Economic challenges of the administrative contract

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Send Article Date: 2022-10-04 Date of acceptance of the article:**2022-10-04**

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Abstract:

The contractor with the management may be exposed to some new circumstances upon the conclusion of the contract when executing the administrative contract, and that would add additional burdens, which would require the contracting administration to intervene to create what is known as the financial balance of the administrative contract, the aim of that intervention is to strike a balance between the burdens that the contractor bears with the administration and the benefits through compensation based on certain conditions and theories.

key words: administrative contract, financial balance, the hardship, The Prince Act

Introduction:

The administration has the right to establish legal or practical actions it deems appropriate, among those legal actions, the administrative contract, in which the wills of the administration and the contractor are united, the administration aims to conclude administrative contracts to achieve the public interest that rises above the individual interest of the contractor related to administrative contracts. In order for the administration to achieve its competencies, it intends to adopt the means of public law, or through administrative decisions, or mixing between more than one legal system, and the law competent to settle disputes that may arise is the public law, but in the case of the administration following the method of public law, The contracts concluded by

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them shall be subject to the provisions of the administrative judiciary when disputes arise.

The administration can make amendments in contracts, so justice requires demanding compensation for the inability of the contractor to object to the administration's actions because they are legitimate, this is embodied in the right of the contractor to respect the economic balance of the contract, by interfering with the administration in adjusting prices or extending the term of the contract with exemption from the delay fine, or compensation for losses, to ensure the continuity of the regular and steady functioning of public utilities.

The amendments should proceed within logical limits, in such a way that the amendments do not reach the degree of harm to the contractor, change the subject matter of the original contract, or create a different new contract, in this case the contractor has the right to demand the termination of the contract with compensation for damages and consequences.

The study problem arises in answering the main question : What are the causes of the financial imbalance in administrative contracts ? The following questions are divided into it :

1-What is the meaning of the administrative contract ?

2-What is meant by the financial balance of the administrative contract ?

SECTION I: Economic balance of the administrative contract

To talk about the economic balance of the administrative contract must be defined first the concept of administrative contract than we talk about maintaining the economic balance as an obligation on the shoulder of the contracting administration

First Requirement: The concept of an administrative contract

The administration concludes contracts called administrative contracts, through concluding them with individuals, bodies or other departments, with the aim of managing and organizing the public utility, within specific conditions, so that the administration enjoys privileges according to which the contracting and

management are subject to a legal system, which is the administrative law. The administrative contract, as mentioned above, has three pillars : satisfaction, location and reason, which must be available in order to produce legal effects associated with the conditions of consent, health and safety and free from the defects of fraud, error, unfairness and coercion (Al-Fayyad, 2011, p.9). An administrative contract in general is a contract concluded by a legal person from among public law persons for the management or administration of facilities, whereby the contract includes conditions that are not familiar to private law contracts.

First : the contract in the language :

The contract is defined in the language as everything that indicates commitment to doing something or leaving it from one side or two sides, and it has other connotations, including linking the parties to the thing, as well as the covenant and guarantee, and it was used by Arabs for the moral linking of speech, and it is said the contract of sale, the marriage contract and other contracts Others (Madkour, 1999, p. 245).

Second : the administrative contract idiomatically :

Several definitions of the administrative contract appeared, with different interpretations in its definition, as you notice that the administrative jurisprudence in France did not define a specific meaning for the administrative contract, there are trends from which the French legislator proceeded in defining the content of the administrative contract, as it may start in defining it sometimes from an important principle, which is the management of facilities The general guarantee of its regular and steady functioning, and sometimes stems from the nature of the special conditions that the administration makes for the operation of public utilities, which clearly indicate the administration's intention behind organizing administrative contracts (Aliwat, 2009, p. 4). He defined the administrative contract as : “a contract concluded by a legal person who is a public law person to manage or run a facility, and that his intention to adopt the common law method is shown by including

the contract one of the conditions that are not unusual in private law contracts" (Raslan, 1978, P. 823).

Third : The legal definition of the administrative contract: Administration contracts are considered legal contracts, as the law gives them this quality, and the reference is that the legislator has given the administrative judiciary in some countries the jurisdiction to consider disputes related to these contracts, where the judiciary applies the rules of public law (Kanaan, 2012, p. 341). We find that the legislator in Algeria did not provide for specific contracts that could be considered as administrative contracts based on the legal text that gives them this character, There are some legal texts that give the status of an administrative contract by force of law such as the public transactions law, The concession contract.

