

UDC 334.752(532); 658.114/.115(532); 347.918(532)

CERIF: S 111

DOI: 10.51204/Anali_PFBU_25404A

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THE LEGAL FRAMEWORK FOR ARBITRATION IN SAUDI PUBLIC–PRIVATE PARTNERSHIP AND PRIVATIZATION CONTRACTS

The increasing complexity of service delivery and infrastructure development is making it difficult for governments to meet these growing demands independently. In Saudi Arabia, public–private partnerships (PPPs) have emerged as a vital mechanism to address this gap. This study explores the legal aspects of arbitration in PPP and privatization contracts, examining the inclusion of arbitration clauses under the Saudi Private Sector Participation Law and associated regulations. The study delves into the necessary legal conditions for valid arbitration agreements, the implementation procedures, and the consequences of noncompliance, addressing the role of arbitration as a preferred method for dispute resolution. It offers a comparative analysis of international norms and legal frameworks, assessing the unique constraints on arbitration in Saudi privatization contracts. Addressing the scarcity of literature on this topic in Saudi Arabia, this study provides critical insights and recommendations to strengthen the legal framework for arbitration in PPP and privatization contracts.

Key words: Arbitration. – Privatization. – Public–private partnership. – Contracts. – Alternative dispute resolution.

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1. INTRODUCTION

The growing complexity of modern service delivery and infrastructure development, compounded by rapid technological advancements and increasing demand, has made it challenging for governments to meet these needs independently. In Saudi Arabia, this has necessitated collaboration with the private sector, leading to the use of public–private partnerships (PPPs) to efficiently deliver services and infrastructure. This study focuses on the legal aspects of PPP contracts, specifically examining the inclusion of arbitration clauses in privatization contracts and whether they involve asset transfers or PPPs. It explores the legal conditions necessary for valid arbitration agreements, the procedures required for their implementation, and the legal consequences of noncompliance, based on the recently issued Private Sector Participation Law (PSP Law) and related regulations in Saudi Arabia.

The significance of this study is closely tied to Saudi Vision 2030, which aims to diversify the economy and reduce dependence on oil revenues. A key element of this vision is the privatization program, which seeks to transfer state-owned assets to the private sector and privatize certain government services. One of the program's main goals is to generate approximately USD 16.5 billion through PPPs by 2025. Given the complexity of these contracts and the risk of potential disputes that may arise, arbitration has been identified as an efficient mechanism for dispute resolution, offering a faster alternative to traditional litigation. Arbitration offers efficiency, flexibility, and faster resolution compared to administrative litigation, and could be seen as beneficial for investors by reducing the time and costs associated with legal disputes (Cîmpean, Vornicu, Dragoş 2021, 24–46). Investors typically prefer arbitration for its predictability and confidentiality, which are critical in safeguarding their interests (Cîmpean, Vornicu, Dragoş 2021, 24–46). The Saudi PSP Law addresses this by allowing arbitration in PPP and divestment contracts, provided that certain conditions are met.

The core issue addressed in this study is the scarcity of scientific literature and practical examples related to Saudi Arabia regarding arbitration in privatization contracts, including PPPs. The study aims to fill this gap by contributing a resource on arbitration in PPP and divestment, which is a critical subject since privatization and PPPs attract both domestic and international investment. Investors typically prefer resolving disputes through alternative dispute resolution methods, with arbitration being one of the most prominent. The Saudi PSP Law permits arbitration in these contracts under specific conditions. However, the authority to approve

arbitration agreements varies depending on the type of private sector participation, i.e., whether it involves asset transfer or a PPP. Furthermore, arbitration is not universally applicable; it is restricted in certain cases, necessitating a careful legal analysis of the relevant laws and procedures. Therefore, this study adopts a descriptive-analytical approach to reviewing and analyzing legal texts, regulations, judicial rulings, and scholarly opinions. A comparative normative approach will also be adopted where necessary, drawing on international law and reports from institutions such as the World Bank to propose practical solutions and recommendations that align with the Saudi context. The research is divided into three main parts, each covering a key aspect of arbitration and privatization under the Saudi legal framework. The first part examines the concepts of arbitration and privatization in Saudi law and it is divided into two sections: the first provides a definition of arbitration within the Saudi legal system, while the other focuses on the definition and scope of privatization in Saudi Arabia. The second part explores the procedural steps for incorporating arbitration clauses into privatization contracts and includes three sections: the first section discusses arbitration in asset transfer contracts or PPP contracts involving asset transfers; the second section covers arbitration in general public–private partnership contracts; and the third section outlines the circumstances where arbitration is not permitted in privatization contracts. The third part focuses on the conditions required for arbitration in privatization contracts and is divided into three sections: the first section addresses the requirements regarding the location of arbitration; the second section discusses the applicable governing law; and the third section examines the selection of the arbitration center.

