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Survey of Constraints and Barriers of Administrative Contracts in Public Law

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ABSTRACT: Administrative contracts are very much important in Iran under current settings .some people say it is bad to have too much interference in the private sphere in the era of privatization. The government should regulate the market being another argument. Leaving aside the literary arguments, legally Ethiopia has devoted one title in its civil code to specifically deal with administrative contracts. In addition to this, we have procurement proclamation to enable equitable, efficient and effective procurement. In this section, we will have something to say on Ethiopian administrative contract. Government contracts, including administrative and non-administrative, ceremonial functions, which form the subject of public law, but administrative contracts, in addition to the terms of the substantive rules of law are complied with. The content of these rules is that in addition to administrative contracts, a series of other specific rules are subject to interpretation and enforcement of these rules in relation to disputes arising from their contracts and legal proceedings have great importance. The findings suggest that restrictions on the types of public law contracts can be include restrictions in the choice of the contracting parties, restrictions in the shape (form) and limitations in contract term.

***Keywords*:** Constraints, Administrative Contracts, Public Law.

INTRODUCTION

Though hard to locate the exact time, one can still validly locate philosophical and economic backgrounds of administrative contracts. Back in the days of Adam Smith who preached the laissez faire argument with the effect of diametrically insulating the state from the market, the role of the state was exponentially limited to enabling the state to undertake only its “traditional” functions.

As per Adam Smith, the state was advised to let the market alone. The state should put its hands off the market but without forgetting to create internal peace and order, facilitating the market by formulating a peaceful environment and without directly intervening in the market. To this end, the state should establish institutions like the police, courts and parliaments. Such an impact on the economy as caused by leaving the market alone however would not outlive such a condition as the Great Depression. The Great Depression proved the fact that markets cannot operate by their forces alone-rather to some extent the state should regulate the market. Next generation political economists devised the WELFARE state where we have a state which regulates the market- that provides public services such as education ,health, transport, water, light ,sanitation, recreation etc.

Thus, apart from its traditional functions, the state was also conferred with those additional functions listed above. Basically the state used to institutionalize its coercive force to carry out its protection function. But with the growth in the type and nature of functions and because the appropriate way of attaining goals as the case may be is entering into contract. Either by its coercive force or its right to enter in to contract the state strives to carry out its ever growing functions.

Because of the need to carry out its functions, government, via its branches, will embark upon different activities which inevitably will invite the interplay of its branches and the private sector. These branches otherwise known as administrative agencies assist government to properly take its tasks of service provision among other things. It is therefore while these agencies carry out their functions that they use the law of administrative contracts to their ends. The ends are public services, the means administrative contracts.

If this is so, administrative contracts are contracts under the strict sense of the law but only an” administrative” one (see for example Art. 1676(2) cum Art. 1675 of Ethiopian civil code with Art.3131 of the same).

But this nature of the contract i.e. being an administrative contract makes the same different from the beginning to the end from other types of contracts that we know.

Our inquiry therefore will be what is there in administrative contracts? What grain of difference does the qualification administrative add over non-qualified contracts?

One basic addition by the qualification is associated with prerogative matters. Because administrative agencies favorably enjoy the presumption of acting on behalf of the public and because public interest is overriding enough to put aside even basic principles of the law the agencies will enter into an arrangement where the platform is squarely fitted to their play than to the other contracting party. 4

When talking about administrative contracts, hence, one is talking about a contract where the two parties are unequal. Being a contract between unequal parties from the onset, at the end of the day, it will end up entitling parties in unequal manner.

If this is so, how should we define administrative contracts? Well as noted earlier the general contract title of the civil code is applicable to this case because of Articles 1676, 3131 and Art. 1675.

Definition

"A contract is an agreement whereby two or more persons as between themselves create, vary or extinguish obligations of a proprietary nature".

Administrative contracts do share all of the above elements. The differences, however, extend beyond the requirements of Art. 1675 far in to the requirements of Art.3132 which partly reads as: "A contract shall be deemed to be an administrative contract where"

a. It is expressly qualified as such by the law or by the parties; or

b. It is connected with an activity of the public service and implies a permanent participation of the party contracting with the administrative authorities in the execution of such service.

Performance of Administrative Contracts

Normally performance includes an act of giving, doing or not doing as the case may be in view of the creditor, the creditor's agents or anyone who is to benefit from under the contract.

Performance of a contract under normal course of things extinguishes the obligation. Upon performance the respective obligations of the parties to the contract will come to an end.

In principle, a contract is binding upon the parties to it as if it is a law. Art 1731(1) to this end prescribes as:

"The provisions of a contract lawfully formed shall be binding on the parties as though they were law"

Thus the first source of obligation will be the contract duly formed by the parties.

The parties to an administrative contract are the administrative agencies and the contractors. Contracts validly formed by the parties will try to address the who? Whom? And how? Questions that is associated with the contract and the consequent performance.

Non Performance of Administrative Contracts

One of the points where contracts prove to be laws and not mere agreements is upon non performance. Contracts are not mere agreements because upon non-performance they have legal effect- an effect sanctioned and enforced by the law.