Second Requirement: Ensuring the economic balance of the administrative contract as an obligation of the contracting administration

Maintaining economic balance is one of most important contractual considerations for the parties of the contract, and Each of the parties of the contrat shall endeavour to take care and caution with respect to the contractual and regulatory banks contained in the contrat to ensure the achievement of the financial balance of the administrative contract wumstances that may arise and woud cause an imbalance in the economic balance of the contract hich is a right of the private party contracting administration that it must respect and aide by throughout the duration of the contract in the face of all circ .

The principle in the theory of traditional in civil law is that the contractis is the law of the contracting parties, and it does not exempt force majeure , which is an unexpected event that can not be paid and is a cause external to thedebtor that frees him from his obligation or exempts him from liabilty, and this rule was not taken it is based on its launch in the field of administrative contracts, especially the concession contract, and from the french council of state created a compromise situation between the

situation in which the contractor can fulfill his obligation, and the force majeure in which it is impossible to implement the obligation at all(kedar, 2008, p 40)

In this case, the contractor con fulfill his obligations, but he will be subjected to sever financial exhaustion, and this is the theory of precarious conditions that the french council of state invented at the begining of twentieth century in order to achieve the public interest which stipulates that the public facility must operate regularly and steadily on one hand, and in response to the rules of justice and fairness on the one hand.

It is always possible, in long-term contracts, that circumstances appear during the exutive of the contract period that were not taken into account at the time of the conclusion of the contract, circumstances that do not affect the will of the contracting parties, but which make the implementation of the obligation cumbersome and difficult, and even make the continuation of the implementation vulnerablr to suspension and interruption (Al-Khalayleh,2015, p 306)

Causes of Economic imbalance of the administrative contract

Investment in infrastructure is necessarily long-term. Most governments, lacking the resources and the expertise to finance and maintain infrastructure on their own, seek to attract foreign capital and expertise. To do so, they need to offer the possibility of predictable revenue streams over time frameworks ranging from five to thirty years, depending on the nature of the investment, with international developers and banks looking to the longer end of that spectrum. Therefore, in typical contracts related to investment – concessions, offtake agreements and production sharing arrangements – the investors and host governments (or their agencies) establish a pricing scheme that assures investors adequate revenue to cover their debt service obligations, a reasonable return on the equity capital invested in view of the risk profile and the possibility of an eventual return of that capital to the investor. Sophisticated investors and lenders require that these pricing schemes allow for adjustment over the life of the contract,

typically for the effects of inflation, changes in currency valuation and other changes in law. In many cases, however, the effect of changing circumstances is not entirely spelled out in contracts. In that case, investors and lenders must look to the legal regime covering their relations with the host state. Typically, the law of the so-called project contracts is that of the host state while, just as typically, the law of the international financial facilities and guarantees is that of either New York or England or sometimes France, depending on what part of the world the project is found (Frederick, 2006, P2).

The ferst requement : The Theory of Imprevision

When the economics of the contract are greatly disrupted as a result of exceptional un expected circumstances such as natural disaster, wars or serious economic crises, as a result of that, the implementation made the implementation more burdensome and difficult for the contractor, with the consequent material losses that are not expected and exceeds in severity the usual normal losses , it is permissible for the contractor with to request administration contribution to bear these consequences according to : First condition: The occurrence of general exceptional circumstances that were not expected and could not be prevented, and this requires identifying the idea of exceptional circumstances. The exceptional event may be political, economic, natural or administrative, but it originated from other than the contracting administration. The second condition : that the emergency circumstance makes adherence to the contract more difficult and more costly, and the occurrence of a heavy financial loss that exceeds the normal losses. The compensation received by the contractor shall be the sharing of losses with the management, and for its correct estimation, a set of points must be taken into consideration as follows : A- Determine the exact start and end date of the circumstances.

B-Loss Distribution Mechanism.

C-The contract includes precautionary terms for emergency circumstances.

Ferst : the concepte of the hardship on administrative contract

The origins of the theory of hardship are found in how Roman law evolved. The basic principle was that if performance of a contract was possible, but a fundamental change in the circumstances surrounding the contract had rendered performance much more burdensome, so that continued performance by the party affected would amount to an undue hardship, then the affected party could invoke the principle of clausula rebus sic stantibusThis means that the contract contained an implied term , that certain important circumstances must remain unchanged, As one author has pointed out, that principle found its way into codifications of private law in the 18th century, but was subsequently criticized because of its vagueness and lack of clarity and fell out of disfavor in the 19th century, when liberal theories emphasized party autonomy.

