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The American University in Cairo

School of Sciences and Engineering

**FRAMEWORK FOR ENHANCED APPLICABILITY OF THE
EGYPTIAN PUBLIC PROCUREMENT LAW TO
INTERNATIONAL ADMINISTRATIVE CONSTRUCTION
CONTRACTS**

**A Thesis Submitted to the
Construction Engineering Department**

**In partial fulfillment of the requirements for the degree of
Doctor of Philosophy in Engineering
With Specialization in Construction Engineering**

**By
Eng. Amr Mohammad Abu Helw**

**Under the supervision of
Dr. A. Samer Ezeldin
Professor and Former Chair
Construction Engineering Department
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December 2021

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ABSTRACT

Local governments and public authorities conclude contracts for the purpose of acquisition of goods, delivery of services and construction of public facilities like bridges, infrastructures and public buildings. A public contract is an agreement to perform particular tasks financed by government funds to the benefit of the whole community. Private entities and corporations are subject to stricter standards in their dealings with the government than in private transactions. Conversely, the government must deal fairly and equitably with those who it contracted with to achieve successful implementation of the projects. On October 3, 2018, a new Egyptian public procurement law, namely, law no. 182 of 2018 was issued to regulate contracts concluded by public authorities. The executive regulation of the law was published on October 31, 2019. After extensive study and review of legislation and standard administrative contracts in selected European countries, Middle Eastern countries and others, this research propose amendments to the Egyptian public procurement law to make it more equitable and to avoid unbalanced provisions that could make international contractors and investors decide to refrain from dealing with major public projects in Egypt. The suggested amendments address five dominant subjects, namely; (i) delay claims by the contractor, (ii) contract termination, (iii) limit of compensation under performance guarantee, (iv) price adjustment and (v) dispute resolution mechanism. To verify the proposed amendments, semi-structured interviews are conducted among four eminent and renowned experts in the field of public work contracts to obtain their opinions and comments. The experts' recommendations are implemented to make the amendments more comprehensive and better applicable to their intended purpose.

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CHAPTER 1 : INTRODUCTION

1 . 1 Public Law

In modern times, two separate fields of law have been recognized, one of private law and the other of public law. The private law governs the affairs of subjects as between themselves, while the public law governs the affairs of subjects vis-à-vis the public authorities.

Public law is a set of rules that govern the relationships between individuals or private organizations and public bodies such as government departments and local authorities or private organizations exercising a public function.

No matter the variety of legal systems, they all take the necessary distinction between public law and private law into account, in one way or another. Every country has its own way of conceptualizing this distinction and putting it into practice. In general, the manner in which they do so bears witness to the “prejudices, habits, dominating passions, of all that finally composes what is called “national character” (Zoller, 2008).

In some legal systems, the distinction is blurred or hardly discernible. It can only be understood from particular rules or specific institutions integrated into a larger body of applicable law. This is the case in England and the United States. Both countries possess some public law rules or institutions—for instance, in England, the so-called “public law remedies” which are distinct from those available in private law or in the United States, the cases of private right and those of public rights which arise between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments. In both countries, however, cases concerning these remedies or rights are adjudicated in the last resort by ordinary courts, remaining within their jurisdiction rather than withheld for

another court's purview on account of their public law component (Zoller, 2008). Sometimes, the distinction between public law and private law is apparent. Instead of being inferred in the legal system through different rules or institutions, discrimination builds the entire legal system and forms the backbone of it. This is the case in France, where public law is fundamentally separate from private law: Two different high courts exist, one to adjudicate private law disputes (Cour de cassation) and one to hear public law cases (Conseil d'Etat). This division between the two court systems has important consequences for French legal education. All students take common courses during the first three years of their legal studies, but then the curriculum splits, and the students graduate from law school with a specialization in either private or public law (Zoller, 2008).

These preliminary notes yield the first observation: Public law is to be found everywhere, and there are no States without some public law.

1 . 1 . 1 Branches of Public Law

Public law involves the relationship between the government and the citizens. Public law constitutes three major areas which are:

Administrative Law: This branch of public law deals with the functions and roles of government for citizens. Some roles include the arrangement of retirement and child benefits systems, to name a few. Disputes are likely to arise from these systems, and this law is intended to help resolve these issues.

Criminal Law: Some offenses threaten society, such as theft, murder, extortion, and embezzlement. Such actions are considered a violation of the community. Criminal law ensures that offenders are punished and penalized accordingly. The main objective of this type of law is to protect the rights of citizens and ensure their safety. The

government is responsible for recognizing and prosecuting violators, and this is how it relates to citizens.

Constitutional law: deals with issues related to the state's constitution. This includes the structure and branches of government, the head of state, and the distinction between private and public law in all aspects. The law protects and ensures that all rules are met literally without a violation (Public Law-Branches, 2020).

1 . 1 . 2 Administrative Law

In civil law domain, a contract is an agreement reached by and between two or more persons to create, amend, settle, or terminate a legal relationship. The parties to the contract are legal entities of equal standing. The basic premise is freedom of contract. It means that the parties are free to choose their contractual counterparts and determine the contract's content, the only restriction being the requirement for the contract not to contravene the imperative provisions of the law and the good morals. Contracts are legally binding on the parties involved. They may only be amended, terminated, rescinded or invalidated at the mutual consent of the parties or in the cases provided for by the law (Yotova, 2016).

The development of societal relations has brought into existence contracts also in the domain of administrative law. Administrative law can be defined as the body of constitutional provisions, legislation, court rulings, executive orders, and other official directives that (a) govern the procedures used by public authorities in the adjudication, adopting, and implementation of policies, (b) regulate the exercise of their power to enforce laws and regulations, and (c) control the extent to which the administration is open to public scrutiny. Administrative law also allows for the review of public authority decisions, actions, orders, rules, policies, and other aspects of their activities. In short, administrative law is the organizational law of public administration. It

regulates how and why public administrative agencies do what they do, as well as their authority to do so. As such, it is one of the most significant aspects of modern government. All people in society are affected by administrative law in myriad ways in their daily lives (Rosenbloom, 2018).

1 . 2 Concept of Administrative Contracts

Based on the means by which the public interest is achieved, it is clear that over time, under the influence of changes in society's evolution (urbanization, industrialization and others), the role of public administration has changed, reaching today at the level of a service provider, which it required the completion of legal management documents, which in most cases takes the form of contracts (Negrut, 2014). The theory of administrative contracts is nowadays more current than ever, being closely linked to the public domain, public property and public service (Negrut, 2014).

Contracts concluded by the administration with individuals in order to work together to achieve a public interest, subject to the administrative system, are public contracts or administrative contracts (Sandu & Pagarin, 2012).

The administrative contract could be defined as a legal instrument through which, together with the administrative law and regulations, some authorities, bodies, entities and institutions of the public administration system carry out their duties in implementing the law to meet the public interest. These management documents of the administration are subject to a special juridical system. To the contrary of unilateral administrative deeds, contracts are bilateral legal documents. The administrative contract includes both regulatory and conventional provisions. The regulatory provisions include binding clauses stipulated by law, and the conventional provisions include terms negotiated and agreed upon by the parties of the contract (Sandu & Pagarin, 2012).

Generally, the common law treatment of administrative contracts is different from that of civil law. The common law views administrative contracts in the same way it views other ordinary contracts whose parties are equal in front of the law. Therefore, no party will have the upper hand, priority or sovereignty over the other party by any means. As a consequent incidence, the common law requires no new or special law governing administrative contracts and there is only one contract law system that governs all types of contracts. Therefore, the ordinary courts of law have the adjudication authority of disputes that arise between the parties of the administrative contracts. The perspective difference is observable under the civil law system where parties of administrative contracts are unequal and the contract itself is governed by a special regime and adjudicated by special administrative tribunals. This is the case in civil law countries, especially in France (Wakene, 2011).

The administration practices some exceptional authorities and powers in the administrative contracts. In other words, the administration concludes contracts containing exceptional provisions and conditions such as the right to revoke the contract at its own discretion without considering this step as an administrative fault, the right to supervise the way in which the contract is executed, the right to alter the contract without the other party's consent and the right to dictate instructions by its own decision (Alhamidah, 2007).

