

**BOT AND THE THEORY
OF ADMINISTRATIVE CONTRACTS
IN EGYPT**

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Introduction:

In Egypt there is a fundamental division between public and private law, or, more precisely, between administrative law and private law. This division of law is reflected in a division of jurisdiction of courts. According to Article 272 of the Egyptian Constitution "The State Council shall be the independent judiciary organisation competent to take decisions in administrative disputes and disciplinary cases..."

The state council has built up a theory of administrative contracts which is distinct from civil contracts. However, according to the State Council Law No. 47 of 1972 some contracts per se fall within the jurisdiction of the State council if a government agency is a party: namely concessions, public works and public procurement contracts. BOT contracts in most cases will be related to these three categories, and as such the rules governing administrative contracts will be applicable to BOT contracts if one of the parties is a government agency.

Our main concern in this paper will be confined to the theory of administrative contracts in its relation to BOT. But if a BOT contract is between private parties, or with a government agency in relation to its private domain, the contract will be a private contract subject to the Egyptian Civil Code.

Innovation in Contracts and the Legal Environment:

Innovation in contracts is an inevitable and acceptable phenomenon. New needs require new types of contract which satisfy these needs. However, innovation has to be accommodated in the legal environment within which it will operate, otherwise difficulties will occur in its application.

Build-Operate-and Transfer (BOT) appears as a new legal concept to encourage private enterprises and entrepreneurs to help the government in its development effort.

BOT laws in different countries usually declare that the policy of the state is to recognize the indispensable role of the private sector (indigenous and international) as the main vehicle for national growth and development.

BOT is defined as a contractual arrangement whereby a private party:

- (a) Designs and builds a project (or a given infrastructure facility), in accordance with specifications as agreed between a government agency and the private party.
- (b) Owns the whole project (or the given infrastructure facility) during the contract duration in which it is allowed to charge the users or consumers appropriate tolls, fees, rentals and charges not exceeding those proposed in the bids or as negotiated and incorporated in the contract to enable the private party to recover its investment, operating and maintenance expenses in the project (or the given infrastructure facility).
- (c) Operates and maintains the project (or a given infrastructure facility) during the contract duration in conformity with the laws and regulations of the country concerned.
- (d) At the end of the fixed term of the contract, the private party transfers the whole of the project (or a given infrastructure facility) and all properties, without compensation, to the government concerned or any body (ies) appointed by the said government,
- (e) The private party ensures all financial sources necessary for the implementation of the BOT contract,
- (f) The private party fulfils all financial obligations to the government concerned as stipulated in its Laws and Regulations.

The subjects of BOT contracts include, but are not limited to: power plants, highways, ports, airports, canals, dams, bridges, hydropower projects, water supply, irrigation, telecommunications, railroads and railways, transport systems, land reclamation projects, industrial estates or townships, housing, government buildings, tourism projects, markets, slaughter houses, warehouses, solid waste management plants or projects, information technology networks and database infrastructure, education and health facilities, sewerage, drainage, dredging, and other infrastructure and development projects.

The private party may obtain financing from foreign and/or domestic sources and/or engage the services of a foreign and/or a national contractor.

Sometimes the concerned government may partly finance the project. As to staffing, the national labour laws should be respected.

The project proponent transfers the facility to the government agency or local government unit concerned at the end of the fixed term.

The BOT usually includes a supply-and-operate situation which is a contractual arrangement whereby the supplier of equipment and machinery for a project or a given infrastructure facility, if the interest of the government so requires, operates the facility providing in the process technology transfer and training to nationals.

It appears from what has previously been said that the BOT contract is a complex one, including a chain or sequence of contracts as one block aiming at lessening the government burden in development and supplying public services by private enterprises entrepreneurs.

The Theory of Administrative Contracts:

Like France, Egypt (with some reservations) belongs to that family of legal systems to which we attach the name "Civil Law". When we say "with some reservations" we mean that Egyptian law is also influenced by its legal tradition derived from Islamic Sharia. The Egyptian legal system attaches great importance to legislation, codification, and a dual system of law, public and private. A government contract is predominantly a public law contract which is called an administrative contract. The difference between public and private law in Egypt has a fundamental practical importance. Therefore it is essential to determine the legal nature of any contract to see whether it is a public or private law contract.