The findings are presented in the conclusion, summarizing the key legal insights gained from the analysis of arbitration in PSP contracts under Saudi law. Based on these findings, recommendations are provided with the aim of enhancing the legal framework and procedural application of arbitration in PPP and divestment contracts, ensuring a more efficient and streamlined dispute resolution process, aligned with Saudi Arabia's evolving economic and legal landscape. These recommendations will also aim to address the challenges identified in the course of the study, offering practical solutions for improving the integration of arbitration in future privatization initiatives.

2. THE CONCEPT OF ARBITRATION AND PRIVATIZATION IN THE SAUDI LEGAL SYSTEM

Legal terminology often differs from one legal system to another. Even within the same legal system, certain terms may have varying definitions depending on the specific internal legal framework. Therefore, the initial articles of many laws typically provide definitions for the terms used in that particular law. In some cases, these definitions are limited to the scope of the law's application, ensuring that their effects do not extend beyond the law's intended purpose. The challenge in this part lies in the absence of a specific definition for arbitration in the Saudi legal system. Furthermore, the definition of privatization provided in the relevant Saudi law differs from those found in comparative laws and reports by international organizations, such as the World Bank. To address these challenges, this part is divided into two sections.

2.1. Definition of Arbitration in the Saudi Legal System

The Saudi Arbitration Law does not explicitly define the term “arbitration”; instead, Article 1 provides definitions for three key terms: arbitration agreement, arbitral tribunal, and competent court. This could suggest that the concept of arbitration is already well-understood and does not require a formal definition within the law. Rather than providing a detailed definition, the legislator outlines the entire arbitration process from start to finish, which effectively fulfills the purpose of defining arbitration. A similar approach is observed in the Saudi Judiciary Law, where there is no specific definition for the term “judiciary” as the articles comprehensively describe its nature and function. Moreover, the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules also do not provide a specific definition of arbitration.

David Christie (2016) argues that the lack of a formal definition of arbitration in Scots law, while contributing to ambiguity in distinguishing arbitration from other dispute resolution mechanisms, does not impede its practical effectiveness within the legal system. As previously mentioned, such terms may not require explicit definitions if they are commonly understood, especially when the rules describe the entire arbitration process, thereby achieving the purpose of defining arbitration through its procedural framework.

Based on this, the definition of arbitration can be inferred from the regulatory texts governing it. While various definitions of arbitration exist, they generally agree on the core concept. One such definition describes arbitration as “a legal system through which a legal dispute between two or more parties is resolved by a third party or parties, whose authority derives from the agreement of the disputing parties” (Wali 2006, translated by author). Although the phrasing of the definitions may vary, the substance remains consistent: arbitration is a legal mechanism for resolving disputes in a swift and amicable manner (Al-Anani 2019).

However, the latter definition is not entirely accurate in its description of arbitration as an “amicable” resolution mechanism. Arbitration is not a friendly method of dispute resolution but rather a judicial means for decisively resolving disputes. The difference between arbitration and amicable settlement lies in the nature of the decision-making process: arbitration is based on facts, evidence, and legal arguments, rather than the parties’ willingness to compromise, as is the case in amicable settlements. In an amicable settlement, the parties negotiate and make concessions to reach a mutually agreeable resolution. In contrast, arbitration is more akin to a judicial process where the parties present their claims and defenses, and the arbitrator issues a binding award based on the merits of the case. This distinction is further supported by a ruling from the Saudi administrative judiciary Board of Grievances, which stated, “Since the defendant has raised a plea of lack of jurisdiction due to the presence of an arbitration clause, the court, upon reviewing the matter, found that the contract between the parties included an agreement to resolve any disputes between them amicably, and there is no reference to an arbitration clause in its proper legal form. Therefore, the defendant’s plea is rejected” (Case No. 1276/1/Q, 1415 AH, translated by author).

A more comprehensive definition of arbitration is that it is “the mutual consent of the disputing parties to submit their dispute to an arbitral tribunal composed of third parties, who issue a final award, resolving the conflict in place of the judiciary” (Al-Sharqawi and Al Sharif 2021, translated by author). Furthermore, the courts addressed the concept of arbitration in one of its rulings, defining it as “a contract formed through offer and acceptance, whereby the parties agree to refer their dispute to arbitrators instead of the competent court. This agreement may take the form of a clause in a contract, known as an arbitration clause, which mandates arbitration for disputes related to that contract, as is the case in this matter” (Case No. 935/2/Q, 1410 AH, translated by author).

