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International Adjudication for the Settlement of International Administrative Contract Disputes: What Guarantee dose it Offer for Attracting and Maintaining Foreign Investment ?

التحكيم الدولي لتسوية منازعات العقود الإداريّة الدولية: أية ضمانة لاستقطاب الاستثمار الأجنبي واستقراره؟

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ABSTRACT:

International adjudication is one of the legal guarantees that encourage the attraction of foreign investments, especially within the framework of international administrative contracts. The Adjudication provides a mechanism that ensures balance between the contracting parties through the efficiency, impartiality, and speed of its procedures.

Keywords:*Administrative contracts; investment; Adjudication, International; Guarantees .*

ملخص باللغة العربية:

يعد التحكيم الدولي أحد الضمانات القانونية لجذب الاستثمارات الأجنبيّة، لاسيما في إطار العقود الادارية الدولية. فالتحكيم آلية تضمن التوازن بين الأطراف المتعاقدة من خلال كفاءة ونزاهة وسرعة الاجراءات.

كلمات مفتاحية: العقود الادارية؛ الاستثمار؛ التحكيم الدولي؛ الضمانات.

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Introduction:

Legal doctrine and jurisprudence agree on attributing an administrative nature to a contract if the administration is a party to it, it relates to the operation of a public service, and it contains exceptional terms not commonly found in private law. The importance of administrative contracts lies in their role as a tool through which the administration exercises its activities and fulfills its needs.

To achieve economic development, satisfy public needs, and attract investment opportunities, relationships between states have emerged in the form of international contracts that aim to serve the economic and political interests of each state. These contracts are referred to as international administrative contracts. The importance of the subject stems from the fact that international administrative contracts are long-term agreements containing unusual terms. They are concluded between a state or one of its affiliated entities and a foreign natural or legal person, to establish contractual obligations involving large-scale investments aimed at exploiting natural resources or establishing industrial facilities[1]. In these contracts, the state may exercise sovereign powers, which can lead to disputes with the foreign contracting party, whether it is a public entity or a foreign investor.

The reason for choosing this topic lies in the necessity of ensuring neutrality and the satisfaction of the contracting parties with the issued rulings, thereby guaranteeing the stability and attraction of foreign investments, especially since the judiciary of the host state often prioritizes the state's economic interests over neutrality.

1 Alaa Mohydin Mostapha Abou Ahmed, *Adjudication in International Administrative Contract Disputes*, Dar Al-Jamia Al-Jadida, Egypt, 2008, P64-65.

Adjudication is considered the traditional means of resolving disputes amicably before resorting to the judiciary[1]. It involves the disputing parties appointing a third

party—the arbitrator—whose decision on the dispute replaces a court judgment and is binding upon the parties[2].

Based on this, the objective of this research paper is to explore the possibility of including an adjudication clause in investment disputes arising from international administrative contracts and the foreign investor's insistence on such a clause, in order to ensure a fair and impartial resolution of the dispute.

From the above, the central issue raised by the topic is:

To what extent does international adjudication contribute to resolving disputes arising from international administrative contracts in a way that guarantees judicial protection for the foreign investor?

Answering this question requires adopting an analytical and deductive methodology, by examining and analyzing the legal provisions relevant to the subject. This will be addressed through the following two-part structure:

THE FIRST TOPIC : The extent to which adjudication clauses can be included in international administrative contracts

THE SECOND TOPIC : Provisions of international adjudication in disputes involving international administrative contracts

1 Barbara Adeahman, *Explanation of the Civil and Administrative Procedures Law*, Baghdad Publications, Baghdad, 2009, P516.

2 Salamat Ahmed Abdelkarim,, *International Commercial Adjudication Law*, Dar Al-Nahda. Cairo, 2004, P45.

THE FIRST TOPIC

The extent to which adjudication clauses can be included in international administrative contracts

The agreement to adjudication in international administrative contracts has sparked controversy among both legal scholars and the judiciary, while in terms of legislation, some have explicitly stipulated the possibility of resorting to adjudication in this type of contract, whereas others have rejected it. This prompts us to explore the position of the Algerian legislator on this matter.