The theory of administrative contracts was formed in modern French Law as a creation of the Council of State case law and was subject to further development and enhancement by the French administrative doctrine (Sandu & Pagarin, 2012).

1 . 3 Administrative Contracts in Egypt

In simple contracts such as purchasing a daily newspaper, the administrative bodies can use contracts subject to Egyptian civil law, but whenever it is more

beneficial, the administrative bodies have to use contracts subject to public procurement law, i.e., administrative contracts. If the administration chooses to enter into administrative contracts, it actually chooses to exercise the role of authority and sovereignty rather than merely a party to a contract. Thus, the administration includes in its contracts many conditions that have no equivalent in civil law contracts, such as the clause of "changes". Moreover, many of the administrative contract terms and clauses are not subject to negotiation by their nature. Therefore, the administration never waives its right to incorporate such clauses into the administrative contracts it concludes (Abd El-latif, 2013).

As the administration has the capability to conclude both civil law contracts and administrative contracts, a question is raised about the differentiation between them. In other words, whether the contract concluded belongs to this type or that. Therefore, a certain criterion was established for that differentiation. This criterion identified three elements that should characterize the administrative contract: the administration is a party of the administrative contract, the subject matter of the contract is related to a public utility and the contract includes exceptional clauses. (Abd El-latif, 2013). The following is a detailed demonstration of the three elements.

First, the administration is one of the contracting parties of the administrative contract. Generally, any contract should have two or more parties. In administrative contracts, one of the contracting parties, or both, is an administrative body. This means that all the Egyptian administrative body units, inclusive of ministries, departments, as well as local administration units, public authorities and public organizations, shall be subject to tender law provisions and, accordingly, can conclude administrative contracts (Egyptian Bids and Tender Law , 1998).

Second, the subject matter of the contract is related to a public utility. The public utility can be defined as an organization created by a government agency and under its strict management to perform an essential public service that meets the needs of people in a regular way and in compliance with the principle of equality of users. The public utility can be the enterprise that provides electricity, telephone service, natural gas, water or postal services. The contract is considered an administrative contract if it relates to a public utility, whether the purpose of the contract was to establish a new public utility or to keep a pre-established one running (Abd El-latif, 2013).

Third, administrative contracts include exceptional provisions that do not exist in civil law contracts. For example, any administrative contract contains a clause that allows the administrative authority to amend the contract without referring to the contractor or obtaining his prior consent. Civil law contracts never contain such clause (Abd El-latif, 2013).

Based on the foregoing, any contract that contains the three aforementioned elements together is considered an administrative contract. The absence of any of them might make the contract concluded by the administration a civil law contract in which the administration appears the same as a private law person.

In this context, the Supreme Administrative Court ruled that the contract is considered an administrative contract when one or more of its parties is an administrative body, the subject matter of the contract is related to public utility and the contract contains exceptional provisions. In such cases, the Administrative Courts will have the competent jurisdiction to solve any dispute arising out thereof (Jurisdiction of the State Council Courts, 1987).

1 . 4 The New Public Procurement Law in Egypt

After being approved by the Egyptian Parliament, a new Public Contracts Law No. 182 of the year 2018 has been issued on October 3, 2018. The law regulates the agreements and contracts which are concluded by the public authorities in Egypt and includes specific regulations that such authorities shall follow and apply. Moreover, it replaces Tenders and Auctions Law No. 89 of the year 1998 and amends its consequences as well. The Ministry of Finance has prepared the new law in favor of economic and social changes to meet the current and future needs of public authority and society.

The law first starts by defining a number of goals. Among these goals is the fair and correct organization of bids and the right and equitable execution of contracts as well. The law also aims to encourage relevant bodies and entities to continuously create new and innovative solutions and methods. In addition, it clearly lays out that it attempts to create a good atmosphere in which small and medium-sized projects can grow and take place.

1 . 5 Problem Statement

The subjects of administrative contracts governed by public law are to some extent similar to those of construction contracts performed between private parties. Therefore, administrative contracts contain similar provisions such as delay damage, advance payment, time for payment, indemnifications, remedies for contract parties, dispute resolution, variations, suspension, and termination. However, there are a lot of differences in the details of such subjects.

As the basis of the relationship between the administration and a contracting party, the administrative contract, and particularly its execution, introduces some differences with respect to the classic contracts between two private persons. The

administration naturally benefits from some powers that do not apply to a non-public contracting party. These include, among others, the power to direct and control, the power to enforce sanctions, penalties and fines, and the ability to amend the contract unilaterally.

The authority exercised by the administrative bodies in the execution of administrative contracts makes these contracts - to a great extent - imbalanced, and this imbalance has many drawbacks. On the one hand, it causes contractors to place contingency amounts in the contract price, which makes the implementation of public utilities more expensive than the implementation of private projects. On the other hand, the project's success is threatened if the administrative authority aggressively exercises its authority. Besides, it may lead to the reluctance of many contractors - especially international ones- to enter into contracts with the administrative bodies, which deprives public facilities of their expertise and limits the base of competition for the best prices for implementing public projects.

This thesis introduces proposed amendments to some articles in the new Egyptian Public Contract Law No. 182 of 2018, the law applicable to administrative contracts in Egypt, in order to make its application more balanced between the contract parties and to eliminate the unfairness and excessive burden on the contractors, thus increasing the chances of success for administrative projects.

1 . 6 Thesis Objective

This thesis focuses on five subjects in administrative contracts: “delay claims by the contractor”, “contract termination”, “limit of compensation under performance guarantee”, “price adjustment”, and “arbitration”. These subjects have often been a source of debates and disputes in the implementation of administrative contracts and a source of imbalance between the contract parties, which leads many contractors,

especially international ones, to avoid entering into contracts with the administrative bodies, depriving public facilities of their experience and limiting the competition.. The application of the five subjects in some countries' administrative contracts is discussed in light of the public procurement laws and court decisions to make a comparison between dealing with the five subjects in those countries and in Egypt according to the new public contracts law No. 182 of 2018. Based on that comparison, some amendments are suggested to the related provisions of the mentioned law to facilitate the application of fair administrative contracts.

The object of the thesis is to introduce proposed amendments to some articles in the new Egyptian Public Contract Law No. 182 of 2018 as an attempt to reform the law to make its application more equitable and fair and attract local and foreign contractors to the administrative contracts in the construction field in Egypt. Thus, the construction industry benefits from the experience and innovation of those contractors, and at the same time, there will be more competition that leads to obtaining reasonable prices.

1 . 7 Methodology

The most adequate and proper research methodology in such topics consists of the following steps which are demonstrated in the figure below.

- 1- Topic Identification.
- 2- Data Collection.
- 3- Data Analysis.
- 4- Law proposed amendments and verification.

