# THE DISPUTES OF ADMINISTRATIVE CONTRACTS: THE POSSIBILITY OF USING ARBITRATION ACCORDING TO THE JORDANIAN ARBITRATION ACT 2001

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## ABSTRACT

*Nowadays, economic issues such as the lack of public finance and budget deficits have meant that some governments are unable to fund projects and deliver services to people. The need for local private sector involvement (administrative contract) has become increasingly important to some financially poor countries, such as Jordan and is also considered to be a critical driver of economic growth as local private sector involvement will encourage foreign private sector involvement and, as a result, will encourage foreign direct investment in the country.*

*Whether or not private sector investors can be encouraged to enter into contracts with the government depends not only on the size of projects, but also on whether the legal system can protect these investments. Arbitration is considered one of the main guarantees in this regard and therefore this paper will examine the legal issues that prevent using arbitration in settling the disputes of administrative contracts.*


**Keywords**: Arbitration, Administrative Contracts, The Jordanian Arbitration Act 2001.

## INTRODUCTION

Governments have a duty to continually upgrade the services that are delivered to people through joint government and private sector initiatives. In Jordan, administrative contracts are particularly important as it is a poor country and the involvement of private investors in its projects is vital.

Companies considering entering into government contracts in poor countries such as Jordan are often very eager to ensure that their investments would remain safe in the event of a dispute with the government in question. It is believed that arbitration is an attractive method of dispute resolution in these circumstances since it offers investors a neutral environment for settling any potential disputes of this kind. The existence of a well-developed system of arbitration in Jordan could therefore be a significant draw for private investors, who would generally rather avoid the possibility court action. However, at present Jordan is only beginning to develop in this regard and the feasibility of using arbitration in administrative contract disputes need to be investigated.

The Arbitration Act 2001, in ruling that 'the provisions of this law shall apply to every conventional arbitration conducted in Jordan and *relate to civil or commercial disputes between parties of public or private law persons,* whatever the legal relationship to which the dispute is connected, whether contractual or not' notably did not refer to administrative disputes (The

Arbitration Act, 2001). In addition, since the introductions of the Arbitration Act in 2001, there have to date been no legal precedents concerning arbitration in administrative contracts. Whether or not the Act can be said to permit arbitration in administrative disputes, despite it not mentioning them specifically, is a controversial question. While Alshatnawi, for example, infers that administrative contracts cannot be arbitrated, Abdulhadi has argued that power has clearly been granted to public authorities in this regard. Abdulhadi's position appears to be stronger, although it may not be true to say the Arbitration Act 2001 was entirely *clear*.

In his book, "Arbitration in Administrative Contracts", Abdulhadi comprehensively studied the use of arbitration in administrative contracts in France and Egypt, but his assertion that the Jordanian Arbitration Act 2001 was clear in giving providing permission for Jordanian public authorities to arbitrate was not based on similarly thorough examination (Abdulhadi, 2005). Also, although Abdulhadi demonstrated the advantages of arbitration in general, it can be said his failure to counter any opposing arguments somewhat weakened his stance.

Since the Jordanian Arbitration Act 2001 is derived from the Egyptian Arbitration Act 1994, it is argued here by some Egyptian and Jordanian authors that the Arbitration Act 2001 does allow for arbitration to be used in settling the disputes of administrative contracts in Jordan (Sharaf, 1993; Nasar, 1997; Ibrahim, 1991; Alam, 1986; Aldori, 1985; Sari, 1999). This is because there was no specific prohibition of this in the Act, even though it may only have explicitly permitted arbitration as a means of resolving civil or commercial disputes. According to a basic principle of Jordanian law, actions are generally allowed rather that forbidden as long as they are in the public interest[1]. In other words, consent to carry out an act that is ostensibly beneficial to the public, does not have to be explicitly provided by the law.

In order to add weight to the above argument, however, it is important to refute the claims of those who are inclined to disagree. The case against the use of arbitration in administrative contracts includes the arguments that it infringes on the obligatory nature of judicial jurisdiction, that it is not compliant with administrative contract theory, that arbitration does not provide legal and technical guarantees and that the Arbitration Act 2001 is in fact unconstitutional. All of these will be examined and refuted in the following sections.

## The Application of Arbitration Act 2001 to the Disputes of Administrative Contracts

The Jordanian Government follows one of two approaches when it concludes any contract. In the first of these, the contracts grant the government exceptional powers (administrative contracts), such as in the case of public works contracts and supply contracts[2]. In the second, contracts are arranged with private individuals in which the government is also treated as a private individual without privileges (civil or commercial contracts), such as in the case of contracts of sale/purchase and contracts of lease. According to the Arbitration Act 2001, commercial and civil disputes of government can be arbitrated, but the Act does not mention the possibility of using arbitration in administrative contracts[3].

However, existence a government (public person) as one of the disputing parties doesn't mean that all the disputes of government can be arbitrated as the Arbitration Act limited the kind of disputes that the Act governs in civil and commercial and non-administrative.

Arbitration therefore is not used in administrative contracts as there are doubts about its legality in this context since the Arbitration Act 2001 is unclear in this regard, only explicitly allowing the use of arbitration in commercial and civil, but not administrative, disputes.

According to Alshatnawi, the fact that the Arbitration Act 2001 only referred to disputes of civil and commercial contracts when stating which types of dispute it would apply to, was a deliberate attempt to limit its scope (Shatnawi, 2006).

However, it could be argued that the phrase 'civil or commercial dispute' laid down in the Arbitration Act merely mentions these two types of disputes as examples of the kinds of disputes which can be arbitrated. In other words, the act did not include an exhaustive list of disputes but rather examples of disputes where the 2001 Act might apply[4]. It could be also concluded that the legislator did not intend to limit the types of disputes covered by the 2001 Act since administrative disputes are no less important than commercial and civil disputes.

