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# The impact of the coronavirus pandemic on the implementation of administrative contracts

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## Abstract

The public administration of any country is responsible for ensuring the special needs of the people. To achieve this, the administration has two main methods: administrative decisions and administrative contracts. The administrative decision expresses its peremptory authority, which is based on addressing others, legal or natural persons, in the various fields in which the state exercises its daily activities.

**Keywords:** administrative contracts; coronavirus pandemic, health

## Introduction

The administrative contract is one of the agreement's works based on the compatibility of income, and what characterizes the administrative contract is that the rules governing administrative contracts differ from those governing private law contracts.[1]

The problem of the research revolves around the fact that at the stage of contract implementation, the administration has the authority to obligate the other party, but the problem arises when circumstances change - such as in the case of the Corona pandemic - during which the contract arose, in a way that was not taken into account that makes the implementation of this contract cumbersome for one of the parties and threatens him with loss, which One of the parties to the contract will be forced to try to change the terms of the contract in a way that makes them commensurate with the situation in which it is contemporaneous until it reaches the point of non-completion of the agreement and non-implementation. Accordingly, the problem posed by the research revolves around the following question: How did the law deal with cases of implementing administrative contracts during emergency conditions?

What are the parties' mutual obligations during the coronavirus pandemic? How are the problems of non-performance resolved?

To answer these questions, we will divide this research into two chapters: in the first chapter, we deal with the obligations of the mutual parties during the Corona pandemic, and in the second ways to solve the problems of non-performance of the contract.

[1] Georges Fodel and Pierre Delulfaut, Administrative Law, Part One, 1st Edition, University Publishing Corporation, Beirut, Lebanon, 2008, p. 24.

# Chapter 1: Parties' mutual obligations during the coronavirus pandemic

Civil contracts are governed by the principle of the need for equality between the parties to the contract, where the "pacta sunt servanda" rule prevails over such contracts.

However, this rule does not apply to administrative contracts where the Department has a privileged position vis-à-vis its contractor, to achieve the public interest by maintaining the regular functioning of public facilities and steadily performing services for its beneficiaries. To this end, the public interest prevails over the individual private interest of the contractor of the administration if this does not justify the administration to sacrifice the entire rights of the contractor, In particular, the financial rights generally sought by the contractor through the conclusion of the contract. This can be inferred by the lawmaker's handling of these cases so that the contract clauses are adjusted and changed when circumstances change in a way that makes it difficult to implement[2]. To indicate how the legislator handles these cases, we will divide this chapter into the following two requirements: In the first requirement, we will address: Contractor's rights to the administration during the pandemic, and in the second requirement: the rights of the administration to confront the contractor during the pandemic.

***The first requirement***
***Contractor's rights to the administration during the pandemic***

One of the most important implications of the contractor for management in the light of the spread of the coronavirus pandemic is his right to the management's assistance. This is to enable the individual complete his obligations under the signed contract to ensure that the General Facility regularly performs its normal services by distributing the loss between the Contractor and the Administration under the current circumstances for the duration of the pandemic's continuing impact as an emergency circumstance. This makes the contractor's commitment burdensome to ensure the continuity of the work of the public facility in the public interest.[3]

The French judiciary has determined the part that is not covered by the administration's compensation to the contractor at a rate of 5 to 20% of the value of the losses, while the administration bears between 80 to 90% of the value of the losses incurred by the contractor.[4]

The aggrieved Contracting Party is entitled to request the Administration's participation in the loss to which it bears partial compensation.

Such compensation is not due if the contractor's fault occurred in matters foreseen before the performance of the contract in accordance with the normal functioning of the ordinary system of work in the operating administration.[5]

Besides, under the coronavirus pandemic, management is obliged towards the contractor to ensure the financial balance of the contract.