It was then resurrected in the 20th century as a result of the disruptions caused by the First World War on the basis of a French administrative court ruling in a dispute between a private power company and the City of Bordeaux, France. The City had granted the company, known as the Compagnie générale d'éclairage de Bordeaux or "Gaz de Bordeaux", as it has come to be known in the literature, a concession to provide gas lighting to the City of Bordeaux. The concession contract had a fixed price, but also provided an adjustment mechanism beyond a certain range of price fluctuation.

The dispute arose in 1916 Conseil d'Etat, (Compagnie générale d'éclairage de Bordeaux, Rec. 125, concl. Chardenet, 30 March 1916, quoted in M. Long, P. Weil et al., Les Grands Arrêts de la Jurisprudence Administrative (2003) at 188-89. Translation from the award in ICSID Case No. ARB/01/8, CMS Gas Transmission Company v The Argentine RepublicMay 12, 2005).

As a result of the First World War, the price of coal used by Gaz de Bordeaux more than tripled, which itself exceeded the price established for its revenues under the concession contract. The dispute, being one that related to a concession for a public service,

was heard by administrative tribunals and ultimately the French Conseil d'Etat. The Conseil d'Etat decided that the adjustment mechanism in the concession agreement was insufficient under the circumstances such that its economic viability was undermined. Gaz de Bordeaux could not be required to perform the services under the original conditions. Quoting the relevant section of its decision : "… Just as the Company cannot not argue that it should not be required to bear any increase in the price. it would be totally excessive if it is admitted that such increases are to be considered a normal business risk; on the contrary, it is necessary to find a solution that puts an end to temporary difficulties, taking into account both the general interest … and the special conditions that do not allow the contract to operate normally …; to this end it is necessary to decide, on the one hand, that the Company is required to provide the concession service and, on the other hand, that during this period it must bear only that part of the adverse consequences that a reasonable interpretation of the contract allows …"7 The Conseil d'Etat set out the elements of the circumstances that would permit a temporary adjustment of administrative contracts, particularly those involving concessions. The event had to be unforeseeable and external to the parties, exceed all reasonable expectations and result in a profound unbalancing of the contract. The solution should be temporary so as to preserve the long-time viability of the contract. Due to the emphasis on the unforseeability of the event in these elements, the doctrine has come to be known as the théorie de l'imprévision in French, referred to as "hardship" in English. The upshot of the Gaz de Bordeaux case was that the Conseil d'Etat decided that the City of Bordeaux should pay compensation and that Gaz de Bordeaux and the City should reach agreement on the amount. If they could not, it was to be fixed by a judge.

Investment in infrastructure is necessarily long-term. Most governments, lacking the resources and the expertise to finance and maintain infrastructure on their own, seek to attract foreign capital and expertise. To do so, they need to offer the possibility

of predictable revenue streams over time frameworks ranging from five to thirty years, depending on the nature of the investment, with international developers and banks looking to the longer end of that spectrum. Therefore, in typical contracts related to investment – concessions, offtake agreements and production sharing arrangements – the investors and host governments (or their agencies) establish a pricing scheme that assures investors adequate revenue to cover their debt service obligations, a reasonable return on the equity capital invested in view of the risk profile and the possibility of an eventual return of that capital to the investor. Sophisticated investors and lenders require that these pricing schemes allow for adjustment over the life of the contract, typically for the effects of inflation, changes in currency valuation and other changes in law. In many cases, however, the effect of changing circumstances is not entirely spelled out in contracts. In that case, investors and lenders must look to the legal regime covering their relations with the host state. Typically, the law of the so-called project contracts is that of the host state while, just as typically, the law of the international financial facilities and guarantees is that of either New York or England or sometimes France, depending on what part of the world the project is found. Therein lies a dichotomy and the source of many conflicting understandings among practitioners as to the preservation of long-term contracts. In countries with a common law legal tradition, where the major international commercial lenders, multilateral banks and their attorneys are based, a contract, particularly one with a fixed price, is understood as allocating the risk of unforeseen events between the parties. Practitioners from those jurisdictions are trained to think that except in the most extreme circumstances, the terms of the contract should be enforced, that it is up to the parties to guard against risks by inserting price adjustment and other clauses to protect themselves. Except perhaps for the rarely invoked common law doctrine of reformation of contract, there is no recognized legal theory or mechanism for a contract to be adjusted by a court or an arbitral

tribunal. In the United States for instance, it is virtually unheard of for a court to adjust a contractual term due to a change in circumstances (Frederick R. Fucci, 2006, p 2).

