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Rules and Regulations of Business Partnerships Between Private and Public Sectors: A Comparative Analysis of the Saudi and Kuwaiti Systems

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Abstract
Business partnerships between the private and public sectors in Kuwait and Saudi Arabia are increasingly used to promote sustainable economic development but face complex legal and procedural challenges. A central issue concerns the administrative authority's power to substitute the private investor during project implementation, particularly when unforeseen legal or natural events hinder contractual performance. This intervention, intended to protect public facilities, often generates conflict between the rights of investors and the public interest. This study analyses the legal basis, scope, and limitations of such substitution powers through legislative texts and judicial rulings in both countries. It identifies key differences in investor protections and public authority privileges and explores the implications for contractual stability and efficiency. The research concludes with recommendations, including the introduction of specific legislation to govern public-private partnerships, clearer substitution procedures, and explicit standards for negligence and gross error that justify the replacement of an investor.

Keywords: Partnership contracts, partnership project, substitution, investor, judicial oversight, public utility.

1. Introduction

The role of the modern state is primarily based on satisfying the basic needs of its citizens through the establishment of numerous service facilities. However, the expansion of such facilities has increasingly burdened state budgets due to the scale of required expenditures. In parallel with transformations in the role of the state and the conditions of globalization, a few concepts have emerged that are no longer a luxury for states, including governance, empowerment, and privatization. The growing role of global companies and conglomerates in shaping economic policy has led many states to involve the private sector in public and service projects to reduce financial pressures and improve service quality and efficiency. This, in turn, has given rise to various models designed to attract the private sector, with its reputation for service quality, effectiveness, good governance, to participate in the development and financing of public projects, in return for financial compensation that covers costs, generates profit, and enhances service provision. Among the most significant of these models are public-private partnerships (PPPs), which allow the private sector to participate with the state through contractual arrangements-based public-private integration and risk sharing. PPPs aim to promote sustainable economic and social development through the establishment, development, maintenance, operation, and management of infrastructure and public facilities, thereby improving service delivery while enabling the state to benefit from private sector expertise in financing, implementation, and management.

1.1 The Problem of the Study

PPP contracts present numerous practical and legal challenges arising from their procedural complexity, long duration, opaque legal nature, and the multiplicity of parties involved. One of the most significant legal and practical issues concerns the powers exercised by the contracting administrative bodies over the contractor (investor) during the implementation phase, particularly in circumstances where the contractor encounters serious legal difficulties or an unforeseen natural event.

In such cases, the administrative authority may intervene to safeguard the continuity and regularity of the public facility by substituting the contractor with another party to manage or operate the project. This intervention, while necessary, creates significant legal uncertainty, affecting not only the contractor, the financier and third parties but the project itself. Substitution thus represents a point of tension within PPP contracts: it is both a mechanism for protecting the public interest and a measure capable of profoundly disrupting contractual and financial expectations.

1.2 Significance of the Study

The importance of this study derives from the importance of PPP contracts themselves, as they constitute a fundamental mechanism upon which most countries rely to manage public facilities and exploit public resources. Given their significance, there is a need to shed light on the legal regime governing this type of contract, particularly with respect to the powers and privileges enjoyed by the contracting administrative authorities during the execution of the contract.

Substitution in PPP contracts remains a controversial issue, because it lies at the intersection of administrative privileges and contractual guarantees. The authority to substitute the contracting party raises sensitive legal and practical issues, given its implications for the rights of the contracting investor, the continuity of the public facility, and the protection of the public interest.

1.3 Objectives of the Study

This study aims to examine one of the most significant and sensitive privileges exercised by the administrative authority under PPP contracts, namely, substitution, the replacement of one contractor with another. This issue is of paramount importance considering the nature of PPP transactions, the procedures governing substitution, the legal constraints imposed on it, and the effects arising therefrom. Accordingly, of the study seeks to address the following questions:

1. How should substitution in PPP contract be defined and characterised?
2. What is its legal basis and nature?
3. What procedural requirements and controls govern its exercise?
4. What effects does substitution produce for the contractor, third parties, and the public facility?

2. Research Methodology

This study relies on a comparative analytical approach to analyse legal texts within both the Kuwaiti and Saudi systems and to derive and extrapolate legal rules from them. Accordingly, the study is divided into two sections. The first addresses the nature of substitution in PPP contracts in terms of its concept, legal nature, and causes. The second section examines the controls governing substitution and the legal effects resulting therefrom.

3. Chapter One: The Concept and Legal Nature of Substitution in PPP Contracts

PPP contracts are among the modern forms of contract on which many states rely to manage and operate public facilities. They involve numerous parties and entities, pass through various stages and procedures, and are characterised by their long duration. Through such contracts, the state seeks to implement public service projects of economic, social, or service-related importance, to improve or develop existing public services, or to reduce costs and improve efficiency.[1]

In principle, a PPP contract is a contract between two parties, entailing rights and obligations. However, this logic cannot be applied without qualification, because the administrative body enjoys numerous privileges and powers vis-à-vis its contracting party, including the power of substitution. This is due to the intrinsic link between the contract

[1] See Kuwaiti Law No. 116 of 2014 concerning Public-Private Partnerships. See also the Saudi Privatization Law, Royal Decree No. M/63 (18 March 2021), which defines a PPP as 'a contractual arrangement related to infrastructure or public service, resulting in a relationship between the government and the private party'.

and the operation of the public facility, as well as the need to ensure the regular provision of its services to beneficiaries in a manner that serves the public interest.

Accordingly, it is necessary to address the following questions: What is meant by a PPP contract? What is the substitution privilege enjoyed by the contracting administration? What is its legal nature?

3.1 The Conceptual Framework of Substitution and Partnership Contracts

In this context, it is necessary to clarify the concept of substitution within the scope of PPP contracts and to determine its legal nature, particularly whether it constitutes an administrative prerogative or derives from a different legal basis.

3.1.1 The Legal Nature of the Partnership Contract

An administrative contract is defined as a contract in which one of the parties is a public administrative body and whose subject matter relates to the operation of a public utility. Such contracts include exceptional conditions not typically found in private law contracts, most notably the privileges enjoyed by the contracting administrative body vis-à-vis its contractors, intended to protect public utilities.[1]

Like private law contracts, administrative contracts are legal acts resulting from the convergence of the will of the administration with that of another party. In general, a contract is based on the agreement of two wills with the intention of producing specific legal effects by creating or modifying obligations. Accordingly, administrative contracts are, in principle, subject to the same foundational requirements as civil contracts[2], namely consent, a valid subject matter, and a legitimate cause. However, they differ in their legal framework, as administrative contracts are invariably linked to the operation of public services and frequently include exceptional conditions typically absent from private law contracts.

Because the principle of freedom of contract does not apply universally to administrative contracts, the relationship between the contracting parties is inherently unequal. This allows the administration to exercise certain powers against its contractors whenever the public interest so requires, subject to judicial oversight. These powers derive not only from

[1] For a definition of an administrative contract, see M. S. Al-Tamawi, *General Principles of Administrative Contracts*, 3rd edition (Cairo: Dar Al-Fikr Al-Arabi, 1975), 50; S. Al-Sharqawi, *Administrative Contracts* (Cairo: Dar Al-Nahda Al-Arabiya, 1998), 5; N. M. Nabulsi, *Administrative Contracts: A Comparative Study*, 2nd edition (Beirut: Zain Legal Publications, 2012); A. O. Ayad, *Manifestations of Public Authority in Administrative Contracts* (Cairo: Dar Al-Nahda Al-Arabiya, 1973), 5.

[2] This was confirmed by the judgement in Appeal No. 43 (8 December 1997), in which the Kuwaiti Court of Cassation (Administrative Circuit) stated that 'contracts concluded by the administration with individuals are not considered administrative contracts unless they pertain to the operation or organization of a public utility, and the administration demonstrates its intention to apply public law and its provisions, and to enforce its rights through direct execution by including in the contract exceptional and unusual conditions, distinct from private law, or by referring to its own regulations'. Low.gov.com.

contractual provisions but also from the legal framework governing administrative contracts, including legislative and constitutional texts.

An administrative contract differs from a civil contract in that one of its parties must necessarily be a public legal entity, and its formation, execution, and termination are governed by the rules, methods, and provisions of public law. Consequently, the parties to an administrative contract are not on an equal footing. The administrative body has the authority to supervise and monitor performance, to amend the contract at its sole discretion, and to determine the methods of execution in order to protect public funds and ensure the regular and continuous operation of public facilities. The contractor cannot invoke the principle of freedom of contract or rely on the principle of non-performance as a defence.[1] Contracting with an administrative authority is thus fundamentally based on the intention of both parties, at the time of conclusion, to meet the needs of the public service and serve the public interest.[2]

Therefore, if this is the legal position with respect to administrative contracts, it raises the question regarding the nature of PPP contracts. Are they private law contracts, or do they have the same nature as administrative contracts?

The answer to this question depends on the legal classification of PPP contracts. If a PPP contract is characterised as an administrative contract, it is subject to public law rules, the privileges of the administrative authority, and the jurisdiction of administrative courts. If, by contrast, it is classified as a private law contract, it is governed by the principle of freedom of contract and falls within the jurisdiction of the ordinary courts.

PPP contracts can be defined as public contracts under which projects are undertaken, financed, and managed by the private sector, while ownership remains with the state or is temporarily transferred to the investor and later returned to the contracting administrative authority after a specified period.[3] Regarding their legal nature, three main jurisprudential approaches have emerged: the first considers PPP contracts to be administrative contracts; the second views them as administrative contracts; and the third classifies them as contracts of a special nature.[4]

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[1] See the ruling of the Kuwaiti Court of Cassation (Administrative Chamber) in Appeal No. 61 of 2001 (14 October 2002), in S. A. Al-Jassem, *Encyclopaedia of Systems* (Platform for Kuwaiti and Arab Legislation and Judicial Rulings, YEAR).

[2] See the ruling of the Kuwaiti Court of Cassation (Administrative Chamber) in Appeal No. 493 of 1999 (19 June 2000) and Appeal No. 61 of 2001 (14 October 2002), in Al-Jassem, *supra* note 5.