First Requirement: The Position of Legal Doctrine and Judiciary on the Possibility of Including an Adjudication Clause in International Administrative Contracts

This part will address the opinion opposing the inclusion of an adjudication clause as a method for resolving disputes in international administrative contracts , followed

by the opinion supporting adjudication as an amicable means for resolving disputes in international administrative contracts .

1- The Opposing Opinion to Including an Adjudication Clause in International Administrative Contracts:

A segment of legal scholars has rejected adjudication as an alternative means for resolving disputes in administrative contracts, whether domestic or international. They justify their position with the following grounds and arguments:

A. Allowing adjudication in this type of contract constitutes a clear violation of the principle of the distribution of jurisdiction between administrative and judicial authorities. This principle prohibits ordinary courts from hearing administrative disputes, as these are under the jurisdiction of the administrative judge due to the administration being a

party to the dispute[1]. Accordingly, recognizing adjudication's authority to resolve disputes of an administrative nature equates to recognizing the ordinary judiciary's jurisdiction over such disputes.

B. Resorting to adjudication violates the principle of judicial immunity of the state and state sovereignty, as adjudication is considered equivalent to the judiciary of a state. Public legal persons cannot litigate a foreign state before it, as doing so would infringe upon the sovereignty of that state before a foreign body that exists outside its territory and is subject to foreign laws[2].

Among the judicial applications rejecting adjudication as an amicable method for resolving disputes related to administrative contracts is the position of the French Council of State, which prohibited adjudication in the field of public law. One such application is the case of the National Company for Waste Sales (S.N.V.S) against the American company TANGER. When a dispute arose between them, they resorted to adjudication, which had previously been included by both companies in the contract as a clause to be invoked in the event of a dispute. The adjudication ruling was in favor of the American company, prompting the French company to appeal the ruling before the French Council of State, insisting that adjudication was not permissible in administrative contracts in accordance with Article 1004 of the French Civil Code. The Council ruled to annul Article 10 of the decree dated October 15, 1946, which allowed the American company to resort to adjudication, on the basis that the latter is a public company subject to public law rules, which prohibit it from resorting to adjudication according to legal texts and well-established judicial rulings in French public law.

1 Walid Mohamed Abbas, *Adjudication in Administrative Disputes of a Contractual Nature*, Dar Al-Jamia Al-Jadida, Alexandria,2010, P111.

2 Jaber Jad Nassar, *The Concise Guide to Administrative Contracts*, Dar Al-Nahda Al-Arabiya, Cairo, 2000, P59.

2- The Opinion Supporting the Possibility of Including an Adjudication Clause as a Means to Resolve Disputes in International Administrative Contracts :

A second group of legal scholars has argued that there is no objection to including an adjudication clause in international administrative contracts, basing their view on the fact that international agreements have permitted this. As for the judiciary, the French Council of State has allowed adjudication for public legal entities, but only exceptionally and with the presence of an explicit provision that permits it.

Among the judicial applications that allowed adjudication in international administrative contracts is the case of the company *Société des Frères* against the Tunisian Ministry of Public Works. A contract was concluded between them for the transfer of technology, and it included an adjudication clause in the event of a dispute between them. When a dispute arose between the French company and the Tunisian ministry, the latter appealed the adjudication ruling before the Paris Court of Appeal, relying on the fact that both the French and Tunisian Councils of State have consistently held that adjudication is not permissible in administrative contracts. However, the Court of Appeal upheld the validity of the adjudication ruling, emphasizing that the prohibition in French law pertains to domestic public order, the application of which is limited solely to internal administrative contracts, and not international ones, in which resorting to adjudication is valid and produces all its effects.

