The Legitimacy of Arbitration in Administrative Contracts in the French System

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Disputes involving the state or any public legal entity affiliated with it have always been subject to extensive legal and jurisprudential discussions. Since arbitration was recognized in its modern form as a legitimate means to resolve such disputes and issue judgments on them, the issue has evolved from explicit rejection by legislation initially designed to regulate arbitration provisions by expressly excluding state disputes from the scope of matters that can be subject to arbitration. This applies to disputes of a general nature, where the state exercises sovereignty through sovereign and political-administrative decisions, as well as disputes of a private nature, where the state acts similarly to any individual under private law, entering into economic, commercial, service contracts, and others with individuals, companies, and other states.

From here, the issue of resorting to arbitration in administrative contracts has gradually imposed itself on states and their entities. This is due to the development of economic life, the liberalization of international trade, the flow of capital, and the dominance of multinational corporations over the global economy. As countries increasingly engage in international exchange and become parties to private law contracts, a preference has emerged among private individuals for arbitration as a

means to resolve disputes that may arise during the conclusion, implementation, or interpretation of contracts, rather than resorting to domestic courts.

This situation has led national legal systems, especially in France, to pay attention to arbitration, regulate it, and recognize the possibility of resorting to it exceptionally in administrative contracts. However, the uniqueness of these contracts necessitated the establishment of specific conditions and rules for accepting the agreement to resort to arbitration[1], rather than relying solely on the will of the contracting parties.

Those who act in public affairs act on behalf of the community, so they must be authorized to do so based on a general document, a legal instrument that defines their eligibility to act. Since the legitimacy of arbitration in administrative contracts has sparked significant debate both internationally and domestically, involving legislators, jurists, and judges, we have decided to address this matter within **the French legal system**, **which is a leading model among Latin legal systems**, and this is done by recounting the positions of each of the **legislator**, **judiciary**, **and jurisprudence**.

The idea of accepting the agreement to resort to arbitration in administrative contract disputes has caused a doctrinal, judicial, and legislative debate, with opinions divided into two directions. Some argue that accepting the assumption of arbitration as a means to resolve these disputes violates the jurisdiction of the judiciary, particularly the administrative judiciary, and forces the state to stand before a court on equal footing with private individuals. This view has been

expressed by Laferriere for a long time when he said: "The state cannot agree to settle its disputes through arbitration due to the negative and unexpected consequences that may arise from it," he added, saying, "How can we imagine the possibility of the state resorting to an external arbitrator to settle its disputes while it denies the possibility of resorting to regular judiciary to resolve these disputes[2]?" On the other hand, others support the application of the arbitration system in contracts concluded by the state or one of its public bodies. They see no obstacle preventing the administration from resorting to arbitration in administrative contract disputes, considering the importance of arbitration in settling disputes in light of the changing role that the state plays at present. They believe that arbitration is the most suitable method for resolving disputes that may arise during the conclusion or implementation of these contracts. This perspective has influenced the organization of forms and conditions of arbitration in administrative contracts, with legislative intervention resolving the controversy over the legitimacy of resorting to arbitration in these contracts, following the approach taken by the French legislator.

In France, the principle regarding arbitration in public law has been a prohibition, as the French legal system has been resistant to all forms of arbitration in administrative contracts concluded by the state or its public bodies with private individuals. However, there are exceptions (**first paragraph**). We will delve into the details and circumstances of resorting to arbitration in administrative contracts in France, exploring the position of the French legislator on this matter. Although there are several exceptions, we will also examine the position of jurisprudence

(oscillating between opposition and support) and the ordinary judiciary, including the Council of State, on the same issue (**second paragraph**)."

• **First paragraph**: **The position of the French legislator regarding arbitration in administrative contracts**.

Arbitration plays a significant role in settling administrative disputes, and as a result, this practical importance of arbitration clashed with the legislator's position[3]. The general principle in French law is that public law entities are not allowed to resort to arbitration to settle their disputes. This principle is based on legislative texts that do not permit public law entities to agree to arbitration for resolving their disputes. Among these texts are Articles 83 and (1004) of the Civil Procedure Code issued in 1803, which explicitly prohibited arbitration in disputes involving the state or public legal entities[4].

This prohibition was reaffirmed in Article 2060 of the current Civil Code issued in 1972, amended by the law issued on 9/7/1975. The article encompasses all disputes in which public entities are parties, even if they involve contracts related to administrative matters falling under the jurisdiction of civil or commercial courts. This prohibition is related to public policy and cannot be contravened[5]. The general rule established by these provisions is to prevent public law entities from agreeing to arbitration. No exception can be made to this general rule except through legislation[6].

However, the legislator has deviated from this general principle and introduced exceptions aimed at easing the accumulation of cases in the

administrative judiciary and aligning administrative regulations with commercial regulations. Nevertheless, these objectives have been only minimally achieved in practice[7].

The scope of these exceptions can be defined as follows:

1. Arbitration under the Law of 17/4/1906:

The French legislator allowed, in Article 69 of the law issued on 17/4/1906, resorting to arbitration to settle disputes related to the settlement of expenses for public works and supplies. This scope is limited to disputes arising from these contracts and not extending to other issues. The law also defined the scope of arbitration for public works and supply contracts concluded by the state and directorates. The French Council of State considered this enumeration exhaustive. Consequently, arbitration was excluded from the scope of contracts for public works and supplies concluded by public utilities. Subsequently, the legislator expanded the scope of arbitration to include contracts for public works and supplies concluded by municipalities, joint associations, and others[8].

2. Arbitration under the Law of 9 July 1975:

The French legislator exempted certain types of public institutions with an industrial and commercial character from the prohibition of arbitration imposed by the law of 5 July 1972 through the issuance of the law on 9 July 1975. However, despite this permission granted to these institutions to resort to arbitration, they rarely resorted to it to settle their disputes, even though some of their disputes are related to administrative contracts[9].

