Administrative Contract

Farid T. (LL.B, LL.M

- Civil Code
- • Proclamation NO. 649/2009
- • UNICTRAL Model Law on Public Procurement
- (2014)

- **Philosophical and economic backgrounds of administrative contracts**
- Adam Smith preached the Concept of **laissez faire Market** System
- – Complete separation between the government and economic system (market)
- – As per Adam Smith, the state was advised to let the market alone.
- – Consumer is a Sovereign
- – They believe in Automatic Adjustment
- – The role of the state was exponentially limited to undertake only its “traditional” functions.

- **Traditional Functions of the Gov’t**

❖To create/ maintain internal peace and order

❖To this end, the state should establish institutions like the police, courts and parliaments.

❖facilitating the market by formulating a peaceful environment and without directly intervening in the market.

- Leaving the market alone led to market failurity (the Great Depression)
- The Great Depression proved the fact that markets cannot operate by their forces alonerather 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:-
- – eg education ,health, transport, water, light
- ,sanitation, recreation etc.

- **Welfare Government System**
- The government starts to take some measures when the market fail to regulate itself.
- Basically the state used to institutionalize its coercived force to carry out its protection function. (Keeping the balances)
- When the government starts to take interact with consumers, the concept of Administrative contract came into picture.
- To this end of utilizing its contracting capacity, government enters into a special type of contract called administrative contract.

- **Developmental State**
- In its origin came after 2nd world war. Eg. Price cup.
- Under developmental state, development is the essence, growth is the basic thing.
- Under developmental state, the interest of ruling organ may prevail over the customer.

- Generally Government may act in 3 capacity
- I) Traditional Function of the Government
- II) Economic Interest backing the Public (Administrative Contract Applies)
- III) Involves in Economic Activities as private Trader (Like other civil law, law of K, etc)
- Common Law Legal System Vs. Civil Law legal System Views of Administrative Contracts

- **Common Law Legal System**
- Administrative Contracts are just like ordinary K. No special Law governing administrative K.
- Equal treatment for both parties including administrative organ. No party enjoy priority.
- **Civil Law legal System Views**
- Parties to Administrative K are unequal whose case are governed by special regime and adjudicated by special tribunals. Administrative tribunals in France.

- **Administrative Contracts and Other Forms of Contracts**
- Administrative agencies assist government to properly take its tasks of service provision among other things.
- Administrative agencies use the law of administrative contracts to their ends.
- The ends are public services, the means administrative contracts.

- **Administrative contracts differs**:-
- Administrative agencies favorably enjoy the presumption of acting on behalf of the public and because public interest that the agencies will enter into an arrangement than to the other contracting party.

- Definition of administrative contracts?
- The general contract title of the civil code is applicable to this case because of Articles 1676, 3131 and Art. 1675. Art.1675 C.C
- *“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***…
- 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.

- **Elements of Art.3132**:
- **“Expressly qualified as such by the la**w” I.e. in the civil code we have such articles as Article 3207 (Concession) and 3244 (contract of public works) which expressly qualify contracts as administrative contracts.

- **Qualified by the parties**..
- • Art.3132 (1) is that parties may qualify expressly a contract as an administrative contract.
- – a contract qualified as such by the parties on face value cannot be considered as an administrative contract unless one of the parties is an administrative authority. – 3133 – B.Os (PLC or Shc) + public interest
- • What about a contract that involves an administrative authority but not qualified as such by the parties?

- René David says
- “As a French legal scholar and as I think it fit, in our classification of law, public law should be distinguished from private law. Especially it is important to separate civil law from administrative law…contracts made by public officials have this [special trait] which enable us call them administrative contracts and treat them separately from civil law.[emphasis]

- Article 2(6) of Proclamation NO. 649/2009: Public Body » mean any public body, which is partly or wholly financed by the Federal Government budget, higher education institutions and public institutions of like nature;
- • From this it is possible to infer that at least two things make an entity an administrative body.
- – The first is the source of income of the entity.
- • If the entity partly or wholly derives its income from the government, there is a possibility to consider it a public body which can enter into administrative contracts.
- – On the other hand the purpose of the organ makes it an administrative body

- Art.3132 (1) Says “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”
- **The object**: Public service (general interest)According to Art 3132(1) two reasons make “any activity” a “public service”
- One of these reasons is necessity/ urgency – This necessity should be the need of the general interest. So any thing necessary and considered as such by a public community to the general interest.

