THE ROLE OF FLEXIBLE RULES THAT GOVERNING ADMINISTRATIVE CONTRACTS IN ENHANCING THE PERFORMANCE OF COMPANIES

ASAM SAUD ALSAIAT

A Faculty Member in the Department of Law, Faculty of Sharia and Law at the University of Al-Jouf

ABSTRACT

The administrative contract is an essential part of the economic and social regulation of States. These contracts, concluded by the administration are not of a single nature and are not subject to a single legal system. However, in this study, it will be limited to administrative contracts and their effect on performance.

This study aims to provide readers with an overview, regarding the administrative contracts, the effect of the administrative contract from the public administration perspective, and the other side of the contract, and the relationship between the flexibility of rules, that governs the administrative contracts and the performance.

The study resulted in revealing that, flexibility is one of the basic characteristics of administrative laws. The flexibility of the rules of administrative contracts, helps to achieve the desired goals, such as justice, the general interest of the community, and the private interest of individuals, so it increase the performance of the companies in all over the world. The most important reasons that led to the expansion of administrative laws and therefore, its flexibility are the increasing interference of the government in all areas in life, because of the expansion of the function of the modern state.

KEYWORDS: *Administrative Contract, Flexibility, Rules & Performance of the Companies*

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INTRODUCTION

It is well known that, the tools that the administration carries out its activities, and seeks to achieve its objectives are the administrative decisions, issued by a self-desire and will binding on individuals, followed by the administrative contracts, which oblige the administration to achieve a union between its needs and other needs.

The administrative decisions are distinguished by the need of the individual administration, without a union with other needs, without interference from any other need, and the decisions are binding on which is responsible on it. It is not binding on non-citizens. In other words, it cannot issue administrative decisions, obliging foreigners who reside in the country or reside outside the home country.¹

The administrative contract is an essential part of the economic and social organization of countries, rather than an administrative decision, which based primarily on the meaning of the obligation and the imposition of laws, with no regard to the individual needs, which is not enough to meet all the desired objectives of the administration. Therefore, the management resorts to the contractual method, because it is easy and simple, if it is estimated that, this method is more effective in achieving the goals through the friendly agreement with parties, establishes between them a contract, that defines the rights and obligations of both the administration and the

¹ Abu Ras M. (no date). "Administrative Contracts"

contracting person.¹

Administrative contracts, in general are characterized by the use of the means and privileges of public authority, and the basis of this administrative contract, on the idea of giving priority to the public interest on the private interest. Additionally, administrators only have the right in drafting the contract, before it is concluded.²

The contracts concluded by the administration are not of a single nature, and are not subject to a single legal system, but, it divided into two: administrative and civil contracts, according to the legal system that is applied. The civil contract is between two equal parties, and is subject to private law. The administration relinquishes its powers and takes down the status of individuals in their actions; the administrative judiciary is concerned with adjudicating the disputes arising therefrom. The administrative contract is subject to the provisions of the general law, and the administrative judiciary is competent to adjudicate the disputes, arising therefrom, as it reflects the privileges of the public authority, exercised by the administration against individuals, in view of the requirements of public utilities. The rule of equality of contractors, in the field of private law contracts does not apply to it, and the administration has a distinct position from the contractor. The administration seeks to manage public utilities, and preserve and achieve public interest, while the contractor seeks to achieve its own interest.³

The administration has the authority to compel the contractor, to commit to the implementation of its contractual obligations. As the contractor's obligations to the management are flexible, the rights derived from the contract should also be granted, given the interrelationship between the obligations and rights of the contractor.⁴

This paper will study the impact of the flexibility of the rules, governing the administrative contracts on the contractors, and their role in improving the performance of the companies.

STUDY PROBLEM AND SIGNIFICANCE

The most prominent feature of the general theory of the administrative contract is, its judicial character as one of the theories of administrative law, which was credited with establishing the French State Council, in the early 20th century. Since that date, the idea of administrative contracts has emerged in its nature, that is, according to its own characteristics. The State Council, supported by jurisprudence, has endeavored to build the general theory of administrative contracts, to emphasize its independence and to establish a general framework that distinguishes it from the rules applicable to private law, and all types of contracts.⁵

Administrative contracts of an international character, raise many difficulties in view of the disparity in the legal status of the Contracting Parties, since, they are concluded between the State or one of its organs, and a foreign person. The former is a person of public law and thus, enjoys exceptional and sovereign privileges not enjoyed by the He, is considered a person of private law.⁶

¹ Abdali H. (2015). "Effects of the Administrative Contract"

² Ray, Linda. (2014). "Advantages and Disadvantages of Management Contracts"

³ Ibid

⁴ Abu Bakr M. (2005). "Administrative Organization in Contemporary Organizations" (Applied Approach), University Press House, Alexandria

⁵ Al-Tamawy A. (2012). "The extent of the administrative contract theory is affected by the expansion of the use of arbitration".