3. Arbitration under the Law of 19 August 1986[10] (Allowing Arbitration in International Contracts):

By virtue of the law of 19 August 1986, the French legislator intervened and authorized the state, provinces, and public institutions to accept an arbitration clause in international contracts concluded with foreign companies in order to achieve national interests. This provision was an exception to the provisions of Article 260 of the Civil Code[11].

4. Arbitration under the Law of 2 July 1990:

And it is the law specific to the French Post and Telecommunications Authority: This law, in Article 22, stipulated the authority's ability to resort to arbitration to settle disputes that may arise from contracts it concludes with others[12].

5. Arbitration under Law No. 587 of 1999:

Law No. 587 of 1999, concerning innovation and scientific research in institutions contributing to education, authorized, in Article 2, the resort to arbitration[13].

To implement this law, a decree clarifying the practical conditions for resorting to arbitration had to be issued. Indeed, Decree No. 764 of 2000 was issued, which required the approval of the institution's board of directors to resort to arbitration in all contract disputes, whether administrative or civil[14].

It is evident from the above that the prevailing trend in France is to adopt arbitration in administrative contracts, whether as a condition or as an option. These exceptions were compiled and included in the Administrative Judiciary Law issued

by the French government through Decree No. 387 of 2000[15]. However, there is sensitivity on the part of the Council of State in applying the legislative texts that establish this practice.

• **Second paragraph**: **The stance of jurisprudence and the judiciary in France regarding arbitration in administrative contracts**.

To understand the stance of jurisprudence and the judiciary regarding arbitration in administrative matters and, specifically, arbitration in disputes arising from administrative contracts, it is evident that the discussions and opinions have progressed beyond the reasons for prohibition and restriction. Instead, they have evolved to discuss how to implement alternative dispute resolution methods in general, and arbitration specifically, in administrative disputes in general and administrative contract disputes in particular.

• **Firstly**: **The position of French jurisprudence regarding arbitration in administrative contracts**.

To explore the traditional stance of jurisprudence regarding arbitration in administrative contracts, i.e., identifying the reasons for prohibition and restriction, we will discuss in section (a) the traditional jurisprudential view. We will then focus on the supportive jurisprudential stance towards arbitration in administrative contracts in France in section (b).

a) The traditional jurisprudential stance regarding arbitration in administrative contracts:

Edouard Laferriere, who held the position of Deputy President of the French Council of State and authored a book on administrative justice and dispute procedures in 1896, questioned, "How can the state accept submission to arbitrators in cases where it cannot even accept submission to civilian judges? Moreover, the distinction between ordinary justice and administrative justice is part of the public system of the state[16]."

It is likely that this position was adopted after 90 years by the French Council of State in its decision issued on 6/3/1986. This decision prohibited public entities from resorting to arbitration without explicit and legislative consent, based on the provisions of Article 2060 of the French Civil Code. This article exempts public law entities from adhering to the procedural rules that determine the jurisdiction of French national courts in case of arbitration awards.

Despite the fact that the jurist Edouard Laferriere[17] included in his famous statement all the reasons for the prohibition and restriction of resorting to arbitration in administrative matters, the subsequent jurists and administrative law judges attributed the reasons for this prohibition and restriction to direct legal provisions, represented by Articles 2060, 1004, and 83 of the abolished Civil Procedure Code. The most important principles are as follows:

1. **Conflict of arbitration with the principle of state sovereignty and its inherent jurisdiction**:

Opponents of adopting arbitration in the realm of administrative contracts argue that arbitration conflicts and clashes with state sovereignty. It is well-known

that the state enjoys legal personality, as do all entities recognized with legal personality. However, it differs from these entities in that it possesses sovereignty, meaning its authority is inherent. The state exercises its powers freely and independently[18].

2. **Application of another law other than the state's law to the dispute**:

This contradicts the state's sovereignty. As a public authority, the state should only be subject to the judgments of the judiciary it has established and the laws it has enacted. Since arbitration involves an agreement between parties to establish a special judiciary whose members are chosen to settle existing or future disputes between them, and this is done through a binding decision imposed on the parties, it constitutes an encroachment on state sovereignty[19].

Thus, the state is prohibited from resorting to arbitration to settle its disputes with others because its sovereignty necessitates not submitting to arbitration bodies and not allowing the application of foreign law to it. Consequently, it cannot be sued except before the official judiciary established by itself.

Finally, what can be said about the basis for the prohibition of resorting to arbitration in administrative contracts, as noted by Professor Jarrosson, is that it takes on a complex nature (at times supported by legal texts and at other times reinforced by legal provisions)[20].

B. The supportive juristic stance on arbitration in administrative contracts:

Despite assurances about the future of administrative courts in France, Pierre Devolve, in the final report he prepared for the conference on the future of administrative courts in France, considered that "despite the prohibition of recourse to arbitration for public entities, this did not prevent the legislator from enacting exceptions that allow resorting to arbitration. This can be traced back to the Law of 17/4/1906 and continued with the provisions of Article 317 of Law 6 of the Code of Administrative Courts, as well as the executive authority's recourse to orders (partnership contracts: Order of 17/6/2004) and sometimes by decree (Decree of 3/6/2004 regulating preventive archaeology). This has caused reservations from the Association of Administrative Courts."

However, the scope of arbitration remains limited and cannot extend to matters of legitimacy, being confined to contractual liability. Resorting to arbitration does not exclude the intervention of the administrative judge, who intervenes either in assessing the legitimacy of resorting to arbitration or supervising arbitration decisions when reviewing appeals in cases where such appeals are not excluded by law or through examining invalidity. In the end, the administrative judge decides that alternative dispute resolution methods cannot exclude administrative jurisdiction, and they cannot avoid resorting to it, as these alternative methods cannot evade state jurisdiction.