[3] Law No. 116 defines a PPP contract as 'a set of agreements that must be concluded regarding the implementation of a partnership project between a public entity and the project company, in accordance with this law'. For a comprehensive overview of legal definitions of partnership contracts, see Y. M. A. Al-Tayari, *Legislative Authority Oversight of Administrative Contracts and International Agreements of a Financial Nature: A Comparative Study* (Riyadh: National Centre for Legal Publications, 2017).

[4] See M. Al-Jubouri, *The Legal System for Transition to the Private Sector: A Comparative Study* (Amman: Dar Al-Hamid for Publishing and Distribution, 2008), 25; S. Al-Fawaeer, 'Public-private partnership contracts: Their concept and legal nature. A

Although the comparative legislation examined in this study does not expressly define PPP contracts as administrative contracts, their administrative nature can be inferred from certain provisions within those laws. Kuwaiti law, for example, emphasises the privileges of the contracting administrative body vis-à-vis the investor. Article 19 of Kuwaiti Law No. 116 of 2014 provides that 'the contract may be terminated by a decision of the Supreme Committee upon the request of the Public Authority or entity for reasons related to the public interest'. Article 26 further states that 'the project shall be placed under the direct management of the Public Authority or another specialised company'.[1] Similarly, the Saudi Privatization Law provides in Article 27 that the contracting authority may impose penalties and may, either directly or through another party, implement the contract to ensure the continuous and regular provision of services. Article 34 further subjects the contract and related agreements to the provisions of this system and other applicable regulations'[2]

The administrative nature of PPP contracts is further confirmed in French law. Presidential Decree No. 559/2004 of 17 June 2004 defines a PPP contract as an administrative contract under which the state or a public institution entrusts to a third party, for a specified period, with a comprehensive task relating to the construction, conversion, maintenance, operation, and management of a public facility.[3]

As these provisions demonstrate, PPP contracts must be regarded as administrative contracts in terms of their nature and characteristics. Although they involve a specific private partner, one of their parties must always be a public legal entity,[4] and they are necessarily connected to a public service. Furthermore, the contracting authority follows specific public-law procedures in their conclusion and execution.[5]

These characteristics are clearly highlighted when reviewing the legislation under study. The governing principles of these contracts include privileges for the administrative body and conditions that are not common in private law contracts. For example, the contractor

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comparative study', *International Journal of Law, College of Law, Qatar University*, 6(3)(2017); and A. Makki, 'Public-private partnership contracts: An attempt to define the concept and nature', *Moroccan Journal of Local Administration and Development*, (132) (2017). See also A. Al-Shater, p. 211

[1] See also Articles 49 and 50 of Decree No. 78 of 2015 issuing the Executive Regulations of the Kuwaiti Law on Partnership between the Public and Private Sectors.

[2] See also Article 136 of the Implementing Regulations of the System.

[3] Al-Makki, *supra* note 8 at p. 65.

[4] Kuwaiti legislation related to PPP contracts consistently emphasises the involvement of a public entity. For example, in Article 1, paragraph 17 of Law No. 116, such a contract is defined as 'the set of agreements that must be concluded regarding the implementation of a partnership project between the public entity and the project company', while in paragraph 8, public entities are defined as 'any ministry, government department, or public entity with an attached or independent budget that enters into a contract with a private sector investor to undertake a project under the partnership system in accordance with the provisions of this law, or to invest in the shareholding of the public company established to implement the partnership project'. In contrast, the Saudi legislator has defined this kind of contract simply as one which is concluded between the public and private sectors, and any related contracts. See Article 1 of the Executive Regulations of the Privatization System issued by Royal Decree No. M/63 (5/8/1442 AH).

[5] Kuwaiti Law No. 116, Articles 31 and 36.

may not dissolve the project company, change its legal nature, or assign it except with the approval of the concerned authorities.[1] By contrast, the contracting administrative body enjoys the right to monitor and supervise the implementation of the contract,[2] to grant prior approval for the assignment of the contract to a third party,[3] to determine the prices charged for benefiting from the service it provides,[4] and to amend the contractual conditions.[5] Moreover, the contracting administrative body is entitled to replace or substitute another contractor for the original contractor,[6] or to terminate the partnership contract unilaterally where required by the public interest.[7]

As previously noted, PPP contracts are linked to the fulfilment of essential public needs, including transportation, energy, water, health, and education. These remain fundamental obligations of the state towards its citizens, however, and entrusting their operation to private entities does not imply a relinquishment of administrative authority or responsibility. Rather, the protection of the public utility and the achievement of the public interest must remain the basis and objective of the actions and contracts of administrative bodies. To this end, the legislator has established a special legal framework governing this category of contracts, encompassing the initial project proposal, the establishment of the project company, the securing of financing, the conclusion and execution of the contract, and ultimately its termination or redemption.

It is clear from the foregoing that a PPP contract is an administrative contract through which the state or one of its public institutions entrusts a private entity with the management and operation of a public utility for a defined period. During this period, the private partner (the contractor) undertakes to construct, operate, and manage the facility. at the contract is based on cooperation and partnership between the public and private sectors. Under this arrangement, the project company (the private partner) is obliged to implement investments relating to the public utility, establish and operate the project, secure the necessary financing, and, where appropriate, enter contracts with third parties.[8]

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[1] *ibid*., Article 24.
[2] *ibid*., Article 31.
[3] *ibid*., Article 24.
[4] Article 35, paragraph 5, and Articles 28.27, Executive Regulations of Kuwaiti Law No. 116.
[5] Kuwaiti Law No. 116, Article 36.
[6] *ibid*., Articles 24 and 25.
[7] *ibid*., Article 19.
[8] Pursuant to Law No. 116 of 2014, the Kuwaiti legislator has defined a partnership project as 'a project to implement the provisions of activities through which the state aims to provide a public service of economic, social, or service-related importance, or to improve, develop, reduce the costs of, or increase the efficiency of an existing public service. This project is offered by the Public Authority in cooperation with the public entity, in accordance with the partnership system and after its approval by the Supreme Committee'. Article 1 of the Saudi Privatization Law provides a similar definition: 'a contractual arrangement related to infrastructure or public service, resulting in a relationship between the government and the private party.' For a definition of PPPs in the international context, whether at the European or United Nations level, see C. S. El-Din, *The Legal Nature of Public-Private Partnership Contracts in the UNCITRAL Model Law and Arab Legislations: An Analytical Study* (Cairo: Arab Organization for Administrative Development, 2012).

As previously noted, a PPP contract aims to provide a public service of economic, social, or service-related importance, or to improve, develop, reduce the cost of, or increase the efficiency of an existing public service. It enables the investor to utilise state-owned property (land) for the purpose of i constructing, developing, operating, or rehabilitating a project and to assume responsibility for its financing, management, and development for a specified period, after which ownership reverts to the state. In essence, it constitutes a set of agreements concluded for the implementation of a partnership project between the public entity and the project company, in accordance with the law'.[1] As discussed above, such contracts involve multiple parties, including the contracting administrative body, the contracting investor, and financing entities, and comprise a series of interconnected and continuous procedures, rendering them complex legal acts. In addition to the rights enjoyed by the private partner, the administrative body retains specific privileges and obligations, which correspond to the obligations imposed on the other parties. These contracts are further characterised by the sharing of project risks among their participants.[2]

3.1.2 The Definition of Substitution Within the Scope of a Partnership Agreement

Substitution is generally defined as a procedure undertaken by the contracting administrative body to remove the contractor from a project due to their failure to fulfil their obligations and the resulting harm to the public utility. Where it is established that the contractor has committed serious violations warranting such action, the administrative body may assume temporary management and operation of the project to ensure the smooth, regular, and continuous functioning of the public utility.

Comparative legislation expressly provides for this procedure. The Kuwaiti legislator, for example, addresses substitution in Article 25 of Law No. 116 of 2014, which provides that:

> If the contracting investor fails to perform their contractual obligations or commits serious errors that affect the smooth and continuous operation of the project, or lead to its suspension or bankruptcy, the Supreme Committee may, upon the request of any of the public authority or entity supervising the project, or the funding entities–if any–replace the contracting investor with another investor to complete the contract period.[3]

[1] Law No. 116, Article 1, paragraph 17.

[2] Regarding the distinction between partnership contracts and other contracts, see Al-Saraji, *supra* note 8 at p. 75 *et seq*. Regarding the distinction between partnership and similar concepts, see M. Abdul-Al Issa, 'Public-private partnerships: Concept, reasons, motives, and forms', *Arab Journal of Administration*, 38(3) (2018): 40.

[3] Article 25 also emphasises the need for the new investor to possess the same or better qualifications and conditions upon which the project was awarded, and that this must be stipulated in a written agreement between the contracting authority and the investor, the project company, the consortium company, or the financing entities. Furthermore, this agreement may not include any additions or

By contrast, the Saudi legislator does not expressly provide for substitution of the contractor by the administration or for the administration's replacement of the contractor. Article 27 of the Saudi Privatization Law provides that

> The contract or the subsidiary contract may include the imposition of a late penalty, a penalty clause, or compensation resulting from a breach by either party in the execution of its contractual obligations, and –[...] shall specify the mechanism for calculating [such penalties], whether on the basis of a lump sum, a percentage of the value of the contract, or otherwise, as agreed. [1]

In light of the emphasis placed on the procedures necessary to ensure the sustainability of the project, and in the absence of an explicit provision for substitution, it may be inferred that the Saudi legislator has referred this matter to the general principles governing administrative contracts, particularly the powers of contracting administrative bodies vis-à-vis their contractors. As previously noted, given the importance of PPP contracts and the state's reliance on them, such contracts must necessarily be accompanied by privileges aimed at protecting the public utility and the associated project. The privilege of substitution is no exception. Within the framework of PPP contracts, substitution is considered a significant coercive measure and one of the privileges enjoyed by the contracting administration vis-à-vis the investing contractor. It is derived from the general legal regime governing administrative contracts and not necessarily dependent on an express contractual provision.

