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Financial Rebalancing on Administrative Contract

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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, compensation, theories.

I. 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 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 ().

Study Objectives

The study aims to achieve the following:

1. Clarify the nature of administrative contracts, and the criteria by which they differ from other contracts.
2. Highlight the management authorities over the contracting party.
3. Clarify what is meant by the financial balance of the administrative contract, and indicate the mechanisms for achieving it.

Study problem and questions:

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 and criteria of the administrative contract?
2. What is meant by the financial balance of the administrative contract?
3. What are the followed mechanisms to restore the financial balance of the administrative contract?

Search Plan:

The nature of this topic necessitated that:

The first topic: Concept, standards and pillars of the administrative contract

The second topic: the authority of management and its impact on the financial imbalance of the administrative contract.

The third topic: the concept of financial balance for the administrative contract, and its effect on reparation for damage due to the administration's use of power.

The First Topic

The concept of the administrative contract, its elements, and its criteria

The first requirement: the concept of the administrative contract

There is no agreed definition of administrative contracts, so when the administration conducts its activities using the contract, it either contracts as a public authority with the other party in an administrative contract, or it contracts as one of the persons of the private law in a civil contract that is subject to the provisions of the private law and the public judiciary, as follows:

First: The concept of the administrative contract among the jurists:

Jurists provided many definitions that reveal the nature of an administrative contract, including:

First definition:

Professor (Suleiman Al-Tamawi) defined the administrative contract, saying:

"A contract created by a public legal person, aiming of running or organizing a public utility, where the administration's intention to adopt the provisions of public law is clear." However, it stipulated that the administrative contract includes exceptional conditions that are not familiar with the rules of private law, or that the contractor is authorized to directly participate in managing the public utility, granting some privileges of public authority ().

Second definition:

Dr. (Bashar Jamil Abdul Hadi) defined it as:"The contract in which one of the parties is the public administration represented by its corporate person or its administrative apparatus as a public official authority, aims to run a public utility regularly and steadily to achieve the public interest and focuses on the means of public law and the procedures and conditions that are not familiar to these means in private law contracts." ()

Second: The judiciary's definition of the administrative contract:

The French State Council settled, in their definition of the administrative contract: (Every agreement entered into by a public legal person for the purpose of running a public provided that the public legal entity intends to adopt the provisions of public law, either by including in the agreement unfamiliar terms in private law

contracts, or by permitting the contracting party to participate directly in the management of the public utility) (),

The Egyptian State Council followed the French Council of State in defining the administrative contract by saying: (A contract entered into by a public legal person with the intention of managing a public utility, in which the public administration's intention to adopt public law methods by including the contract unfamiliar conditions in the private law) () .

The second requirement: the Elements of the Administrative Contract

It is agreed that the administrative contract - like any contract - is based on three basic pillars, namely:

First pillar:Acceptance: It is the essence of the contractual bond, and it means that the will of the contracting parties is directed towards creating a legal effect, and this will is expressed as something hidden and cannot be viewed.

Second pillar: the place: refers to the legal process that is intended to be achieved, in terms of establishing reciprocal rights and obligations for both contracting parties, provided that the contractual subject is present or possible, a specific designation that is not ignorant and capable of assignment, and that is permissible to deal with .

Third pillar: causation: Civil contracts states that if the contract was for legally prohibited or contrary to public order or morals activity or cause, then it is void. ().

Based on that, if the contract compiled the preceding elements and did not exhibit any defect or reason that undermines its validity, then the contract is valid and cannot be nullified.

