



Doc 3

GENERAL THEORY OF ADMINISTRATIVE CONTRACT

The administration may impose its will, but may also decide to negotiate. Public entities, legal entities, have a contractual capacity. There are nevertheless certain specificities linked to the purpose of general interest of its mission, that is why its contractual freedom will be framed. The administration will be prohibited from contracting in certain areas (organization of the public service, police powers, etc.).

Public authority has been awarded contracts as early as the 16th century (construction of canals, construction of roads, etc.). As early as the 19th century, the administration of bridges and roads will elaborate specifications (cahiers des charges) in the field of construction of tracks, and the judge will establish a system of rules in the forefront of a liberal conception of the State. Little by little, contractual action will be systematized.

The contracts of the administration don't present uniformed criteria. We will have to determine the criteria of the administrative contract before we see the legal regime of the contracts of the Administration.

IDENTIFICATION OF THE ADMINISTRATIVE CONTRACT

The definition of the concept of administrative contract is necessary because public entities may from time to time enter into contracts under private law. Attention should also be paid to the legal regime of the administrative contract, which differs greatly from that of private-law contracts; there is a legal qualification as well as a judicial qualification;

THE LEGAL QUALIFICATION

The submission of a contract to an administrative law regime may arise from the will of the legislator. This applies in particular to public works contracts, contracts involving occupation of the public domain or public procurements. For Professor Rene CHAPUS, the determination by law would be confused with the determination according to the object in that the law would merely take note of a reality coming from the object of the contract.

THE JURISPRUDENTIAL QUALIFICATION

The administrative contract is linked to two elements, an organic criterion (authors) and a particular regime. A priori, if one takes into consideration the regime of the contract, one will arrive at a purely tautological reasoning. Therefore an administrative contract is a contract subject to an exorbitant regime of private law. Similarly, a contract subject to an exorbitant private law regime is an administrative contract. Is not that strange?

The administrative contract is a contract concluded by the administration and is subject to an exorbitant regime of private law. Consequently, the judge relies on the material criterion, relating to the content of the contract to identify the administrative contract.

Two sets of criteria make it possible to identify the unnamed contract, the organic criterion and the material criterion.

ORGANIC CRITERION: THE CO-CONTRACTORS

This is a permanent criterion. When a public person is a contracting party, the contract is considered administrative as long as it also meets the material criterion.

CONTRACTS BETWEEN PUBLIC ENTITIES

When the contract is concluded between two public persons, it is in principle administrative. This is what "*l'Arrêt UAP 1983 du Tribunal des Conflits*", established by presuming administrative these contracts because they "normally participate in the meeting of two public management".

But a contract established between two public persons may be of private law when, having regard to its object, it gives rise only to private law relationships (*l'Arrêt UAP pre-cited*).

CONTRACTS BETWEEN PRIVATE PERSONS

Where the contract is concluded between two private persons, it is in principle a contract under private law (even if the material criterion is verified). But there are exceptions to this principle. A private person may have a mandate by which he represents a public person.

Also, it can act on behalf of a public person; *l'Arrêt Société Peyrot 1963 - Tribunal des Conflits* enshrined this possibility (in this case, there was no mandate). In that case *Tribunal des Conflits* considers that the construction of national roads "belongs by nature to the State" and that, consequently, the insurer acts on behalf of the State, whatever its status (a legal entity governed by public law, a semi-public company, etc.). This solution is found in other judgments, notably that of 1976, *Dame Culard*, which concerned *Crédit Foncier de France*; the loans were made on behalf of the State (because the company was committed to the State to conclude these contracts with French private individuals as part of the French public service for French Expatriates in Tunisia). This tendency to limit the importance of the organic criterion is similar to that which Community law seems to adopt.

MATERIAL CRITERION: THE OBJECT AND THE CONTENT OF THE ACT

This is an alternative criterion in the sense that one or other of the conditions must be met. This was determined by *l'arrêt Epoux Bertin 1956 - Conseil d'Etat*. When the organic criterion is met, the material criterion must be checked to determine the administrative nature of the contract. There are two elements that can establish the public nature of the contract: exorbitant clause or exorbitant regime.

EXORBITANT CLAUSE:

If a contract is concluded by a public entity and it contains one or more exorbitant clauses, it is considered to be public law. This solution was adopted by *l'Arrêt Société des Granits porphyroïdes des Vosges 1912 - Conseil d'Etat*. This decision doesn't define the notion of an exorbitant clause; it was therefore the latter case-law which had dealt with it. It is therefore a question of clauses providing the public person with more important rights, thus showing the special nature of the contract, which is not based on an equality of contracting parties (unlike private law) but on an element of unilaterality. It is therefore a clause foreign to those that can be found in private law. So we look at the content of the contract, not its purpose. The administrative judge thus held that a clause of unilateral termination of the administration in the absence of fault of the contracting party was an exorbitant clause.

EXORBITANT REGIME:

This notion was applied by *Conseil d'Etat*, which issued *l'Arrêt Société d'Exploitation de la Rivière du Sant 1973*, on the occasion of a refusal to contract. In the present case, a contract had been concluded between *Electricité De France* and an electricity producer (private person); The judge noted the provisions in the contract which state that it is public and therefore the application of the public law regime (among which the obligation to conclude these contracts).