The contractual relationship between the contractor and the management falls within the scope of the mutual contractual obligations that he seeks to obtain. As long as the

[2] Mohieddin Al-Qaisi, General Administrative Law, 1st Edition, Al-Halabi Human Rights Publications, Beirut, Lebanon, 2007, p. 117.
[3] Suleiman Muhammad al-Tamawi, Principles of Administrative Law, first edition, Dar al-Fikr al-Arabi, Cairo, Egypt, 2007, p. 667.
[4] Ali Abdel Amir Qabalan, The Impact of Private Law on the Administrative Contract, second edition, Zain Human Rights Publications, Beirut, Lebanon, 2014, p. 107.
[5] Haitham Halim Ghazi, Financial Balance in Administrative Contracts, First Edition, Dar Al Fikr Al Jamia, Cairo, Egypt, 2014, p. 144.

obligations are subject to increase and decrease, it does not need to be reflected in the rights of the contracting party corresponding to these obligations. This is what is expressed in the idea of the financial balance of the administrative contract or the honorable balance between the rights and obligations of the contracting party.[6]

It is important to preserve the contractor's rights to maintain the regular and steady functioning of public facilities, in the public interest, in accordance with the principle of the proper administration of justice.

The realization of the public interest can only be achieved by the contractor's proper implementation of its contractual obligations under contractual terms agreed with the Administration and possible adjustment by the Administration. The contractor, then, cooperates with the administration in running the public utilities regularly and continuously and in various circumstances, and the administration, in return, must preserve his financial rights, which are the motive that drives him to contract with the administration and to implement his obligations towards it.[7]

The management's refusal to restore the financial balance of the administrative contract when the burdens on the contractor increase as a result of the management's behavior or as a result of circumstances beyond the contractor's control and expectations - as in the current case of the corona - that occurred during the implementation of the contracts, will lead to individuals' reluctance to contract with the management, which will negatively affect the public utilities, and consequently, the negative consequences for the public interest, as well as depriving the contractor of fair compensation in return for the implementation of his obligations. [8]

"A key issue in administrative contracts is that, to the extent possible, the concessions given to the obligor must be commensurate with the burden imposed. The benefits and burdens must be commensurate in a way that achieves compatibility between the expected benefits and the imposed obligations. Each commitment contract includes - as if it were an account - the financial balance between what is granted to the obligor and what is required of him. This is what is called the financial and commercial balance, and the financial equation of the concession contract.[9]

It is worth noting that the financial balance in administrative contracts includes, in a broad sense, all cases in which the contractor with the administration is entitled to compensation for his losses in the following cases:

- The management's wrong behavior with him during the implementation of the contract.
- Administrative decisions that implement the contract are more stressful for him.
- Unexpected circumstances in which the administration has no income have increased its burden. The case of the coronavirus pandemic is the subject of our research.

***The second requirement***

***The right of the administration to confront the contractor during the pandemic***

The reasons for the continuation of the regular and steady functioning of the public

[6] Suleiman Al-Tamawi, The General Foundations of the Administrative Contract, Fifth Edition, Dar Al-Fikr Al-Arabi, Cairo, Egypt, 1991, p. 610.
[7] Atef Saadi Muhammad Ali, Administrative Supply Contract between Theory and Practice, Ain Shams University Publications, Egypt, 2005, p. 530.
[8] Abdel Aziz Abdel Moneim Khalifa, Execution of the Administrative Contract and Settlement of His Disputes, Judicial and Arbitration, Manshaat Al Maaref, Alexandria, 2009, p. 191.
[9] Nasri Mansour Nabulsi, Administrative Contracts, second edition, Zain Human Rights Publications, Beirut, Lebanon, 2012, p. 602.

facility require the parties to the contract - the contracting party and the administration - to respect what was contracted in the implementation of their obligations despite the changes that occur in the surrounding circumstances. Since the contractor of the Administration cannot derogate from the fulfillment of the contractor's accepted obligations solely because of incidents that make the performance of the contract burdensome. However, this rule is not taken for release but is subject to the condition that implementation remains feasible, but if it flips impossible, the contracting party may withdraw from the implementation of the terms of the contract.[10]

There is no doubt that the effects of the Corona pandemic that humanity is going through had greatly affected the joints of economic life, and implemented contractual obligations in general, and within the scope of administrative contracts in particular, a stressful matter. The Coronavirus posed a serious threat to public health at a global level before it was local and produced effects at all levels.

