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The Scope of the Pacta Sunt Servanda Principle in Administrative Contracts with Special Reference to Saudi Arabia

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Abstract

This study aimed to examine the extent to which the Pacta Sunt Servanda principle applies to administrative contracts. A descriptive methodology was used to investigate the study. Data were sourced from various primary legal materials. The results revealed that administrative contracts are only partially subject to Pacta Sunt Servanda principle. The powers exercised by government agencies during contract execution are not absolute; they are subject to legal restrictions and must respond to the needs of public facilities to achieve the public interest. The contractor adheres to decisions regarding exorbitant clauses, as these are administrative decisions. Overall, the breach of the Pacta Sunt Servanda principle by government agencies in administrative contracts, which involves using exceptional powers not available in private law contracts, highlights the prioritization of public interest over the interests of the contracting party with the government agency. Nevertheless, the contractor's rights were not discarded but preserved by judicial intervention.

Keywords: *Pacta Sunt Servanda, Administrative Contracts, Exorbitant Clauses, Saudi Arabia.*

Introduction

Are administrative contracts concluded by government agencies binding and unchangeable except through mutual agreement between the parties, by law, or a judicial award? Civil and commercial contracts are primarily based on the principle that they are binding as a matter of law or have the strength of law for both parties involved, as expressed in the Latin phrase "Pacta Sunt Servanda." Pacta Sunt Servanda is an age-old principle that means that the contract entered into voluntarily and freely must be honored (Pillay, 2015; Kareem & Beden, 2023) or, as stated by Pajaziti and Lutfiu (2024), "agreements must be kept." According to the binding force of the contract, contractors must perform their obligations and commit to acting justly without denying their undertaking (Guiding Principles of European Contract Law, n.d.). Article 95 of the Civil Transactions Law stipulates, "1. A contract shall be implemented by its provisions and a manner consistent with good faith practices. 2. A contract shall be binding on a contracting party in terms of its provisions and other requirements as prescribed by legal provisions, custom, and the nature of the contract. (Civil Transactions Law, 2023). Article 94/1 of the same law also states, "1. A valid contract may not be terminated or amended except by agreement or under a legal

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provision.” (Civil Transactions Law, 2023). Hence, the parties must adhere to the contract terms and fulfill their duties and responsibilities.

In addition to civil law, the Pacta Sunt Servanda principle applies to Islamic and public international law. In Islamic law, a contract is a sacred bond; fulfilling it is a person's sacred duty (Cahyo & Kurnianingsih, 2023). Furthermore, there is a rule stating, “Muslims must abide by their stipulations” (Wehberg, 1959), as the Quran indicates in verse 1 of Surah Al-Ma'idah: “O believers! Honor your obligations. All grazing livestock has been lawful to you—except what is announced to you, and hunting while on pilgrimage. Indeed, Allah commands what He wills.” The Pacta Sunt Servanda principle becomes mandatory in the law of conventions within public international law (Zahid & Shapiee, 2010). This principle is founded on the voluntary consent of state parties to assume rights and obligations. In this context, parties express their intent to be bound by the convention's terms, take responsibility for its application, and adhere to them in good faith (Pajaziti & Lutfiu, 2024). In this regard, the Vienna Convention on the Law of Treaties stipulates that “every treaty in force is binding upon the parties to it and must be performed by them in good faith” (Vienna Convention on the Law of Treaties, 1969).

On the other hand, the Pacta Sunt Servanda principle has exceptions; on this basis, no contract is entirely binding or binding in all situations, as it is subject to avoidance (Kull, 2001). The Civil Transactions Law stipulates, “If a contract is concluded through adhesion and contains arbitrary conditions, the court may amend such conditions or exempt the adhering party, as equity requires. Any agreement to the contrary shall be deemed null and void.” (Civil Transactions Law, 2023).

