This is in direct contradiction with the nature of the administrative contract and the position of the administration with relation to the other contractual party, the thing that may defeat the theory of administrative contracts altogether.

In addition to the above, bringing an administrative contract before arbitration may lead to the application of a law that does not distinguish between administrative and civil contracts. Likewise, it may lead to the application of law through the understanding of arbitrators who do not have sufficient knowledge of the nature and the foundations of the administrative law.

The theory of the administrative contract, in the French, Egyptian and Emirati legal systems, is subject to the appreciation of the powers, privileges and controls on the part of the administration. These privileges represent means and methods for maintaining public interests. They are, put together, represent one of the criteria that distinguish the administrative contract from other types of

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<sup>163</sup> See Georgi Shafeeq Sari, *op. cit.*, p. 111 and after; Zaki Mohamed Al-Naggar: *Non-Judicial Methods for Settlement of Administrative Disputes*, Dar Al-Nahdha Al-Arabiya, 1993 , p. 343. See also Fatwa No. 661 on 1st July 1989 and 17th May 1989, 140,44,43,374 and Fatwa No. 211 on 11th March 1993; on the session held on 27/2/1993, p. 47. The reference to these is made in *The Collection of Legal Principles Determined by the Supreme Administrative Court of Egypt and the General Assembly of the Fatwa and Legislation sections in administrative contracts in Egypt for the last forty years from the 1st of October 1955 to the end of September 1995*, p. 138.

contracts. These privileges are quite influential in determining the impact of the administrative contract, the most important of which are the following:

1. The power of the administration regarding the control, guidance and supervision over the implementation of the contract.
2. The power of the administration to impose disciplinary measures on the other contractual party without having to resort to the judiciary.
3. The power of the administration to impose amendments on the contract for reasons of safeguarding public interest, for no fault on the part of the other contractual party.
4. The power of the administration to terminate the contract on its sole discretion for no fault on the part of the other contractual party for reasons of safeguarding public interest.

The administration party is also subject to certain restrictions, prior to and when concluding the contract, which are not normally imposed upon the contractual parties in private contracts. All the above, put together, constitute what is known as the theory of the administrative contract, which distinguishes it from civil contracts, subject to the fundamental principle in civil law that says “agreements must be kept” or “Pacta sunt servanda”. Hence, resorting to arbitration in administrative contracts may amount to dismantling the theory of the administrative contract.

Thus, it would be possible to say that the advocates of this opinion rightly argue that the nature and the legal system pertaining to administrative contracts are in contradiction with the legal system of arbitration<sup>164</sup>.

The comparative legal systems feature a number of different solutions in relation to employing arbitration as a dispute resolution mechanism alternative to the judicial resolution of disputes concerning administrative contracts. I will look at examples from Egypt, France and the UAE:

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<sup>164</sup> See Ismat Abdulla Al-Sheikh, *op. cit.*, p. 237 and after and Ibrahim Ahmed Ibrahim, *op. cit.*, p. 339 and after.

## 1. Arbitration in Administrative Contracts in Egypt:

Article 501 of the Civil and Commercial Proceedings Law No. 13 of 1968 stipulates that it is permissible to agree on arbitration in a specific dispute by virtue of a special document and it is possible to agree upon arbitration in the field of disputes arising from the implementation of a specific contract. The above provision permitted arbitration in all sorts of contracts without restriction. However, Egyptian jurisprudence was split into two trains of thought on the question of the extent of resorting to arbitration in administrative contracts.

The first train of thought argues for the inadmissibility of arbitration in administrative contracts, on the grounds that resorting to arbitration in administrative contracts is inconsistent with the sovereignty of the state, because depriving the state of enforcing its own jurisdiction is a violation of one of the manifestations of sovereignty. This may lead to exclude the application of the national law by applying a foreign law, and allowing this to take place is considered as an assault on the jurisdiction of the administrative judiciary to consider administrative disputes.

The Supreme Administrative Court in Egypt has adopted this position in its rulings. The court advocated the inadmissibility of arbitration in disputes arising from administrative contracts in its ruling issued in the appeal case No. 3049 of year 32<sup>165</sup> judicial, in session held on 20/2/1990, in spite of the fact that the provisions of the disputed contract included an arbitration clause stipulating resorting to arbitration in the event of dispute arising during the implementation of the contract<sup>166</sup>.

Another position argues for the admissibility of arbitration in administrative contracts basing their argument on the fact that Article 501 of the above-mentioned law on civil proceedings, does not distinguish between different types of contracts. The General Assembly of the

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<sup>165</sup> This figure denotes the judicial sitting year of the court for considering lawsuits brought before the court.

<sup>166</sup> See Jabir Jad Nassar, 1997, *op. cit.*, p. 56 and after; Anwar Ruslan : The Role of Arbitration Tribunals in Administrative Disputes, a research paper presented to the Third Arab Forum for the Development of the Relationship between Legal Professionals and Administrators, Egypt , 15-17 December 2003, p. 158 and after. See also Majid Tarban, *op. cit.*, p. 208 and after; Abdulmageed Al-Ahdab: Arbitration in Arab Countries, Vol. 3, Nofel Corporation, Beirut, 1990, p. 47.

departments of Fatwa and Legislation of the Egyptian Council of State lent support to this position<sup>167</sup>.

This jurisprudence argument was rendered futile after the issuance of Law No. 27 of 1994 on the issue of Arbitration in Civil and Commercial Matters. The first Article of this law stipulates that “the provisions of this law are applicable on any arbitration between parties of public law or private law, irrespective of the nature of the legal relationship from which a dispute arises”. Most jurisprudence scholars in Egypt support the argument that this provision admits the possibility of resorting to arbitration in disputes arising from administrative contracts, depending on the content of the provision which is provided in the explanatory memorandum on the above-mentioned law (which has settled, beyond any doubt, the admissibility of arbitration on all kinds of contracts)<sup>168</sup>.

To put a conclusive end to this argument, the Egyptian legislator issued Law No. 9 of 1997 amending the provision of Article 1 of law No. 27 of 1994. The new version of Article 1 stipulates that: “In administrative contracts disputes, the agreement on arbitration is admissible provided that the approval of the competent minister or his representative is granted, with regard to public persons. Authorization or delegation to other persons in granting such ministerial approval is absolutely prohibited.” This legislative amendment emphasizes the admissibility of arbitration in administrative contracts and determines the competent authority for granting that admissibility. It also indicates that arbitration is admissible in all disputes arising from administrative contracts, whether at the phase of concluding the contract or during the phase of its implementation, as well as post-implementation consequent effects. It is applicable to both local administrative contracts and administrative contracts with international dimensions.

The Egyptian legislator augmented this amendment by issuing the Law No 89 of 1998, on tenders and auctions. Article No. 42 of the said law

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<sup>167</sup> See Jabir Jad Nassar, *op.cit.*, p. 67 and Sherif Yousef Khater: *Arbitration in Disputes of Administrative Contracts and Controls*, Dar Al-Fikr Al-Qanouni, 2011, p. 145, and after.

<sup>168</sup> See Ismat Abdulla Al-Sheikh: *Arbitration in International Administrative Contracts*. Dar Al-Nahdha Alarabyia, 2000, p. 177 and after and Shareef Khatir, *op.cit.*, p. 154 and after.

stipulates that “In the event of dispute arising during the implementation of a contract, the two contractual parties may agree on resorting to arbitration to settle their dispute provided that the approval of the competent minister is obtained. The two contractual parties shall be obliged to continue implementing their respective obligations provided for in the contract.”<sup>169</sup>

## **2. Arbitration in administrative contracts in France :**

The situation in France hinges upon a general principle of prohibiting the inclusion of the arbitration clause in administrative contracts, with some exceptions. In other words, inadmissibility is the rule while permissibility is the exception<sup>170</sup>.

The above statement is derived from the provisions of the old French Law of Civil Procedures, Articles 83 and 104, which were merged later in Article 2060 of the current French civil law. This stipulates the inadmissibility of arbitration in all disputes in which public law persons are involved, even if the contract at stake is connected to an administrative contract. This rule is deemed as an intrinsic public order principle and must not be violated. Both the French jurisprudence scholars and Administrative jurisdiction have emphasized this principle of prohibition because it is connected to public order.<sup>171</sup>

The French Council of State, which is the supreme administrative law court in France, followed suit by upholding this legislative ruling, by prohibiting the inclusion of the arbitration clause in administrative contracts, even though the French civil judiciary has permitted the inclusion of the arbitration clause in administrative contracts of international nature<sup>172</sup>. There are exceptions to the provision of inadmissibility of arbitration in administrative contracts by the French

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<sup>169</sup> See Sharif Khatir, *op. cit.*, p.174 and after and Abdulaziz Abdulmoniem Khalifa: *Arbitration in Local and International Administrative Contracts Disputes*. Legal Books Publications, 2006 P. 72 and p. 103.

<sup>170</sup> Y. Gaudement, *L'Arbitrage: Aspects de Droit Public et de La Question Ren. ARB* 1992, p. 241.

<sup>171</sup> See Sharif Khatir, *op. cit.*, p. 114 and after.

<sup>172</sup> See G. Teboul: *Arbitrage International et Personnes Morales De Droit Public: Brenes Remarques Sur Quel ques Aspects De Contentieux Administratif*, A.J.D.A., 1997, P.25; C. Jarrosson: *L'arbitrage en Droit Public* A.J.D.A.,1997, P.16; F. Munoz: *Pour une Logique De La Conciliation*. A.J.D.A., 1997, p.41 and M.Guillaume-Hofnung: *La Mediation*, A.J.D.A.,1997,P.30.

legislator and administrative judiciary. The most important of these exceptions include:<sup>173</sup>

- The possibility of resorting to arbitration in order to carry out the process of clearance of expenses of public works and procurement contracts (Law No. 17 April of 1906, Article 69.)<sup>174</sup>
- Admissibility of resorting to arbitration in contracts pertaining to some categories of public industrial and commercial corporations. These corporations are specified by the provisions of a decree (the law issued on 9 July 1975).<sup>175</sup>
- Admissibility of arbitration in international administrative contracts (Law of 19 August 1986)<sup>176</sup>

It is evident from the above that the French legislator has recognized a general principle that stipulates the prohibition of including the arbitration clause in administrative contracts and this trend was endorsed by the legislations of the French Council of the State. However, to encourage foreign investors and to maintain good international economic relations, some of the exceptions were permitted, the most important of which is the admissibility of arbitration in international administrative contracts by the Law of 19 August 1986<sup>177</sup>.

### **3. Legal Regulation of Arbitration in the United Arab Emirates:**

The Emirati legislator admits arbitration in some of the provisions of the Federal Law of Civil Proceedings No. 11 of 1992, in the case of both public and private law persons. The financial circular issued on 26 September 1985 obliges parties to disputes to bring administrative contracts disputes before the Permanent Committee for Projects, presided by the Minister of Planning. It also entrusted the Compensation and Arbitration committee, branching from the Permanent committee, with the task of resolution of administrative contractual disputes arising from the implementation and/or interpretation

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<sup>173</sup> See Sharif Khatir, *op. cit.*, P. 122 and after; Yusri Mohamed Al-Assar, *op. cit.*, P. 86 and after and Hamdi Ali Omer: *Arbitration in Administration Contracts: A Comparative Study*. Dar Al-Nahdha Alarabyia 1997, P. 92.

<sup>174</sup> See Sharif Khatir, *op. cit.*, P. 122.

<sup>175</sup> See A. H. De Nouveaux: *Etablissements Publics Autorises: A Compromettre*, *Ren.Arb.*2002, No.1, P.249.

<sup>176</sup> See Sharif Khatir, *op. cit.*, P. 134.

<sup>177</sup> Y. Gaudement, *L'Arbitrage op. cit.*, P.242

of administrative contracts (Article 1 of the Federal Law on Civil Proceedings, No.11 of 1992 amended by Cabinet Resolution No. 8 of 2000).

It is to be noted here that the provisions of the civil procedures law do not explicitly mention administrative contracts. Hence, the question arises about the legality of resorting to arbitration to settle disputes relating to the state in the UAE. This ambiguity derives from the fact that the Emirati federal legislator did not include an explicit provision admitting resorting to arbitration to resolve administrative disputes, in general. Furthermore, the Emirati jurisprudence and judiciary did not adopt any criterion for arbitration in such disputes.

I conclude from the above: The Federal Law for Civil Procedures No. 11 of 1992 has established a general criterion for organizing the procedures and the general rules for admitting arbitration in articles 202-218, regardless of the nature of disputes involved, whether belonging to the administrative law or to private law. The law also admits, in general terms, agreement on resorting to arbitration in disputes that may arise of the implementation of a specific contract, be it civil, commercial or administrative. According to the rule that the general, in its entirety, if not specified, the generality of the provisions of the law admit resorting to arbitration for those engaged in contractual relations irrespective of the nature of the contract at stake. The circulars and cabinet resolutions have entrusted the Standing (permanent) Committee for Projects and its affiliated committee for compensations and arbitration, with the task of settlement of all sorts of disputes arising from the implementation and interpretation of contracts. In the event of failure to reach a satisfactory resolution through arbitration, the competent court within the UAE shall undertake the task of resolving such said dispute. In both cases the provisions of the administrative law should be observed when handling such disputes. These provisions are obliging and inviolable, with regard to issues of public order.

The special characteristics of the administrative contract must be satisfied and observed. The Compensation and Arbitration Committee has practiced arbitration in several international administrative contracts and, in various rulings, admitted resorting to arbitration in administrative contracts under the umbrella of the law of civil proceedings and observed in many rulings the

general principles of administrative contracts. The compensation and arbitration committee is made up of three arbitrators; one of the three arbitrators is to be appointed by the cabinet of ministers, the second is to be appointed by the Minister of Justice and the third is to be appointed by the president of the Supreme Federal Court. The decisions of the arbitral tribunal are mandatory and may be contested before the judiciary according to the prescribed legal methods.