Of course, these effects needed legal treatment, especially with regard to contractual obligations that have become in jeopardy due to this virus, the contractors, whether they are individuals or companies, have incurred great losses due to their inability to fulfill their contractual obligations, which has raised legal problems of great impact and cost and losses. Despite this, not all cases have reached the level of impossibility. Accordingly, we conclude that the contractor with the administration is obliged to continue to implement his obligations towards the administration, and in the event the contractor refrains from implementing his obligations, he will expose himself to penalties, such as delay fines or any due compensation.[11]

It is understood that the coronavirus pandemic may be considered an emergency circumstance that naturally does not exempt the contractor from completing its obligations arising out of the contract. The obligation of the contractor to continue the implementation despite the occurrence of the emergency incident, even if it is stressful, otherwise it will be subject to the measures that the administration deems appropriate to ensure the proper functioning and continuity of the public facility. The penalties imposed by the Administration against the contractor, once the contractor has failed to fulfill its obligations, take three types: financial penalties, pressure penalties, and termination Penalties. Below we will discuss these penalties in detail

***First: Financial penalties***

Financial penalties are arbitrary compensation in the contract when the contracting party breaches its contractual obligations. The penalties for compensation may be determined by the administration if the text of the contract is devoid of them, or the penalties specified in the text do not meet the purpose that serves the objectives of the facility.[12]

It should be noted that the financial sanctions imposed by the Administration on its contractor, which breached its contractual obligations in the administrative contract, are divided into financial compensation and late fines.

***a. Financial compensation***

"Compensation is the original penalty as a result of the contracting party's breach of his

[10] Muhammad Refaat Abdel Wahab, Principles and Provisions of Administrative Law, First Edition, Al-Halabi Human Rights Publications, Beirut, Lebanon 2005, p. 117.
[11] Article 425 of the Iraqi Civil Code No. 40 of 1951.
[12] Suleiman Muhammad Al-Tamawi, General Foundations of Administrative Contracts, op.cit., p. 509.

obligation, which causes damage to the public project, and a condition in compensation for the damage. Compensation is not judged by the judiciary except if it is proven to the administration as a result of the contractor's breach of his obligation." "or that compensation is not considered an administrative penalty because it is merely an application of the general rules in private law".[13]

***b. Late fines***

The late fine is a punitive compensation that the administration has the right to sign without there being an error that has occurred to it, but the damage is always assumed for the mere delay[14]. The imposition of a late fine is one of the basic clauses in the administrative contract that the administration imposes on the contractor in the event of a delay in implementation, and the delay fine is one of the most common financial fines, which the administration signs on the contractor who is lax in implementing the administrative contract. The basis for its imposition is due to the administration setting special dates for the implementation of the administrative contract, and the administration resorts to imposing them on the contractor to force him to implement the specified dates.

***Second: pressure penalties***

Pressure penalties aim to pressure the contractor to fulfill his contractual obligations, by substituting the administration with the defaulter or by replacing others. The pressing penalties are the imposition of specific penalties against the contractor with the administration to put pressure on him, by resorting to various legally justified coercive means as a punishment for him for his behavior on the level of illegal danger or because of his reluctance or failure to fulfill his contractual obligations stipulated in the clauses of the contract.

***Third: Terminate Penalties***

It is the third type of penalty imposed by the administration on the contracting party in cases of breach of his commitment to the terms of the administrative contract. The administration has the authority to impose resolute penalties between it and the contracting party. The purpose of imposing the penalty is its desire to terminate the contractual bond after the administration is certain that there is no point in evaluating the contractor and returning him to the right path, so the administration terminates the contractual relationship between it and the contractor before the period specified in the contracts. According to the basic principles of administrative contracts, the administration has an inherent right to rescind administrative contracts, if the contractor breaches his contractual obligations in a breach that requires this strict penalty, and if the administration finds that there is no point in correcting the contractor.

# Chapter two

***Ways to Resolve Problems of Non-Performance of Contract***

The implementation of the administrative contract is not always easy, as problems may arise before the contractor that prevents the implementation of the contract or make its implementation a difficult issue. As we mentioned earlier, the difficulty of implementation does not give the contractor the right to renounce the contractual obligations or terminate the contract concluded between him and the administration, otherwise, he will be subject to the penalties that the latter deems fair and appropriate. However, the requirements of justice

[13] Hussein Darwish, The Administration's Authority to Inflict Financial Sanctions in Administrative Contracts, Research published in the Emirati Justice Journal, Abu Dhabi, Issue 19, Year 5, 1987, p. Master's thesis submitted to the Council of the College of Law, University of Baghdad, 1989, p. 18.