Although the contracts concluded by the government which has exceptional powers and authorities are considered administrative contracts[5], but it is also argued that disputes arisen from the administrative contracts are actually civil rather than administrative in nature, since they do not fall within the jurisdiction of the administrative courts[6], which is the only authority for settling administrative disputes in Jordan[7]. Because administrative contract disputes are not settled by the High Court, but rather by civil or special courts, the disputes can be seen to be civil.

The argument is strengthened further by the fact that the High Court of Justice also considers disputes arising from government contracts to be civil rather than administrative, as can be demonstrated by a number of its decisions. For example, it judged that the Formation Law of Civil Courts should outline which disputes the High Court had authority over and the disputes of administrative contracts were not among them (The High Court of Justice, 1982).

In another instance, the High Court of Justice ruled that 'the challenge of non-renewal of the Hashemite University Public Employment Contract as a government contract is considered an administrative decision which falls within the jurisdiction of the High Court of Justice irrespective of previous judgments' (The High Court of Justice, 2000).

Nevertheless, it may be that issues related to administrative decision-making which occurs prior to contracts actually being concluded, are ruled by the administrative court, although disputes arising after the contracts have been signed fall under the control of regular civil courts. The non-renewal decision examined in this case can clearly be considered an administrative decision and not related to the carrying out of the terms of the contract itself. In circumstances where the dispute concerned the latter, the case would be dealt with by the other courts.

Also, the wording of the above decision is interesting since the phrase 'irrespective of previous judgements' suggests that previous judgements had been made which were at odds with the above decision. In this regard, no contradictory judgement before this decision was made appears to exist.

In addition, the High Court of Justice has ruled that any dispute which arises whilst an administrative contract is being executed should fall under the jurisdiction of the civil or special courts (The decision of general council-The High Court of Justice, 1999). This is also true for any dispute concerning the carrying out or conditions of administrative contracts. In sum, the High Court of Justice is responsible only for administrative matters set out in the High Court of Justice 1992 S (9/A) and administrative contract disputes are not among those mentioned (The High Court of Justice, 1999).

## Impossibility of Making an Analogy upon Arbitration for Resolving the Disputes of Administrative Contracts

The Arbitration Act laid down that 'the provisions of this law shall apply to every conventional arbitration conducted in Jordan and relate to civil or commercial disputes between parties of public or private law persons, whatever the legal relationship to which the dispute is connected, whether contractual or not' (The Arbitration Act, 2001).

The Cassation Court has decided in one of its judgments that 'Arbitration is an exceptional method of settling certain disputes between the disputing parties and therefore expanding the interpretation of the arbitration agreement to add new types of disputes which can be subject to arbitration is not allowed' (The Cassation Court, 2002).

According to this judgment, the Court of Cassation appears to hold the position that arbitration should only be used to settle disputes (civil and commercial) in exceptional circumstances and otherwise litigation should be used as the default form of dispute resolution. Therefore, according to Alshatnawi, *only* civil and commercial disputes-those permitted by the Arbitration Act-and no other types can be arbitrated (Shatnawi, 2006).

In this regard, there is a rule used in the interpretation of law which is 'non analogy upon exceptional matters in the law[8], such making an analogy upon the arbitration which is exceptional and alternative method to litigation which the original/main method for resolving disputes. Accordingly, it is said that we cannot extend civil and commercial disputes to include administrative disputes, especially since the court was clear in its decision when it chose not to expand upon the types of disputes which can be arbitrated (Shatnawi, 2006).

However, the author disagrees with the above opinion as the analogy should not apply to the arbitration itself. Rather, we can expand on the types of disputes (civil and commercial) permitted within provision No (3) of the Arbitration Act. In other words, we cannot analogise and expand on the concept of arbitration in general, which is an exceptional way of settling disputes, but it is possible to do so in relation to the articles of the Arbitration Act. Therefore, drawing parallels between administrative disputes and commercial and civil disputes does not breach the rules of interpretation.

Also, Alshatnawi relied on one sentence in the decision of the Cassation court which stated that arbitration is an exceptional way of settling disputes but at the same time failed to examine the decision in full before claiming that arbitration is prohibited in administrative contracts, instead selecting only those parts which served his view. By returning to the same decision, we find that the court decided as follows:

'Arbitration is an exceptional method of settling certain disputes between the disputing parties and therefore expanding the interpretation of the Arbitration Agreement to add new types of disputes which can be subject to arbitration is not allowed. Accordingly, the arbitrator is not authorized to be guardian of the assets of a company in the revocation process of a company because the arbitration agreement only refers to arbitration any dispute regarding the execution of the company's projects of but not the revocation the company itself' (The Cassation Court, 2002).

In light of this, it appears that the court decided that expansion in the types of disputes which relate to the arbitration agreement itself is not allowed. However, the court did not mention extending the types of disputes which fall within the Arbitration Act.

The author therefore believes that the disputes of administrative contracts can be arbitrated according to the Arbitration Act 2001 because, although it only explicitly allowed arbitration in civil and commercial disputes, it did not prohibit arbitration in administrative disputes.

However, it could be argued that the phrase 'civil or commercial dispute' laid down in the Arbitration Act merely mentions these two types of disputes as examples of the kinds of disputes which can be arbitrated. In other words, the act did not include an exhaustive list of disputes but rather examples of disputes where the 2001 Act might apply (The Arbitration Act, 2001). It could be also concluded that the legislator did not intend to limit the types of disputes covered by the 2001 Act since administrative disputes are no less important than commercial and civil disputes. Thus, it would be unreasonable to deduce that that the legislator would have intended to ban the arbitration in administrative especially they affect positively on economy and stream of commerce.