The purpose of PPP agreements is to establish and operate economic facilities of paramount importance to the state in terms of providing public services and meeting basic societal needs. This necessitates that the contracting administrative body have the power to replace the investing party, even without their consent. Partnership contracts are characterised by their lengthy duration and by the distribution of risk between the parties. The legislative philosophy governing these contracts is based on the need to ensure and improve the conditions surrounding the implementation of the contract in order to guarantee the regular and continuous provision of public services. This is achieved by drawing on private-sector expertise while highlighting the inclusion in the agreement of the

impose any obligations on the contracting authority or anything that contradicts the terms of the award. The Executive Regulations of the same law, issued by Decree No. 98 of 2015, stipulate that... Published in Kuwait Today, Issue No. 1229, Year 61.

[1] Royal Decree No. M/63 (5/8/1442 AH).

exceptional conditions that ensure the stability and continuity of project implementation in a manner consistent with the public interest.[1]

This approach aligns with the spirit of the UNCITRAL *Legislative Guide on Privately Financed Infrastructure Projects*,[2] which recognises that situations may arise during the life of the project in which it is in the interest of both parties for the project to continue under the responsibility of another concessionaire rather than be terminated due to a breach or an exceptional event beyond the concessionaire's control. In such circumstances, the financing entities are concerned with ensuring that the work is completed and that the concession continues to operate, while the contracting authority may prefer to appoint another investor manage and run the project rather than assume direct responsibility for the project.[3]

Accordingly, substitution does not entail termination of the contract. Rather, the administration, either directly or through others and at the contractor's expense and responsibility, intervenes in the management of the project to preserve the project and ensure the regular and continuous provision of services in furtherance of the public interest. It achieves this by temporarily removing the private partner from the management and exploitation of the facility where that partner has committed serious violations affecting the operation of the public facility, and assuming direct responsibility for managing the facility. Thus, substitution primarily aims to avoid termination of the partnership contract. This objective is shared by financing entities, which, with the approval of the contracting administrative authority, may permit another contractor to replace the defaulting contractor and continue implementing the project under the existing agreement.[4]

Finally, although substitution is a stringent penalty, it is consistent with the broader system governing administrative contracts and their connection to public utilities. Within the

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[1] Regarding the characteristics of the new investor appointed to complete the contract, Article 25 of Kuwaiti Law No. 116 states that this individual must possess the same or better 'qualification specifications and terms of reference upon which the project was awarded'. Furthermore, this must be 'stipulated in a written agreement between the public entity and the investor, the project company, the consortium company, or the financing entities', if any. Article 25 further asserts that this agreement 'may not include the addition or imposition of any obligations on the public entity or anything that contradicts the terms of award'.

[2] UNCITRAL, *Legislative Guide on Privately Financed Infrastructure Projects* (Vienna: United Nations Commission on International Trade Law, 2001).

[3] *ibid.*, p. 173. Paragraph 150 of the *Legislative Guide* affirms that 'it may be beneficial to recognise in law the right of the contracting authority to conclude agreements with lenders stipulating that, with the consent of the contracting authority, a new franchisee shall be appointed to operate within the framework of the existing project agreement in the event of a serious breach by the franchisee in providing the service required under the legislator's agreement, or after the occurrence of other specific events that may justify the termination of the project agreement. The agreement concluded between the contracting authority and the lenders should specify, among other things: the circumstances under which the lenders are permitted to replace the franchisee and the procedures for replacing the franchisee, the grounds on which the contracting authority may reject a proposed substitution, and the lenders' obligations to continue providing the service at the same levels and under the same conditions stipulated in the project agreement' (p. 174).

[4] *ibid.*, p. 173, para 148.

framework of PPP contracts, substitution is grounded in legislation specific to this type of agreement31 while also reflecting general contractual principles, including the obligation of the debtor to fulfil its contractual obligations, albeit through administrative mechanisms rather than through the courts.[1]

3.2 The Legal Nature of Substitution in a Partnership Contract

As previously established, a partnership contract constitutes an administrative contract subject to a special and complex legal regime. Within this framework, the administrative authority enjoys the privileges inherent in administrative contracts in its dealings with the contracting parties. Among these are coercive sanctions that enable the administration to compel the contractor to fulfil its contractual obligations, thereby ensuring the execution of the contract and safeguarding the public utility. These sanctions do not result in the termination of the administrative contract, which remains in force. Substitution is regarded as one of the most important of these sanctions, raising the question of its legal nature.

Administrative contracts of all types are among the principal instruments through which the administration manages public facilities and provides services in furtherance of the public interest. Under general contract law, contractual relations are governed by the principle that “the contract is the law of the contracting parties”, reflecting the principle of contractual stability and precluding unilateral amendment or termination absent mutual consent. However, this principle does not apply absolutely to administrative contracts, given their direct connection to public services and the public interest.[2]

Accordingly, the administrative authority enjoys numerous privileges vis-à-vis its contractors to achieve the objectives of the public service.[3] Because of the importance of PPP contracts and the general reliance of countries on this type of contracting—as previously mentioned—they must inevitably have privileges aimed at protecting the public facility and the project associated with it. The power of substitution is consistent with this

[1] Article 288 of the Kuwaiti Decree-Law No. 67 of 1980 promulgating the Civil Code stipulates: ‘(1) In the case of an obligation to perform an act, if the debtor fails to fulfil their obligation, the creditor may request authorization from the court to enforce the obligation at the debtor’s expense, provided such enforcement is possible. (2) In urgent cases, the creditor may enforce the obligation at the debtor’s expense without authorization from the court.’ See also Article 266 of the Saudi Civil Transactions Law, Royal Decree No. M/191 (29/11/1444 AH) and Article 209/1 of the Egyptian Civil Code No. 131 of 1948. Likewise, Article 1144 of the French Civil Code stipulates: ‘In the event of non-performance, the creditor may request the enforcement authority to enforce the obligation themselves at the debtor's expense, provided they obtain an enforceable instrument from the court.’

[2] In accordance with the binding force of the contract under private law, the contracting authority initially possessed only limited powers in that it could not amend the terms of the contract without the consent of the other party. This approach prevailed until the beginning of the twentieth century, when the view gradually emerged that, although the administration could not unilaterally introduce reservations or amendments into the contractual text, its role as a regulatory authority responsible for safeguarding public order and its constituent elements entitled it to adopt certain measures capable of modifying some contractual conditions. F. Krikou and N. S. Larbaoui, ‘The legal basis for the administration’s right to amend the administrative contract’, *Journal of Human Sciences*, (43) (2015): 434.

[3] The Egyptian Administrative Court affirms this: ‘The legislator has granted the administrative authority certain powers to confront a defaulting contractor in fulfilling their contractual obligations, giving it the right to terminate the contract or execute it at the contractor's expense, charging the contractor for price differences and expenses incurred, without resorting to the courts.’ Judgement in Appeal No. 32 of 1949 (23 February 2010), in Al-Jassem, *supra* note 5.

logic. Within the framework of PPP contracts, substitution constitutes a coercive measure directed at the investing contractor. It has been established for the benefit of the facility and in the public interest and derives from the general regime governing administrative contracts, rather than from an express contractual stipulation.

In determining the legal nature of substitution, it is necessary to recall that administrative contracts form part of a broader, complex legal process comprising numerous stages and administrative actions.[1] These include preparatory measures preceding the contracting process, such as securing financial allocations and issuing licenses or authorizations; procedures relating to contract formation, including tendering, the evaluation of bids, and the awarding of the contract;[2] procedures related to contract execution and supervision, such as amendment, the imposition of penalties on the contractor for breach of contractual obligations,[3] or termination in the public interest;[4] And finally, actions relating to the post-execution phase, including the return of financial guarantees upon satisfactory completion of the project.[5]

Within this complex process, the administration issues unilateral legal actions that are separable from the contract itself. These separable acts, which can be considered independent decisions or actions, are capable of producing specific legal effects without affecting the validity or continuation of the contractual relationship.[6] Separable administrative decisions may therefore be defined as unilateral decisions that contribute to the formation, execution, or completion of the administrative contract, while remaining distinct from it in nature. As such, they are subject to challenge by way of annulmen.

Separable decisions constitute administrative decisions in the general sense. They express the binding and unilateral will of the administration, in accordance with applicable laws and regulations, with the aim of producing legal effects by creating, modifying or extinguishing legal positions.[7] Although they form part of the broader contractual process,

[1] A contract to which an administrative body is a party, whether administrative or civil, undergoes multiple stages and various procedures until it is completed. Those procedures carried out by a decision of the competent authority have the characteristics and elements of an administrative decision and are separate from the contract and are subject to annulment.' Judgement of the Kuwaiti Court of Cassation (Administrative Circuit) in Appeals Nos. 925 and 82 of 2005 (28 November 2004), in Al-Jassem, *supra* note 5.

[2] G. S. Sari, *Separable Decisions in the Field of Administrative Law* (Cairo: Dar Al Nahda Al-Arabiya, 2002), 63.

[3] Regarding the rulings of the French and Egyptian administrative courts in particular, see M. A.-A. Al-Sinnari, *Principles and Provisions of Administrative Contracts in Theory and Practice* (Cairo: Dar Al-Nahda Al-Arabiya), 88.

[4] Regarding the administration's termination of its contracts in general, see M. S. A. El-Sayed, *The Administration's Authority to Terminate the Administrative Contract: A Comparative Study* (no publisher, 1993).

[5] Sari, *supra* note 35, p. 63.

[6] *ibid*., p. 43 *et seq*. The Kuwaiti Court of Cassation (Administrative Circuit) has stated that 'a contract in which an administrative body is a party, whether it is an administrative or civil contract, goes through multiple stages and procedures until it is completed. Those procedures carried out by a decision of the competent authority have the characteristics and elements of an administrative decision, and are separate from the contract, and are subject to annulment'. Judgement in Appeals Nos. 925 and 82 of 29 November 2004, in Al-Jassem, *supra* note 5.