As for the ongoing debate about the proposed legislation regarding arbitration in administrative contracts, some jurists consider that the Labetoulle report proposes a distorted form of arbitration. This is because it grants jurisdiction to administrative courts to review appeals arising from internal arbitration in administrative contracts, as well as the matter related to international arbitration in administrative contracts[21].

And the basis for this aspect of jurisprudence is the distinction between ordinary justice and administrative justice, which distinguishes the French judicial system and has no equivalent in Anglo-Saxon legal systems. This could pose a significant blow to France's economic and commercial attractiveness. On the other hand, adopting this approach could lead to jurisdictional complexities and conflicts between ordinary and administrative justice, and this could potentially undermine the credibility of arbitration in the future[22].

Secondly: **The stance of the French judiciary on arbitration in administrative contracts**:

The judicial work in France is divided between the position of the administrative judiciary, which has remained strict regarding the prohibition of arbitration in both domestic and international administrative contracts (A), despite recent opportunities for the French court of conflict to express its position on arbitration in administrative contracts (B). On the other hand, there is the stance of the ordinary judiciary, which has attempted to deviate from the prohibition by differentiating between national administrative contracts and internationally-

oriented administrative contracts and only enforcing the ban on arbitration in domestic contracts (C).

A) The stance of the administrative judiciary on arbitration in administrative contracts in France:

While the traditional stance of the French Council of State on arbitration in administrative contracts has been characterized by rigidity, the traditional positions of the French Council of State have undergone significant development.

The traditional stance of the French Council of State:

Based on its interpretation of the provisions of Article 2060 of the French Civil Code[23], which prohibits the inclusion of arbitration clauses in administrative contracts, the French Council of State has remained committed to prohibiting the recourse to arbitration in both domestic and international administrative contracts. It applies the rules of civil law in the administrative field, considering it as the general legal principle.

In fact, Government Commissioner Gazier went as far as stating in one of the rulings that the prohibition of arbitration in disputes involving public entities is a principle derived from the general principles of French public law[24].

The strict position of the French Council of State regarding the prohibition of resorting to arbitration in administrative contracts is evident through numerous judgments and decisions it has issued. In previous rulings[25], it has long held that arbitration by public entities is not legitimate, based on the provisions of Articles 83 and 1004 of the repealed Code of Civil Procedure of 1806[26].

In a ruling dated 13th December 1957 concerning the case of the National Company for the Sale of Virtues[27], it was decided that, according to Articles 83 and 1004 of the Code of Civil Procedure, public institutions are prohibited from resorting to arbitration unless the law expressly permits it.

The facts of this case revolved around the legality and legitimacy of Article 10 of the decree that authorized the Board of Directors of the National Company for the Sale of Virtues, as a public institution, to enter into an arbitration contract. The Court of Appeal in Paris decided to suspend the dispute pending the decision of the French Council of State on this legal point.

When the matter was brought before the French Council of State, it ruled that the decree allowing this company to resort to arbitration was tainted with the defect of illegality, despite the commercial nature associated with this institution[28].

Furthermore, Government Commissioner Gazier considered in his report presented as part of the documents of this case that, even though the public institution has a commercial and industrial character, this alone is not sufficient to subject the dispute to the provisions of Article 631 of the French Commercial Code. Instead, there must be a distinction in line with the nature of the connection of these public institutions to the public service, and one form of such distinction for public institutions with industrial and commercial character is the non-submission of their disputes to arbitration[29].

As for the rulings issued by the Council, it is noticeable that it has maintained the same strict approach regarding the prohibition of resorting to arbitration in administrative contracts.

In the ruling issued by the French Council of State on 6th March 1986 in the Public Works Division, it stated that public law entities cannot escape the legal rules that define the jurisdiction of national courts and submit to the decisions of arbitrators to resolve disputes falling within the jurisdiction of national courts[30].

Additionally, the Council's ruling in the case of Disneyland in 1986, opposing arbitration in administrative contracts, led to the enactment of the law in 1986, which allowed arbitration if national interest required it. France was then compelled to issue a law on 19th August 1986, stating that there is no impediment to including an arbitration clause in contracts, subject to the following conditions: 1) The contract must be international, and 2) The contract must have a public national benefit. Moreover, obtaining authorization to accept this condition is required through a decree for each specific case.

According to its ruling dated 3rd March 1989, the French Council of State excluded disputes arising from administrative contracts from being subject to any authority other than its own jurisdiction[31].

• **The recent position of the French Council of State**:

In a recent case brought before it to challenge the provisions related to arbitration included in the law concerning partnership contracts, the French

Council of State ruled against the annulment and thereby affirmed the validity of the provisions related to arbitration in administrative contracts.

This case, known as "Sueur et autres[32]," was decided on 29th October 2004 by two combined chambers. It was determined that the economic aspect of partnership contracts requires the resolution of disputes arising from such contracts through arbitration. The law was also found to respect all the required oversight by trading councils, especially for local authorities, as well as the duties of informing stakeholders. Consequently, it confirmed the validity of the conditions and provisions introduced by this law[33].

After this recent position of the Council of State regarding arbitration in administrative contracts, the "Inserm" case came up for consideration, and it was also decided by two combined chambers. On 31st July 2009, the French Council of State returned to its strict stance once again[34].

In the context of the appeal against invalidity submitted by "Inserm" on 31st July 2009, the Council of State referred the case to the Dispute Court to determine whether "Inserm's" request falls under the jurisdiction of the administrative court or not[35].

