The Scope of Judicial Review of Financial Administrative Sanctions in Public Procurement: A Comparative Study

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Public contracts constitute the primary legal instrument at the disposal of public authorities to implement projects needed to serve the public interest. From this standpoint, most comparative legal systems have sought to provide a set of legal tools to ensure the proper execution of such contracts, the most serious of which is the contracting authority's power to impose financial penalties on the con-

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tractor in the event of failure to fulfil their obligations. However, this power is not absolute, as comparative legislation subjects it to a series of restrictions and controls. If these are exceeded, the contractor may turn to the administrative contract judge for redress. This judge possesses varying degrees of authority depending on the nature of the penalty imposed, in order to award compensation or mitigate its effects if certain circumstances arise. That is what the present study seeks to examine.

Keywords: public procurement, judicial control, fines, indemnity, guarantee forfeiture

1. Introduction

The power of a public authority to impose financial penalties on a contractor is one of the most important mechanisms established by law to ensure the proper performance of public contracts. This mechanism ensures that the contractor complies with its obligations in accordance with the specifications and conditions set out in the contract and the terms of reference.

It is generally recognised that any breach by the contractor of its contractual obligations may affect the regular and continuous functioning of the public service. Such a breach may take the form of a refusal to fulfil an obligation, a delay in performance beyond the deadlines previously established in the concluded contract, poor or non-compliant performance contrary to the specifications set out in the terms of reference, failure to comply with administrative instructions issued by the contracting authority, or obstruction of the body responsible for overseeing the execution process in the performance of its duties.

In fact, a contractor with a public authority is considered to be a collaborator in the management of the public service. As a result, any negligence or failure on the contractor's part to fulfil one of its contractual obligations does not merely constitute a contractual fault, but also a fault against the public service itself.

Accordingly, to address any failure by the contractor to fulfil its obligations, the contracting public authority is granted several powers under the law, including the power to impose financial penalties, which represent the least severe form of administrative sanctions that may be imposed on a contrac-

tor who breaches its contractual obligations with the public authority. These sanctions are generally applied when the contractual breach committed by the contractor is not particularly serious. In such cases, the contractor may simply be required to pay a specified sum as a consequence of the breach, or a sum may be deducted from the amounts previously deposited with the contracting public authority as a form of guarantee.

In this context, it should be noted that financial sanctions are typically divided into three types (Rouault, 2015, p. 343):

– Compensatory payments, which the contractor must pay as compensation for the damage caused to the contracting public authority as a result of contractual breaches.
– Financial penalties, which are predetermined amounts specified in the contract and are applied automatically in the event of certain contractual breaches during performance.
– Forfeiture of the financial guarantee, which refers to the retention of the guarantee amount deposited by the contractor with the contracting public authority as security for the proper performance of the public contract.

Of course, the principle of legality requires that a contractor with a public authority be entitled to challenge judicially the legality of any of the aforementioned sanctions imposed on them or, at the very least, to contest the proportionality of the sanction in relation to the breach committed. Any claim to the contrary would imply that the actions of the contracting authority are immune from judicial review, an idea that fundamentally contradicts the principles of the rule of law.

In this regard, it is important to note that the Algerian legislator, following the 2020 constitutional amendment adopted in the wake of the 2019 popular movement, revised the general administrative clauses applicable to public works contracts pursuant to Executive Decree No. 21-219. It also revised the legal framework governing public procurement through Law No. 23-12. However, certain implementing provisions of Law No. 23.12 still refer to Presidential Decree No. 15-247 on the regulation of public procurement and public service delegations.

On that basis, it should be noted that judicial review of financial penalties in public procurement raises several regulatory issues under Algerian law due to the multiplicity of legal instruments governing the matter and the fragmentation of their provisions across Law No. 23-12 establishing the general rules relating to public procurement, Presidential Decree No. 15-247 on the regulation of public procurement and public service dele-

gations, and the decree approving the general administrative clauses for works contracts. This plurality of sources has resulted in the absence of a coherent and unified framework governing certain aspects of financial sanctions, including delay penalties, compensation claims, and the forfeiture of performance guarantees. Moreover, these instruments remain silent on several issues relating to the limits of the contracting authority's discretionary powers, the criteria for assessing financial penalties, and the extent to which courts may review, reduce, or adjust such penalties.

Consequently, the question arises as to how judicial review can strike an appropriate balance between safeguarding the public interest and ensuring the continuity and efficiency of public services, on the one hand, and protecting contractors against excessive or disproportionate sanctions in accordance with the principles of legality and contractual fairness, on the other.

In other words, what is the scope defined by Algerian law and the judiciary for the administration's authority to impose financial penalties on its contractors in the field of public procurement, in light of the aforementioned legal developments? What solutions have been proposed in comparative jurisprudence?

The problem outlined above reflects the primary objective of this study, which is to shed light on judicial review mechanisms and their effectiveness in controlling the legality of financial sanctions imposed within the framework of public contracts under Algerian law, specifically with regard to compensation, delay penalties, performance-related fines, and the forfeiture of financial guarantees. The paper primarily seeks to clarify the legal powers available to the administrative judge to balance the protection of public funds and the continuity of public service, on the one hand, with the safeguarding of the contractor's financial rights, on the other. Furthermore, through a comparative approach, the study aims to explore and analyse the legal solutions and judicial precedents adopted by the legislature and judiciary in both France and Egypt in order to assess the adequacy of the current Algerian provisions and offer a forward-looking vision for their development, thereby ensuring sound governance of public contract enforcement and maintaining contractual equilibrium.

2. Methodology

The materials used in this study consist of the legal texts regulating public procurement in Algeria, namely Law No. 23-12, which defines the general

rules relating to public procurement, and Presidential Decree No. 15-247 on the regulation of public procurement and public service delegations. These materials also include the general administrative clauses applicable to public works contracts, approved by Executive Decree No. 21-219, as well as the 1964 general administrative clauses.

In addition to the aforementioned legal texts, the study relies particularly on the jurisprudence of the Algerian administrative courts concerning issues related to the imposition of financial administrative sanctions on contractors with the administration. It also draws upon the jurisprudence of the administrative courts in both Egypt and France on the same subject, which is likewise based on the legal texts governing public procurement in those countries.