The Compensation and Arbitration Committee, which is entrusted with the task of resolving disputes arising from administrative contracts, is obliged to apply the rules of the administrative law in contractual administrative disputes, considering that these rules are peremptory norms of public order. Violation of these rules renders the awards issued by both the arbitral tribunal and the Compensation Committee void. This applies to arbitration in domestic national administrative contracts.

The situation in UAE is still quite vague with regard to resorting to arbitration in international administrative contracts, or administrative contracts with international dimensions. There is no doubt that the country is witnessing a tremendous surge in investments in economic and commercial projects and is currently engaged in great international economic and commercial activity. This economic vitality requires establishing economic foundations that satisfy the demands of foreign investors and ensures security and confidence and arrange for admissibility of arbitration in disputes arising from international administrative contracts or contracts with international dimensions. There is also an urgent need for putting in place the necessary rules of international arbitration and arbitration in contracts with international dimensions<sup>178</sup>. This requires explicit recognition by the national legislature of the importance of admissibility of arbitration in international administrative contracts and administrative contracts with international dimensions, which involve the state as a contractual party. There is also a need for exempting arbitration tribunals from abiding by the rules of national public order when considering such contracts. This is so because instating the domestic public order principles and

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<sup>178</sup> See A'ad Ali Al-Hamoud Al-Qaisi: Administrative Contracts according to the Administrative Contracts System in the UAE, University Press, Sharjah University, UAE , 2013 , pp. 167-173

applying the public law render resorting to arbitration in administrative contracts devoid of meaning and intent.

By studying the problematic question of arbitration in administrative contracts with regard to the scope of admissibility and its impact on the theory of the administrative contract, certain facts emerge:

1. Arbitration as a legal system is in conflict with the legal system and nature of administrative contracts. The nature and theory of the administrative contract are based on empowering the administration party to achieve public interests through mutual understanding and agreement with the other contractual party. For a contract to be deemed administrative, three conditions must be satisfied: at least one of the contractual parties to a contract must be a public persona of public law; the contract should be connected directly with the organization or running or operation of a public facility and the means and ways of public law should be incorporated by inclusion of exorbitant conditions unfamiliar in private law contracts. In case of including the arbitration clause in the provisions of an international administrative contract, or an administrative contract with international dimensions, that would entail eliminating the privileged powers of the administration party in the management of the contract and gearing it towards realizing public interests. Achieving public interests is the basis upon which the privileged authority of the administration party is established, through the inclusion of exorbitant conditions in the contract. These exorbitant conditions include the right of the administration party to terminate the concluded contract for reasons of safeguarding public interest, with compensation paid to the other contractual party.

Arbitration is a legal system which is based on agreement opted for by the parties to a dispute by their own free will and each party is in the same footing as the other disputant party before the arbitral tribunal. The arbitral tribunal may opt for applying a foreign law, which may result in depriving the contract of one of the essential features of an administrative contract and strips the administrative party of its endowed privileges and

powers as a public authority. Accordingly, arbitration would not be the ideal method for settling disputes arising from administrative contracts and particularly those with international dimensions. Resorting to arbitration in such contracts may lead to the elimination of the theory of administrative contract altogether.

2. Despite the observation mentioned in the point above, it is also possible to say that resorting to arbitration in the modern world occupies a prominent and privileged place as an essential method for resolution of disputes arising from administrative contracts with international dimensions, to attract more foreign investment and promote economic development. Foreign investors are normally distrustful of national laws in foreign countries. They agree to invest in foreign countries only after ensuring the inclusion of the arbitration clause in administrative contracts with international dimensions. Investors normally harbor deeply seated suspicious that national domestic laws in foreign countries, and particularly the rules and provisions of administrative law, are always in favor of the national interests. Local litigation systems and local jurisdictions are usually very slow and follow tedious and complicated procedures, which may result in slowing down the pace of capital circulation. At present, the door to competition for attracting foreign investment has become wide open between both developed and developing countries, on a global level.

The above concerns have urged many countries to be cautious with regard to resorting to arbitration in the area of administrative contracts, whether at legislative, jurisprudence or judicial levels. Some other countries adopted a stricter position with regard to the possibility of applying arbitration and admitted arbitration in very restricted limits, as in the following:

- A. The general principle in France is to prohibit arbitration in administrative contracts, except in international administrative contracts, as it represents the only possible vent for attracting foreign investments and enhancing economic development and growth, without which foreign investors and states would be reluctant to invest in a country that

disallows arbitration. This might be due either to economic instability in foreign countries or due to suspicions that domestic legislations are susceptible to change from time to time which results in great economic upheavals for the investors.

- B. The Egyptian legislator has embraced the admissibility of arbitration in international administrative contracts by an explicit provision, as stipulated in the legislative amendment No. 9 of 1997 to Article No. 1 of the Arbitration Law No. 27 of 1994, linking the possibility of resorting to arbitration to the approval by the competent minister.
- C. Several Arab countries embraced the position adopted by both Egypt and France. Saudi Arabia, Qatar, Morocco, Algiers, Tunisia, Libya, Lebanon and others admitted arbitration in international administrative contracts, provided that it is approved by the competent minister or the cabinet of ministers. Kuwait still maintains inadmissibility of arbitration and the Kuwaiti judiciary is still adamant about disallowing arbitration in international administrative contracts<sup>179</sup>.

I perceive that a lot of Arab countries, which allowed inclusion of the arbitration clause, were urged to do so to attract foreign investments by allowing unconditional admissibility of arbitration in international administrative contracts. This may prejudice the higher interests of the state, both politically and economically, in addition to the opacity of the position of the UAE state with regard to the international administrative contracts and administrative contracts with international dimensions.

I can bring to witness here the argument for rejecting the idea of admissibility of arbitration in the field of administrative contracts in general by most countries led by Egypt and France. Then, later on these countries have opted for allowing arbitration in the field of international administrative contracts and administrative contracts with an international dimension, provided that the admissibility is approved by

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<sup>179</sup> See Abdulhameed Al-Ahdab: Preview of the Present and Future of Arbitration in the Arab World, paper posted on the internet. See Waleed Abbas: Arbitration in Contractual Administrative Disputes, Ph.D. thesis, Ain Shams University, 2008, pp. 214 and after; see Ismat Abdulla Al-Sheikh, *op. cit.*, p. 188 and after and Khalid Al-Falah Al-Anzi, Ph.D. thesis, Arbitration in Administrative Contracts in Kuwait, Cairo University, Dar Al-Nahdha Al-Arabyia, 1st edition 2007, pp. 298 and after.

the highest authorities in the state (such as the competent Minister, or the Prime Minister).

3. I advocate that stipulating inadmissibility of arbitration is the best option open for us in the field of administrative contracts with international dimensions. It could be permitted in the most restricted manner, namely in cases where a certain contract would be of great national benefit (such as transfer of certain advanced type of technology) and must not be in contradiction or conflict with the higher national interests. In this case, it should be granted only after the prior approval of the highest executive authority is obtained to make sure the previous condition is squarely met. There is no doubt that appreciation of the highest public interests of the state is a matter to be decided by the competent authorities under a thorough political supervision of the parliament and public opinion.

The above-mentioned point is brought here because arbitration conflicts with the nature of the administrative contract and contradictory to the privileges and powers of the administration, which were endorsed by the legislator or the judiciary because they realize the higher interests of the state.

In case of resorting to arbitration in administrative contracts, both domestic and with international dimensions, admissibility is to be permitted through a separate and independent arbitration stipulation after the emergence of the dispute. In this way, the administration would be fully aware of the type and nature of the dispute and the extent of the impact of resorting to arbitration upon the higher interests of the state, as well as determining the applicable law on the dispute. It is better, in this case, to choose the applicable law which is compatible with the laws in force in the countries that recognize the special nature of the administrative contract and distinguish between administrative and civil contracts. In other words, if the dispute is related to countries that embrace a dual judiciary system, the applicable law to be chosen should belong to one of these countries. If the dispute is related to countries that embrace a unitary judiciary system, the applicable law chosen should belong to one of these countries.

In light of the above considerations, a balance should be stricken between economic interests and growth and the flourishing of both domestic and international trade, on the one hand, and societal values and interests, on the other. Also, a balance should be stricken between the flexibility and relative nature of the concept of public order, on the one hand, and the concept of public world order, on the other hand. It is the responsibility of the national legislator to put in place the necessary controls and standards to arrive at the proposed balance.<sup>180</sup>

Having the above comparative analysis of arbitration in administrative contracts with international and international dimensions, I recognize the following:

1. The legal system or regulation of arbitration in administrative contracts is the best solution to this type of contracts, which is based on the following:
  - a. A general principle is to prohibit arbitration in administrative contracts because its nature and legal regulation conflicts with the system of arbitration. The nature and the theory of the administrative contract is based upon the empowerment of the administration to achieve public interests through understanding and agreement with other contractual parties. For a contract to qualify as administrative, it must meet three conditions: at least one party to the contract must be a public persona of the public law; the contract must relate to the organization, management and operation of a public facility and must embrace the means and ways of public law by including exorbitant conditions, unfamiliar in private law contracts. Inclusion of the arbitration clause in international administrative contracts or administrative contracts with international dimensions entails the elimination of the authority and powers of the administration in the management and the implementation of the contract towards achieving public interests. The latter is the basis upon which the

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<sup>180</sup> For more information on the concepts of the domestic public order and global world order and its impact on arbitration in the area of the applicable law, see Waleed Abbas: *Arbitration in Contractual Administrative Disputes*, Alexandria, New University Press, 2010, P. 64 ; Ahmad Abdulkareem Salamh : *Concise Private International Relation Law*, Dar Al- Nahdha Alarabyia , 1996 , P. 309 and P. 780 and *Free Contract Theory* , Dar Al-Nahdha Alarabyia , 1989. See also Majid Tarban, *op. cit.*, P. 472.

authority of the administration hinges, through the said exorbitant conditions, such as the right to terminate the contract on its own discretion with paying compensation to the other party for reasons of safeguarding public interests.

- b. Exceptional admissibility of arbitration in administrative contracts with international and international dimensions is the only possible means of attracting foreign investments and realizing development and economic growth. This is so because inadmissibility of arbitration in international administrative contracts and in administrative contracts with international dimensions will deter investors from engaging in investment in the country where arbitration is inadmissible. They would refrain from investing in such countries for fear of domestic legislation and policies, and for fear of the slow pace of court proceedings and the loss of capital in pursuing settlement of disputes through slack litigation procedures.

2. I do not embrace the current position regarding the regulation of arbitration in international administrative contracts and administrative contracts with international dimensions in most Arab countries, especially the position in both Egypt and the United Arab Emirates. In both countries, there is a conspicuous absence of explicit and forthright provisions in this regard, despite the endorsement of both jurisprudence and judicial authorities of admissibility of arbitration. It is to be noted here that in some countries it was unconditionally endorsed. For all of the above, we propose the following:

- a. There is an urgent need to prohibit arbitration, in general principle, in domestic national administrative contracts because its system is in conflict with the system and concept of arbitration in general and because the privileges and powers bestowed upon the administration are sufficient enough to settle potential disputes in an effective way. The most important of these privileges and powers include the power of the administration to control, guide and supervise the performance of the other contractual party; the right of the administration to

impose penalties on the other contractual party without resorting to a court of justice; the right of the administration to amend the contractual provisions on its own discretion to safeguard public interests and for no infringement on the part of the other contractual party and the right of the administration party to terminate the contract for reasons of safeguarding public interest, with compensation paid to the other contractual party. Resorting to arbitration would eliminate this exceptionally distinguished nature of administrative contracts. Arbitration should be admitted in the narrowest possible limits.

- b. There is an urgent need for stipulating, in explicit terms, admissibility of arbitration in the international administrative contracts and administrative contracts with international dimensions to allow for integration with the international community and to keep up with the demands of the new economic world order. This would also help in achieving development and attracting investment, provided that the necessary restrictions and controls should be put in place. This should be carried out without prejudicing public order for the sake of merely satisfying the requirements of engaging into the workings of the international public order. Such restrictions may include resorting to arbitration within the framework of realizing significant benefits in national economic development and increased investment, whereby the potential revenues would far exceed harping on the question of maintaining the intrinsic nature of the administrative contract and the narrow concept of the domestic public order.

### **Summary of Chapter Three:**

Arbitration is considered as one of the most important alternative methods for settlement of disputes, particularly in administrative contracts. This is because it is simplicity of arbitral proceedings and characterized by speediness in issuing arbitration awards, as arbitrators are obliged to issue their decision within a

specified target date. The speediness is an important and necessary factor in implementing international transactions, which are influenced by fluctuations in exchange rates and raw material prices. The need for the growth of international commercial, oil and investment relations between industrial countries, on the one hand, and oil producing countries and developing countries, on the other hand, requires effective settlement of potential disputes in a neutral manner, giving priority to economic considerations and avoiding political and international considerations.

Arbitration in disputes connected with domestic administrative contracts and administrative contracts with international dimensions is also characterized by protecting the privacy and confidential information of the contractual disputant parties. It also involves securing peace of mind and confidence, on the part of the contractual parties, as they maintain the right to choose their own arbitrators. Admitting arbitration encourages major investment firms to get into contracts with government administration in conducting their transactions, as well as the absence of multiple levels of litigation, which is crucial for the speedy settlement of disputes.