The facts of the case are as follows: The National Institute of Health and Medical Research "Inserm[36]," which is considered a public entity, entered into a contract with the company Lebten F. Saugistad according to Norwegian law. Due to contractual disputes between the parties, "Inserm" requested before the President of the Court of First Instance in Paris to appoint an arbitrator.

When the appointed arbitrator issued his ruling, it went against the interests of "Inserm," leading them to file a lawsuit seeking the annulment of this arbitration decision.

If this decision of the French Council of State signifies a return to its traditional and strict position against arbitration in administrative contracts, it puts the ball in the court of the French Dispute Court. The latter will be obliged to issue a highly significant decision, especially considering that the Court of Appeal in Paris has established its jurisprudence in giving priority to the international commercial aspect of the contract over its administrative nature.

In addition to the recent judicial positions issued by the French Council of State, more recent stances regarding arbitration in administrative contracts can be observed through various indicators. One notable instance is the intervention made by the Vice President of the French Council of State during a seminar on arbitration and public law, which took place on 30th September 2009[37].

This intervention included several positions defending Labottoul's report concerning arbitration in administrative matters in general and administrative contracts in particular. The stance of the French Council of State called for adapting the provisions of arbitration to the specific requirements of administrative disputes while ensuring respect for the public interest and the responsibilities of public authorities.

This can only be achieved by entrusting jurisdiction to the national judge, specifically the administrative judge, to examine the legitimacy of individual

decisions made by the administration. As for arbitration in administrative contracts, specific conditions have been laid down for its application.

In summary, the recent position of the French Council of State on arbitration in administrative contracts can be summarized as follows:

- The possibility of subjecting individuals governed by public law to arbitration must be linked to the necessary guarantees for contractual freedom and equal treatment in the face of public demands and judicial security. Moreover, this type of arbitration must ensure transparency and protect public funds for individuals governed by public law.

If confidentiality is mandatory regarding commercial disputes, then concerning administrative contracts, this confidentiality should not extend beyond the arbitration proceedings, while the arbitral awards should be made public.

- Arbitration in administrative contracts should be accompanied by judicial safeguards, taking into account the commitment of individuals governed by public law to the legal principle, as it is part of the public order.

- The arbitrator must be impartial, and the remuneration of arbitrators in administrative contract arbitration should consider that it involves public funds and, therefore, should not be excessive.

B. The stance of the French Court of Dispute Settlement on arbitration in administrative contracts:

After the French Council of State referred the case to the jurisdiction of the Court of Dispute Settlement on 31st July 2009, to determine whether the claim

submitted by "Inserm" falls under administrative jurisdiction or not, during its consideration of the appeal against the invalidity submitted by "Inserm," the judgment of the French Court of Dispute Settlement was issued on 17th May 2010. It provided an opportunity to understand the court's position on arbitration in administrative contracts[38], a position that sparked heated jurisprudential debates[39] and raised the ire of arbitration proponents in France[40].

Referring to this judgment of the Court of Dispute Settlement, it is observed that it attempted to reconcile the jurisprudential positions supporting arbitration in administrative contracts on one hand, and on the other hand, the jurisprudential positions advocating for the unity of arbitration and the predominance of the commercial nature of arbitration in administrative contracts, denying any specificity to arbitration in administrative contracts, thus negating the role of administrative justice in the field of arbitration, even if it concerns an administrative contract.

In its ruling, the Court of Dispute Settlement considered that despite the agreement between INSERM, a public institution subject to the provisions of French public law, and the foreign institution subject to private law, which focused on the construction of a building dedicated to scientific research for the benefit of the French public institution, this work falls under the scope of international commercial activities and lacks any administrative character or connection to the provisions of French public law. As a result, the jurisdiction to hear appeals against the arbitral award falls under the ordinary judiciary and not the administrative judiciary[41].

Based on this ruling, the Court of Dispute Settlement attempted to find a solution to distinguish between the jurisdiction of the administrative judiciary in the field of arbitration in administrative contracts on one hand, and on the other hand, it identified the areas of intervention of the ordinary judiciary in the field of arbitration in administrative contracts. The rationale behind this decision was that appeals against arbitral awards issued in France, based on an arbitration agreement, and related to disputes regarding the implementation or termination of contracts concluded between an individual governed by French public law on one hand, and an individual governed by foreign private law related to international commercial interests on the other hand, fall under the jurisdiction of the ordinary judiciary. However, if the appeals concern arbitral awards issued in France, based on an arbitration agreement, and related to disputes regarding the implementation or termination of contracts concluded between an individual governed by French public law on one hand, and an individual governed by foreign private law related to partnership contracts, contracts concerning the occupation of public property, delegated management contracts, and public contracts, the jurisdiction belongs to the administrative judiciary to hear these appeals[42].

And perhaps the dispute court, in its judgment, has adopted the same position expressed by the Government Commissioner, Mattias Guyomar, in his report submitted in connection with the dispute[43].

Although the dispute court in this judgment attempted to find judicial solutions to the controversy surrounding arbitration in administrative contracts and

took a middle position to satisfy all parties, these solutions adopted by its judgment will not be able to address all the problems raised by arbitration in administrative contracts, especially international administrative contracts. This is because the solution adopted by the court, if valid in the realm of private law contracts, is entirely different when it comes to administrative contracts. This is due to the fact that the latter are not contracts defined by their nature, but rather the assertion of the existence of an administrative contract or not is the result of the presence of formal and objective conditions that determine the legal nature of the contract.

We say this despite the increasing trend in France towards regulating and specifying the types of administrative contracts and their nomenclature in order to determine jurisdiction between ordinary and administrative courts.

C. Civil French judiciary's position on arbitration in administrative contracts:

The French Court of Cassation previously confirmed, in its decision dated April 14, 1964, that the prohibition mentioned in Articles 1004 and 83 does not apply to international administrative contracts, but it only concerns domestic administrative contracts[44].