Given the nature, subject matter, and sources of this study, an analytical approach was adopted as one of the most appropriate methods for examining and interpreting the relevant legal provisions and judicial decisions. This approach is particularly suitable in view of the complexity and interrelationship of these texts, rulings, and their respective provisions. It is also appropriate because the subject matter of the study is governed by several overlapping legal instruments occupying different hierarchical positions within the legal system. These include Law No. 23-12, Presidential Decree No. 15-247, and the general administrative clauses for public works contracts approved by Executive Decree No. 21-219.

The adoption of the analytical approach is justified by the need to achieve an in-depth understanding of the relevant legal provisions and judicial decisions and to uncover their various dimensions. This approach makes it possible to identify and examine their constituent elements in detail, thereby revealing the underlying objectives pursued by the legislature and the judiciary. It also facilitates the analysis of the concepts and terminology employed in the relevant legal texts and judicial rulings, as well as the determination of their scope and legal implications. The importance of the analytical approach becomes even more apparent when dealing with provisions or decisions characterised by ambiguity or open to multiple interpretations, as it helps to eliminate uncertainty and clarify the intended legal meanings.

Accordingly, the adoption of this approach will assist in deriving accurate scientific findings and providing an objective legal analysis of the issues under consideration, thereby serving the objectives of the study and ensuring that its conclusions are characterised by precision and objectivity.

On the other hand, the nature of the subject under study justifies the adoption of the comparative approach, given its particular significance in contemporary legal studies, which are no longer confined to the analysis of domestic legal provisions alone but increasingly require openness to comparative experiences and the incorporation of solutions developed by other legal systems. The use of this approach is further justified by the need to examine the subject matter within a broader framework that allows for a comprehensive understanding of its various legal dimensions and facilitates the attainment of more accurate and objective findings, supported by insights drawn from comparative legislative experiences.

Indeed, only the comparative approach allows for the effective identification of similarities and differences between the legal provisions governing public procurement in Algeria and those of the selected foreign jurisdictions included in the comparative analysis. Such an approach makes it possible to highlight the distinctive features of each legal system and to assess the extent to which each effectively addresses the issues under consideration. It also facilitates the identification of best legal practices that have proven successful in practice, thereby contributing to the achievement of the necessary balance between the contracting public authority's pursuit of the public interest and the protection of public funds through the imposition of financial sanctions, on the one hand, and the safeguarding of the contractors' rights, on the other.

In other words, the adoption of the comparative approach makes it possible to assess the extent to which national legislation keeps pace with relevant legislative developments and to identify the strengths and shortcomings of the legal framework governing the subject under study through comparison with selected foreign legislation, judicial decisions, and even doctrinal writings. Furthermore, this approach constitutes an effective tool for anticipating future developments in the national legal framework governing public procurement and for proposing appropriate reforms capable of enhancing its effectiveness and ensuring greater harmonisation with international standards and leading comparative practices.

In this regard, Algerian legislation and jurisprudence were adopted as the primary reference materials for the purposes of analysis and examination, given that Algeria constitutes the jurisdiction within which the subject matter of this study arises. As for the comparative dimension, Egyptian and French law were selected for well-founded reasons. First, all three legal systems belong to the same Roman-Germanic legal family, which explains the considerable degree of convergence in their underlying prin-

ciples and legislative structures. Second, Egyptian and French law have historically constituted important sources of inspiration upon which the Algerian legislature has consistently relied in enacting legislation and addressing various issues arising in public life, including those relating to public procurement.

An examination of the legal frameworks of the three countries reveals that they follow a common approach to the award and performance of public procurement contracts. They also provide for essentially the same financial sanctions in cases where contractors breach their contractual obligations. Nevertheless, these legal systems differ in terms of the procedural and substantive safeguards governing the imposition of such sanctions.

3. Results

Whether in Algeria, France, or Egypt, the judiciary does not have the authority in the field of public procurement to annul decisions imposing financial penalties on contractors during the performance stage of the contract, since such decisions are not considered separable from the contract and therefore cannot be challenged through annulment proceedings.

However, the judiciary does have the power to reduce the compensation imposed by the public authority on the contractor if it is excessive in relation to the actual damage suffered by the public authority, or if it is established that the damage incurred by the public authority was caused by the authority itself or by an external factor beyond the contractor's control that was unforeseeable or unavoidable, such as *force majeure* (Law No. 23-12 establishing the general rules relating to public procurement, 2023).

The public authority's power to impose financial penalties on its contractors, whether in Algeria or Egypt, is exercised automatically and does not require prior judicial authorisation. This differs from French law, where the contractor must first be formally notified of the delay before penalties can be imposed. In all cases, however, once these penalties are imposed, they remain subject to review by the administrative courts, which have full authority to verify whether the contracting public authority has complied with the legal requirements for imposing such penalties. The court may award compensation to the contractor for the damage arising from these penalties but does not have the power to annul them (Nabulsi, 2010).

Judicial review of the public authority's power to impose delay penalties does not extend to their amount under Algerian law, since the Algerian

public procurement law requires the public authority to adhere to the amount of the penalty stipulated in the contract when imposing it on the contractor responsible for the delay. The same approach is adopted by the administrative courts in Egypt. By contrast, French administrative courts have assumed broad discretion in this regard, extending to the adjustment of the amount of the penalty, either by increasing or reducing it, so that it is proportionate to the actual damage caused by the delay (Bachir, 2007).

As regards the sanction of forfeiture of the performance bond, the Algerian Council of State has made its refund conditional upon the full performance of the contract and the resolution of all outstanding reservations. However, it has not clarified whether partial resolution of reservations would allow for a partial refund of the bond to the contractor. Likewise, no rulings have been found addressing compensation for the damage resulting from delays in refunding the bond within the prescribed period (Saðs, 2013).

This study notes a marked scarcity of judicial precedents in Algeria concerning a public authority's power to impose financial sanctions on its contractors, in contrast to the abundance of decisions issued by the French and Egyptian administrative courts in this field.