2.2. Definition of Privatization in the Saudi Legal System

In contrast to the Arbitration Law, the Saudi PSP Law provides a clear definition of the term “privatization”: Article 1 of the PSP Law states (in the Arabic version) that privatization refers to either public–private partnerships or the transfer of asset ownership. This definition somewhat differs from what is outlined in World Bank publications. According to the World Bank, privatization specifically refers to the transfer of state-owned assets and the responsibility of delivering public services to the private sector. The key distinction lies in the fact that, under the Arabic version of Saudi law, public–private partnerships are considered a form of privatization, whereas the World Bank defines privatization solely as the transfer of assets, which excluded PPPs from this category since the public sector maintains an ongoing relationship with the private sector in PPP agreements (Farquharson, Yescombe 2011).

The distinction between public–private partnerships and privatization lies in the redistribution of property rights and sovereign power functions. While privatization generally involves the full transfer of ownership and control from public to private entities, PPPs feature a cooperative relationship where the state retains some level of control or oversight. This affects the design, governance, and implementation of infrastructure and public service projects, with varying degrees of private sector involvement in each model (Deryabina 2008).

It is evident that the Saudi legislator has adopted a broader definition of privatization, encompassing all contractual relationships with the private sector, regardless of whether they involve asset transfers or PPPs. This approach ensures that these various forms of contracts fall under a unified regulatory framework. A closer examination of the law reveals that the legislator distinguishes between these two models – asset transfer and PPPs – by establishing different procedures, formalities, and authorities for each. In addition, the English version of Saudi privatization law, called the law as Private Sector Participation (PSP) Law, defines PSP as PPP or divestment (Art. 1). This definition and name of the law aligns with the definitions in the comparative laws and of international organizations such as the World Bank.

In conclusion, in Saudi Arabia PSP includes both asset transfers and public–private partnerships. The legislator defines asset transfer as a contractual arrangement related to infrastructure or public services, resulting in the transfer of ownership of assets from a government entity to the private sector. On the other hand, public–private partnerships are defined by the legislator as a contractual arrangement related to infrastructure or public services, creating a relationship between the government and a private

entity. The elements of a PPP are: 1) the duration of the agreement must be five years or more; 2) the private party must perform at least two or more tasks, such as designing, constructing, managing, operating, maintaining, or financing the assets, regardless of whether the assets are owned by the government, the private party, or both; 3) there must be a qualitative and quantitative distribution of risks between the government and the private party; 4) the financial compensation owed to or by the private party must primarily be based on its performance in fulfilling the contractual obligations assigned to it.

3. PROCEDURE FOR INCLUDING ARBITRATION IN PSP CONTRACTS

The agreement to resort to arbitration instead of litigation entails certain concessions in exchange for certain advantages. For instance, parties waive the right to appeal the arbitrators' decisions in exchange for rulings that are quick, confidential, and cost-effective in terms of litigation expenses and attorney fees. Therefore, agreeing to arbitration is a right guaranteed to individuals in disputes where reconciliation is permissible. Arbitration is recognized as an effective method for resolving conflicts in PPPs. One study (Osei-Kyei *et al.* 2019, 185–195) comparing Ghana and China shows that arbitration is considered one of the most suitable mechanisms for resolving disputes in PPPs, particularly in Ghana, where governance and contract arrangement issues frequently cause conflicts. However, when it comes to public legal entities, these entities are bound by the powers and delegations granted to them.

Article 10 of the Saudi Arbitration Law stipulates that arbitration agreements are valid only when made by those who have the authority to dispose of the rights, regardless of whether they are natural persons – or their representatives – or legal entities. It also stipulates that government entities may not agree to arbitration unless they obtain the approval of the Prime Minister, unless a special legal provision permits it (Art. 10, para. 2 Saudi Arbitration Law) The term “legal provision” refers to what is issued by the legislative authority. Article 67 of the Basic Law of Governance states that the legislative authority is responsible for enacting laws and regulations to serve the public interest or to prevent harm in matters concerning the state, in accordance with Islamic law. It exercises its functions in accordance with the Basic Law of Governance and the regulations of the Council of Ministers and the Shura Council (Art. 90 Basic Law); moreover, Article 70 specifies that laws are issued and amended by royal decree. Therefore, the general

rule is that government entities are prohibited from agreeing to arbitration without the approval of the Prime Minister or unless a specific law permits it and overrides the general rule. This provision applies the legal principle that the special overrides the general.