Nowadays, economic issues such as the lack of public finance and budget deficits have meant that some governments are unable to fund projects which provide and deliver services to people. The need for local private sector involvement has become increasingly important to some financially poor countries, such as Jordan and is also considered to be a critical driver of economic growth as local private sector involvement will encourage foreign private sector involvement and, as a result, will encourage foreign direct investment in the country. Government contracts therefore are seen as a primary source of economic growth, job creation and government revenue to finance essential public services and improve the quality of goods and services delivered to people.

Accordingly, being able to resolve any disputes which may occur in the most efficient way possible (arbitration) encourages investment because private investors usually prefer to avoid going to the courts.

It is often held that, according to the Constitution and a number of other laws, litigation is the only valid method for settling administrative contract disputes and that use of arbitration in this context would break judicial rules. Above it has been demonstrated, however, that administrative disputes may be accommodated by the Arbitration Act. The next section will discuss the relationship between arbitration and applying jurisdiction to the disputes of administrative contracts in the next section.

## The Infringement of the Arbitration Act on the Compulsory Nature of the Judicial Jurisdiction in Jordan

According to the Formation Law of Civil Courts 2001[9], civil courts have jurisdiction over all government departments in cases of dispute (The Law of Civil Courts Formation 2001, article 2). This fact leads many to believe that using arbitration to settle administrative contract disputes contradicts the rules of judicial jurisdiction in Jordan (Altamawi, 1984) and therefore whether the Arbitration Act 2001 can be applied to these disputes remains unclear.

It can be argued that the use of arbitration in settling government contract disputes does not go against the jurisdiction of the judiciary because the disputing parties act in accordance with the arbitration agreement, which is regulated by the Arbitration Act. The Constitution has determined the sources of legislation, such as the Constitution, Acts of Parliament, regulations and instructions (The Constitution 1952, article 24, 25, 26, 27, 31, 33, 126 and 128). Acts of

Parliament cannot breach the Constitution, which is the highest source of law, but they can modify the terms of any other act since they are on an equal footing in terms of legislative structure.

There is an apparent conflict, therefore, between the Formation Law of Civil Courts and the Arbitration Act and so it is important to determine which takes precedence.

The Constitution asserts that laws will come into effect thirty days from the date they are published in the Official Gazette[10]. The Law of Civil Court Formation No (17/2001) was published in the Official Gazette on 18/3/2001 under number 4480 and therefore came into effect on 18/4/2001[11]. The Arbitration Act No (31/2001) was issued in the Official Gazette on 16/7/2001 under number 4496, meaning that the Act came into force on 16/8/2001[12]. In one decision, the Cassation Court ruled that 'The Law of Tax 1982 must be applied upon the Jordanian Syrian Company of trade and not the Law of Certification the Economic Cooperation Agreement 1976, since the first law is later and newer than the second law' (The Cassation Court, 1985). In addition, a rare ruling by the Special Tribunal[13], which all courts are obliged to apply, decreed that, according to civil law[14], new laws may annul articles of any previous laws[15]. In consequence, the Arbitration Act is able to modify parts of the earlier Law of Civil Courts Formation.

Furthermore, the Arbitration Act applies to all arbitration agreements, including those entered into by the government of Jordan[16]. In cases where arbitration fails to settle a dispute, however, the civil courts are still the competent authority. For example, the Court of Appeal has the authority to pass judgement when a challenge is mounted during the arbitration process or in respect of the award itself[17]. It is shown, therefore, that the use of arbitration in government contract disputes does not entail that the jurisdiction of the courts is entirely overruled.

The Cassation Court has also stated that the Arbitration Act does not impinge on judicial jurisdiction. One example was when it decided that, 'the Labour Law 1996 grants the Conciliation Court power to decide in labour disputes whatever the value of the claim. However, arbitration is an exceptional judicial council to the general rules created by the will of disputing parties to settle the disputes and therefore it does not infringe the rules of judicial system' (The Cassation Court, 2005).

This argument is also reinforced by the fact that the court's power is not limited to enforcement of the arbitral award. In addition, it has to oversee that the all the steps in the arbitration process are followed in accordance with the law and that the arbitrator complies with the principles of litigation. Before the arbitral award is imposed, the court has to scrutinise the minutes of the arbitration to ensure that the award complies with the arbitration agreement. If this record of the arbitration agreement is not kept, it is considered an infringement of the Arbitration Act and the arbitral awarded is invalidated (The Cassation Court, 1991). It can be seen, therefore, that arbitration does not encroach on the courts' competence.

In another decision, the Court of Cassation noted that disputing parties have a guaranteed right to resort to competent court in cases of a dispute over the arbitral award. As a result, any condition in the arbitration agreement obliges the disputing parties to accept the arbitral award and prohibit them from challenging it before the competent court makes the condition itself void (The Cassation Court, 1998).

In summary, it has been shown that the Arbitration Act does not threaten the authority of the courts or infringe the compulsory rules of judicial jurisdiction.

## Compliance of Arbitration with the Theory of Administrative Contract

Government contracts with private providers are important as governments receive the assistance of private sector companies to carry out their projects[18], which are concerned with delivering public services to people in many areas of social and economic life[19]. They are seen as a primary source of economic growth, job creation and government revenue to finance essential public services and improve the quality of goods and services delivered to people.

Administrative contract can be defined as a contract between the government and an individual(s) to carry out tasks associated with the running of the public utilities (Alhelo, 1990). It contains clauses which grant the government exceptional powers in the management of these projects, such as powers of supervision and control of contract[20], power to impose penalties on the contractors if they fail to fulfil their obligations (Ja'far, 2000) and the power to modify the clauses of the contract[21].

The administration is therefore the strong party because of having exceptional powers in its administrative contracts as a means to exercise pressure on the contractor to fulfil his obligations. Such powers enable the administration to ensure systematic and consistent function of the utility and that the contract is carried out in the best way.

Whereas in some countries such as the UK, government departments are treated just the same as private individuals in government contracts and do not benefit from any special privileges, in Jordan the government is always granted exceptional powers.