To determine whether a contract belongs to the public law can be complicated but putting it simply, there are two main conditions which a public law contract must usually satisfy:

- (a) One of the parties must be a public body or at least a body providing a public service. Where the contract is made with a minister or the prefect of a province there is no difficulty, but in recent decades there have grown up in Egypt, as in France, a wide range of other entities, from public utilities to bodies with a variety of social, professional and cultural purposes, and the precise limits of the category are not clear.

(b) Not every contract made by a public body is governed by public law. For such a contract to be an administrative contract one or both of the following conditions must also be satisfied:

- i- the object of the contract must be the entire performance by the private party of a public service (Merfaq Aam) as opposed to merely the making of a contribution to its performance.
- ii- The contract must contain provisions which would not usually be found in a private contract of a similar kind. Examples of such exorbitant clauses are terms which empower the administration, but not the private party, to vary or rescind the contract.

Provisions such as these are normal in public law contracts, but they would obviously be surprising in other contexts.

Contracts between public bodies of a commercial or industrial character and the users or consumers of their products belong to the private law, even if they contain exorbitant clauses.

From these criteria, it appears that BOT is most likely to be an administrative contract. If the administration is a party, and the private enterprise is entrusted with building, operating and transfer of ownership to the administration, and if there are exorbitant clauses concerning modification, control of pricing, manning, technology and the right of the administration to rescind the contract, the BOT contract will be an administrative contract.

Rules Applicable to Public Law Contracts:

Administrative law in Egypt is almost entirely based on the decisions of the State Council. In the sphere of contracts, this case-law largely follows the law of the Civil Code and the ordinary courts, though with special rules to take account of the need for public contracts to be duly authorised.

The most important differences derive from the overriding purpose of all administrative law, which is to ensure the supremacy of the public interest. The rights of the private contracting party, even if embodied in the terms of the contract, may not stand in the way of the public interest. In this context, the most important power of the administration is to unilaterally modify or abrogate the contract if this is necessary to protect the public interest. This

power will often be expressly stated in the contract.

The administration must, however, compensate the private party for any loss which he suffers by the over-riding of his rights.

It is another characteristic of administrative law that the administration has the privilege of execution d'office. It can take what steps are necessary to enforce or supervise the contract, without invoking the assistance of the administrative courts. The administration is never obliged to appear as plaintiff.

An administrative contract, according to Egyptian law and the case-law of the State Council, is regarded as essentially an arrangement between unequal parties. The rules on administrative contracts have a number of peculiarities compared with private law contracts. These concern the formation, content and performance of contracts. These special principles stem mainly from the underlying need to recognize the predominance of the public interest, an interest which may prevail even to the extent of overruling the express terms of the contract.

In addition, administrative contracts fall outwith the jurisdiction of the civil courts and within that of the administrative courts and being bilateral acts, they are not in general reviewable by the recours pour excès de pouvoir, but only give rise to a remedy for damages under the pleine jurisdiction of the administrative courts.

In all administrative contracts, especially concessions, the administrative courts (mainly the Administrative Judicial Court and the Supreme Administrative Court) still retain the power to influence the contents of the contract through their interpretation of the intention of the parties. In this interpretation they will insist that the most reasonable terms (from the point of view of public interest) are secured.

Although a private person can make a contract with whomsoever he wills and on whatever terms he wishes, the dominant position and immense contracting power of public authorities is redressed by subjecting them to certain procedural requirements. Failure to comply with these renders the decision to enter the contract (a decision separable from the contract itself) liable to be quashed for excès de pouvoir. Thus in concession contracts (and public procurement contracts too) requirements govern the publicity which must be given by the public authority to its intention to make a contract so as to

invite tenders from interested parties. The awarding of the contract should abide by the rules of Law No. 9 of 1983 concerning adjudication. The said law set out a number of standard terms and conditions (cahiers des clauses et conditions and cahiers des charges) which bind the different administrative authorities in making contracts. Law No.9 of 1983 deserves detailed treatment.