[7] Regarding administrative decisions, see S. Al-Tamawi, *The General Theory of Administrative Decisions: A Comparative Study*, 6th edition (Cairo: Dar Al-Fikr al-Arabi, 1991); R. Fouda, *Elements of the Existence of an Administrative Decision: A Comparative Study*

they differ in nature from the contract itself and fall outside the scope of the contractual relationship.[1] They are therefore part of the structure of a legal process that falls under the jurisdiction of the ordinary or administrative courts, based on their full authority. These decisions are separated from that process and are subject to separate challenges by way of annulment.[2]

On this basis, the coercive measures available to the administration against its contractors, including substitution, are regulatory rather than contractual in nature.[3] The administration may therefore exercise the power of substitution even in the absence of an express contractual provision.[4] Substitution is a matter of public order, and the contracting authority may not waive or restrict this prerogative under any circumstances, whether or not it is explicitly stated. This conclusion is supported by legislation granting the contracting authority the power to take measures to ensure the continuity of the project and the associated public service upon the expiration or termination of the contract, or in the event of a breach.

In this regard, Article 18 of Kuwaiti Law No. 116 of 2014 provides that 'any agreement contrary to the statutory rules governing contract duration, asset ownership, and the transfer of the project to the state 'shall be absolutely null and void, as shall all its consequences'.[5] Similarly, Article 28 of the Saudi Privatization System confirms the right of the contracting authority to terminate the partnership contract, the subsidiary contract, or both unilaterally in cases of serious breach, failure to deliver agreed quality standards, or in the event of bankruptcy, liquidation, or where required by the public interest.[6]

Accordingly, the temporary management or operation of the project by the administration constitutes a matter of public order and an inherent prerogative of the contracting authority,

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(Cairo: Dar Al-Nahda Al-Arabiya, 1999); A. K. Shatnawi, *Studies in Administrative Decisions* (Amman: University of Jordan Publications, 1987); M. Hafez, *The Administrative Decision: A Comparative Study* (Cairo: Dar Al-Nahda Al-Arabiya, 1993).

[1] *ibid.*, Appeals 925 and 82 before the Kuwaiti Administrative Court.

[2] A. H. Hashish, *Separable Decisions and Administrative Contracts: A Comparative Study in Egyptian and French Law* (Cairo: Dar Al-Nahda Al-Arabiya, n.d.), 495.

[3] Regarding the jurisprudential approach to the nature of substitution, see A. A.-M. Atiya, *The Contractor's Rights in the Face of Exceptional Administrative Powers During the Execution of the Administrative Contract: A Comparative Study* (Cairo: Dar Al-Nahda Al-Arabiya, 2020), 904.

[4] 'In order to achieve the goals and objectives of this authority, the administration enjoys privileges and powers that negate any contractual character, in order to guarantee the proper functioning of the public utility regularly and consistently, and its optimal exploitation and management. This is guaranteed by the rights of supervision, intervention, and amendment it enjoys as dictated by the public interest. These are rights that the administration cannot waive. Moreover, when it exercises these rights, it cannot be argued that it affects the original contract or violates contractual conditions, because the procedures it takes in this regard deal with a special legal system related to a public utility. It has the right to amend or terminate the contract itself prematurely whenever the public interest so requires, even if the contract does not contain a provision authorizing it to do this.' Kuwaiti Fatwa and Legislation Department, Fatwa No. 2/300/96-771 (17 April 1997); *Encyclopaedia of Principles of Administrative Justice, 1982-1999, Book Three: Disputes between Individuals and Administrative Contracts* (State of Kuwait: Publications of the Fatwa and Legislation Department), 212.

[5] Article 19 of Law No. 116 stipulates that the contract may be terminated by a decision of the Supreme Committee upon the request of the Authority or the General Committee for reasons related to the public interest, with the Committee obligated to justify its decision and state the benefit resulting from this termination. See also Article 49 of the Executive Regulations of Law No. 116.

[6] Article 27 of the Saudi Privatisation System also stipulates other penalties that may be imposed on the contractor, including the imposition of delay fines or the substitution of the contractor and the assumption of its role in implementing the contract.

even where not explicitly provided for in the partnership agreement. Accordingly, the temporary management or operation of the project by the administration constitutes a matter of public order and an inherent prerogative of the contracting authority, even where not explicitly provided for in the partnership agreement. Any contractual provision that excludes or restricts this power is therefore null and void. Substitution is further characterised as a temporary measure, limited in duration to what is necessary to restore the project to its normal functioning and ensure the regular and consistent provision of public services. Its goal is the protection of the public interest, irrespective of whether the facility has suffered tangible harm, even when the contractor has committed a serious error that hinders the facility from providing its services.[1]

3.3 The Legal Basis for Substitution

Research has affirmed that substitution is a privilege enjoyed by the contracting administrative authority vis-à-vis its contractor (the investor), aimed at ensuring the continued operation of the facility and project in providing services to the public in accordance with the public interest. This privilege is linked to, and derives from, the system governing administrative contracts. This raises the question of the true legal basis of this privilege. Addressing this question leads to a clearer understanding of the legal nature of substitution, particularly as to whether its use by the contracting administrative body a requirement is grounded in contractual provisions (the partnership agreement) or a fundamental right exercised independently of the contractual framework.

Legal opinion differs on the valid basis for establishing the right of substitution. Some scholars attribute it to the criterion of public authority, arguing that the contracting administrative body exercises this right not in its capacity as a contracting party, but as a public authority party to the contract. According to this view, substitution constitutes an administrative decision external to the contract and separate from it, resulting from the administration's exercise of its specific public powers rather than from contractual clauses.[2] However, this criterion is untenable, as public authority is considered a means, not an end. The administration does not exercise a contractual right, but rather a power conferred upon it by virtue of its status as a public authority. Accordingly, this approach conflates means and ends. Public authority is the means through which the administration

[1] Regarding the general characteristics of substitution, see Atiya, *supra* note 43 at 893.
[2] O. A. Al-Bourini, 'Administrative decisions that can be separated from the administrative contract and judicial oversight of them', *Journal of Law, Kuwait University*, 37(1) (2013): xx-xx.

achieves its fundamental purpose: the management of public facilities in a manner that serves the public interest and protects public funds.[1]

Other legal scholars, by contrast, have relied on the public utility and its needs as the basis for the administration's authority to unilaterally amend its contracts.[2] The principle of the adaptability of public utilities constitutes a fundamental principle upon which the contracting authority relies to exercise its powers and privileges vis-à-vis its contractors. This principle allows the administration to amend the legal and regulatory rules governing the operation of the public utility and to modify its service patterns to ensure responsiveness to developments in the public interest and societal needs, thereby enabling the provision of services at the lowest cost and with optimal efficiency.[3] This principle is rooted in the discretionary authority vested in the administration to regulate public utilities and ensure their proper operation. It is a principle of public order that does not require explicit legislative provision and cannot be waived by the administration or modified by agreement.

Accordingly, the contracting administrative authority may amend the obligations of the contracting party during the execution of the administrative contract in accordance with the principle of adaptability and the requirements of the public interest. This is justified by the inability of the contracting authority to anticipate all the circumstances that may affect the public service, thereby necessitating interventions to ensure continuity of service.[4] This approach has been affirmed by the Kuwaiti administrative judiciary. The Kuwaiti Court of Cassation has stated that:

> The Kuwaiti Court of Cassation has stated that, in exercising its power of amendment within the bounds of legality, the administration neither deviates from the contract nor commits an error, but rather exercises a legally established right derived from the nature of the public service and its connection to the contract, even in the absence of an express contractual provision or the consent of the other party. This power relates to the public order and cannot be relinquished.[5]

[1] See Nabulsi, *supra* note 2 at 334.
[2] See Droit des services publics, Dalloz, 1995, p. 43; J. Carbagjo, cited in Nabulsi, *supra* note 2 at 335.
[3] M. Al-Mutawalli, *The Principle of Equality before Public Utilities as Applied to the Distribution of Health Services in Egypt* (Cairo: Dar Al-Nahda Al-Arabiya, n.d.), 124.
[4] A. M. Al-Jarboa, 'Controls of the authority of administration in amending its administrative contracts by its unilateral will: An analytical study in light of the jurisprudence of the Board of Grievances', *King Saud University Journal of Administrative Sciences* 2(1) (2008): 74.
[5] See the ruling of the Kuwaiti Court of Cassation (Administrative Circuit) in Appeal No. 493 of 1999 (19 June 2000), in Al-Jassem, *supra* note 5. See also Appeal No. 82/88 of 1989; *Encyclopaedia of Principles of Administrative Judiciary*, *1982-1999*, *supra* note 45 at 261.

On this basis, substitution is grounded in the concept of the public utility and the necessity of ensuring its continuous and regular operation. The continuity of public services justifies the exceptional powers granted to the contracting administrative authority during the execution of administrative contracts. This is because the administrative body possesses discretionary powers to choose the appropriate method for performing its assigned tasks, ensuring the regular and continuous operation of public utilities in providing services to beneficiaries.[1] These powers stem from the general principles governing administrative contracts and relevant legislation, even where they are not expressly stipulated in the contract. Consequently, substitution derives its legal basis from the public utility itself, which is subject to change in response to circumstances and evolving needs, and the contracting administrative authority is required to respond accordingly.[2] No entity may relinquish this power, because it pertains to public order. This power is not absolute but is subject to limitations including proportionality and restrictions concerning the additional burdens imposed on the contractor.

Although a partnership agreement results from the convergence of two wills,[3] those wills are directed towards fulfilling the needs of the public facility, achieving the public interest, and ensuring continuity of service provision.[4] The administrative authority must have the power to take action to guarantee that continuity, including the right to amend the contract in accordance with the public interest.[5] The contractor's acceptance of the conditions set by the administrative authority at the time of contracting constitutes acceptance of the privileges inherent in the legal regime governing public facilities. These privileges arise from the nature of the facility (the project) and not from contractual conditions.[6]

The administrative body has the original authority to regulate and operate the facilities. It is therefore essential that the administration possess powers commensurate with necessity

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[1] Appeal No. 1113 of 2004 (27 December 2005), in Al-Jassem, *supra* note 5.

