



RESEARCH ARTICLE

Legal Aspects of Amending a Public-Private Partnership Contract

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ARTICLE INFO	ABSTRACT
Received: Oct 27, 2024 Accepted: Dec 20, 2024	Sustainable development seeks to promote the advancement of a wide range of public infrastructures and address the needs of citizens who rely on these public services; therefore, the majority of global legislations have expedited the development by establishing a comprehensive legal framework regulating public-private partnership agreements (PPP) through clear and structured procedures. This study addresses the extent of the public administration's jurisdiction to modify this agreement in response to emergencies and evolving factors during the performance of the PPP and in a manner that is consistent with the paramount interest of the state and its continuous delivery of the service for which it was established. The goal of this study is to examine the possibility of amending the PPP agreements by outlining the legal framework that governs this issue and elucidating the extent of this authority in light of evolving circumstances that call for this kind of modification, which could take place at any point between the contract's creation and performance.
Keywords Partnership contract Administrative contracts Public utilities Administrative power Modifying administrative agreements	
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INTRODUCTION

Pursuing sustainable development, whether in the economic or service sectors, typically constitutes a critical challenge. Given that many countries in the world are currently facing significant financial constraints due to the paucity of essential resources such as oil, gas and other vital sources of wealth, governments are increasingly seeking to establish a legal, regulatory and institutional partnership with the private sector primarily through administrative contracts that achieve the desired goal of establishing and operating essential public utilities. (Tawfiq 2012) Consequently, public-private partnership (PPP) contracts have emerged, which primarily concern all aspects and procedures of contracting between the public and private sectors, including the conclusion phase, obligations and rights of its contracting parties and the performance of the contract. The World Bank's PPP Knowledge Lab defines a PPP as "a long-term contract between a private party and a government entity for providing a public asset or service, in which the private party bears significant risk and management responsibility, and remuneration is linked to performance".

This research sought to address the legal aspects related to concluding the PPP agreement and the administration's authority to amend this type of agreement in case of potential changes striking in the stages of establishing and executing the project subject to the agreement.

1.1 Research Importance and Objectives:

The importance of this research stems from the subject it addresses, which is the position of Jordanian legislation and the authority it grants to the public administration to amend PPP contracts, as these contracts have a pivotal role in promoting the ultimate interest of the state and the continuity of the adequate performance of the public facility. This research aims to achieve a set of objectives: identifying the nature of the PPP. Agreement and examining the adequacy of the authority of the public administration to amend the PPP contract, the legal basis for its power, and the legal effects arising from the amendment of these contracts on the rights of the other contracting party.

1.2 Research Problem

The problem of this study lies in examining the adequacy of the public administration's authority to amend the PPP agreement in light of the supreme interest of the state and the emergence of circumstances that arose during the performance of the agreement. Therefore, this study raises a fundamental problem represented by the legal capacity that allows the public administration to follow the approach of amending the PPP contract according to a correct legal framework.

1.3 Research Approach:

The analytical approach was relied on in this research due to its suitability in addressing the issue of the public administration's authority to amend the PPP contracts. This approach introduces a significant method for analyzing and inducing legal texts, which will facilitate the achievement of the objectives of this research. The research is divided into two chapters. The first chapter delves into the PPP agreement concept and the legal adaptation of the public-private partnership contract. The second chapter discusses the idea of the administration's authority to amend the public-private partnership contract and its legal basis and restrictions on the administration's authority to amend the PPP contract.

Legal Nature of Public-Private Partnership Agreement

The issue of clarifying the legal nature of PPP contracts is of great importance; therefore, it is necessary to address the concept of PPP contracts and their legal nature as follows:

2.1 The Concept of Public-Private Partnership Agreement

Public-private partnership agreement PPP is a type of administrative contract related to the construction and execution of infrastructure projects that aim for sustainable development. A public-private partnership is essentially a performance-based, long-term method of acquiring products and services. From design and planning to long-term maintenance and support, the private sector bears a significant portion of the risks associated with financing and construction. It guarantees the efficient operation of the good or service. The government typically outlines its expectations for the services to be rendered. Still, it gives the private sector partner as much leeway as possible to develop the optimal solution, which requires the availability of accurate financial, administrative and technical expertise and capabilities from both sectors.(Abdelali , B & Badrawi , Y 2021)

The desired goal of this partnership is to promote sustainable development and provide pronounced services in all fields, specifically the economic and social sectors.(Draji 2014)

In short, a public-private partnership contract is: "A method employed by countries to deliver public services previously undertaken by the state, to alleviate the financial burden on the public budget by transferring responsibility to the private sector. Additionally, by utilizing this strategy, the public sector can refocus its resources and efforts on areas of spending that the private sector is less inclined to engage in (Razeq 2014).