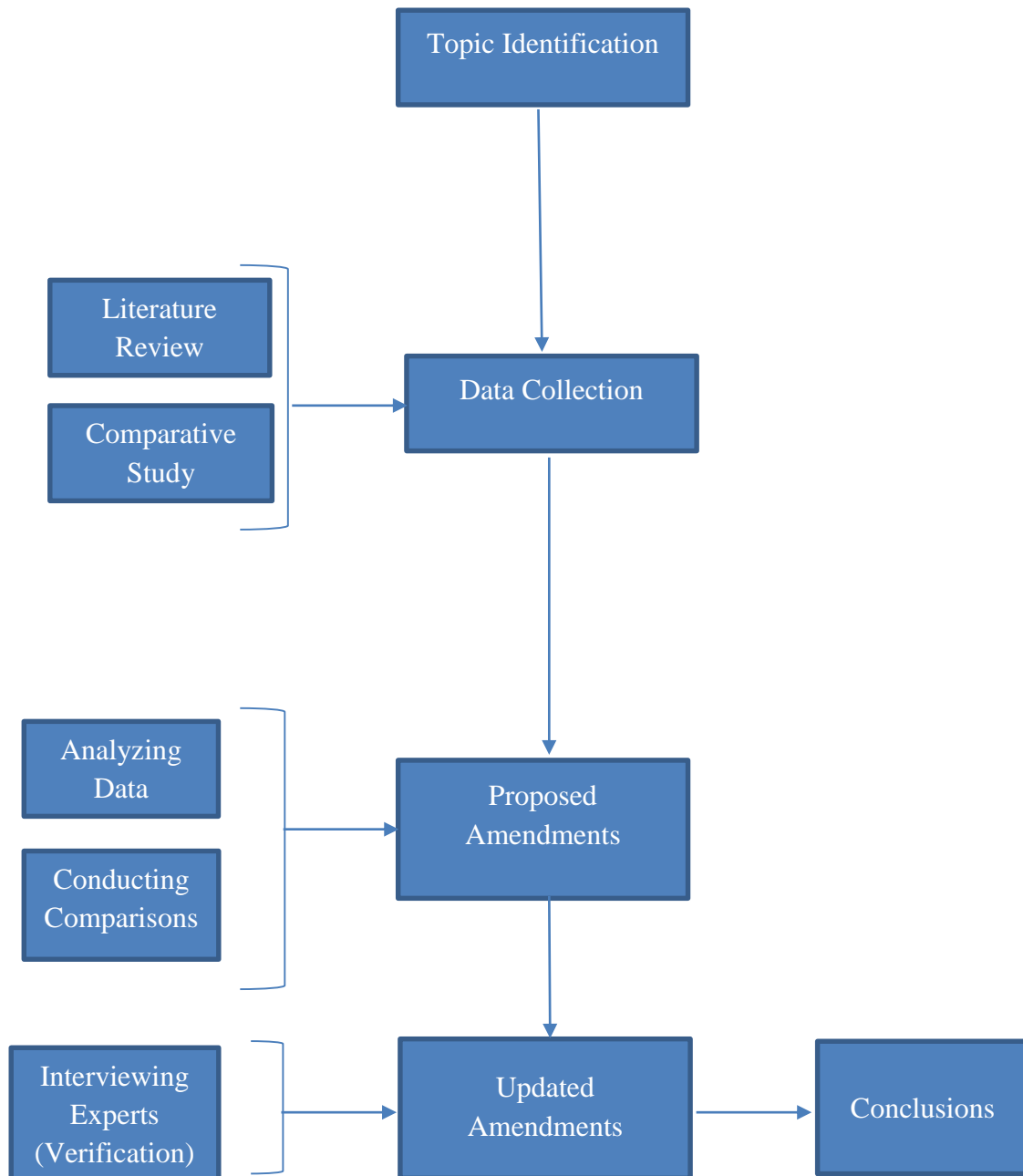


Figure 1: Research Methodology

1 . 7 . 1 Topic Identification

Topic Identification was performed through a comprehensive literature review from scientific sources like journals, articles, conference papers, books, reports, etc.

1 . 7 . 2 Data Collection

Data collection was performed through an extensive literature review comprising the definition of the administrative contracts, the legal regime applicable to that type of contract, and the object and parties of the administrative contract. The literature review also covered the principle of the administrative contracts in various legal systems and countries in Europe, the middle east, and the United States in addition to Egypt and how the public procurement law or regulations in these countries deals with the issues of delay claims by the contractor, contract termination, limit of compensation under performance guarantee, price adjustment and Arbitration. Several cases and judgments issued by the courts of different countries - especially the common law countries - concerning these issues have been cited to clarify how these issues are legally and judicially dealt with.

1 . 7 . 3 Data Analysis

The data gathered from the literature review and cases were analyzed, and a comparison was held between the application of the public procurement process in administrative contracts in various countries and Egypt with regard to the five subjects: delay claims by the contractor, contract termination, limit of compensation under performance guarantee, price adjustment and Arbitration. Based on the comparison, proposed amendments are developed to enhance the applicability of the public procurement law to administrative contracts in Egypt.

1 . 7 . 4 Amendments Verification

The verification of the amendments is conducted by interviewing a number of renowned and well-reputed experts and presenting the amendments to them in order to obtain their opinions about the completeness and comprehensiveness of the amendments of the law articles and to ensure their integrity.

1 . 8 Thesis Organization

This thesis is organized into six chapters as follows:

Chapter One is an introduction to the concept of administrative contracts, including public law, administrative law and administrative Contracts in Egypt in addition to casting lights on the new Public Procurement Law in Egypt, Law No. 182 of the year 2018. It also includes the problem statement and the thesis objective, methodology and organization.

Chapter Two is a literature review of administrative contracts and legislation in various legal systems and countries. Moreover, how the five subjects of delay claims by the contractor, contract termination, limit of compensation under performance guarantee, price adjustment and arbitration are dealt with in the legislations and jurisdiction of such countries.

Chapter Three presents a comparison between the Egyptian procurement law and the relevant legislation in other countries.

Chapter Four represents the proposed amendments to the new public contracts law regarding the five subjects concerned by the thesis.

Chapter Five presents the verification of the proposed amendments.

Finally, Chapter Six is the summary and conclusion of the research findings. It includes the contributions and the limitations of the research. Figure 2 below show the thesis structure, including the six constituent chapters.

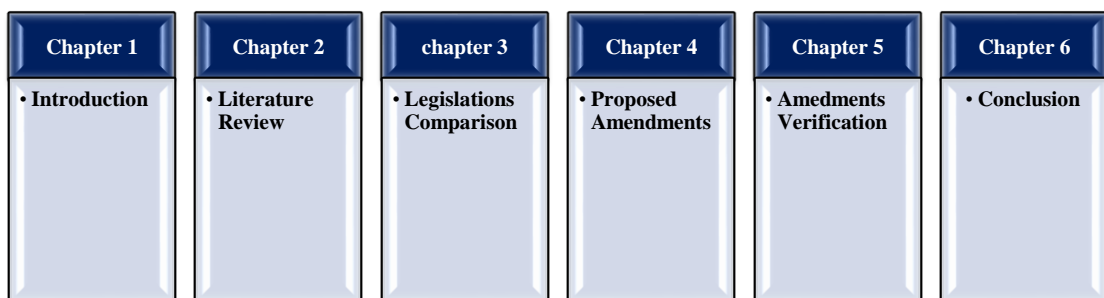


Figure 2: Thesis Structure

CHAPTER 2 : LITERATURE REVIEW

In this chapter, for the purpose of reforming the new Egyptian public procurement law, an extensive literature review is conducted to investigate how the administrative contracts are handled in different legal systems and countries, and how the five subjects of delay claims by the contractor, contract termination, limit of compensation under performance guarantee, price adjustment and arbitration are dealt with in the legislation and jurisdiction of some of such countries.

2 . 1 Law Reform procedure

Law reform or legal reform is the process of analysing current laws and advocating and carrying out changes in law provisions, usually with the aim of enhancing justice or efficiency. Law reform is very important to any legal system and to any country. For the law of a country cannot remain static but must keep abreast with the political, legal, economic and social developments of society. Invariably, there will be areas where the law is unclear, complicated or inaccessible. Legal reform can be the driver for all other reforms, including reform of the economy and construction industry (Yunus & Allen, 2017).

The process for each law reform project may differ according to the scope of inquiry, the range of key stakeholders, the complexity of the laws under review, and the time allotted for the inquiry. While the exact procedure needs to be tailored to suit each topic, particular steps are usually followed to develop recommendations for reform. Such steps include initial research, investigation of other countries legislation, and expert opinions (ALRC, 2021).

2 . 1 . 1 Use of Comparative Law in Law Reform

law reform was defined as the solution of a problem that arises because the law, legal institutions or legal methods are outdated and obsolete. To the question, "where should we turn to reform a law?", some natural answers would seem to include investigating what they do in other countries and looking abroad for some ideas to use at home. These are natural answers because it is a common reaction when faced with any problem to try to ascertain how others have solved the same problem. The most appropriate option open to a legislator, a member of a law reform agency, a judge, or an academic faced with a law reform problem is to try to ascertain how the problem has been solved in other jurisdictions. If he considers a foreign solution appropriate, he can borrow it for his own system. This depends, of course, on the recognition on his part that many law reform problems are the same worldwide due to the increasing standardization of life (Whelan, 2012).

The comparative research with a practical aim in view, such as law reform or the unification of divergent laws is the most vigorous and fertile in output. It is now almost inconceivable in the majority of countries that any attempt at reforming national law should not be preceded by an examination of foreign solutions to the same problem, although naturally, the quality of this research and the importance attributed to it varies considerably. External comparison offers one considerable advantage over all other methods. It is able to supply not only solutions but also experience with the practical working of the solutions in question. Thus, comparative law has become the "handmaid" of law reform (Whelan, 2012).