[2] M. R. A. Wahab, *Principles of Administrative Law* (Beirut: Al-Halabi Publications, 2005): 531. In the same vein, the Egyptian Administrative Judiciary affirms that 'administrative contracts are distinguished from civil contracts by a special character based on the needs of the public service that the contract aims to facilitate, and the prioritization of the public interest over the private interests of individuals. Consequently, the administration has the authority to supervise and direct the implementation of administrative contracts and always has the right to change the contract terms and add new conditions as it deems more in line with the public interest, without the other party objecting that the contract is the law between the contracting parties [...]'. Judgement of the Supreme Court in Appeal No. 582 of 40 Q (26 January 1999), in Al-Jassem, *supra* note 5.

[3] The jurisprudence of this court has established that a contract is the law of the contracting parties, and is therefore considered to be law, or a private law between those parties, even if its origin is the agreement between them. Consequently, its provisions are the reference for determining the rights and obligations of each party towards the other. See Judgement of the Egyptian Supreme Administrative Court in Appeal No. 1421 of 2005, Session 27 of 2007, in Al-Jassem, *supra* note 5.

[4] See the aforementioned legal texts relating to the legislation of the countries of comparison.

[5] Judgment of the Kuwaiti Court of Cassation (Administrative Circuit) in Appeal No. 493 of 1999 (19 June 2000), in Al-Jassem, *supra* note 5.

[6] In this context, the Administrative Department of the Kuwaiti Court of Cassation states that 'in an administrative contract, the interests of the two parties are not equal, in order to give precedence to the public interest. Therefore, the administrative authority has the right to amend the terms of the contract related to the operation and organization of public facilities by its sole management'. Judgement in Appeal No. 61 of 2001 (14 October 2002), in Al-Jassem, *supra* note 5.

and in the public interest. In exercising this power, it does not deviate from the contract nor commit any error, but rather exercises a right and privilege derived from the provisions of the contract on the one hand, and from the nature of the facility and its connection to the contract on the other. This right requires neither explicit stipulation in the contract nor the consent of the other party. It is based on the administration's regulatory authority regarding that aspect of the contract relating to public order. Any reference in the contract to this right merely serves to regulate the power of amendment and outline the conditions and circumstances of its exercise and the resulting consequences, without infringing upon the administration's inherent right to amend.[1] The contracting party cannot plead ignorance of these privileges and remains obliged to comply with all decisions and legal or material actions issued by the contracting administration, whether derived from contractual provisions or relevant legislation.[2]

As the above makes clear, the execution of contractual obligations in administrative contracts is not facilitated in the same way as in private law contracts, in which either party may claim non-performance of their obligations if the other party fails to fulfil their contractual obligations. In administrative contracts, by contrast, the contractor is fully aware of the privileges the administrative body enjoys, whether explicitly stated in the contract or not. Furthermore, the nature of administrative contracts is such that the contractor is essentially an auxiliary partner in serving and maintaining the regular operation of the public service. They are obliged to carry out the orders issued to them in this regard and cannot claim that the administrative body has not performed certain actions or procedures, failed to fulfil some of its obligations, or that there are disagreements in viewpoints or interpretations of contract clauses related to the execution process, though they do have the right to claim compensation from the contracting authority. Conversely, failure to comply exposes the contractor to the penalties available to the administrative body if such inaction affects the process. In this context, implementing the administrative contract includes imposing late penalties, confiscating insurance amounts, withdrawing the work, or any other coercive penalty that the administration deems appropriate, including,

[1] See the ruling of the Kuwaiti Court of Cassation (Administrative Circuit) in Appeal No. 493 of 1999 (19 June 2000), in Al-Jassem, *supra* note 5. This aligns with Article 49 of Decree No. 78 of 2015 issuing the Executive Regulations of Law No. 116 of 2014: 'The partnership contract must include a condition stipulating the prior agreement of the contracting investor to transfer ownership of his shares in the project company and other assets owned by the project company, in order to ensure the continuity of the project and to enable the new investor to fulfil his contractual obligations.'

[2] J. J. Nassar, *A Concise Guide to Administrative Contracts* (Cairo: Dar Al-Nahda Al-Arabiya, 2001): 206.

of course, substitution.[1] This constitutes the basis and legal justification for the privileges enjoyed by the administrative authority in relation to administrative contracts in substitution. This is because the power of substitution derives from the nature of the facility itself and not from the terms of the contract.[2]

4. Grounds for Substitution

Substitution is not a privilege exercised entirely at the discretion of the contracting authority. Rather, it must be exercised within the framework of the principle of legality, which requires that, when exercising its privileges, the administrative authority must aim to achieve the public interest. Furthermore, the authority's intervention must be limited to what is necessary to ensure the proper execution of the contract and the regular and continuous operation of the public service. Substitution must therefore be based on sound and justifiable grounds. The foundation of this authority vis-à-vis the contractor lies in the continuing obligation of the administration towards the public, as it remains responsible for managing the public service and meeting public needs. This raises the question of the grounds for substitution and the requirements imposed by administrative legality.

4.1 Failure to Perform Contractual Obligations and Breach of Contractual Terms

Substitution by the contracting administrative authority becomes necessary where the project company fails to fulfil its contractual obligations in a manner that disrupts the regular and continuous provision of public services. This may occur in cases of total or partial shutdown of the public utility. It must be emphasised that substitution is an exceptional measure and should be exercised only in narrowly defined circumstances. Accordingly, the extent to which the investor has failed to fulfil their contractual obligations and the impact of this failure on the progress of the project must be assessed in light of both the applicable legislation and the terms of the partnership contract.

Substitution constitutes a remedial intervention aimed at addressing delays or non-compliance in contract performance. Its purpose is not punitive but rather to ensure the continuation of the project and, where possible, to enable the contractor to resume the fulfilment of its obligations. This is confirmed by Article 49 of Decree No. 78 of 2015 issuing the Executive Regulations of Kuwaiti Law No. 116 of 2014, which provides that,

[1] See the rulings of the Kuwaiti Administrative Court in Appeal No. 61 of 2001 (14 October 2002) and Appeal No. 565 of 1999 (6 November 2000), and the rulings of the Egyptian Supreme Administrative Court in Appeal No. 582 of 1999 (26 January 1999) and Appeal No. 3239 of 1999 (23 February 1999).

[2] M. M. A. El-Enein, *Encyclopaedia of Administrative Judiciary and Applications of the Laws of Cassation and Auctions on Administrative Contracts According to the Rulings and Fatwas of the State Council up to 2009*, Book Two (Cairo: Maktabat Nadi Majlis al-Dawla), 204.

with the approval of the higher authority and at the request of the public entity supervising the project or the financing entities, the contractor may be replaced by another investor to complete the remaining contract period, in accordance with the contractual terms governing substitution.

Article 49 further stipulates that substitution may be implemented where the contracting investor fails to fulfil their contractual obligations or breaches any of its terms and fails to rectify this breach within the period stipulated in the partnership agreement, thereby affecting the proper functioning of the project.

Similarly, the Executive Regulations of the Saudi Privatization Law stipulates that 'If the contractor breaches one or more parts of the project...'.[1] Partial withdrawal from the contractor is affected by a decision of the head of the relevant government entity or his designee, based on a recommendation from the competent committee, with due notification to the contractor. [2]

The authority of the administration to adopt such measures in response to non-compliance is also affirmed by the UNCITRAL *Legislative Guide on Privately Financed Infrastructure Projects*,[3] which recognises the duty of the contracting authority to ensure service provision in accordance with applicable law and contractual terms. This necessarily entails the right to assume temporary operation of the facility in the event of a serious breach by the concessionaire. In most government contracts, this right is presumed even in the absence of any express legislative or contractual provision.[4]

In this context, substitution may also be understood in light of the civil law principles relating to the specific performance of obligations, whereby the debtor is required to fulfil the commitments agreed with the creditor. In construction contracts, the contractor bears an obligation to perform and execute the agreed works diligently, in accordance with the principle of good faith.[5]

4.2 Serious Error

Substitution may also be justified where the investing contractor has committed a serious error in the performance of its contractual obligations that disrupts the regular and continuous operation of the public service. Such an error indicates the contractor's inability

[1] Article 136, paragraph 1.
[2] *ibid.*, paragraph 2.
[3] UNCITRAL, *supra* note 28.
[4] *ibid.*, p. 172.
[5] According to civil law, if a contractor refuses to perform the work voluntarily, the employer may resort to the courts and the competent public authority to enforce the contract against the debtor. This enforcement takes three main forms: specific performance, enforcement through compensation, and enforcement through coercive fines. See M. Sadeqi, 'The contractor's obligation to complete the work', *The Journal of the Iraqi University* (50) (2021): 535.

to fulfil its obligations, leading to the partial or complete suspension of service provision. It must be emphasised, however, that substitution would harm the interests of the project company if exercised merely to enable the contracting administrative authority to seize control of the project without valid justification. This necessitates a very narrow interpretation of the notion of serious error and a clear distinction between serious breach and mere dissatisfaction with performance.

Legislation often refers to "serious error" without defining its specific manifestations, thereby leaving its interpretation to the discretion of the contracting authority.[1] Judicial practice has generally construed serious error in administrative contracts as the failure to commence work, irregular performance, or significant delay or slowdown. [2] The concept remains difficult to define in practice, however, and delay or slowness in performance does not constitute a serious error in every case. The assessment must be linked to the nature of the project and the extent to which service continuity is affected.

