

Judicial control of contractual penalties

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Abstract

This research examines Judicial control of contractual sanctions in administrative contracts as a fundamental safeguard for maintaining a balance between the privileges granted to the administration and the rights of contracting parties. It aims to clarify the role of administrative courts in monitoring the legality of contractual sanctions and their compliance with legal rules and principles of justice.

The study also highlights the scope of judicial review over decisions imposing contractual sanctions, including competence, form, cause, and purpose, as well as the proportionality between the sanction imposed and the breach committed. The research concludes that administrative courts play a significant role in protecting contractors from arbitrary actions and ensuring that the administration remains subject to the principle of legality, thereby achieving a balance between public interest and individual rights.

Keywords: Judicial control , Contractual penalties, Administrative Contracts, Administrative Judiciary, Legality.

Introduction

Contracts are among the most important legal instruments regulating relationships between individuals, entities, and institutions. They constitute the fundamental tool that establishes mutual rights and obligations between the parties. Legal scholars and the judiciary have established the principle of "freedom of contract," which necessitates respecting and executing agreements in good faith, given that the parties' will is the primary source of contractual obligations. Therefore, the stability of transactions and the achievement of trust between contracting parties depend largely on the extent to which contracts are executed according to the agreed-upon terms and conditions. However, practical experience reveals numerous instances where one of the contracting parties may breach their contractual obligations, whether by refusing to perform, delaying performance, or performing in a defective manner that fails to achieve the intended purpose of the contract. This breach gives rise to contractual liability, which necessitates the imposition of legal or contractual penalties aimed at protecting the aggrieved party and ensuring the stability of transactions. Among the most prominent of these penalties are penalty clauses, compensation, termination, specific performance, and other means guaranteed by law to the parties to ensure respect for the obligations arising from the contract. While the general principle is that contracting parties are free to regulate their relationship and determine appropriate penalties for breach of contract, this freedom is not absolute. Rather, it is subject to limitations imposed by considerations of justice, the public interest, and the protection of contractual balance between the parties. One party may resort to imposing excessive penalty clauses or exploiting their economic or legal position to impose burdensome obligations on the other party. This may lead to an imbalance in the contract and cause unjustified harm to one of the parties to the contractual relationship. Hence, the important role of Judicial control emerges as one of the most important legal guarantees for achieving justice within the framework of contractual relationships. The judge's role is not limited to the literal application of the contract's provisions, but extends to verifying the legality of contractual penalties and their conformity with the provisions of the law and the principles of justice and equity. Furthermore, within the limits prescribed by law, the judiciary has the power to intervene to modify, reduce, or nullify certain penalties if they are found to be arbitrary, excessive, or contrary to

public order and morals. The importance of Judicial control of contractual penalties increases with economic development and the expansion of commercial and investment transactions, as contracts become more complex and multifaceted. It has become essential to strike a balance between respecting the will of the contracting parties and protecting the weaker party, ensuring that contractual freedom is not exploited in a manner inconsistent with the requirements of justice. Therefore, modern legislation has moved towards granting the judiciary broader powers in overseeing contractual penalties, particularly concerning penalty clauses, compensation, and contract termination. The importance of studying the subject of Judicial control of contractual penalties lies in its addressing a delicate aspect of general contract theory, combining the principle of freedom of contract with the principle of achieving contractual justice. This topic also contributes to clarifying the limits of the judge's authority to intervene in contractual relations, the legal controls that govern this intervention, and the extent of its impact on protecting rights and achieving stability in transactions. From this standpoint, this research seeks to clarify the concept of contractual penalties and their types, analyze the legal basis for Judicial control of them, and clarify the forms of this oversight, its limits and legal effects, in order to highlight the role that the judiciary plays in achieving a balance between the interests of the contracting parties and ensuring respect for the legal principles governing contracts.

Section One

Judicial Appeal Against Contractual Penalties

The authority of the contracting authority to impose contractual penalties stems from the privileges it enjoys as a public authority (Al-Zahraa, 2022: 22). In such cases, the contractor has no recourse but to appeal to the courts, challenging the legality or appropriateness of the penalties imposed by the contracting authority. The contractor can also restrict the administration's authority to impose penalties by stipulating clauses in the contract that define the expected violations and their corresponding penalties (Al-Zahraa, 2022: 22).

