CHAPTER TWO

EFFECTS OF ADMINISTRATIVE CONTRACTS

1.1. Performance of Administrative Contracts

1.1.1. Who Should Perform And To Whom To Perform

- **Once the administrative contract fulfills the validity requirements**, it **imposes legally binding obligations** on the **contractor and the contracting administrative authority**.
- Both parties to an administrative contract are expected to perform their obligations in the manner provided in the contract.[1]
- Contracting parties, **in particular the contractor has to perform its obligation diligently in a correct manner**, deemed to be satisfactory according to the rules of art prevailing at the time and in the kind of activity concerned.[2]
- According to **Article 1740(2)** the **contract can be performed by the debtor, his agent or by a person authorized by court or law**. The persons authorized by law are tutors, liquidators, trustees and a person authorized by court is either a curator or an interested creditor who wants to save the rights of the debtor by performing his obligation.
- However, **the law never mentions about performance of a contract by a third party who is not authorized by debtor, court or law**. Never the less, we can easily argue that **if the creditor accepts the payment, the debtor has no right to stop a third party from performing the obligation** since the creditor has a right to assign his right to a third party without the consent of a debtor.[3] In such case, if the debtor insists on paying the debt, he can pay it to the person who has already paid the creditor.[4]
- **The law refrains from including unauthorized third party in the list of Article 1740(2) since assignment of a right is a contract**. A creditor is not duty bound to receive payment from a person not authorized by debtor, court or law. **A creditor is free to accept or reject such payment without any effect on his/her right against the debtor**.

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[1] Supra note 3, Article 3172(1)
[2] Supra note 3, Article 3172(2&3)
[3] Supra note 3, Article 1962
[4] Supra note 3, Article 1824

- **However, the creditor may sometimes insist that the debtor himself should perform the obligation.**[5] This **is when the contract** or **the law expressly provides** that the debtor shall perform the contract personally. For example, **Ethiopian Labor law** provides that the employee should perform the contract personally.
- The **second case** where personal performance becomes necessary is **when the creditor proves that personal performance is essential to him**. The creditor can prove such only when the obligation **is obligation to "do" of a professional nature or art**. For example, a **lawyer**, or a **doctor** can not authorize a duty which he agreed to do. Moreover, a musicians, painters, Poet, actor, dancer etc cannot authorize someone to perform his obligation.
- Generally, the **creditor should accept performance** either **from the debtor, his agent or person authorized by a court of law** unless he proves that personal performance of the contract is essential to him by the contract or a the law expressly provides personal performance.
- **Exception**: If **personal performance of debtor benefits the creditor** or if there is an **express agreement of parties**.

Does this rule squarely fit to administrative contracts?

- **Art 3172(1)** says "… contracting parties shall perform their obligations in a manner provided in the contract". Based on this provision contracting parties may agree to the effect of carrying out obligations personally. Even the last sentence which reads "… or has been expressly agreed" authorizes parties to have the said stipulation of imposing an obligation on one of the parties to enable personal performance of the obligation.

1.1.2. Manner of Performance of Administrative Contracts

- According to Article 3172(1) of the civil code determining **the manner of performance is left for the contracting parties.**
- If the **parties fail to agree**, the law authorizes the **contractor** to "…**choose the suppliers** for the purpose of buying materials **and things necessary for the performance** of the

[5] Supra note 3, Art. 1740(1)

obligations.[6] And sub-article (2) authorizes the contractor to "...**choose the workmen or employees** to perform such obligations under his responsibility".

- Generally, **the modality of performance is conditioned on the letters and spirits of the contract. This can be gathered from Article 3172(1)**. Furthermore, the "unless and otherwise agreed" phrase of Article 3173 stresses on the fact of giving the chance to the parties of an administrative contract in determining the manner of performing the contract.

1.1.3. Time of Performance of Administrative Contracts

- In principle parties can agree the time of performance of a contract.[7] If the parties fail to decide when each party should perform their respective obligations, **Article 3174(2)** "**failing a specific provision in the contract, each contracting party shall perform his obligations within a reasonable time"**
- **Compare** the **"reasonable time" under 3174(2)** requirement with the **"forthwith" requirement in Article 1756(2)** and try to guess why the rule is relatively lenient in administrative contact.
- **What does reasonable time refer to? Does it mean immediately? How is it different from the "forthwith" requirement?**
- The law prohibits administrative authorities from unilaterally imposing a time on the contractor. Article **3175** reads:

"The administrative authorities may not impose unilaterally on the other contracting party a time which has not been agreed upon for the performance of his obligations unless they may under the contract fix such time by means of requisition orders".

- Accordingly administrative authorities are legally insulated from the practice of taking contractors by surprise. **This prohibition is even against the prerogatives of administrative contracts such as one under Article 3179 (Unilateral modification)**.
- Article 1756(3) invites another instance of requiring performance. As such, "payment shall be made whenever a party requires the other party to perform his obligations." But

[6] Supra note 3, Article 3173
[7] Supra note 3, Article 1756 cum 3174

should this be dependent on will and whim of the requiring party? No! The law provides standards under Article 1757. Let us see Article 1757(1):-

"Only a party who benefits by a time limit having regard to the forms or nature of the contract or [who has performed] or [offered to perform] his obligations [may require] the other party to carry out his obligations under the contract".

