

Legal Regulation of Participation Contracts and its Role in Supporting Public Oil Companies

Nawal Qasim Hashim

Senior Legal advisor, Ministry of Oil / Legal Department

Introduction

Due to the important role played by public oil companies in Iraq in the development of the oil and gas sector and the achievement of revenues on which the state budget depends, they strive to diversify the contracts they conclude with specialized foreign companies to develop their performance and have recently tended to conclude partnership contracts with foreign companies to develop and improve their performance depending on the financial or human resources of these companies. Defining the concept of these contracts and explaining their legal adaptation and their role in supporting public companies is one of the important issues that should be identified for the purpose of providing a sound legal environment that enables companies to conclude these contracts and achieve the intended goals of them, and this is one of the main reasons that prompted us to research the concept of participation contracts.

First: The importance of research

The importance of research is highlighted by the following:

1. The necessity of approving participation contracts to support the activity of public oil companies through the implementation of work related to the objectives of these companies in partnership with the partner and benefit from his experiences and capabilities and reflect them on the reality of work in these companies
2. Develop and organize clear work procedures for the mechanisms of concluding participation contracts and create a clear legislative environment to encourage and attract local and foreign partners.

Second: The research problem

The research problem arises in the following points:

- 1= The inadequacy of the legal base that regulated the subject of participation, and this requires intervention in order to find a legal treatment for this issue.
- 2-Lack of full knowledge of the methods of participation and the failure of public companies to deal with the frameworks and methods of participation contracts

Third: Research Methodology

The research methodology is based on a comparative analysis of everything related to participation contracts and the position of comparative legislation thereof and the study of the most important ways necessary to achieve the purpose of their conclusion.

Fourth: Research Plan

The research will be dealt with according to a systematic plan that included dividing it into two sections, the first of which was addressed in the definition of the participation contract and the

statement of its legal nature, while the second section of the plan was devoted to the statement of the legal organization of the participation contract in Iraqi law, and a conclusion of the research was prepared, including a number of conclusions and proposals.

The first topic: the definition of the participation contract

The concept of the participation contract of modern concepts imposed by the new variables and we will try through this section to define the participation contract and indicate its legal nature.

The first requirement: the definition of the participation contract

Musharaka is defined as (the agreement of two or more persons to unite their endeavors in order to make a profit)¹ and is also defined as (a contractual agreement to jointly carry out a specific purpose...)² It was also defined as "partnerships in which partners from the public and private sectors pool their resources, funding and expertise under joint management to achieve long-term growth in value for both partners."³

The Egyptian legislator defined it as (a contract concluded by the administrative authority with the project company and entrusted to him to carry out all or some of the works stipulated in Article (2) of this law), and the project company was defined in the same article as (the Egyptian joint stock company established by the winning bidder and its sole purpose is to organize participation contracts).⁽⁴⁾

As for the French legislator, he issued Order No. (559) issued on June 17, 2004 on participation contracts, as amended by Law No. (753) of 2008, which defined the participation contract as (an administrative contract under which a public sector person entrusts a private sector person with financing investment related to the necessary works and equipment for the public facility, management, exploitation and maintenance throughout the specified contract period in exchange for sums of money that the contracting administration is obligated to pay to him in a piecemeal manner throughout the duration of the contractual period, and institutions from the public and private sectors Work together to complete projects or provide services to citizens, especially in infrastructure projects).⁽⁵⁾

As for the Kuwaiti legislator, it issued Law No. (116) of 2014 on partnership between the public and private sectors, where Article (1/17) of it defined the participation contract as (a set of agreements to be concluded regarding the implementation of one of the partnership projects between the public entity and the project company in accordance with this law).

