

The Administrative contract

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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.

Such as for example:

a. Tenancy or lease contracts whether entered into with a public or private entity are not administrative contracts;

b. Legal consultancy contracts or granting a power of attorney to a lawyer are not administrative contracts.

In French administrative law, the judges qualify a contract as an administrative one, with regard to two cumulative criteria, one regarding the contracting entity (a personal criteria) and one regarding the contract's content (a material criteria).

The personal criteria:

In principle, a contract is administrative if one of the contracting party is a public entity.

In the case where both the contracting parties are public entities, precedents have confirmed the existence of a "presumption of administrative quality" (Tribunal des Conflits, Union des Assurances de Paris, 1983). This presumption may be overturned if the contract does nothing other but create private engagements that have no relation with public interest.

A contract between two private contracting parties is generally a private law contract, even if one of the private contracting parties is in charge of the execution of a public service. However, in one of the cases, the administrative judge applied the criteria regarding a representation mandate, which led to qualify such a contract as an administrative contract, on the basis that one of the parties acts for a public entity (Conseil d'état, Société Brossette, 1931).

The material criteria:

This criteria is based on two alternative conditions:

- The object of the contract: A contract is administrative if it is related to the organization or the execution of a public service (Conseil d'état, Epoux Bertin, 1956). As an example, this is the case for contracts with users of a public service.
- The clauses or the regime: A contract is administrative if its clauses or general regime eliminate the traditional contract law.

Also, the contract is deemed as an administrative one –according to the French jurisprudence- if it includes a clause or several clauses granting the administrative entity rights that are different in nature or substance to those which would be accepted by a person of his own free will and accord within the frame of the civil or commercial laws, such as for example:

a. The possibility to confiscate the goods that are not in conformity with the conditions agreed upon;

- b. Referring the clauses to provisions according to the conditions;
- c. Imposing a guarantee or bond on the party contracting with the administration;
- d. Considering the contractor as having failed to carry out his obligations and confiscating the bond;
- e. Re-awarding the work to another person at the expense of the relevant contractor.

In some cases the public administration establishes the private law rules in its contracts, and then we consider it withdraws the relevant contracts from the description of administrative contracts.

The jurisprudence in France, Egypt and Lebanon considers a contract as administrative if its subject or object is the execution of a public facility, such as the execution of public works (roads, bridges, and tunnels), and contracts including an undertaking to collect the municipal fees.

Contracts with Highly Unusual (clause exorbitante) provisions/clauses(under the French Law):

Definition based on the effect: Such clauses allow the “granting of rights to the parties or charge them with obligations of foreign nature to those obligations which are freely agreed to generally by any person within the framework of civil and commercial laws” (State Council, 20 October 1950, Stein).

Definition based on the content:

1. The possibility for the contracting authority to terminate the contract. Disputes Court 1967, the Velodrome Company of Parc des Princes, but not in case of non-performance of certain obligations, Disputes Court 1970, Comblanchien Town;
2. The possibility for the contracting authority to direct, supervise or monitor the execution of the contract. Agricultural Cooperative “Farmer Prosperity, State Council, 1963;
3. The possibility for the party contracting with the government to directly deduct taxes. But this is not the case if it is the administration that carries out such deduction on behalf of the said contracting party. State Council, 1986, SA of credit to the French Industry (CALIF);

In conclusion, we note the following turnarounds:

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;
3. 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.

In all cases, in order to consider the Administrative contract valid, the contracting parties must fulfill the same conditions stipulated in the Civil Law (Civil Transactions Code in the UAE), such as the capacity, age, majority, etc.

Added to this the legal capacity related to the position of the contracting party and whether he has the right to enter into such a contract or not according to the laws in force.

So, any contract entered into by a person who does not have the capacity or is not qualified to do so shall be considered invalid. Administrative contracts must be made in writing while civil contracts are not subject to this condition. The same condition applies to tenders and auctions unless the law stipulates otherwise.

III) The execution of administrative contracts

As the base for the relationship between the Administration and a contracting party, the Administrative contract, and particularly its execution present some differences with regards to a classic everyday contract between two individuals. The Administration naturally benefits from certain powers that are not applicable to non public contracting party. These powers are:

1. The power of direction and control: the administration can give specific service orders concerning the execution of the contracting party’s obligations.
2. The power to “edict” sanctions: the administration may sanction the contracting party in the event of lateness or bad execution by this contracting party. The sanctions range from fines to other measures. In the event that the administration court finds the sanction to be irregular, the Administration will have to compensate the contracting party.
3. The power of unilateral termination: This power may be used as a form of sanction. It is unilaterally pronounced by the administration in the event of a grave fault on the part of the contracting party, and under the condition of eventual compensation. However, the termination may also take place without the occurrence of a fault.
4. The power of unilateral modification: This power was a controversial issue, much debated in France, until a final position regarding this power was fixed. In 1902, the administrative judge decided that the administration may change the lighting service from electricity to gas, thus forcing the contracting party to adapt.

On the other hand, the public administration may, during the execution of an administrative contract, control its execution, and it may as well bring modifications to the contract whenever it deems that the public interest so requires, but within specific limits only, as it may not bring amendments to the clauses related to the financial conditions agreed to with the other contracting party, or require the introduction of unreasonable or unlimited amendments. Moreover, it is not permissible to change the contract from a road construction contract to a bridge construction contract!!!

However, if a transport contract provides for the operation of one hundred buses for example and the administration finds out that the public interest requires that this number be increased, it may impose the increase on the contractor, and also if the administration deems that it would serve better the public interest to modernize the means of gas transport and supply to the beneficiaries or the transport of electricity and water or the means of communications and internet.

It is necessary to indicate that each order issued by the administration to the contractor to execute any additional obligation beyond what is stipulated in the contract, requires that the administration indemnifies the contractor in a fair manner for all expenses incurred in the additional execution and the administrative judicial authorities have the right to order such indemnity.

In view of the foregoing, the rights of a contracting party towards the administration may be summarized as follows:

- To receive the price agreed upon within the deadlines agreed upon;
- To receive the indemnities due in case of any modifications brought and which result in cost increase in the contract.
- To take into consideration all incidental events, force majeure and new developments.