A review of the Council of Ministers' decision to approve the PSP Law shows that its second clause contains an explicit approval from the Prime Minister to allow arbitration for disputes arising from PSPs contract or any related contracts, regardless of whether inside or outside Saudi Arabia, according to rules issued by the Board of Directors of the National Center for Privatization. These rules must include the determination of the applicable law, regardless of whether arbitration takes place inside or outside Saudi Arabia. Furthermore, Article 34 of the PSP Law affirms the permissibility of including an arbitration clause in PSP contracts or entering into an arbitration agreement to resolve an existing dispute arising from the contract or any related contracts (Art. 34 PSP Law). Such a clause or agreement must specify the applicable law for the subject matter of the dispute. The essential formalities of resorting to arbitration in PSP contracts will be discussed in the following sections.

3.1. Inclusion of Arbitration Clauses in Asset Transfer Contracts or PPP Contracts Involving Asset Transfers

Firstly, the legal framework defines the transfer of asset ownership as a contractual arrangement related to infrastructure or public services, resulting in the transfer of any asset ownership from a government entity to a private party. The legal framework provides definitions of the key terms in this context. First, assets are defined as any asset, whether permanent or temporary, fixed or movable, tangible or intangible, including rights. Second, infrastructure is defined as public utilities or assets that provide public services, either directly or indirectly. This leads to the third term, public service, which, according to the Saudi regulator, refers to any service provided by a government entity, either directly or indirectly, whether essential for supplying goods or services to the public, or nonessential for supporting governmental activities and tasks.

Regarding arbitration in this type of privatization, the law stipulates that it is permissible to agree to arbitration in privatization contracts in general. However, there is no explicit provision allowing the competent authority to grant approval for arbitration in asset transfer projects or public-private partnership projects that involve asset transfers. Nevertheless, the privatization legal framework designates the Council of Ministers as

the competent authority for granting approvals concerning bidding and contracts for such projects. In accordance with the legal principle that the authority over the whole includes authority over the parts, the Council of Ministers holds the authority to approve arbitration clauses and agreements in these contracts. Furthermore, the Prime Minister’s decision to approve the PSP Law explicitly states in its second clause that arbitration is permissible in privatization contracts, as previously mentioned, and that a privatization contract may involve the transfer of asset ownership or a public–private partnership, or both. However, this permission is not absolute, as arbitration cannot be chosen as a dispute resolution method for asset transfer projects where the asset value is less than SAR 100 million.

The process of requesting the inclusion of arbitration in contracts related to asset transfer projects involves procedural and formal steps that must be undertaken by the relevant entities. Initially, the relevant body prepares the necessary studies to clarify the justifications for seeking approval to include an arbitration clause for resolving disputes arising from the asset transfer contract or its related contracts, or for concluding an arbitration agreement for an existing dispute arising from the contract. Additionally, the justifications for choosing the arbitration location, applicable law, and the selected arbitration center must be provided. It is important to include a list of the positive outcomes that would result from granting approval, as well as the negative consequences of not granting approval, in the submission to the supervisory committee, which then decides whether to forward the request to the Council of Ministers.

The relevant entity overseeing the asset transfer project must also draft the arbitration clause to be included in the contract or draft the arbitration agreement and submit it to the supervisory committee, chaired by the relevant minister or their equivalent. In addition, the contract management and monitoring plan must include a preliminary mechanism for handling any disputes involving the government, and this mechanism must include the standards, procedures, and governance for selecting arbitrators and appointing lawyers. If the referral to arbitration occurs after the dispute arises, the relevant entity must update the contract management and monitoring plan to include the governance of dispute management, the mechanism for working with government lawyers representing the state in the dispute, the mechanism for monitoring the progress of the case, and the reporting process to the project’s lead official and the supervisory committee. After that, the entity responsible for the project will select the arbitrators, appoint the lawyers, supervise them, and provide support related to evidence and documentation, as well as cover the expenses and costs associated with the dispute.

The regulator made a wise decision of requiring governance procedures for resorting to arbitration, as there must be an initial mechanism for handling any dispute. It would have been preferable to include a requirement for dispute resolution procedures through amicable efforts. One study suggests that going through steps before resorting to arbitration is very significant to avoid conflict escalation (Marques 2018). To prevent conflicts, effective governance and contract management should be prioritized, especially relationship management. This entails clear communication, understanding objectives, defining roles, and promoting senior management involvement. Despite good relationships, disputes may still arise due to operational issues, requiring pragmatic procedures. If conflicts surface, involving senior representatives early is crucial. The contract can provide for an expert committee or independent expert to resolve disputes, though decisions may not always be binding (Marques 2018). Mediation, as a neutral, nonbinding process, can also be employed to facilitate negotiations. An alternative is conciliation, where a more active role is taken in proposing solutions for resolving differences.