The French ordinary judiciary relied on previous legislative texts in its prohibition of the state and public law entities resorting to arbitration, particularly concerning domestic arbitration in administrative contracts, but not international arbitration. The reality indicated that the state or one of the public institutions had to enter into contracts that allowed for arbitration clauses, especially in international

trade contracts, which have become mostly standard contracts where the parties cannot substantially change their terms, including the arbitration clause [45].

The French ordinary judiciary has consistently maintained this position through various decisions and judgments. For instance, in a ruling issued by the Court of Appeal of Paris on April 10, 1975, in the case of "Myrtoon Steamship," the court considered that the prohibition of the state from resorting to arbitration is limited to domestic administrative contracts and does not extend to contracts governed by international agreements[46].

Similarly, the French Court of Cassation followed the same approach in the case of "San carlo." In this case, a French public institution filed a compensation claim against the captain of the ship San carlo for damages to its cargo during transportation from Ethiopia to France. The ship's owner argued that the French court lacked jurisdiction over the dispute because the shipping document signed by the French institution stipulated that disputes arising from the contract should be subject to arbitration under Italian law. The court ruled in this dispute that the prohibition of arbitration stated in the French procedural law is only applicable to domestic arbitration, not international arbitration[47].

In another ruling, Galakis, the French Court of Cassation decided that the prohibition mentioned in Article 2060 of the French law on the eligibility of French legal persons to accept arbitration clauses does not apply in international relations. Therefore, any arbitration clause agreed upon by a French public entity is considered valid as long as it is present in a contract related to international trade[48].

The French judiciary did not stop at this, but extended this material rule to all foreign laws that have the same prohibition found in French law. There are cases that the French law has addressed in this regard, including the following examples (but not limited to):

- **The case of "Frères Bec"**:

This case revolves around the state of Tunisia conducting tenders for road construction and other projects in Tunisia. The contract was concluded between Tunisia and the French company Frères Bec, and it included an arbitration clause stipulating that if an amicable settlement is not reached, arbitration would be resorted to according to the International Chamber of Commerce in Paris – meaning institutional arbitration[49]. When a dispute arose between Tunisia and the French company, the arbitration panel in Paris ruled against the Tunisian Ministry of Equipment and Construction. This ruling was challenged for nullity before the French judiciary because it was the seat of arbitration. The Tunisian Ministry of Works, in its challenge for nullity, relied on the invalidity of the arbitration agreement itself, arguing that the arbitration ruling was void since the agreement on arbitration was prohibited by the Tunisian Code of Civil Procedure, which prohibits public legal persons from accepting an arbitration clause.

The French Court of Appeal stated the following: "The prohibition imposed on legal persons to accept an arbitration clause applies only to purely internal

relations and is not related to public policy. It is sufficient for the arbitration clause to be valid that it is included in a contract concluded to fulfill international relations and was concluded according to international commercial practices and customs[50]."

- **The case of "Gatoil"**:

The facts of this case are that the National Iranian Oil Company entered into a contract with the company Gatoil. The contract stipulated that the Iranian company would supply the Panamanian company with the necessary production materials in exchange for the Panamanian company supplying the Iranian company with its required materials for production.

When the Iranian company reduced its agreed-upon share of the petroleum to be delivered, the Panamanian company, Gatoil, withheld the funds due to the Iranian company, leading to a dispute. The case was referred to arbitration under the rules of the International Chamber of Commerce, and the ruling was in favor of the Iranian company against Gatoil. The ruling was challenged because it was based on an invalid arbitration clause, as the Iranian company had signed the arbitration clause without obtaining a license from the Iranian Parliament, which Iranian law requires.

Upon considering this case, the Court of Appeal in Paris on 17/12/1997 rejected the challenge for nullity, deeming that the prohibition imposed on the state to accept an arbitration clause applies only within the scope of domestic law and does not apply to private international relations. It is not related to public policy, and a state cannot disavow an arbitration agreement and cling to its domestic law.

Moreover, a foreign person cannot resort to domestic laws of the contracting state to evade the arbitration agreement in disputes arising between them and that state[51].

- **The case of "L'Inserm[52]"**:

In its judgment dated 13/11/2008, the Court of Appeal in Paris considered that the principle of prohibiting public entities from resorting to arbitration does not contravene the French public policy as long as it concerns a contract related to international trade interests. The court ultimately rejected the requests of L'INSERM and affirmed the validity of the arbitration decision in the dispute. Furthermore, the court went further by refusing to suspend the execution of the arbitration decision until the French Council of State's ruling, stating that the appeal before the administrative judiciary would not affect the claim of the arbitration decision's nullity.

Perhaps this position of the court has been subsequently adopted by the Court of Cassation [53]after the French Council of State and the French dispute court issued their judgments in the matter.

In the end, while the prohibition was considered the rule, and permission was the exception regarding arbitration in administrative contracts, especially in administrative matters in general, this equation seems to be shifting towards the opposite direction. In other words, it is expected that permission for arbitration will become the norm in administrative contracts, and the prohibition will become the exception. This conclusion is based on the indicators that have resulted - and continue to result - from the jurisprudential discussions and recent stances of the

French Council of State, as well as the preparation of the arbitration project in administrative matters in general and administrative contracts, in particular.

• The apparent wording allows arbitration in all contracts, as it uses the phrase "all disputes arising from the execution of a specific contract," encompassing both civil and administrative contracts[54]. However, the administration has continued to accept arbitration clauses when concluding contracts, especially in public works contracts and exploitation contracts. When a dispute arises, the administration resorts to the judiciary, claiming that arbitration is not permissible in administrative contracts. This position is indeed perplexing and surprising[55], and contrary to a general principle, which is not to deprive the state and public entities of their eligibility to include an arbitration clause.