4. Discussion

4.1. The Scope of Judicial Review of Compensatory Financial Sanctions

Compensatory financial sanctions are considered the primary sanction that a public authority may impose on a contractor who breaches its contractual obligations, particularly where no specific financial sanctions are stipulated for such a breach. In such instances, the public authority may claim compensation directly, without the need to resort to judicial proceedings (Chabanol, Jouguelet, & Bourrachot, 2005).

The legal regime governing financial compensation in the field of public procurement is largely similar to that established for private law contracts, both in terms of how compensation is assessed and the requirement that damage be established. The legal basis for both is the same, namely the rules of Algerian civil law (Algerian Civil Code, 1975). However, they differ in terms of the method of obtaining compensation. In public contracts, financial compensation is generally obtained directly by the con-

tracting authority through payment orders issued to the contractor at its sole discretion or by deducting the compensation from amounts deposited by the contractor with the contracting authority through the forfeiture of the guarantee amount (Qattish, 2013).

Compensatory financial sanctions are also similar to delay penalties in that both require the contractor to pay a monetary amount to the contracting authority. However, they differ in terms of the objective they seek to achieve. While delay penalties are intended to ensure that the public procurement contract is performed within the timeframe specified in the contract and the terms of reference, thereby ensuring the regular and continuous operation of public services, compensatory financial sanctions are intended to remedy the damage caused by contractual breaches committed by the contractor. Therefore, compensation is only due if the contracting authority proves the damage it suffered as a result of those contractual breaches, as is the case with private law contracts.

Financial compensation is assessed according to the extent of the damage incurred by the contracting authority, taking into account any fault on its part that may have contributed to the occurrence of that damage to a certain extent, in which case it bears the corresponding share of responsibility in accordance with the provisions of civil law (Al-Tamawi, 1991).

It should be noted that Law No. 23-12 does not provide detailed provisions regarding the imposition of compensation on a defaulting contractor, leaving this matter to the implementing regulations. Turning to the latter, the first paragraph of Art. 152 of the Decree No. 15-247 on the regulation of public procurement and public service delegations in Algeria provides for compensatory sanctions, stating: "No objection can be made to the contracting authority's decision to terminate the public contract when applying the contractual terms for guarantee and the measures aimed at repairing the damage incurred due to the fault of the contractor ... "

It is apparent from the text of the above article that the Algerian legislature allows the public authority to obtain compensation for the damage caused by contractual breaches committed by the contractor. However, it does not explicitly state that the authority may assess and claim such compensation at its sole discretion without the need to resort to the contract judge. Instead, this is implied by the provision that the contractor may not contest decisions taken by the contracting authority for the purpose of claiming compensation and remedying damage caused by the contractor's fault. As can be seen from the above Article, the prohibition on objections

applies not only to the sanction of contract termination but also to financial penalties. This implies that the Article implicitly grants the contracting authority the right to make such decisions independently, particularly since a contractor does not, under any circumstances, have the right to contest a final judicial decision requiring the payment of compensation.

Moreover, some commentators argue that the Algerian regulator granted the contracting authority this power by stipulating its right to deduct an amount of compensation deemed appropriate from the performance bond amount provided for in Art.130 of the Decree on the regulation of public procurement and public service delegations, in order to compensate for damage caused by the contractor's fault (Ben Chaaban, 2012).

However, this view may be criticised for conflating compensatory financial sanctions with the forfeiture of the performance guarantee, whereas the two are distinct. The forfeiture of the performance guarantee constitutes an independent sanction and differs fundamentally from compensation. The former merely represents the minimum compensation due to the contracting authority in the event of contractual breaches by the contractor, whereas the latter constitutes full compensation for the actual damage resulting from those breaches.

In this context, it is important to point out that, initially, public authorities in France did not have the power to compel the contractor to pay financial compensation for contractual breaches that caused them harm. Instead, they were required to resort to the administrative courts in order to obtain a ruling mandating the payment of such compensation. Even when the public authority did resort to administrative courts, compensation was not initially granted unless the contract expressly contained a clause providing for compensation in similar circumstances.

In other words, early decisions of the French administrative courts did not even recognise the public authority's right to compensation on the basis of the general rules of private law. The courts adhered strictly to the principle of legality in administrative contracts, according to which no sanction or compensation could be imposed except pursuant to a contractual provision (Ben Chaaban, 2012).

This position was clearly affirmed in the French Council of State's decision of 15 July 1881 (the *Chemin de fer d'Orléans ã Rouen* case). The ruling explicitly stated that the public authority could not request the court to award compensation that was not provided for in the administrative contract. The clauses of the contract concluded between the claimant authority and its contractor specified that, in the event of a contractual breach

by the contractor, the public authority had the right to impose financial penalties or to terminate the obligation. However, the contract made no provision for compensation in respect of breaches for which the public authority had not stipulated a financial sanction.

Thus, the ruling confirmed that no compensation could be awarded unless expressly provided for in the contract, reaffirming the strict adherence to the principle of legality in the field of administrative contracts at the time (No. 55533, Conseil d'Etat, 1881).

It can thus be concluded that, according to the reasoning of this decision, the public authority had no power to impose compensatory sanctions unilaterally. Even the administrative judge was strictly bound by the provisions of the contract itself when the public authority sought the imposition of such a sanction. In other words, both the public authority and the judge were limited to what had been expressly stipulated in the contract, and no compensation could be awarded beyond those terms.

This remained the case until a significant development occurred in the jurisprudence of the French Council of State. The Council began recognising the contracting public authority's right to compensation for the damage suffered as a result of contractual breaches committed by the contractor, even in the absence of an explicit provision in the administrative contract. This shift was based on the general principles governing private law contracts. This turning point was established by the Council of State's landmark ruling of 31 May 1907 in the Deplanque case (Richer, 2014; Frier & Petit, 2006; Rouault, 2007; Leberton, 2015; Long et al., 2005).