The comparative legislation method is ideal for assessing the process of state public law reform efforts. Such a methodology allows researchers to (1) draw conclusions through an examination of varied responses to the same model act, with

each individual legislation confirming or refuting the general hypothesis that state factors determine legislative outcomes, and (2) formulate more specific questions for future consideration. Given the impracticability of experimental or statistical methods, this comparative analysis provides guidance for future legislative action and hypotheses for further study (Meier, Hodge, & Gebbie, 2009).

The following is an application of the comparative law method to several countries worldwide to explore how the administrative contracts are applied in these countries, especially the five subjects under study.

2 . 2 Administrative Contracts

Contracts between private persons and governmental bodies are a daily occurrence. The administrative contracts are concluded by selecting a partner by the public administration through the means provided by the law (public tender, auction, direct negotiation, etc.); in the case of civil or commercial contracts, the contract parties choose each other freely (Negrut, 2014).

Such contracts are essential to the performance of the executive's various actions and functions, and apart from their practical importance, they raise theoretical questions. The major problem arising with respect to administrative contracts is the substantive law to be applied. The issue of substantive law raises secondary problems with regard to remedies and jurisdiction. It appears that administrative contracts are to be governed by one of three systems of rules: contract law, administrative law, or a system that combines elements of both systems (Shalev, 1979).

However, there is no definitive solution. The application of contract law leads to a confrontation between the basic principles of contract law, especially the principle of freedom of contract and inviolability of public contract, the needs of the administration, the powers and duties of the sovereign. Whereas the principle of

freedom of contract allows the individual to choose his contractual partner and to fashion the contents of the contract according to his wishes (with the consent of the other party, of course), it is accepted that the public administration is not free to contract with whosoever ever it desires and under conditions acceptable to it. This is a restriction of the contractual principle of freedom of contract. However, it is also possible that the confrontation between the laws of contract and the needs of the administration will cause extension or relaxation of the laws of contract. For instance, when the needs of the administration require withdrawal from or amendment of an administrative contract, these needs will be preferred to the contractual principle of *pacta sunt servanda* and to the rights of the other party to the contract (Shalev, 1979).

The alternative is to apply the rules of public law to administrative contracts. But the public law has not developed and, thus, does not contain rules and principles for solving all the problems entailed in the issue of administrative contracts and promises. Therefore, the only remaining solution is that of a synthesis between contract law and administrative law. This alternative also arises from the nature of the subject under discussion: as contracts, administrative contracts are subject to the laws of contract, and as executive acts, they are subject to the rules of administrative law. This synthesis solution has to be clarified, elucidated and defined. The interaction of the two different systems, public and private law, when applied to administrative contracts, poses questions of classification and identification of the applicable law (Shalev, 1979).

2 . 2 . 1 Legal Regime Applicable to Administrative Contracts

In order to reflect the legal regime applicable to administrative contracts, it is necessary to identify the differences between administrative contracts and civil or commercial contracts.

Unlike private law contracts, where the terms are negotiated, determined with mutual consent of the contract parties, the administrative contracts contain binding terms and contractual clauses that are not usually subject to negotiation. Meanwhile, the civil or commercial contracts serve a private interest, making them applicable to the private law regime, while administrative contracts serve the public interest where the applicable legal regime is the public law (Negrut, 2014).

Regarding the legal regime of administrative contracts, Negrut, 2014 underlies that they are essentially identical to civil contracts. The difference lies in the applicable legal regime; administrative contracts are subject to public law rules that are part of the legal administration regime. The legal regime of administrative contracts is based on two fundamental elements: inequality between the parties, in the sense that the public authority has a dominant position and that it acts as the holder of some public authority; and the lack of freedom of will of the other contract party contrary to the case of the contracts regulated by private law (Negrut, 2014).

Several elements relating to the concept of the administrative contract have been identified by Iorgovan, 2005. The administrative contract constitutes an agreement of will between the authority of public administration and a private entity. It envisages the supply of goods and performance of works and services by the private entity in exchange for remuneration. It is intended to ensure the functioning of a public service, whose organization represents a legal responsibility of the contracting authority of public administration or, where appropriate, the enhancement of a public asset. The two parties to the administrative contract must accept some of the regulatory conditions stipulated by law or based on government decisions. Moreover, the public administration authority may transfer rights, interests, or obligations only to other public administration authorities in accordance with the law, and the private entity can

grant them to any person subject to the consent of the public authority. The public administration authority may also amend or terminate the contract unilaterally, without resorting to the courts, under certain circumstances (Iorgovan, 2002).

The special legal system to which administrative contracts are subject is distinguished by specific forms required for their fulfillment (task notes, auctions, government approvals, etc.), and special principles relating to their execution (Negrut, 2014).

2.2.2 Object and parties in the administrative contract

The object of the contract is the provision of public domain goods and services, carrying out public works and public procurement. For instance, the object of such contracts can be government procurement, concessions of public services, implementation of public construction and assembly works and provision of services. Concerning the parties to the administrative contracts, the contracting party must always be a public authority or its agent, acting under the power conferred by law for the public interest or the use of the public domain (Sandu & Pagarin, 2012).

Generally speaking, a contract between two private legal entities is a civil law contract or a common law contract. On the other hand, a contract between a public law legal person and an individual can be an administrative contract if it has a public legal relationship. A contract between two public law legal entities is basically an administrative contract. However, this rule also contains an exception, according to which, if a contract is concluded between two public entities, it is administrative in nature, unless it results in a private law legal relationship (Sandu & Pagarin, 2012).

2.3 Administrative Contracts in Various Legal Systems and Countries

In the following, dealing with administrative contracts will be demonstrated in several countries worldwide, some of which belong to the civil law legal system, while

others belong to the common law legal system. The notion of the administrative contract is clear in civil law countries as its principle was derived from French public law. In contrast, in common law countries, the specific legal form given to administrative contracts is considered an achievement of jurisprudence and jurisprudence, supplemented by legislation. The Countries under study were selected on three bases. First, they reflect the two most popular legal systems in the world, civil law and common law legal systems. They also represent geographical and cultural diversity, as they include European countries and Arab countries in addition to the United States and Australia. Last, and possibly most significant element, is that the legislations in the selected countries serve as exemplary models for reforming the existing provisions in the Egyptian Procurement Law, and it is precisely for this reason that not all of the same countries are included in each of the five subjects covered by this research.

2 . 3 . 1 Administrative Contracts in European Countries

2 . 3 . 1 . 1 Administrative Contracts in France

A creation of French public law is the administrative contract. Jurisprudence states that we are in the presence of an administrative contract if one of the parties is a public authority and the contract contains stipulations that derogate from the common rules of private law (clause exorbitant), ensuring a superordinate position of the administrative authority (for example stipulations that grant the public authority a right to control, a power to apply sanctions or the right to one-sided termination of the contract) (Fodor & Fodor , 2013). These conditions can be enlarged, as the administrative courts decided that the administrative nature of a contract is not founded on the nature of the parties but on the object of the contract. Thus, contracts concluded between subcontractors of a motorway may be qualified as administrative. Participation

to the execution of public service may be another condition that qualifies a contract as administrative, even if concluded between private parties and in the absence of a clause exorbitante. Even if jurisprudence and case law show that there is not always easy to identify a contract as being administrative or private, there is no doubt that all contracts mentioned in the Public procurement code (Code des marches publics) concerning procurement of goods, services and works, belong to this category. In addition, a public-private partnership contract is an administrative contract (Fodor & Fodor , 2013).

In France, government procurement contracts are subject not only to the general principles of administrative law, but also to a special body of law codified in the act of the public contracts.

The law governing administrative contracts in general, and government procurement contracts in particular, is an independent corpus of rules, some of which are common with the basic law of contracts. Therefore, French administrative contracts are not subject to the general rules of civil law applicable to civil contracts except for certain important exceptions. This distinctiveness, to a large extent, results from granting some advantages and authorities to the contracting public entity. Such advantages and authorities are not available to any of the private contract parties (Goldman, 1987).

The theory of administrative contracts resulted from the existence of two types of courts in the French judiciary; ordinary courts dealing with ordinary disputes and include civil, criminal and commercial circuits, and administrative courts specializing in disputes involving the public administration (Alhamidah, 2007).