Despite that, some scholars correctly maintain that the system of arbitration in administrative contracts may be in conflict with several principles of administrative law. That is why most scholars believe that resorting to arbitration should be safeguarded with guarantees that ensure the achievement of the advantages of arbitration without prejudice to the considerations and principles of administrative law. Therefore, resorting to arbitration in administrative disputes should be admitted within certain limits, that is, in cases where contracts related to projects of great benefit to the state, without conflicting with the higher interests of the state. This must be controlled by obtaining the prior approval of the highest executive authority within the state.

# **Chapter Four**

## **Regulations for Resorting to Arbitration in Disputes Pertaining to Administrative Contracts with International Dimensions**

This chapter deals with the following topics:

**Section One:** Pre-arbitration Dispute Settlement Procedures in Administrative Contracts with International Dimensions.

(The competent authority entrusted with approval of resorting to arbitration in administrative contracts)

**Section Two:** Penalties for violating the arbitration stipulation in disputes related to administrative contracts with international dimensions.

**Section Three:** Appropriateness of resorting to arbitration in administrative contracts with international dimensions and maintaining the individual distinct nature of contracts.

## **Section One**

### **Pre-arbitration Dispute Settlement Procedures in Administrative Contracts with International Dimensions (The Competent Authority Entrusted with Approval of Resorting to Arbitration in Disputes Related to Administrative Contracts with International Dimensions)**

A comparative Law overview shows that normally there are certain pre-arbitration procedures which should be put in place prior to resorting to arbitration in administrative contracts with international dimensions, or prior to resorting to dispute settlement through arbitration in relation to an administrative contract with international dimension. The Egyptian legislator admits resorting to arbitration in administrative contracts disputes by Law No. 27 of 1997, subject to the approval of the competent minister, or whoever entrusted with such power from public persona. This restriction is imposed to ensure controlling the use of resorting to arbitration and to guarantee that the arbitration agreement satisfies considerations of public interest.<sup>181</sup>

Accordingly, administrative entities in Egypt shall not be allowed to resort to arbitration in administrative contracts disputes without obtaining a prior permission from the competent minister or whoever entrusted with such power within a certain public persona. The explanatory memorandum to Law No. 27 of 1997 provides justification for stipulating the condition of approval from the competent minister in case of resorting to arbitration in administrative contracts with international dimensions. According to this memorandum, the requirement of ministerial approval ensures the imposition of certain restrictions and

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<sup>181</sup> See Sharif Khatir, *op. cit.*, P. 174; Mahmoud Atif Al-Banna: *Foundations of Administrative Law: Means and Methods of Administrative Activity*, Dar Al-Fikir Alarabi, No Date, P. 137 and Abdulaziz Khalifa, *op. cit.*, P.72.

controls on resorting to arbitration. These restrictions and controls shall guarantee that the arbitration agreement fulfils requirements of public interest. Hence, the approval by the competent minister is obligatory on the part of the administrative entity prior to resorting to arbitration in administrative contracts with international dimensions.<sup>182</sup>

The approval by the competent minister, or whoever is entrusted with such powers from public persona, shall be restricted to resorting to arbitration in domestic administrative contracts or those with international dimensions. Administrative contracts of international nature are those contracts which involve a foreign person or a foreign company or a foreign state as a party to the contract. In such contracts, the approval of the cabinet of ministers is required because such contracts are mainly related to issues relating to national development, technology transfer or exploitation of natural resources, which require the approval of an administrative power higher than that required to issue approval for resorting to arbitration in domestic administrative contracts with international dimensions.<sup>183</sup>

The same rule with regard to administrative contracts of international nature is stipulated by the French legislator in the provision requiring the approval by the cabinet of ministers in cases of resorting to arbitration in administrative contracts of international nature, pursuant to Article 2060 of the French Civil Code. It stipulates that a Cabinet Decree, signed by the Minister of Finance and the competent minister, is obligatory for allowing arbitration in international administrative contracts."<sup>184</sup>

The Egyptian Law No. 9 of 1997 prohibited delegation of power in this regard, stipulating that delegation is prohibited in the case of obtaining approval from the competent minister or whoever is entrusted with such power from public

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<sup>182</sup> See Abdulaziz Abdulmoneim Khalifa : Arbitration in Administrative Contracts Disputes, Dar Al-Kuttub Al-Ghanounyia , 2006 ,P 72. See also minutes of the People's Assembly of Egypt, 23 April 1997, the 7th Legislative Chapter, Second Council Sitting, session No. 60, appendix No. 2, P. 82, referred to in Sharif Khatir, op. cit., P. 174.

<sup>183</sup> See Sharif Khatir, op. cit., P.176 and Abdulaziz Khalifa, op. cit., P.72.

<sup>184</sup> See Ismat Abdullallah Al-Sheikh, op. cit., P.178; Shrif Khatir, op.cit., P.129 and Hamdi Ali Omer: Arbitration in Administrative Contracts: A Comparative Study, Dar Al-Nahdha Alarabyia, 1997, P. 100.

persona because of the seriousness of the issue at stake, as the whole issue entails exclusion of resorting to the national judiciary, which is replaced by resorting to arbitration<sup>185</sup>.

Similarly, the French Legislator stipulated in article No. 2060 of the French Civil Code that arbitration should be carried out through an arbitration stipulation, that is with regard to an existing dispute, in public works and procurement contracts, if the issue at stake is related to the clearance of expenses arising from such contracts. In other words, the legislator did not embrace inclusion of the arbitration clause as an integral part of the original administrative contract or as separate and independent contract, prior to the emergence of the dispute. This law focuses only on disputes related to the clearance of expenses of public work and procurement contracts, to the exclusion of all other types of administrative contracts. Resorting to arbitration, according to this legislation, shall not be included in the original contract but through arbitration stipulation after the emergence of a dispute. It also stipulates the approval of the cabinet of ministers by a decree signed by the Minister of Finance or the competent minister, with respect to public work and procurement contracts for the state. If the issue is connected with provinces or districts, the issue of resorting to arbitration shall be discussed by the council (municipality) of the province and approved by the competent minister.<sup>186</sup>

In Egypt, the administration party is obliged to obtain the approval of the competent authority in relation to each case separately, on a case by case basis, in the event of agreement to resort to arbitration in administrative contracts disputes. That is so because resorting to arbitration is considered an exceptional tool for settlement of disputes arising from administrative contracts, which, according to jurisdiction rules, is to be brought before the Egyptian administrative judiciary (pursuant to Article 10 of the Egyptian State Council Law No. 47 of 1972, which stipulates that the state council courts have exclusive

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<sup>185</sup> See Ismat Abdulla Al- Sheikh, op. cit., P. 226. Also see Majid Tarban, op. cit., P. 150; Alaa Eldeen Mohieldeen Abu Ahmed, op. cit., P.232; Hafeiza Al-Haddad, op. cit., P.34 and Lambie Et J. M. Loncle, L' Arbitrage Lans Les Grands Projets en Concession de Service Public, R.A.J,No1,2003. P3

<sup>186</sup> See Majid Tarban, op. cit., P. 150 and D. Foussard : " L' Arbitrage en Droit Administratif, Ren.,Arb. 1990. p.3.

jurisdiction on disputes related to obligations, public works, procurement or any other administrative contract).

Pursuant to the Bidding and Tenders Law No. 89 of 1998, the Egyptian legislator has provided for the parties to a contract to reach an agreement on resorting to arbitration to settle a dispute arising from the contract while such contract is being implemented. However, this admissibility is subject to obtaining the approval of the competent minister, with the commitment of each party to continue to implement its obligations arising from the contract. The Egyptian Law No. 9 of 1997 is concerned with concluding administrative contracts and the methods and procedures to be followed in doing so. It was mainly introduced to strike a balance between the methods of contract conclusion and the tools for the settlement of disputes arising from administrative contracts. This law opened the way for embracing the possibility of resorting to arbitration in administrative contracts under specific and restricted conditions. In this law, the Egyptian legislator includes a third condition for resorting to arbitration in administrative contracts to the two conditions provided for in previously issued laws. The first two conditions are the approval by the competent minister or whoever entrusted with such powers and the prohibition of delegation of powers. The third condition introduced by the above mentioned law added is that of the commitment of the parties to the contract to continue implementing their contractual obligations arising from the disputed contract.<sup>187</sup>

The French legislator intervened by issuing a Law on 19 August 1986 in which Article No. 9 provides that the state, local and regional entities, as well as public corporations, may have the right to resort to arbitration to settle disputes arising from contracts concluded with foreign companies, with the sole purpose of implementing projects of national interest. According to the above, resorting to arbitration is governed by the following<sup>188</sup> :

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<sup>187</sup> See Sharif Khatir, *op. cit.*, P. 180.

<sup>188</sup> See Alaa Mohieldeen Mustafa Abu Ahmed: *Arbitration in Disputes Related to International Administrative Contracts in Light of Positive Laws, International Treaties and Arbitration Awards: a Comparative Study*. New University House, Egypt, 2008, p. 232 and after. See Hafiza Al-Haddad, *op. cit.*, p. 34. See also Lambie et J. M. loncle, *op. cit.*, P.3 and D. Fossard, *op.cit.*P.3 ets

1. The contract shall be concluded with a foreign company; that is to be deemed of international nature. Hence, such exception shall not apply to local or national administrative contracts.
2. The subject matter of the contract shall be concerned with a project of national benefit to justify resorting to arbitration.
3. The need for the issuance of a decree by the Council of Ministers to approve the inclusion of arbitration clause in each separate contract.

There is no doubt that the Council of Ministers is the competent authority for assessing what goes under public benefit that justifies resorting to arbitration, which should be entrusted with issuing the approval to include an arbitration clause in administrative contracts.

The situation is very much different with regard to the United Arab Emirates, where the state did not issue a special law with regard to resorting to arbitration. It is crucial to issue such law because foreign companies, which have sought investments in the UAE during the last few years, generally, incline to include the arbitration clause in their contracts. Hence, there is an urgent need for developed legal systems to set arbitration regulations that would convince foreign investors to settle for arbitration carried out by local arbitration institutions.

By scrutiny of the provisions related to arbitration, stipulated in the civil procedures law, No. 11 of 1992 I find that Article No. 203 of the UAE Federal Civil Code stipulates that “The parties to a contract may, in general terms, stipulate in the basic contract, or by a supplementary agreement, that any dispute arising between them, in respect of the performance of a particular contract, shall be referred to one or more arbitrators and may also agree to refer certain disputes to arbitration under special conditions.”<sup>189</sup>

The UAE Federal Constitution, in Article No. 102/1 stipulates that “the union shall have one, or more than one, federal court of first instance to be seated in the permanent capital of the union, or the capital of any other emirate, to exercise jurisdiction in the following cases: civil, commercial and administrative

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<sup>189</sup> [http://arbitrationlaw.com/files/free\\_pdfs/UAE%20Civil%20Procedure%20Code.pdf](http://arbitrationlaw.com/files/free_pdfs/UAE%20Civil%20Procedure%20Code.pdf) (accessed on 9 April 2016)

disputes between the Union and individuals, whether the Union is the plaintiff or defendant”.

From the above, we realize that the federal law No. 11 of 1992 regarding civil procedures, as well as the Federal Constitution, avoided restricting or specifying the nature of contractual parties and left it open, by inclusion of the phrase “contractual parties in general”, which may refer, equally, to any individual of private capacity as well as to a public persona.

The UAE federal constitution did not provide for the establishment of an independent administrative judiciary. Furthermore, **it did not stipulate for special provisions for administrative arbitration as opposed to civil and commercial arbitration**. The legislator holds the contractual parties in dispute on equal stands and **does not set special procedures for administrative arbitration** where the existing provisions apply on contractual parties in general terms.

It is to be noted that the UAE Ministry of Economy has already drafted a federal law bill on the issue of arbitration and enforcement of arbitration awards, which is yet to be ratified and come into effect. Article (2) of the proposed law provides for the following: “with regard to administrative contracts disputes, agreement on resorting to arbitration shall be subject to the prior approval of the competent minister or whoever entrusted with such powers from public persona who are not affiliated to a particular minister and it is possible to delegate such powers”<sup>190</sup>.

As to the applicable law on arbitration disputes in administrative contracts with international dimensions, the Emirati law does not provide clearly for a mechanism for determining such a law in the light of the regulatory principles set for arbitration. Accordingly, the judiciary are left with applying the provisions of the international private law in the Emirati law. By scrutinizing the Emirati civil transactions code, we realize that the agreement on arbitration is governed by the provision of Article No. 19 of 1992 of the Emirati Code of Civil

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<sup>190</sup> Referred to in a study by Abdulla Hamad Omran Al-Shamsi: Arbitration in Administrative Disputes in the UAE State: A Comparative Study. A master thesis presented to the Faculty of Law, Cairo University, 2007, p. 73 and after. See also Majid Mohamed Nihad Tarban, 2013 op. cit., P. 163 and after.

Transactions, which stipulates that contractual relations shall be subject to what the contractual parties explicitly agree upon. In the absence of such an explicit agreement on the applicable law, the provisions of the law which govern the contract are applied. Therefore, defining the governing law depends upon the explicitly or implicitly stated will of the contractual parties. Hence, in the absence of such expressly stated will, the contractual relationship shall be governed by the applicable law of the home country of the contractual parties, if both belong to the same home country, otherwise the contract shall be governed by the applicable law of the country in which the contract is concluded.<sup>191</sup>

This law shall be applicable under the controls that determine the application of the law with regard to location within the domain of the international private law, which means the law to be applied should pay due respect, and should be compatible with, the teachings and principles of Islamic Sharia, the public order and ethics of the state<sup>192</sup>.

Article No. 28 of the Emirati Civil Code states that the law of the United Arab Emirates shall be applied if it is impossible to prove the existence of an applicable law or to determine its rulings and effect.