Second Requirement: The Position of the Algerian Legislator on the Issue of Resorting to International Adjudication

Algeria has entered into several international agreements that addressed adjudication and were applied in disputes that

arose between the Algerian state and some foreign companies[1]. By referring to[2] which includes the Code of Civil and Administrative Procedures, we find that the legislator has recognized the right of public entities to resort to adjudication as an amicable means of dispute resolution, but only in certain matters. The legislator has also explicitly affirmed, as a rule, the jurisdiction of Algerian judicial authorities to adjudicate disputes arising between the Algerian state and the foreign investor, pursuant to[3] related to investment, in addition to setting a set of conditions for the validity of the adjudicationclause.

1- The Scope of Adjudication in International Administrative Contracts :

The Algerian legislator has defined the areas in which the state, wilaya, municipality, or any public institution with an administrative character may conduct or request adjudication, such that it is permissible only in the following cases[4]:

- The cases mentioned in international agreements ratified by Algeria.
- Public procurement matters.
- International economic relations.

1 See: Evian Agreement of 1962 and its implementing decree No. 364-63 issued on December 14, 1963, between Algeria and France concerning adjudication.& Sonatrach" and "Getty" American agreement signed on October 19, 1968.

2 Law No. 08-09. Containing the Civil and Administrative Procedures Law. Official Journal , No. 21, issued in 25february 2008.

3 Law No. 22-18. relating to investment. Official Journal No. 50, issued in 24july2022

4 See : Articles 800 (Paragraph 2), 975, and 1006 (Paragraph 3) of Law No. 08-09, containing the Civil and Administrative Procedures Law.

Adjudication is considered international if the dispute involves economic interests concerning at least two countries[1].

Within the framework of disputes arising from the application of the Investment Law, Article 12 of Law No. 22-18 related to investment indicates that the Algerian judicial authorities are competent to adjudicate disputes between the foreign investor and the Algerian state arising from:

- The application of the Investment Law, whether the dispute is due to the foreign investor;

- Or due to a measure taken by the Algerian state.

However, internal judicial jurisdiction in these disputes is excluded if there is a bilateral or multilateral agreement relating to mediation and adjudication ratified by the Algerian state, or if an agreement is concluded between the Algerian Agency for Investment Promotion and the investor allowing them to resort to adjudication.

2- The Legality of the Adjudication Clause :

The adjudication clause is the agreement by which the parties commit, within a contract related to rights over which they have full discretion, to submit any disputes that may arise concerning this contract to adjudication[2].

Including this clause as an amicable means of dispute resolution results in serious consequences, namely stripping the national judiciary of the state of its jurisdiction to considerdisputes, especially those related to administrative contracts, and granting that authority to adjudication tribunals[3].

1 Article 1039 of the Civil and Administrative Procedures Law.

2 Article 1007 of the Civil and Administrative Procedures Law.

3 Alaa Mohydin Mostapha Abou Ahmed , op. cit., P262.

In light of this seriousness, the Algerian legislator resolved this matter by requiring formality in this type of agreement. The legislator was explicit in his stance, stating clearly that the adjudication agreement must be in writing, whether in the original contract or in the document referred to. Written proof can be established through any other means of communication that allows it[1].

In addition to formality, the adjudication agreement must meet the substantive conditions required for the formation of contracts, which are: consent, subject matter, and capacity.

Regarding the element of consent, since the adjudication agreement is a consensual contract, it is only concluded with the mutual agreement of the two parties (an offer matched by an acceptance).

As for the subject matter of the adjudication agreement, it is the subject of the dispute that the two parties agree would trigger the activation of the adjudication tribunal in the event it arises. The subject matter must not be contrary to public order or public morals. Given the variation in

the concept of public order from one country to another, the field of adjudication law adopts the concept of international public order[2], which seeks to protect the higher interests of the international community. Therefore, if the subject of adjudication is in violation of the latter, the adjudication agreement is considered void[3].

1 Articles 1008 (Paragraph 1), 1012 (Paragraph 1), 1040 (Paragraph 2) of Law No. 08-09, containing the Civil and Administrative Procedures Law.