The question arises whether the Pacta Sunt Servanda principle is considered in administrative contracts. Yotova (2018) defines an administrative contract as a written agreement between a government agency and individuals or organizations that creates, modifies, or terminates rights and obligations. At least one party must be consigned to a public authority. Similarly, Brizani (2024) defined administrative contracts as involving at least one party, a public law body, where the public interest precedes other contractual interests. These contracts contain provisions that reflect the supremacy of the public law entity, which the other contracting party would not typically accept in a private law contract. In his turn, Darwesh (2019) defined the administrative contract as an agreement made by a public legal entity for managing or organizing a public facility. This demonstrates the government agency's commitment to adhering to public law provisions, including exorbitant clauses—extraordinary and unparalleled conditions in private law contracts—and may grant the second party authority to manage the public facility. The Saudi Board of Grievances defined the administrative contract as “the contract concluded between various government agencies, individuals, public institutions, or companies, to ensure the regular and steady functioning of public facilities, which, by its nature, includes conditions and establishes obligations that are unusual in civil or commercial contracts.” (Al Rayes, 2022) Thus, the administrative contract necessitates that the government agency is a party, the subject matter of the contract pertains to a public facility, and the contract encompasses exorbitant clauses or the adoption of public law provisions (Al-Amouri, 2018). The exorbitant clauses in administrative contracts are specific prerogatives of the government agency that place it in a superior position relative to the private contractor. These exorbitant clauses distinguish administrative contracts from those governed by civil law (Câmara & de Souza, 2020). Al-Ajmi (2020) states that exorbitant clauses are critical for differentiating administrative contracts. Similarly, Al-Khudair (2010) regarded exorbitant clauses as the decisive factor in highlighting the administrative nature of the contract. Farhat (2022) emphasized that these clauses are

essential in adapting the contract to an administrative format. The government agency exercises its prerogatives during contract execution to meet the needs of public facilities and fulfill public interest requirements. Additionally, this applies when the second party fails to fulfill the contractual obligations. The exorbitant clauses create an imbalance, making the government agency unequal to the second party in the contract (Shebaita, 2020). These clauses include the public agency's authority to supervise the works and guide the second party during contract execution, the unilateral modification of the contract within specific limits through orders, the imposition of sanctions on the contractor for failing to meet its contractual obligations, and the unilateral termination of the contract for the public interest. Per these powers, an administrative contract is not typically considered legally binding for all parties involved.

The study examines whether the *Pacta Sunt Servanda* principle applies to Saudi law administrative contracts, such as civil and commercial contracts. Therefore, the contract may not be cassated or modified except by agreement of the parties or for reasons provided by law or judicial award.

The study offers valuable insights into evaluating the *Pacta Sunt Servanda* principle within the scope of administrative contracts. It enables professionals to analyze how the principle affects the execution of administrative contracts. The study also explains the effects of government agencies' powers, which constitute a significant breach of the law of contractors established in private law. Furthermore, the *Pacta Sunt Servanda* principle is widely recognized as crucial in establishing the rule of law and fostering trust in transactions within society (Tuori, 2023).

Methodology

This study adopts a descriptive methodology to examine the research topic. The data were collected from various sources, including primary legal materials. The data collection method employed is a literature review, which involves explicitly written information regarding the legal position and application of the *Pacta Sunt Servanda* principle, sourced from various widely published materials.

Exorbitant Clauses in the Face of *Pacta Sunt Servanda*

Exorbitant clauses are a set of prerogatives, powers, or rights granted to government agencies in administrative contracts, which are essential for achieving the public interest that takes precedence over the private interest of other contractors (Câmara & de Souza, 2020). These clauses elevate the government agency to a superior position over the contractor, partially undermining the *Pacta Sunt Servanda* principle and distinguishing administrative contracts from all other private law contracts, primarily civil and commercial. The administrative judiciary in Saudi Arabia regards exorbitant clauses as general principles of administrative contracts, which are exercised by government agencies, even without specific legal or contractual provisions, because they are inherent to the administrative contract and necessary for realizing the public interest (Al-Ganai & Al-Mounes, 2023). Exorbitant clauses include the government agency supervising the work and directing the contractor, unilateral modification of the contract, imposing sanctions on the contractor, partial withdrawal and execution of the work at the contractor's expense, termination of the contract for the contractor's fault, and termination of the contract in the public interest.