[14] Mahmoud Khalaf Al-Jubouri, Administrative Law, Book Two, First Edition, House of Culture for Publishing and Distribution, Amman, 2010, p. 135.

required finding a solution that satisfies both parties so that it reduces the contractor's fatigue and does not affect the public interest. One of these mechanisms and means is that the contracting party invites the other contracting party to renegotiate the contract to discuss emergency circumstances that affected the contractual balance as a means of agreement, and arbitration as a judicial means to resolve disputes arising from non-implementation. In this chapter, we will discuss these two methods in some detail through the following two requirements:

***The first requirement***
***Renegotiation is a way to solve the problem of non-implementation.***
***The second requirement***
***Arbitration is a way to solve the problem of non-implementation.***
***The first requirement***
***Renegotiation is a way to solve the problem of non-implementation.***

The means of renegotiation is how the parties to the contract are obligated to renegotiate and review the contract when exceptional circumstances occur beyond their control and expectations, and that would cause a disturbance in the financial balance of the contract, and harm one of its parties when the other party is intransigent in implementing the contract. This method takes different names, including (hardship condition), (emergency condition), (review condition), or (justice and fairness condition), but the most likely name is the renegotiation condition.[15]

Despite the multiplicity of labels, the term renegotiation condition remains the closest to reality, as the content of this method aims to renegotiate to address the problem of changing circumstances and imbalance in the contract.

Through renegotiation clauses and when emergency circumstances arise (as in the case of the coronavirus pandemic) leading to contractor fatigue, the State obliges itself to negotiate with its contractor rather than to change or modify the terms of the contract at its own will.

Some scholars argued that the renegotiation clause should be defined as "the clause in which the parties to the contract agree to renegotiate among themselves to amend the terms of the contract when specific circumstances occur by the parties that would prejudice the balance of the contract and seriously harm a contractor.[16]

Another aspect of jurisprudence is defined as: "The condition that the parties include in the contract, under which they are obligated to negotiate to amend the provisions of the contract if unforeseen circumstances appear that would affect the financial balance of the contract."

By examining the aforementioned definitions, we can see the following:

- The renegotiation clause is an agreement clause, as its content is related to what the parties to the contract agree on, so the clause is usually regulated in detail, where the parties explain their concept of the condition and the events they face, and their impact on the contract, and the solutions that will be resorted to by the parties in the event of those events.

- The renegotiation clause is special, its forms vary according to different

[15] Bashar Muhammad Al-Asaad, Investment Contracts in Private International Relations, first edition, Al-Halabi Human Rights Publications, Beirut, Lebanon, 2006, p. 288.
[16] Sherif Mohamed Ghannam, The Impact of Changing Circumstances on International Trade Contracts, First Edition, New University House, Alexandria, Egypt, 2007, p. 34.

contracts and circumstances. In other words, its content is not the same in all contracts. Rather, it varies according to the parties' visions and the nature of the circumstances surrounding the conclusion and implementation of the contract. Therefore, the formulas of the condition change from one contract to another. The condition in one contract may face economic conditions and in another contract political or financial conditions.

Accordingly, the terms of the clause vary from contract to contract depending on the changing circumstances in which it is implemented, the parties' authority to determine the scope, extent, and application of the clause, and ways of addressing the challenges to its application.

The basis for the renegotiation clause if national legislation does not regulate the renegotiation clause takes one of the following cases:

**1.** Regarding the agreement between the parties, especially in contracts that require a long period of implementation, the parties expressly agree to activate this condition as a result of changing circumstances during the implementation of the contract, and these changes lead to a financial imbalance in the contract, where the parties agree to renegotiate their contracts and choose the conditions and their content, it is the will of the contracting parties that determines these conditions, and that stems from the principle of the sovereignty of the will and contractual freedom.[17]

**2.** The principle of the authority of the will means that the contractual obligation is based on the will of the contracting parties only. This will determine the source and scope of rights and obligations. The principle of free will gives contractors the power to include in their contracts the terms of their choice. Most notably, the parties' renegotiation clause, which they seek to agree on as agreed, and its inclusion in the contract, is an effective remedy to the problem of changing circumstances and economic imbalance of the contract, particularly if the contract is a long-term contract, where it is most vulnerable to the problem.