The UAE has eventually become a signatory to the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards by the issuance of the Federal Decree No. 43 of 2006. Article No. 1/1 of the convention stipulates that “this Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.”<sup>193</sup> Some scholars consider the

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<sup>191</sup> Article No. 19 of the Emirati Civil Code states the following, “The form and the substance of contractual obligations shall be governed by the law of the state in which the contracting parties are both resident if they are resident in the same state, but if they are resident in different states the law of the state in which the contract was concluded shall apply unless they agree, or it is apparent from the circumstances that the intention was, that another law should apply.”

<sup>192</sup> Article No. 23 of the Emirati Civil Code stipulates that, “It shall not be permissible to apply the provisions of a law specified by the preceding Articles if such provisions are contrary to Islamic Sharia, public order, or morals in the State of the United Arab Emirates.

<sup>193</sup> See <http://www.diac.ae/idias/rules/Newyork/> (accessed on 11 March 2017)

accession of states to the New York Convention shall influence a judicial development to the purpose of recognition of the validity of the arbitral award independently from any domestic or foreign national law. That entails the validity of the arbitral award without jeopardizing the rulings and principles of the domestic legislations.<sup>194</sup> Article No. 5/2 stipulates that recognition and enforcement of an arbitral award may also be refused if the competent authority, judge, in the country where recognition and enforcement is sought finds that (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) the recognition or enforcement of the award would be contrary to the public policy of that country.<sup>195</sup> Based upon this article, some scholars and administrative law legal professionals claim that the New York convention does not involve any impact on the expansion of arbitration in the area of administration.<sup>196</sup>

Therefore, jurisprudence rightly believes that the enforcement of foreign awards, under the law of civil procedures related to arbitration within the UAE requires the following:<sup>197</sup>

1. The admissibility of Arbitration in the case brought before arbitration
2. The enforceability of the arbitration award in the state in which it was issued
3. Reciprocity
4. Lack of jurisdiction of the UAE courts to consider the matter brought before arbitration

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<sup>194</sup> See in this regard, Jalal Wafaa Mohamdain: Arbitration under the Umbrella of the International Center for Settlement of Investment Disputes, 1995, New University Publishing House, Alexandria, P. 11; Samia Rashid, op. cit., P. 92 and P. 328; Hamdi Ali Omer, op. cit., P. 89; Isam Eldin Al-Qasabi; The Special Nature of Arbitration in the Area of Investment Disputes, Dar Al-Nahdha Alarabyia, 1993, P. 58; Bakr Abdulfattah Sarhan: Emirati Arbitration Law, University Books, UAE, Sharjah, 2012, p. 383; Ashour Mabrouk: Post Arbitral Award Considerations, 3rd edition, 2008, Dar Al-Fikr Al-Qanouni, Al-Mansoura, Egypt, P. 241 and Fawzi Sami : International Commercial Arbitration , Dar Al-Thagafa, UAE, Sharjah, 2008 P. 34 .

<sup>195</sup> <http://www.wipo.int/amc/en/arbitration/ny-convention/text.html> ( accessed on 11 March 2017)

<sup>196</sup> See Isam Eldin Al-Qasabi, op. cit., P. 58 and Also see P. Fouchard: La Leve'e Par La France de La Re'serve de Commercialite Pour L'application de Convention de New-York, Revue de L'arbitrage, 1990, P.580 Et s.

<sup>197</sup> See Bakr Abdulfattah Sarhan, op. cit., P. 383; Ashour Mabrouk op. cit., P. 241

5. The entity which issues the award should enjoy both local and international jurisdiction
6. Considering the fundamental defense rights of opponents
7. The arbitration award should have the power of res judicata
8. The arbitration award should not conflict with the public order principles of the UAE
9. The arbitration award should not conflict with rulings, orders and regulations issued by the state of the UAE.

The above conditions were drawn from the above-mentioned UAE law on civil procedures (articles 235 and 236) and the provisions of the New York Convention of 1958 (Articles 1-14).<sup>198</sup>

The above discussion indicates that the application of the applicable law may entail that the arbitrator would resort to the same principles which are compatible with the nature of the agreement on arbitration. Their initial agreement on the applicable law, in case of resorting to arbitration, shall be applied on the dispute that may arise. If there is no such explicit or implicit agreement on the applicable law, then the principles of the International Private Law, as practiced within the UAE, may be invoked as mentioned above. This may entail exclusion of applying the principles of the administrative law on contracts concluded by the state, stripping these contracts of their individual distinct nature and identity. It is also known that the individual distinct nature and identity of administrative contracts are based on empowering the administration to achieve public interests. These are contracts concluded by a public persona of public law to the purpose of managing and operating a public facility through adopting the means and ways of public law. Such contracts should include exorbitant conditions, unfamiliar in private law contracts. Hence, it would be pertinent to resort to legislative intervention, which regulates arbitration in administrative contracts with international dimensions in the United Arab Emirates.

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<sup>198</sup> See Bakr Abdulfattah Sarhan, *op. cit.*, P. 389; Ashour Mabrouk, *op. cit.*, P. 241 and Fawzi Sami, *op. cit.*, P. 34.

We notice here that one of the conditions of enforcing foreign rulings, pursuant to the Emirati Civil Code (including arbitration awards), is the necessity of admission by the Emirati law of arbitration in the subject on which the award is issued and the viability of the arbitration award for enforcement within the country in which it is issued. The intention of the Emirati law in this regard is to restrict admissibility of enforcement of arbitral awards only to those proven to be enforceable in the foreign country in which an award is issued. This is to ensure that such arbitral awards were issued in line with legal principles of the country of issuance and enforceable therein. Articles 235 and 236 of the Emirati Federal Law of Civil Procedures stipulate that arbitral awards must be passed on a matter which may be decided on by arbitration according to the law of the country of issuance and must be enforceable in that country. Another condition is reciprocity. It means that the UAE legislator requires the enforceability of foreign arbitral awards in the UAE and likewise the enforceability of arbitral awards issued in the UAE in the foreign country, on similar terms, or on less restricted conditions than the ones set by the UAE legislator.<sup>199</sup>

As previously mentioned, the Emirati law recognizes conciliation by arbitration, which is a process through which the contractual parties resort to arbitrators to settle their dispute, leaving the matter of determining the suitable law to be applied on the subject of the dispute entirely to the choice of the selected arbitrators. In other words, such process adopts non-compliance with any law in order to reach a just verdict, which is left to the arbitral tribunal or arbitrator to reach a just solution to the conflict, and in this regard, the tribunal or arbitrator may resort to the principles of justice and natural law. (The principles of justice and equity are the ideal set of principles that derive from the abstract nature of things, and impose their presence on the human mind. These principles could be embraced as a platform for reaching just settlement of international disputes, irrespective of positivist legal principles). (Principles of justice and natural law are inherent in the nature of social relations between

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<sup>199</sup> See Article 235/1 of the Emirati Federal Law of Civil Procedures and the UAE Federal Supreme Court in appeal No. 258 of 1999, judicial, in session held on 2 October 1999, the Technical Office, p. 653.

individuals, irrespective of time and place. It is the basis for exalting the rule against bias in order to maintain public confidence in the legal system. These principles can be arrived at through objective reasoning tapping a package of ideals and eulogized values shared by all nations. Legislators should always adhere to these principles.<sup>200</sup> These principles represent the source from which any legal system derives its concepts and legislations and have a tremendous impact on the formulation of its provisions. Therefore, arbitrators should always adhere to these principles and the failure to do so may result in annulment of the arbitral award and deems it unenforceable).

That is why this procedural process is known as conciliation by arbitration because the arbitrators seek to arrive at a fair judgment, regardless of the rules of law, and depending on their own discretion of what is fair through the application of the principles of justice to the conflict, without allowing any room for the disputant parties other than complying with their verdict. There is no limitation on the arbitrators in this case, however, other than paying due respect to the public order, including all peremptory guidelines dictated by this public order and the contractual parties are obliged to adhere to. Article 212/2 of the Federal Law of Civil Procedures stipulates that “The arbitrators award shall be in conformity with the provisions of law, unless the arbitrator was authorized to reconcile the dispute, in which event he shall not be bound to comply with such rules except in matters which concern public order.”<sup>201</sup>

According to the above, conciliation by arbitration exempts the arbitrator from following the rules of substantive law and procedural rules except with regard to the rules of public order and the basic rights of defense and litigation, which together represent guarantees for enforcing justice.

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<sup>200</sup> See Husam Al-din Kamil Al-Ahwani: Introduction to Legal Science, Part 1. Theory of Law. 1997, P. 55; Mohamed Hussain Mansour: Theory of Law. New University Press, Alexandria, 2004, P.67; Ghalib Ali Al-Dawdi : Introduction to the Science of Law. Wael Press, 2004, P. 177 and Arabic Language Academy: Dictionary of Law, Cairo, The General Authority for Government Printing, 1999, P. 657.

<sup>201</sup> See Nabeel Ismail Omer: Arbitration in Civil, Commercial, National and International Matters. University Publishing House, Alexandria, 2004, p. 166 and after. See also Mohamed Al-Sayyed Al-Tihaiwi: Types of Arbitration and its Distinction from Reconciliation, Agency and Expertise. University Publications House, 2002, p. 178 and after.

I believe that conciliation by arbitration should be ruled out in the field of administrative contracts, because it may lead to excluding the application of the theory of administrative contracts to legal disputes concerning administrative contracts. Otherwise, the contractual parties, other than the administration, who opt for conciliation by arbitration, may be able to completely avoid the application of the rules of administrative law, of which the most important are the powers and privileges of the administration as set within the theory of the administrative contract. These privileges of the administrative party include:

1. The right to control, guide and supervise the other contractual party
2. The right to impose penalties on the other contractual party
3. The right to amend the provisions of the administrative contract by the administrations' sole discretion
4. The right to terminate the contract by the sole discretion of the administration for purposes of maintaining public interest with paying damages to the other contractual party.

The administrative law endows the administration party with these powers and privileges to enable the administration in controlling the contractual party and to make sure that the other party adheres to the realization of public interest through the implementation of the contract concluded with the administration. In the event of failure to adhere to this principle, the administration party has the right to oblige the other contractual party to do so.

For the above reasons, the French jurisprudence and the French Council of the State stipulate restrict conditions for allowing public persona to resort to arbitration in disputes in which the administration is a contractual party or resorting to international arbitration. These include contracts related to international administrative contracts and those with international dimensions, connected to the local domestic legal system. The condition stipulated by the French council of the state resides in inclusion of a legal provision, either by virtue of an international treaty or through a legislative provision, explicitly allowing admissibility of arbitration. The basis for this is the desire to disallow

public persona of public law circumvent the state administrative jurisdiction of the administrative court or application of administrative legal system.<sup>202</sup>

## **Section Two**

### **Penalty on Violating the Clause of Agreeing on Arbitration in Disputes Related to Administrative Contracts with International Dimensions**

Jurisprudence scholars were divided on the resultant effect of including the arbitration clause in an administrative contract without the approval of the competent authority.<sup>203</sup>

Some scholars claim that if the agreement on resorting to arbitration in administrative contracts is not coupled with obtaining prior approval of the competent authority, the agreement shall be rendered null and void, but it should be possible to obtain such approval at a later stage during carrying out arbitration procedures, which would rectify this nullity.<sup>204</sup>

Other scholars advocate that in case of an agreement on the inclusion of arbitration clause in administrative contracts without obtaining prior approval from the competent authority, it is possible to seek obtaining the approval during carrying out arbitration procedures. In other words, it is possible to seek obtaining correction measures to rule out the nullity of the arbitration clause. But in case the administration was responsible for the failure to obtain the approval of the competent authority, such an act would amount to an

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<sup>202</sup> See Genevois : Les Principes Generaux L'aspects De Droit Administratif . Rev.Lnt. dr. Comparee, 1980, P.270 Et s, C. Jarrosson: L'arbitrage en Droit Public, A.J.D.A.1997, p.16 Et s and A. Patrikios: L'arbitrage en Matiere Administrative,These, Paris,1996, P.46 ET S.

<sup>203</sup> See Mustafa Mohamed Al-Jammal and Ukasha Mohamed Abdulaal : Arbitration in Private International and Local Relation. Alexandria, 1998, p. 148 and after. See also Hamdi Ali Omer: Arbitration in Administrative Contracts. Dar Al-Nahdha Alarabyia, 1997, p. 139 and after. See Muhsin Shafeiq: International Commercial Arbitration: A Study on the Law of International Trade. no date, p. 47. See also Abdulaziz Abdulmoneim Khalifa: Commercial Arbitration in International and Local Administrative Contracts: An Analytical Study. Dar Al-Al-Kutub Al-Ghanounyia, 2006, p. 106 and after.

<sup>204</sup> See Mustafa Mohamed Al-Jammal and Ukasha Mohamed Abdulaal, op. cit. , p. 148 and after.

administrative mistake. The administration party would be obliged to pay damages to the other contractual party for the losses incurred due to concluding the arbitration agreement without obtaining the provisional approval of the competent authority. It is assumed, in this case, that the other contractual party has acted in good faith, believing that the administrative party has satisfied all requirements and conditions prior to the conclusion of the contract.<sup>205</sup>

A third position among scholars maintains that the administration party should not be forgiven for not seeking to obtain approval of the competent authority. The failure to do so amounts to a violation of established general international system. Ensuring the enforcement of the arbitration agreement is not restricted to protecting higher interests alone, but also involves protection of international social solidarity that requires each state to contribute to and encourage the establishment of special relationships between nations to come closer and live in peace. The advocates of this position perceive that compensating the contractual party for the damages incurred due to the failure of the administration party to obtain approval to resort to arbitration from the competent authority is not a sufficient remedy. It does not provide a genuine solution and it cannot be accepted as an argument for abandonment of the arbitration agreement.<sup>206</sup>

A fourth position among scholars maintains that obtaining the approval of the competent authority to resort to arbitration in administrative contracts disputes should be restricted to local administrative contracts and administrative contracts with international dimensions. Accordingly, inadmissibility of arbitration shall be a direct consequence of failure to obtain the approval for resorting to arbitration on such contracts. However, resorting to arbitration in disputes related to international administrative contracts without obtaining the approval of the competent authority does not render the arbitration clause null and void.<sup>207</sup>

The French judiciary have embraced the fourth position mentioned above. The French argue for the admissibility of arbitration in international administrative

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<sup>205</sup> See Hamdi Ali Omer, *op. cit.*, p. 139 and after.