- The second reason is inadequacy on the part of the private sector. – Thus a public service is any activity but which private individuals on their initiative cannot carry out among other things because of financial constraints.
- **Permanent participation**
- • Permanent under Art. 3132(b) imply?– continuous, uninterrupted, regular and normal participation of the contractor in the relationship and the expansion of a public service.
- – Eg. Public transportation

- **1.3 Formation of Administrative**
- Contracts.
- • **Validity Requirement (4 of them are mandatory)**
- –Consent
- –Capacity
- –Object
- –Form (Art.1724 – Written form)

- **Consent**
- Art. 3134 -3339 – Special Aspects of the consent is regulated.
- Under Art. 3134, it is the contract concluded by the administrative agencies that proves the existence of consent. Meaning mere conclusion of a contract by an administrative body implies the existence of consent on the part of the administrative body.
- It partly reads “…, the conclusion of a contract by the administrative authorities implies an express manifestation of will on their part”

- Under administrative contracts however may be the insufficiency of implied consent. – Ordinary contracts envisage the possibility of deriving consent from silence under exceptional circumstances.
- • Administrative contacts always one has to prove the existence of express consent. Nowhere therefore silence does amount to acceptance.
- • To be specific, Art.3134 (2) says: –
- “Where an authority competent to approve a contract keeps silent, such silence shall not, in the absence of a formal provision, be deemed to amount to approval.”

- **Expressly approval and signature**
- • When it is expressly approved and signed the K, that A.A said to have consented to the K.
- • For Approval
- – Express approval is mandatory.
- – Stamp and Signature of the authorized person on behalf of the agency binds the latter.
- A.K Approving Agency – Art 3144
- A. Agency Vs. Concluding Parties • Applicable for : Variation and Extinction, etc.
- Violation of Authorization and Approval make the contract void.

- **Capacity**
- Administrative contracts are made by artificial persons be it the administrative agency or the contractor
- Capacity is all about establishment, registration or license, Financial capacity .
- Basically any juridical or physical person that wants to conclude a contract with administrative agencies should have: Article 28 of Procl. 649/2009
- – Technical and professional capacity (29(4) Pr.)
- – Legal capacity – Financial capacity (Solvency, Credit..etc) – Fiscal capacity • Art 3140

- **Object**
- • Peculiar however to administrative contracts, administrative agencies are entitled to formulate in advance model specification, general clauses and common directives (Art 3135) .
- • Predominantly administrative contracts have objects determined by administrative agencies.
- • Art 3138 (2) – For execution and interpretation, the model contract applies if they there are express reference to it.
- – Model Contract (Art 3135/6/7)
- – Actual (Specified) Contract
- • Deviation (Art 3139) • No Reference • Art 3170/71 – deals with lack of object or unlawfulness of the object

- **Form**
- • Art 1678(c) + Art.1724 + Art 26 of Proc. 649/09 • Art. .1724 says Any contract binding the Government or a public administration shall be in Writing and registered with a court, public administration or notary.
- On top of the prescription under Art 1724, some administrative contracts should be formed following procedures of tender. (Minute of the process of forming the K/tender)

- Art 26 of Proc. 649/09 26.
- **Form of Communications**
- 1) Communications between candidates and public bodies shall be in writing. Any communications not made in written form shall be subsequently referred to and confirmed in writing.
- 2) Subject to necessary safeguards with regard to authenticity and confidentiality, and when technical conditions so permit, the Minister may issue a directive to determine the extent by which communication by electronic means may be used in addition to or instead of writing.

- **1.3.2 Modalities of Formation.**
- Art 3147(1) “Administrative contracts (may be) concluded by the procedure of allocation by tender” (emphasis)
- • As art 3147(1) makes it clear by utilizing “may be…” it is optional that such a procedure is followed. Art 3147(2) “They shall be concluded by such procedure, under pain of nullity, whenever the law imposes such obligation.”
- • Once the law dictates us to conclude an administrative contract by the procedure of allocation by tender we have to do it in that way the consequence of not following the …nullity.

- To this end, AK procedure of allocation are governed by Articles 3148-3169.
- • If the contract is to be concluded after allocation, – Art.3148 tells us that “the allocation shall be notified to the public in the manner prescribed by administrative regulations or in default… in the manner which appears the most appropriate”.
- • 3148 (Notification)+3164+3158 – tells us that tender designed to serve utmost public interest + ensure transparency.