After all these methods have been exhausted, arbitration can be pursued, which should also occur within a well-governed framework. This ensures that all prior avenues for resolution have been explored, and that arbitration is conducted under structured governance protocols.

3.2. Inclusion of Arbitration in Public–Private Partnership Contracts

As previously mentioned, arbitration can only be authorized by those who have the legal authority to dispose of their rights. The rules governing privatization specify the competent authority for approving arbitration clauses and agreements in public–private partnership contracts. Article 5 of the Private Sector Participation Governing Rules stipulates that the Board of Directors of the National Center for Privatization (NCP) holds the authority to approve the inclusion of an arbitration clause in the contract to resolve disputes arising from it, or to approve the conclusion of an arbitration agreement to resolve an existing dispute arising from the contract. This also includes specifying a foreign law applicable to the subject of the dispute within the arbitration agreement or clause (Art. 5 para. 1(c)). It is important to note that this authority granted to the Board of Directors is exclusive and non-delegable (Art. 10 para. 2).

Before granting approval, the Board must ensure that the executing entity is compliant with the arbitration rules within the privatization framework and meets the regulatory requirements stipulated in the rules. It is important to note that the Board's approval has no legal effect and is considered null if the arbitration clause or agreement does not specify the arbitration venue, applicable law, and the designated arbitration center. A request for approval to include an arbitration clause or agreement may be separate from the request for approval of the PPP project. In such cases, the Board of Directors must issue its decision on this request within no more than twenty-five working days from the date of receipt.

An exception to the above process is that no explicit decision from the Board is required, and tacit approval is granted without formal expression if all of the following conditions are met:

- a) The request pertains to a PPP project valued at less than SAR 500 million.
- b) The request pertains to a PPP project that has been tendered through a public competition within the regulatory framework of privatization.
- c) Arbitration is to take place within Saudi Arabia, and the applicable law for the dispute is Saudi law.
- d) A decision has been issued by the supervisory committee, with unanimous agreement among its core members, confirming compliance with all the requirements and regulations stipulated in the rules for approval of the arbitration agreement. The committee must also approve the conclusion of the arbitration agreement, and the Board of Directors must be notified of the supervisory committee's decision.

3.3. Prohibitions on Including Arbitration in PSP Contracts

The default rule for resolving disputes arising from contracts in which a government entity is a party falls within the jurisdiction of the administrative courts under the Board of Grievances (Saudi Law of the Board of Grievances 2007, Art. 13(D)). Similarly, the Arbitration Law specifies that government entities may not resort to arbitration without obtaining the approval of the Prime Minister or unless a special legal provision allows it. Both of these conditions are met under PSP Law, which permits government entities to include an arbitration clause or agreement to resolve disputes arising from PSP contracts and their related contracts. However, this is not an unrestricted

allowance, as some PSP projects are prohibited from selecting arbitration as a method for dispute resolution. Comparatively, in Brazil, arbitration in PPP contracts was historically restricted, especially in cases involving public administration, but legislative reforms have since permitted arbitration under specific conditions, particularly for PPPs and concession contracts (Wald, Kalicki 2009, 26). These reforms ensure that public interests are protected while allowing state entities to engage in arbitration.

In Saudi Arabia, the restriction is on matters that related to national security, depending on the project budget and other legal matters. Therefore, article 17 of the Arbitration Rules for PSP Contracts outlines the cases where arbitration is not allowed as a dispute resolution method (Arbitration Rules for Privatization Contracts 2023, Art. 17). These cases include:

- a) Privatization projects tendered through limited competition or direct contracting.
- b) Privatization projects related to national security.
- c) Privatization projects for which a similar contract has already been executed – including any related contracts – and judicial jurisdiction has been granted to the competent courts in Saudi Arabia.
- d) Asset transfer projects where the asset's value is less than SAR 100 million.
- e) Public-private partnership projects where the total monetary obligations of the government to the private party over the entire contract period are less than SAR 100 million.

By reviewing the legal texts related to the privatization regulatory framework in Saudi Arabia, it becomes evident that allowing arbitration in privatization contracts aligns with the preference of the private party, which is often accustomed to arbitration in resolving disputes arising from investment and commercial contracts, and due to the foreign private party's unfamiliarity with local laws and official judicial procedures. Nevertheless, government efforts continue to encourage the private sector to commit to the official judicial jurisdiction, represented by the administrative courts. For instance, preference is given to bidders who do not require arbitration and agree to refer disputes to the competent official courts within Saudi Arabia. Article 18 of the Arbitration Rules for Privatization stipulates that, if the competent authority approves the arbitration clause, the relevant body must do the following: a) Include in the privatization project tender documents additional points for bidders who agree to the judicial jurisdiction of the competent courts in Saudi Arabia for resolving disputes

arising from the privatization contract or any related contracts; b) Include in the arbitration clause or agreement a mandatory prerequisite concerning the implementation of amicable resolution procedures before referring the dispute to arbitration (Arbitration Rules for Privatization Contracts 2023, Art. 18).