The legitimacy of the decision to substitute therefore depends on the existence of a clearly established serious error and the necessity of intervention to protect the public interest—which ultimately is what determines the legitimacy of the contracting authority.[3] Despite the difficulty in defining the nature and forms of gross error, there is no harm in legislation stipulating cases of gross error and not relying on a vague term that is open to much interpretation, especially if the contracting authority intervenes based on a gross error by the investor without a clear definition of this error committed by the contracting investor.[4] As previously noted, the essence of the partnership is based on the contribution of the local and international private sector in establishing, managing and exploiting the state's strategic projects, which means that the expansion of administrative bodies in interpreting serious error may have negative effects with this trend and the policy adopted by them, so that it becomes an environment that repels investment. As the UNCITRAL *Legislative Guide on Privately Financed Infrastructure Projects* indicates, the contracting authority's

[1] In Article 51 of the Executive Regulations of Kuwaiti Law No. 116, the legislator attempted to define the serious error of project failure by stipulating that 'a project is considered to be in default if the project company is exposed to circumstances beyond its control that would disrupt the proper functioning of the project and prevent this company from fulfilling its contractual obligations in accordance with the agreed conditions, and the contracting investor or the project company must take the necessary care to address the circumstances that led to the failure and work to remove its causes […]'.

[2] The Egyptian Supreme Administrative Court affirms that 'the administrative authority's right to withdraw from a project arises merely from the contractor's delay in execution or breach of contract terms, and it has the right to exercise this right whenever it deems appropriate [...]. This means that it cannot be compelled to wait until the contract expires to exercise this right, as long as it believes the contractor is not serious about fulfilling their obligations or has ceased execution. To argue otherwise would disrupt the functioning of the public service'. See Abdullah Nawaf Al-Anzi, *The Legal System of Penalties in Administrative Contracts* (Alexandria: Dar Al-Jami'a Al-Jadeed, 2010) 121.

[3] Al-Bourini, *supra* note 48.

[4] French administrative law has permitted the contracting authority to substitute itself for the contractor in various circumstances, such as abandonment of the position or workplace, refusal to comply with change orders, or gross negligence in fulfilling contractual obligations. See A. O. Ayad, op. cit., p. 358.

right to intervene constitutes the most extreme measure available and may raise concerns among investors that it could be used to impose unilateral control over the project.

Accordingly, it is desirable for legislation to define the circumstances constituting serious error and to limit the right of the contracting authority to intervene to cases of gross negligence or substantial failure in service provision. It is equally important to clarify that substitution is a temporary measure aimed at remedying a specific emergency or failure, and that the contractor should resume responsibility for the project once the underlying issue has been resolved.[1]

5. Regulation of Substitution and its Legal Effects

As previously established, substitution is one of the privileges exercised by the contracting administrative body against the project company (the contractor) in order to protect the public facility and ensure the continuity of its services in accordance with the public interest. This privilege enables the administrative body to intervene directly, without recourse to the judiciary and regardless of whether substitution is stipulated in the partnership contract, by virtue of the discretionary powers it enjoys in this regard. However, this privilege and associated discretionary powers cannot be exercised arbitrarily or outside the parameters of administrative legality.

As noted above, substitution is exercised by the contracting administrative body in accordance with applicable legislation and the general principles governing administrative contracts. For this privilege to be legitimate, it must be subject to a set of procedural and substantive controls.

5.1 Procedural Controls

It has already been observed that administrative contracts, including partnership agreements, are complex legal arrangements involving multiple stages and formalities before, during, and after implementation. Many of the actions taken by the contracting administrative body in this context constitute administrative decisions, which must satisfy the requirements of legality in all their essential elements. Accordingly, the substitution procedure must comply with the procedures prescribed by the relevant legislation; failure to do so renders the decision unlawful and subject to annulment and liability for compensation.[2]

[1] UNCITRAL, *supra* note 28 at 172.
[2] 'While the administrative authority has the power to impose penalties on a contractor who fails to fulfil their obligations in any way, whether by complete non-performance or by delay, the judiciary has the authority to oversee the administrative authority's

A comparative review of legislation reveals that partnership contracts are subject to several essential procedural requirements to which the contracting administrative body must adhere. These include the submission of a substitution request by the funding entities, as provided for in Article 49 of Decree No. 78 of 2015 issuing the Executive Regulations of Kuwaiti Law No. 116 of 2014, which states:

> With the approval of the Supreme Authority, and based on the request of the public entity supervising the project, or the authority or the funding entities, the contractor may be replaced by another investor to take his place to complete the contract period, in accordance with the conditions agreed upon in the contract document and the substitution contract […].[1]

Similarly, Article 25 of the same law provides that:

> If the contractor investor fails to perform his contractual obligations or commits serious errors that affect the regular and continuous progress of the project or lead to its cessation or expose him to bankruptcy, the Supreme Committee may, based on the request of any of the authority or the public entity supervising the project or the funding entities—if any—replace the contracting investor with another investor to take his place to complete the contract period.

In the same vein, the Executive Regulations of the Saudi Privatization System provide in Article 136 that:

> Partial withdrawal from the contractor shall be by decision of the head of the government entity or his delegate, based on a recommendation from the bids examination committee or the committee responsible for procurement and the contractor shall be notified of this.

Given the particular importance of partnership contracts due to the frequent involvement of foreign investors and the close connection between substitution and the protection of public funds, the entities requesting substitution must exercise caution and prudence. Substitution entails significant risks for the continuity of the project. For this reason, the financial aspects of the substitution must be clearly defined in advance to ensure uninterrupted operation and to prevent any harm to public funds.

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use of this right. Its power in this regard is broad, extending beyond simply reviewing the legality of the penalties imposed by the administration to include, in some cases, their proportionality to the contractor's alleged shortcomings.' Judgement of the Commercial Division of the Kuwaiti Court of First Instance, Appeal No. 337 of 200 (15 January 2001), in Al-Jassem, *supra* note 5.

[1] See also Article 3 of Decree No. 78 of 2015 issuing the Executive Regulations of Kuwaiti Law No. 116 of 2014, which relates to the competencies of the Supreme Committee for Public-Private Partnership Affairs.

As is well established, administrative authorities act within the limits of the financial resources allocated to them under the general budget. They are not permitted to exceed these limits, as doing so would undermine financial oversight mechanisms and potentially harm the public facility and the public interest.

Comparative legislation reinforces these safeguards. Article 50 of the Executive Regulations of Kuwaiti Law No. 116 requires the preparation of a detailed report when requesting substitution, accompanied by the terms of reference for announcing the substitution request and attracting a new investor. It also limits the bidding period to one month from the date of publication in the official gazette. By contrast, Saudi legislation does not regulate these preliminary procedures, focusing instead on the method of substitution and implementation at the contractor's expense while requiring adherence to the same specifications and standards applied to the original contractor.[1]

n addition, Kuwaiti law requires that the new investor satisfy conditions equal to or more stringent than those applied to the original contractor for the substitution to be lawful.[2] These provisions reflect the approach adopted by the UNCITRAL Legislative Guide *on Privately Financed Infrastructure Projects*, which emphasises that:

> The contracting authority is often required to follow the same procedures for selecting the defaulting original concessionaire when selecting a new concessionaire to succeed him, and the contracting authority may not be able to agree, in consultation with the lenders, to engage with a new concessionaire unless he is selected in accordance with those procedures.[3]

5.2 Objective Criteria

5.2.1 The Administration's Commitment to Legality

As previously discussed, the procedure leading to substitution constitutes an administrative decision separable from the contractual process, in so far as it fulfils all the conditions and characteristics of an administrative decision. The contracting administration therefore must ensure compliance with the requirements of legality. This includes issuance by the competent authority, observance of legally specified forms and procedures, and reliance on valid reasons justifying its adoption.

Accordingly, substitution must be exercised within the bounds of legality: by the administrative body, in accordance with legal procedures, and based on justified reasons

[1] *supra*-Article 138.
[2] *supra*-Articles 25 and 50 of the Executive Regulations.
[3] UNCITRAL, *supra* note 28 at 173, para 149.

directly related to the functioning of the public utility and the execution of the administrative contract. It must be linked to the subject matter of the contract, with the public interest and the continuity of the public utility serving as its guiding objectives. This position has been affirmed by the Kuwaiti Court of Cassation (Administrative Division), which held that:

> While the administrative body has the authority to impose penalties on its contractor if the contractor fails to fulfil its obligations in any way, whether by complete refusal to perform or by delay, the judiciary has the power to oversee the administrative body's use of this right. Its authority in this regard is broad, not limited to monitoring the legality of the penalties imposed by the administration, but may extend in some cases to monitoring their proportionality to the contractor's alleged shortcomings.[1]

Thus, the privileges enjoyed by the administration vis-à-vis the investor (contractor) are not absolute. They must be exercised within the framework of the principle of legality, with the aim of achieving the public interest. Administrative oversight should be limited to what is necessary to ensure the proper execution of the contract, irrespective of the contractor's wishes. The basis of this authority lies in the administration's continuing obligation to the public as the entity responsible for managing the public facility and meeting public needs. This authority is unknown in private law contractual relationships. [2]

For substitution to be legitimate, it must be issued by the competent authority, based on valid reasons, and be connected to the subject matter and conditions of the administrative contract, with the ultimate aim of protecting the public facility.

In this regard, it must be emphasised that the legality of substitution is closely linked to its justification. Compelling and valid reasons for substitution must arise after the commencement of the contract performance, necessitating the administration's intervention. Such reasons include the investor's failure to fulfil contractual obligations or the commission of serious errors or contractual violations that threaten the continued operation of the public utility. This reflects the fundamental principle governing administrative contracts: the continuity of public utilities in providing services regularly

[1] Judgement in Appeal No. 337 of 2000 (15 January 2001), in Al-Jassem, *supra* note 5. See also, in the same vein, the judgments in Appeal No. 758 of 2005 (23 January 2007) and Appeal No. 105 of 2007 (22 June 2010), in Al-Jassem, *supra* note 5. Likewise, the Saudi Board of Grievances stresses the need for the administrative body—despite possessing a margin of discretion—to exercise caution and verify the existence of a serious breach by the contractor when withdrawing work. See Administrative Court of Appeal Judgment No. 3261/Q 1439 AH (9/9/1442 AH); *Collection of Principles Established by the Supreme Administrative Court* (Saudi Board of Grievances); <www.bog.gov.sa>.

[2] Judgment of the Kuwaiti Court of Cassation (Administrative Circuit) in Appeal No. 493 of 1999 (19 June 2000), in Al-Jassem, *supra* note 5.

and consistently. Exceptional circumstances may arise that disrupt or halt the execution of the contract, or that render its continuation harmful to the public utility. Accordingly, the parties' intent must be directed towards fulfilling their contractual obligations in a manner that ensures the continued provision of public services, serves the public interest, and, importantly, safeguards public funds.