Government agencies have various powers during the execution of the administrative contract, including supervising the works and guiding the contractor. The government agency exercises the power of supervision and guidance to ensure that the contractor fulfills the technical and administrative conditions, meets the financial obligations towards the government agency, and maintains control over the financial ties between the parties (Najeeb, 2019). The legal basis of supervision and guidance powers is the terms of the contract. However, the government agency has this power even if it is not stipulated in the contract. Supervision and guidance are among the privileges of government agencies in achieving the public interest, which includes meeting the requirements of public facilities, a goal and justification for this power. (Rudi, 2011). The power of supervision and guidance has two meanings: narrow and broad. Regarding the narrow meaning, the public agency merely verifies that the obligated party fulfills the contract by the agreed-upon terms and conditions. The public agency supervises either by sending engineers to work locations to check progress and ensure good execution or by receiving complaints from beneficiaries (Al-Fawzan, 2011). Therefore, there is no deviation from the general rules for executing the contract regarding supervision and guidance in the narrow sense of the term. (Al-Ajmi, 2020). Regarding the broad meaning of supervision and guidance, a government agency's power is to intervene, direct the execution of works, and choose the most appropriate methods to operate the public facility properly and achieve the public interest (Terkawi, 2021). However, the power of supervision and guidance, in a broad sense, should not extend to modifying the terms of the contract. Otherwise, this is considered exercising the power to modify the contract, which is subject to other conditions (Al-Ajmi, 2020). Additionally, the supervision and guidance orders must be legitimate, and the government agency must not issue these orders arbitrarily (Hamada, 2018). Or else, the decision will be subject to appeal before the administrative competent court for illegality as an *ultra vires*

Unilateral Modification

Government agencies can unilaterally modify the administrative contract without the contractor's consent, as it can only be cassated, modified, or revoked by mutual agreement of the parties or for reasons specified by law or a judicial award. This power to modify responds to the continuously changing requirements of public facilities. (Awad, 2014). Modifications may involve changes to the contractor's obligations, including increases or decreases in scope, methods of contract execution, or a reduction in the execution period (Hamada, 2018). However, the contract charges remain constant except in specific cases: first, the price fluctuation of the tender's key services and items; second, adjustments to tariffs, fees, or taxes; and third, unexpected financial difficulties that arise during the contract's execution. The contractor may appeal the decision to amend prices before the competent grievance committee (Government Tenders and Procurement Law, Articles 68, 86).

The Saudi administrative judiciary ruled in favor of government agencies' power to modify administrative contracts unilaterally. The Board of Grievances stated that, in administrative contracts, the government agency possesses asymmetrical powers compared to contracts made between individuals, based on the public interest requirements related to those contracts. Furthermore, the unique nature of administrative contracts means that some government agencies' actions fall within their discretionary power, allowing them the freedom to act accordingly. This power is independent of the contract, even if not explicitly stated, and the authority to modify is derived from the contract, the nature of the facility, and the necessity for

government agency diligence. The government agency must ensure that its operations run smoothly and that public funds are effectively managed to achieve the public interest. It is also acknowledged in the regulatory principles that the government agency has the right to unilaterally modify the contract by changing, increasing, or decreasing obligations or damages (Al-Ajmi, 2020). However, modifying the administrative contract is subject to the following restrictions:

a. Modification must be within the legal limits. Article 69 of the law states that a government agency may issue modification orders to increase the contract value by 10% or decrease such value by 20%. (Government Tenders and Procurement Law, 2019). In return, the contractor may seek compensation before the administrative court if the government agency exceeds the prescribed modification percentages in the case of damage (Al-Ajmi, 2020).

b. The competent person must issue a modification order. According to article 114/6, the person responsible for determining the award shall issue all orders that increase or decrease the contractor's obligations (Executive Regulations of the Government Tenders and Procurement Law, 2020). Otherwise, the contractor may challenge the modification order due to a lack of competence (Al-Ganai & Al-Mounes, 2023).

