

# Arbitration Rules in PSP Contracts

## Part 1: General Provisions

### Chapter 1: Definitions

#### Article (1)

Unless the context indicates otherwise, words and terms of these Rules shall have the same meaning as specified in the Law, the Governing Rules, and the Implementing Regulations. The following words and terms shall have the meanings specified herein:

<b>Rules:</b>	Arbitration Rules in PSP Contracts.
<b>Law:</b>	Private Sector Participation Law.
<b>Governing Rules:</b>	The PSP Governing Rules issued pursuant to the Law.
<b>Implementing Regulations:</b>	The Implementing Regulations of the Law.
<b>PSP Regulatory Framework:</b>	The Law, the Governing Rules, the Implementing Regulations, the NCP Regulations, and any other legislative instruments governing the PSP Projects.

### Chapter 2: Scope of Application

#### Article (2)

- 1- The Rules apply to the PSP Contracts or any Ancillary Contracts thereto governed by the provisions of the PSP Regulatory Framework for which no approval has been issued for arbitration, prior to these Rules coming into force.
- 2- The Rules shall not apply to contracts for advisory and similar services in relation to PSP Projects, and such contracts shall be subject to the applicable laws of the Kingdom, in relation to arbitration.

### **Article (3)**

The Rules shall be a part of the PSP Regulatory Framework and the provisions therein shall be applied without prejudice to other provisions set forth in the PSP Regulatory Framework.

## **Chapter 3: Objective of the Rules**

### **Article (4)**

The Rules aim to establish a regulatory and procedural framework to regulate matters related to the arbitration clause or arbitration agreement in the PSP Contract or any Ancillary Contracts thereto, and to regulate the clause or agreement to settle disputes arising from the PSP Contract or any Ancillary Contracts thereto - both within and outside the Kingdom - including determining the governing law applicable for settling such disputes.

## **Chapter 4: Adherence to the Rules**

### **Article (5)**

1. Entities subject to the provisions of the Rules - each within the scope of their competence and responsibility - shall comply with the provisions of these Rules.
2. The Concerned Entity shall be responsible for ensuring the compliance of the Contracting Authority, its employees, and work teams with the provisions hereof when carrying out tasks and activities falling within their competence, and shall undertake the requisite internal administrative arrangements to ensure compliance with these Rules.
3. The Approving Authority may refuse to grant the requisite approval for the arbitration clause or arbitration agreement if it transpires that the Contracting Authority has not complied with the Rules.

## **Part 2: In-Kind Disputes**

### **Article (6)**

- 1- The PSP Contract or any Ancillary Contracts thereto may not include a provision for settling in-kind disputes related to real estate located in the Kingdom through arbitration, or concluding an arbitration agreement in this regard.
- 2- In-kind disputes refer to disputes relating to an original right in rem or to a subordinate right in rem linked to a real estate property related to the PSP Project, including disputes relating to the ownership of a property, buildings, or facilities, but excluding disputes relating to financial claims or compensation, even if these pertain to a property.

### **Article (7)**

The Concerned Entity shall verify that any arbitration clause or arbitration agreement relating to the settlement of disputes arising from the PSP Contract or any Ancillary Contracts thereto contains an explicit provision that in-kind disputes related to real estate located in the Kingdom shall not fall under the arbitration clause or arbitration agreement.

## **Part 3: Governance Framework**

### **Chapter 1: Approving Authority**

### **Article (8)**

Without prejudice to the powers, functions, and responsibilities of the Approving Authority in accordance with the PSP Regulatory Framework, the Approving Authority shall grant the requisite approval for the arbitration clause or arbitration agreement after verifying that the Contracting Authority has complied with the Rules and meets the regulatory requirements set out in the Rules.

### **Article (9)**

The Approving Authority's approval to include an arbitration clause to settle disputes arising from the PSP Contract or any Ancillary Contracts thereto, or to conclude an arbitration agreement to settle a dispute arising therefrom, shall not be considered applicable unless it specifically includes the venue of arbitration, the applicable governing law, and the seat (center) of arbitration.

### **Article (10)**

- 1- If an independent application is submitted to the Approving Authority seeking only the approval of an arbitration clause or arbitration agreement, the Approving Authority must issue its decision within a period of not more than twenty-five (25) working days from the date of receipt of the application, and the application may include more than one PSP Project in the same sector.
- 2- If a signed PSP Contract or Ancillary Contracts do not contain an arbitration clause, an application may be submitted to the Approving Authority for the purposes of granting approval to an arbitration agreement to settle a dispute, taking into account the following:
  - a. The application shall be submitted to the Approving Authority by the Contracting Authority after having obtained the approval of the Supervisory Committee.
  - b. The application shall include the study carried out in this regard, containing the basis on which the application should be approved.
  - c. MOF approval shall be obtained in the event of any potential direct financial impact that could arise from concluding the arbitration agreement, should the approval be granted.