<sup>206</sup> See Muhsin Shafeiq, *op. cit.*, p. 47.

<sup>207</sup> See Abdulaziz Abdulmoniem Khalifa, *op. cit.*, p. 106 and after.

contracts, indicating that the prohibition provided for, with regard to local administrative contracts, does not apply on contracts concluded for the purposes and requirements of international trade.<sup>208</sup>

In the case of *San vs Carol*, the French Cassation court went on to say that the ban imposed on the state with regard to entering into an arbitration agreement with foreign private enterprises is not an integral part of the international public order and should not to be considered related to the issue of legibility. The statement ended with deciding the non-applicability of the prohibition imposed upon the state and public units, pursuant to the French Law of Pleadings, with regard to the admissibility of the arbitration clause in the context of international relations, where the question of the validity of arbitration agreements is subject to the law governing the contract and not the specific law of the contractual parties.<sup>209</sup>

In another judgment of the Paris Court of Appeal, on June 13 of 1996, the Court decided that, whatever the basis of the ban on the state to enter into an arbitration agreement, such a ban remains restricted to administrative contracts concluded locally but not to contracts relating to the international public system. According to the latter system, the state shall refrain from taking advantage of the provisions of the national law, or of the law of the contract, in order to avoid entering into an arbitration agreement. If such arbitration agreement is encountered within the framework of an international contract and was entered into in accordance with the needs and conditions that are consistent with international trade and public order practices, it is deemed a valid agreement and shall enjoy full effectiveness.<sup>210</sup>

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<sup>208</sup> See Majid Tarban, *op. cit.*, p. 154, in the case of the owner of the ship *Galkis vs the French Ministry of Maritime Transport*, regarding the rental contract between the two parties. Article 17 of the contract stipulates that any dispute that may arise during the implementation of the contract shall be settled before the court of London. The owner of the ship brought the dispute before the court of London and got a favorable verdict. On trying to get an order to execute the verdict from The Seine Court in Paris, the Ministry defended against that by claiming the invalidity of the arbitration clause arguing that arbitration is not admissible in administrative contract pursuant to the French law. The court endorsed this claim which led the owner of the ship to appeal before the court of cassation to receive the above-mentioned verdict.

<sup>209</sup> See Majid Tarban, *op. cit.*, p. 155.

<sup>210</sup> See Ahmed Makhloof : *Arbitration Agreement as a Means for Settlement in International Trade Disputes: A Foundational Analytical Study*. Cairo, Dar Al-Nahdha Alarabyia, 2001, p. 299 and after.

I believe that violating the condition of obtaining the approval of the competent authority in the case of resorting to arbitration in disputes arising from both local and administrative contracts with international dimensions, and international administrative contracts and the failure of the administrative contractual party to obtain such approval, entail invalidity of resorting to arbitration for the failure to satisfy the conditions set up for admissibility of resorting to arbitration. The affected party may claim damages for the losses incurred as a result of such violation on the part of the administrative contractual party. This position is in perfect harmony with the rule of law and, at the same time, does not entail any harm to the other party who acts in good faith.

I argue for endorsing the above position because it agrees with a true rule of law. It does not inflict harm on the other contractual party, who may claim and obtain compensation for damages resulting from considering resorting to arbitration invalid for absence of the arbitration clause. It is contrary to other positions presented above because, unlike the other positions, it takes into consideration both agreement with the true rule of law and does not harm the other contractual party.

## **Section Three**

### **Relevance of Resorting to Arbitration in Disputes Relating to Administrative Contracts with International Dimensions and Maintaining Administrative Contracts Distinctive Nature**

A generally attested<sup>211</sup> agreement among scholars is that arbitration does not influence the administrative nature of administrative contracts with international dimensions. What has influence on the nature of contracts is the inclusion of provisions that conflict with the main principles of administrative contracts, such as:

- The conditions that specify the nature of the administrative contract and the penalty for failure to comply with these conditions.
- Determining the responsibility of the state in the case of exercising its right to the exorbitant conditions included in administrative contracts.
- Non-recognition of the primacy of the public interest over private interests in determining public authority privileges in administrative contracts.

There is no doubt that describing a public facility obligation contract, or any other administrative contract, by attributing a commercial or private designation for such contracts, may lead to failure in adherence of contractual parties to the substantive rules that govern administrative contracts with international dimensions and which endow the administration with exorbitant privileges, such as:

- The right to control and guidance the contractor.
- The right to amend the contract on the sole discretion of the administration party.

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<sup>211</sup> See Majid Tarban, *op. cit.*, P. 74.

- The right to terminate the contract on the sole discretion of the administration party.
- The right to impose penalties upon the other contractual party without resorting to the judiciary.

Arbitration awards in some international contracts are sometimes inclined to deny the administrative nature of the contract to avoid falling under the impact of the privileged exorbitant conditions, conferred upon the administration contractual party in administrative contracts. Such cases include:

1. The case of ARAMCO regarding the conclusion of an agreement between the Saudi Kingdom and a foreign company, on 29 May 1933, to the purpose of exploiting the oil resources in the Saudi Eastern Region for a period of 60 years. That foreign company has assigned all its rights and privileges to another, namely CASOS company, and the Kingdom of Saudi Arabia agreed to such assignment, based upon the agreement concluded with the first company. On 31 January 1944, the other company changed its name to ARAMCO<sup>212</sup>.

On 20 January 1954, the Kingdom of Saudi Arabia concluded a contract with the Millionaire Aristotle Onassis. The contract granted Onassis the right to establish a private company under the name of Saudi Arabian Maritime Tankers Company, "SATCO", which was to maintain a fleet of tankers, under the Kingdom of Saudi Arabia flag, registered in Saudi Arabia. The contract included a provision that gives the contracting company preferential rights to export petroleum and petroleum products exported by sea from Saudi Arabia to foreign countries and from its pipeline terminus outside Saudi territories, whether the shipping is carried out by the concessionaire companies themselves, or companies that own its assets (Offtakers) or respective buyers.

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<sup>212</sup> This is referred to in detail in the proceedings of the case in Hafizah Al-Sayyed Al- Haddad: Agreement on Arbitration in State Contracts of Administrative Nature and its Impact upon the Applicable Law. University Publications House, 2001, p. 48 and after. See also Mohamed Abdulaziz Bakr: The Impact of the Arbitration Clause upon the Individual Concept of the Administrative Contract, p. 25 and after. See also Majid Tarban: Arbitration in Administrative Contracts Disputes: A Comparative Study, Dar Al-Wadhih, UAE, 1st Edition, 2013, p. 74 and after.

Aramco refused to comply with the Onassis Contract. It maintained that its implementation would violate the letter and spirit of the ARAMCO, Concession Agreement; conflict with longstanding business arrangements and practices concluded in reliance on that Agreement and be wholly impracticable. The prospect of Onassis controlling its export lifeline was not one that ARAMCO, – or the international oil industry at large – could accept, which grants the latter the absolute right to choose its own transportation means, including hiring foreign petroleum tankers. Negotiations between ARAMCO, and Onassis proved fruitless. The Government proposed resolution of the dispute by arbitration. The fourth article of the arbitration agreement concluded on 23 February 1955 stipulates that the arbitration tribunal shall arrive at its award pursuant to the applicable laws of the Kingdom of Saudi Arabia and the law which the tribunal decide to apply with regard to issues falling within the jurisdiction of Saudi Arabia (which entails the application of Islamic laws along the sect of Ahmed Bin Hanbal). The tribunal opted for determining the legal nature of the contract first and then decide on the applicable law. Accordingly, the arbitration tribunal concluded that the contract at stake is not to be considered administrative as the Islamic law does not recognize administrative contracts recognized in the French legal system. The contract is deemed as falling within the category of Non-standard (non-classified) Contracts which does not fit into any category of labeled contracts.

The tribunal summed up its verdict by holding that granting a priority right to SATCO as a result of the Onassis Agreement encroached upon the exclusive rights granted to Aramco and that ARAMCO, was not bound to implement the Onassis Agreement. It further held that ARAMCO, had not assigned its rights to the off takers and buyers. The Government could not legally oblige ARAMCO, to use its port facilities to pump oil into SATCO's tankers. The Onassis Agreement was not effective as against Aramco or against its off takers and buyers because, in the exercise of its rights as concessionaire, the Company had concluded contracts with them, which it

could ask the Government to respect. When the Government granted Aramco the exclusive right to export, it undertook to recognize all arrangements made by ARAMCO, to export its oil and products.

The arbitration Award held that the Onassis Agreement was in conflict with the Aramco Concession Agreement of 1933, and was not effective as against ARAMCO.<sup>213</sup>

2. The second case is concerned with the contract concluded between the Libyan government and the two American companies Texaco about petroleum concession contracts from 1955 until April 1971. Many amendments were made into this contract over the years.<sup>214</sup>

The Libyan government on 1973 have nationalized the capital of the two companies, which were party to the concession contract. The two companies refused to recognize this action and notified the Libyan government of their intent to resort to arbitration to settle this dispute, pursuant to the provision of Article( 28 ) of The Libyan Law on Petroleum and nominated an arbitrator from New York State. The Libyan government refused to appoint its own arbitrator which impelled the disputant companies to refer the matter to the International Court of Justice to nominate a sole arbitrator to resolve the disputes arising between the two parties. The ICJ appointed Dr. Pere-Jean Dubut, professor of Public International Law at the university of Nice and member of the International Law Association, as the sole arbitrator.<sup>215</sup>

The arbitrator discussed the nature of the contract concluded between the Libyan government and the two companies and whether it is to be

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<sup>213</sup> See the link

<http://jwelb.oxfordjournals.org/content/early/2010/09/28/jwelb.jwq012.full.pdf> accessed on 8 April 2016

<sup>214</sup> See Samia Rashid , op. cit. , p. 52 and after. Also see Hafiza Al-Haddad: Contracts Concluded by the State with Foreign Persons: Al-Halabi Publications, Beirut, Lebanon, 2003, P. 464; Majid Tarban, op. cit., P. 76 and P. 176; Fouad Abdulmoneim Riyadh, op. cit., 1992 and Ahmed Sadiq Al-Shiqairi: The Domain and Nature of International Private Law, Journal of International Private Law, Cairo, 1968.

<sup>215</sup> See Hafiza Al-Haddad, op. cit., p.468 and after. Also, see Siraj Abu Zaid, op. cit., P. 131; Abdulkarim Mohamed Al-Surouri: The Legal System For Energy Contracts: a paper presented to the 21st UAE University Conference : Energy between Law and Economy held during the period from 20th to 21st of May 2013, P. 739.

considered administrative, which shall entail that the Libyan government shall have the right to amend it by its own discretion or otherwise non-administrative, in which case the right to amend the contract would be inadmissible.

Although the Libyan law recognizes the theory of administrative contracts, the sole arbitrator refused to consider the contract concluded between the Libyan government and the two companies as an administrative contract. His argument was based on the understanding that the concession contracts disputed do not satisfy the conditions required by the Libyan law to qualify as administrative contracts. He argued that the idea of management or exploitation of a public facility does not exist in the provisions of the contracts at stake. Also, the Libyan government had entered these contracts on an equal footing with the two American companies and the contract does not include exorbitant conditions unknown in private contracts. Dubut concluded that even if the disputed contract is deemed administrative, it is not admissible to apply the legal rules associated with administrative contracts, such as the right of the administration to terminate the contract at its own discretion, because that would be a departure from the common legal principles recognized in both the Libyan legal system and the international law. The theory of administrative contracts, which has its origin in the French legal tradition, and was embraced by the Libyan legal system, is not recognized in public international law.<sup>216</sup>

Based on the foregoing, the arbitral tribunals in the first case refused to consider the disputed contract as an administrative one, because Saudi law, in the case of ARAMCO, does not recognize the administrative contracts theory.<sup>217</sup> In the case of TEXACO vs Libya, the sole arbitrator rejected the application of the administrative contracts theory on the disputed contract, even though recognized by the Libyan law, and because the common principles shared between the Libyan law and public international law do not embrace the administrative contracts theory. In

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<sup>216</sup> See Siraj Abu Zaid, *op. cit.*, P. 132 and Abdulkarim Al-Sirouri, *op. cit.*, P. 740.

<sup>217</sup> See Siraj Abu Zaid, *op. cit.*, P. 132 and Abdulkarim Al-Sirouri, *op. cit.*, P. 740.

other words, the theory of administrative contracts is French and Libya used to embrace that theory. On the other hand, the international law at that time did not embrace the French theory of administrative contracts because it was not recognized in the international law, consequently, the Libyan law and the international law do not share the common ground of applying the theory of administrative contracts, which is in the essence of this dispute.