- **Notice of Allocation**
- The minimum threshold of the content of the notice of allocation is available under Art. 3149 - what/when/where the authority needs? The tender + contract
- We have other modalities of forming administrative contracts under Proclamation 649/2009

- **FDRE Procurement Law And Guiding Principles of Public Procurement**
- Guiding Principles of Public Procurement
- • The UNCITRAL Model Law on the Public Procurement contains different principles which are required to be adopted by member states. The nine principles applicable to public procurement as contained in the Model Law which form the essence of the procurement regimes are the following;
- • Principle of Economy; Principle of Competitiveness; Principle of Effectiveness; Principle of Transparency; Principle of Combating of abuse; Principle of Avoidance of risk; Principle of Accountability; Principle of Fairness and equitability; and Principle of Integrity.
- • It is important to keep in mind that these laws are based on the principles of a demand economy".

- **1. Principle of Economy**
- • The principle of economy is the first principle that requires economic object of public procurement is to obtain the best product at the best price.
- • It is generally accepted that to ensure that the lowest price is obtained the widest possible competition by potential suppliers is necessary, and the principle of competition will therefore have a direct influence on the principle of economy.
- • Economy can also relate to the question of the cost effectiveness of both the process and the subject matter of the procurement.

- **2. Principle of Competitiveness**
- • It is believed that competition, as an economic principle, will ensure that suppliers will offer the best product at the best price with best technical and professional capacity.
- • Many legal scholars claim this principle overlaps with the principle of economy. However, it is generally accepted that effective competition will enhance the process”. Open tender procedures ensure effective competition.
- • The principle of competition is central to the methods of procurement provided in the ‘Model Law’.

- **3. Principle of Effectiveness**
- • Effectiveness can be defined as productiveness with relation to the costs of the procurement process.
- • Crucially, the final goal of any procurement system is to insure that the procurement process itself is carried out efficiently.
- • Thus, effectiveness at every stage of the procurement process must be realized and the procurement process must carry out: – without unnecessary or disproportionate delay or waste of resources for the purchasing entity, – without unreasonable cost for bidders.

- **4. Principle of Transparency**
- • Transparency is a key principle to implement system objectives of public procurements.
- • Transparency in public procurement requires publication of all the ‘rules of the game’ in advance including administrative rulings and procedures and directives relating to public procurement.
- • Transparency requires public tender opening.

- **5. Principle of Combating of Abuse**
- • The principle of the combating of abuse entails that conflicts of interest, fraud and corruption must be avoided.
- • This principle is supported by, and overlaps with, most of the principles referred to above, and is to an extent a function of the above principles.
- • In particular, the principles of accountability, transparency and integrity assist in ensuring that abuse is combated.

- **6. Principle of Avoidance of risk**
- • Risks relating to public construction procurement can be addressed in a procurement regime by providing for at least the following:
- – The ‘ascertainment by the procuring entity the information relating to tenderers’, ‘professional and technical qualifications’, ‘competence, financial resources, equipment and other physical facilities, managerial capability, experience and reputation’ and if the tenderer has the personnel to perform the contract, its ‘legal capacity and its financial means’.
- – This principle requires the tenderers to must fulfill their obligations to the state regarding taxes, security and similar contributions; and to have a clean criminal record.

- **7. Principle of Accountability**
- • Accountability entails that both the government officials and parties participating in public procurement to be held accountable for their actions in the process of procurement.
- • The principle of accountability includes the requirement of the provision of effective remedies which offer appropriate redress in the case of unlawful actions.
- • The general public and the tenderers clearly also have an interest in holding the procuring entity and government officials accountable for the proper implementation and functioning of the public procurement system.

- 8. Principle of Integrity
- Integrity is referred to as an objective of public procurement in the ‘Model Law’.
- In public procurement, the “principle of integrity includes the incorporation of all of the principles referred to above as well as the proper implementation of these principles.
- Integrity in public procurement entails consistency and objectivity in the implementation of all of the applicable provisions to ensure their ability to achieve their objectives/goals.