However, despite the previously established principle recognising the public authority's right to claim compensation before the administrative courts where such a right was not stipulated in the contract, the public authority was still not permitted to compel the contractor unilaterally to pay compensation. This remained the case until the French Council of State changed its position in its decision of 11 October 1929 in the case of the South Atlantic Navigation Company (*Compagnie de Navigation Sud-Atlantique*), where it allowed the contracting public authority to impose the compensatory sanctions unilaterally on the contractor in breach, without the need to resort to administrative courts for a ruling. In that decision, the Council ruled:

> Whereas the concession specifications did not contain any explicit provision granting the concession-granting authority the right to impose a sanction on the contracting company for breaching the arbitration clause, this absence

> does not imply that the latter is absolved from fulfilling its obligations; and that the company's systematic opposition constitutes a breach of a clause in the specifications established in the public interest (namely, the proper functioning of the public service), which caused harm to the State of a nature that justifies compensation, the burden of which the Minister is entitled to place upon the company. (*Recueil des arrìts du Conseil d'État*, 1929, p. 893)

Accordingly, even though the aforementioned decision reduced the compensation from 20,000 francs to merely 2,000, it nonetheless established that the jurisdiction of the French administrative courts over decisions by the contracting authority to impose compensation on the contractor for breach of its obligations has shifted from being broad to more restricted. Conversely, the contracting authority's power to impose such sanctions has evolved from being limited to becoming more expansive. Whereas the Council of State's ruling in the *Deplanque* case had conferred exclusive jurisdiction on the contract judge to award compensation in favour of the public authority, its decision of 11 October 1929 empowered the public authority to impose compensation unilaterally, without prior recourse to the courts. The role of the judge was thereby confined to assessing the proportionality of the financial penalties imposed in relation to the actual harm sustained and the surrounding circumstances.

Nevertheless, recent French jurisprudence tends to recognise the contracting public authority's right to obtain compensation whenever the contractor's actions cause it harm, albeit without expressly referring to the right to enforce such compensation directly. In this regard, reference may be made to the French Council of State's decision of 18 May 2021, which held that faults committed by the contractor during the performance of the contract could partially reduce its entitlement to compensation for the damage suffered as a result of the wrongful termination of the contract (Hoepffner, 2021; Videlin, 2021).

As for the position of the Algerian administrative courts regarding whether the contracting public authority has the power to impose compensatory sanctions unilaterally on a contractor who has failed to fulfil its contractual obligations, it remains unclear. However, we do not believe this would pose a significant issue in comparable cases, insofar as Art. 152 of the Decree No. 15-247 on the regulation of public procurement and public service delegations in Algeria implicitly affirms the public authority's right to financial compensation for breaches committed by the contractor and precludes any objection to that right.

Nevertheless, although the public authority does possess the power to impose financial compensation unilaterally as a sanction on the contrac-

tor, as previously discussed, this power is by no means absolute. Its exercise remains subject to the review of the contract judge, whose role is limited to verifying, first, that the contractor has indeed committed a contractual breach; second, that the contracting public authority has suffered actual harm; and third, that a direct causal link exists between the breach and the damage incurred. The judge also retains the authority to assess the proportionality of the amount of compensation imposed by the contracting authority in relation to the extent of the damage sustained (Al-Enezi, 2010).

Accordingly, the contract judge may reduce the amount of compensation if it is deemed excessive in relation to the actual damage sustained by the contracting authority, in accordance with the general principles applicable to private law contracts. The judge may also reduce the amount of compensation assessed by the contracting authority if it is established that the latter contributed in part to the occurrence of the harm. Furthermore, the judge may entirely exempt the contractor from the financial compensation imposed by the contracting authority if it is determined that the damage suffered resulted from an external cause for which the contractor bears no responsibility and which could neither have been foreseen nor prevented, such as an event of *force majeure*, an act of the contracting authority itself, or what is referred to in legal doctrine as an act of the prince (Al-Enezi, 2010, p. 88).

In Egypt, in a case concerning public works, the Supreme Administrative Court established a judicial principle in a ruling dated 21 May 1988, holding that if the damage suffered by the contracting authority exceeds the amount of the stipulated delay penalty and such damage is attributable to gross negligence or fraud on the part of the contractor, the contracting authority is not bound by the penalty limit. In such instances, it retains the right to claim full compensation for all damage sustained, in addition to the penalty, pursuant to the general rules of contractual liability, which require full reparation of the harm whenever justified (Badawi & Al-Sharqawi, 2011; Ukasha, 1998). It is worth noting that the aforementioned principle was reaffirmed in a subsequent ruling of 12 December 1992.

All of the foregoing leads us to conclude that the position of Algerian law regarding the powers of the administrative judge in relation to the contracting authority's power to impose compensatory sanctions on a contractor for breach of contractual obligations is largely consistent with modern judicial trends in France.

4.2. The Scope of Judicial Review of the Contracting Authority's Power to Impose Financial Penalties on the Contractor

The mechanism of financial penalties aims to compel the contractor to fulfil its contractual obligations in order to ensure the regular and continuous functioning of public services. In practice, these penalties consist of lump-sum monetary amounts stipulated in the clauses of the public procurement contract and serve as a sanction for the improper performance of contractual obligations or delays in execution. They most often take the form of delay penalties (Boulifa, 2016).

In Algeria, the contracting authority's power to impose financial penalties on a contractor is derived from the provisions of Art. 84 of Law No. 23-12 establishing the general rules relating to public procurement. However, the latter does not specify the conditions and procedures that must be followed by the contracting authority when imposing such a sanction, leaving this matter to the applicable regulations. In this regard, Presidential Decree No. 15-247 requires compliance with the amount of the penalty stipulated in the contract but remains silent on the procedures that should precede its imposition.

Requirement to comply with the contractual clauses. Indeed, Presidential Decree No. 15-247 explicitly affirms the contractual nature of the financial penalty and does not permit the contracting authority to disregard the contractual provisions on the grounds that the stipulated penalty is insufficient to compel the contractor to fulfil its obligations in accordance with the requirements and deadlines set out in the specifications. This is provided in Art. 147, para. 3, of the said Decree. However, this provision should be read in conjunction with para. 5 of the same Article and the final paragraph of Art. 84 of Law No. 23-12 cited above, both of which provide that, in cases of *force majeure*, deadlines shall be suspended and no financial penalties for delay shall be imposed. These provisions therefore limit the application of delay penalties.

One of the consequences of the contractual nature of the delay penalty is that the contracting authority may depart from the provisions of the applicable laws or regulations concerning the determination of the amount of the financial penalty where such legal or regulatory provisions are supplementary and non-mandatory, or where they establish a range for the amount of the financial penalty by specifying its minimum and maximum limits.