In the context of establishing a criteria for distinguishing between administrative contracts and private contracts, the French administrative court requires that administrative contracts must be connected to public utilities and services, and

include uncommon conditions compared to those of the private contract law. With the existence of these two conditions, the administration body enjoys exceptional powers compared to the other party of the contract and all disputes between the parties fall under the jurisdiction of the administrative courts. Such courts interpret the contract and review its disputes in the light of administrative law. Thus, the administrative contracts are ruled by several particular procedures in relation to their formation, terms and conditions, dispute resolution mechanism, and their termination (Alhamidah, 2007).

2 . 3 . 1 . 2 Theory of Administrative Contracts in Romania

In Romania, the theory of administrative contracts emerged and developed with the development of the legal relationship between the administration and private entrepreneurs engaged in public works or public service operations. However, leading experts in the interwar period had reservations about it, calling it an external institution, which could not evoke the nature of the contract's endogenous reality. The lack of administrative courts in Romania during the interwar gave the theory of administrative contracts unique characteristics (Sandu & Pagarin, 2012).

This contract theory is closely related to the public domain and thus public property, public service and concepts of constitutional law. According to the current doctrine, an administrative contract is defined as an agreement between a public authority, on a position of legal supremacy, on the one hand, and other subjects of law, on the other hand, which aims to serve the public interest by performing public work, rendering a public service, or promoting a public benefit, subject to the public administration regulations (Sandu & Pagarin, 2012).

2 . 3 . 1 . 3 Administrative Contracts in Germany

According to the provisions of German legislation, the administrative contract is interpreted as an agreement between parties on creation, alteration or termination of legal relations within public law. In this regard, a conclusion is made that the main criterion on the distinction between an administrative contract and a civil one is its subject matter arising from its content that consists of rights and obligations of parties. The contract is considered to be administrative given the following conditions: if it was concluded in accordance and compliance with legislation on public (administrative) law; if it consists of an obligation to adopt an administrative act or other authoritative action; if it is connected with public obligations or rights of citizens (Paterylo , 2015).

The administrative contract is formal and its subject matter covers issues of material public interest. Therefore, its content may not be negotiated freely by the parties as it has to comply with some imperative provisions of the law. Although the wills of the two contracting parties concur, one of the parties (unless both are public law entities) is entitled to use its authority to manage the conclusion and implementation of the contract, to impose sanctions and to amend or terminate the contract unilaterally. After the conclusion of the contract, if either party is not in a position to implement it due to substantial (Yotova, 2016).

The administrative authority may act unilaterally with a notice given in writing to terminate the contract for the purposes of preventing or eliminating severe consequences affecting the public interest. It is again with a view to protecting the public interest that a preliminary implementation clause may be included in the administrative contract. The preliminary implementation may be challenged in court (Yotova, 2016).

2 . 3 . 1 . 4 Administrative Contracts in the United Kingdom

The involvement of the private sector in the establishment of public sector projects has significantly increased in the last forty years in the United Kingdom. The projects cover a wide range of areas such as welfare accommodation, infrastructure, justice, military and defense (Brekoulakis & Devaney, 2017).

Procurement law in the United Kingdom is derived, to a big extent, from the European Law, which has been translated into law in England and Wales by certain Regulations. Thus, the domestic Public Contracts Regulations 2015 “PCR 2015”, which came into force in February 2015, is derived from the European Public Sector Directive 2014/24/EU. The PCR 2015 applies to public sector contracting authorities which include state, regional and local authorities, bodies governed by public law and associations formed by one or several of such authorities or bodies (Burrows & McNeill, 2019).

2 . 3 . 1 . 5 Administrative Contracts in Spain

In Spain, the existence of administrative contracts and certain of their legal peculiarities are recognized by law. According to the law of June 22, 1894,¹⁴ the administrative court is competent in all matters connected with the execution, interpretation, cancellation, and effects of contracts entered into by central, provincial, and municipal administrative bodies and dealing with public works or various public utilities. This specialized competence in contractual cases has remained unchanged even after transferring judicial control over public administration to the Supreme Court in 1904. This Spanish example is generally followed in Latin- American countries, where the institution of administrative contract seems established by legislation and jurisprudence (Langrod, 1955).

2 . 3 . 1 . 6 Administrative Contracts in Italy

In Italy, general acceptance of the civil law been consolidated by the law of March 20, 1865, diction over administrative conflicts to the civil State, organized on the French model, though not abolished, retained certain powers, but only as exceptions to the general rule. In spite of the laws of March 31, 1889, May 1, 1890, and March 7, 1907, which reinstated a portion of the judicial competence of which the Council of State (4th and 5th sections) and the Junta Provinciale administration had been deprived in 1865, the situation was unchanged as respects administrative contracts; these remained under the civil jurisdiction, and they continued to be regarded as similar to "ordinary" contracts. Nevertheless, some exceptional modifications of this doctrine have gradually been admitted, in response to the requirements of administrative action. Thus, in addition to the concrete legislative provisions and practical formulas adopted in contractual termination or revision clauses, there is a trend toward the introduction of public law elements and conceptions in the rules governing such contracts, influenced by the French jurisprudence and expressing similar needs of administrative action in Italy (Langrod, 1955).

2 . 3 . 1 . 7 Administrative Contracts in Belgium

In respects, in Belgium, the suppression in 1830 of the Council of State, which had existed under the Dutch administration, contributed-as was the case later in Italy-to delay the jurisprudential and doctrinal evolution. Indeed, the civil courts applied the provisions of the Civil Code to all cases involving state liability, and until 1920 they did not even admit a general rule of state liability in connection with its "public" activities. The courts were fully aware, however, that public welfare requires specific rules for administrative contracts (*contrats d'utilite publique sui generis*). This progressive orientation of jurisprudence was accompanied by recognition of the

function of public authority and of the powers thereby implied. Though the re-establishment of the Council of State in 1946 has not changed this division of judicial competence, the attitude of the civil courts as well as of the authors and legislature denotes an evolution toward the creation of administrative contracts as a specific new institution in Belgian law (Langrod, 1955).

2 . 3 . 1 . 8 Administrative Contracts in Turkey

According to the Turkish Public Procurement Contracts Law (No: 4735), a ‘public procurement contract’ is defined as a contract in which both sides share equal rights and liabilities, and unless otherwise stated, this principle of equality should be taken into account when interpreting the law. Therefore, according to Turkish law, these types of contracts are governed by private law, although contracts of concession are considered as part of public law legislation. Standing court practices of the Council of State and the Court of Dispute also define the contracts resulting from public tenders as private contracts, providing us with a useful tool in determining the nature of public contracts. It is mandatory for contracting authorities to go through the public service contract procedure to contract services out (Toprak, 2014).

In Turkey, the main criteria in distinguishing these services is article 128 of the Turkish Constitution, which states that public services addressing fundamental and permanent functions of the State, state economic enterprises and other public corporate bodies should, in accordance with the principles of general administration, be carried out by public servants and other public employees. This constitutional article makes it clear that if a service is considered as fundamental and permanent, it must exclusively be provided by the government (Toprak, 2014).

2.3.1.9 Administrative Contracts in the Republic of Ireland

In Ireland, the legislation governing the award of public contracts is derived from European Union directives. The Public Sector Directive 2014/24/EU was transposed into Irish law by the European Union (Award of Public Authority Contracts) Regulations 2016 (SI No 284 of 2016) on May 5, 2016 “the Public Sector Regulations”. These regulations are effective April 18, 2016 and apply to all procurements by contracting authorities commenced on or after that date (Curran & Smith, 2020).

The Public Sector Regulations apply to contracting authorities. A contracting authority is defined as a state, regional or local authority; a body governed by public law, or an association established by one or more of these authorities or one or more bodies governed by public law. A "body governed by public law" is a body created for a specific purpose of meeting needs in the public interest, and has no industrial or commercial character and has its own legal personality (Curran & Smith, 2020).