2 Abdel Aziz Abdel Monem Khalifa, *Arbitration in Domestic and International Administrative Contract Disputes: An Analytical Study in Light of the Latest State Council Judicial Rulings*, Dar Al-Fikr Al-Jami'i,Alexandria, 2007, p.38

3 Alaa Mohydin Mostapha Abou Ahmed , , op. cit., P298.

In addition to consent and the legality of the subject matter of the adjudication agreement, the parties involved must also have the legal capacity — the capacity to dispose of their rights — whether they are natural or legal persons[1].

THE SECOND TOPIC
The Provisions of International Adjudication in Disputes Concerning International Administrative Contracts

The provisions of international adjudication in the field of administrative contracts go through several stages, starting with the appointment of arbitrators and the procedures for issuing these awards , followed by their recognition and enforcement .

First Requirement: Appointment of Arbitrators and Procedures for Issuing International Adjudication Awards in Disputes Concerning International Administrative Contracts

This part will address the appointment of arbitrators and the procedures for issuing international adjudication awards in disputes concerning international administrative contracts.

1- Appointment of Arbitrators :

The parties who have agreed to adjudication as an amicable method for resolving international disputes in the field of administrative contracts must form the arbitral tribunal. According to the Code of Civil and Administrative Procedures, the appointment of arbitrators is made directly by the parties, who have complete freedom to constitute the international arbitral tribunal, whether in terms of the number of arbitrators or their qualifications. Alternatively, the parties

1Article 1006 of the Civil and Administrative Procedures Law: "Any person may resort to adjudication in rights over which they have full disposal."

may resort to a permanent adjudication system in which the method of selecting arbitrators and a list of their names is specified.

Additionally, the national judge (President of the Court) has the authority to appoint arbitrators in exceptional cases, such as in the absence of appointment, difficulty in appointment, or in cases of dismissal or replacement of arbitrators, and this is based on a request from the party concerned with expediting the proceedings[1].

It is important to note here that the role of the national judge in this context is to assist the adjudication tribunal, not to adjudicate the subject of the dispute.

2- Procedures for Issuing International Adjudication Awards :

These procedures concern the determination of the applicable law for resolving the dispute subject to adjudication, as well as the conditions required for the validity of the adjudication award.

A- The Applicable Law for Resolving Disputes Concerning International Administrative Contracts:

Regarding the law that determines the procedures to be followed in resolving disputes arising from an international administrative contract, the Algerian legislator, as a general rule, subjected this to the principle of party autonomy, in one of the following three possibilities:

- The parties directly specify the procedures to be followed in the adjudication agreement.

- The parties specify the procedures by referring to a specific adjudication system in the adjudication agreement.

1Article 1041 of the above-mentioned law.

– The parties specify the procedural law of a particular country in the adjudication agreement.

However, in the absence of agreement between the parties on any of the three aforementioned possibilities, the arbitral tribunal shall determine the procedures directly, or choose a specific law, or refer to a particular adjudication system[1].

As for the law applicable to the subject matter of the dispute, as a general rule, the disputing parties select the rules of law that the arbitral tribunal will apply to the dispute. However, if the parties do not agree, the tribunal shall decide the subject of the dispute in accordance with the rules of law and customs it deems appropriate[2]. What is observed here is that the arbitrator has the authority to assess the law that is suitable and consistent with the subject of the dispute.

It is also worth noting that, according to Article 1046 of the Code of Civil and Administrative Procedures, the arbitral tribunal may order provisional or precautionary measures upon the request of one of the parties, unless the adjudication agreement provides otherwise.