As for the Iraqi legislator, there was no explicit definition of the participation contract, as no special law was issued to regulate this contract, similar to Arab and foreign laws, and the provisions of the subject of participation were scattered between the provisions of the Investment Law No. (13) of 2006 as amended and the Public Companies Law No. (22) of 1997 as amended, where Article (7/II/2) of Law No. (50) of 2016 stipulated the Second Amendment Law of the Investment Law No. (13) of 2006 on the following (The Iraqi investor may own land allocated for industrial projects) It belongs to the state and the public sector, and it is permissible to conclude a partnership with the foreign investor in financing or management ...).

¹ d. Akram Yamlki and Dr. Bassem Muhammad Saleh, Commercial Law / Companies, Baghdad University Press, 1983, p. 9.

² Dr. Mohsen Shafiq, The Multinational Project, research published in the Journal of Law and Economics, Faculty of Law, Cairo University, first issue, 1977, p. 250

³ Akinniy Julius Ojebode Public Private Partnership (PPP) as a Mechanism for the Provision of Affordable Housing Delivery in Nigeria ,A thesis submitted to school of Environment and Technology University of Brighton for,2016 p36

⁴ Law No. (67) of 2010 regulating the participation of the private sector in basic environment projects, services and utilities.

⁵ Quoting from Dr. Harir Ahmed, The legal system of the partnership contract between the public and private sectors and its role in financing investment in infrastructure projects, research published in the Journal of Law, Institute of Legal and Administrative Sciences, University of Mostaganem, 2018, Vol. 7, No. 1, pp. 79-80.

Article (15/III) of the Public Companies Law No. (22) of 1997, as amended, stipulates the following (The company has the right to participate with sober Arab and foreign companies to carry out work related to the company's objectives inside Iraq).

Because the text of the above article came absolutely and in the absence of controls or instructions issued regarding the organization of the provisions of participation contracts, the Iraqi Council of Ministers, based on the authority vested in it under Article (80) of the Constitution, which included the authority to issue regulations, instructions and decisions with the aim of implementing laws, issued its decision No. (392) for the year 2013 circulated under the letter of the General Secretariat of the Council of Ministers No. (S.Z.\10\1\14\234338) on 17/11/2013 to facilitate the development of the text of Article (15) mentioned above. Implementation.

This was followed by the issuance of Resolution No. (96) of 2016, which included the mechanisms for implementing participation contracts and the controls that can be adopted by public companies for the purpose of concluding these contracts, but the aforementioned decision was suspended with the issuance of the Federal Budget Law for the year 2017, where Article (14 \ First) of it was approved for all ministries and entities not related to the Ministry to expand the door of private investment and participation with the private sector within the limits of their competencies and with the approval of the Council of Ministers. ⁽⁶⁾

The application of this article has also been suspended because the federal budget laws for subsequent years have not referred to the provisions of this article and therefore did not address the organization of partnership contracts with the private sector because the federal budget law is an annual law implemented during the fiscal year of its issuance, which starts from January 1 and ends on December 31 of the same year. ⁽⁷⁾

With the suspension of these two decisions, and due to the lack of instructions or controls related to participation contracts, the subject of concluding participation contracts is subject to the discretionary authority of the public company, provided that it is in accordance with the provisions of Article (15) of the Public Companies Law No. 22 of 1997, as amended, and the Ministry of Planning confirmed what was mentioned in its letter No. (4/7/2142) on 1/6/2021, in which it indicated that the work of the guide for the implementation of Cabinet Resolution No. 96 of 2016 was suspended due to the lack of a special text in the Federal Budget Law for subsequent years and the lack of controls and instructions related to partnership contracts between the public and private sectors.

From extrapolating the above legal texts, we can define the Musharaka contract as (it is the contract concluded by public oil companies with the private sector for a limited period under which the contractual tasks and legal centers of the parties are organized in accordance with the provisions of Iraqi law and also includes all agreements associated with the contract) and then subject to the rule of the contract *pacta sunt servanda*, meaning that the parties to the contract can guarantee the contract the conditions they desire and that suit their needs and goals while not harming the public interest.