Likewise, one of the consequences of the contractual nature of the delay penalty is that its imposition is not contingent upon the contracting authority having suffered damage as a result of the delay. The contracting authority may impose the penalty on the defaulting contractor automatically, even if it has not incurred any damage, since the penalty constitutes one of the contractual terms of the agreement.

In this regard, it should be noted that there is no explicit provision in Algerian law or jurisprudence addressing this point. By contrast, the position of the French administrative courts on the matter was made clear by the Council of State in its decision of 14 June 1944 in the Skouloukos case, in which it held that the contracting authority may impose a delay penalty even if it has not suffered any damage (Delaubadere & Gaudmet, 2001). This position was subsequently confirmed in a decision of 19 July 2017 (No. 392707, Conseil d'Etat, 2017). The same approach was followed by the Supreme Administrative Court in its decision of 20 April 1993, in which it held:

> The legal nature of the delay penalty is that of a contractual sanction, and it constitutes a form of agreed compensation in the event the contractor delays in fulfilling its contractual obligations. It is stipulated as a guarantee for the performance of these contracts within the agreed deadlines. (Al-Hashimi, 2010, p. 44)

However, the issue that arises in this regard concerns cases in which the contract does not include a provision on financial penalties. Does this mean that the contracting authority loses its right to impose such a penalty, even if it is provided for in the applicable law or regulation?

In response to this question, some scholars have argued that the legal or regulatory provisions in force concerning public procurement are supplementary to the will of the contracting authority. This means that if the contracting authority fails to include a provision on financial penalties in the administrative contract, these legal provisions fill that gap and cease to be merely supplementary, becoming mandatory instead. As such, they become binding on the contracting authority, since the legislator's intention from the outset was to impose such a penalty (Bakhbeirah, 2008).

However, the majority of legal scholars in France and Egypt, together with the judiciary, agree that the contracting authority does not have the right to impose a financial penalty if it is not expressly stipulated in the administrative contract (Al-Hashemi, 2010). Accordingly, they affirm the contractual nature of such penalties. Despite this consensus, however, disagreement later arose as to the extent to which the contracting author-

ity is bound by the limits of the penalty and whether it may replace it with a more severe sanction.

Initially, scholars and the judiciary in France held that the contracting authority could impose harsher financial penalties than those stipulated in the administrative contract where the original penalties proved ineffective or insufficient to compel the contractor to fulfil its contractual obligations, particularly in cases of serious delay in performance. Conversely, the French Council of State, in a decision of 5 July 1950, recognised the contracting authority's right to impose a lesser financial penalty than that provided for in the contract, or even to waive it entirely, provided that it did so explicitly (Nabulsi, 2010). This position, however, was opposed by the French Court of Auditors, which maintained that such penalties became part of the state budget as soon as the relevant contractual breach occured and the administration was therefore prohibited from reducing or waiving them (Nabulsi, 2010).

For their part, Egyptian legal scholars and the judiciary have held that the terms of the contract must be strictly adhered to when imposing financial penalties. It is therefore absolutely impermissible to replace the stipulated penalty with a harsher one, even if the former is minor in comparison with the seriousness of the contractual breach committed (Bachir, 2007).

In fact, the logic of this approach suggests that, since financial penalties are not intended to compensate for actual damage resulting from poor performance or delay in fulfilling contractual obligations, and since proof of damage is not required, the contracting authority may not exceed the agreed penalty on the grounds that it is insufficient to compensate for the actual harm caused by delay or non-conforming performance. Similarly, the contractor has no right to request a reduction in the agreed penalty on the basis that it exceeds the damage actually sustained.

In this regard, the Egyptian Administrative Court, in a judgment of 24 November 1957, affirmed that:

> It is a well-established principle in administrative law that delay penalties in administrative contracts are prescribed to ensure the performance of these contracts within the agreed deadlines, in order to safeguard the regular and uninterrupted functioning of public services. Therefore, the penalties stipulated in such contracts are imposed unilaterally by the contracting authority, without the need to prove that damage has occurred. Moreover, contractors are not allowed, from the outset, to prove that no damage has taken place, as the contracting authority, in setting specific deadlines for the performance of the contract, is presumed to have assessed that the needs of the pub-

> lic service require performance within those deadlines, without any delay. (Ghazi, 2014)

In fact, this ruling leads to the conclusion that the Egyptian Administrative Court adhered to the traditional position of administrative jurisprudence in Egypt, which emphasises strict compliance with the terms of the contract. As a result, it narrowed the scope of discretion available to the contracting authority when imposing financial penalties on the contractor. Likewise, it limited the authority of the administrative judge when reviewing the contracting authority's exercise of its power to impose delay penalties, confining the judge's role to determining whether the contracting authority complied with the contractual provisions, without having the power to increase or reduce the penalty amount, provided that the delay was attributable to the contractor's fault.

By contrast, modern administrative jurisprudence in France has departed from its previous stance and from the aforementioned approach. It has allowed the contract judge either to increase the amount of the financial penalty if it is deemed too low in proportion to the seriousness of the contractual breach it is intended to address, or to reduce it if it is considered excessive or if external circumstances beyond the contractor's control have partially contributed to the occurrence of the contractual breach (No. 296930, Conseil d'Etat, 2008). It has also allowed the judge to exempt the contractor from the financial penalty if the poor performance or delay in fulfilling contractual obligations resulted from an external cause beyond the contractor's control, such as *force majeure* or acts or errors committed by the contracting authority (No.414068, Conseil d'Etat, 2019), including failure to deliver the worksite or a delay in issuing the order to commence performance (Nabulsi, 2010).

The French Council of State adopted the aforementioned approach in its ruling of 29 December 2008 in the OPHLM de Puteaux case, which concerned the performance of public works. The Council held that the administrative judge may, upon request, reduce or increase delay penalties arising under the contract, applying the principles derived from Art. 1152 of the Civil Code, where such penalties are manifestly excessive or unreasonably low in relation to the value of the contract (Llorens, 2009; Soler-Couteaux, 2009).