Footnotes:

1 . Mustafa Bonja: Internal and International Arbitration in Administrative Contracts, a Comparative Study, Ph.D. Dissertation, Faculty of Legal, Economic, and Social Sciences, Tangier, Morocco, 2014, p. 140.

2 . Edouard Laferriere's treatise on administrative jurisdiction and contentious remedies, Paris 1888. Volume 2, pages 145 and 152.

3 . See: Ahmed Mohamed Abdelbadei, previously cited reference, page 51.

4 . See: Jaber Jad Nassar, previously cited reference, page 41.

5. See: Abdel Aziz Abdel Monem, previously cited reference, page 343.

6 . See: Georgie Shafik, previously cited reference, page 157.

7 . See both: Naglaa Hassan El-Sayed, previously cited reference, page 130, and Majed Ragheb El-Helw, previously cited reference, page 176.

8 . See both: Abdel Aziz Abdel Monem, previously cited reference, page 344, and Asmaa Abdullah El-Sheikh, previously cited reference, page 190.
9 . See: Majed Ragheb El-Helw, previously cited reference, page 178.

10 . The issuance of this law came in response to the establishment of Walt Disney's French theme park "Marne-la-Vallée" following the model of Walt Disney theme parks in the United States. Georgie Shafik referred to it, previously cited reference, pages 203-204.

11. See: Jaber Jad Nassar, previously cited reference, pages 203-204.

12 . See: Georgie Shafik, previously cited reference, page 205.

13 . See: Asmaa Abdullah El-Sheikh, previously cited reference, page 193.

14 . See: Naglaa Hassan El-Sayed, previously cited reference, page 137.

15 . See: Jaber Jad Nassar, previously cited reference, page 52.

16 . 35 Michel Rousset: Arbitration in Public Law, Administrative Law Journal (AJDA), 1997, p. 30.

17 . "Public policy requirements dictate that the State should be subject only to the jurisdiction established by law; the jurisdiction of administrative courts is a matter of public policy, just like the jurisdiction of the judicial order. And if it is not within the competence of judicial courts to decide on matters falling under the jurisdiction of the administrative order, how can one then admit that arbitrators can decide on these matters? E. La Ferrière, Administrative Litigation, 1888, Vol. 2, pp. 145-146.

18 . A. de Laufradere, F. Moderne, and P. Devolve, Treatise on Administrative Contracts, previously cited, pp. 955-956.

19 . C. Jarrosson: "Arbitration in Public Law" AIDA, 16-24, 1997, p. 17.

20. C. Jarrosson, "Arbitration in Public Law," previously cited reference, p. 16.

21 . According to French law, the Court of Appeal of Paris is considered competent, in principle, to rule on claims for recognition and annulment resulting from international arbitration in all international contracts.

22. Thomas Clay: "Arbitration for Public Law Entities: The Big Bazaar!" in "Chronique de droit de l'arbitrage" No. 2, Petites affiches, March 25, 2008, No. 60, p. 3.

Serge Lazareff, "Paris Arbitration Place Threatened," "Les Cahiers de l'arbitrage" No. 2008/1, Gazette du Palais, March 28-29, 2008, No. 88a 89, p. 3.

T. Clay, "Arbitration and Alternative Dispute Resolution Methods," Recueil Dalloz, Panorama 2008 No. 3, January 17, 2008, p. 180.

JL Delvolvé, "A Real Revolution... Unfulfilled (Remarks on the Draft Reform of Arbitration in Administrative Matters)," Revue de l'arbitrage, 2007, No. 3, p. 373.

23 . M. Boisseson: Interrogation and Doubts about Legislative Evolution, Paris, 1987, p. 3.

24 . Conclusion by Gazier on this Ass. December 13, 1957, Société nationale de vente des surplus, Leba, p. 677, D. 1958.

CE (Conseil d'État) Assembly, December 13, 1957, Société nationale de vente des surplus, p. 677, conclusion by F. Gazier.

25 . CE (Conseil d'État) Opinion, August 14, 1823, cited in Leb, 1824, p. 633.

GE (Grandes décisions des tribunaux) November 17, 1824, Ouvrard c Minister of War, Leb. p. 631.

CE (Conseil d'État) December 23, 1887, de Dreux-Breze, bishop of Moulins, Leb. p. 842. 102.

26 . Report of the Working Group on Arbitration, previously cited reference, p. 3.

27 . Conseil d'État, December 13, 1957, Société nationale de vente des surplus.

28 . CE (Conseil d'État) Opinion No. 339710 of March 6, 1986, EDCE (Études du Conseil d'État) 1987, No. 38, p. 178: "It follows from the general principles of French public law (...) that public law entities cannot evade the rules determining the jurisdiction of national courts by leaving the resolution of disputes in which they are parties to the decision of an arbitrator."

29. Conclusion by Gazier on this Ass. (Assemblée) December 13, 1957, Société nationale de vente des surplus, Leb. p. 677, D. 1958.

30 . CE (Conseil d'État) Opinion, March 6, 1986, in "Les grands avis du Conseil d'État" (The major opinions of the Council of State), p. 175.

31 . Council of State, Section, March 3, 1989, Société des Autoroutes de la région Rhône-Alpes: "Considering that the construction of national roads has the nature of public works and

belongs by its very nature to the State [...] regardless of the status of the concessionaire; that the litigation that arises falls, therefore, under the jurisdiction of the administrative courts."