- Peculiar to administrative contracts and as against the rules that you know under Articles **1757 and 1759, Articles 3177 and 3178** stipulate the rules that aim at protecting the public interest.
- **As a rule, a party to a contract can refuse performance if the other party fails to perform his own**. But the issue is different when it comes to administrative contracts.
- According to **Article 3177 the contractor may not refuse to carry out his/her obligations** simply because the administrative authority has failed to carry out its commitments.
- According to **Article 3178 the other contracting party may not invoke Set-off except in the case of debts other than fiscal debts"**.
- Under **Article 1833** which reads: **set off shall occur regardless of the cause of either obligation except where the obligation is owing to the state or municipalities".**
- **Try to analyze the two provisions and discuss whether set-off is allowed in administrative contract or not? If yes, under what circumstance?**

1.2. Non Performance of Administrative Contracts

- 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.

1.3. 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 Article 1772, a party,** in case of non-performance, **can require either the performance of the contract** or **the cancellation of the contract in addition to compensation** for the damage he suffered due to non-performance.
- However, before a party claims any of these remedies it should be preceded by one condition i.e. giving notice.

1.3.1. Notice

- The general rules of contract provides that **before asking for any remedy in case of non-performance such party should put the non-performing party in default with notice**. And this helps us to determine the right time of transfer of risk as **the date of notice indicates the date of transfer of risk.**
- **But the rules that govern administrative contract do not clearly mention the need to put the non-performing party in default**.

Article 1772 underlines the issue as:

"*A party may only invoke non- performance of the contract by the other party after having placed the other party in default by requiring him by notice to carry out his obligations under the contract*".

- This being the rule, Article 1775 accepts the general requirement of notice under Article 1772. **However, there are four conditions in which notice is not necessary.**
- These are;
    - **obligation to refrain** from doing something,
    - **obligations to be carried out within a fixed period** of time and when they are not carried out within this fixed period,
    - where the **debtor clearly shows in writing his/her intention not to perform** or
    - when the **parties have an agreement not to give notice** then the law out rules the importance of giving default notice.[8]

Do you think we can apply the same procedure for administrative contracts too?

[8] Supra note 3, Article 1775

- **Article 3196** mentions the use of notice only occasionally while it prescribes about **"interest for delay".**
- **Administrative contract rules do not clearly legislate on notice issues.**
- So, one can say that as administrative contracts are one type of general contracts, the general rules of notice are applicable by default. Moreover, the master draftsperson's commentary on the subject matter makes the point clear.
    - As such he held "Articles 3194-3200 present us Articles 1771-1805 by further elaborating and innovating them". None the less, **Article 1775 inspires us about the contract that will possibly determine the fate of default notice.** With the exception of Article 1775(c) the other provisions under Article 1775 are inspiring of the content factor. Another instance where default notice is mentioned, in the mean time of course, is Article 3198.
- Therefore, the two occasions provided under **Articles 3196 & 3198** are indicatives of the effectiveness of the general provisions of contract on administrative contract.
- But notice that the terms of the contract will however determine the necessity or other wise of notice.

1.3.2. Forced Performance

- **Forced performance is a remedy that compels the debtor to perform the obligation** he assumed under a contract and the time of performance of which has lapsed. This type of contract **cannot be order anytime;** rather **it needs court order** and **can only be enforced with the help of law enforcement agencies** as it would be difficult for the creditor to force the debtor to perform his obligation.
- In order to balance the interest of the debtor and the creditor, **forced performance can only be ordered when the performance of the contract is of special importance for the creditor** and **such performance would not affect the personal liberty of the debtor**.[9]
- Though the same rule also governs administrative contracts, **the contractor cannot ask the court for forced performance by the contracting administrative authority.**[10]

[9] Supra note 3, Article 1776
[10] Supra note 3, Article 3194

- The **court can**, however, **order the payment of compensation** to the contractor unless the administrative authority is willing to perform its obligations.[11]
- When an administrative authority enters into contract in addition to its obligation to pay the agreed price, it may also assume other obligations towards the contractor. For instance it may have assumed the obligation to supply the materials or the workmen which the contractor needs for the performance of his obligations, or it may have agreed to clear the site for the construction of a certain work.
- **However, the administrative authority cannot invoke its right not to be forced to perform its obligations to avoid its duty to pay the agreed price for works already completed by the contractor.**
- **Its right not to be forced to perform will only help it to refuse forced performance of contract which it has unilaterally cancelled as per Article 3180 of the Civil Code** or **forced performance of its obligation to supply material or work-men which are necessary for the performance of the contract by the contractor.**
- **It is only the court which can order forced performance when the contractor failed to perform his obligation**. In other words, the contracting administrative body does not have the power to force the contractor to perform his obligation.[12]
- **The administrative authority can however compel, by requisition order, the workers of the contractor who is engaged in the running of a public service to stop strike.**[13] This is intended to ensure the continued supply of essential public services.