The First Requirement

The Nature of Judicial Appeals Against Contractual Sanctions

In addition to the fundamental guarantees of confrontation, the right to defense, and the justification of punitive decisions, the administration, in its unilateral decisions imposing administrative sanctions, is subject to two types of oversight to ensure their legality, prevent arbitrariness and injustice in their issuance, and prevent exceeding the bounds of the law. This is because the administration in a state governed by the rule of law must be subject to legality and to both internal and Judicial control. Therefore, administrative decisions containing administrative sanctions, like other administrative decisions, are subject to annulment if they violate the principle of administrative legality. When exercising its authority to issue administrative sanctions, the administration must base its actions on a legally permissible legal foundation. Oversight of the legality of administrative actions allows for appeals against unlawful decisions, as well as claims for compensation for any resulting damages (Badou, 2003: 137). The oversight of the legality of administrative decisions that include administrative penalties takes two forms: self-regulation, exercised by the issuing administrative body through a grievance submitted by the person subject to the administrative penalty. The administrative body then reviews and corrects its decision if it finds it to be unlawful. This self-regulation may be carried out by the employee (Al-Sharqawi, 1995: 106) who issued the punitive decision, by reviewing the decision themselves. If they discover an error, they may, on their own initiative, amend or revoke it, exercising the authority granted to them by law. Alternatively, self-regulation may be hierarchical, exercised by the administrative head over the actions of their subordinate who issued the administrative penalty decision, such as fines in the areas of traffic and taxes. It may also be exercised before a committee or administrative body authorized by law to consider grievances against administrative penalty decisions, such as the committees responsible for reviewing grievances against fines imposed by the tax authority. In addition to self-regulation of administrative penalties, there is Judicial control exercised by the judiciary over administrative decisions of a punitive nature, regarding the validity of the decision itself and the presence of its essential elements in terms of form, jurisdiction, and subject matter. The reason and purpose, and in terms of preventing the administration from abusing its authority, is that if the judiciary finds it illegitimate, it will rule to annul it (Al-Ajami, 2010: 290).

The administration's authority to impose contractual penalties is unilateral, and while the aim is to enable it to achieve the public interest by ensuring the smooth and regular operation of public services, allowing this authority to be exercised without any constraints contradicts the public interest. This leads to the complete sacrifice of the contractor's rights, causing them to refrain from contracting with the administration in the future (Al-Sharqawi, 1995: 106).

Therefore, it is necessary to subject the administration's authority to impose contractual penalties to oversight in order to reassure the contractor and to achieve a balance between the administration's powers and the rights of the contractor. Accordingly, we will address this Judicial control of contractual penalties (Khalifa, 2009: 115) in terms of clarifying the jurisdiction of the administrative courts over which these penalties are subject and their scope.

The second requirement:

The nature of the administrative judiciary's jurisdiction in reviewing appeals against contractual penalties.

The right of the administration to impose contractual penalties falls within the scope of executing the administrative contract. Therefore, appeals against decisions imposing these penalties are subject to the full jurisdiction of the courts, not the annulment courts. Hence, we can say that subjecting disputes related to the execution of administrative contracts, including the validity of contractual penalties, to the full jurisdiction of the courts is the most appropriate approach given the legal nature of these disputes. Within the framework of the full jurisdiction of the courts in reviewing disputes related to the execution of administrative contracts, the matter is not limited to the judge annulling the contested decision, but extends to financial adjustments. This judiciary can also provide a final settlement to a dispute, annulling decisions that violate the law, if found to have comprehensive consequences, both positive and negative. The Iraqi and Iranian legislators were explicit in this regard when considering an appeal before them, stating: "Lawsuits are not brought before the Administrative Chamber to challenge a decision or administrative contract issued by a public administrative authority of an administrative nature." In summary, disputes related to administrative contracts including those that arise during the administration's exercise of its authority to impose various penalties during the implementation of administrative contracts, all are subject to the full jurisdiction of the judiciary, which can decide on them in terms of canceling the decision to impose penalties, as well as ruling on financial compensation in the event that the administration causes negative effects for the contractor (Baali, 2005: 185).