4. CONDITIONS FOR ARBITRATION IN PSP CONTRACTS

As is well known, the nature of contracts in which the government is a party differs from other types of contracts. The government may use its public authorities and often holds a relatively stronger position in controlling and managing the course of the contract. Additionally, the government is divided into ministries and agencies, each pursuing different objectives but all deriving from a unified budget. Therefore, it is essential to have a general regulatory framework that all these entities adhere to and do not deviate from. Based on this, the Council of Ministers authorized the National Center for Privatization to establish the rules governing the arbitration process in PPP or divestment contracts and set the necessary conditions for this. The following sections will outline and analyze the conditions that must be observed regarding the place of arbitration, the applicable law, and the arbitration center chosen to resolve the dispute.

4.1. Conditions Relating to the Place of Arbitration

The arbitration rules for privatization contracts stipulate that, as a general principle, arbitration should be conducted domestically. The rules emphasize that arbitration must take place within Saudi Arabia in the following cases:

1. Privatization projects where the best bidder holds Saudi nationality, or where the leader of the consortium with the best bid holds Saudi nationality, or where the majority of consortium members hold Saudi nationality.
2. Privatization projects for which a previous contract – including any related contracts – was made for a similar project and arbitration was conducted domestically.
3. Asset transfer projects where the value of the asset is less than SAR 200 million.

4. Public–private partnership projects where the total cash payments committed by the government to the private party over the full contract duration are less than SAR 200 million.

Since the state is a party to PSP contracts and has established administrative courts to resolve disputes in which it is a party, it waives this right and submits to arbitration, given the nature of PSP contracts and their significant impact on spending efficiency and the transfer of the burden of providing public services to the private sector to alleviate the state's burdens. However, even when resorting to arbitration, the state has implemented governance and conditions to prevent its excessive use in government contracts. An example of this is that when a government entity requests the inclusion of arbitration in PSP contracts, certain restrictions apply, such as the preference for domestic arbitration. Therefore, the relevant agency should work to include provisions in the privatization project documents that grant additional points to the competitor who agrees to arbitration in Saudi Arabia.

4.2. Conditions Relating to Applicable Law

The principle that what cannot be fully achieved should not be fully abandoned was applied in the arbitration rules in privatization. The rules state that the laws in force in Saudi Arabia should be designated as the applicable laws governing the dispute. However, the competent authority may grant approval for the application of a foreign legal system if it is deemed appropriate and justified. As clearly outlined in the rules, the default is the application of Saudi law. This essentially represents only a shift in the forum for resolving disputes, as there is no doubt that the Saudi judiciary would adjudicate the matter in accordance with Saudi law. As such, there is minimal risk of inconsistent rulings between arbitration and official judiciary proceedings. The primary advantage of arbitration is the acceleration of dispute resolution and the reduction of legal expenses. Moreover, Saudi law is mandatory and cannot be replaced by a foreign legal system in specific cases, as specified by the arbitration rules for privatization, including in the following cases:

1. PSP projects where the best bidder holds Saudi nationality, or where the leader of the consortium with the best bid holds Saudi nationality, or where the majority of consortium members hold Saudi nationality.

2. PSP projects for which a previous contract – including any related contracts – was made based on a similar project, and the applicable laws were designated as those in force in Saudi Arabia.

To prevent the potential exploitation of arbitration in favor of the contractor, at the expense of the government, the foreign legal system designated for application cannot be that of the country where the best bidder, consortium leader, or the majority of consortium members hold citizenship. This provision is intended to ensure balance in the contract: if the state waives the application of its laws in the contract dispute, the alternative applicable law should not be that of the other party's country. In any case, the preference is for the applicable law to be domestic, and the relevant authority should work towards ensuring this. The rules also stipulate that the authority responsible for privatization should include additional points in the tender documents for the project for any bidder who agrees to designate Saudi laws as the applicable law in the event of a dispute in the privatization contract.

4.3. Conditions Relating to the Selection of Arbitration Center

Article 26 of the Arbitration Rules for Privatization stipulates that if arbitration is conducted in Saudi Arabia, the Saudi Center for Commercial Arbitration (SCCA) will be designated as the arbitration entity. As an exception, the competent authority may grant approval for another arbitration entity or center, as deemed appropriate, based on valid justifications, provided that the chosen arbitration center is approved by the Permanent Committee for Saudi Arbitration Centers.