c. Modifications must be made before the government agency receives the work subject to the contract. Article 114/5 stipulates that additional work may not be allocated subsequently to the government agency receiving the work subject to the contract.

d. The modification must pertain to the contract's subject. Article 1/114 states that the additional work must be included in the contract, not outside its parameters.

e. The modification does not fundamentally change the subject matter of the contract. A unilateral modification to an administrative contract may not significantly modify the economic terms of a contract until it appears to establish a new contract, which means violating the maintenance of the contract's financial balance. The government agency exercises the modification power under the oversight of the administrative judiciary when deciding on suits for contractual liability and judicial annulment of the contract. (Al-Ganai & Al-Mounes, 2023).

f. The modification should focus on serving the public utility's interest. Article 2/114 provides that the necessary adjustments or variations of the works must benefit the facility, without compromising the conditions and specifications, or modifying the scope of works, the nature of the contract, or its financial balance.

g. Financial sums must be available to cover the additional work. Article 3/114 stipulates that one must ensure the availability of necessary funds to cover the additional work before assigning the contractor to execute it.

h. The additional work must be the same type as the original one. Article 4/114 indicates that if the extra duties do not contain similar substances as outlined in the contract, the matter should be submitted to a committee concerned with bid examination or the direct procurement bid examination committee, as applicable, to confirm the claim for assigning such tasks and the appropriateness of the charges suggested by the contractor. If the contractor rejects the committee's findings, contracts shall be signed with the contractor to carry out the extra works in accordance with the provisions of the law and these regulations.

i. The modification does not affect the contractor's financial entitlements. The modification of the administrative contract should be limited to the provisions related to the management of the

public facility and the scope and requirements of the work to be carried out by the contractor (Al-Ajmi, 2020).

When government agencies unilaterally modify the administrative contract, the conditions concerning contract modification must be satisfied. Otherwise, the contractor may, when appropriate, appeal the decision to the Administrative Court due to its illegality as an *ultra vires*.

Imposing Sanctions

Government agencies impose sanctions on contractors without involving the judiciary in case of a breach of contractual obligations. The sanctions include fines, partial withdrawal, and execution of works at the contractor's expense, and contract termination.

Fines

A fine is a monetary penalty that the contractor must pay as a sanction for breaching contractual obligations without requiring proof of damage to the government agency (Al-Ajmi, 2020). The imposed fines fall into two types: those for delays and those for failures. The contract includes a delay fine to ensure the contractor meets obligations by the agreed-upon date. The fine is enforced when the contractor delays executing the contract (Al-Mawla, 2007). Article 72 states that a contractor who does not implement a contract within the agreed date shall incur a fine of not more than six percent of the price of a supply contract or twenty percent of the price of other contracts. The Minister of Finance can amplify these proportions upon approval if bidders are informed of such increases before submitting the proposals. Regarding the failure fine, Article 73 of the Government Tenders and Procurement Law stipulates that a contractor who does not satisfy the contract items in ongoing service contracts shall incur a fine not more than twenty percent of the contract value after subtracting the value of non-executed works. These percentages may also be increased upon the Minister of Finance's approval, provided that bidders are informed of such an increase before submitting their proposals. However, the contractor is exempt from the delay fine in certain instances specified in Article 74 of the law; specifically, if the contractor is given additional work, the scheme's annual preparations are inadequate to achieve the project within the limited period, the deferral is due to the government agency or exigent circumstances, factors outside the contractor's control cause the deferral, the government agency orders postponement of the work, or part thereof, for causes not related to the contractor.

Regarding a fine for failure, if a contractor fails to comply with the contractual requirements under continuing service contracts, it shall be vulnerable to a fine of not more than twenty percent of the contract's value. The prescribed percentage can be amplified upon approval by the Minister of Finance if bidders are informed of such an increase before providing the plans.