1.3.3. Damages

- Similar to the case of private contracts, compensation or damage is the other remedy available in case of non-performance on administrative contracts.
- **The term damage refers to the economic loss that the non-performance of the contract** by one party entails for the other party. So, the purpose of the damage is to compensate the party that sustained economic loss as a result of the non-performance of the contract.

[11] Supra note 3, Article 3194(2)
[12] Supra note 3, Article 3195(1)
[13] Supra note 3, Article 3195(2)

- This will be **determined by considering all the economic benefits which the party affected by the non-performance could have derived had the contract been performed as it is**.
- **The burden to proof** the fact that there is non-performance of contract, that he has sustained economic loss and that there is a direct cause and effect relationship between the non-performance of the contract and the economic loss sustained **lie on the party who asks for damage.**[14] And the **damaged party may be claim compensation together either with cancellation or forced performance**.[15]
- However, the **defendant can raise a defense such as force majeure**. **Article 1793** of the Civil Code lists circumstances which could be considered as force majeure while Article 1794 of the same code mentions circumstances which, for various policy reasons, cannot be considered as constituting force majeure.[16]
- **Article 3199 of the Civil Code provides two additions to the list of circumstances which are not considered as force majeure.** According to this article the **delay or default of the suppliers of the contractor cannot be raised as force majeure** releasing the contractor from liability for non-performance.

1.3.4. Cancellation of Administrative Contracts

- **Cancellation refers to the situation where parties declare the extinction of obligations prematurely.**
- **Non-performance can be taken as a ground** that may lead to cancellation of the contract.
- **Cancellation may be a self- help measure when parties have previously agreed about it** in their contract, **where one of the parties has failed to perform his obligation within the time fixed as per**[17] or **where performance by one of the parties is hindered or has become impossible**.

[14] Supra note 3, Article 1790(1)
[15] Supra note 3, Article 1790(1)
[16] See also, Supra note 3, Article 1791(2)
[17] Supra note 3, Articles 1770, 1774 and 1775

- **Article 1788** holds "*A party may cancel the contract even before the obligation of the other party is due where the performance by the other party of his obligations has become impossible or is hindered so that the essence of the contract is affected*".
- **These above conditions authorize parties to unilaterally cancel their contracts. Unilateral cancellation should not imply cancellation solely undertaken by the party resorting to it. Far from this, there are conditions that call for the intervention of courts.**

What do the provisions on administrative contract law say about this?

- Normally law of administrative contract does not say anything on this matter. But this does not mean that parties to an administrative contract do not have cancelation as one remedy of non-performance. For one thing **Article 1676 is an indicative of the possibility of applying those rules on cancellation in case of administrative contracts.**
- On the other hand we have **Article 3180 which talks about "termination of contract."** We underline the worth of this because the concept under Art. 3180 is susceptible to the following proliferated interpretations:

    a. Taking Art. 3180 as a **cancellation proviso and specially a unilateral cancellation proviso**

    b. Taking Art.3180 as a **termination proviso at face value**

    c. Taking Art. 3180 as **an invalidation clause specially when considering the Amharic version of this same Article**

1.4. Extinction of Administrative Contracts

- Though administrative contracts can be concluded for a long time, no contracts are concluded to last forever. Even in case of administrative contracts, **a contract for the concession of public service, such contracts the duration of concession may not exceed maximum of sixty years.**[18] A contract once concluded will come to an end for one or another reason. When we examine the relevant rules of general contract law and

[18] Supra note 3, Article 3227(2)

the special administrative contract law rules we learn that **administrative contracts may be extinguished by:-**

1. Decision of the parties

- As part of the principle of freedom of contract, the contractor and the administrative authority can create contract by an agreement.
- **Article 1675** of the Civil Code which provides that "a contract is an agreement whereby two or more persons agree as between themselves to create, vary or ***extinguish*** obligations of proprietary in nature."
- Parties can also extinguish their contract unilaterally. Very noticeable in this regard is the power of the administrative authority to unilaterally decide to extinguish the contract.
- **When we examine the administrative contract provisions of the Civil Code we see unusual and extensive power of unilaterally extinguishing contracts given to the contracting administrative authority**.
- An **administrative authority can unilaterally declare the extinction** of the contract **based on two grounds**; these are **the fault of the contractor** (leading to cancellation) and second the **requirement of public interest** (leading to termination).[19]
- When we look it from the side of the contractor, **the special administrative contract law rules do not allow the contractor to unilaterally extinguish the contract**.
- However, this does not mean that the contractor is not at all allowed to extinguish the contract. **If the contract so stipulates** or **those conditions that are mentioned in general contract law as a ground for unilateral termination[20] (by notice)** or **unilateral cancellation of contract[21] are fulfilled, the contractor can unilateral terminate or cancel the contract**.

    a. Law and,
    b. Decision of court of law

[19] Supra note 3, Article 3180 and Article 3181(1)
[20] Supra note 3, Article 1820 and 1821
[21] Supra note 3, Article 1787, 1788, and 1789