Law No.9 contains many elements that are common to most government tenders regulations. With specific exceptions, the Egyptian law requires:

- 1- Open competition, where bidding is governed by the principles of publicity, equality and freedom of competition (Article 2)
- 2- Best value, lowest price: the supplier offering the best value at lowest price should win.
- 3- Decision Making Process:
There are two committees that take the decision on awarding the contract:
 - (a) a bid opening committee that convenes a public session to which all bidders are invited and at which all bid prices are read aloud;
 - (b) a decision-making or settlement committee which reviews the technical bids and either makes a decision or, if the bid is over L.E. (\$62,000) recommends a decision to the relevant minister (Article 12)In both committees the Ministry of Finance and the State Council (Ministry of Justice) should be represented. The State Council has an important role in the contracting process.

However, according to Article 5, the law permits a sole source in defined cases, monopolized sources of supply, goods whose import is monopolized, specialized products or services, and goods and services urgently needed. In such cases, a decision making committee is formed consisting of officials from the buying agency and representatives from the Ministry of Finance and the State Council (Ministry of Justice). Under Article 8, the Ministry of Defence has sole sourcing authority for armaments contracts.

4. Performance Bond

The performance bond is an important guarantee in Egyptian administrative contracts. The winning private party must submit, before signing the contract, a performance bond as issued by a reputable bank equal to at least 5% of the value of the works contract and 10% for other contracts. This performance bond is released after the certificate of final completion of the work is issued.

However, Egyptian public sector companies and cooperatives are exempted from this bond requirement (according to Article 21 of Law No. 9) provided they do the work themselves and do not request advance payment.

5- Advance Payments:

Advance payments are permitted against a letter of guarantee (Article 25).

6. Submission of government contracts to the State Council:

According to the State Council's law No. 47/1972, Article 58, all transactions exceeding L.E. 5000, in which the government is a party, whether they be contracts, arbitrations, settlements etc. should be submitted to the State Council for review. The law does not require the approval or verification of the State Council. All that is required is the mere submission of the transaction to the State Council. It is also known that the legal opinion of the State Council in such matters is not binding on the administration. But in practice, the State Council's legal opinion carries much weight, and the administration respects it. The administration does not ignore the State Council's legal opinion unless there are good reasons to do so, and at the peril of the decision-maker.

It must be noticed that while Law No.9 spells out in detail the responsibilities and penalties regarding suppliers and contractors, the law places no corresponding responsibility on the government purchaser.

BOT and Concessions:

Within the framework of administrative contract, BOT is very similar to what we call in Egypt, a concession.

Instead of entrusting all public services directly to the government, a concession agreement can be used by which the government will entrust the management of public services and utilities, (gas, water, electricity or any

other similar commodities) exploitation of minerals, e.g. petrol, construction of roads, factories, airports, tourist resorts, reclamation of desert land, etc., to a private entity or individual, under the supervision of the government. This is what is called in Egypt a concession contract. The private entity is called the concessionaire and the government as a party is called the concedant authority.

Definition of a concession contract:

According to Article 668 of the Egyptian Civil Code a concession contract is a contract whose object is the management of a public utility service of an economic nature. Such a contract is concluded between the administrative authority responsible for such serviced and a private company to whom the service is entrusted for a fixed period.

The Administrative Judicial Court defines the concession contract and its legal nature by stating that "a concession contract is an administrative contract by which an individual or a company undertakes to provide a service to the public of its own expense by virtue of a contract with the state or one of its organs and according to the conditions and stipulations agreed upon, in exchange for permission from the state to the private entity to exploit the project for a definite period of time and acquire the profits accumulated from it. Therefore the concession contract is an administrative contract, which has a special legal nature. Its object is the management of a public service for a definite period of time. The concessionaire shoulders all expenses and financial risks, in exchange for which the concessionaire gets a rate or a fee from the consumers ."(1)

The following are the characteristics of the concession contract.

- a. It is an administrative contract with a special legal nature.
- b. Its object is the management or exploitation of a public service of an economic nature.
- c. It is limited to a fixed period, to allow the concessionaire to recoup his investment in the establishment of the project plus a reasonable margin of return on the capital.
- d. The concessionaire not the government is responsible for all financial risks of the project.
- e. The concessionaire in the establishment or building and management

of the public services is under the supervision of the concedant authority.