In all of the voluminous compilations of American jurisprudence, there is only one prominent decision to this effect (during the oil crisis of the 1970's) - and this has been roundly criticized bycommentators.1 If the change in circumstance is extreme, either the contract is avoided (especially in bankruptcy) or it is enforced. Many states receiving foreign investment in infrastructure have civil law traditions, meaning legal systems originally inspired by the French civil code and its Roman origins. As this tradition has evolved, and without taking into account differences between the various municipal legal systems, the philosophy tends to be that when a contract is entered into, it sets an economic balance between the parties.

In a long-term contract, if the economic balance is significantly disturbed by unforeseen events, the contract may be adjusted to preserve it. If the parties cannot agree on the scope of the adjustment, they have recourse to courts or administrative tribunals to re-establish the balance. Practitioners trained in common law countries tend to be very suspicious of this concept and seek to contain it or neutralize it through contract drafting. If they do not address it, then the general legal principles established in the host country prevail. Difficult questions arise when the assumptions made in contracts are overwhelmed by events, either man-made or natural. Recent history provides a wealth of examples, starting with the Russian crisis in the mid-90's, the Asian "contagion" that led to the collapse of the Indonesian economy, the devaluation of the Real in Brazil and later drought-inspired power shortages and, of course, the Argentine crisis starting in 2000. Many disputes have arisen between investors and host governments or their agencies as a result of these events, some of which have resulted in published arbitral awards. Much has been written over time about the doctrine of hardship and how it should be applied, as well as the broader issue of how to allocate

risk in long-term contracting. In order to inject some fresh perspective in what is a longstanding focus of scholarship, the methodology of this paper will be to look at recent attempts by parties to international infrastructure agreements to invoke the doctrine of hardship as an excuse for non-performance, to follow how the dispute has been resolved and to analyze what the ultimate outcome proved to be.3 Even though these disputes have arisen in projects from many different countries, there are common threads. These observations are then applied to some of the questions that experience has shown to be of the greatest concern to investors when confronting the prospect of changed circumstances, either in acontract negotiation or a dispute. Section II of this paper is organized according to those questions. The analysis and the learning of recent arbitral awards are applied to each of them. Before the specific questions are addressed, the paper begins with a brief theoretical exposition, focusing first on the development of the doctrine in civil law countries. and then with a short explanation of the ways in which the common law tradition has handled the problem of changed circumstances in contract performance, principally the doctrine of commercial impracticability. The paper then discusses how the participants in the UNIDROIT process have attempted to establish principles that reconcile the two competing legal traditions and also cites the code or other legal principles of domestic legal systems that incorporate hardship into their laws. The purpose of this exercise is to show that everywhere attorneys are struggling to deal with the most fundamental problem in long-term contracting – how to manage change. The last section of the paper attempts to synthesize the analysis presented in the form of considerations that attorneys drafting contracts need to take into account in order to ensure the greatest level of stability in long-term contract performance – or to minimize the potential disruptions associated with claims of hardship as an excuse for non-performance In sum, this paper is being presented in the belief that if there is a greater awareness and understanding of the relatively arcane doctrine of hardship, some

of the more undesirable aspects of claims of changed circumstances can be avoided, or at least managed so as to preserve most of the benefits expected by both parties at the outset of the long term investment agreement. While most hardship disputes arise in the international context when host states or their enterprises seek to avoid or change contractual obligations, it is submitted that well-drafted hardship and adjustment clauses promote the goal of stability of contract for both investors and host countries and encourage long term investment in infrastructure.

Seconde The Unexpected Materialistic Difficulty Theory:

This theory revolves around the contractor's entitlement to obtain full compensation in case of unexpected materialistic difficulties upon concluding the contract that face the contractor upon the implementation of contractual obligations. This theory relates to all the obstacles that appear during the implementation of the contract. An exceptional and unexpected character from the two parties to the contract, and for this theory to be activated, the following conditions must be met :

1- That the difficulties are materialistic, such as the nature of the land in which the project is executed.

2- That there are unexpected circumstances when the contract is concluded by the two parties.

3- To be out of control of the will of parties.

4- To make the implementation of the contract a cumbersome matter by increasing the difficulties of the contractor.

It must be noted that the most important effect resulting from the application of this theory is the commitment of the contractor to continue implementing the contract as a prerequisite for full compensation for damages In addition to compensating the contractor by granting an additional amount of money, or setting a new price that is compatible with the new circumstances in case that the terms of the contract and its implementation have changed completely.

The French judiciary has taken a careful approach to this issue, by differentiating between two types of difficulties, which are :

1. Usual difficulties : These do not give the contractor the right to demand compensation from the administration for losses or damages, such as those risks related to the nature of the land.

2. Unexpected difficulties (exceptional): the contractor has the right to claim compensation for them with the existence of these conditions.