The aforementioned decision was reaffirmed by a subsequent ruling of the same Council, issued on 19 July 2017, in a public works case (*Société GBR Ile-de-France* v. *Centre hospitalier de psychiatrie de l'enfant et de l'adolescent* [CHIPEA]). In this ruling, it was held that an administrative

judge, when seized of such claims, has the authority to reduce or increase the delay penalties arising from the contract. This power is exercised in accordance with the principles derived from Art. 1152 of the Civil Code, provided that the penalties are manifestly excessive or unreasonably low in comparison with the total value of the public procurement contract (Cossalter, 2017; Dreyfus, 2017).

It is worth noting that the French judiciary has continued to follow this approach, as illustrated by the judgment of the Administrative Court of Appeal of Paris issued on 8 June 2018, followed by the Council of State's decision of 15 July 2025. In the latter, it was once again held that the judge is entitled to reduce manifestly excessive contractual penalties, taking into account the conduct of the contracting authority that contributed to the non-performance, including a breach of the price revision clause.

Moreover, in another decision rendered on 9 November 2018 in the *Société Savoie Frêres* case, which concerned a public works contract, the Council held that a public buyer may not include a sub-criterion based on the amount of delay penalties for the performance of services in order to select an operator and differentiate between bids with respect to the period for completion of the works. This is because such a sub-criterion does not make it possible to assess the technical capacity of companies to comply with contractual deadlines, nor does it evaluate the technical quality of their bids. Furthermore, the public entity is not obliged to apply liquidated damages, and the administrative judge may reduce or increase contractually incurred penalties if they are manifestly excessive or unreasonably low (Amilhat, 2019; Richer, 2019).

Accordingly, it can be concluded that the powers of the French administrative judge in reviewing financial penalties imposed by the contracting authority on the contractor are significantly broader than those of the Egyptian administrative courts in relation to the same matter.

Is prior notice to the defaulting contractor required before imposing a delay penalty? In addition to its contractual nature, the financial penalty under Algerian public procurement law is characterised by its automatic nature, meaning that it may be imposed as soon as the contractor commits the contractual breach that justifies it, without the need to issue a warning or give prior notice to the contractor (Boulifa, 2016). In this regard, some scholars argue that, although the contracting authority is not required to give prior notice to the contractor before imposing such a sanction, it is nevertheless advisable to warn the contractor, first, to inform it of the breach committed and, second, to prevent the continuation of that

breach (De Laubadere, 1999). This undoubtedly helps ensure the proper, regular, and continuous functioning of the public service (Bachir, 2007).

Nevertheless, it should be noted that, under Algerian law, giving prior notice to a contractor in delay remains mandatory for the application of the sanction of contract termination, but optional for the imposition of a delay penalty, pursuant to Art. 90 of Law No. 23-12.

It should be noted that neither Presidential Decree No. 15-247 nor the 2021 general administrative clauses applicable to public works contracts contain provisions requiring prior notice before imposing a delay penalty on a defaulting contractor. Algerian judicial decisions on the matter are also consistent with this position. In a decision of 16 December 1989 (A.T. v. Wilaya of Guelma), the Administrative Chamber of the Algerian Supreme Court held that delay penalties apply where works are not completed within the agreed time limits and are determined solely by comparing the date of expiry of the contractual deadline with the date of completion. In the case at hand, the disputed period was found to fall entirely outside the period allocated for carrying out the works and therefore could not be attributed to the contractor (Saðs, 2013).

The French legislator, however, adopted a different approach regarding the requirement of prior notice before imposing a delay penalty. The general administrative clauses applicable to public works contracts (Order approving the general administrative clauses applicable to public works contracts, 2009), as well as those applicable to public supply and service contracts (Order approving the general administrative clauses applicable to public procurement contracts for standard supplies and services, 2009), allow the contracting authority to impose such a penalty as soon as a delay in performance is established.

4.3. The Scope of Judicial Review of the Forfeiture of the Performance Guarantee

According to Art. 83 of Law No. 23-12 establishing the general rules relating to public procurement in Algeria, the contracting authority must ensure the availability of the necessary guarantees to provide the best conditions for selecting its contractors or for performing the contract under optimal conditions. The guarantees required, as well as the procedures for their recovery, shall be determined, as appropriate, in the specifications

or in the contractual provisions of the public contract, on the basis of the applicable legislative or regulatory provisions.

Accordingly, under Algerian law, the sanction of guarantee forfeiture may take the form of the contracting authority's confiscation of the bond deposited by the contractor in its favour, either to guarantee the seriousness of the bid submitted for the award of the public contract or to secure the contractor's liability in the event of a breach of its contractual obligations relating to the performance of the contract (Chardigny, 2013).

Since the study addresses the contract performance stage, the sanction referred to here is the forfeiture of the performance bond, which is set by Art. 133 of the decree regulating public procurement at between 5% and 10% of the contract value. This guarantee represents the minimum compensation to which the contracting authority is entitled as a consequence of the contractor's breach of contractual obligations. The contractor may not contest the forfeiture on the grounds that the value of the guarantee exceeds the actual damage incurred (Nabulsi, 2010).

Art. 130, para 5, of the aforementioned decree sets a maximum deadline for the payment of the performance bond, stipulating that the payment must be made no later than the date on which the first request for partial payment is submitted. If the contractor fails to comply with this requirement, the contracting authority may terminate the public contract and proceed to contract with the next-ranked bidder, while also forfeiting the amount of the guarantee.

However, there are cases in which the law explicitly exempts the contractor from providing the performance bond. One such example is found in Art. 130 of the Decree No. 15-247 on the regulation of public procurement and public service delegations in Algeria, which provides for exemption from the performance bond in cases involving certain study and service contracts where the contracting authority can verify the proper performance of the contract before making any payments; contracts concluded through simple negotiated procedures;[1] contracts concluded with national public institutions; or contracts with a performance period not exceeding three months.

[1] It should be noted that, according to Art. 40 of Law No. 23-12, the negotiation procedure is the process of awarding a contract to a single economic operator without a formal call for competition and may take the form of either direct negotiation or negotiation following consultation.