Section Two

The Scope of Judicial control of the Administration's Authority to Impose Contractual Penalties

The administration's authority to impose penalties on its contractors is subject to Judicial control. This represents a crucial safeguard for contractors in administrative contracts. It is a well-established principle that a contractor's right to access the courts is a matter of public order, guaranteed by the constitution to all citizens. Therefore, any clause in an administrative contract that deprives a contractor of this right is considered null and void, as it violates public order, and any resulting legal effect is also null and void. Judicial control of the administration in this area is extremely broad. It encompasses the legality of the administrative decision to impose a penalty, whether in terms of form, jurisdiction, violation of legal provisions, or abuse of power. Furthermore, oversight includes the reasons that led the administration to make the decision. The judiciary assesses whether an error occurred and whether the penalty was proportionate to the contractor's offense (Supreme Administrative Court, 1961: 1406).

The judiciary's oversight of the administration's authority to impose contractual penalties includes oversight of legality in addition to oversight of appropriateness. In both cases, this oversight is the responsibility of the contract judge, not the annulment judge, since the decisions issued to impose contractual penalties are not separate decisions from the contract because they fall within the framework of its implementation.

The first requirement

Legal oversight of the administration's authority to impose contractual penalties.

Since the administration's means of imposing contractual penalties is a decision issued by it in this regard, its validity requires, in addition to being issued by a competent authority and in the form specified by law, that its purpose aligns with the public interest, and that it is based on justifiable reasons without being

flawed by a violation of the law. Therefore, the judiciary's full oversight of the legality of contractual penalty decisions focuses on the jurisdiction to issue the decision, the form of the issuing procedures, the purpose of the decision, its reason for issuance, and its subject matter (Khalifa, 2009: 121). Consequently, an administrative decision to impose a contractual penalty is unlawful if it suffers from one of the following defects:

1. Defect of jurisdiction: A contractual penalty decision is unlawful if it is established before the judge of the contract that it was issued by an authority other than the competent authority, which is the authority entrusted with concluding the contract, or if it was issued by an authority delegated by the competent authority, while in reality it does not constitute the competent authority. This renders the decision flawed by lack of jurisdiction, thus making the penalty issued by The contracting authority's actions are considered illegitimate (Boudiaf, 2013: 90).

2. Procedural Defect:

If the legislator has prescribed a specific form or procedure for issuing a decision, and a contractual penalty must precede its imposition, such as the requirement of prior notice before imposing the penalty, then the administration is bound by it. Its decision to impose the penalty is considered illegitimate if it partially or wholly omits this part, or if it carries it out in a manner inconsistent with the law. It should be noted that the administration is not liable if the form it violated was established in its favor, or if its omission was based on a state of urgency or necessity, or on a contractual provision exempting it from this obligation, even if the matter is addressed in the Public Procurement Law (Khalifa, 2009: 122).

3. Abuse of Power

A contractual penalty can be considered legitimate if its purpose is to achieve the public interest, such as when the interest of the institution for which the administrative contract was concluded necessitates its imposition. This penalty may include a punitive deterrent for the contracting party, either to bring them back to the right path or to completely exclude them from executing the contract due to their inability to do so, in accordance with the interests of the institution (Awabdi, 1995: 194).

If the contract judge determines that the contracting authority's disciplinary decision was not intended to serve the public interest—for example, if it was intended to pressure the contractor into making contractual concessions or to retaliate against them for not complying with demands that fall outside the scope of the contract—then the judge will rule the disciplinary decision illegal. This will establish the contractual liability of the administration, thus entitling the contractor to compensation (Khalifa, 2009: 124).

4. Defect of Violation of the Law

An administrative disciplinary decision issued by the contracting authority is illegal if it was issued in accordance with the general rules of administrative contracts and the various applicable legal texts. Any decision outside the scope of the law renders the disciplinary decision imposed on the contractor illegal (Khalifa, 2009: 124).

5. Defect of Cause:

For the validity of imposing a contractual penalty, there must be a justifiable reason for the contractor to perform an act or refrain from performing it, while this or that constitutes a contractual or legal error that constitutes a breach of his contractual obligations, which is why his negative or positive unlawful conduct is met with a penalty. Hence, the contractual penalty decision becomes unlawful when the event whose existence constitutes a breach by the contractor of his contractual obligations is absent, or the event on which that penalty is based falls outside the scope of a contractual or legal error (Khalifa, 2009: 126).