It should be noted that the principle of the sovereignty of will and contractual freedom at the international level is more clear and widespread. In the absence of a unified and binding legal system regulating international contracts, the contractual will represented by the terms of the contract prevails. Also, the agreement on the renegotiation clause creates a kind of security and reassurance for the contracting parties, because as long as it is not an external matter, but was found according to the will and agreement of the contracting parties, it corresponds to their perceptions and is compatible with their goals. Therefore, it will make them feel secure because it works to respect their rights arising from the contract, balance these rights, and work towards achieving cooperation. It will also contribute to administering the execution order to all parties to the contract as they see fit and consistent with their interests.[18]

In our view, even though Iraqi legislation has not been provided for, I believe that the requirement to renegotiate the Administration and the Contracting Party should apply within the scope of administrative contracts, which we see as the Department's right and obligation to confront.

***The second requirement***

[17] Hana Abdel Latif, The limits of adopting the idea of renegotiating the contract, PhD thesis submitted to Abi Bakr University, Faculty of Law and Political Science, Tlemcen, Algeria, 2015, p. 25.
[18] Ahmed Abdel Karim Salama, International Contract Law, International Contract Negotiations, for the first edition, Dar Al-Nahda Al-Arabiya, Cairo, 2008, p. 27.

***Arbitration is a way to solve the problem of non-implementation***

Economic and social changes imposed resorting to arbitration to resolve administrative disputes. Countries in which national savings and the returns from their natural wealth were unable to meet the growing needs for the capital required by their development plans tended to adopt policies that would stimulate and encourage national and foreign investments by providing and creating the appropriate climate in which the various aspects of guarantees against political and economic risks are realized. There is no doubt that the arbitration clause, which aims at settling disputes that arise in connection with the implementation or interpretation of these contracts, occupies a prominent place in the field of guarantees. The contracting party requires that it be included in the terms of the contract to achieve reassurance for him in the event of a dispute with the contracting state, given the difficulty of the contractor trusting the state's judiciary with regard to decisions issued by ordinary courts in cases in which the state is a party.

If the principle is that the judiciary is the way to establish and protect rights regardless of the legal status of the litigants. However, with the diffusion of the aspects of life and the development of economic life, the trend towards a free economy, and the intertwining of internal and international relations, the countries think and approve alternative ways to resolve disputes, reduce the burden on the judiciary, and achieve reassurance on the part of the contracting party. Among these methods is arbitration as a means of settling disputes alongside the national judiciary.[19]

The issue of arbitration in administrative contracts is of the utmost importance, owing to the widespread prevalence of arbitration in general, the evolution of international economic and special conditions, the resulting complexity of transactions, and the need for speedy and ***specialized consideration of such cases.***

The Iraqi legislator has devoted Chapter Three of the Civil Procedure Code No. (83) of 1969, Articles (251, 276), to arbitration in general, without including in its provisions anything that explicitly indicates the prohibition of arbitration in administrative contracts, or the permission to resort to it. While the Public Contracts Law of 2004 permitted resorting to arbitration implicitly in Section (12) by stipulating that (Alternative dispute settlement When settling all similar disputes, that is, whether they are objections to the tender or complaints during the administration of public contracts[20], the principles of alternative dispute settlement are used to the maximum extent possible, provided that the two parties agree), as it is well known that arbitration is one of the means of settling disputes, and its implementation requires the agreement of the two parties to the contract to do so.

It cannot be accepted that the Iraqi legislator decided on the subject of arbitration in administrative contracts before the issuance of the Iraqi Investment Law No. (13) of 2006, because the arbitration was limited to dealing with specific contracts represented in general contracting contracts governed by the general conditions for contracting civil engineering

[19] Muhammad Naim Alwa, Encyclopedia of Public International Law, International Arbitration, first edition, Zain Human Rights Publications, Beirut, Lebanon 2012, p. 55.