Except in cases of exemption explicitly provided for by law, providing the performance bond is mandatory, and failure to do so may expose the contractor to the sanction of contract termination. In this regard, it is worth noting that the French administrative courts were among the first to recognise the contracting authority's right to terminate a contract due to failure to provide the bond. The French Council of State held, in its decision of 16 March 1928, that a supplier's failure to complete the guarantee amount within the prescribed period constituted grounds for contract termination (Council of State, 1928).

Thus, the purpose of providing the performance bond is to ensure the correction of defects that may appear in the works performed within one month from the date of final acceptance of the public contract. The contractor may recover this amount only if it is established that the contract was performed in accordance with the conditions agreed upon in the contract (Saðs, 2013).

In the same context, the Algerian Council of State ruled in a decision of 15 July 2002 that the amount of the performance bond may not be refunded until all reservations noted in the provisional acceptance report have been lifted and the final acceptance report has been issued (Saðs, 2013).

In the sense outlined above, the sanction of performance bond forfeiture differs from delay penalties in that the former aims to ensure the proper performance of the provisions and clauses of the public contract, while delay penalties are intended to ensure the performance of contractual obligations within the deadlines stipulated in the contract. It also differs from compensatory sanctions in terms of the requirement of damage: the contracting authority is not required to prove that it has suffered damage in order to impose the sanction of performance bond forfeiture, whereas the imposition of compensation requires proof that damage has been incurred as a result of contractual breaches committed by the contractor and that such damage exceeds the value of the performance bond. This is because the bond covers only damage whose value is equal to or less than the amount of the bond.

In this context, the majority of legal scholars maintain that the forfeiture of the performance guarantee may be combined with an award of damages. This allows the contracting authority to recover the full amount of the loss resulting from the contractor's contractual breaches, unless the terms of the public contract provide otherwise. This view is based on the principle that the performance bond guarantees only the minimum amount of compensation to which the contracting authority is entitled (Cherifi, 2014).

Since the performance bond is considered a form of contractual compensation, some legal scholars believe that its forfeiture is subject to review by the contract judge, who has the authority to adjust it in cases of partial fulfilment of the contractor's contractual obligations. The judge may take into account the work already completed when assessing the actual amount of the guarantee due to the contracting authority, such that the forfeiture is partial rather than total (Khalifa, 2010). In this regard, the Administrative Court of Appeal of Lyon ruled in its decision of 8 March 2018 that, where the company holding the contract breaches its obligations, the contracting authority may deduct from the guarantee retention the cost of works undertaken to remedy the defects (manufacturing/construction defects) identified upon the acceptance of the works)No. 17LY01827, CAA Lyon, 2018).

The contract judge may also require the contracting authority to pay interest for late payment to the contractor where it unjustifiably withholds the guarantee amount by keeping it frozen in its accounts and failing to return it within the legally prescribed period.

However, the above position does not appear to be explicitly supported by any provision or ruling in Algerian law or jurisprudence. The position adopted by the Algerian Council of State regarding the recovery of the performance bond links its return to the full performance of the contract and the lifting of all reservations, but does not address whether the partial lifting of reservations would allow for the return of part of the performance bond to the contractor. This question therefore remains unanswered.

Accordingly, in the absence of a clear legal provision, it may be argued that there remains scope for the Algerian administrative judge to expand their powers and rule in favour of the contractor by allowing the partial recovery of the performance bond where the reservations have only been partially lifted. Naturally, the reference here is to the contract judge rather than the annulment judge, because the decision to forfeit the guarantee relates to the performance stage of the contract rather than to its formation stage.

5. Conclusion

There is no doubt that judicial review of the contracting authority's power to impose sanctions on its contractor is of great importance. It serves as a safeguard against the contracting authority's potential abuse of that power. In this context, it can be said that the jurisdiction of the full litigation

judge to hear disputes relating to sanctions imposed within the framework of an administrative contract constitutes an important guarantee in itself, given that the contract judge possesses powers that the judge of legality does not.

Although the contract judge in the field of public procurement does not have the authority to annul decisions imposing sanctions on the contractor, given that they do not constitute severable administrative acts subject to an action for annulment, the judge does have the power to order a reduction in the compensation assessed by the contracting authority if it is deemed excessive in relation to the actual loss sustained. Furthermore, the judge may reduce the financial compensation determined by the contracting authority if it is established that the latter partially contributed to the occurrence of the damage. The judge may even exempt the contractor entirely from such compensation if it becomes evident that the damage incurred by the contracting authority resulted from an external cause beyond the contractor's control that could neither have been foreseen nor prevented. This conclusion is consistent with the principles of justice and equity; it finds support in French jurisprudence (Council of State, 1944) as well as Egyptian jurisprudence (Badawi & Al-Sharqawi, 2011; Ukasha, 1998), and is further supported by legal doctrine (Frier & Petit, 2006; Lebreton, 2015; Richer, 2014; Rouault, 2007).

Conversely, there is a lack of judicial precedent supporting this approach in Algeria, where the available literature consists primarily of doctrinal writings based on Art. 152 of Decree No. 15-247. These writings indicate that the contracting authority retains the right to claim compensation directly from the contractor for the damage suffered, a situation that may be attributed primarily to the scarcity of relevant judicial appeals.

With regard to the contracting authority's power to impose financial penalties on its contractor, it has been observed that although the imposition of such penalties is automatic and does not require prior judicial authorisation, it remains subject to judicial review. The judiciary has full authority to verify whether the contracting authority has complied with the legal conditions required for imposing such sanctions. It may declare the penalty unlawful and award compensation to the contractor for the resulting harm, although it does not have the power to annul the penalty itself.

In this regard, the study noted an absence of Algerian judicial precedent consistent with this approach, particularly given the explicit provision in the public procurement law requiring the contracting authority to adhere strictly to the amount of the penalty stipulated in the contract when impos-

ing it upon a contractor in breach. This reflects the same rule previously adopted by the administrative courts in Egypt (Ghazi, 2014), but contrasts sharply with the modern approach of French administrative jurisprudence (No. 494073, Conseil d'Etat, 2025). The French Council of State has assumed broad powers extending to the adjustment of the penalty amount, either by increasing or reducing it, in order to ensure that it is proportionate to the damage caused by the delay. In this regard, we consider the approach of the French judiciary to be more progressive, as it aligns more closely with the principles of justice and equity; it would therefore be desirable for both Algerian legislation and jurisprudence to follow the same approach.