⁶ Al-Hussayan A. (1985). "The Grievances Board in Islamic Judiciary System and its Practice in Saudi Arabia", LLM. dissertation, Harvard University.

One of the characteristics of the administrative contract is the use of the means of public law, by including in the contract unusual conditions, in the special law, which is known as exceptional conditions.

It is clear that, the administrative contract has conditions that must be met to be in front of an administrative contract and the consequent determination of the court competent, to hear the disputes arising from its implementation. If these conditions takes place, then the contract is the responsibility of the administrative judiciary in the Kingdom, if one of these conditions is missing, it becomes a special contract and becomes under the jurisdiction of the ordinary judiciary.¹

There are many disputes, if there are no conditions governing the administrative contracts, so many laws and legislation have been put in place. These conditions and laws, governing administrative contracts can lead to restrictions on contractors.

The scholars are interested in studying many administrative issues and problems, in order to raise the productivity of the organizations, in all their activities. Management is an activity aimed at fruitful cooperation, effective coordination between various human efforts, to achieve a certain objective with a high degree of efficiency.

This paper will study the impact of the flexibility of the rules, governing the administrative contracts on the contractors and their role in improving the performance of the companies.

STUDY OBJECTIVES

This study aims to:

- Study the role of flexible rules, that governing administrative contracts in enhancing the performance of companies.
- Study the effect of administrative contracts, for various contract parties.
- Clarify the rules that governing administrative contracts.

STUDY QUESTIONS

This study will ask several questions:

- What is the role of flexible rules, that governing administrative contracts in enhancing the performance of companies?
- What is the effect of administrative contracts for the parties to the contract?
- What are the rules that governing administrative contracts?

ADMINISTRATIVE CONTRACTS

Contracts concluded by the administration may be civil contracts or administrative contracts, according to the legal system applied to it. The legal system under which the administrative contracts are subject, is different from the legal system to which the contracts concluded by the administration are, subject as a party to the two types of contracts.

The civil contract is between two equal parties and represents the interests of the equivalent, either in the

¹ Al-Jubouri M. (1998). "Administrative Contracts", Second Edition / First Edition, Dar Al-Thaqafa Library.

administrative contract represents the public interest, or it should be surrounded by a set of rules governing the formation of the administrative contract, and the conclusion and implementation of its provisions, and the implications thereof, to ensure the management of public money.¹

The contract defines, in its general form, as consent of two wills to create a legal effect, whether the effect is the creation, transfer, modification or termination of an obligation. The contract may be concluded between natural or legal persons.

It is also defined as a contract concluded by a person, for the purpose of operating a public facility or regulatory facilities, and showing the intent of the administration - the general legal person - to adopt the provisions of the general law, and to include exceptional and unusual conditions in the special law, or to empower the contractor with the administration, to participate in the management of general facility.²

THE EFFECT OF THE ADMINISTRATIVE CONTRACT FROM THE PUBLIC ADMINISTRATION PERSPECTIVE AND THE OTHER SIDE OF THE CONTRACT

Public administration, as a party to the administrative contract has many rights and privileges that distinguish it, from the rest of its contracts.³ It differs in terms of non-compliance, with the principle of equality between contractors.

The administration has rights and privileges, that are not owned by the contractor, so as to achieve the public interest and satisfy the needs of the necessary individuals, And the preference of the public interest to the individual interest.⁴

The Administration has several abilities than the other parties in the administrative contracts, such as the control and guidance ability on the implementation of the contract. It has the right to supervise and guide the implementation of the administrative contract, and has the right to issue orders and instructions, so that the contractor shall perform the contract according to its conditions, technical and financial specifications, and in accordance with the purpose of it, and does not require to stipulate this right in the contract, as it is decided without need to provide for it, this right is related to public order, if the administration waived in the contract, its right to control and guide the condition is void, due to violating public order.⁵

In addition, the administration has the ability to modify certain terms of the administrative contract freely, to comply with the requirements of the General Facility, without being protested by the contracted dealer.⁶

The nature of the administrative contracts, their objectives and their implementation on the idea of continuity of public facilities, requires a change in the conditions of the contract, its circumstances, and the ways of implementing it, according to the requirements of public interest. The contract may also be based on the intention of the parties, to conclude the contract to the need to meet the facility requirement, and to achieve the public interest.

¹ Al-Tabakh Sh. (2006). "Administrative Compensation in the Light of Jurisprudence", Judiciary and Administrative Court Rulings, Dar Al Fajr University, Egypt.

² Al-Helou M. (2004). "Administrative Contracts and Arbitration", New University Press

³ Bader A. (2003). "Administrative Contracts and the Contract of T.O.B", Dar Al Nahda Arab Publishing and Distribution Library, Egypt, P.P 163.