In this context, it must be noted that the country's deficiency in financial capabilities constitutes one of the most prominent reasons governments resort to public-private partnerships to provide sustainable development and constructive public services. (Al-Rasheed 2006)

In light of those mentioned earlier, we argue that public-private partnerships are created under the majority of laws to accomplish sustainable development using elements founded on expertise, competitiveness, experience, and variety in various social and economic domains.

Therefore, the PPP agreement is defined as: "An agreement between the private sector and the public sector that specifies the objectives, form and percentages of contribution between them to finance the agreed-upon investment and equipment and manage and maintain them throughout the contract term." (Al-Qahawi & Al-Wadi 2012) It is also defined as: "A mechanism aimed at financing infrastructure projects, whereby the state entrusts a private legal entity called in practice (the project company), pursuant to an agreement concluded between them called (a partnership agreement), by virtue of which the project company is obligated to participate in providing infrastructure facilities of an economic nature, according to the provisions and texts contained in this agreement regulating ownership, funds, profits and other measures and procedures related to the enforcement of the project." (Salman 2012)

Numerous international public or private organizations have paid great attention to public-private partnerships (PPPs) agreements; for example, the United Nations has defined it as: "a cooperative arrangement between public sector authorities (such as governments or governmental agencies) and private sector companies or entities. These partnerships are typically established for delivering and managing public services or infrastructure projects, where both parties contribute resources and share risks, responsibilities, and rewards." (United Nation 1998)

Likewise, the International Monetary Fund (IMF) extensively addressed the PPP agreements in its reports, specifically the infrastructure investment and fiscal policy. The IMF describes PPPs as a mechanism through which governments can attract private sector investment and expertise to fund, develop, and manage infrastructure projects, particularly in situations where public budgets are constrained. These projects include building and operating hospitals, schools, roads, bridges and tunnels, road lighting networks, airports, ports, and water and electricity stations. (Partnerships 2004)

French law defines the partnership contract under Law No. 179/2009, dated 12/17/2009, as the administrative contract by which the state or one of the public institutions gives a third party the right to establish a project for a limited period during the investment consumption period, or according to the agreed upon financing terms, to finance intangible investments and projects or to supply the necessary equipment for the public facility, to establish and finance projects or equipment or to maintain them, and to exploit and manage them. (Burhan 2008) While Article 1 of Egyptian Law No. (67) of 2010 concerning Regulating Private Sector Participation (Law No. 67) defines a PPP contract as: "a contract concluded between the Administrative Authority and a Project Company under which the Project Company is entrusted to undertake all or some of the activities stipulated under Article 2 of this Law."

From the above, it is concluded that PPP contracts are a type of administrative contract concluded by the public administration in the state to establish and execute a project related to sustainable development linked to a major public utility in the state according to a unique legal nature to which it is subject in terms of conclusion and amendment.

2.2 Legal Adaptation of Public-Private Partnership Agreement

Legally, the issue of the partnership contract (PPP) issue has been widely debated as it tends to be administrative in character due to its connection with a public moral party. At the same time, its primary goal is to deliver a public service to individuals within the state. However, administrative jurisprudence tends to consider this type of contract as a private contract subject to private law due to multiple reasons, including that it is typically concluded between a private party and the administration, the technical and administrative expertise of the party to contract has, its financial

capabilities to manage it and because this contract does not include exceptional, unusual conditions. In contrast, the contracting state descends in the partnership contract to the level of the ordinary individual in this type of contract, aiming to encourage investment and achieve sustainable development, and finally, due to the lack of adequate legal regulation for this type of contract despite the existence of laws that address minor details with specific types for certain projects that achieve sustainable development. (Nassif 2006)