⁶ Article (14 \ I) of the Federal Budget Law for the year 2017 stipulates the following: (a) Ministries and entities not associated with a ministry shall expand the opening of the door for private investment and participation with the private sector within the limits of their competencies and whenever possible and with the approval of the Council of Ministers. . The governorates shall work to expand the opening of the door for private investment, expand the opening of the door for private investment and participate with the private sector within the limits of their competencies and whenever possible and with the approval of the provincial council .

Second: The Council of Ministers may exclude the bodies specified in item I (a, b) of this article from the provisions of the laws in force in order to facilitate the expansion of investment and the participation of the private sector.

⁷ See the text of Article (1/IX) of the Financial Management Law No. (6) of 2019, which defined the fiscal year as: the period during which the Federal Budget Law is implemented, which starts from January 1 and ends on December 31 of the same year.

Subchapter two: Legal Nature of the Musharaka Contract

There is a side of jurisprudence that believes that participation contracts are administrative contracts because there is a public law person who is a party to the contract represented by one of its legal persons as a public authority⁸.

However, we do not support this trend because the Musharaka contracts are private law contracts and the consequence of considering participation contracts as private law contracts is subject to the principle of the authority of the will and the principle of pacta sunt servanda and these principles find their origins in civil law and are based on equal rights and obligations between the public partner and the private partner. Although the Iraqi legislator did not specify the nature of the Musharaka contract in the text of Article (15) of the Public Companies Law No. (22) of 1997, as amended, the following arguments can be relied upon to consider the Musharaka contract as a private law contract:

1. The legal basis for the conclusion of participation contracts, as we explained earlier, is the provisions of Article (15 \ III) of the Public Companies Law, and this article has been contained within Chapter IV (Investment and Borrowing) and it is understood from this that these contracts are in fact investment contracts and since investment contracts according to the most correct opinion in jurisprudence are private law contracts and disputes arising from them are subject to the provisions of private law.⁹
2. This article is contained in the Public Companies Law No. (22) of 1997 as amended, which is part of the commercial law system, and based on what is stated in Article (10) of the Trade Law No. (30) of 1984, public companies are considered a merchant if they conduct business in their own name and for their own account to the extent that does not conflict with the nature of the services they perform, and this confirms the jurisprudential opinion that the public group acts as a merchant based on the said article.¹⁰
3. The public companies in the participation contracts aim to achieve profit and then it is difficult to describe the contracts concluded with others as administrative contracts, as this does not apply with the definition of the administrative contract even with the imposition of the presence of the public company as a party to it because this is not enough to give it an administrative character, but the contract must be related to the activity of a public facility in terms of its organization and the conduct of its service to achieve the public interest and its conclusion by the state and the inclusion of unfamiliar conditions

The second topic: the legal regulation of the participation contract in Iraqi law

The Iraqi legislator organized the provisions of the method of participation between public companies and private sector companies under some laws, but he did not address the mechanisms of this participation and ways to implement them, despite its importance to the Iraqi economy, and the provisions of participation were scattered in some laws and we will try in this section to address the laws that referred to participation contracts in Iraqi law and we will try to refer to the controls issued by the Ministry of Oil and its role in supporting oil companies.

The first requirement: the legal basis for the method of participation in Iraqi law

The Iraqi legislator did not regulate participation explicitly, but referred to it in scattered laws, including the following:

1. Investment Law No. (13) of 2006 as amended, where Article (7/II/2) of Law No. (50) of 2016 the Second Amendment Law of the Investment Law No. (13) of 2006 stipulates the following (The Iraqi investor may own lands allocated for industrial projects belonging to the state and the public

⁸ Dr. Suleiman Mahmoud Al-Tamawi, General Foundations in Administrative Contracts, 2nd Edition, Dar Al-Fikr Al-Arabi, Cairo, 1984, p. 32.

⁹ Jinan Jassim Muscatat, The Legal System of Public-Private Partnership Contracts, PhD Thesis, University of Baghdad, 2016, p. 66.