⁴ Radi M. (2011). "Administrative Contracts", Dar Kandil Publishing and Distribution, Jordan, First Edition, p. 140.

⁵ Al-Jubouri M. (1998). "Administrative Contracts", Second Edition / First Edition, Dar Al-Thaqafa Library

⁶ Al-Banna M. (2007). "Administrative Contracts", Dar Al-Fikr Al-Arabi for Publishing and Distribution, First Edition

The administration, which has the ability to regulate the facility and determine the rules of its management, shall have the right of amendment, to suit this necessity and in accordance with that interest.¹

The administrative ability in modifying the administrative contract is not absolute without limitation. The administrative law and the judiciary provisions have imposed restrictions on the administration, that must be taken into account, when it wishes to use this property.²

These principles and provisions can be summarized as follows

- The Amendment Shall Not Exceed the Subject Matter of the Contract

It is the changing needs, that require the modification of certain provisions of the contract, so that, this modification should not affect the provisions relating to financial privileges, so as not to lead to the reluctance of individuals, to contract with the administration.³

- The Modification Should Have Objective Reasons

Public administration contracts under certain conditions that may change at the post-contract stage, particularly in long-term administrative contracts, such as a public works contract or a procurement contract. If the circumstances change, the administration must be given the right to modify the contract, in accordance with the new circumstances, taking into account the original contract subject, and meeting the needs of the public service users.

If the circumstances that the administration claims to have changed are found at the conclusion of the contract, or that the administration does not aim to change the public interest and the necessity of managing the public facilities, but rather to seek special interests, the contractor has recourse to the administrative court, to obtain the appropriate compensation.⁴

- The Administration Must Adhere to the Principle of Legality

In the case of the right to modify the contract, the administration must respect the principle of legality. The decision to modify must be issued by a competent authority, in accordance with the form prescribed by the law, and its decision should be, in accordance with the applicable regulations.⁵

The other contract's parties have rights, derived from the administrative contract, which is transferred to them directly. The administrative contracts serve as the link between these rights, and other parties in it. The contract with the administration, contributes to the management of the public facility and aims at achieving self-interest, which can transfer to the other parties in the administrative contract. In light of the foregoing, the rights of others in the administrative contract may be classified as follows:⁶

- The right of others to have money as a result of the work.

¹ Bader A. (2003). "Administrative Contracts and the Contract of T.O.B", Dar Al Nahda Arab Publishing and Distribution Library, Egypt. P.P. 170

² Al-Banna M. (2007). "Administrative Contracts", Dar Al-Fikr Al-Arabi for Publishing and Distribution, First Edition. P.P 225-226

³ Radi M. (2011). "Administrative Contracts", Dar Kandil Publishing and Distribution, Jordan, First Edition. P.P 162

⁴ Ibid, P.P 163

⁵ Al-Shawarbi A. (2003). "Administrative Contracts in the Light of Jurisprudence - The Judiciary – Legislation", Knowledge Establishment for Publishing and Distribution.

⁶ Arslan A. (1987). "Saudi Administrative Law", Institute of Public Administration, P.P 3

- The right to prosecute the obligor.
- The right to sue the administration for breach of contract terms.
- The right to equality between beneficiaries

ADMINISTRATIVE REMEDIES

The administration has the right to impose remedies on the contractor, and it derives its ability in this, either from the provisions of the administrative contract itself, or from the ability granted to it, to maintain the regular and continuous flow of public facilities.

The ability of the administration, to impose sanctions on the contractor is subject to a special legal law, namely, the general law system in the administrative contracts. The necessity of ensuring the regularity of the public facilities regularly requires strictness in dealing with the contractor, to force him to execute the contract strictly. ¹

The jurists have concluded that, the authority of the administration to sign sanctions against its contractor is independent of the contractual texts, that is, they exist even if the contract does not stipulate any of them. If some of them are stated and others are disregarded, the administration has the right to sign penalties, for violations not stipulated in the contract. ²

Administrative sanctions imposed by the administration, on its contractor have been divided into several types as follow:

- Financial Penalties

Is the amount of money the administration is entitled to ask the contractor, who is breach of the contractual obligations, either as a result of its failure to implement its obligations in full way, or because of its delay in implementing them in a completely unsatisfactory manner, or substituted another one without the approval of the administration. ³

In imposing financial sanctions, the penalty prescribed by the administration must be commensurate with the contractors, who make mistakes in the execution of the contract. The most important types of such sanctions can be noted, respectively:

- Financial Compensation: The purpose of the compensation is to redress the damage caused by the breach of the obligations of the contractor. Compensation, unlike financial fines, is therefore justified only if the damage is proved as in private law. Compensation is estimated, in accordance with the magnitude of the damage suffered by the administration, taking into account, what the administration has contributed to obtain a certain percentage, so that, it assumes this part of responsibility, due to the error it caused. ⁴
- Delay Penalties: The total amounts of money estimated by the administration in advance included in the contract texts, shall be imposed on the other party (the contractor) as a penalty if delayed in execution. ⁵

¹ Radi M. (2011). "Administrative Contracts", Dar Kandil Publishing and Distribution, Jordan, First Edition. P.P 143

² Nabulsi N. (2010). "Administrative Contracts (Comparative Study)", Zen Law Publications, Lebanon, P.P 153.