Office of Government Procurement (OGP) was established in Ireland to facilitate the operation of public service in a coordinated and efficient way and delivers sustainable savings for the taxpayer. The OGP commenced procurement operations in 2014 having responsibility for sourcing several categories of works, goods, and services on behalf of the public authority. The OGP and its sector partners issue various types of contracts and framework agreements, in conformity with The Public Sector Regulations, through which public sector entities can buy goods and services (Office of Government Procurement, 2014). Among these contracts is a standard contract for public sector contracts exceeding five million euro in value, which is Public Works Contract PWC-CF1 version 1.9 published in 2014. The PWC was primarily designed to provide cost certainty, allow lump-sum fixed-price contracts to be awarded, achieve

value for money, rebalance risk; and deliver construction projects more efficiently (Cunningham, 2014).

2 . 3 . 2 Administrative Contracts in the Middle East Countries

2 . 3 . 2 . 1 Administrative Contracts in the Kingdom of Saudi Arabia

Although the statute did not define the term "administrative contracts", the explanatory note to the Statute of 1982 and the Board of Grievances' jurisprudence discuss the distinction between administrative and non-administrative contracts. In one of its decisions, the Board explained that one of the cardinal principles is that the two types of contracts are different because the administrative contracts aim to serve the public interest and public welfare while non-administrative contracts deal with private interests. In administrative contracts, the public interest supersedes the interest of the other party in the contract. Thus, it is worth knowing the criteria established by the Board to distinguish between the two types of contracts (Al-Jarbou, 2011).

Since there is no specific definition of the administrative contract and standards for distinguishing it from other contracts, the Board of Grievances considered Saudi legal commentators' analysis of how other countries, particularly France and Egypt, distinguish between administrative contracts and other contracts. The Board's decisions meet with the commentators' analysis in a point that in distinguishing between administrative and non-administrative contracts, the surrounding circumstances of the contract should be examined and taken into consideration. Those circumstances include contract parties, the administrative body with which the contract has been entered into, nature of the works or the service to be performed under the contract, and the terms and conditions of the contract. So, the Board concluded, influenced by the Egyptian Public Procurement Law, that three elements make a contract administrative in nature under the law of the Kingdom of Saudi Arabia: a public administrative authority must be a

party to the contract, the contract is concluded in order to serve a public utility or a public service, and the contract must contain exceptional provisions not usually found in private law contracts (Al-Jarbou, 2011).

2 . 3 . 2 . 2 Administrative Contracts in Kuwait

In Kuwait, the state now plays a wider role in modern society than was the case in the past. In fact, the provision of public services and the fulfillment of public needs have become major if not primary functions of the state and its administration. The result of this wider role has been an increase in the legal relations between the state and individuals, effected through contracts between the administration and private companies. In these contracts, the administration faces certain conditions, which impose restrictions as well as obligations. These contracts are expressly differentiated from private law contracts. The distinction lies in the fact that Kuwait is a civil law state in which administrative law exists through legislation as well as through judicial decisions, thereby giving priority to administrative actions. This distinction is taken into account by domestic courts when reaching decisions, thereby allowing the administration to enjoy certain privileges in terms of its public provision contracts (Alhamidah, 2007).

To enforce the distinction, Kuwaiti administrative law establishes rules through legislation and judicial decisions, and through the establishment of specialized administrative courts, all of which enforce the priority of public interest over private benefits.

2 . 3 . 2 . 3 Administrative Contracts in Qatar

The development of Qatar from a small tribal sheikhdom to a modern state shares some similarities and differences with Kuwait and Saudi Arabia.

Contracts concluded between the government (or an entity thereof) and a private foreign or domestic company to build a facility that provides a public service are considered administrative contracts and are subject to a particular regulatory framework that governs the administration and regulation of government agencies. The Qatari legislature took a bold step towards revamping the public procurement system by promulgating the recent tenders and auctions law. In the context of the ongoing development of the Qatari public procurement law, the new Law of Organization of Tenders and Public Auction was issued on 18 November 2015 and officially published on 13 December 2015. The law took effect on 13 June 2016. In order to avoid any legal vacuum, the former legislation continued to be in force during this transitional period until the latter law came into force, according to section (5) of the new promulgating law. One of the key features of the new legislation is that it is designed to be as concise as possible by providing sufficient details on the various provisions and rules related to tenders and auctions (Elamin , 2016).

2 . 3 . 2 . 4 Administrative Contracts in the United Arab Emirates

The public contract in the UAE has become a necessity since the new modern government's role these days is not limited to acting as a custodian state and protecting individuals' rights and freedoms. The state government has evolved to operate in various tasks, and the state is now involved in providing services that were not previously part of its public services. The state is no longer dependent on the private sector and individuals to provide services, but governments in the current time are highly involved in providing the public with their needs and requirements to meet the continuous demand of society. As a result, new public service administration entities have emerged to meet individuals' needs, and the government is forced to run its public

services smoothly and contract with other entities and individuals to provide these services (lawteacher, 2018).

To this end, public contracts and their administration were introduced in the United Arab Emirates in 1975 through the Federal Regulation of the Conditions of Procurement, Bids and Contracts, Financial Order No. 16 in November 1975, regarding the regulation of procurement methods and Works contracts. Yet again in 2000, through Ministerial Resolution No. 20 of 2000 on Administration of Contracts Systems (lawteacher, 2018).

2 . 3 . 3 Administrative Contracts in other countries

2 . 3 . 3 . 1 Administrative Contracts in in the United States

Federal public procurement in the United States is governed by multiple statutes, executive orders, the Federal Acquisition Regulation (FAR) and agency regulations that implement or supplement the FAR, among them the Defense Federal Acquisition Regulation Supplement (DFARS). The DFARS supplements the Federal Acquisition Regulation (FAR) and is administered by the Department of Defense.

In general, the FAR regulates acquisitions by federal executive agencies, which are defined as executive departments, military departments, wholly-owned federal government corporations and independent establishments of the federal executive branch. Some of the public agencies such as the Federal Aviation Administration, the Federal Deposit Insurance Corporation and the US Postal Service are not subject to the FAR but have particular procurement regulations similar to the FAR in many aspects. Federal legislative and judicial branch agencies may choose to adopt the FAR or choose to comply with requirements similar to those contained in the FAR. State or local governments are not subject to the FAR (Graham & Johnson, 2020).

.FAR applies to acquisitions of supplies or services, including construction, under contract, with funds appropriated by Congress. Contracts with the federal government can take a number of forms, including bilateral instruments; awards and notices of awards; job orders issued under basic framework agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. Federal grants, cooperation agreements, and other transactions, which are special agreements used for research, prototyping, and follow-up production, are not subject to FAR. (Graham & Johnson, 2020).

The specific sections of the applicable FAR are determined by the contract value and whether the contract is used for commercial items. The Commercial items are supplies normally used by the general public or by non-governmental entities for purposes other than governmental purposes or services sold competitively in large quantities in the commercial market based on applicable catalog or market prices for specific tasks being performed. Commercial item contracts are governed by Part 12 of the FAR, which formulates procurement policies more similar to those of the commercial marketplace. (Graham & Johnson, 2020).

Part 16 of the FAR lists the types of contracts the federal government uses to obtain supplies and services, depending essentially on what the government gets and how performance risk is allocated. The main types of contracts the government usually uses include fixed-price; cost-plus; time-and-materials or labor-hour; indefinite-quantity (IDIQ); indefinite-delivery, and commercial item contracts (Graham & Johnson, 2020).

FAR contains comprehensive requirements that agencies document the rationale for a wide range of procurement decisions, including decisions about which

supplies and services to purchase, which procurement methods to use, extent of possible competition, and selection of contractors. The FAR requires contract processes to be publicized by agencies and provides for administrative or judicial review of contract disputes and procurement decisions. The FAR also imposes on contractors a number of disclosure obligations, from general requirements that all contractors register and providing a range of certifications and representations related to their professions, to more specific disclosure requirements. Such as TINA (Graham & Johnson, 2020).

2.3.3.2 Administrative Contracts in Australia

Australian governments make many contracts which take several forms such as procurement contracts for the acquisition of goods or services or for the provision of works and contracts with private entities for the construction, and in some case operation, of capital assets for the use of which the relevant private entity may receive public money or may charge users (Hayne, 2017).