We argue that the partnership contract (PPP) is primarily categorized as a public law contract rather than a private law contract, given the unique authority of the public administration to unilaterally amend the terms of the partnership contract, which is an authority that the public administration a prerogative inherent in this type of contract. Legal scholars have emphasized that the PPP contract principally constitutes an administrative contract by nature. It involves one party from the public sector entrusting a party from the private sector responsible for financing, investing in, and performing projects necessary for public services and infrastructure. PPP projects typically involve constructing, equipping, managing, exploiting, and maintaining public utilities. The private sector partner takes on these obligations throughout the duration of the contract in return for recurring payments from the public administration during the predetermined contractual terms. (Razeq 2014)

Another perspective in jurisprudence suggests that "A partnership contract unites the public and private sectors to promote a specific goal, subject to procedures determined by the legislator, which is for the private contractor to establish and maintain one of the infrastructure projects in exchange for financial compensation." (Razeq 2014) Consequently, public partnership contracts are categorized as administrative contracts subject to the provisions and rules of administrative law. This category results from the nature of these agreements, which are made between a private and public legal entity with the primary goal of overseeing a public service or facility. (Al-Marashdeh 2008)

French legislation governing PPP contracts has further reinforced this characterization, explicitly defining such agreements as administrative contracts. Disputes arising from these contracts fall under the jurisdiction of administrative courts. However, disputes arising from these contracts fall under the jurisdiction of administrative courts, which can be concluded from the definition of the partnership contract contained in Decree No. 559/2004 dated 6/17/2004, amended by Law No. 179/2009, dated 12/17/2009, Decree No. 515/2009, dated 5/7/2009, and Decree No. 177/2010, dated 2/23/2010 (Al-Qaisi 2012).

In brief, PPP agreements are fundamentally administrative contracts in nature. They have distinctive forms and are characterized by specific conditions prescribed and mandated by law. Therefore, the administration has the right to amend its terms as deemed appropriate. (Hamash 2008).

Authority of the Administration to Amend the Partnership Contract (PPP)

It is well known to most legal commentators that the public administration has the authority to amend the administrative contract to achieve the ultimate public interest of the state, which precedes the interest of individuals entering a contractual relationship with the state. Therefore, it is necessary to address the concept of the administration's authority to amend the contract and the legal basis that grants it this right on the one hand and the restrictions face such an amendment on the other hand, according to the following domains:

3.1 The Concept of Administration Authority to Amend the PPP Contract and Its Legal Basis

It is well established in administrative law and jurisprudence that the public administration has the right to unilaterally amend the administrative contract to adapt to new circumstances or unforeseen needs that arise. In contrast, the contract is being executed, provided the modification aligns with the overarching public interest. (Salam , H & Mustafa , R (2024)The emphasis is on ensuring that the contract-supported public utilities or services efficiently address the populace's needs. Unlike private

contracts, the public administration can make modifications without the contractor's consent, where both sides must consent to any changes. This results from the administration's responsibility to prioritize and protect the public interest.

The administration can modify the contract to increase or decrease obligations or scope as needed to address changes arising during the execution of the project. However, this right does not require a specific clause in the contract granting the administration this authority since it is rooted in the general principles and established rules of administrative law, making it an inherent jurisdiction of public administration in such contracts (Othman 1990).

The nature of administrative contracts and their objectives are based primarily on the idea of the prolongation of public utilities regularly and steadily and in accordance with any new changes that occur to the contract subject matter or in the methods of its execution, confirming that the consent of the other party to the administrative contract is not required since the contract is related to the public interest (Al-Thahir 1997).

Bearing in mind that even if this amendment is not stipulated in the legislation or the administrative contract, the administration has the right to amend the administrative contract based on the fact that the public interest may require modifying (Khalifa 2007) in terms of the agreement to be more effective in light of the potential circumstances or that occurred during execution. (Shahada 2006)

It is also worth mentioning the theories of emergency and their reliance on the idea of justice, both of which require the administration to intervene in bearing part of the non-contractual expenses incurred due to the emergency (Kanaan 2001). In such a scenario, when some circumstances arise constituting unexpected burdensome on one party to the contractual relationship (such as financial, logistical, or operational challenges), (Yakan 1973) the fairness of the contract may be disrupted. To restore equity, the administration or the law typically ensures that no party gains an unfair advantage over the other, maintaining the principle of equality and mutual benefit, which underpins administrative contract costs while maintaining the viability of the contract. (Yakan 1973).