B- Conditions Required for the Validity of the Adjudication Award:

The adjudication award must be in writing and signed by all arbitrators[3]. However, if one arbitrator refuses to sign, this does not affect the validity of the award, provided that the other arbitrators mention the refusal in the decision. The award must be reasoned, showing the arguments and evidence upon which

1 Article 1043 of the aforementioned law.

2 Article 1050 of the same law.

3 See Articles 1052, 1053, and 1029 of the Civil and Administrative Procedures Law, noting that the legislator did not explicitly specify the requirement for writing, but the wording of the mentioned articles indicates that the adjudication award must be written.

the arbitrator relied in making the decision[1]. The award must also specify the place and time of its issuance and pronouncement and must be issued within the period granted to the arbitrators, with the possibility of extending this deadline[2].

The adjudication award is considered issued by the arbitral tribunal upon its declaration and delivery to the parties in the dispute. It must be filed with the registry of the court by the party in whose favor the award was rendered[3].

Once the award is issued, it gains the authority of res judicata according to the provisions of Article 1031 of the Code of Civil and Administrative Procedures .

Second Requirement: Recognition and Enforcement of International Adjudication Awards

Recognition of a judgment in general means acknowledging that the judgment was properly issued and is binding upon the parties[4]As for the recognition of an

adjudication award, it is a defensive procedure used when a court is reviewing a claim related to a dispute that was previously submitted to adjudication. In such a case, the party in whose favor the adjudication award was issued invokes the authority of res judicata by notifying the court—before which the dispute is raised again—of the award and requests that the

1 Article 1027 (Paragraph 2) of the Civil and Administrative Procedures Law.

2 Article 1028 of the Civil and Administrative Procedures Law.

3 See : Articles 1035, 1051, and 1052 of the Civil and Administrative Procedures Law.

4 Hindi Ahmed, *Execution of Arbitrators' Awards*, Dar Al-Jamia Al-Jadida for Publishing Egypt,2001, P24.

court acknowledge its validity and binding nature in the matters that were settled by it[1].

On the other hand, enforcement is an offensive procedure whereby the party who obtained the international adjudication award requests the judge to grant the award the same enforceability as a court judgment. This is done through an enforcement order issued by the competent judge, which thereby gives the international adjudication award its enforceable power[2].

For the recognition and enforcement of adjudication awards, a number of conditions and procedures must be observed. According to Article 1058 of the Code of Civil and Administrative Procedures[3], only international adjudication awards rendered within Algeria are subject to annulment actions. In contrast, awards issued abroad cannot be directly challenged for annulment, but they can be indirectly contested through appeals or cassation against the orders concerning recognition or enforcement—whether those orders granted or denied such recognition or enforcement[4].

1- Conditions and Procedures for the Recognition and Enforcement of International Adjudication Awards :

The conditions and procedures for the recognition of international adjudication awards in Algeria are as follows:

1 Ahadab Abdelhamid,. *Encyclopedia of Adjudication*Al-Halabi Legal Publications. , Lebanon, 2008, P502.

2 Fauchard Philippe, Gaillard Emmanuel, Goldman Berthold, *Treatise on International Commercial Adjudication*, ED Litec, Paris, 1996, P904.

3 Article 1058 (Paragraph 1) states: "An international adjudication award issued in Algeria may be subject to annulment in the cases specified in Article 1056 above."

4 According to the provisions of Articles 1055, 1056, and 1061 of the Civil and Administrative Procedures Law.

- Proof of the existence of the adjudication award: The party invoking the international adjudication award must prove its existence by submitting either the original or a copy of the adjudication award, along with the adjudication agreement. These documents must be filed with the registry of the competent judicial authority.

- The recognition must not be contrary to international public order[1]

- As for the conditions and procedures for the enforcement of international adjudication awards in Algeria—whether these awards are final, partial, or preparatory—they include:

- Proof of the existence of the adjudication award:Similar to the recognition process, the enforcing party must present the original or a copy of the adjudication award, along with the adjudication agreement. These documents must be filed with the registry of the competent judicial authority.

- The enforcement must not be contrary to international public order[2].

- The enforcement order must be issued by the president of the court:

    - If the adjudication award was issued within Algeria, the order is issued by the president of the court within whose jurisdiction the arbitral tribunal was located[3].