In Australia's Constitution, the federal administrative law basics are focused on the structural separation of the roles of the legislature, the executive, and the judiciary, especially the independence of the federal courts. In this way, the administrative law system guarantees that the government and the people are bound by law, and encourages the observance of the rule of law in Australia. The procurement activities of the Australian government are regulated by the Commonwealth Procurement Rules and supervised by the Department of Finance. On January 1, 2018, the rules were updated (Hayne, 2017)

2 . 4 The Subjects under Research in Administrative Contracts

2 . 4 . 1 Delay Claims by the Contractor

According to the principles stipulated in the jurisprudence in administrative law, the penalty clause in administrative contracts differs from the nature of delay damages in civil contracts. Delay damages in civil contracts are a pre-agreed compensation, which is applied if the contractor fails to complete the works satisfactorily under the contract within the specified contract term in addition to any time extension duly granted. Delay damages in civil contracts are not enforced by way of penalty, and therefore, the court may pass a less stringent Judgment if it is proved that the delay damages are exaggerated in light of the damage suffered by the employer. While in the administrative contracts, the aim is to ensure the execution of public projects on the agreed-upon due dates in order to maintain the smooth running of the public utilities. The Administration has the right to impose delay penalties immediately upon the occurrence of the delay even if the damages were not proven, and without notice or other legal procedures (Assaad & Abdul-Malak, 2020).

On the other hand, if the delay is attributable to the public authority, contractors may, according to the administrative legislation in the country, claim a cost compensation. Claims occur due to the nature of construction works. Public authority typically wants construction projects to be carried out in the shortest possible duration and at the lowest possible cost. Contractors aim to perform at the minimum cost, and when a project is delayed, idled, or disrupted by the Public authority, they seek equitable compensation for the additional costs suffered because of the delay. Claims may occur due to numerous failures to properly manage the procurement process and administrate the contract, such as failing to effectively plan the project at the pre-contract phase; using inappropriate bidding procedures and procurement methods;

providing insufficient information to the bidders during the tender; issuance of excessive variations on-site; employing incapable representatives, and causing delay due to design deficiencies. Risks and unforeseen events also give rise to claims (Cunningham, 2014).

2 . 4 . 1 . 1 Delay Claims by the Contractor in the United States

Federal Acquisition Regulation (“FAR”) is a set of rules that govern the government procurement process. It regulates the government's purchasing of works, goods, and services. It does not regulate the private sector's purchasing activities, except to the extent of it is integrated into government solicitations and contracts by reference. The FAR is codified in title 48 of the U.S. Code of Federal Regulations. It is prepared, issued, and maintained collaboratively by the Administrator of General Services, the Secretary of Defense, and the Administrator of the National Aeronautics and Space Administration, subject to the approval of the Administrator of Federal Procurement Policy. The FAR provisions can be interpreted by entities such as the Federal courts, the General Services Board of Contract, and the Armed Services Board of Contract Appeals. Generally, all governmental bodies are required to comply with FAR.

The ability of the contractor to recoup the increased costs resulting from the delay depends on the cause of the delay, the nature of its impact on the contractor, and the contract provisions regarding compensation for the delay. In general, there are two types of compensable delays: (1) government-ordered suspensions; and (2) constructive suspensions (Beezley & Osborne, 2020).

Government-ordered suspensions arise when the contracting officer issues a directive to suspend or stop work. In general, these suspensions are covered by Federal Acquisition Regulation 52.242-14 addressing suspension of work, and FAR 52.242-15, addressing stop-work orders. Both clauses grant the government the unilateral right to

suspend or stop part of all of the work and, in the meantime, contain different remedies for the contractor in seeking to offset the increased costs resulting from the government's directive (Beezley & Osborne, 2020).

FAR 52.242-14 — suspension of work — allows the contracting officer to unilaterally suspend, delay, or interrupt all or part of the contractor's work for the government's convenience. If the delay or suspension to performance is for an unreasonable period of time and caused by the contracting officer's conduct or failure to act within a time specified in the contract (or a reasonable time if none specified), then "an adjustment shall be made for any increase in the cost of performance of the contract (excluding profit) necessarily caused by the unreasonable suspension, delay, or interruption, and the contract modified in writing accordingly (Federal Acquisition Regulation, 2019).

A four-part test to recover a fair adjustment under the FAR suspension of work clause has been recognized by the U.S. Court of Appeals for the Federal Circuit: First, there must be an unreasonable period of delay extending the Contract completion time. Second, the delay must be the result of government action or inaction. Third, the delay resulted in some losses. Fourth, there is no delay concurrent with the suspension that is the contractor's fault. The burden of proving the extent of the delay and the causal relationship between the government's behavior and the delay will be borne by the contractor. It is worth noting that the suspension of work clause does not allow for adjustments for suspensions or delays for which an equitable remedy is provided for or excluded under any other provision of the contract (Beezley & Osborne, 2020).

FAR 52.242-15, the stop-work order clause, in turn, grants the contracting officer a unilateral right to stop the work or part thereof for 90 days. Once a stop-work order is received, the contractor is required to immediately comply with its provisions.

The contractor's obligation includes taking appropriate steps to reduce the incurrence of costs of the work covered by the order during the period of a work stoppage (Federal Acquisition Regulation, 2019)

After these 90 days, the contracting officer may extend the order with the contractor's consent, cancel the order, or terminate the work under the termination clause for convenience or default. In the absence of one of these procedures, the contractor is expected to resume work when the stop-work order expires. Where the stop-work results in an increase in time or costs adequately allocated to the contractor's performance under the contract, and the contractor asserts his right to the adjustment within 30 days after the end of the period of work stoppage, the contracting officer may modify the contract to take into account the effects on schedule or price. If the contract is terminated due to default or convenience, the contractor may still seek fair adjustment or settlement to recover reasonable costs incurred as a result of the stop-work order. Importantly, idle equipment or labor costs may be recoverable after a stop-work order if the contractor shows that he has made reasonable measures to mitigate those costs. Whether a stop-work order mentions that the contractor is expected to remain available for follow-up after the end of the closure period, may affect the reasonableness of salary and other costs paid for retaining skilled personnel during the stoppage period. Accordingly, federal contractors must be prepared to promptly confirm requests for equitable adjustments and demonstrate the reasonable cost impact to the contractor, ideally utilizing actual cost data resulting from any government-ordered suspension or delay (Beezley & Osborne, 2020).

As for Constructive Suspensions, according to the 2006 edition of "Administration of Government Contracts", Constructive suspensions occur when work is stopped in the absence of an explicit order by the contracting officer and the

government is found to be accountable for the stoppage. When a contractor's performance is effectively suspended, but the government does not formally direct the performance suspension, the law considers "what has been done that should have been done" and identifies the suspension as a construction suspension. In such case, the contractor may recover under the applicable "changes" clause (Cibinic, Nagle, & Nash, 2006).

The requirements for a constructive suspension claim are similar to the requirements for a government-directed suspension. Most importantly, the contractor must notify the government that the work has been constructively suspended as a result of government action. One of the common examples of constructive suspensions is the government's failure to approve specifications or submittals in a timely manner, resulting in unreasonable delays for the contractor from performing the related work. Furthermore, the constructive suspension may take place when the government informs the contractor that it intends to issue a change order, causing the contractor to suspend the work rather than continue with performance that may become worthless or wasteful as a result of the change. Contractors who have been constructively suspended must be prepared to confirm a constructive suspension claim in a timely manner. Contractors should also seriously document the actual cost impact of the constructive suspension (Beezley & Osborne, 2020).

In the case of *Howard Contracting, Inc. v. G.A. Macdonald Construction Co., Inc.*, the California Supreme Court has effectively ruled that a subcontractor can recover damages for prolongation cost caused by delays and disruption even though the recovery of such claims was prohibited by a City's prime contract. The case is substantial for several reasons. First, it affirms the statewide public work contract prohibition against "no damage for delay" clauses. Second, the court decision also

affirms that in every construction contract, the law makes an undertaking that the employer will allow the contractor to access the project site promptly to promote the performance of work immediately. Third, the court has concluded that, as a matter of law, the main contractor can file a subcontractor's "pass-through" claims against the employer. Fourth, the contractor can recover extended overhead as a result of project delay, and the Eichleay Formula for determining the allocation of home office overhead in contractor delay claims has been legitimized by the courts.