### **Article (11)**

Subject to article (10) of the Rules, submission to the Approving Authority shall take place for the purpose of approving the arbitration clause to be included in the PSP Contract or any Ancillary Contracts thereto; as part of the application submitted by the Contracting Authority to the Approving Authority to request approval of the PSP Project Business Case documents or approval for awarding, as applicable.

## **Article (12)**

If the required approval to include an arbitration clause to settle disputes arising from the PSP Contract or any Ancillary Contracts thereto, or to conclude an arbitration agreement to settle an arising dispute, relates to a PPP project, the Board of Directors approval is deemed automatically issued without the need for a specific decision if all of the following conditions are met:

- 1- The request relates to a PPP Project whose value is less than SAR 500 million.
- 2- The request relates to a PPP Project that has been tendered through public competition in accordance with the PSP Regulatory Framework.
- 3- Arbitration is conducted within the Kingdom, and the governing law applicable to the subject matter of the dispute is the Saudi law.
- 4- A decision is issued unanimously by the main members of the Supervisory Committee that includes confirmation that the requirements and controls set out in the Rules have been met for the approval of the arbitration agreement, and with the approval of the Supervisory Committee to conclude the arbitration agreement, provided that the Board of Directors be notified of the Supervisory Committee's decision.

## **Chapter 2: Supervisory Committee**

### **Article (13)**

Without prejudice to the Supervisory Committee's powers, functions, and responsibilities in accordance with the PSP Regulatory Framework, the Supervisory Committee shall undertake the following tasks:

- 1- Consider the proposed request for approval to include an arbitration clause to settle disputes arising from the PSP Contract or any Ancillary Contracts thereto, or to conclude an arbitration agreement to settle a dispute arising therefrom, and to agree to submitting it to the Approving Authority for approval.

- 2- Approve the wording of the arbitration clause to be included in the PSP Contract or any Ancillary Contracts thereto, or the wording of the arbitration agreement, provided that it includes the venue of arbitration, the applicable governing law, and the seat (center) of arbitration.
- 3- Sign the arbitration agreement on behalf of the government if it is in a document independent of the PSP Contract or any Ancillary Contracts thereto.
- 4- Provide direct oversight and follow-up on any dispute referred to arbitration.

### **Chapter 3: Concerned Entity**

#### **Article (14)**

Without prejudice to the powers, functions, and responsibilities of the Concerned Entity in accordance with the PSP Regulatory Framework; the Concerned Entity shall undertake the following tasks:

- 1- Prepare the necessary study containing the basis for requesting approval to include an arbitration clause to settle disputes arising from the PSP Contract or any Ancillary Contracts thereto, or to conclude an arbitration agreement to settle a dispute arising therefrom, and the justifications for choosing the venue of arbitration, the applicable governing law, and the seat (center) of arbitration, while indicating the positive effects of granting approval, the negative effects of disapproval, and submitting the study to the Supervisory Committee in order to adopt and approve submitting it to the Approving Authority.
- 2- Draft the arbitration clause to be included in the PSP Contract or any Ancillary Contracts thereto, or draft the arbitration agreement, and submit it to the Supervisory Committee for approval.
- 3- Take over the implementation work relating to any dispute referred to arbitration, including selection of arbitrators, authorization and oversights of lawyers; the support necessary to enable them to represent the Government in the dispute; matters related to proof and evidence; and cover expenses related to the dispute.

#### **Article (15)**

- 1- The Concerned Entity shall verify that the contract management and monitoring plan - prepared in accordance with the requirements of the PSP Regulatory Framework - includes an initial mechanism for dealing with any dispute that the government is a party to, provided that this mechanism include criteria, procedures, and governance for selecting arbitrators and appointing lawyers.
- 2- If a dispute is referred to arbitration; the Concerned Entity must update the contract management and monitoring plan to include an integrated framework that regulates dispute management and government representation in the lawsuit, provided that it includes the following:
  - a. Dispute management governance at the level of the Concerned Entity, the tasks and responsibilities, identifying persons involved in dispute management and their tasks and responsibilities, and the mechanism for coordinating work between them.
  - b. The mechanism for working with, following up on, and supervising lawyers representing the Government in the dispute, and establishing a central point of contact between the Government agency and lawyers.
  - c. The mechanism for monitoring the proceedings and filing reports to the Director-Head and the Supervisory Committee.

## **Part 4: Arbitration Rules**

### **Chapter 1: Rules for Choosing the Arbitration Method**

#### **Article (16)**

The competent courts in the Kingdom shall have jurisdiction to settle disputes arising from the PSP Contract or any Ancillary Contracts thereto, and the Approving Authority may grant approval to the agreement to settle disputes through arbitration as it deems appropriate and based on justifications therefor.