The theory of emergencies typically applies when unexpected, extraordinary circumstances arise during the contract's term. It is also related to administrative contracts, which are characterized by span extended periods, making them susceptible to changing circumstances; therefore, when unexpected circumstances arise during the performance of the contract affecting the contract obligations requiring consideration, not negligence, this theory is resorted to. The party engaged with the administration is assumed to shoulder significant responsibilities under the contract. However, considering the unexpected emergency, fairness requires the public administration to share the burden, restore balance, and ensure the contract's continued execution. (Yakan 1973).

In this context, the French State Council relied on the requirements of justice, as it authorized the amendment of contracts provided the economic balance was disturbed. In one case, the French State Council ruled to amend the concession contract of the Gas Company (Bordeaux), requiring it to supply gas to the city at a price of eight cents. Then, the price of coal needed to produce gas rose significantly from 1913 to 1915, which prompted the State Council to issue its famous ruling on the necessity of amending the contract in line with the rise in coal prices (Al-Jabouri 1998). Therefore, the administration shall not terminate the contract but rather maintain it, provided it enables the contracting party to pursue the contract execution and support the other party to the extent that helps it fulfil its contractual obligations and restore its financial balance. (Kanaan 2001) The same applies to the rest of the comparative legal legislation, which confirms the right of the public administration to amend the partnership contract in accordance with the special laws regulating these contracts, which also indicate in their provisions that the partnership contract must include an agreement between its parties on a mechanism for amendments when required including

unexpected circumstances that have emerged or to compensate the contractor when obligations increase. (Burhan 2008)

In the law regulating private sector participation, the Egyptian lawmaker granted in Article (7) of the Egyptian Private Sector Participation Regulation Law No. (67) of 2010, the administrative body had the right to amend the contract terms as it stated that: "The Administrative Authority is entitled to amend the conditions of construction, equipment, rehabilitation and other works as well as the services availability payment agreed upon under the PPP contract. If the PPP contract includes the entitlement of the Project Company to operate or utilize the project, and if required for the public interest, the Administrative Authority has the right to amend the rules of operation or utilization, including the sale prices of products or services. These modifications will only take place within the scope agreed upon in the PPP contract and after the approval of the Supreme Committee for Public Private Partnership Affairs, and without prejudice to the right of the Project Company, or the Administrative Authority (as the case may be), for compensation in accordance with the conditions and rules stipulated in the PPP contract. If the sale price of the product or the services provision payment is amended, such amendment shall not have retroactive effect."

In all cases, the amendment shall take effect immediately, especially with regard to the selling price of the product or service fees. (Law No 67) The Egyptian lawmaker adopted the theory of the prince's Act "*fait du prince*" and emergency circumstances and their effect on the partnership contract, as follows:

First: The theory of the Prince's Act

The Theory of the Prince's Act relates to the situation where unilateral decisions or illegal action by the public authority (the administration), in its sovereign capacity, directly affects the performance of an administrative contract or creates challenges or burdens for the contractor beyond what was agreed upon initially. This entails fair compensation for the contractor for the additional burdens caused by these unilateral changes, such as amending the terms of the contract to reflect the new circumstances, for instance, in situations where there was an increase in the prices of the goods that the contractor uses in performing the contract, employees' wages, or taxes.

Second: The Theory of Emergency Circumstances:

These are circumstances that arise after the conclusion of the contract and during its performance, exceptional general circumstances and incidents that are unexpected and cannot be avoided, and are likely to make the implementation of the obligation burdensome and thus cause the contractor to suffer huge losses, and such incidents do not make the implementation of the obligation impossible. (Al-Ainain 2003)

French law, despite its emphasis on the authority of the public administration to amend the administrative contract, has diverged from this rule in the scope of partnership contracts. Unlike traditional administrative agreements, where the public administration has significant authority to amend terms unilaterally, partnership contracts are governed by a different framework, including the division of risk sharing without referring to the administration's amendment of the agreement, as there is no need for the administration to amend the partnership contract to restore financial balance. (Salam , H & Mustafa , R (2024)