THE OBJECT OF THE CONTRACT AND THE PERFORMANCE OF A PUBLIC SERVICE

In this case, it is the object of the contract, and not the contract itself, to determine the public nature of the contract. The object of the contract sometimes reveals clearly the application of the public law regime. For example, public procurements, partnership contracts, public domain contracts or contracts for public works.

The execution of the public service may therefore be entrusted to one of the contractors. This is what emerges from *l'Arrêt Epoux Bertin 1956 CE*: the administration was considered to have entrusted the management of foreigners by an administrative contract. But the contract can be only "one of the modalities of the execution of this service" (*Consorts Grimouard de 1956*):

in the present case, the execution of the public service is not entrusted to a private sector person, but its operations constitute a modality.

THE LEGAL REGIME GOVERNING THE CONTRACTS OF ADMINISTRATION (CONCLUSION OF THE CONTRACT)

The principle in private law is that the contract is formed solo-consensus. In public law the situation is almost reversed, the training being strictly framed by the texts. The rules applicable to this title relate mainly to the choice of the contracting party and to the determination of the content of the contract. Freedom of contract is always maintained, but this expression is called into question.

PROCEDURES OF CHOOSING THE CONTRACTING PARTY

In the absence of a text, the principle is contractual freedom. Given the corruption cases of recent years and the development of new government directives, the aim was to strengthen the transparency rules for the award of certain contracts.

PUBLIC PROCUREMENTS

Public procurements in Algeria are governed by Presidential Decree No. 15-247 of March 6th, 2015 regulating public procurements and public service delegation. However, unlike the situation in many European Union countries, there is no real judicial control and/or legality in the award of public procurements.

The text is based on three principles, namely:

- Freedom of access to public procurement;
- Equal treatment of candidates;
- Transparency in the selection and procurement procedures.

However, products of Algerian origin and companies governed by Algerian law (even if the capital is held by foreigners) benefit from a so-called national preference up to a reduction of 25% in the amount of the evaluation, in order to make them more competitive on the price criterion.

Public procurement is carried out in the following ways:

- . Tender following an open call for tender;
- . Award following a restricted call for tender;
- . Selective consultation;
- . Single or over-the-counter (OTC) procurement after consultation following an inflexible bidding process;
- . Contest entry;
- . Award following a tender;
- . Pass-through by simple agreement or after consultation (exceptional and conditioned mode of payment)

THE EXECUTION OF THE CONTRACT

The contractual relationship must be **fair**: those who contract with the administration enjoy a number of rights. The administration as the strongest part of the contract, justified by the public power privilege, has many prerogatives that exist without being necessary to foresee them in the contract.

THE POWER OF DIRECTION AND CONTROL

The administration remains responsible for the public service, and in this respect has direction and control power, which will enable it to monitor the performance of the contract.

In some cases, this power allows the administrative authority to demand benefits in return for additional remuneration.

THE POWER OF PUNISHMENT

In order to impose a sanction, the contracting party of the administration must be in **breach** of its obligations. They are imposed by the administration under the supervision of the judge, and the administration must first of all put its contractual partner into compliance with its obligations; therefore a possibility of dialogue remains open between the co-contractors. They may be financial penalties or coercive penalties intended to ensure performance of the contract. In the latter case, the administration may decide to substitute itself for the contracting party to carry out the contract, or may decide to substitute a third party for it.

There are a number of possible coercive penalties, such as force use for public works procurements, sequestration in the context of dispossession, and so on.

Finally, as a sanction, the administration may unilaterally terminate the contract in the event of gross negligence on the part of the co-contractor. This may be terminated by the judge. Furthermore, any sanction must be justified.

THE POWER OF UNILATERAL MODIFICATION

This is a very important power with regard to the contractual logic of the Civil Code. It was discovered very early by the judge (*C.E, 10 Janvier 1902, Compagnie Nouvelle du Gas de Deville-lès-Rouen*).

This power even exists without text. The contracting partner is nevertheless not deprived because this power is limited. Its exercise must not undermine the financial equilibrium of the contract (if necessary, the administration is required to pay full compensation) and must be exercisable only on grounds of public interest. If these conditions are not fulfilled, the contracting party may claim damages or even the termination of the contract in the event of the contract being overturned.

THE POWER OF TERMINATION IN THE INTEREST OF THE SERVICE

The interest of the service will lead to the administration adopting a posture that will cause it to terminate the contract. It will be necessary here to consider the imperatives of the public service.

In a decision of *Conseil d'Etat (CE, 2 May 1958, Distillerie de Magnac-Lava)*, the judge considered that it was for the granting authority, under the general rules of the administrative contract, to terminate a contract when the general interest commands it.

Termination of the contract may be effected either by regulation or by contract. The judge will check whether the foundation of the power implemented by the administration is correct. The contracting partner shall be entitled to full compensation for any loss suffered as a result of non-performance of the contract.

QUESTIONS:

- TRANSLATE THE UNDERLINED TERMS INTO ARABIC.
- GIVE AN ABSTRACT (IN ARABIC) TO THE TOPIC.