3. In a third case, the arbitration tribunal refused to apply the Egyptian law regarding an administrative contract agreed upon by all disputant parties and deemed it to be a private contract. It was then challenged by an appeal brought before the Cairo court of appeal in the case known as the Chromalloy case in 1994.<sup>218</sup>

In brief, the details of this case began with the conclusion of a contract on 16 June 1998 between Chromalloy Aeroservices and the Air Force Armament Authority of the Egyptian Ministry of Defense in which the US company represented to procure equipment, services and technical support related to military helicopters. Due to the failure of the Company to deliver its contractual obligations, the Egyptian Air Armament Authority terminated the contract and confiscated the letter of guarantee. The American company refused this action on the part of the Egyptian government and demanded bringing the dispute before arbitration pursuant to the provision included in the contract concluded between the disputant parties. The arbitration tribunal decided that the termination by the sole discretion on the part of the Egyptian government was illegal and obliged the Egyptian party to pay damages, exceeding \$17 million, to the company against the illegal termination of the contract. The Egyptian party appealed to the Cairo court of appeal to render the arbitral award null and void for several reasons including: the exclusion of the arbitral award to the issue of taking the applicable law into consideration and the invalidity of the arbitral award for violation of the controls on negligence

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<sup>218</sup> See Samia Rashid, *op. cit.*, p. 66 and after. Also, see Hafiza Al-Haddad, *op. cit.*, P. 63 and Sharif Khatir, *op. cit.*, P. 195.

and omission legally recognized pursuant to Article 53/d of the Law No 27 of 1992 regarding arbitration in civil and commercial material.

In its session held on 5 December 1995, the court of appeal reached the ruling that the arbitral award shall be deemed invalid because the arbitral tribunal did not take into account the applicable law (the Egyptian law in this case) agreed upon between the disputant parties as governing their contract. The disputed contract is considered an administrative one because one party to the contract is a public persona and the contract is connected to the management of a public facility. Also, the administration has shown its intention to adopt the provisions of the principles of public law and to attain their rights by direct implementation or execution, as provided in the contract including levying financial fines in some cases and the power to terminate the contract in certain cases solely upon notification by a registered letter. All these are considered exorbitant conditions exceptionally unusual to be included in private law contracts.

Accordingly, if the contract included a provision determining the applicable law, as known to the arbitral tribunal, is the Egyptian law, it is understandable that this law is the Egyptian administrative law. If the arbitral award ruled otherwise, by applying the Egyptian civil law, the award shall be in violation of the provisions determining the applicable law of the contract. Accordingly, the request for rendering the arbitral award null and void would be in line with the provisions of article 53/1 / d of the law No. 27 of 1994 on arbitration in civil and commercial matters.<sup>219</sup>

4. In an international dispute between the Emirate of Abu Dhabi and an English company, the arbitral tribunal excluded applying the national law to the disputed contract. The sole arbitrator, in the dispute between the Sheikh of Abu Dhabi and the English company in 1953, decided that the applicable law to the dispute in question should be the law of the country in which the contract was concluded, according to normal practice, that is as judged by the arbitrator and according to the applicable law of the

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<sup>219</sup> See Hafiza Al-Haddad, *op. cit.*, P. 63 and Sharif Khatir, *op. cit.*, P. 195.

contract. Hence, the local law of the Emirate of Abu Dhabi should prevail.<sup>220</sup>

However, the arbitrator repealed his argument by saying that it is not possible to apply the local law in this case because the ruler of Abu Dhabi presides over the local judiciary, enjoying unlimited discretionary authority. Hence, it is not advisable to apply the local law of a foreign state where the ruler (the executive authority) also enjoys the judicial power within the state, which is party to the dispute. In such case the judicial decision would be biased.

This entails lack of established legal rules applicable on modern commercial contracts in the context of such primitive countries.<sup>221</sup>

In the face of such situation, the sole arbitrator argued that the established law to be applied in this case should be a settled law, whose principles and provisions were already entrenched in civilized nations. He ended up by applying the English law to the conflict brought before him, excluding the local law of Abu Dhabi, which should have been applied instead because it was the applicable law of the country in which the contract has been concluded.<sup>222</sup>

5. Another case is the one known as the EFL Aquitaine case between the French company and the national Iranian Company. In 8 January 1980, the Revolutionary Council of the Islamic republic of Iran issued a law involving a single article which provides for the establishment of a special committee endowed with the power to declare null and void all oil contracts which the committee deems incompatible with the Iranian law of 1951. Pursuant to the provisions of this law all Iranian oil industry and business were nationalized. This involved terminating the contract concluded between the EFL Aquitaine company and the National Iranian

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<sup>220</sup> See Ahmed Sadiq Al-Shiqairi: Modern Trends in Determining the Applicable Law to International Contracts. The Egyptian Journal for International Law, Vol 21, 1965, P. 63; Majid Tarban, op. cit., P. 116; Samia Rashid, op. cit., P. 67; Mohamed Al-Roubi: Arbitration in Construction, Exploitation and Delivery Contracts B.O.T. Contracts. A paper presented to the 16th UAE University Conference under the title of International Commercial Arbitration: The most Important Alternative Solutions, held in Abu Dhabi during the period 28-30 April 2008, Vol. 1, P. 153.

<sup>221</sup> See Majid Tarban, op. cit., p. 116.

<sup>222</sup> See Mohamed Al-Roubi, op. Cit., P. 153 and after.

Company, which impelled the French company to resort to the arbitration clause which was an integral part of the original contract concluded between the two companies, which was already deemed null and void by the above-mentioned committee. The Iranian company insisted on applying the governing Iranian law, which was issued after the conclusion of the contract. By doing so, arbitration would be lacking in jurisdiction to settle the dispute.

The appointed arbitrator deemed it appropriate to adhere to recognized principles of the international law. These principles stipulate that the state associated with an arbitration clause provided for in a contract entered into by the State or any public entity, shall not, by its own discretion, at a later date to the signing of the arbitration clause, prevent the other contractual party from resorting to the arbitration as agreed between the parties to resolve disputes arising from their contract.<sup>223</sup>

Therefore, and through our review of the above cases, we arrive at the conclusion that in the first case the theory of the administrative contract was excluded, arguing that the Saudi law does not recognize the administrative contracts theory. It is also ruled out in the second case because the administrative contracts theory does not conform to the common principles shared between the Libyan and international laws, which do not embrace the theory of administrative contract. In other words, the theory of administrative contracts is essentially French while the Libyan legal system was not influenced by the French system. The international law at that time did not embrace the French theory of administrative contracts, which was not recognized in international law. Accordingly, both Libyan law and international law do not apply the theory of administrative contracts which was in the essence of the dispute at stake.

In the third case, the theory of administrative contracts was, again, ruled out by denying the disputed contract the status of an administrative contract. Therefore, the arbitral tribunal ruled out the possibility of applying the Egyptian

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<sup>223</sup> See Hafiza Al-Haddad, op. cit., P. 290 and Majid Tarban, op. cit., P. 219. Also see F. Ouchard: "l'arbitrage ELF Aquitaine Lran C National Lranian Oil Company, P.346; Une Nounelle Contribution Au droit Lnternational de L'arbitrage", Ren. Arb. 1984 P.333 Et s.

administrative law. In the fourth case, the correct applicable law to be applied to the contract, that is the local law of the Emirate of Abu Dhabi, was ruled out under the pretext of the absence of valid stable rules applicable to modern commercial contracts, because the law to be applied must be of established principles and provisions exercised in civilized nations. For this reason, the sole arbitrator decided to apply the English law.

In the fifth case, the arbitral award ruled out the insistence of the administrative party (Iran) to uphold the existing applicable law which has come into force after the conclusion of the disputed contract and resorting to arbitration, with the implicit purpose of evading submitting to arbitration. The argument of the administrative party does not render the correct and legal arbitration clause included in the disputed contract null and void. Based on the principle of good faith in the implementation of contractual obligations, it is not permissible for the state to carry out any actions or adhere to subsequent laws in order to avoid resorting to arbitration, as long as this obligation has been issued right from the outset. The principle of *Pacta sunt servanda* (agreements must be kept) should be at work here.<sup>224</sup>

I strongly advocate restricting the recourse to arbitration within the framework of the theory of administrative contracts, to be limited only to the international administrative contracts and administrative contracts with international dimensions. This should be done under certain conditions and restrictions that ensure refraining from sacrificing the theory of administrative contracts for the benefit of a foreign law. Public interests should have priority over private ones.

Thus, to resort to arbitration in disputes on administrative contracts with international dimensions and international administrative contracts should not affect the administrative nature of the contract in dispute, that is in case the administrative nature of the contract is undisputedly evident and the substantive rules of administrative contract should be adhered to. The disputant parties should agree that the administrative law must be applied on the conflict in the

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<sup>224</sup> See Majid Tarban, *op. Cit.*, P. 220 and Hafiza Al-Haddad, *op. cit.*, P.290. See also Fouchrad *Op. Cit.* P.333 Et.S.

case of resorting to arbitration, and, hence, properly applying the theory of administrative contracts, because of the privileges enjoyed by the administrative contractual party. Such privileges are not available in the event of deciding that the disputed contract is a civil contract subject to the provisions of the private law.

## **Conclusion**

This research on the issue of arbitration in administrative contracts in the state of the United Arab Emirates and the restrictions on resorting to arbitration, is made up of four chapters. The first chapter deals with the main concepts of the constitutional system of the UAE state. The chapter discusses the structure of the federal state and the nature of governance within the UAE, together with the main outlines of the administrative law as applied within the state. This chapter also elucidates that the judiciary system of the state is of unitary nature, dealing with all types of disputes, including administrative law and administrative contracts disputes, in addition to all other types of disputes arising between individuals of private law nature. This awkward situation could only be sorted out by the establishment of an independent administrative judiciary system to replace the unitary system in the UAE. This independent administrative judiciary would be responsible for looking into all sorts of administrative disputes, applying the principles of the dual judiciary system, as practiced in both France and Egypt. It is only natural that the application of the principles of the administrative law and the theory of the administrative contract in the UAE would eventually lead to the establishment of a competent administrative judiciary to consider all types of administrative disputes. This will lead to unifying the principles and theory of international administrative contracts and administrative contracts with international dimensions at the federal level. Ultimately, such development will lead to the establishment of a judicial system specialized solely in handling such disputes. The theoretical framework already exists but practiced and applied by an unspecialized judiciary. The natural approach is to apply the principles, provisions and theories of the administrative law by specialized judiciary, as indicated throughout this thesis.

The second chapter deals with determining the concept of the administrative contract and the criteria for distinguishing it from other types of contracts. The research arrives at establishing three criteria for distinguishing administrative contracts, applied in Egypt and the UAE, and two obligatory criteria and one optional criteria in France. The three distinguishing criteria are:

- a. At least one of the contractual parties must be a public persona, such as the state or public authorities and entities affiliated to the state. These are subject to the public law and the administrative judiciary in particular, with the objective of achieving public interests and enjoys public power;
- b. The contract should be connected to the organization, management and operation of a public facility. Examples of such facilities include any institution, organization or authority related to the state and whose prime goal is to provide public services. These are classified into public administrative facilities such as the police, the judiciary, health or education; public social facilities, such as social insurance authorities; economic administrative facilities and professional facilities. They are also divided into federal and local public facilities, and
- c. The contract shall include exorbitant conditions unfamiliar in private law contracts.

The third chapter deals with the main problems concerning resorting to arbitration in disputes connected with administrative contracts with international dimensions. I emphasized the importance of resorting to arbitration for the settlement of disputes in administrative contracts with international dimensions, as well as indicating the various benefits to be reaped by resorting to arbitration, together with the disadvantages that might arise from it. This chapter also involves a discussion explaining what is meant by arbitration in administrative disputes, its various forms and types and the justifications for resorting to arbitration as well as distinguishing arbitration from other forms of similar legal systems. My main intention is to determine which type of arbitration is appropriate for settlement of disputes in administrative contracts with international dimensions and the benefits to be gained from both conditional and unconditional arbitration I called for in the recommendation arising from this research.

Given the importance of resorting to arbitration with the aim of settlement of disputes in administrative contracts with international dimensions, and the various advantages benefited compared to resorting to the national jurisdiction, the question was raised of the admissibility of the agreement to resort to arbitration in disputes in administrative contracts with international

dimensions. The answer to the above question was carefully studied and analyzed from jurisprudential, judicial and legislative perspectives, introducing the main concepts maintained in the French, Egyptian and the Emirati positions in this regard. It is found out that the general principle is the prohibition of public persona from resorting to arbitration in administrative contracts disputes except when authorized by a legal provision or an international agreement.

The legislator in France, Egypt and the UAE has admitted resorting to arbitration for settlement of disputes in administrative international contracts, subject to obtaining the approval of the competent authority.

In chapter four, I discussed the regulations and restrictions imposed upon resorting to arbitration in administrative contracts with international dimensions. In this chapter I explicated the pre-arbitration procedures and the competent authority entrusted with the task of carrying out these procedures. This chapter also includes a section on the penalties imposed in case of violating the condition of obtaining prior approval to resort to arbitration disputes arising from administrative contracts with international dimensions and the extent of the relevance of resorting to arbitration while maintaining the distinctive nature of administrative contracts.

I arrived to the conclusion that resorting to arbitration should be exclusively limited to the settlement of disputes in international contracts and administrative contracts with international dimensions. Resorting to arbitration in such contracts should be extremely restricted in order to avoid using arbitration as a ruse to evade submitting to the legal system governing administrative contracts in general terms. To achieve the above, the competent authority for approval of resorting to arbitration should also be in the hands of the highest executive authorities within the state, as stated in the various sections of this study.

After the above presentation of the main themes of my thesis, I have come to identify the following (recommendations) regarding resorting to arbitration for the settlement of disputes arising from international contracts and administrative contracts with international dimensions:

**recommendation 1:** There is a dire need to establish an independent administrative judiciary to be responsible for dealing with administrative disputes within the United Arab Emirates, particularly dealing with disputes arising from administrative contracts. The ultimate goal is to unify the principles, rules and provisions in this branch of law.