Risks are shared at each stage of the contract, starting from project design to operation and maintenance, given that partnership contracts are characterized by their long-term nature, their interconnectedness, and the real risks and burdens borne by the contractor with the administration throughout the period of its implementation, as the percentage of risks borne by the contractor is determined in light of the system specified in the contract. The risks taken into account are those that negatively affect the good execution of the project in terms of its duration, cost, or the level of work

that the contractor is committed to under the contract. The criterion for dividing risks between the two parties to the contract is determined on the basis of the initial evaluation of the contract. This division is included in the contractual clauses. (Mustafa 2008)

3.2 Restrictions on the Administration's Authority to Amend the Partnership Contract

In administrative legal jurisprudence, the public administration has the authority to amend the PPP agreement, similar to other regular administrative contracts. Simultaneously, laws confirm that this authority granted to the administration is not absolute. Still, it is subject to restrictions and controls that must be considered when amending the partnership contract. (Law No. (67)) In their nature, these restrictions represent the existence of circumstances that arose after the conclusion of the administrative contract that justify this amendment, even if those circumstances are due to the administration's error in its assessments. With emphasis on the necessity for this amendment to be consistent with the principle of legitimacy in terms of jurisdiction and form, i.e. the amendment decision must be issued by the competent administrative authority in accordance with what is regulated by the law. This intervention must be embodied in the formal form drawn up by the law for voluntary expression. When exercising its authority to amend the contract, the public administration must not exceed a specific limit in the amendment to the extent of changing the entire contract. Finally, the issue of compensating the partner contractor for any damage incurred by the amending must be considered, which represents a guarantee provided by the administration to the partner in partnership contracts. (Helou 2007) The most prominent restrictions and controls that must be considered when implementing the issue of amending PPP contracts are the following:

First: Consent of the competent authority to amendment of the partnership contract:

It is accepted in such contracts that an inevitable principle requires that the direct contracting parties not be allowed to carry out any work that would add to or change the contract's content except in accordance with a modification written order issued by the authorized party. (Khalifa 2007)

Second: There must be a serious reason for the amendment, and this amendment must aim to achieve public interest:

For the administration to exercise its authority to amend the administrative contract, a legitimate and compelling reason must justify the amendment, such as a change in circumstances that existed at the time of its conclusion, because the basis for the right to amend is the public interest that serves the broader community rather than private or administrative interests. (Al-Tamawi 1991)

Third: The amendment must be partial:

The amendment of the terms of the contract must be partial so that it does not constitute a new contract that completely diverges from the one he concluded with the administration and without his consent. This compels the contractor to implement a contract that exceeds his financial circumstances and technical capabilities, making him fail to fulfil his obligations. (Khalifa 2007)

Fourth: The necessity of respecting the general rules of legitimacy:

The amendment decision is an administrative decision, in essence. Therefore, it must have the components and pillars of the validity of the administrative decision in terms of its issuance by a person authorized to issue it and within the framework of the legal or regulatory rules governing the subject of the amendment, and that it be based on a valid reason that justifies it, represented by the change in the circumstances under which the contract was concluded, and that it be issued in accordance with the established form and procedures, and that the motive for the amendment decision is to achieve the public interest. Suppose the amendment decision deviates from the principle of legitimacy. In that case, it is considered void. In this case, the contractor with the administration can appeal before the annulment court if the theory of separate actions can be applied

or before the contract judge if the administration's authority to amend has been addressed by explicit texts in the contract or the attached specifications. (Khalifa 2007)

Fifth: Not to prejudice the financial balance of the contract:

Legally, the administration has the authority to amend specific terms of an administrative contract provided it unilaterally is within the framework of the principle of legitimacy and whenever required. However, this right is not absolute. The amendments must consider some conditions, such as ensuring the financial balance of the contract and the equilibrium between the contractor's obligations (work, services, materials) and rights (payment, financial compensation). The administration mustn't change the monetary consideration or financial benefits for the contractor separately, as these are determined during the initial agreement and cannot be changed without mutual consent. (Helou 2007)