Regarding the sanction of forfeiture of the performance guarantee, the study observed that the Algerian Council of State made the recovery of the guarantee conditional upon the full performance of the contract and the lifting of all reservations. However, it did not address the case of a partial lifting of reservations, specifically whether this would allow for a partial return of the guarantee to the contractor. Furthermore, no precedent was found concerning the compensation for damage resulting from delays in returning the guarantee amount within the prescribed period, leaving the position of the Algerian judiciary unclear on several matters. Conversely, French jurisprudence (No. 17LY01827, Administrative Court of Appeal of Lyon, 2018) has established that deductions may be made from the guarantee retention in an amount sufficient to remedy the defects identified. This implies the possibility of partial forfeiture of the guarantee, a progressive approach that balances the public interest with the rights of the contractor.

One of the observations arising from this study is the apparent absence of a clear position in Algerian administrative jurisprudence on many issues relating to the contracting authority's power to impose sanctions on its contractor. This stands in contrast to the abundance of decisions issued by both the French and Egyptian administrative courts. This absence may be attributed to the rarity of judicial appeals that would allow the courts to express their position, as well as to the limited publication of Algerian administrative court decisions.

Accordingly, in light of the findings reached and with a view to strengthening the judicial safeguards afforded to contractors dealing with a public authority, particularly given that the imposition of financial penalties is merely a means of ensuring the regular and continuous functioning of the public service rather than an objective in itself, the study concludes with the following recommendations:

- Endorsing the position of the Algerian legislator, who granted the contracting authority the right to claim compensation unilaterally from its contractor.
- Allowing the partial refund of the performance bond where the contractor has partially lifted the reservations, and including explicit provisions in the Algerian public procurement law allowing the contractor to obtain compensation for the damage resulting from the arbitrary withholding of the performance bond.
- Given the risks that delay penalties pose to the functioning of the public service, and considering that delays may result from multiple external factors, it would be advisable to include explicit provisions allowing the judge to reduce the amount of such penalties in proportion to the actual damage caused by the delay.
- Promoting a culture of resorting to the courts to defend the legal safeguards afforded to contractors against the powers exercised by the contracting authority, thereby encouraging the judiciary to play its role in reinforcing and upholding those safeguards.

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THE SCOPE OF JUDICIAL REVIEW OF FINANCIAL ADMINISTRATIVE SANCTIONS IN PUBLIC PROCUREMENT: A COMPARATIVE STUDY

Summary

The contracting authority' power to impose financial sanctions on the contractor is one of the measures established by law to ensure compliance with public contracts. One such sanction is the contracting authority's right to obtain compensation for the damage caused by the contractor. However, this power is not absolute, as its exercise is subject to judicial review, which is limited to verifying the existence of the elements of legal liability and assessing whether the amount of compensation imposed by the contracting authority is proportionate to the extent of the damage suffered. Another type of financial sanction is the imposition of fines. Under both Algerian and Egyptian law, their application is subject to the amount stipulated in the contract. This differs from the approach adopted by modern French administrative jurisprudence, which allows the judge to increase the fine if it is unreasonably low, reduce it if it is excessive or if circumstances beyond the contractor's control contributed to the contractual breach, and even exempt the contractor from the fine if poor performance or delay in fulfilling contractual obligations resulted from an external cause beyond the contractor's control. The third type of financial sanction is the forfeiture of the performance guarantee deposited by the contractor. Under French law, its application is subject to judicial review, and the judge has the authority to modify it in cases of partial fulfilment of contractor's contractual obligations. By contrast, Algerian law does not provide for any exemption, even partial, from this sanction; recovery of the performance bond is linked to the full performance of the contract and the lifting of all reservations.

Keywords: *public procurement, judicial control, fines, indemnity, guarantee forfeiture*

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OPSEG SUDSKE KONTROLE FINANCIJSKIH UPRAVNIH SANKCIJA IZREČENIH U OKVIRU JAVNE NABAVE: KOMPARATIVNA STUDIJA

Sažetak

Ovlast upravnih tijela za izricanje financijskih sankcija ugovaratelju smatra se jednom od zakonom utvrđenih mjera kojima se osigurava uredno izvršavanje ugovora o javnoj nabavi. Među navedenim sankcijama nalazi se i pravo uprave na naknadu štete koju je prouzročio ugovaratelj. Međutim, ta ovlast nije apsolutna jer njezino ostvarivanje podliježe sudskoj kontroli koja je ograničena na utvrđivanje postojanja pretpostavki pravne odgovornosti te na ocjenu odgovara li iznos naknade koji je uprava odredila svojem ugovaratelju opsegu pretrpljene štete. Druga vrsta financijske sankcije jest izricanje novčane kazne. Jedna od njezinih značajki u alžirskom i egipatskom pravu jest to da njihova primjena ovisi o iznosu ugovorne kazne, za razliku od pristupa suvremenih upravnih sudova u Francuskoj koji su razvili tumačenje kako se u sudskom postupku može povećati kazna u slučaju da se utvdi da je preniska, odnosno smanjiti ako se utvrdi da je prekomjerna ili ako su povredi ugovora pridonijele okolnosti izvan kontrole ugovaratelja, pa čak i osloboditi ugovaratelja od njezina plaćanja ako su neuredno izvršenje ili zakašnjenje u ispunjenju ugovornih obveza prouzročeni djelovanjem treće osobe nad kojom ugovaratelj nije imao kontrolu. Treća vrsta financijske sankcije jest unovčenje jamstva koje je položio ugovaratelj. Njegova primjena u francuskom pravu podliježe sudskoj kontroli, pri čemu sud može izmijeniti sankciju u slučaju djelomičnog ispunjenja ugovornih obveza od strane ugovaratelja. Nasuprot tomu, alžirsko pravo ne predviđa nikakvo, pa ni djelomično, oslobođenje od te sankcije; povrat jamstva za uredno ispunjenje ugovora vezan je za potpuno izvršenje ugovora i otklanjanje svih utvrđenih nedostataka.

Ključne riječi: *javna nabava, sudska kontrola, novčana kazna, naknada štete, unovčenje jamstva*