Regardless of the type of fine, whether for delay or failure, the contractor may resort to the administrative court if the government agency violates the rules related to the fines and requests revocation of illegal decisions and compensation when appropriate, according to the court's competence associated with the administrative contracts.

Partial Withdrawal and Execution Works at the Contractor's Expense

According to Article 75 and Articles 2/1/136 and 138 of the Executive Regulations of the Government Tenders and Procurement Law, a government agency may withdraw part of the works or procurements and execute it at the expense of the contractor as a sanction when the contractor unable to achieve the contract obligations after being cautioned by the concerned government agency within fifteen days, provided that it does not surpass the prevalent prices,

executed by the conditions and specifications contained in the contract concluded with the contractor. The government agency head shall issue the withdrawal decision or their representative, based on the recommendation of the Tender Evaluation Committee or the Procurement Committee, as applicable, and shall notify the contractor.

Termination

According to Article 76, administrative contracts can be terminated at the contractor's fault in both obligatory and permissible cases. The obligatory instances include:

- a. It is established that the contractor obtained the contract through bribery, fraud, deceit, forgery, or manipulation, participated in any of these activities while executing the contract, or directly or indirectly bribed a public official of the agencies governed by the law, either personally or through others.
- b. If the other contractor with the government agency is a company that has been dissolved or liquidated, has filed for bankruptcy, has been declared insolvent, has entered receivership, or has gone bankrupt. If the contractor assigns the contract without the written consent of the Minister of Finance and the relevant government agency.

Regarding permissible cases, a government agency may terminate the contract in the following situations:

- a. If the contractor breaches any contract terms, delays the commencement of work, or fails to fulfill the contract promptly, the issue remains unrectified within 15 days after written notification.
- b. If the contractor passes away. III. If the contractor subcontracts, it must be to another contractor that has received written authorization from the government agency.

The government agency might suspend the termination decision in permissible cases. At the same time, it may not do so in obligatory cases because termination is subject to the force of law (Al-Ajmi, 2020). On the other hand, upon contract termination, the final guarantee shall be confiscated while reserving the government agency's right to claim compensation for the damage incurred by the contractor (Government Tenders and Procurement Law, 2019). Additionally, the contractor has to file a case before an administrative competent court if the government agency violates the rules related to contract termination.

Unilateral Termination for the Public Interest

According to Article 77, a government agency can unilaterally terminate the contract for the public interest it requires before the natural end of the contract date and without the contractor's fault for entirely dispensing with the project or rearranging it in terms of conditions and specifications, or if there are damages from its continuation (Al-Mutawa, 2021). The termination authority is subject to judicial oversight. Therefore, the contractor may request compensation for the unilateral termination of the contract for the public interest (Al-Amouri, 2018).

Unilateral termination in the public interest differs from the previous case because it is based on public interest requirements. Unlike the earlier case, it is founded on the contractor's fault.

Regardless of the type of exorbitant clause, due to the mandatory nature of administrative decisions and Article 3/1 of the Government Tenders and Procurement Law, which states that government agencies shall only contract per applicable laws and regulations while carrying out

their works and procurements, it can be concluded that the exorbitant clause binds the contractor.