32 . 100 CE (Council of State), 72 Section of the Contentious Session of October 27, 2004, delivered on October 29, 2004, Nos. 269814, 271119, 271357, 271362 - M. Sleur and others, rec., concl. D. Casas,

33 . 109..... As for the other provisions of the contested ordinance: Considering that according to Article 11 of the contested ordinance: "A partnership contract necessarily includes clauses relating to: (...) 1) The methods of dispute prevention and settlement and the conditions under which, if necessary, recourse can be made to arbitration, with the application of French law"; similar provisions are found in) of Article L 1414-12 of the General Code of Territorial Communities, as amended by the contested ordinance; that by authorizing the Government to "create new forms of contracts concluded by public or private persons in charge of a public service mission" within the limits that it defines, Article 6 of the Law of July 2, 2003 must be considered as having intended to allow the authors of the contested ordinance to define as a whole the legal regime of these new contracts, including the conditions for prevention and settlement of disputes that may arise in the course of their execution; that, given the complexity of the contracts in question, linked in particular to the global nature of the mission entrusted to the contracting party of the administration, the duration of the commitments made, and the financing mechanisms to be implemented, requiring the establishment of adapted methods of dispute resolution, the authors of the contested ordinance could, without disregarding the scope of this authorization and without any rule or principle of constitutional value being an obstacle, derogate, by the aforementioned provisions, from the general principle of law under which public law entities cannot evade the rules determining the jurisdiction of national courts by leaving the resolution of disputes in which they are parties to the decision of an arbitrator and which relate to relationships governed by domestic law;... .....").

34 . Council of State (French Administrative Supreme Court), July 31, 2009, No. 309277, 7th and 2nd sections combined.

35 . "Considering that INSERM (National Institute of Health and Medical Research) seeks the annulment of an arbitral award rendered in a dispute related to the application of a protocol agreement signed with the Saugstad Foundation, a Norwegian association; that this protocol provides, in particular, that the foundation will contribute up to a limited amount of 25 million francs to the construction of a building dedicated to neurological research to be built at Luminy on land owned by the University of Aix-Marseille, whose project management and management will be the responsibility of INSERM as part of its statutory mission for

health research; that in support of its request, INSERM argues that the Council of State has jurisdiction to hear an appeal against an arbitral award relating to a dispute between a public person and a contracting party, as long as the contract in question is a public contract; that the Institute notably maintains that the agreement with the foundation consists of a 'contribution offer' for the realization of a public work for which only the administrative court has jurisdiction, and that this allocation of jurisdiction is not affected by the fact that the contested act is an arbitral award brought under Article 1505 of the Code of Civil Procedure before the Court of Appeal in whose jurisdiction the award was rendered; however, the Paris Court of Appeal, in a judgment dated November 13, 2008, recognized its jurisdiction and rejected the INSERM's request for the annulment of this arbitral award; that these questions raise serious difficulties that justify referring the matter to the Tribunal des conflits (Conflict Court); therefore, the question of whether the action brought by INSERM falls within the jurisdiction of the administrative court or not shall be referred to the Tribunal des conflits."

36. The INSERM is a public institution of a technical and scientific nature, subject to the dual supervision of the Ministers of Health and Scientific Research, established in 1964.

37 . Arbitration and Public Law Entities Intervention by Mr. Jean-Marc Sauvé, Vice-President of the Council of State Text written in collaboration with Mr. Timothée Paris, Court Counselor, Administrative and Administrative Court of Appeal, assigned to the Vice-President of the Council of State. Conference on September 30, 2009, organized at the Council of State by the National Chamber for Private and Public Arbitration.

38 . TRIBUNAL OF CONFLICTS No. 3754 Decision of April 12, 2010, Read on May 17, 2010 National Institute of Health and Medical Research vs. Letten F. Saugstad Foundation.

39 . Opinion of the French Arbitration Committee in the INSERM/Foundation case, Arbitration Review 2010, p. 401. -Mr. Audit, The New Regime of Arbitration for International Administrative Contracts (following the decision rendered by the Tribunal of Conflicts in the INSERM case), Arbitration Review 2010, p. 256-257. -Mr. Laazouzi, Arbitration Review 2010, p. 653; Legal Gazette 2010, p. 2633, notes by Lemaire 2330, comments by S. Bollée, and 2944. -Commentary by T. Clay; International Law Review 2010, p. 551, commentary by S. Braconnier; Administrative Law Journal 2010, p. 959, contributions by M. Guyomar, and 971, note by F. Delvolve; International Private Law Review 2010, p. 653, study by M. Laazouzi; Commercial Law Review 2010, p. 525, commentary by E. Loquin; Administrative and Juridical Weekly 2010, p. 1564, study by P. Cassia.

40 . Thomas Clay، Les contorsions byzantines du Tribunal des conflits en matière d'arbitrage LA SEMAINE JURIDIQUE -ÉDITION GÉNÉRALE -N° 21 LA SEMAINE JURIDIQUE Juris-Classeur Periodique (JCP) 84e année -24 MAI 2010، P.1045.

41 . ... Considering that the agreement protocol concluded between the INSERM, a public establishment of a scientific and technological nature, and the Letten F. Saugstad Foundation, a Norwegian private law association, which aims to construct a building in France to house an institute of research legally and institutionally integrated into the INSERM, and which provides for partial financing by the foundation, involves international trade interests; therefore, the appeal for annulment filed against the arbitral award rendered in the dispute between the parties regarding the performance and termination of this contract, which does not fall within the scope of the above-defined public administrative regime, falls under the jurisdiction of the judicial authority; DECIDES: Article 1: The judicial authority has jurisdiction to rule on the appeal for annulment filed by the INSERM against the arbitral award rendered in the dispute with the Letten F. Saugstad Foundation, as well as the payment claim directed against the latter. Article 2: This decision shall be notified to the Keeper of the Seals, Minister of Justice and Liberties, who is responsible for its execution.