**Recommendation 2:** Both Egyptian and Emirati judiciary should contemplate the idea of embracing the French administrative judiciary position through expanding the concept of the administrative contract. This is to be achieved through limiting the distinguishing criteria to only two instead of three; namely the criterion of involving a public persona as party to the contract and any one of the two other criteria, that is either the contract must be connected with the organization or management of a public facility or involving exorbitant conditions.

**recommendation 3:** Resorting to arbitration in legal disputes, is of great importance. Arbitration is a quick tool of dispute settlement characterized by high confidentiality and safeguarding the interests of contractual parties. In addition, arbitration also ensures that foreign investors would be able to avoid resorting to the local judiciary of the state which happens to be a contractual party.

I **strongly recommend** restricting resorting to arbitration to settle disputes arising from administrative contracts only to the extent that this would encourage foreign investment. It should be restricted to contracts on economic projects designed to enhance economic development of the state and important and qualitative economic projects which will enrich the active economic diversity within the state. Allowing resorting to arbitration in such contracts would help attract foreign investment because entrepreneurs prefer resorting to arbitration to settle disputes arising in contracts involving foreign states or administration to avoid being subject to the provisions of foreign domestic judiciary. However, this should be restricted to the field of international administrative contracts and administrative contracts with international dimensions only.

The theory of administrative contracts is mainly based upon the concept of empowering the administrative party to achieve public interests through understanding and consent with the other contractual party. For a contract to qualify as administrative, it must satisfy the three distinguishing criteria mentioned above. The intervention of the legislator was not quite definitive and decisive as shown in the various parts, in proposing the solutions to be adopted when resorting to arbitration in disputes arising from administrative contracts with international dimensions. Hence, it is pertinent that the Emirati legislator should intervene to decide on the following:

1. The domain in which resorting to arbitration in administrative contracts is to be used
2. Determine the competent authority (the supreme political authority; or the Prime Minister; the cabinet of ministers or the competent minister) to be entrusted with the power to issue approval for resorting to arbitration within the specified domain
3. The arbitral tribunal should be obliged to refrain from prejudicing the nature of the administrative contract in order to make sure that resorting to arbitration is not exploited as a ploy to evade abiding by the rules and provisions of the administrative contract, established over years to protect public interests and funds without prejudicing the rights and freedoms of individuals, by paying damages to those prejudiced by applying stipulated procedures to maintain public interests.

**recommendation 4:** The administrative authorities should only resort to arbitration in disputes arising from international administrative contracts or administrative contracts with international dimensions after obtaining approval from the highest executive authority in the state; (the supreme political authority; the Prime Minister; the Cabinet of Ministers; the competent minister or whoever is entrusted with the minister's powers within the public persona concerned). Delegation of powers should be strictly prohibited.

**Recommendation 5:** In the event of resorting to arbitration in the field of administrative contracts with international dimensions, the distinctive individual nature of administrative contracts, which represents the essence of

the theory of administrative contracts, should be maintained by emphasizing the following:

1. The administrative capacity of the contract.
2. The need to enforce the substantive rules of the administrative contract.
3. The need to instate a specific condition as part of the agreement on resorting to arbitration specifying clearly that the applicable law on the dispute is the administrative law (and the theory of administrative contracts).

**Recommendation 6:** Resorting to arbitration in administrative contracts should be restricted to international administrative contracts and administrative contracts with international dimension relating to projects of a national interests, such as economic projects designed to enhance economic development of the state and important and qualitative economic projects which will enrich the active economic diversity within the state, with the goal of encouraging investment.

**recommendation 7:** In case the legislator intervenes with a legislative regulation for organizing arbitration in the field of international administrative contracts and administrative contracts with international dimensions in an exceptional manner in light of the above recommendations, the idea of conciliation by arbitration should not be applied in the field of disputes arising from such contracts, because this may lead to exclusion of the theory of administrative contracts. Such exclusion may consequently enable contractual parties other than the administrative one to resort to conciliation by arbitration eliminating the application of the rules and provisions of the administrative law altogether, the most important of which are the powers and privileges of the administrative contractual party as stated in the theory of administrative contracts.

**recommendation 8:** The state should issue a special law regarding arbitration explicitly and concisely stating the limitations on resorting to arbitration in administration disputes and particularly in administrative contracts. This is of great importance in consideration of the recent influx of foreign investment

companies which incline to include arbitration provisions within the contracts concluded within the UAE. Accordingly, the Emirati legal system urgently needs to put in place sophisticated legal regulations to establish arbitration rules that would help attract foreign investors by allowing carrying out arbitration before local arbitration institutions.

***I conclude this study*** in the light of a very important fact that the state occupies a very distinguished status in the field of public law as a public persona against individual contractual parties, of private law nature, in the areas of commercial and economic transactions. Engagement, as a contractual party, in arbitration procedures, deprives the state of its authority, power and privileges, by appearing before the arbitral tribunal on an equal footing with persons of private law. Hence, it is pertinent to handle the issue of resorting to arbitration in administrative contracts on this basis while at the same time maintaining the principles of the general administrative law system of the state.

Therefore, the general development of arbitration system in the area of administrative contracts has contributed a great deal to entrench its real dimensions manifested in the speedy and expedient realization of justice and arriving at resolutions in the shortest possible time with the least possible expenses. This is particularly evident in the case of arbitration in the area of international administrative contracts and administrative contracts with international dimensions, as there is consensus among scholars that resorting to arbitration is the best alternative, striking a sort of balance between advantages and risks. The arbitrator can resolve disputes to which the administration is party in a way not very much different from what is normally carried out by courts of justice.

It is possible to say that the priority should be to restrict resorting to arbitration in the area of international administrative contracts or administrative contracts with international dimensions that prove to be of primary importance for development, by imposing very strict measures (such as the prior approval by the cabinet of ministers or the competent minister). This should also be enhanced by explicitly providing for the obligatory adherence to the principles of the theory of administrative contracts within the states that embrace it. This is

particularly appropriate, if we bear in mind that the role of the state now has greatly changed and the gap between the rules and principles of the administrative law and private law has been greatly reduced. Beside its traditional functions, the state now exercises many commercial, industrial technical and technological activities, which has eventually led to the emergence of the principles and rules of administrative economic law.

Therefore, modern jurisprudence, in general, has supported the need to employ arbitration in administration contracts and limited the prohibition to local domestic administrative contracts. That is why the international community has admitted arbitration in international administrative contracts, in order to enhance international cooperation and the economic development of nations within the sphere of economic investment. To realize such goal, many conventions were concluded, including the New York Convention of 1958, the Geneva Convention of 1961 and the Convention of Washington in 1965. These international conventions have played a great role in ratifying admissibility of the arbitration clause in international contracts, including administrative contracts. A similar approach was embraced by local legislators with regard to local laws such as the French Law No. 73-86 of 19 August 1986, which allows the state and public authorities to accept inclusion of the arbitration clause in international contracts concluded with foreign companies. Likewise did Article 1 of the Egyptian Arbitration Law No. 27 of 1994.

It is evident that legislative intervention or reform, in the UAE, has become an urgent necessity to allow admissibility of arbitration in the field of administrative contracts, and administrative contracts with international dimensions, in an unequivocal and unambiguous manner. The whole matter should not be left to the individual jurisprudence or judiciary reasoning in this area. This is because arbitration paves the way for creating an opportune environment for prosperity of investment and attraction of foreign capital, as well as restoring confidence to foreign entrepreneurs and businessmen in entering administrative contracts, which admit the inclusion of the arbitration clause, thus, avoiding being subject to a foreign judiciary.

The adoption of the legislature in the United Arab Emirates of admissibility of arbitration in the administrative area, or administrative contracts helps in achieving a balance between the powers and privileges of the public authority and the will of individuals and organizations. This balance could be realized by the selection of arbitrators who have sufficient expertise in the field of the activity to which the disputed contract belongs. It also ensures giving arbitrators and disputant parties alike the freedom to avoid engaging in the complicated legal rules, and the lengthy judicial proceedings. That could be achieved by adopting a flexible and simple system for arbitration procedures, chosen by both the arbitrator and the disputant parties, in complete confidentiality, as well as the selection of arbitrators who have sufficient expertise in the subject of the dispute.

Accordingly, the legal reform, by introducing legislative amendments, is of prime importance for settlement of disputes in administrative contracts in the UAE by adopting arbitration. This is true at least for specific types of contracts concluded by the administration for some categories of public personas or some disputes of a special technical nature. Therefore, this legislative reform should aim at setting a clearly defined and consistent exceptional general legal system for administrative arbitration.

I personally still believe that the judge within a legal system of administrative judiciary, with all the efficient instruments and methods available to such system, can ensure a balance between public interests and private interests of individuals. Resorting to arbitration in administrative contracts remains as an alternative method of dispute resolution for parties who desire to settle their disputes by the issuance of a binding ruling through a special type of judiciary (the arbitral tribunal).

- Based upon the above:

I tried, in general terms, to prove that the theory of administrative contracts, in general, and the administrative contracts with international dimension, in particular, hinges mainly on the general theory of administrative contracts, as per the regulations and theories that govern these contracts, giving rise to certain powers and privileges, or the restrictions and limitations imposed upon such contracts, as

well as the rights enjoyed by the administrative party in such contracts against these privileges. This is understood within the framework of achieving a balance between the two positions of privileges and restrictions. This, understandably, leads to ruling out resorting to arbitration in administrative contracts because it would be in contradiction with the following:

1. Resorting to arbitration, particularly if it eventually resulted into resorting to foreign competent judiciary or authorities, is in clear conflict with the concept of judicial immunity of the state, as it is not allowable to subject disputes in which the state is a party to a judiciary other than that of the concerned state.
2. The system of arbitration in local administrative contracts and those with international dimensions conflicts with the legal system of administrative contracts because it subjects the administrative contract to different rules and provisions, as compared to those applicable to civil contracts. Furthermore, the administration is exceptionally endowed with more privileges and powers than the other contractual party, which is not permitted in private law contracts. On a different level, the legal system of arbitration, having in mind its different rules and provisions from normal judiciary systems, impels the administration to stand on equal terms with the other contractual party before the arbitration panel, stripped of all the privileges and powers. The choice of arbitration to settle disputes may entail subjecting administrative contracts to a legal system which is different from the legal system of the national judiciary and that may entail destroying the theory of administrative contracts altogether.

The theory of the administrative contract is essentially based upon empowering the administration party to achieve public interests through negotiation and agreement with the other contractual party. For a contract to be labeled administrative, it must satisfy three conditions, which are: at least one party to the contract must be a public persona of public law; the contract must be connected with the management or operation of a public facility and it must embrace the ways and means of public law by including exorbitant conditions, unfamiliar in normal civil contracts. However, the inclusion of the arbitration clause in an administrative contract with international dimensions would eliminate the privileged powers of the

administration party in the management of the contract through the exorbitant conditions. This would prejudice achieving public interests, which is the cornerstone of the power of the administrative party. Examples for application of the privileged powers include the right to terminate the contract, on the sole discretion of the administrative party, for reasons of maintaining public interests with paying damages to the other contractual party. The exorbitant conditions are mainly included to ensure achievement of public interests, usually overseen by the administration party.

In addition to the above, bringing administrative contracts before arbitration may lead to the application of a law that does not distinguish between administrative and civil contracts. Alternatively, it may lead to the application of the law by arbitrators who do not have sufficient knowledge of the nature and principles of administrative law .

3. Another disadvantage of resorting to arbitration resides in its costly procedures, compared to resorting to the state judicial system. The latter does not entail paying litigation fees on the part of disputing parties and the plaintiff have to bear a very small fee initially while the losing party has to bear the total litigation fees on the issuing of the final verdict. On the other hand, in case of resorting to arbitration, especially international one, the total cost of the whole procedure could be very expensive. This is so because arbitrators, disputing parties and lawyers may be from different countries or residing in different countries. This may result in a huge increase in the expenses that include traveling, accommodation and sessions venue rental, let alone the costly fees paid to arbitrators and lawyers, in addition to other administrative expenses due to the arbitration center, in case of resorting to institutional arbitration. The parties to the dispute will have to bear all these expenses .

4. The arbitration tribunal sometimes lacks legal expertise and knowhow, that is in case the task is assigned to businessmen who are not specialized in the legal field of arbitration in disputes. Contrary to that, resorting to the judiciary insures bringing the dispute before a competent professional judge with sufficient expertise and knowhow and more qualified to look into the subject of dispute .

5. Finally, in some if not most, of the legal systems, resorting to arbitration entails depriving those who lose their case of bringing a fresh lawsuit before the judiciary. Even worse, losing a disputed case also deprives the losing party in the dispute of submitting any sort of appeal, be it normal or exceptional, such as in the Egyptian legal system. A verdict issued by a competent judge in a dispute brought before a court of justice is open to be examined by different stages of litigation and could be appealed through all types of allowable appeals, which will help to arrive at a fair settlement of disputes .

. However, due to the fact that refraining from resorting to arbitration may eventually result in jeopardizing the higher interests of the state, in certain types of international administrative contracts or administrative contracts with international dimensions, I am inclined to claim that it is almost mandatory to resort to arbitration, as an alternative instrument for dispute settlement arising from such contracts, as an exception to the general principle. This is basically justifiable by the principle of maintaining the higher interests of the state in such contracts, which is represents a priority against rigidly or dogmatically adhering to the theory of administrative contracts, applied through the national judiciary. That explains why I propose applying arbitration in an exceptional manner in these types of contracts based upon the following principles and justifications:

1. Arbitration is characterized by simplicity of procedures compared to referral to the judiciary because its procedures do not involve prolonged and complicated processes. Arbitration panels usually enjoy more flexibility than the national judicial litigation procedures. Parties to a dispute decide upon procedures, timing and phases leading to a final judgment, which shall not be subject to objective appeal and should be immediately implemented. The speedy and prompt carrying out of arbitration procedures make it the most preferred method for dispute settlement in administrative contracts with international dimensions.