The third requirement: the Criteria to Be Met in Administrative Contracts

There has been a great difference among the jurists regarding the sufficiency of the first criterion for describing the contract as an administrative contract, or whether the rest of the other criteria must be fulfilled, some of the jurists were satisfied with the first criterion, to be a distinct condition of the administrative contract from other contracts, and in return for this opinion another opinion emerged that believes that the other two criteria must be available to give the administrative character to these contracts, and these differed among themselves about the sufficiency of one of the other two criteria to be the condition or is it possible to be limited to one of them without the other, so one team went to the adequacy of joining the contract with the public utility, while the second party took another path, which is the adequacy of the contract to include exceptional conditions in order for the contract to acquire the administrative capacity () as follows:

First criterion: the management to part of the contract:

This criterion means that one of the parties to the contract must be a person of public law, for the contract is not an administrative unless one of the parties holding the administrative capacity - such as governorates and local bodies (regional decentralization), as well as bodies and institutions, likewise if the party to the contract is a public legal person, but lost that capacity during the implementation of the contract.

Second Criterion: That the subject of the contract related to the management or administration of a facility:

This standard is considered one of the most prominent elements that distinguish an administrative contract from other contracts concluded by the administration, but is considered one of the foundations on which the administrative law is based.

Third criterion: the administrative contract includes exceptional conditions that are not familiar to the scope of interpersonal relations governed by private or civil law, and these conditions constitute the cornerstone of identifying the nature of administrative contracts (), for example, subjecting the contractor by management to the authority of oversight, modifying the contractor's obligations, suspending implementation, or unilaterally terminating the contract ().

The Second Topic

Management authority and its impact on the financial imbalance of the administrative contract

The financial imbalance between the two parties in an administrative contract arises according to several reasons, the conditions contained in the administrative contract that often handles formulating provisions, because the administrative contract is subject to the rules of the administrative law, so the administration has many privileges, while the other party lacks authority. The administration's goal is to ensure the progress of work, and it shall have priority when the consequences arising from failure occur (). The management has oversight powers, to amend, impose penalties, and the power to terminate the deal, detailed as follows:

The first requirement

The authority of management to control, direct, and amend the administrative contract

First Branch: Supervision and Guidance Authority:

The authority of oversight and direction is considered one of the most important powers recognized by the jurisprudence and the administrative judiciary, which follows up on the implementation of the other party to the contract, and it cannot be violated or dispensed with ().

Concept of control and direction: The process of controlling management to implement its contracts that it entered into with other parties has two concepts:

First: Censorship in its limited meaning: The control authority in its limited meaning is similar to the word supervision, which means: "the administration verifies that the contractor is carrying out his contractual obligations as agreed upon".

Forms of control process: The management practice of the control process takes two forms:

1. Operational actions: such as entering places of exploitation of the facility, warehouses, and factories, or receiving documents from the contractor to review and examine, conduct investigations, receive complaints from beneficiaries and take decisions therein.

2. Legal actions, such as the administration issuing executive orders, instructions or warnings to the contracting party, control in this sense takes place during the implementation of the contract as a right assigned to the administration even if there is no provisions.

Second: control in general: The control authority does not stop merely to ensure that the terms of the contract are implemented, but rather goes beyond that to allow the management to interfere in directing the implementation of the contract, and also to implement other than what is stipulated in the contract, (),

In this way, the administration exercises original authority in implementation and in issuing executive decisions by its own will without the need to resort to the judiciary in advance.

Forms of management exercising the right to control: There are two forms of management exercising its right to control, and they are:

First: The administration appears as any party in a contractual relationship that has the right to monitor the implementation of another party's obligations stipulated in the contract.

Second: For the administration to represent the authority characteristic of public law relations, as it issues orders binding on the contractor to implement obligations in a manner ().

However, the administration's authority varies, for its limited and based on the principles that govern public utilities, for example in contracts for the acquisition of supplies in comparison with them in public works contracts (), and this is detailed as follows:

The first case: If included in the contract, then the contractual or regulatory provisions must be enforced.

The second case: if not, in this case it varies and differs according to the type of contract.

Controls for exercising the authority of control and directional:

The management authority to implement the contract is restricted to ensure fairness, if limits exceeded and damage occurs, it must compensate, and to achieve this goal, the following controls must be observed:

1. That the aim of controlling is to achieve the public interest in a balanced manner
2. That the management take decisions related to control within the framework of legality, and to be consistent with legal procedures ().
3. That the administration does not use authority to monitor the implementation of the administrative contract as a justification for amending the contract, ().