1 Articles 1051 (Paragraph 1), 1052, and 1053 of the Civil and Administrative Procedures Law.

2 Article 1051 (Paragraph 2), 1052, and 1053 of the same law.

3 Articles 1051 (Paragraph 2), 1054, and 1035 (Paragraph 1) of the Civil and Administrative Procedures Law.

- If the adjudication award was issued outside Algerian territory, the order is issued by the president of the court where the enforcement is to take place[1].

− The Chief Clerk of the court issues an official copy of the adjudication award bearing the executory formula to the party requesting enforcement, in accordance with Article 1036 of the Code of Civil and Administrative Procedures.

Through this review of the conditions and procedures for recognition and enforcement, it is noticeable that the Algerian legislator did not specify the judicial authority competent to issue the recognition order.

2- Appeal and Cassation of Orders Related to Recognition or Enforcement :

Orders related to recognition or enforcement, whether they involve the acknowledgment of recognition or enforcement, or involve refusal, are subject to appeal and cassation against the decisions issued regarding that appeal[2], as follows:

A. Appeal against orders related to recognition or enforcement:

Although the Algerian legislator did not limit the cases for appeal when it comes to orders rejecting recognition or enforcement, it has specified the cases in which an appeal can be made against orders granting recognition or enforcement. These cases are outlined in Article 1056 as follows:

1 Article 1051 (Paragraph 2) of the Civil and Administrative Procedures Law.

2 Articles 1055, 1056, and 1061 of the Civil and Administrative Procedures Law.

- If the arbitral tribunal ruled without an adjudication agreement or based on an invalid agreement or expired agreement,

- If the composition of the arbitral tribunal or the appointment of the sole arbitrator was in violation of the law,

- If the arbitral tribunal ruled against the mandate entrusted to it,

- If the principle of adversarial proceedings was not respected,

- If the arbitral tribunal did not reason its award, or if there was a contradiction in the grounds,

- If the arbitral award violated international public order.

The appeal must be made to the judicial council within one month from the date of the official notification of the order of the court president rejecting or granting recognition or enforcement, in accordance with Article 1057 of the Code of Civil and Administrative Procedures.

B. Cassation of decisions issued in appeal:

Decisions issued by the judicial councils in the appeal against the court president's order regarding the rejection of recognition or enforcement, or the order granting recognition or enforcement, are subject to cassation, in accordance with Article 1061 of the Code of Civil and Administrative Procedures.

As for the grounds for cassation, the legislator did not specify them, so the general provisions in the absence of a specific text apply. These are the grounds mentioned in Article 358 of the same law, which lists 18 grounds for cassation.

The same applies to the procedures for cassation; Article 354 of the Code of Civil and Administrative Procedures is applied. The cassation appeal is made before the Supreme Court within two months from the date of the official notification of

the contested decision if the notification is personal, and within three months if the official notification is made to the real or chosen residence .

Conclusion :

In light of the differing doctrinal and judicial opinions regarding the possibility of public entities resorting to adjudication, the Algerian legislator, under the Civil and Administrative Procedures Law, has not prevented public entities from resorting to adjudication in contracts they enter into, including international administrative contracts. The legislator has also expanded the jurisdiction of national judges in recognizing and enforcing international adjudication awards. Additionally, adjudication is recognized as a means for resolving disputes arising from the Investment Law if stipulated in an agreement.

Among the most important findings of our study are:

- Allowing public entities to resort to adjudication in disputes related to their contracts does not mean depriving the administrative judge of jurisdiction over those disputes. Instead, it aims to provide a peaceful means of resolving disputes, especially in international relations, where states must maintain friendly relations without one country being subject to the judiciary of another against its will. The choice of the adjudicating body should be determined by the mutual will of the parties to the dispute.

- International adjudication is a neutral judicial system, and once a state agrees to adjudication, it cannot retract its acceptance. This serves as a guarantee for attracting and stabilizing foreign investment.

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