However, private contractors sometimes fail to provide a high standard of service and the exceptional powers given to the administration in its contracts may be also abused and lead to disputes arising between the contracting parties. The main disadvantage of government contracts is the disputes that might result, along with the flawed mechanisms available to solve such disputes (litigation), in particular in less developed countries such as Jordan. As an alternative to litigation, arbitration is considered a suitable method to be used for resolving the disputes of administrative contracts.

However, during the arbitration process, the government loses its official status and has no special privileges, as it is treated as an equal to the other disputing party. Those who oppose the use of arbitration in government contract disputes argue that this removal of exceptional powers breaches one of the fundamental principles of administrative contracts (Nassar, 1997; Sari, 1999).

It is contended, however, that treating the government as a private individual does not contradict the principles of administrative contract theory because exceptional powers are in fact only granted to the public authorities in its contracts, but not in cases of disputes arising from these contracts (Alsharief, 1993). Additionally, it is important to note that, since the Constitution states that all Jordanian individuals or entities are equal before the law[22], the government is also treated as a private individual which holds no special powers within the litigation system.

Private companies choosing to invest in developing countries such as Jordan by entering into government contracts are normally extremely eager to ensure that their investments would be afforded reasonable protection in the event of a dispute with the host government. Offering investors the possibility of resolving potential disputes through an impartial process which treats both parties as equals, is a good method protecting their interests. Allowing arbitration in administrative contract disputes can therefore be seen to be a factor which helps attract investment.

## The Availability of Legal and Technical Guarantees in the Arbitration of Administrative Contracts

A further argument raised against the use of arbitration in administrative contract disputes, that it does not come with the same guarantees found in judicial proceedings, especially since arbitrators are sometimes lacking in legal experience (Baker, 2000). Arbitration is also costly and most arbitral awards are not formally published, meaning that it is not always possible to learn from the episode and prevent similar types of disputes being repeated (Munir, 1991).

While it may be true that arbitration is expensive, this is a disadvantage of arbitration in general, not just of arbitration in administrative contracts and it can be argued that the costs of arbitration are clear to the disputing parties in advance. Also, the decision of whether or not to publish the arbitral award rests with the disputing parties themselves. They have the right not to do so, particularly perhaps if they fear that its publication with have a negative effect on their reputation. The privacy in this regard is considered one of the main advantages of arbitration to be used for resolving the disputes of administrative contracts since the public authorities of some sectors such as the defence sector may wish to keep certain contract details confidential to avoid prejudicing national security or other public interests while other sectors like to treat their own particular sensitivities and certain information as confidential to avoid third party interference in the smooth running of the contract[23].

The settlement of administrative contract disputes often requires expertise on legal, technical and administrative matters, which judges may lack. The limited experience of judges in disputes which include technical and complicated matters may mean that they have to rely on experts' reports in order to issue decisions within a short space of time[24] and this drawback is particularly relevant in the area of administrative contracts disputes. Disagreements over damages for delays, the right to stop work and changing the conditions/orders of contract are the types of disputes that need to be settled as quickly as possible without delay.

Most arbitrators, on the other hand, are qualified experts in arbitration and have comprehensive knowledge of legal issues, which means they can be fully trusted upon to arbitrate in disputes. In this regard, arbitration is able to provide solid guarantees of a legal and technical nature, which may even surpass those offered by litigation.

Arbitrators must be chosen wisely and ideally for their experience in the nature of the dispute. However, even if the parties fail to select an appropriately qualified person for the role, it does not necessarily follow that arbitration itself is an unsuitable method of dispute resolution in cases concerning administrative contracts due to its many other advantages.

The nature of government contracts requires that disputes are resolved quickly and effectively in order to save public money and deliver services to people without delay. If a dispute arises, it is important to settle it as early as possible as delays and extra costs can further damage the relationship between the government and its contractors which, in turn, can effect negatively on the services delivered to people. Litigation in this regard is time consuming and expensive as it involves many stages and takes a long time before a settlement is reached. Therefore, the main disadvantages of litigation-that it is costly and time consuming-are particularly relevant in relation to government contractual disputes. Such disputes must be settled in a short space of time and the nature of the contract itself will often require that services are delivered to people promptly.

## The Constitutionality of the Arbitration Act 2001

The Constitution has provided in one of its provisions that 'The Civil Courts in the Hashemite Kingdom of Jordan shall have jurisdiction over all persons in all matters, except those matters in respect of which jurisdiction is vested in Religious or Special Courts in accordance with the provisions of the present Constitution or any other legislation in force'. The Constitution therefore determined the only competent authorities for resolving all kind of disputes including: Civil courts, religious courts and special courts[25].

It has been argued that the Arbitration Act 2001 is unconstitutional because the Jordanian Constitution sets out the ways that disputes can be settled by certain courts (civil, religious and special) without mentioning arbitration (Shatnawi, 2006).

To assess whether the Arbitration Act is constitutional, it needs to be established whether the arbitral tribunal can be counted as either a civil, religious or special court.

Firstly, the arbitral tribunal cannot be said to be a civil court since these courts are ruled by the Formation Law of Civil Courts and, during the litigation process, must apply civil procedures law. The law also stipulates that there are only three types of civil court: The Court of First Instance, the Court of Appeal and the Court of Cassation[26].

Since this study has reached that administrative contracts disputes are considered civil rather than administrative in nature[27], it should be mentioned in this regard that civil courts are not the only competent courts for resolving civil disputes which may come under the jurisdiction of special courts. For example, the Court of Lands and Water Settlement is a special court and authorised to resolve all civil disputes regarding any property or usefulness or any other rights related to lands and water (The Law of Lands and Water Settlement 1952). Also, the Council Courts as a special court have a competence in resolving the civil disputes regarding the matters of public health, recreational facilities, local road maintenance, granting and termination licences (The Law of Councils Court, 2001).