2. Another advantageous feature of arbitration is restricting the time allowed for arbitrators to deliver their verdict. For example, Paragraph One of Article 18 of the Arbitration Regulation of the Paris Chamber of Commerce stipulates that the arbitration verdict should be issued within six months, as of the date of receiving the compendium of the dispute subject, as per Article 13 of the Regulation.

Article 7 of the Abu Dhabi Commercial Conciliation and Arbitration Centre Regulation stipulates that the arbitration panel shall issue its verdict within six months, as of receiving the documents pertaining to the case brought before the arbitrators, unless the two parties agree on a longer period. Article 210/1 of the Civil Procedures Law of UAE stipulates the following: "If the parties to the dispute did not specify, in the arbitration agreement, a date for the issue of the award, the arbitrator shall pass his award within six months from the date of the first arbitration session; otherwise any of the parties shall be entitled to refer the dispute to the court or, if a suit has already been filed, to proceed with the same before the court".

There is no doubt that the speedy carrying out of arbitration procedures and its being restricted by a time limit play a significant role in international trade relations, which does not allow for the slow and complicated procedures of litigation before courts. The speediness is one of the most important and necessary factors in conducting international transactions, which are usually, affected by fluctuation in exchange rates and raw material prices. The need for growth of international trade and oil and investment relations between industrial and oil producing countries, as well as developing countries, requires efficient neutral resolution of potential disputes, avoiding international political considerations as much as possible while economic considerations assume the upper hand.

3. Arbitration in the field of administrative contracts with international dimensions is also characterized by maintaining non-disclosure of the information pertaining to disputant parties, unlike what happens when a dispute is brought before a court of justice, which is governed by a general major principle of the public nature of court sessions as one of the guarantees of fair litigation. Publicity is a major feature of judicial procedures while non-disclosure is a major feature of resorting to arbitration.

Non-disclosure is of key importance within the field of international trade and contractual relations of international and administrative nature because the latter are mainly concerned with professional and economic secrets, which, if disclosed, may result in serious damages befalling parties to

disputes, which may impel some parties to opt for losing a case instead of divulging their secrets. Such threat may force dispute parties within the field of international economic investment to resort to arbitration to maintain confidentiality of their transactions; contractual relations; professional expertise and the nature of concluded deals. This is because arbitration sessions are normally held privately, attended only by the parties to the dispute brought before the arbitration tribunal and their representatives and the arbitration verdict may be made public by the mutual consent of the disputing parties.

4. Another advantage of arbitration in disputes arising from administrative contracts with international dimensions is that it provides security and trust for the disputing parties, as they are directly or indirectly involved in the selection of arbitrators. Normally, the arbitration panel consists of three arbitrators. Both the plaintiff and the defendant have the right to nominate or appoint one arbitrator and either mutually agree on the third arbitrator or leave it to the two nominated arbitrators to appoint a third, who would normally be the president of the arbitration panel, in accordance with the laws applicable to the dispute under examination.

There is no doubt that the right to nominate the arbitration panel by the parties to the dispute engrains trust and confidence in the two parties in contrast to referral to the judiciary and state-appointed judges. It also enables the concerned parties to choose arbitrators who are renowned for their distinguished technical and legal expertise and who would be able to grasp the nature of the dispute.

This advantageous feature is clearly evident in disputes relating to international trade and private oil investments, where the disputes are of a technical nature. Hence, it would be easier and better to bring it before arbitration where the parties to the conflict may choose arbitrators endowed with necessary technical specialized expertise.

5. The permissibility of resorting to arbitration in administrative contracts with international dimensions encourages international entities to enter contractual relations of administrative nature. It also enables the administration to pick the

best contractual offers on both local and international levels, those who may refrain from being obliged to carry out transactions which fall within the jurisprudence of local national judiciary. This is particularly applicable in case of foreign contractors who, in this manner, are not forced to appear before the judiciary of a foreign state.

6. Arbitration is carried out in one direction in the local laws of many countries, including UAE, as the verdict issued by the arbitration tribunal is not subject to appeal, which is not the case with resorting to state judiciary. Hence, resorting to arbitration may save time and would be cost-effective.

**. In light of the above, I have arrived at the following conclusions:**

**1-** Resorting to arbitration in administrative contracts should be restricted to international administrative contracts and administrative contracts with international dimension relating to projects of a national interests, such as economic projects designed to enhance economic development of the state and important and qualitative economic projects which will enrich the active economic diversity within the state, with the goal of encouraging investment.

**2-** In case the legislator intervenes with a legislative regulation for organizing arbitration in the field of international administrative contracts and administrative contracts with international dimensions in an exceptional manner in light of the above recommendations, the idea of conciliation by arbitration should not be applied in the field of disputes arising from such contracts, because this may lead to exclusion of the theory of administrative contracts. Such exclusion may consequently enable contractual parties other than the administrative one to resort to conciliation by arbitration eliminating the application of the rules and provisions of the administrative law altogether, the most important of which are the powers and privileges of the administrative contractual party as stated in the theory of administrative contracts.

**3-** The state should issue a special law regarding arbitration explicitly and concisely stating the limitations on resorting to arbitration in administration disputes and particularly in administrative contracts. This is of great importance in consideration

of the recent influx of foreign investment companies which incline to include arbitration provisions within the contracts concluded within the UAE. Accordingly, the Emirati legal system urgently needs to put in place sophisticated legal regulations to establish arbitration rules that would help attract foreign investors by allowing carrying out arbitration before local arbitration institutions.

And the general development of arbitration system in the area of administrative contracts has contributed a great deal to entrench its real dimensions manifested in the speedy and expedient realization of justice and arriving at resolutions in the shortest possible time with the least possible expenses. This is particularly evident in the case of arbitration in the area of international administrative contracts and administrative contracts with international dimensions, as there is consensus among scholars that resorting to arbitration is the best alternative, striking a sort of balance between advantages and risks. The arbitrator can resolve disputes to which the administration is party in a way not very much different from what is normally carried out by courts of justice.

It is possible to say that the priority should be to restrict resorting to arbitration in the area of international administrative contracts or administrative contracts with international dimensions that prove to be of primary importance for development, by imposing very strict measures (such as the prior approval by the cabinet of ministers or the competent minister). This should also be enhanced by explicitly providing for the obligatory adherence to the principles of the theory of administrative contracts within the states that embrace it.

Therefore, modern jurisprudence, in general, has supported the need to employ arbitration in administration contracts and limited the prohibition to local domestic administrative contracts. That is why the international community has admitted arbitration in international administrative contracts, in order to enhance international cooperation and the economic development of nations within the sphere of economic investment.

\_ Accordingly, the problem of my research is, precisely, concerned with answering the question whether it is permissible to resort to arbitration within the framework of the theory of administrative contracts or not. The tentative

answer is negative, that is arbitration should be inadmissible within the theory of administrative contracts, in general terms. However, I came to the conclusion that the higher interests of the state necessitate resorting to arbitration to settle disputes in the area of administrative contracts, and, in particular, in relation to international administrative contracts or administrative contracts with international dimensions, as an exception to the general rule of inadmissibility, for the sake of preserving the higher interests of the state. Nonetheless, this exception should be restricted to certain limits. This exception must be approved by certain higher authorities within the State, with explicit legislative intervention to permit resorting to such exception, to clarify, beyond any doubt, when to resort to arbitration in such administrative contracts. **I believe that this study has successfully attempted to be comprehensive, integrated and relevant to the intricacies of its subject, with no apparent shortcomings. However, I hope that further studies and research in this area would be successful in identifying, to the benefit of the legislature, the various dimensions and details of the theory of administrative contracts theory which should be applied, in an exceptional manner, in the area of administrative contracts, hence, supplementing the different angles of my subject matter of this study. Future researches and researchers may contribute to the development and deepening of my findings for the general, larger and more comprehensive benefit.**

**-To sum up, the academic contribution to knowledge of this research resides in:**

I found that the solution to the application of arbitration in international administrative contracts and the international dimension without prejudice to the theory of administrative contract. And at the same time guarantee the rights of the investor, which means achieving the public interest of the state and the interest of the other party contracting with the state. As follows:

- 1- Clear and explicit legal legislation should be established in the United Arab Emirates that allows arbitration in international administrative contracts and administrative contracts with international dimensions.
- 2- arbitration in international administrative contracts and administrative contracts with international dimensions contracts should be in the very necessary investment projects of the state and achieve significant economic progress.

3- The approval of arbitration in international administrative contracts and administrative contracts with international dimensions contracts should be by the supreme authority of the State such as the Prime Minister, the Council of Ministers or the competent Minister.

4. Arbitration in international administrative contracts and administrative contracts with international dimensions contracts should have a clear requirement that the administrative law of the UAE should be the applicable law in case of disagreement between the parties.

5. The other party, the investor, must be compensated. In case of cancellation or amendment of the contract by the government. In the event that the investor does not breach any of the terms of the contract.

6- The contract must include a requirement of legal or legislative stability. To ensure the rights of the investor in case of changing the laws of the state.

Thus, I come to the conclusion of my study in the area of arbitration in international administrative contracts and administrative contracts with international dimensions within the United Arab Emirates state. I have spared no effort, whatsoever, in providing a comprehensive study of the subject and hope that this study would be a weighty contribution to this interesting subject of study and research.

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## Table of Contents

<b><u>Abstract</u></b>	2
<b><u>Introduction</u></b>	6
- The Significance of the Study.	7
- Difficulties Facing the Study.	8
- Research Questions.	9
- Research Methodology.	10
- The Study Plan.	12
<b><u>Chapter One</u></b>	13
Basic Concepts Regarding the Constitutional and Administrative System of UAE.	13
<b>Section1:</b> The structure of the UAE state and how it was created.	13
- Pre-Union Era (Colonial Occupation).	13
- The Progress toward Unification Stage (The establishment of the UAE state).	14
<b>Section 2:</b> The Nature of Government System of the UAE.	17
- The UAE Constitution and the principle of separation of powers.	17
- The special nature of the system of government in UAE.	19
- General Special Features of the UAE 1971 Constitution and its Amendments.	20
<b>Section 3:</b> The General Outlines of the UAE Administrative Law [Genesis, Sources and the Competent Judicial Authority for Settlement of Disputes].	27
- Sources of the Administrative Law in the UAE.	29
- Courts of first instance.	32
- Courts of Appeal.	32
- The Federal Supreme Court.	33
1. Local Administrative Disputes.	36
2. Federal Administrative Disputes.	36

Summary of chapter 1.	38
<b>Chapter 2.</b>	40
The Concept of the Administrative Contract and its Distinguishing Criterion.	40
<b>Introduction.</b>	40
<b>Section 1.</b>	44
The administration shall be party to the contract.	44
<b>Section 2.</b>	50
The contract shall be related to the management or organization of a public facility (Connection of administrative contract with a public facility).	50
<b>Section 3.</b>	59
Adopting the means and ways of public law.	59
<b>Summary of Chapter 2.</b>	69
<b>Chapter 3.</b>	72
Key problems surrounding the use of arbitration in international disputes concerning administrative contracts with international dimensions: (analysis and possible solutions).	72
<b>Section 1.</b>	73
Advantages and Disadvantages of Arbitration in Administrative Contracts with International Dimensions.	73
<b>Section 2.</b>	81
Forms and Types of Arbitration in Administrative Contracts.	81
- <b>First:</b> Forms of Arbitration.	84
1. The Arbitration clause.	84
2. Arbitration Stipulation.	86

- <b>Second:</b> Types of Arbitration in Administrative Contracts.	87
1. Voluntary and Mandatory Arbitration.	88
2. Institutional versus “ad hoc” arbitration.	90
3. National (Domestic) and International Arbitration.	91
4. Normal Arbitration and Arbitration with Conciliation Authorization.	92
<b>Section 3.</b>	95
Distinguishing Arbitration from other Similar Legal Systems.	95
- <b>First:</b> Arbitration and Conciliation.	95
- <b>Second:</b> Arbitration and Mediation.	97
- <b>Third:</b> Arbitration and Expertise.	99
- <b>Summary:</b> Distinguishing Arbitration from other similar alternative dispute resolution methods.	101
<b>Section 4.</b>	102
The Scope of Permissibility of Resorting to Arbitration in Administrative Contracts with International Dimensions	102
1. Arbitration in Administrative Contracts in Egypt.	108
2. Arbitration in France.	110
3. Legal Regulation of Arbitration in the United Arab Emirates.	111
<b>Summary of Chapter Three.</b>	120
<b>Chapter 4.</b>	122
Regulations for Resorting to Arbitration in Disputes Pertaining to Administrative Contracts with International Dimensions.	122
<b>Section 1.</b>	123
Pre-arbitration Dispute Settlement Procedures in Administrative Contracts with International Dimensions.	123

<b>Section 2.</b>	135
Penalty on Violating the Clause of Agreeing on Arbitration in Disputes Related to Administrative Contracts with International Dimensions.	135
<b>Section 3.</b>	139
Relevance of Resorting to Arbitration in Disputes Relating to Administrative Contracts with International Dimensions and Maintaining Administrative Contracts Distinctive Nature.	139
<b>Conclusion.</b>	150
<b>Bibliography.</b>	159
<b>Table to Contents.</b>	174