#### **Article (17)**

Arbitration may not be used as a means of resolving disputes in any of the following cases:

- 1- PSP Projects tendered through limited competition or direct contracting.
- 2- PSP Projects related to national security.
- 3- PSP Projects that are similar to contracts - including any of its Ancillary Contracts - that have already been signed and wherein jurisdiction has been granted to the Kingdom's competent courts.
- 4- Divestment Projects with an asset value of less than (100) million riyals.
- 5- PPP Projects in which the total value of the Government's cash flows to the Private Party for the entire duration of the Contract is less than (100) million riyals.

#### **Article (18)**

If the Approving Authority agrees to the arbitration clause, the Concerned Entity shall work on the following:

- 1- Provide, in the PSP Project tender documents, additional points for the bidder who accepts the jurisdiction of the competent courts in the Kingdom to settle disputes arising from the PSP Contract or Ancillary Contracts thereto.
- 2- Include in the arbitration clause or arbitration agreement an obligatory prerequisite for the application of amicable settlement proceedings before referring the dispute to arbitration.

### **Chapter 2: Rules for the Selection of the Venue of Arbitration**

#### **Article (19)**

Arbitration shall be conducted in the Kingdom. The Approving Authority may, as an exception, give approval for the arbitration to take place outside the Kingdom as it deems appropriate and based on justifications therefor.

#### **Article (20)**

Arbitration outside the Kingdom shall not be selected in any of the following cases:

- 1- PSP Projects in which the preferred bidder has a Saudi Nationality; or if the lead member of the preferred bidding consortium has a Saudi Nationality, or if the majority of the consortium members of the preferred bidding consortium have Saudi Nationality.
- 2- PSP Projects in respect of which a Contract has already been concluded - including any Ancillary Contracts thereto - in a similar project and the arbitration has been conducted locally.
- 3- Divestment Projects in which the Asset's value is less than (200) million riyals.
- 4- PPP projects in which the total value of the Government's cash payments to the Private Party for the entire duration of the Contract is less than (200) million riyals.

#### **Article (21)**

The Concerned Entity shall endeavor to include in the PSP Project tender documents additional points to the bidder agreeing to arbitration within the Kingdom.

### **Chapter 3: Rules for Determining the Governing Law**

#### **Article (22)**

The laws in force in the Kingdom shall govern the dispute. The Approving Authority may give consent to the apply a foreign law as it deems appropriate and based on justifications therefor.

#### **Article (23)**

A foreign law shall not be specified in any of the following cases:

- 1- PSP Projects in which the preferred bidder has a Saudi Nationality, or if the lead member of the preferred bidding consortium has a Saudi Nationality, or if the majority of the consortium members of the preferred bidding consortium have Saudi Nationality.

2- PSP Projects in respect of which a contract has already been concluded - including any Ancillary Contracts thereto - in a similar project and the regulations in force in the Kingdom have been defined as applicable to the subject matter of the dispute.

#### **Article (24)**

In the event that a foreign law is to be specified, it shall not be the same as the law of the nationalities held by the preferred bidder; the lead member of the preferred bidding consortium; or the majority of its consortium members.

#### **Article (25)**

The Concerned Entity shall endeavor to include in the PSP Project tender documents additional points to the bidder who agrees to specify the regulations in force in the Kingdom to be applicable to the subject of the dispute.

### **Chapter 4: Rules for Determining the Arbitration Seat (Center)**

#### **Article (26)**

- 1- In case of arbitration within the Kingdom, the Saudi Commercial Arbitration Center shall be designated as the arbitration body.
- 2- The Approving Authority may grant approval to the designation of another seat (center) as it deems appropriate and based on justifications therefor. The arbitration seat (center) shall be accredited by the Standing Committee of Saudi Arbitration Centers.

#### **Article (27)**

If the arbitration is outside the Kingdom, the arbitration center to be selected must fulfill the following conditions:

- 1- Be licensed in the State where it is headquartered.
- 2- Its headquarters shall not be located in the State whose nationality is held by the preferred bidder, the lead member of the preferred bidding consortium, or the majority of the consortium members of the preferred bidding consortium.
- 3- Be established and continuously operating for a period no less than (15) years.
- 4- The Arbitration Rules applicable at the Centre shall be in conformity with the provisions of the Arbitration Law in force in the Kingdom or with the (UNCITRAL rules) issued by the United Nations Commission on International Trade Law.
- 5- The Centre's accredited arbitration language should be Arabic or English.

## **Part 5: Final Provisions**

### **Article (28)**

Aspects relating to arbitration in respect of which there is no special provision in the Rules (e.g. language of arbitration, number of arbitrators, terms of arbitration, etc.); shall apply as agreed in the arbitration clause or agreement consistent with the relevant applicable statutory provisions.

### **Article (29)**

These Rules shall enter into force as of their approval and issuance date and shall be published in the Official Gazette.