The court of state property protection is another example of special court that resolves the civil disputes. This court is authorised in the conflicts of state properties either movable or immovable that the public employees owned by illegal way and the court therefore decides to take the property to be registered back in the name of state and it also obliges the public employee to pay a compensation to the treasury (The Law of State Property Protection, 1996).

On the other hand, the religious courts are divided into sharia courts for Muslims and ecclesiastical courts for the minority Christian communities. Arbitration is not considered one of the religious courts since these courts are responsible for disputes over personal status such as marriage, divorce, child custody and inheritance and communal endowment, in their respective communities.

Special courts are also established and their powers defined by legislation enacted for a specific purpose. Examples of special courts are the State Security Court which is regulated by the Law of State Security Act 1959, the Court of Customs which is organised by the Law of Customs 1998 and the Criminal Court which is governed by the Criminal Procedures Law, 1961.

Supporters of the claim that the arbitral tribunal is not a special court tend to focus on a number of key distinctions between the two. Arbitration lacks powers of court, it is said, which preclude it from being considered a truly judicial process and certain procedures applied in court are absent. The differences can be highlighted as follows:

- Unlike courts, the arbitral tribunal does not have the power to oblige witnesses to attend hearings or enforce any party to submit documents or evidence.
- It is up to the disputing sides themselves whether arbitration is held in Jordan or oversees (The Arbitration Act 2001, article 27), but disputing parties are not given a say in the location and type of special court, which are determined by the law[28].
- Special courts apply only national laws while the disputing parties can choose either national or foreign law to be applied in arbitration.
- The arbitrator is chosen by the disputing parties themselves while court judges cannot be selected by disputing parties.
- Arbitrators may be Jordanian or foreign whereas only national judges can be appointed to the official judiciary, including in special courts[29].
- There is no compulsion under the Arbitration Act to discipline an arbitrator who fails to fulfil their obligations. Any such action depends on the terms set out by the disputing parties themselves in the arbitration agreement. If regular judges, on the other hand, fail to comply fully with their responsibilities, they may be subject to disciplinary action, such as admonition, reduction in salary, demotion and dismissal (The Independence of Judiciary Act 2001, article 38).
- Arbitrators, unlike judges, are not compelled to renounce any other commercial role[30]. Judges cannot have any other employment whilst in the service of the judiciary (The Independence of Judiciary Act 2001, article 29).
- Arbitrators are treated as ordinary, private individuals who are not free from legal liability; they are not required to take a special oath to fulfil their role. Decisions on the employment and dismissal of judges are taken by the Judicial Board and in accordance with the will of the King (The Independence of Judiciary Act 2001, article 26) and before assuming authority; judges must take an oath before the King or Judicial Board[31].
- Unlike arbitrators, Judges enjoy immunity, as set out in the Independence of the Judiciary Act.

It is contended, however, that these differences are exaggerated and do not, therefore, obstruct the argument that the arbitral tribunal can be considered a special court. The fact that arbitral tribunals may fail to apply certain procedures adhered to in the court system, for example, is based on a comparison with regular (civil) courts rather than special courts, which may also in fact apply distinct laws and procedures. For instance, the State Security Court, the Criminal Courts and the Customs Court are governed by the Law of State Security Court 1959, the Law of Criminal Procedures 1961 and the Customs Law 1998 respectively. In the same way, the arbitral tribunal can be considered a special court, which is regulated by a special law (Arbitration act).

Also, witnesses can indeed be obliged to attend an arbitral tribunal and documents and evidence can be forcibly acquired if necessary[32]. Although this is only done by means of a request to the competent court, which maintains supreme power in this respect, the difference can be said to be in the process of calling witnesses rather than in whether or not the power to call witnesses exists.

Similarly, although it is true to note that the arbitral award is not final, it is a misunderstanding to claim that this is a clear difference to a court decision, as they also may be challenged. It should be mentioned in this regard that the arbitration awards have the authority of res judicata[33] and the opportunity to be challenged is limited[34].

Moreover, special court judges may not, in fact, always be official judges, as in the case of the Military, Police and State Security courts. The arbitrator, therefore, can likewise be said to

perform the role of a judge even though he or she may lack the qualifications and status of a regular judge.

According to the Arbitration Act, challenges to the arbitration award should be heard before the Court of Appeal and not the Court of First Instance[35]. In this sense, arbitral awards are being considered as equal to decisions made by first courts, which are also challenged at the level of the Court of Appeal[36].

One of the most important differences between official judges and arbitrators is perhaps the fact that judges are granted immunity from liability for damages whilst carrying out their role, whereas arbitrators are not.

Immunity for arbitrators would mean protection from certain liabilities, in order to prevent not serious lawsuits being brought by parties who were dissatisfied with the outcome of the arbitral award (Hwang, Chung & Cheng, 2008).

Two opposing viewpoints exist on the issue of immunity for arbitrators, namely the "Contractual School of Thought" and the "Status School of Thought". According to the latter, since arbitrators carry out judicial or quasi-judicial functions, which should afford them a kind of judicial status, they should benefit from the same immunity from civil liability. The Contractual School argues, on the other hand, that the relationship between the arbitrator and disputing parties should be based on the terms of their contract, rather than being defined by conflating aspects of judicial and arbitral identity. In other words, arbitration is essentially thought of an agreement in which the arbitrator is appointed as an agent of the disputing parties, who grant him or her power to settle the dispute by issuing the arbitral award (Ragheb, 1993; Alnajar, 1993; Wali, 1993).

It is believed by this author, however, that the functions of arbitrators should be thought of as judicial and they should be granted the same immunity received by judges. This has the important effect of increasing the confidence of arbitrators, who would not be influenced by the threat of facing a lawsuit from parties disappointed by the arbitral award.