³ Al-Shawarbi A. (2003). "Administrative Contracts in the Light of Jurisprudence - The Judiciary – Legislation", Knowledge Establishment for Publishing and Distribution, P.P 37.

⁴ Nabulsi N. (2010). "Administrative Contracts (Comparative Study)", Zen Law Publications, Lebanon, P.P 186.

⁵ Radi M. (2011). "Administrative Contracts", Dar Kandil Publishing and Distribution, Jordan, First Edition. P.P 147

- Confiscation of the Amount of Insurance: is a guarantee for the administration, to avoid the effects of errors made by the contractor, in the implementation of the administrative contract, and ensuring its suitability to meet the responsibilities resulting from the negligence.
- Non-Financial or Pressing Sanctions

This type of sanctions does not aim to charge the contractor's financial burdens, as a result of breach of its contractual obligations. It aims to pressure him, to force him to execute. The means of pressure take three forms:

- Place the Project under Guard in the Franchising Contract: This procedure may be imposed by the administration as a result of the total or partial suspension of the facility, for reasons that are not subject to the obligation of the obligor, as if the interruption was due to force majeure. This is to ensure the continuation of the facility. In this case, the contractor does not bear the financial risks of managing the facility. But, in the case that, the guard is imposed as a penalty for the shortening of the contractor role; the project is administrated at his expense and under his responsibility.¹
- Withdrawal the Work from the Contractor in a Public Works Contract: it means the administration can replace the defaulted contractor in the execution of its work, and perform the work by itself at the contractor expense, or give the ability to other one to perform such work, at the Contractor's responsibility and expense.

There are many rules governing administrative contracts, that cannot be included in this paper

THE RELATIONSHIP BETWEEN THE FLEXIBILITY OF RULES THAT GOVERNS THE ADMINISTRATIVE CONTRACTS AND THE PERFORMANCE

The public administration is not limited to ensuring the implementation of the contract, according to its objectives, but, intervening in steering the implementation work, by choosing the most appropriate ways to ensure the proper functioning of public facilities, while adhering to the principle of legality when issuing administrative decisions.

The rules governing administrative contracts are characterized by many characteristics, which are Newly-born, judicial, flexible, adaptable and independent.²

The rules of administrative contracts are not frozen in certain legislative texts, but they are in a permanent movement, due to their influence on the factors and social, political, and technological considerations that surround them. The needs of public administration and facilities are renewable and changing. So, it must be continuously changed to suit these evolving needs.³

The difference in terms of stability between administrative laws and other laws, is less in some circumstances, especially in developing countries. Where most of them constitute large legislative movements, so, it is lead to try to build a new legal system, or an amendment to an existing law, which result multiple mistakes.⁴

The flexibility of the rules of administrative contracts helps to achieve the desired goals, such as justice, the general interest of the community, and the private interest of individuals, so it increase the performance of the companies,

¹ Ibid, P.P 153

² Abdali H. (2015). "Effects of the Administrative Contract"

³ Kanaan and Nawaf (2005). "Administrative Law", House of Culture for Publishing and Distribution.

⁴ Abu Ras M. (no date). "Administrative Contracts"

in all over the world. Achieving such goals requires considerable flexibility, when developing such laws.¹

The most important reasons that led to the expansion of administrative laws and therefore, its flexibility is the increasing interference of the government in all areas in life, because of the expansion of the function of the modern state, which led to the exercise of many functions and economic and social activities. The increase in population has had a significant impact on the expansion of administrative laws.²

CONCLUSIONS

The administrative contract is an essential part of the economic and social organization of countries, rather than an administrative decision. The most prominent feature of the general theory of the administrative contract is, its judicial character as one of the theories of administrative law. One of the characteristics of the administrative contract, is the use of the means of public law, by including in the contract unusual conditions in the special law, which is known as exceptional conditions. There are many disputes, if there are no conditions governing the administrative contracts, so many laws and legislation have been put in place. There are many rules governing administrative contracts, and these rules are characterized by many characteristics, which are Newly-born, judicial, flexible, adaptable and independent.

The flexibility of the rules of administrative contracts helps to achieve the desired goals, such as justice, the general interest of the community, and the private interest of individuals, so it increase the performance of the companies in all over the world.

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¹ Kanaan and Nawaf (2005). "Administrative Law", House of Culture for Publishing and Distribution.

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