42 . Considering that an appeal against an arbitral award rendered in France, based on an arbitration agreement, in a dispute arising from the performance or termination of a contract concluded between a French public legal entity and a foreign legal entity, executed within the French territory, involving international trade interests, even if administrative according to the criteria of French domestic law, shall be brought before the Court of Appeal within the jurisdiction where the award was rendered, in accordance with Article 1505 of the Code of Civil Procedure. Such an appeal does not affect the principle of the separation of administrative and judicial authorities. However, it is different when the appeal, directed against such an award under the same circumstances, requires the examination of the award's conformity with the imperative rules of French public law relating to the use of public domain or those governing public procurement and applicable to public contracts, partnership contracts, and public service delegation contracts. Since these contracts fall under a public administrative regime of public order, an appeal against an arbitral award in a dispute arising from the performance or termination of such a contract falls within the competence of the administrative court.

43 . "Given their special status, French public entities cannot escape compliance with a number of imperative rules - whose scope corresponds to that of the public policy laws that the Rome Convention reserves for automatic applicability to contractual situations. [...] Once the existence of such a pocket of imperative provisions is identified, the contours of it need

to be specified. We believe that its content can be defined in light of the 'constitutional requirements inherent in equality in public procurement, the protection of public properties, and the proper use of public funds,' as established by the Constitutional Council in its decision No. 2003-473 DC of June 26, 2003. To define the imperative rules of public law, the automatic applicability of which is essential to guarantee these constitutional requirements, you can consider the following two criteria: legal regimes for the conclusion of contracts that implement the general principles of public procurement, relating in particular to public contracts, public service delegation contracts, or partnership contracts; and unchangeable substantive rules relating in particular to the use of public domain or the execution of public service." ... Tribunal des conflits, May 17, 2010, conclusion by Guyomar, Revue de l'arbitrage, 2010, p. 275.

44 . Court of Cassation, Civil Chamber 1, April 14, 1964, "San Carlo," Revue Critique de Droit International Privé 1966.

45 . Ch. Jarrosson, The Notion of Arbitration, Paris, 1987, p. 200.

46 . Court of Appeal of Paris, April 10, 1957, "Myrtoon Stewardship."

47 . Court of Cassation, Civil Chamber 1, April 14, 1964, "San Carlo," op. cit.

48 . Court of Cassation, Civil Chamber, May 2, 1966, "Galakis," "Les grands arrêts de la jurisprudence française de droit international privé," Dalloz, 4th edition, 2001, No. 44, 401.

49 . The significance lies in challenging the place agreed upon by the individuals for arbitration, not the place where the sessions are held.

50 . For more on this matter, refer to: Hafiza El Haddad: "Contracts Between States and Foreign Individuals," Alexandria, unpublished, first edition, 1996, p. 126.

51 . The Court of Appeal of Paris, in its judgment of December 17, 1991, "Gatoil"; Revue de l'arbitrage.

52 . The Court of Appeal of Paris, judgment of November 13, 2008; Revue de l'arbitrage 2009, 12, p. 389.

53 . Court of Cassation, Civil Chamber, January 26, 2011, No. 09-10198, Published in the Bulletin... "WHILE the assessment of the validity of an arbitration clause in a contract of an administrative nature falls within the exclusive jurisdiction of administrative courts, whether or not this contract affects international trade interests, and the exception of nullity of such a clause constitutes, before the judicial court seized of an appeal for annulment of an arbitration

award in international arbitration, a preliminary question requiring a stay of proceedings pending the decision of the competent administrative court; that by rejecting the request for a stay of proceedings submitted by Inserm, which invoked the nullity of the arbitration clause in the contract of an administrative nature concluded by Inserm and the Letten Foundation, and ruling on the validity of this clause, the Court of Appeal violated the principle of separation of powers, the laws of August 16 and 24, 1790, and exceeded its powers." BASED ON THE FOLLOWING REASONS that, according to Article 1492 of the Civil Code, arbitration is considered international when it involves international trade interests; that the international nature of arbitration relies exclusively on an entirely economic definition, where it is sufficient for the dispute submitted to the arbitrator to relate to an operation that does not economically unfold within a single state, regardless of the quality or nationality of the parties, the law applicable to the substance or the arbitration, or even the seat of the arbitral tribunal; that the purpose of the protocol agreement was, according to its preamble, to pool the efforts of Inserm and the Letten Foundation to "promote the realization of a project for the construction of a neurobiology research center" with the construction of a building "exclusively dedicated to research in neurobiology and the training of clinicians and researchers in this field" with financing primarily by the Foundation, which implies fund movements of the Norwegian Foundation beyond borders; that, moreover, as stated in the order issued on May 15, 2006, by the President of the Tribunal de Grande Instance of Paris, "the parties agree to consider it as an international arbitration" and that in the mission statement, the parties expressly agreed on the international character of the arbitration; that the challenge to the annulment of the arbitral award rendered in France in international arbitration is, in accordance with Article 1505 of the Code of Civil Procedure, brought before the Court of Appeal in whose jurisdiction the award was rendered; that, therefore, the appeal against the award rendered in Paris, in the context of international arbitration, was properly exercised before the Court of Appeal of Paris; that, accordingly, the proceedings initiated before the administrative courts and currently pending before the Council of State have no impact on the appeal for annulment filed before the Court of Appeal of Paris for this arbitral award; that, consequently, the request for a stay is rejected; that the prohibition for a state to arbitrate is limited to domestic contracts, subject to contrary legislative provisions; that, in view of the principle of the validity of the international arbitration clause, the sole ground alleging the nullity of the arbitration agreement under Article 1502(1) of the Code of Civil Procedure, and consequently the appeal for annulment, are rejected;

54 . Reference cited, page 57.

55 . See: Ahmed Abu Aloufa: Optional and Compulsory Arbitration, reference cited, page 79.