The Administration's Obligation to Notify the Project Company and Enable Its Defence

The administration's substitution of the project company in executing the contract requires formal notification to the investor. This notification serves as a procedural safeguard for the administration, even where the contractor is already aware of their shortcomings, as it requires the administration to warn the investor of the need to fulfil their contractual obligations under penalty of sanctions. This procedure serves the interests of both parties: it guarantees the contractor's right to a defence and ensures the uninterrupted operation of the public service subject to the partnership agreement.[1]

In legal terms, formal notice constitutes a declaration by the creditor of their intention to demand the fulfilment of their obligation and serves to demonstrate the debtor's detrimental impact on the creditor.[2] If the creditor does not formally notify the debtor of the delay, the debtor is not deemed to be in legal default, and the delay does not produce its legal effects with respect to the creditor's rights. In such circumstances, the creditor cannot be harmed by the debtor's failure to fulfil their obligations. Formal notification constitutes a declaration by the creditor of their intention to place the debtor in default and urging the prompt fulfilment of the obligation. Notification is thus a legally binding, personal act, intended to warn the debtor that they need to fulfil their obligations and avoid further delays; it is directed at the debtor alone and is temporary in nature. It does not terminate the contractual relationship, nor does it create a new legal position; rather, it establishes the debtor's negligence or delay in fulfilling their obligations and enables the creditor to take further lawful measures.[3]

The right of a contractor to notify the administration is reflected in civil legislation. Article 298 of Kuwaiti Civil Code provides that: 'The debtor shall be notified by means of a formal notice or an official document that serves as a notice. Notification may also be by

[1] T. Sultan, *The Authority of the Administration to Impose Penalties on Contractors in Administrative Contracts and its Regulations: A Comparative Study* (Cairo: Dar Al-Nahda Al-Arabiya, 2010), 445.
[2] Regarding excuses in general, see A. A.-M. Attia, *The Contractor's Rights in the Face of Exceptional Administrative Powers During the Execution of the Administrative Contract: A Comparative Study* (Cairo: Dar Al-Nahda Al-Arabiya, 2020), 911 *et seq*; Sultan, *supra* note 84 at 446.
[3] Sultan, *supra* note 84 at 449.

any other means agreed upon.'[1] Similarly, Article 175 of the Saudi Civil Transactions Law stipulates that 'compensation is not due until the debtor has been notified, unless there is an agreement or legal provision to the contrary'.[2]

While Kuwaiti legislation does not expressly require notification prior to substitution, Saudi law places greater emphasis on this requirement.[3] Nevertheless, formal notification remains essential to allow the contractor sufficient opportunity to remedy the defect, thereby ensuring the best interests of the public utility and the project covered by the contract, the legality of the substitution process, and adherence to the civil law governing the execution of obligations. This is despite the contracting authority's right, derived from its discretionary powers to direct enforcement in cases of contractor failure to fulfil their obligations. The importance of prior notification also is emphasised in the UNCITRAL *Legislative Guide on Privately Financed Infrastructure Projects*, which recommends including 'a provision requiring the concession holder to issue a warning to rectify the defect within a sufficient period'.[4]

5.2.2 Justification of the Substitution Decision

The justification of administrative decisions is a fundamental procedural requirement of an administrative decision. were mandated by legislation. The failure to provide justification renders the decision procedurally invalid. For the justification to fulfil its function, it must be serious, sufficient, and contemporaneous with the issuance of the decision, and it must disclose the legal and factual grounds on which the decision was based.

Justification assumes particular importance in the context of substitution, as it protects the project company and its financial interests against arbitrary administrative action. It also enables judicial and administrative oversight bodies to assess the legitimacy of the substitution decision. Kuwaiti legislation expressly links substitution to defined grounds, including failure to perform contractual obligations, failure to remedy breaches within the

[1] Issued by Decree-Law No. 67 of 1980. Article 299 of the same law stipulates: 'There is no need for notice in the following cases: (1) If it is agreed that the debtor is in breach of the obligation as soon as he fails to fulfil it when the due date arrives. (2) If the specific performance of the obligation becomes impossible or futile due to the actions of the debtor. 3- If the subject of the obligation is compensation resulting from an unlawful act. [...] (5) If the debtor declares in writing that he will not perform his obligation.'
[2] Royal Decree No. M/191 (29/11/1444 AH). See also the ruling of the Saudi Administrative Court in Appeal No. 3261/Q 1439 AH (9/9/1442 AH) regarding the set of principles adopted by the Supreme Administrative Court/Board of Grievances mentioned above. Furthermore, Article 218 of the Egyptian Civil Code stipulates that: 'Compensation is not due except after the debtor has been formally notified, unless otherwise provided.' Similarly, Article 1146 of the French Civil Code states: 'Compensation is not payable unless the debtor has been given notice.' Regarding administrative jurisprudence trends related to formal notification, see Sultan, *supra* note 84 at 452.
[3] Saudi Privatization Law, Article 75.
[4] UNCITRAL, *supra* note 28 at 171.

specified period, commission of serious errors affecting the regular and continuous functioning of the project or leading to its cessation, or exposure to bankruptcy.[1]

By contrast, UAE partnership law does not yet provide equivalent clarity, and its executive regulations have not entered into force at the time of writing. Saudi legislation refers more generally to breach without expressly distinguishing between ordinary and serious breach.[2] Nevertheless, judicial practice confirm that oversight of substitution decisions may extend beyond formal legality to include an assessment of their suitability considering the reasons invoked.[3]

5.3 The Legal Implications of Substitution

5.3.1 Privileges of the Contracting Party

Where substitution is exercised, the contracting administrative body is required to continue fulfilling its obligations towards the investor (contractor) as if no breach had occurred, while preventing the contractor from carrying out or providing any services related to the project. At the same time, of the administrative body must bear all obligations arising from the substitution, subject to deduction of the operating costs it incurs as a result.[4]

Substitution grants the contracting authority the right to undertake a range of material and legal actions. These include entering and inspecting the project site for monitoring and oversight purposes, as well as accessing any property belonging to the project company that is used in the management or operation the project. This extends to training or manufacturing sites and to any materials supplied to serve the project.[5] During the period of substitution, the authority is obliged to exercise due care in preserving and maintaining all facilities and equipment under its temporary control and must return them to the contractor at the end of the substitution period. Failing this, it is liable for any damage caused.[6]

Substitution further grants the contracting authority the right to organise and operate the facility in accordance with the stipulated conditions,[7] including the use of project machinery, facilities, personnel, and funds allocated to its service. This use gives rise to

[1] See Article 49 of Decree No. 78 of 2015 issuing the Executive Regulations of Kuwaiti Law No. 116 of 2014. The partnership contract must include a condition stipulating the prior agreement of the contracting investor to relinquish ownership of his shares in the project company and other assets owned by the project company, in order to ensure the continuity of the project and to enable the new investor to fulfil his contractual obligations.
[2] *ibid.,* Article 136.
[3] See judgements in Appeal No. 337 of 2000 (15 January 2001) and Appeal No. 105 of 2007 (22 June 2010).
[4] H. A. Hassan, *Participation Contracts for Financing, Establishing, and Managing Public Utilities: A Comparative Analytical, Critical, Applied Study* (Alexandria: Dar Al-Jami'a Al-Jadeeda, 2016), 331.
[5] *ibid.*, p. 332.
[6] Atiya, *supra* note 43 at 908.
[7] Executive Regulations of Law No. 116 of 2014, Article 49.

two types of obligations. First, ownership of the project's assets and properties remains unchanged, and the administration remains responsible for any damage thereto. Second, the contracting administration may not reduce usage fees or impose measures that increase the financial burden on the original contractor without justification.[1] The contractor retains the right to challenge such measures in court.

Pursuant to the contract, the administration is entitled to collect the estimated fees for use of the facility. During the substitution period, it collects usage fees from those benefiting from the facility and all other revenues generated by the project, in accordance with the contract and its accompanying documents. These revenues must be regarded as public funds, given that their source is a public facility and they are managed by a public entity. As such, they are subject to the rules governing the protection of public funds, including the prohibition of seizure.[2]

5.3.2 The Contract Is Not Subject to Termination

Substitution of the contracting administration in place of the contractor is not a penalty imposed for non-performance. Rather, it is form of pressure intended to encourage the contractor to fulfil their obligations and to prevent harm to the public facility. Thus, substitution is a form of specific implementation of the obligation and cannot itself lead to the termination of the contractual relationship.

If substitution were treated as terminating the contract, the administration would have no legal basis for compelling the contractor to shoulder the costs of continued performance. Ultimately, substitution aims to ensure execution of the contract, in whole or in part, at the contractor's expense and responsibility, including any price differentials and operational costs incurred by the administration.[3]

This approach is confirmed by Article 25 of Kuwaiti Law No. 116 of 2014, which permits substitution in cases of non-performance, serious error, or

[1] See F. bin A. Al-Fawzan, 'The requirements of public interest in imposing guardianship in the administrative contract', *Journal of Islamic Research* (71) (2021): 100.

[2] See Atiya, *supra* note 43 at 910. Similarly, the Fatwa Department of the Egyptian State Council states: 'Although the funds of the facility placed under receivership remain the private property of the concessionaire and are included in the general guarantee for his creditors, applying this designation to the funds of the public facility may hinder the implementation of the principle of the necessity of the public facility's operation. This is because if the creditors seize the funds necessary for the facility's operation, it could lead to its disruption. In this case, the private interest of the creditors conflicts with the public interest, necessitating that the public interest prevail. Thus, the concessionaire's creditors are not permitted to seize the revenue within the limits required for the continued operation of the public facility.' (*ibid*., p. 910).

[3] Regarding the rulings of the administrative judiciary during the implementation phase of partnership contracts, see Tariq Abdul Raouf Rizq, *Civil and Administrative Penalties Applied to Administrative Contracts in Kuwaiti Legislation* (Cairo: Dar Al-Nahda Al-Arabiya, 2014), p. 494 *et seq*., and Hamdi Yassin Akasha, op. cit., p. 475.