The Cassation Court in Jordan has also expressed support for the idea that arbitrators should be treated as judges, thus lending weight to the argument that they should also be offered immunity, when it stated that, 'arbitration is an optional judicial Council created by the will of disputing parties to settle their disputes. However, the arbitrator exercises the functions of judge and renders a mandatory award upon the disputing parties' (The Cassation Court, 2005).

Similarly, in another decision, the Cassation Court judged that 'it is not permitted to invite the arbitrator to the court to discuss what he has done in the arbitration process because the arbitrator is considered a judge' (The Cassation Court, 1998).

To provide further evidence that arbitration should be considered a special court, it is useful to demonstrate the similarities between arbitral awards and judicial decisions. The first of these is that both processes are composed of three separate elements: The claim, the disputing party and the third party whose role is to settle the dispute (Atieeh, 1990). Both arbitrators and judges must take an impartial approach and grant the disputing parties the right of legal defense (Wali, 1993; Alnajar, 1993). Furthermore, arbitrators and judges are subject to being challenged under the same circumstances, as set out under the Civil Procedures Law or the Arbitration Act[37]. Arbitration awards, like court decisions, are mandatory, have the status of res judicata and can be enforced by the provisions of the law (The Arbitration Act 2001, article 52).

Another fact which points towards the constitutionality of the Arbitration Act is that to date, there has been no judicial judgment issued by the High Court of Justice or the

Constitutional Court concerning the Act's constitutionality or otherwise[38], despite both courts having the authority to do so and to prohibit any law considered unconstitutional from being applied. In other words, no serious doubt appears to have arisen on this matter.

Finally, it should be noted that the Law of Judiciary Independence permits the appointment of a regular judge to act as an arbitrator in exceptional circumstances, subject to approval of the Cabinet and to the recommendation of the Judicial Council, when one party in the dispute is a government or public body or in cases of international disputes (The Law of Judiciary Independence 2001, article 17). This legal acknowledgment that judges can act as arbitrators in government disputes suggests that arbitration, as a process, is an accepted constitutional mechanism of dispute resolution.

As has been demonstrated above, the use of arbitration as a means of settling government contract disputes cannot be said to infringe constitutional principles since the arbitral tribunal can be considered one of the 'special courts' that the Constitution refers to.

## CONCLUSION

Despite the fact that the Arbitration Act only expressly allows arbitration as a means of settling civil and commercial disputes, this does not imply that arbitration in administrative disputes is prohibited. This is firstly because the disputes of administrative contracts may be in fact be covered by the Arbitration Act; and secondly because the Act does not breach the rules of compulsory jurisdiction in state. Also, it has been shown that the treatment of the government as a private individual during arbitration procedures does not represent an infringement of administrative contract theory. Finally, legal and technical guarantees are not absent if administrative contract disputes are settled by arbitration.

Importantly, it has also been demonstrated that arbitration as a means of dispute resolution in administrative contracts should not be considered unconstitutional since the arbitral tribunal can be regarded as a type of 'special court', one of three types of court specified in the Constitution 1952 as having power to settle disputes of any nature, including government contract disputes.

Accordingly, for the avoidance of any further confusion, it is thought necessary to alter the Jordanian Arbitration Act 2001 so that administrative disputes are explicitly listed alongside other types of disputes which can be arbitrated[39].

The relevant section could be modified as follows:

*'The provision of this law shall apply to every arbitration concluded with the government'.*

*Or*

*'The provisions of this law shall apply to every conventional arbitration conducted in Jordan and relate to civil, commercial or administrative disputes of public or private law persons, whether the legal relationship to which the dispute is connected, whether contractual or not'.*

It has reached in this paper that the use of arbitration as a mean of settling the administrative contracts disputes cannot be said to infringe constitutional provisions since the arbitral tribunal can be considered one of the special courts mentioned in the Constitution[40].

However, in order to avoid disagreement which may arise over the constitutionality of the Arbitration Act and the issue of whether or not the disputes of government contracts can be

settled by arbitration or not. It is recommended that section (102) of the Jordanian Constitution be amended so that it no longer omits arbitration as a means of dispute settlement.

The Article (102) of the Constitution can be modified as follow:

> *'The Constitution has provided in one of its provisions that 'The Civil Courts in the Hashemite Kingdom of Jordan shall have jurisdiction over all persons in all matters, except those matters in respect of which jurisdiction is vested in Religious or Special Courts or arbitration in accordance with the provisions of the present Constitution or any other legislation in force' (The Jordanian Constitution 1952, article 102).*