Legal basis for control and directional authority:

To determine the legal basis that granted the administration this authority, the legal basis for control should be researched according to the following two cases:

First case: article existence :the administrative contracts include texts that explain how the administration exercises the authority of control and direction, as indicated by some laws related to certain types of contracts, and the control authority finds legal basis in legislation related to administrative contracts such as the legislation of public procurement ().

Second case: no article: the basis of this authority in this case are questionable between jurists, as follows:

1. **Regarding contract:** The control authority may not be explicitly stated in the administrative contract in a manner that clarifies how this authority is exercised, and in this case there is no argument that the control authority finds its basis in the contract context ().
2. **Regarding public facility:** that is the subject of the contract, the needs of the public facility, and ensuring regular and steady functioning, are what justify the exceptional authorities of interests regarding implementing the administrative contract, including the control authority, even if the contract, laws and regulations are not stipulated therein.

In order to achieve a balance between the exceptional management authority in control and directing, and ensuring the rights of the contractor, laws and legislations allowed the contractor to resort to the administrative judiciary in canceling a decision related to instructions related to the implementation of the works contract, or to file a compensation case for the financial burdens resulting from the implementation of these instructions.

As for the supply contract, its nature does not require the administration to take strict measures, as in the works contract because the supply contract relates to materials or movables that the contractor is obligated to place at the disposal of the administration, and the management representative has the right to refrain from receiving materials or equipment that do not meet the specifications and standards () So is the franchise right the control and direction of control takes a special and distinctive form, as the administration monitors the activity of the facility running through the concession to ensure that the contractor adheres to the conditions contained in the contract ()

The second branch: the administration's authority to amend the contract by its own will: The management's authority to amend its administrative contracts is one of the most important aspects that distinguish the administrative contract from other private law contracts, - with the consensus of jurists of law and the comparative judiciary - in a way that changes the obligations of the contractor without adopting on accepting these amendments, in a violation of the basic principle in the private law which stipulates that the binding force of the contract is not violated ().

The legal document for the administration's right to unilaterally amend the administrative contract

Opinions of administrative law jurists differed on determining the legal document on which the administration is based in the unilateral amendment, and detailing that as follows:

The first opinion: It is derived from public authority,

The second opinion: It is derived from the idea of the public facility

Controls that determine the management authority to amend the contract:

First: Agreement Controls: The vast majority of administrative contracts contain explicit clauses stipulating the right of management to amend the original obligations of the contractor ().

Second: Judicial controls, which are as follows:

1. Not to override the modification subject of the contract: the administration may not use its power to amend the contract as an excuse to change its subject.
2. That the modification is for objective reasons: that the Modification is due to circumstances that have arisen after its conclusion.
3. That the modification decision is issued within the limits of the general rules of legality: When the administration accepts to amend a deal, its means for that is the administrative decision.
4. Respecting the contractor's rights in financial balance, as the management authority in the modification should take into account the interest of the contractor.
5. That the modification is within the natural and reasonable limits of the contractor's financial and technical capabilities for which the contract was accepted, otherwise he has the right to rescind the contract ().
6. Not to exceed the controls agreed upon.

Forms of use by the administration of the right to amend: The authority of the administration to amend depends on several aspects:

1. Adjustment of the volume of work subject of the contract ().
2. Modification to the terms of implementation, and in its means to cope with new circumstances, such as the emergence of a new means of implementation.
3. Modification in the implementation period, and this is the most common form of modification by the administration, such as stopping implementation, for example, due to financial circumstances or extending the implementation period.