- **9. Principle of Fairness and Equitability**
- Fairness in the public procurement context is said to generally refer to procedural fairness. It refers sufficent access to procurement process, opportunities and rules applicable (No advantange between tenderers
- Procedural fairness has two requirements namely audi alteram partem (relationship between the organ of state and tenderers) and nemo iudex in sua causa (the tenderers in relation to each other)

- The first relationship requires that sufficient access to the procurement process is provided by the organ of state, that tender opportunities should be publicly available; tenderers should be familiar with all the rules applicable to the process and should be allowed sufficient participation.
- – With regard to the second relationship, organs of state should treat tenderers fairly in relation to each other, meaning that no tenderer should have an advantage above another.
- • Equal treatment in the process of Evaluation – setting relevant qualification criteria for all bidders (Specification)

Performance of Administrative Contracts

- no special rules that govern the interpretation of administrativecontracts.Thegeneralrulesofinterpretatio nofcontract(Articles1732-1739)applyalsotoadministrativecontracts.Itmusthoweve rbenotedthatasprovided inArticle3138(2)the administrative body may incorporate special rules of interpretation in the general terms and conditions of contract which the administrative authority draws.
- Excepting this, it is the interpretation rules that are contained in the general contract law.

- As stipulated in Article 3172(1) of the Civil Code the contractor and the contracting administrative authority shall perform their obligations in the manner provided in the contract. In particular, the contract or 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(Article3172(2&3)CivilCode).

- Article3174(1)of the Civil Code stipulates that both the
- Contracting administrative body and the contractor shall perform their obligations within
- The time fixed in the contract. Where no time is fixed in the contract each of them is obliged to perform their obligations within a reasonable time. There as on able time that is necessary for the performance of contract depends on the circumstance of the case and the nature of the obligation assumed by the contract.

- The contracting administrative authority cannot impose unilaterally on the contract or a time which has not been agreed upon in the contract for the performance of the contract(Article3175CivilCode).
- If the contracts provides, the administrative authorities may unilaterally impose on the contractor by requisition orders a time limit for the performance of his obligations

- Article 3177 clearly indicates that the contractor in and administrative contract cannot avail this rule. According to this article,the nonperformance by the administrative authorities of their obligations shall no ten title the contractor to refuse or suspend performance of his obligations. The only instance where the contractor can refuse or suspend performance of his obligations as a result of the non-performance by the administrative authorities of their obligations is when such non-performance makes impossible the performance of his obligations.

- If the contract or is allowed to refuse or suspend performance of his side of the contract every time the administrative authority failed to discharge his obligations in the contract it will be prejudicial to the public interest and may result in the interruption of basic services. So, so long as performance of the contractisstillpossibledespitefailureonthepartoftheadmin istrativebodyin discharging its obligations, the contractor has to continue performing according to the terms of the contract and seek, latter on, compensation from the administrative authority in default

- The price payable by the administrative authority to the contractor under the contract has to be effected in accordance with the rules of finance(Article3176,Civil Code). The contract or can invoke set-off except for tax debts(Article 3178,CivilCode).

- **Revision/Variation of Administrative Contracts**
- theremaybechangeinthedesireofthecontractingparties orunforeseeable eventsthatmayormaynotrelatetooneofthecontracting parties mayupsetthe balance of the contract there by imposing additional obligations on one of the contractingpartiesandthismaycausereconsideration andrevisionofthetermsofthe contract

- Generally revision of administrative contracts mayBe made by
- a. agreement of the parties,
- b. unilateral action of the contracting administrative authority, and,
- c. court of law
- A)Variationofacontractbytheagreementofthepartiesisam anifestationoftheir freedom of contract.
- Unilaterally modify the terms of the contract under such conditions is recognized by law under Article 3179. when such action would be in the greatest. interestofthepublic.Furthermore,anyincreaseintheoblig ationsofthecontractor shall not be of substantially different nature from those assumed in the contract.

- Right to be indemnified against any loss which he might have suffered (Article 3181(1),Civil Code)
- wording of Article 3179 indicates that the contracting administrative authority does not possess unlimited power to unilaterally vary the terms of the contract even if it is willing to offer the contractor an indemnity for his losses.
- There are two doctrines that enable the contractor to ask for judicial variation of the contract. These are:-
- A. unforeseeable events(the doctrine of imprévision),and
- B. Act of government (the doctrine of fait duprince)

- Contractor has to discharge his obligations according to the terms of the contracts or long as performance is materially possible (Article 3183(1),CivilCode) demand from the administration an indemnity for the increased costs in carrying out his obligations (Article 3183(2),CivilCode).
- b()This relates to the question what happens when in the course of performance of a contract the government issues proclamations, regulations or directives that have the effect of increasing the obligation of the contractor.

- **Non-Performance of Administrative Contracts and its Effects**