## ENDNOTE

1. This rule has been applied by a number of judgments in Jordan. For example, the Cassation Court decided in one of its most important decisions that even though the Jordanian Bar Association Law stated that the pleadings of disputing parties should be signed by a practicing lawyer, this doesn't render pleading signed and submitted by trainee lawyer as illegal. The courts found that the Jordanian Bar Association Law remained silent on whether this rule applies to fully qualified lawyers or includes trainee lawyer who are considered practicing lawyers under Jordanian law. As a result the courts decided that pleadings signed and submitted by trainee lawyer are legal under the Jordanian Bar Association Law. See the Cassation Court No (73/2000), Qistas <https://qistas.com/> accessed 6th February 2017.
2. The concept of the administrative contract in Jordan is based on the government being granted exceptional powers to impose punishment upon the contracting party if he does not follow the provisions of contract or fails to fulfill his obligations or to guarantee that the contract is carried out in the best way. These powers include supervision and control of contract, imposing penalties on the contracting party and modification of the clauses of contract.
3. The Arbitration Act 2001 does not make clear whether or not government contract disputes can be settled by arbitration as it indicates that the Act only applies to civil or commercial disputes, without any mention of administrative disputes (disputes of administrative/government contracts). In this regard, The Arbitration Act 2001 S (3) laid down that 'the provisions of this law shall apply to every conventional arbitration conducted in Jordan and relate to civil or commercial disputes between parties of public or private law persons, whatever the legal relationship to which the dispute is connected, whether contractual or not'.
4. The Arbitration Act 2001 S (3).
5. The concept of administrative contracts is examined in section (2.3).
6. It should be mentioned that the Administrative Judiciary Law (27/2014) has replaced the High Courts of Justice Law (12/1992) and establishes a two-degree adjudication system for administrative disputes. The Administrative Courts therefore consist of two levels, The Administrative Court and The High Administrative Court. While decisions issued by the Higher Court of Justice were final and cannot be appealed, according to the new law, all decisions issued by the Administrative Court shall be subject to appeal before the "Higher Administrative Court" within 30 days of the date of issuance of the appealed decision.
7. The Administrative Judiciary Law (27/2014) laid down that 'the Administrative Court is competent to decide in the following cases: 1-Challenging the election results of councils, associations, chambers of commerce and trade, the registered clubs in the Kingdom and results of other elections which have been carried out in accordance with current laws and regulations. 2-Challenging final administrative decisions regarding the employees of public employment including those related to annual salary increases, promotion, transfers, delegation or secondment. 3-Challenges by public employees in the revocation of final decisions issued in their retirement, provisional retirement, dismissal, loss of employment or prevention of them working by illegal means. 4-Challenges by public employees in the revocation of final decisions issued upon them by the disciplinary authorities. 5-Private disputes related to salaries and

premium retirement matters owed to employees and their inheritors. 6-Any challenge submitted by a concerned individual for the revocation of any decision or procedure in any law which violates the Constitution Law or any regulation violates the Constitution or law. 7-Challenges submitted by a victim to stop the application of any temporary law which violates the Constitution Law or any regulation which violates the law or the Constitution. 8-Any challenge regarding disputes and matters which fall within the competence of courts in accordance with any other law. 9-Challenges submitted by individuals and authorities for revocation of final administrative decisions. 10-Challenging any administrative decision even if it is considered final by the act which issued whereby. 11-Challenging final administrative decisions issued by administrative authorities who have judicial jurisdiction, except decisions issued by the tribunal of mediation or arbitration in labour disputes.

8. Analogy means a comparison between two things that have similar features in order to help explanation a principle or idea.
9. The types of regular courts and its jurisdictions and powers are organised by the Formation Law of Civil Courts, 2001.
10. The Constitution 1952 S (93/2) laid down that 'Any law shall become effective upon the King's promulgation after thirty days from the date of its publication in the Official Gazette unless it is specifically provided in that law that it shall come into force on any other specified date'.
11. The Law of Civil Court Formation S (1) laid down that 'This law shall be called 'The Law of Civil Court Formation' and shall come into force thirty days after being published in the Official Gazette'.
12. The Arbitration Act S (1) laid down that 'This law shall be called 'Arbitration Law of 2001' and shall come into force thirty days after being published in the Official Gazette'.
13. The Constitution 1952 S (123) laid down that '(1) The Special Tribunal (*Diwan Khas*) may interpret the text of any law which has not been interpreted by the Courts at the request of the Prime Minister. (2) The Special Tribunal shall consist of the President of the highest Civil Court as chairman, two of its judges and one senior administrative official who shall be appointed by the Council of Ministers as members. It shall also include a member, delegated by the Minister, from among the senior officials of the Ministry concerned. (3) The Special Tribunal shall give its decisions by a majority of votes. (4) Decisions made by the Special Tribunal and published in the Official Gazette shall have the force of law. (5) All other matters concerning the interpretation of law shall be decided as they arise by the courts of law in the ordinary way.
14. Article (5) from the Civil Law which laid down that "inadmissibility of abrogating any article in previous law except if the new law laid down on this abrogation or if the new law organises certain situations which were organised by the previous law.
15. Decision of the Interpretation Council No (7) year 2001 issued on 6/6/2001, published on page 3177 from the Official Gazette.
16. The Arbitration Act 2001 S (4) laid down that 'The provisions of this law shall apply to every arbitration existing at the time of its entry into force or which commences thereafter even if it is based on an arbitration agreement prior to the entry into force of this law, provided that all previous procedures taken in accordance with any prior law shall remain valid.' Also, S (56) laid down that 'The Prime Minister and Ministers are tasked to carry out the provisions of this law'.
17. The Arbitration Act 2001 S (48, 49, 50 and 51) determined the situations which the arbitral award can be arbitrated.
18. Project of administration covers the whole life cycle: From and including initial studies, feasibility assessments, the production of outline and full business cases, the procurement process and transition through to, service delivery and disposal or exit. See, Hm Treasury, 'Project Governance a Guidance Note for Public Sector Projects', (The United Kingdom: Treasury, 2007) at 5.
19. Goods required by government range from such ordinary commercial products as sugar, paint, furniture and motor cycles to computers, aircraft, space satellites and weapons systems of the greatest complexity.

Services for which contracts are placed by government include the construction or repair of buildings, roads, bridges and airfields, the execution of programmes of research and development, the designing of equipment, the writing of computer programmes and consultancy and project management services. See, C. Turpin, *Government Contracts* (First edn.; London: Penguin Books Ltd 1972) at 15.