Finally, the contractor has the right to request the termination of the contract and to demand compensation, if necessary, under several conditions, including if the public administration violates the restrictions above when amending the administrative contract if the amendments impose new obligations or new burdensome that exceeds the contractor technical or financial capabilities. If the amendment results in an imbalance in the financial balance of the contract, disrupting it so drastically that fulfilling its terms becomes unbearable for the contractor, creating a situation where the contractor incurs substantial losses. (Al-Tamawi 1997)

Furthermore, the contractor has the right to seek compensation for the damage resulting. The administration's right to amend the terms of the administrative contract during its execution is met by the contractor's right to compensate for the harmful effects created using this right while retaining its right to request the termination of the contract. The basis for compensation here is not the administration's error but rather abstract justice and the desire for the contractor to continue fulfilling his obligation. (Khalifa 2007) His right to obtain fair compensation is considered a conditional matter, provided that the amendment was made by the sole will of the administration alone, in accordance with the requirements of the public interest and the operation of the public service, and that the compensation is justified. However, amending the contract after it has been concluded by agreement between its two parties does not grant such a right to compensation except that their joint agreement results in it. (Helou 2007)

4. CONCLUSIONS

In this study, we discussed the extent of the authority of the public administration to amend the public PPP agreement from a legal perspective regulating this issue. We aim to clarify in detail the extent to which this authority is achieved through the emergency circumstances during the PPP agreement's performance. The study concluded with a set of results and recommendations as follows:

RESULTS:

The PPP agreement is considered an administrative contract, clearly illustrated in the French and Egyptian legal legislations.

Reviewing the regulatory framework of both French and Egyptian law, we notice that there is an agreement between them regarding the main controls and procedures for concluding a partnership contract in terms of the necessity of conducting feasibility studies on the projects to be established and implemented in partnership with the private sector and determining the importance of these projects in the development plans and infrastructure in the country. These legal frameworks in the two countries also emphasize some elements that must be included in the terms of the partnership contract, such as the duration of the contract, the rights and obligations of the parties, and the sharing of risks.

National legislations in comparative law countries agree, despite their differences, on the right of the public administration to amend administrative contracts. Although the PPP contract is one of the types of these contracts, these countries differ in terms of granting the administration the authority to amend this contract. We notice that the French lawmaker did not permit the administration to amend the PPP contract based on its organization of the division of risks in these contracts, where risks are shared at each stage of the contract. In contrast, the Egyptian jurist grants the administrative body the right to amend the terms of the PPP contract whenever the public interest requires.

When amending a PPP contract, the General Administration must consider the formal conditions, including the consent of the competent authority to amend the contract. On the other hand, objective conditions are represented by the amendment being consistent with the principle of legitimacy, especially the justifications for the amendment, which must be focused on achieving the public interest. The scope of the administration's authority to amend the partnership contract includes partial amendment. In addition to ensuring the other party's right to be compensated for any damage incurred arising from the amendments of the contract, this is a guarantee provided by the administration to the partner in partnership contracts, which strengthens the partner's confidence, whether foreign or national, which is positively reflected in encouraging investment.

Second: Recommendations

In light of the research results, we recommend the following:

Regulating PPP agreements under a special law, similar to those adopted by all countries of the world, is an essential reference to be followed in concluding such types of contracts, specifically regarding large, pivotal projects with a multi-party foreign element.

Emphasizing the administrative nature of PPP contracts to preserve the role of public administration in regulating this type of contract, specifically if they affect the public and supreme interests of the state.

The unilaterally right of public administration to amend the partnership contract shall be within specific restrictions and controls that ensure the protection of the financial balance in the contract, and this emphasis is not limited to the law regulating the partnership contract. Still, the text stipulates that the partnership contract must include this right and authority for the administration.

Authors' Contributions:

MA is primarily responsible for writing the article, providing detailed insights and analysis from a legal perspective to the topic, using the resource available at his institution.

Acknowledgements

The authors express their gratitude to Sohar University- Oman for their valuable resources and assistance throughout the development of this work.

Acknowledgment

I extend our sincere gratitude to Sohar University for its invaluable support in facilitating this legal research. The university's provision of resources, guidance, and a conducive academic environment has been instrumental in the success of this study.

Ethical considerations

"Not applicable"

Conflict of Interest

The authors declare no conflicts of interest.

Funding

This research did not receive any financial support.

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