- f. The concessionaire must observe all legal rules recognized by the law and courts: that the project should set up a long term or permanent service to consumers, that there should be strict equality between consumers both as regards the services rendered and the rate charged, that the concedant authority has the right to modify the rules relating to the management of the public services.

From the abovementioned characteristics of concessions, it appears that Egypt can accommodate BOT within the framework of a concession agreement.

And this is what actually took place in 1996 in relation to electricity and airports.

BOT as an administrative contract is similar to concessions. It will have the same governing legal rules, namely:

1. The instrument initiating BOT:

According to Article 122 of the Egyptian Constitution of 1971, the law should govern concessions relating to the exploitation of natural resources and public services (Marafiq A'amah).

The 1971 Egyptian constitution does not differentiate between monopolies and other situations as was the case in the constitution of 1958, according to which monopolies should be granted by an act of parliament, (People's Assembly) whereas the exploitation of natural resources and concessions of public services should be granted by a presidential decree approved by parliament.

According to the Egyptian constitution of 1971, any concessions, whether related to a monopoly or the exploitation of natural resources or public services, should be granted by a presidential decree approved by the People's Assembly (Law No. 61 of 1958). If the concession is related to exploitation of water resources belonging to the Ministry of Defence, the concession is granted by a Minister of Defence if the term of the concession does not exceed 5 years, otherwise a presidential decree is necessary.

2. Term of the Concession:

According to Law NO. 129 of 1947 concerning concessions of public services, the term of the concession should not exceed 30 years. The 30-year maximum applies to all forms of exploitation of natural resources, monopolies and concessions of public services.

When the term of the concession comes to an end, the project or the facility granted to the concessionaire should return to the Egyptian government without any compensation.

However, the Egyptian government will have the right to acquire the project before the end of the term in the following cases:

- 1- Force majeure if the concessionaire is unable to implement the project or the facility, as stated in the contract.
- 2- Termination of the concession for national considerations, as was the case of the law No. 155 of 1960 which terminated the concession agreement granted to some transport companies in Cairo. The government is obliged to compensate the concessionaire for any loss which he would sustain.
- 3- Recovering the project if the concessionaire suffers from serious losses and cannot continue its business activities.
Also if the concessionaire has so seriously breached responsibilities stipulated in the contract that it is impossible to continue the contract.
- 4- If both parties agree to terminate the contract before its period and release each other from the obligations stated in the contract.
Law No. 129 of the year 1947 stated that both parties should decide in the concession the conditions and rules relating to recovery of the project before its period. The concessionaire's rights for compensation will be agreed in advance in this case.

It must be noted that, in recovering a project, the government does not take over the concessionaire's obligations (e.g. debts) to third parties. All the government can be obliged to do is compensate for the recovery of a project before its period.

Rights of the Egyptian Government:

According to Law No. 129 of the year 1947, the concedant authority will have the following rights:

- 1- The right of control over the establishment and operation of the project by means of supervising the financial, administrative and technical performance of the concessionaire (Article 7). To exercise such control the Government has the right to appoint its delegate to supervise and report back. The project will also be subject to the supervision of the Controller General (Diwan Al-Muhasabat), if the concedant authority so desires. The minister concerned can also establish a committee to supervise and report to him. The concessionaire has a duty to facilitate the supervisory functions of such bodies by providing them with all documents, information, or statistics required.

Such control is an inherent right of the Government even if it is not stated in the contract.

- 2- Amendment of clauses in the contract relating to the regulatory aspect of the concession:

In the concession agreement, there are two kinds of clauses:

- a- those relating to the financial obligations of both parties. such as: the term of the concession, modes of recovery of the project, the implementation of public works necessary to the establishment of the project. These are all conditions which have no connection with the consumers.
These clauses cannot be amended without the mutual acceptance of both parties and if the concedant authority violates them, it must pay compensation .
- b- Those relating to the organisation and operation of the project, such as fees, timetable, safety of consumers, conditions necessary for consumers to be eligible for benefiting from the project. These clauses in the Egyptian legal vocabulary are regulatory clauses. As such, the concedant authority can amend them, by omitting, increasing or decreasing, without prior consent of the concessionaire (2).