> exposure to bankruptcy, while expressly limiting termination of the contract to judicial ruling, save for those cases specified by law.[1]

Like other procedures undertaken by the contracting authority regarding its administrative contracts, substitution is subject to judicial review. The Kuwaiti Court of Cassation (Administrative Division) has affirmed that

> while the administrative authority has the power to impose penalties on its contractor if the contractor fails to fulfil its obligations in any way, whether through complete non-performance or delay, the judiciary has the power to oversee the administration's use of this right. Its authority in this regard is broad, extending beyond simply reviewing the legality of the penalties imposed by the administration to include, in some cases, their proportionality to the contractor's alleged shortcomings.[2]

Accordingly, the contractor has the right to object to and appeal the substitution, as explained below.

5.3.3 Objection to Substitution

As previously noted, the partnership contract is an administrative contract governed by a special legal regime in which the administrative authority enjoys certain privileges, whether derived from the text of the contract or from the system governing administrative contracts in general. As a regulatory measure, substitution derives from public order considerations and may be exercised irrespective of whether it is stipulated in the contract. Moreover, the contracting administrative body may not waive its right to exercise this privilege under any circumstances.

Despite this, administrative jurisprudence has consistently held that substitution decisions are not subject to annulment proceedings, as they are inseparable from the contractual process and aim to complete the execution of the contract. The Kuwaiti administrative judiciary has confirmed that decisions issued by the administration in execution of administrative contracts fall within the scope of the contract. Disputes arising from these decisions are legal disputes subject to the full jurisdiction of the courts, rather than

[1] Article 19 of the same law states: 'The contract may be terminated by a decision of the Supreme Committee at the request of the Authority or the public entity for reasons related to the public interest, with the Committee obligated to justify its decision, state the benefit resulting from this termination, and estimate fair compensation to be paid to the contracting investor in accordance with what is stipulated in the partnership contract documents.'

[2] Appeal No. 337 of 2000 (15 January 2001) in Al-Jassem, *supra* note 5.

annulment proceedings. In other words, they are not considered administrative decisions but rather contractual disputes.[1]

Substitution falls outside the scope of annulment proceedings for several reasons. First, administrative decisions taken by the contracting administrative body in the course of contract execution are based on rights derived from the contractual clauses. Secondly, the right to challenge these decisions lies before the contract judge, allowing the application of the established principle that, in civil law, where a person has the right to initiate both a contractual liability claim and a non-contractual liability claim, the former suspends the latter.[2]

Accordingly, substitution falls within the jurisdiction of the contract judge (full jurisdiction) or the compensation judge. By contrast, the separate decision issued during the preparatory stage for concluding the partnership contract may be challenged independently through annulment proceedings. Substitution, however, constitutes an executive administrative decision related to the contractual process, whether grounded in the contractual text or in the public authority vested in the contracting administration.[3] This position is emphasised by the Kuwaiti Court of Cassation (Administrative Circuit, which held that

> The administrative contract, like the civil contract in terms of its fundamental elements, is nothing more than the agreement of two wills through offer and acceptance to create personal contractual obligations. While a request for annulment applies only to administrative decisions, the procedures taken by the administration based on or in implementation of the provisions of the administrative contracts it concludes are not considered administrative decisions. Consequently, a request for annulment does not apply to them, but rather they fall within the scope of civil disputes, which invoke the full jurisdiction of the courts and are outside the scope of termination proceedings.[4]

Comparative legislations reinforce this approach by recognising the right of the investing partner to challenge the actions of the contracting authority at all stages of the contractual relationship, the implementation stage, or the termination of the contract. Kuwaiti Law No.

[1] Appeal No. 878 of 2014 (19 May 2015, in Al-Jassem, *supra* note 5.
[2] See Jamal Abbas Othman, previous reference, p. 487.
[3] Examples of the first category include decisions related to launching a competition, exclusion, or cancellation of a tender. The second category includes decisions related to supervising and monitoring the contract execution process, such as decisions to confiscate the performance bond, replace the contractor, or terminate the contract. See H. Y. Akasha, *supra* note 100 at 462.
[4] Appeal No. 646 of 2002 (26 May 2003), in Al-Jassem, *supra* note 5.

116 of 2014 institutionalises this protection through Article 32), which establishes a grievance committee empowered to hear objections from stakeholders to any decision or procedure that violates the law or its executive regulations. The provision also sets strict procedural timelines for complaint or grievance, confers final decision-making authority on the Grievance Committee, and expressly empowers it to award compensation where appropriate.

The Saudi Privatization Law adopts a comparable, albeit more limited, mechanism. Article 39 grants contractors the right to submit grievances to a specialised committee, with judicial review available before the competent courts. However, this right is confined to compensation claims arising from administrative actions related to the tendering and awarding of privatisation projects, thereby excluding annulment claims relating to subsequent contractual stages, which fall within the jurisdiction of the Board of Grievances.[1] At the same time, the Law balances administrative oversight with contractual freedom by permitting, subject to approval by the competent authority, the inclusion of an arbitration clause for the resolution of disputes and a clause specifying the law applicable to the subject matter of the dispute.

6. Conclusion

The scope of administrative judicial oversight over the actions and decisions of the contracting administrative entity extends to all procedures relating to the implementation of the partnership contract. In this context, the administrative judiciary examines whether any shortcoming on the part of the contractor justifies the imposition of financial or coercive penalties, including substitution. Although the administration enjoys such privileges in relation to its contractors, judicial scrutiny of their exercise is not limited merely to legality. Rather, the administrative judiciary may also assess the appropriateness of the contracting authority’s use of its power to impose penalties on the contractor for failure or delay in performing its contractual obligations. Accordingly, the authority of the administrative judge is broad and, in certain cases, extends beyond reviewing the legality of the penalties imposed by the administration to evaluating whether the measure adopted is proportionate to the contractor’s alleged shortcoming.[2]

This study has examined one of the most important privileges enjoyed by the contracting administrative body in partnership contracts, namely, substitution. Such contracts are

[1] ‘The administrative courts have jurisdiction over […] lawsuits related to contracts in which the administration is a party.’ The Board of Grievances System, Royal Decree No. M/78 (19/19/1428), Article 13, paragraph (d).

[2] Judgment of the Kuwaiti Court of Cassation (Administrative Circuit) in Appeal No. 337 of 2000 (15 January 2001), in Al-Jassem, *supra* note 5. See also, in the same vein, Appeal No. 105 of 2007 (22 June 2010).

characterised by their long duration and the multiplicity of parties involved, including the administration, financiers, contractors and subcontractors. Under such circumstances, the implementation process may encounter material, legal, or financial difficulties, and the contractor may commit errors that affect the progress of the project and the ability of the public utility to provide services regularly and consistently. In this case, the contracting administrative body may be required to intervene directly, either by temporarily managing the project itself or by appointing a third party, with the aim of protecting the public facility and pressuring the contractor to remedy its breach and resume performance.

Substitution is one of the most important prerogatives available to the administrative body in partnership contracts. However, its exercise is subject to procedural and objective controls that determine its legality. As has been demonstrated, substitution derives from the rules governing administrative contracts generally and from legislation regulating PPP contracts. Accordingly, substitution must be exercised solely for the purpose of protecting the public facility and the associated project and be based on sound reasoning that justifies the action, not merely the desire of the administration to assert control of the project.

The study reached the following conclusions:

Substitution is, in essence, a procedure undertaken by the contracting administrative body to remove the contractor from managing the project due to their failure to fulfil their contractual obligations or their commission of serious errors that harm the public utility. The administration temporarily assumes the contractor’s role to ensure continuity of the contract and the regular and uninterrupted operation of the public utility.

The coercive measures available to the administration, including substitution, are regulatory rather than contractual in nature. Consequently, the administration may exercise this prerogative even in the absence of an explicit contractual provision, as it relates to public order and cannot be waived under any circumstances. The contracting administrative body has the right to take measures to ensure the continuity of the project and the works covered by the partnership agreement if the project company (the contractor) breaches its contractual obligations.

The legal basis for substitution lies in the public power vested in the administration and the principles governing public utilities and their operation, particularly the requirement of continuous, regular, and adaptable service provision. This authority is inseparable from the concept of the public utility and the imperative of uninterrupted service provision.

Substitution is not a penalty imposed on the contractor, but rather a protective measure aimed at safeguarding the public utility and the interests of its users. It represents a form of specific performance whereby the contractor remains liable for the consequences of its breach accountable to both the contracting authority and third parties.

The exercise of substitution must be justified by reasons arising from the contractor's failure to fulfil its obligations properly or from serious breaches affecting the execution of the contract.

The administration's use of substitution is subject to strict legal controls. It must comply with the requirements of administrative legitimacy, be based on objective justifications, adhere to prescribed procedures and forms, be issued by the competent authority, and be directed exclusively towards serving the public interest. Additionally, the administration is obligated to notify the contractor before acting and to provide reasons for its decision.

The partnership agreement cannot be terminated during the substitution phase. Substitution is a temporary measure designed to compel the contractor to fulfil its contractual obligations and to resume management of the project once the circumstances justifying substitution cease to exist.

Despite the prerogatives enjoyed by the administration, the contractor retains all the rights guaranteed by the legislation governing partnership contracts and judicial practice, including the right to challenge substitution before the competent administrative bodies or courts, and the possibility of resorting to alternative dispute resolution mechanisms such as arbitration.

6.1Recommendations

The Saudi legislator should expressly regulate substitution by clearly defining the concept and its conditions and procedures, rather than relying solely on the general principle of continuity of the public facility.

Specific legislation governing public-private partnership contracts should be enacted in Saudi Arabia, rather than relying exclusively on the existing privatization framework.

Legislators in comparable countries should identify, even if only in general terms, the circumstances or instances of serious breach that justify substitution.

The Kuwaiti legislator should expressly emphasise the obligation to notify the investing contractor prior to initiating substitution procedures.

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