[20] Section (12) of the Public Contracts Law issued by Coalition Provisional Authority Order No. 87 of 2004 included the methods for settling disputes, namely:

1. Objecting to the tender with a specialized administrative court established based on the authority of this order.
2. Submission of complaints from the contractor to the authority issuing the public tender.
3. Settlement of the dispute by using alternative settlement methods to the maximum extent possible, provided that the parties agree.

works issued by the Ministry of Planning in 1988. Article (69) of these conditions permitted resorting to arbitration in disputes arising from the implementation or interpretation of a contract to which the state is a party because it is an employer, and the contractor as a second party, whether Iraqi or foreign.[21]

The general conditions for civil engineering contracting to apply to general contracting contracts for only civil engineering work such as the construction of roads, bridges, and public buildings.[22]

As for the position of the judiciary in this regard, it is hesitant. There are decisions of the Court of Cassation that allow arbitration in administrative contracts, including the one issued on December 18, 1997. The arbitral tribunal was formed and looked into the dispute and issued its decision on (6/8/1996) by the majority. Since the arbitration decision contained substantial errors, the plaintiffs appealed the said decision. When examining the cassation of the decision, it was found that the trial court did not follow what was stated in Articles (273) and (274) of the Civil Procedure Code, and in the event of one of the cases it had to return the case to the arbitrators to fix what was wrong with their decision, they decided to overturn the decision.[23]

This is confirmed by the issuance of instructions for the implementation of government contract No. (2) of 2014 in force, Article (8/Second) thereof stipulates that: (When an amicable agreement is not reached, one of the methods that must be stipulated in the contract is resorted to, which are as follows: A. Arbitration).

The legislator also referred to the possibility of choosing international arbitration when one of the parties to the contract is a foreigner. Thus, the Iraqi legislator has realized the role of arbitration in the development process and what is required by the reality of international trade, especially in administrative contracts.

## Conclusion

If the origin is for the parties to the contract to abide by the contract, there must be a balance between the obligations of the parties to the contract from an economic point of view at the stage of contract formation and its implementation, so that an imbalance occurs in the stage of contract formation leads to the parties resorting to removing this imbalance and the effects of damage to one of the parties.

From the scope of our research, we conclude that exceptions are made to the origin of the pacta sunt servanda rule, a situation in which the contractor's performance of the contract encounters emergency circumstances at the time of the conclusion of the contract, resulting in an increase in financial burdens and an imbalance in the financial of the administrative contract,

[21] Yassin Karim Muhammad, The Authority of the Administration in Supervising the Execution of the Public Works Contract, a comparative study, PhD thesis, College of Law, University of Baghdad, 1996, p. 153.

[22] Saadoun Naji Al-Qashtini, A Study of the General Conditions of Contracting for Iraqi Civil Engineering Works, Al-Maaref Press, Baghdad, 1975, p. 27.

[23] Judgment of the Iraqi Court of Cassation No. (1724 / m 3 / 1997) on December 18, 1997 referred to Judge Medhat Al Mahmoud, Explanation of Civil Procedures Law No. 83 of 1969 and its practical applications, 2nd Edition, Justice Library, Baghdad, 2008, p. 377.

which generates new obligations on the contracting parties of the administration and the contractor.

We also conclude that one of the most important means of solving problems that arise from non-implementation is renegotiation and arbitration. Since negotiation and arbitration are the language of the modern era, in which the rights holders of individuals, institutions, or the state are imitated by the implementation or interpretation of their civil, commercial, or administrative contracts to reach a legal solution to them voluntarily with the necessary speed and accuracy required.

Accordingly, we recommend the Iraqi legislator work on adding the negotiation clause to its legislation because we find it necessary that the renegotiation clause applies to the administration and the contracting party within the scope of administrative contracts, which we see as a right and obligation for the contractor with the administration to confront.

We also recommend that arbitration be adopted as a preliminary means of resolving disputes arising from administrative contracts, depending on the fact that arbitrators can be close to the causes of the dispute, such as in the case of the coronavirus pandemic, as well as its ability to hear the views of the parties, and to find the best solutions to end the causes of the dispute, thereby contributing to reducing the burden of the judiciary and ensuring the proper functioning of public utilities.

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