¹⁰ Dr. Ali Fawzi Al-Musawi, Commercial Contracts for Electric Power, Al-Sanhouri Library, Baghdad, 2008, p. 28.

sector, and it is permissible to conclude a partnership with the foreign investor in financing or management...).

2. Public Companies Law No. 22 of 1997, as amended, as stated in Article (15/III) thereof that (the company has the right to participate with Arab and foreign companies to carry out work related to the company's objectives inside Iraq). It is noted that participation in this article was limited to Arab and foreign companies without Iraqi, but the Iraqi legislator was able to remedy this deficiency when issuing Law No. (28) of 2015, the Fifth Amendment Law to the Public Companies Law No. 22 of 1997, as it allowed Iraqi private sector companies the right to participate with public companies, similar to foreign and Arab companies, believing in the legislator in the need to support the private sector because of its importance in supporting the national economy.¹¹
3. Companies Law No. (21) of 1997 amended in Chapter VII on the distribution of profits and losses in Article (74/A), which states (The reserve shall be used for the purposes of expanding and developing the company's business.... And in order to participate in projects related to the company's activity).

It is noted from the above legal texts that they referred to the concept of participation, but indirectly and without mentioning any instructions or controls that determine the mechanisms of participation and how to implement them, as they granted the legal passport to public and private companies in partnership with private sector companies, but they did not indicate how, and this is a clear legislative deficiency that requires legal treatment through the issuance of controls and instructions regulating this subject, which is what the Ministry of Oil has deliberately done to promote its oil companies, and this will be clarified in the next section.

The second requirement: the controls of the participation contract and its impact on supporting public oil companies

Because the completion of the regulatory legal framework for participation contracts is essential to ensure the success of the participation experience and the advancement of the reality of our public oil companies and to provide clear guarantees for the private sector participating in these contracts because the legal framework and clear instructions are the key to regulating all the terms of the contracts and all related matters and the desire of the Ministry of Oil to improve the performance of these companies through the adoption of the method of participation, the Ministry has issued (controls to regulate participation contracts) between public oil companies and private sector companies.) included defining the concept of participation and the legal organization of it and the purpose of its preparation and the requirements of the form of the participation contract and this subject is a legal treatment of the subject of participation, especially since the controls have been circulated to the oil sector companies to work under them.

In fact, the conclusion of these contracts is not limited to the impact of public companies only, but also goes to encourage the private sector to enter into these contracts, and this is consistent with the basic principles approved by Article (25) of the Iraqi Constitution, where the aforementioned controls included (12) legal article that included how to regulate the contractual relationship between the public oil company and the private partner to implement the participation project proposed by the public company for the purpose of implementing or completing the implementation of public oil companies projects or entering with the partner to implement Works referred to it by government agencies or any other project proposed by the contracting party and agreed upon between the two parties through the signing of a partnership contract between the oil companies and the partner for a limited period under which the contractual tasks and legal centers of the two parties are organized in accordance with the provisions of Iraqi law and also includes all agreements associated with the contract.

The issuance of the above-mentioned controls helped to a large extent in enabling oil companies to conclude many contracts related to their objectives, as the Oil Projects Company concluded (6)

¹¹ Law No. 28 of 2015, the Fifth Amendment Law of the Public Companies Law No. 22 of 1997, published in Jaidah Al-Waqa'a Al-Iraqiyya No. (4376) on 17/8/2015

partnership contracts with Arab and foreign companies, as well as the heavy engineering equipment company concluded (3) partnership contracts with sober Arab companies, which confirms the importance of adopting such contracts and paying attention to them legislatively because the legislative deficiency and the scattering of legal provisions that regulated the partnership contract between the Companies Law and the Investment Law and the lack of The existence of clear mechanisms for concluding participation contracts is one of the most important challenges facing this type of contract, which requires focusing the contract on a sound, integrated, clear and explicit legal basis that achieves the interest of the parties to the contract.