It is noted from the foregoing that there are similarities between the three theories, in that the circumstance that occurs after the start of the implementation is not expected by both contractors, and the administration according to these three theories is obligated to compensate for the Prince Act Theory, and the materialistic difficulties in full compensation, while obligated to compensate to the extent that it removes difficulties to a reasonable extent in the Theory Of Imprevision. (Arwa, 2021, P 3285)

The seconde requerment : The Prince Act Theory Intersting aspects could be highlighted when we compare the two main theories to see how the findaments of the financial blance principle are working in strict cases, As iaffirmed earlier, the le fait du prince theory entails that the public authority can unilaterally amend the essential conditions of the public contracts which means that it will later be obliged to pay a compensation to the other party due to its action (Sultan, 1987, p. 12).

It is a procedure taken by the public authority that affects the implementation of the contract, which increases the burdens of the contractor, which obliges the contracting party to compensate the contractor as a result of this imbalance in what is known by restoring the financial balance of the contract and continuing to implement contractual obligations (Fayyad, 2001, p. 55).

The prince act theory takes many forms, including (Ali, 1994, 455):

1-The procedures issued by the contracting administration that amend the terms of the contract that are subject to modification, that is, related to the public utility, and this is the most important area of the prince act theory

2-Individual decisions taken by the contracting administration, and directly affecting the contract, such as if the administration imposes individual special restrictions on the contractor in contracting public works to impose the protection of citizens.

3-General procedures that the administration applies to the contractor and others, but the amount of damage that may inflict the contractor exceeds those damages that may be caused to other people in general, for example that the administration raises the prescribed fee for the raw material (subject of the supply contract immediately after the conclusion of the contract).

4-The operational work that the contracting administration carries out and has a clear impact on the contract implementation process, as it is cumbersome or more expensive.

5-The issuance of prince act in form of a general regulatory action: the issuance of a law or regulation, so that it takes a legal character in its application to the contracting party. In addition to this, this particular contractor with the administration inflicts special damage different from that inflicts the rest of the supply contract. To work with this theory, the following is required :

A-That the procedure be issued by the contracting administration.

B-That there be an administrative contract concluded between two contracting parties.

C-That the action issued by the administration results in damage to the contractor. D. The action issued by the administration is unexpected. E. That the action issued is legitimate and without errors. The harmful act was issued by the contracting administration. In this regard, the French administrative law jurists have applied the illegality of the requirement for an absolute exemption to the administration from compensating the contractor in the case of the prince's work (Kanaan, 2012, p.306),The Egyptian judiciary proceeded according to the opinions of the French legal jurists of the illegality of the contractor's relinquishment in the administrative contract in absolute terms of the claim for compensation for any damage he suffers from the

work of the Emir during the implementation of the contract. Some jurists criticize the requirement to prove a serious breach of the financial balance of the contract for the following reasons :

1-The process of establishing a serious breach is inconsistent with the nature of full compensation for any damage caused to the contractor as a result of the prince act.

2-The difficulty in proving that management intervention seriously disturbed the financial balance of the contract.

3-The lack of clarity of what is meant by this serious breach. There is an administrative jurisprudence agreement, and a French judicial approval after the legality of the administrative contract stipulating the absolute exemption of the administration from indemnifying the contractor for unexpected damages, which the contractor suffered as a result of the prince act in advanc

Conclusion :

Results :

1-Administrative contract : The will of the administration coincides with the will of the contractor, whether natural or legal person with the aim of achieving a public interest.

2-During the contract implementation period, exceptional general circumstances may occur that the contractor was not able to bypass, and that would make the implementation of the contract cumbersome. Here we are faced with an emergency circumstance that does not affect the contractor's obligations, but rather remains obligated to perform contractual obligations, and the contracting administration is working to bear part of the contractor loss.

3-The contract's attachment to the public utility is an essential element to adapt the contract as an administrative character.

4-The administration has the right to amend the contract in accordance with the provisions of the law. On the other hand, the law did not allow the contractor to bear the results of the actions taken by the administration, taking into consideration the harm that might inflict the right to compensation from the administration in a way that preserves the financial balance of the contract and thus can fulfill the implementation of the contract.

5-The idea of financial balance for the administrative contract is related to the management's right to amend its contract, as we do not find it present in private law contracts, and a fair balance of obligations and rights in the administrative contract.

Recommendations :

1-Setting objective controls that restrict the authority of the administration in the unilateral amendment so that this authority is not used as a weapon on the contractor, which leads to reluctance to contract, and thus negatively affects the regular and steady course of public utilities.

2-consolidating the role of the administrative judiary in the economic rebalancing of the administrative coontract

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