However, foreign investors feel more secure when they can access international arbitration centers, as this offers them a sense of greater protection compared to being limited to domestic dispute resolution mechanisms (Kidane 2017). This has been advantageous for the business environment of the country, providing a more favorable setting for foreign investors (Kidane 2017).

Therefore, a foreign arbitration center may be selected if it is agreed that the arbitration will be held outside Saudi Arabia, without prejudice to cases where arbitration must not take place outside Saudi Arabia. The selected foreign arbitration center must meet the following conditions: a) it must be licensed in the country where its headquarters are located; b) its headquarters must not be in the country where the best bidder holds citizenship, nor in the country where the leader of the consortium with the

best bid or the majority of consortium members hold citizenship; c) it must have been established and operating continuously for no less than 15 years; d) the arbitration rules applied at the center must comply with the provisions of the Arbitration Law in force in Saudi Arabia or be in accordance with the UNCITRAL Arbitration Rules issued by the United Nations Commission on International Trade Law; and e) the official language of arbitration at the center must be either Arabic or English.

5. CONCLUSION

This study examined the concepts of privatization and arbitration in the Saudi legal system, exploring the role of arbitration as an alternative dispute resolution mechanism in PSP contracts. These contracts fall into three main types: asset transfer contracts, public–private partnership contracts, and contracts that combine both asset transfer and partnership. The study analyzed the relevant legal texts and preemptive procedures for including arbitration clauses in these contracts, highlighting the aspects of arbitration agreements that concern the regulator, such as the location of arbitration, the nationality of the arbitration center, and the applicable law. The study has reached several findings and recommendations, which are summarized in the following sections.

5.1. Findings

1. The definition of privatization in the Saudi legal system includes public–private partnership contracts, contrary to the practices in World Bank reports, which differentiate between privatization and PPPs. As clarified in this study, the Saudi regulator’s definition of privatization aims to provide a unified regulatory framework for both asset transfers and PPPs. This is reflected in the system’s clear distinctions between the procedures and authorities for transferring state assets and partnering with the private sector. The law is called the Private Sector Participation Law in the translated version in English.
2. This distinction between transferring state assets and partnering with the private sector extends to the inclusion of arbitration, where the regulator has defined different procedures and authorities concerning the authority approving arbitration clauses in different types of private sector participation contracts. In some cases, the authority lies with the

Council of Ministers, while in others, it is with the Board of Directors of the National Center for Privatization, depending on whether the contract involves asset transfer or a partnership.

3. Historically, there has been resistance to arbitration in government contracts. This is evident from the emphasis on persuading and encouraging private parties not to resort to arbitration by granting preferential points to bidders who do not require arbitration and instead agree to resolve disputes through official courts.
4. In cases where the Arbitration Rules for Privatization do not explicitly cover a particular matter, the provisions of the arbitration agreement in PSP contracts that do not conflict with Saudi Arbitration Law and its implementing regulations will apply. If no specific provisions are included in the arbitration agreement, the Saudi Arbitration Law and its regulations will apply.
5. There is a lack of judicial precedents under the new PSP Law regarding arbitration in PSP contracts, due to the relative novelty of such contracts and the historically stringent regulatory environment, which has limited the use of arbitration to narrow circumstances. Moreover, there is a scarcity of research and studies in this area, which would undoubtedly contribute to raising legal awareness of privatization processes.

5.2. Recommendations

1. Establishment of a permanent committee of legal advisors and relevant field experts within the National Center for Privatization (which is the subject-matter authority for PSP in Saudi Arabia) to supervise and monitor arbitration agreements included in PSP contracts or arbitration agreements that arise after disputes occur. This would ensure their compliance with the regulatory framework for privatization, as violations of the stipulated conditions or exceeding the authorized powers could lead to the nullification of arbitration agreements, thus hindering projects necessary for the continuity of the privatization process and achieving its intended goals.
2. Organizing workshops and training seminars for entities involved in privatization projects, to clarify critical issues and resolve complications related to arbitration agreements in PSP contracts.