The second requirement

Judicial control of the appropriateness of contractual penalties.

The scope of Judicial control of the administration's authority to impose contractual penalties extends beyond simply reviewing the legality of the penalty decision to include reviewing its appropriateness. The judiciary exercises its oversight to ensure the proportionality between the penalty imposed on the contractor and the severity of the alleged offense (Awabdi, 1995: 197).

The judge can reduce the disputed penalty to a level that achieves a balance between it and the offense. The authority of the contract judge in reviewing the appropriateness or legality of contractual penalty decisions varies according to the type of contract. The judge cannot compensate the contractor for the penalty, and according to the general rules of administrative contracts (Rausseau, 1979: 119), the judge has the power to annul the penalty if it exceeds the limits of proportionality to the severity of the offense. Furthermore, the judge has the right to reduce the penalty to a level that achieves this proportionality. The judge's authority to award compensation for contractual penalties, when proven illegal or inappropriate, is perhaps limited to this specific legal nature. The purpose of such penalties is to compel the contractor to fulfill their contractual obligations, thus serving the interests of the contracting entity (Khalifa, 2009: 126).

When the judiciary exercises oversight of appropriateness, it does not deviate from its oversight of legality, as appropriateness in this case is an element of legality. This leads us to the conclusion that there is a fundamental difference between legality and appropriateness. The legality of an action means that this action adheres to legal rules. The appropriateness of an action, however, means that this action was suitable, appropriate, or valid in terms of time, place, circumstances, and surrounding considerations. Therefore, the concept of appropriateness is relative. This does not mean that legality and appropriateness are contradictory concepts, because while the legality of a decision can be assessed and examined based on legal rules, assessing the appropriateness of a procedure or decision can only be done in relation to a set of factual factors distinct from the concept of legality (Sharqawi, 1981: 100). Professor Suleiman Al-Tamawi argues that specifying certain cases in the contract and granting the administration the authority to withdraw work from the contractor provides a fundamental benefit regarding Judicial control. He notes that the judiciary's authority, when work withdrawal is explicitly stipulated, is limited to reviewing the legality of the penalty decision. However, in other cases, the judiciary's authority expands to encompass both legality and proportionality, by assessing the appropriateness of the withdrawal in relation to the contractor's alleged errors. It is generally accepted that the administration resorts to pressure tactics it has the authority to impose on its contractors only when the contractor has committed an error. Furthermore, the administration exercises its power under the oversight of the judiciary, which possesses broad powers in this regard, addressing both legality and proportionality (Al-Tamawi, 1972: 485).

As for the Iraqi situation, we find that our Iraqi judiciary has followed the French and Egyptian judiciary in the direction of the advanced rulings issued by it - whether old or new. This is clear in its ruling issued on 3/8/2004, in which it says ((...the appeal was filed within the legal period, so it was decided to accept it in form, and upon further consideration of the decision of the Compensation Committee, it was found that the compensation it estimated was not small and was appropriate, so it was decided to approve it...)) (Iraqi Court of Cassation, 2004).

The administrative judiciary is distinguished by the fact that its mission is not limited to seeking the correct ruling of the law only, but also includes seeking the point of balance and suitability (Adaptation) between the individual interest and the public interest. Therefore, when the administration imposes a penalty, the authority of the judiciary is highlighted in establishing the scales of justice between several matters, including the degree of the seriousness of the violation to the interests, regardless of its type, the extent of the benefit that the violator achieved as a result of committing it, and the extent to which the penalty is obtained in light of all of that in terms of a fundamental right or freedom. And to the extent that it reaches the point of balance between them, to the extent that it succeeds in reaching the proportionality that precedes the act, that is, so that the penalty is not so harsh as to represent an infringement on a freedom or right worthy of attention and protection, nor is it so weak as to be a cause for wasting fundamental interests. Therefore, the administration cannot in any way be relieved of its obligation by attributing the penalty that it imposed to facts that legally justify taking it, and it is not excusable to claim that the text that defined the fact was ambiguous and unclear. Because in all cases, the authorities are obligated to ensure that the facts upon which they base their application of the penalty legally justify its imposition (Abu Younis, 2000: 111). The principle of proportionality dictates that the authority responsible for determining the penalty should not be excessive in its selection or arbitrary in its assessment. Rather, it must take whatever measures are absolutely necessary to address the legal violation or administrative infraction, and the consequences arising from its commission, while maintaining a reasonable degree of proportion to deter the offender and discourage others from committing the same act. Hence, the criteria or limits of the penalty or punishment are objective. Any transgression of these controls is considered arbitrary or tyrannical and must be rejected (Abu Amer, 1993: 454). While the legislator obligates the administration to be proportionate when choosing a penalty, it also requires it to adhere to reasonableness. This means not