20. Power of supervision the contract enable the administration to impose on the other contractor the use of certain machinery, local raw materials or minerals and local labour, according to what is called for in the public interest and change the way in which the contract is carried out at any point. See M. Aljbori, *The Administrative Contracts* (First edn.; Amman: Dar Althakafa, 2010) at 126.
21. The administration has the right to modify the clauses of a contract, whether at the stage of concluding the contract or during its execution, without needing the approval of the other contractor.
22. The Constitution S (6/A) laid down that 'Jordanians shall be equal before the Law. There shall be no discrimination between them as regards to their rights and duties, on grounds of race, language or religion.'
23. Government should keep the commercially sensitive information withheld. However, the commercially sensitive aspects of contracts differ greatly from sector to sector, depending on the maturity of the market. What may be commercially sensitive in one context may not be in another. For example, commercially sensitive information may be the financial provisions (e.g. the price and priced elements of the payment mechanism). See, Standardisation of PFI contracts version 4 R (26), HM Treasury). See, HM Treasury, 'Standardisation of PFI contracts' <http://www.hm-treasury.gov.uk/Search.aspx?terms=Standardisation+of+PFI+Contracts> accessed 17th March 2017.
24. There are many cases that come before courts in which the judges have limited experience in the subject of the dispute. These cases include, for example: Construction contracts; contracts relating to aircraft; the operation of international markets and exchange; the international carriage of goods; contract relating to ships and shipping; banking instruments and international credit. See, H. Genn, Court-Based and Initiatives for Civil Disputes: The Commercial Court and the Court of Appeal (London: Faculty of Law-University College London, 2002) at 12.
25. The constitution 1952 article (99) laid down that 'the courts shall be divided into three categories: Civil Courts, Religious Courts and Special Courts'.
26. The litigation system in Jordan consists of two stages, the first in the Court of First Instance and the second in the Court of Appeal. However, the Court of Cassation in Jordan, which is the highest court, is not considered a stage of litigation since it only has powers to decide on the legality of decisions issued by the Court of First Instance, the Court of Appeal and some other private courts. This means that the role of the Cassation Court is only to control the decisions issued by the other courts by judging whether they comply with the provisions of the law or not. For this reason, the Court of Cassation is called a 'court of law' since there are no hearings at this stage. Also, the awards of the Cassation Court are final and binding upon the courts below it which issued the decisions being challenged.
27. This point has examined in section (2).
28. The Civil Procedures Law 1988 S (36-47) determined the venue jurisdiction of courts.
29. There are some conditions must be available in appointing any judge such as the judge must have completed twenty five calendar years of age; must be Jordanian; reputable and was not sentenced any felony except the political offence; has at least a bachelor in law; worked four years as a solicitor after getting of bachelor; or three years after master degree; or two years after doctorate degree; or has diploma from the Judicial Institute of Jordan. However, there are no such conditions in the appointing of arbitrators who may be engineer or supplier or may be Jordanian or foreign. See the Law of Judiciary Independence 2001 S (10) and the Arbitration Act 2001 S (15/B).
30. The Independence Law of Judiciary S (17/A) laid down that 'no judge shall gather between the judicial function and practicing any kind of trade or become a member in the board directors of companies or any other function'.

31. The Independence of Judiciary Act 2001 S (15) laid down that judges must take an oath before performing their function.
32. The Arbitration Act 2001 S (8) laid down that 'In matters governed by this law, no court shall intervene except in cases provided for therein without prejudice to the arbitral tribunal's right of asking the competent court for assistance in the arbitral proceedings, such as calling a witness or an expert, ordering the submission of a document or a copy thereof or reviewing it or any other thing, as the tribunal finds appropriate'.
33. The Arbitration Act 2001 S (52) laid down that 'Arbitral awards rendered in accordance with this law are deemed to have the authority of res judicata and shall be enforceable by complying with the provisions of this law'.
34. The Arbitration Act 2001 S (49) laid down that 'an action for the nullity of the arbitral award shall not be admitted except in any of the following cases: 1-If no valid arbitration agreement (and) in writing exists or such agreement is terminated because of the expiration of its time limit. 2-If, at the time of concluding the arbitration agreement, either of the two arbitrating parties was (fully) incapacitated or minor pursuant to the law governing his capacity. 3-If either of the two arbitrating parties was unable to present his defence because he was not properly notified of the appointment of an arbitrator or of the arbitral proceedings or for any other reason beyond his control. 4-If the arbitral tribunal excluded the application of the law agreed upon by the parties to govern the subject-matter of the dispute. 5-If the composition of the arbitral tribunal or the appointment of the arbitrators was not in accordance with this law or the agreement of the two parties. 6-If the arbitral award rules on matters not included in the arbitration agreement or exceeds the scope of such agreement. Nevertheless, if parts of the award relating to matters subjected to arbitration can be separated from those not so subjected, then nullity shall apply only to the latter parts. 7-If the arbitral tribunal has not compiled with the conditions of the award in a manner affecting its content or that the award was based on void arbitral proceedings affecting it'.
35. The Arbitration Act 2001 S (50) laid down that 'An action for nullity of the arbitral award must be submitted to the competent court within thirty days following the date on which the arbitral award was notified to the party against whom it was rendered'. Also, S (2) from the same act defined the competent court as 'The court of appeal within its jurisdiction the arbitration is conducted unless the parties agree to the jurisdiction of another court of appeal in the Kingdom.
36. The decisions of some special courts can be challenged before the Court of Appeal like the decisions issued by the First Instance Court.
37. The circumstances in which the arbitrator and judge can be challenged are laid down in the Civil Procedures Law 1988 S (132) and the Arbitration Act 2001 S (17).
38. For example, the High Court of Justice Law 1992 S (9/A/5, 6) laid down that 'the High Court of Justice is competent to stop the application of any a temporary law which violates the Constitution Law or any regulation which violates the law or the Constitution'.
39. The Jordanian Arbitration Act 2001 S (3) laid down that 'The provisions of this law shall apply to every conventional arbitration conducted in Jordan and relate to ***civil or commercial*** disputes between parties of public or private law persons, whatever the legal relationship to which the dispute is connected, whether contractual or not'.
40. As explained earlier in Section (2.5). The constitution 1952 limited the types of courts that have jurisdiction for resolving all kind of disputes. Article (99) laid down that 'The courts shall be divided into three categories: Civil Courts, Religious Courts and Special Courts'.

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