We speak of non- performance only when the obligations undertaken by the parties are not executed. Otherwise performance extinguishes obligations. If obligations are not performed in accordance with the spirit and letter of the contract then the non-performing party will be, as the case may be forced to personally perform or to pay damage to neutralize the costs of non-performance. These are not the only consequences of non-performance. Let us consider the effects of non-performance under our law.

Effects of non-performance

Depending on circumstances, a contracting party is entitled to take measures independently or cumulatively. What are the measures under the law? As per Art.1772, requiring the enforcement of the contract or the cancellation of the contract as of self help is authorized. "In addition," it is also possible to require compensation for damages sustained because of non-performance.

But these rights under Art.1771 should be preceded by one condition of the law and that is giving notice. Let us briefly consider these rights under the law.

Administrative contracts: a complex definition

Administrative contracts are contracts where one of the parties is a public person. They are examined by the Administrative Court. Administrative contracts are qualified as such either by virtue of a specific legal attribution, or because they concern a public service or contain a highly unusual clause (clause exorbitante).

In order for a contract to be considered as an "administrative" one, it must fulfill the following conditions:

1. One of the parties thereto must be a public authority.
2. The administrative judicial authorities must have jurisdiction to look into such contracts.
3. It must be related to a public service or be classified by the law as an administrative contract.
4. It must include an "onerous" clause or condition from the public law.

From the Book of Legal Vocabulary by Mr. Gerard Cornu, Henri Capitant Association When a contract is considered as administrative contract ? From the Book of Legal Vocabulary by Mr. Gerard Cornu, Henri Capitant Association

I) Certain contracts are administrative by law

A certain category of contracts may be defined as administrative by law. The contracts allowing a private entity to occupy the public domain, for example, allowing a café to include part of a sidewalk to sit customers, is considered as an administrative contract.

According to Dr. René Chapus, the definition of administrative contracts by law leads to confusion in relation to the definition of an administrative contract by its final objective, since the law simply confirms what it may already be defined with regard to the final objective.

Dr. Yousef Saadallah El-Khoury, in his book on public administrative law entitled "Distinction between administrative contracts and civil contracts entered into by public administrations", states the following:

It is important to distinguish between an administrative contract and a civil contract in terms of judicial competence and in terms of the applicable law.

The said distinction may be made by the law such as when the legal provision stipulates that the reference to settle the subject of the decision is the administrative judicial authority, then, the legislator will classify the said contract as an administrative one.

This is illustrated, for example, when the law grants the administrative judicial authorities the competence to look into cases related to administrative contracts, transactions, liabilities or privileges, entered into by a public administration, or by departments of the parliament to ensure the progress of a public interest. A second example is the case when the law grants the said authorities the competence to look into a public works contract, or a contract for the sale of the State's immovable property and contracts for public property occupancy. (This is the case in Lebanon). Another example is when the law grants the administrative judicial authority the competence to look into conflicts on municipality fees (This example is based on France);

II) Certain contracts are administrative according to the judge

Indeed, the judge may decide that a contract is administrative, if the contract fulfills certain conditions:

One of the parties is a public entity;

Its subject or object is to ensure a public facility or a public interest;

It includes clauses that are unusual in comparison to what is customary in the civil law.

In practice, a public entity may contract with another public entity, or with a private individual, pursuant to a contract with a description, or object or conditions indicating that it is an ordinary civil or commercial contract and not an administrative one.

Conclusion:

1. The issue of exorbitant regime in the common law has affected public work contracts. Some have wanted to confer this description due to the mere existence of specifications. But generally the State Council refuses to grant an administrative character to contracts referring to specifications and do not include highly unusual provisions. Disputes Court, 1999, General Procurement Groups Union;
2. Some have considered that the special arrangements for the award of general procurement contracts is not sufficient to make them administrative contracts. State Council, 1990, Town of Sauve;

The law ended the debate opened and stated that:

"Contracts awarded under the General Procurement Code have the nature of administrative contracts" (Article 2 of the Law of December 11, 2001, known as the "MURCEF" Law);

4. Turnaround in the jurisprudence: "A contract to supply stones for paving a public place, like the contract to supply blocks in the "Porphyritic granite Affair" has been hence recognized as an administrative contract (Commentary of a verdict issued by the Court of Appeals of Bordeaux, 14 September 2004).

5. Contracts entered into by public entities sometimes are not subject to the General Procurement Code, such as contracts of public industrial and commercial establishments of the State, remain subject to the common law unless they refer to the highly unusual clauses; But such provisions are not conclusive when the contract is entered into with their agents or users. See GAJA (Great Verdicts of Administrative Jurisprudence), 16th Edition, 2007, pages 158/159;

In general, the regime of common law is assessed on the basis of an “atmosphere of public law” (P. Weil, The criterion of administrative contract in crisis, Mélanges Waline, p.847). Therefore, the contract is governed by rules from a legislative and / or regulatory provision, applicable regardless of the will of the parties, and derogating from the common law.

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