The conclusion

After studying the subject of participation contracts and identifying their concept, legal nature and mechanisms of conclusion and implementation, we reached a set of results and recommendations, summarized as follows:

First: Results

1. The Iraqi law did not provide a definition of the Musharaka contract, but the definition was derived from the general provisions of the Civil Code and from the provisions of Article (15/III) of the Companies Law No. 22 of 1997, as amended.
2. Musharaka contracts have many advantages that make them different from other contracts, although there are a number of similar characteristics between them.
3. Musharaka contracts are considered private law contracts that are subject to the rule of pacta sunt servanda and the principle of the authority of the will, and disputes arising from them are subject to the provisions of the ordinary judiciary and not administrative.
4. The regulations issued for the purpose of organizing participation projects will support the activity of public companies and contribute to the development of their performance in cooperation with the private sector.

Second: Proposals

1. The need to provide a clear and explicit legal system for the subject of participation through the issuance of a law approved by the House of Representatives and published in the Official Gazette in accordance with the legal and constitutional contexts.
2. Issuing instructions to implement the provisions of Article (15/III) of the Public Companies Law No. 22 of 1997, as amended.
3. Public oil companies prepare participation contract forms that include all contractual frameworks that protect the interests and rights of the company and at the same time ensure the attraction of sober specialized companies
4. Addressing the challenges facing the issue of participation and changing its negative framework in the country by encouraging capital owners, expanding the base of private sector participation, providing expertise to workers to manage and monitor the implementation of participation contracts and developing their qualifications in all technical, legal and financial aspects.

References

1. Akinniy Julius Ojebode Public Private Partnership(PPP) as a Mechanism for the Provision of Affordable Housing Delivery in Nigeria ,A thesis submitted to school of Environment and Technology University of Brighton for,2016 .
2. Cabinet Resolution No. (392) of 2013.
3. Cabinet Resolution No. (96) of 2016.
4. Companies Law No. 21 of 1997, as amended.

5. Dr. Akram Yamliki and Dr. Bassem Muhammad Saleh, *Commercial Law / Companies*, Baghdad University Press, 1983.
6. Dr. Suleiman Al-Tamawi, *General Foundations in Administrative Contracts*, 1st Edition, Dar Al-Fikr Al-Arabi, Cairo, 1984.
7. Dr. Ali Fawzi Al-Musawi, *Commercial Contracts for Electric Power*, Al-Sanhouri Library, Baghdad, 2018.
8. Dr. Mohsen Shafiq, *Multinational Project*, research published in the *Journal of Law and Economics*, Faculty of Law, Cairo University, first issue, 1977.
9. Dr. Harir Ahmed, *The legal system of the partnership contract between the public and private sectors and its role in financing investment in infrastructure projects*, research published in the *Journal of Law*, Institute of Legal and Administrative Sciences, Volume 7, Issue 1, 2018.
10. Iraqi Civil Code No. 40 of 1951.
11. Jinan Jassim Mushtat, *The Legal System of Public-Private Partnership Contracts*, PhD Thesis, University of Baghdad, 2016. Public Companies Law No. 22 of 1997, as amended.
12. Iraqi Investment Law No. 13 of 2006, as amended.
13. Iraqi Federal Budget Law for 2017.
14. Iraqi Financial Management No. (6) of 2019.
15. Kuwaiti Law No. 116 of 2014 on Public-Private Partnership.
16. Law No. (28) of 2015, the Fifth Amendment Law to the Public Companies Law No. 22 of 1977, published in the Iraqi Gazette No. (4376) on 17/8/2015.
17. Law No. 67 of 2010 Regulating the Participation of the Private Sector Ministry of Planning letter No. (4/7/2142) on 1/6/2021.
18. Ministry of Oil letter No. (10986) on 10/4/2022.
19. in Basic Environment Projects, Services and Utilities.
20. State Council Resolution No. (58) of 2009.
21. State Council Resolution No. (81) of 2015