3. Collaboration with the Permanent Committee for Arbitration Centers in Saudi Arabia, to explore the possibility of establishing a specialized arbitration center for privatization. This center would attract international experts and arbitrators with experience in arbitrating privatization and public-private partnership contracts.
4. Preparation of annual reports on the impact of the issuance of Arbitration Rules for Privatization and attaching them to reports on the implementation of the PSP Law. According to Clause Three of the Council of Ministers' Decision No. 436, dated 3/8/1442H, the National Center for Privatization must submit an assessment of the law's implementation and any related proposals after two years from the date of the law's entry into force.
5. Avoidance of rigidity in the legal provisions related to arbitration agreement conditions. Arbitration is based on the mutual consent of the parties and should not be imposed or coerced. However, the nature of privatization and PPP contracts somewhat necessitates this due to the public authority being one of the parties. Nonetheless, certain conditions, such as the official language of the foreign arbitration center, may not always be English or Arabic. For instance, Saudi Arabia signs agreements and contracts with companies from countries where neither of these languages is predominant, such as China and France. Therefore, the recommendation is to allow limited flexibility for exceptional cases and future developments, to ensure and maintain the legal rule's stability in transactions.

REFERENCES

- [1] Al-Anani, Aladdin. 2019. *Modern Administrative Contracts with International Characteristics and Arbitration in Them: International Contracts – B.O.T Contracts – Maintenance Contracts – PPP Contracts – FIDIC Contracts (Comparative Study)*. Alexandria: Markaz al-Dirāsāt al-'Arabīyah lil-Nashr wa-al-Tawzī'.
- [2] Arbitration Rules for Privatization Contracts, issued under the Private Sector Participation Law (Royal Decree No. M/63, 5/8/1442H (18 March 2021). <https://uqn.gov.sa/?p=22471>, last visited December 7, 2025.
- [3] Al-Sharqawi, Al-Shahabi, Yahya Al Sharif. 2021. *Principles of Arbitration According to the Saudi Arbitration Law No. 34 of 1433H and Its Executive Regulations*. 2 ed. Riyadh: Dar al-Ijada.

- [4] Christie, David S. 2016. The elephant in the dispute resolution room: problems with the definition of arbitration in Scots law. *Juridical review* 1: 27–48.
- [5] Cîmpean, Daniela, Roxana Vornicu, Dacian C Dragoş. 64/2021. Public–Private Arbitration in Romanian Law. *Transylvanian Review of Administrative Sciences* 17: 24–46.
- [6] Deryabina, Marina. 2008. Public–private partnership: theory and practice. *Voprosy ekonomiki* 8: 61–77.
- [7] Farquharson, Edward, E. R. Yescombe. 2011. *How to engage with the private sector in public-private partnerships in emerging markets*. Washington D.C.: World Bank Publications.
- [8] Kidane, Won L. 2017. *The Culture of International Arbitration*. Oxford: Oxford University Press.
- [9] Marques, Rui Cunha. 1/2018. Is arbitration the right way to settle conflicts in PPP arrangements? *Journal of Management in Engineering* 34: 05017007.
- [10] Osei-Kyei, Robert, Albert P. C. Chan, Yao Yu, Chuan Chen, Ayirebi Dansoh. 2019. Root causes of conflict and conflict resolution mechanisms in public–private partnerships: Comparative study between Ghana and China. *Cities* 87: 185–195.
- [11] Saudi Private Sector Participation Governing Rules, Resolution No. 114, (2021). <https://laws.boe.gov.sa/BoeLaws/Laws/LawDetails/f95abff1-7f8b-4aea-9e97-adb900a2576e/1>, last visited December 7, 2025.
- [12] Saudi Private Sector Participation Law, Royal Decree No. M/63, 5/8/1442H (March 18, 2021). <https://laws.boe.gov.sa/BoeLaws/Laws/LawDetails/8af67ec1-6776-4f67-abb4-ad0900eadf2f/1>, last visited December 7, 2025.
- [13] Saudi Arbitration Law, Royal Decree No. M/34, 24/5/1433H (16 April 2012). <https://laws.boe.gov.sa/Files/Download/?attId=67301cd6-bad9-4e1e-bedf-adbb011be2c9>, last visited December 7, 2025.
- [14] Saudi Basic Law, Royal Order No. A/90, 27/8/1412H (1 March 1992). <https://www.saudiembassy.net/basic-law-governance>, last visited December 7, 2025.
- [15] Saudi Law of the Board of Grievances, Royal Decree No. M/78, 19/9/1428H (1 October 2007). <https://laws.boe.gov.sa/Files/Download/?attId=40708ea3-0b40-4978-8b46-adbb0113c063>, last visited December 7, 2025.

- [16] Wald, Arnaldo, Jean Kalicki. 4/2009. The settlement of disputes between the public administration and private companies by arbitration under Brazilian law. *Journal of International Arbitration* 26: 557–578.
- [17] Wali, Fathi. 2006. *Arbitration Law in Theory and Practice*. 1 ed. Alexandria: Mansha'at al-Ma'arif.

Article history:

Received: 1. 9. 2025.

Accepted: 8. 12. 2025.