The second requirement

The authority of the administration to impose penalties and to terminate the administrative contract by its own will

First branch:

The administration, as a public authority, has the power to impose penalties on the contracting party, which are: "A lump sum compensation as a result of the damages it has incurred from the penalty for the contractor's breach of fulfilling obligations or violating the terms of the contract. This authority is original - that is, it exists even if it is not stipulated in the contract

Types of administrative penalties

Financial penalties: It is the sums of money specified in advance in the contract or in the legal texts governing the contract that the administration may demand from the contracting party, which are:

A. Demurrage

It is a means of pressure on the contractor in order not to be negligent in the implementation of obligations, but there is a disagreement about the legal conditioning of this fine.

Cases in which the administration resorted to imposing financial fines:

First case: The contractor's breach of the contract implementation period.

Second case: Implementation does not comply with previously agreed specifications, conditions, and modalities

B. Confiscation of insurance money:

A management guarantee that avoids the consequences and results of errors committed by the contractor while executing the administrative contract

C. Requiring compensation:

Among the financial penalties that aim to cover the damage, and most of the common law scholars have agreed unanimously on defining compensation as: "The amounts that the administration has the right to demand the contractor breaches obligations in case the contract does not stipulate another financial penalty"

Compulsory penalties of a coercive nature: of a temporary nature, and it is considered one of the means of pressure devoted to the judiciary and approved in jurisprudence, and these penalties are considered more severe than financial penalties, so that the administration has the right to impose them on the contractor in fulfillment of its privilege in direct implementation to force the contractor to fulfill obligations.

Provisions that prevent the administration from overriding the penal authority

There are several provisions that guarantee that the administration will not go beyond taking the sanctions

First:

The contractor to be excuse and warn before signing the penalty () and this process does not need a specific characteristic or form, except that several exceptions are met, one of which exempts the administration from the need to excuse the contractor before signing the penalty of termination, and the most important of these exceptions:

1. That the contract includes an explicit provision to exempt the administrative contract from prior notice.

2. If the contracting party intended not to implement or was unable to implement it definitively.

3. in cases where the contractor's fraud is proven.

4. Certainty that excuses are useless ().

5. The contractor assigns the contract to others.

6. If the implementation of the contract requires necessity ()

Second:

That the decision to impose the penalty is accompanied by the reasons that made the administration take this course ().

Third:

That there is a proportionality between the penalty and the contract violation

Fourth:

The legality of imposing sanctions: That the sanctions taken by the administration are subject to judicial oversight to ensure that they are not abused.

<u>The Third Topic</u>

The concept of the financial balance of the administrative contract, and its effect on reparation due to the administration's use of power ,the idea of financial balance in contracts is specific to the administrative without other types of contracts in private law, and embodies the state of justice that the contracting parties intended to bring about upon the conclusion of the contract, according to which a number of rights and mutual duties are fixed between the two parties, the general rule in the implementation of administrative

contracts is the flexibility of the contractor's obligations with the administration and the ability to increase or decrease according to what the administrative authority imposes, provided that this is free from arbitrariness, and this rule applies its provisions as well to the contractor's rights. If the contractor's obligations with management increase, rights also increase, that if they were limited to the contractor's obligations with management only, then the administrative contracts would turn for the contractor into a fond (), and this is the real idea of financial balance in administrative contracts, where the rights of all parties are taken into account in a parallel and fair manner.

Some jurists define the idea of financial balance in the administrative contract as "Financial balance is not a kind of guarantee for the contractor against the potential deficit of exploitation, but rather is an equation aimed at preserving the nature of the contract as agreed upon by the contracting parties, therefore, the contractor's right to restore the financial balance of the contract is considered fundamental, and natural extension right agreed upon in the contract" ().

In order to achieve balance, the rights of the contractor with management organized into three theories, which are the theory of administrative risks (Prince Act Theory), (the theory of economic risks), and the unexpected materialistic difficulty theory, which is considered a correction of the financial imbalance of the administrative contract, The compensation will be for restoring the financial balance of the contract, the statement of these theories as follows:

First: The Prince Act Theory: 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 () The prince act theory takes many forms, including ():

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 (),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 advance.

Second: 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.

Third: 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.

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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.

II. 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.

III. 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.

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