Rights of private Party:

The theory of administrative contracts gives the private party rights and privileges necessary for the running of the public service, even though they do not quite fit the law of contract in civil law. The most important rights are the following:

1. The right to the value of the contract:

The concessionaire has the right to the fees, tolls etc, and if the government reduces such fees, the concessionaire must be compensated.

2- The right to all benefits which the government declared in the contract: examples: land, financial facilities, protection of the concessionaire's monopoly.

3- Contractual Equilibrium and Modification:

The apparent one-sided character of administrative contracts requires special protection for the contractor. In concession (as we mentioned) public authorities have powers to redefine the character of the service to be performed or the work to be done in order to meet the changing needs of the public interest. This may involve additional costs. Such powers are not typically reserved to the public authority by the contract, but arise from the general principles of administrative law. To protect the concessionaire the law gives him the right for the financial balance of the contract to be preserved. Where this is changed by the exercise of public powers, then he is entitled to an indemnity to restore the equilibrium of the contract. Payment of such an indemnity will be enforceable, if necessary, at the suit of the contractor before the administrative courts, and it may be that in such proceedings the court will decide that a particular variation or modification (in respect of which an indemnity was being claimed) should not have been made. Of course this doctrine involve considerable flexibility in the contract and it may be invoked by the private contractor as well as by the administration.

4. Fait du Prince

Fait du prince is invoked when the economic basis of the contract is upset by an act of the administration itself. This is a doctrine similar to "act of state" in the English law of tort; as one party to the administrative contract is an administrative agency, it may carry out some governmental act (unconnected with its right under the contract) which may affect the other party to the contract. In English Law it is recognized that an administrative agency cannot, by contract, fetter its right-or duty- to exercise an administrative discretion vested in it by statute. Nor can a public authority by its conduct estop itself from exercising such a discretion. In such circumstances the other party to a contract may well have no remedy in damages. In Egypt, however, unless the governmental act is some general legislation affecting all citizens equally, the concessionnaire is entitled to a monetary indemnity or to increase the charge to the consumer. So, where an administrative agency which is a party to the contract takes some measure by virtue of la puissance publique that affects the substance of the contract, the concessionnaire will normally be entitled to an indemnity in accordance with the fait du prince doctrine.

5- Imprevision:

Under this principle, if supervening circumstances (unconnected with the administration) have arisen after the formation of the contract for which no (or inadequate) provision has been made in the express terms of the contract, making it uneconomical for the private party to the contract to perform his part, he will not be allowed to resile from the contract, but may be compelled to perform the contract and will then be entitled to an indemnity from the administration against his extra expenses. In the case of a concession, the indemnity may take the form of a right to charge the consumer more than is provided under the contract.

Article 147 of the Egyptian Civil Code lays down the general rules of imprevison by statings that" the contract makes the law of the parties. It can be revoked or altered only by mutual consent of the parties or for reasons provided for by the law. When, however, as a result of exceptional and unpredictable events of a general character, the performance of the contractual obligation, without being impossible, becomes excessively onerous in such way as to threaten the debtor with exorbitant loss, the judge

may, according to the circumstances, and after taking into consideration the interests of both parties, reduce to reasonable limits the obligation that has become excessive. Any agreement to the contrary is void".

The principle of imprevision is invoked less often now that it has become common for contracts to provide expressly for such matters as inflation or monetary depreciation by (for example) a price-revision clause.

Conclusion:

BOT is an old wine in new bottles. I hope I have shown that concession contracts in Egyptian Law can accommodate most of the subjects of BOT contracts, if they are related to monopolies, exploitation of natural resources or public services. If BOT contracts concern commercial and industrial activities not directly related to the public interest, or if they concern public sector companies, their contracts will be private law contracts subject to the provisions of the Egyptian Civil Code, and to the jurisdiction of the ordinary courts.

Footnotes:

(1) Law No. 129 of the year 1947, and Administrative Judicial Court decision of 27/1/1957, year 11, p 160.

(2) Administrative Judicial Court in its judgment No.146, judicial year No. 8, hearing on 25/3/1956, 10th year Judicial Report, p. 259.