Results and Discussion

The present study revealed several key results. Firstly, administrative contracts are partially subject to the Pacta Sunt Servanda principle, indicating that government agencies in these contracts do not entirely adhere to it. The Pacta Sunt Servanda principle asserts that parties must honor the contracts they commit to, and it can only be modified, revoked, or suspended by a subsequent agreement, by law, or through a judicial award. Nevertheless, government agencies retain the authority to intervene by issuing instructions to the contractor during the execution of the administrative contract, modifying the contract, withdrawing part of the work to execute it at the contractor's expense, or terminating the contract due to the contractor's fault or unilaterally in the public interest. Consequently, the powers of government agencies contradict the essence of the Pacta Sunt Servanda principle. This result does not conflict with Article 92/1 of the Government Tenders and Procurement Law, which states that a government agency shall fulfill its contractual obligations. If it fails to do so, the contractor may file a claim for compensation with the Administrative Court. The non-contradiction is because the powers of government agencies do not stem from the contract itself; instead, they arise from the nature of the administrative contracts, the needs of public facilities, and the pursuit of public interest. This result clarifies the scope of the Pacta Sunt Servanda principle application in administrative contracts theory. The result is consistent with Khedair's (2022) position that the administrative contract only creates a law for contractors under certain circumstances. In contrast, Al-Kholy (2012) argues that the Pacta Sunt Servanda rule is nonexistent or unaccepted within administrative contracts. Similarly, Sawady and Mohammed (2017) suggest that civil contracts are governed by the principle of equality between the parties, with the prevailing rule of 'pacta sunt servanda'. However, this rule does not apply to administrative contracts, in which the administration holds a privileged position relative to the contractor, allowing it to safeguard the public interest through the regular and consistent management of public facilities and the provision of services to beneficiaries. Conversely, various jurists and administrative judiciary awards affirm that administrative contracts are fundamentally based on the Pacta Sunt Servanda principle and that government agencies' powers regarding these contracts are only exceptional (Abd Al-Hameed, 2012).

These diverse perspectives on the position of the Pacta Sunt Servanda principle within administrative contracts prompt the author to recommend conducting further research on this topic.

Secondly, the powers exercised by government agencies during contract execution are not absolute but are limited by law within the public facilities necessary to achieve the public interest. This result aligns with Bezerra et al. (2024), who emphasized that government agencies' prerogatives are not absolute. Hence, if appropriate, the contractor may appeal the government agency's decisions to the Administrative Court due to illegality, claim revocation, and compensation. The right of judicial appeal encompasses all exercised powers, namely, supervision, and guidance, modification of the contract, imposing sanctions, partially withdrawing the work and executing it at the contractor's expense, and terminating a contract. This result derives from the need to balance the requirements of the public interest with the rights of individuals dealing with public authorities through the principle of administrative legality, which requires that all decisions taken by public authorities comply with the law. A judicial review of administration is undoubtedly the most appropriate method for challenging a public

authority's legal competence.

Third, in exchange for the powers granted to the government agency, the contractor must adhere to decisions related to the exorbitant clauses, as these fall under the agency's administrative authority. This result aligns with Gómez's (2023) assertion that the contractor complies with the government agency's terms and the necessity for unlimited adherence to such rules, referred to as exorbitant clauses, an indispensable aspect of an administrative contract. The contractor's commitment to exceptional administrative decisions in administrative contracts is justified by the necessity of the contractor's obligation to the law and in applying the principle of the regular and continuous operation of public facilities; otherwise, these facilities will cease.

Conclusion

The study examines whether administrative contracts are subject to the Pacta Sunt Servanda principle under Saudi law. The authors employed a descriptive methodology to address this issue, collecting various sources, including original legal documents, to gather data. The study yielded significant findings that contributed to the literature on the subject, particularly concerning the partial application of the Pacta Sunt Servanda principle in administrative contracts, the limitations imposed on government agencies when exercising authority over exorbitant clauses, and the capacity of contractors to contest the government agencies decisions before competent administrative courts according to its exceptional powers.

Authors' Contribution

Eltayeib Hussein Mahmoud Sharaf Addin: Engaged in the study design, data collection, and manuscript writing.

Adnan Ayza Almalki: Participated in writing up the manuscript and reviewing the final version of the manuscript.

Osamah Abdullah Almutiri: Participated in reviewing the literature and theoretical framework of the study.

Abdullah Mushkus Almutairi: Participated in the writing up of the methodology and discussion.

Mohammed Eid Kilase Ajoud: Participated in the constructing of the structure and reviewing the manuscript before submission.

Conflict of Interest

The authors declare no conflicts of interest related to this article.

Disclosure of AI

The author declares that Grammarly and QuillBot are used to improve language and edit texts, focusing on grammar checks and sentence structure. (<https://www.grammarly.com>, <https://www.QuillBot.com>).

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