only adhering to the chosen penalty but also ensuring it is only imposed in cases of violations justified by law. Such reasonableness necessitates that the administration exercise sufficient care in its assessment to avoid arbitrariness (Abu Younis, 2000: 119). It is worth noting that while the administrative judge has expanded their oversight to encompass the appropriateness of administrative decisions, consequently monitoring the proportionality between the decision and its subject matter—that is, between the penalty and the violation justifying it—the judge, in their oversight of the administration, restores balance if the penalty imposed by the administration is excessive and disproportionate to the offense. This aims to prevent the administration from enriching itself at the expense of its contractor or from abusing its authority to impose penalties unnecessarily. Justification (Hashem, 2002: 45): However, the inclusion of administrative sanctions within the discretionary power of the administration does not necessarily mean that Judicial control is absent. Rather, it simply means granting the administration a degree of freedom of action, given its proximity to daily realities and its consequent ability to assess certain details that vary from case to case. Thus, while the assessment of sanctions falls within the administration's discretionary powers, the judiciary can intervene and exercise its oversight if the administration's assessment is excessive and beyond all reasonable limits, whether through harsher or more lenient measures. The trend that Arab administrative jurisprudence has begun to adopt in imposing its oversight of the appropriateness of certain administrative decisions represents a firm and definite step forward in affirming the meaning of justice in all its forms, without being bound by specific legal theories or heeding the administration's claims that it alone has the authority to assess the appropriateness of its decisions. It would be desirable for Arab jurisprudence to extend its oversight of the appropriateness of all important decisions when it deems it necessary. A disproportion or imbalance between the importance of the facts and the action taken in relation to them (Al-Barzanji, 1971: 436).

Conclusion

In conclusion, this research demonstrates:

- 1- Judicial control of contractual penalties is one of the most important legal safeguards ensuring a balance between the privileges of the administration and the rights of its contractors. Granting the administration the authority to impose contractual penalties unilaterally aims primarily to guarantee the smooth and efficient operation of public services. However, this authority cannot be exercised without Judicial control, which ensures it is not abused or misused.
- 2- The study reveals that the administrative judiciary exercises broad oversight over contractual penalties. This oversight is not limited to examining the legality of the penalty decision in terms of jurisdiction, form, cause, subject matter, and purpose, but also extends to assessing the appropriateness and proportionality between the penalty and the fault attributed to the contractor. This approach truly embodies the principle of the rule of law and the achievement of contractual justice, as it provides protection to the contractor against any unlawful or excessive use of administrative powers.
- 3- The study also showed that disputes related to contractual penalties fall under the full jurisdiction of the judiciary. This grants the administrative judge broad powers, enabling them to annul unlawful penalties, modify their effects, or award compensation when proven to have resulted in damages. This ensures the necessary legal protection for the contractor while simultaneously safeguarding the public interest.
4. The research concluded that Judicial control does not represent a constraint on administrative authority, but rather a means of regulating and directing this authority toward achieving its intended objectives, thus guaranteeing respect for the principles of legality, equality, and justice. Furthermore, the evolving role of the administrative judiciary in overseeing the appropriateness and proportionality of penalties reflects a significant development in contemporary legal thought toward strengthening the protection of rights and freedoms and achieving a balance between the public and private interests.
- 5- Based on the above, the effectiveness of Judicial control of contractual penalties remains linked to the extent of the independence of the administrative judiciary and the breadth of its powers, as well as the need to develop legislation regulating administrative contracts in a way that ensures clarity of the rules relating to the imposition of penalties, their controls and limits, which contributes to consolidating trust between the administration and its contractors and enhances the stability of administrative transactions and the achievement of the public interest.

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