California Public Works Code § 7102 must be recognizable to public works contractors that encounter delays induced by a public entity. According to the code, contract terms in public works construction contracts and subcontracts under them that aim to minimize the public entity's liability for delay never exclude the contractor or subcontractor from recovering damages suffered as a result of that delay. According to the statute, the public entity cannot request a waiver, alter, or limit the applicability of this clause. Nonetheless, the statute cannot be interpreted to invalidate any clause in a public works construction contract that requires the issuance of a notice of delay or provides liquidated penalties.

In general, charter cities with their own procurement regulations are not covered by California public works procurement statutes. California has several charter cities, the most well-known of which are Los Angeles and San Francisco. While the statutes are explicit, the City of Los Angeles argued in the Howard Contracting case that it was a charter city, and so the statute could not apply to any public works contracts it entered into. Because charter towns are not usually subject to state procurement legislation, the contractor should familiarize himself with the charter city's procurement ordinances before entering a contract with them. However, the court held that the "no damage for delay" clause in the city's public works contract did not apply.

Generally, a party to a contract cannot hinder the performance of the other party unless there is a legal excuse for such action. The Howard Contracting court stated the accepted rule that “in every construction contract the law implies a covenant that the owner will provide the contractor timely access to the project site to facilitate the performance of work.” In regards to public works projects, providing misleading plans and specifications is treated as a breach of the implied warranty of the correctness of the plans. As such, the act of providing misleading plans constitutes a breach of contract rather than a fraudulent act.

In federal projects, delays that extend the activities on the critical path of activities may be compensable. In order for a contractor to be awarded delay damages, a federal court has held that the contractor must present evidence that the delay extended a critical activity. Typically, a computer generated network scheduling diagram, which is referred to as critical path schedule, is introduced into evidence to prove or disprove that the delay impacted a critical activity. The Howard Contracting court held that a bar chart is an acceptable evidence if it identifies the project’s critical path and that the delays impacted that path. A critical path method scheduling matrix remains the best scheduling device. However, if a bar chart is used during the course of construction, the critical activities on the chart should be delineated. By doing so, it will be better able to prove the delays at the end of the project and/or if a lawsuit is filed.

When a subcontractor’s construction performance is altered by the acts of the project owner, the subcontractor seeks a change order from the prime contractor. The prime contractor then presents the change order or claim to the owner. The general contractor passes the changes through to the owner since the subcontractor may not have legal standing to assert a claim directly against the public agency due to a lack of

privacy of contract but may have the right to assert a claim against the general contractor. The Howard Contracting court reaffirmed that as a matter of law a general contractor can present a subcontractor's claim on a pass-through basis.

In the Howard Contracting case, a clear critical path delay was attributable to the City of Los Angeles. However, the delay did not cause an extension of the time for completion of the project beyond what was mentioned in the contract. In the normal delay claim, the delay extends the time for completion beyond the original duration, thereby increasing the period of time for which extended overhead is suffered. Typically, the contractor incurs overhead that is not absorbed in the original contract amount. Generally, "unabsorbed overhead" consists of time-sensitive indirect costs incurred despite construction inactivity on a project such as home office overhead, including accounting and payroll services, general insurance, salaries of upper-level management, heat, electricity, taxes and depreciation.

The City of Los Angeles argued that the contractor was not entitled to recover extended "unabsorbed overhead" because the project was completed on time. The court decided that the contractor could recover extended overhead for delays even if the project was completed before the contractual time for completion. However, such an "unabsorbed overhead" claim can only be proven by satisfying a two-part test. The contractor must demonstrate that (1) it had the intention and capacity to complete early when the contract was concluded, and (2) that it actually would have completed early but for the actions of the government.

In conclusion, the California Supreme Court has now outlined the standards relating to contractor's delay claims on public works projects. Accordingly, contractors should be aware of their ability to recover for such damages and carefully document

the delays as they occur (Howard Contracting, Inc. v. G.A. Macdonald Construction Co., Inc., 1998).

2.4.1.2 Delay Claims by the Contractor in Ireland

In Ireland, the Public Works Contract PWC-CF1, version 1.9, released in January 2014, is a standard contract for public sector contracts of more than EUR 5 million in value (Cunningham, 2014). Clause 10 of the Contract "Claims and Adjustments" addresses contractors' claims, along with time extensions and variations. In brief, the default compensation events are: failure to provide access to the site or part thereof; change orders; suspension of the work by the public entity; late instructions; incorrect site or setting out information; unnecessary opening up; early employer occupation of works; failure to provide a work item or anything else required by the contract and unforeseeable interference by employer's employees (Office of Government Procurement, 2014).

According to sub-clause 10.7. 1., if the time for completion of the project is extended due to a compensation event, then the amount of the delay cost will be added to the contract sum. Such amount shall be determined by applying the daily rate of delay cost offered by the Contractor in his tender to each site working day for which the time for completion of the Works has been extended as a result of the compensation event. If the daily rate of delay cost is not mentioned in the contractor's tender, the delay cost will be estimated based on the expenses, excluding profit and loss of profit, unavoidably incurred by the Contractor as a result of the delay to the time for completion of the project caused by the compensation event in respect of which that date has been extended under the Contract (Office of Government Procurement, 2014).

Further, sub-clause 10.3 provides that if the Contractor considers that it is entitled to an extension of time or cost compensation, or has any other entitlement

under or in connection with the Contract, the Contractor shall within 20 working days after it became aware, or should have become aware, of the event that resulted in such an entitlement, communicate a notice of this to the employer. The notice must be given according to sub-clause 4.14 and prominently state that it is being given under sub-clause 10.3 of the Contract (Office of Government Procurement, 2014).

2 . 4 . 1 . 3 Delay Claims by the Contractor in the United Kingdom

The Public Works Contract and many standard form contracts in use in the UK contain detailed claims clauses under which the contractor or the sub-contractor can claim against the other party for loss and expense suffered as a result of delay or disruption due to certain specified causes. Although most contractors claim loss and expense for delay and disruption under the terms of a contract, they may also have a concurrent right at common law to claim damages for breach of contract (Cunningham, 2014).

Murdoch and Hughes (2008) commented that this feature of claims [employer's disruption] provisions means that, in many cases, an event that enables a claim to be made will also entitle the contractor to recover damages for breach of contract. In particular, it may amount to a breach of the employer's implied obligation of co-operation with the contractor. If this is so, it is for the contractor to decide whether to sue for breach of contract at common law or to claim under the appropriate clause in the contract. The contractor's right to choose between these remedies can only be removed by clear words in the contract itself, and this would be most unusual (Murdoch & Hughes, 2008).

Most contracts, however, require the contractor to give notice of any claim as soon as possible, but in any event within a certain period of time following the occurrence of the cause of the delay. It is considered that the absence of notice would

undermine the contractor's claim for an extension of time (Yogeswaran, Kumaraswamy, & Miller, 1998).

In *London Borough of Merton v Stanley Hugh Ltd* (1985) relating to the contract form of the UK Joint Contracts Tribunal JCT63, the court held that the notice was not a condition precedent to the grant of an extension of time. However, failure to give such notice was a breach of contract that could be taken into account in determining the extension of time, i.e. that the extension granted should reflect the extent by which the employer's right to completion or compensation may have been thereby prejudiced (*London Borough of Merton v Stanley Hugh Leach Ltd*, 1985). It is therefore prudent for the contractor to provide notice of its intent to claim in order to preserve his rights to full compensation. On the other hand, if the wording of the clauses is more specific with regard to notice being a prerequisite for the consideration of the claim, then the contractor obviously will lose his right to claim in the event that the notice is not provided (Yogeswaran, *et al*, 1998).

A relatively recent case, *Education 4 Ayrshire Ltd v South Ayrshire Council* (2009), concerns the question of what happens when a contract clearly states how and when a notice to claim should be provided but one of the parties do not strictly follow the form of notice provisions (*Education 4 Ayrshire Ltd v South Ayrshire Council*, 2009).

Education 4 Ayrshire Ltd, an SPV (special purpose vehicle) set up for the purpose of a PPP, entered a project agreement with a local authority, *South Ayrshire Council*, for the design and construction of six schools in Ayrshire. The notice provisions in the Project required notice of any claim for time or compensation to be sent within a specified timeframe to the Chief Executive of the Council. Communications were sent but not in precisely the correct form.

The SPV conceded that compliance with the notice requirements was a condition precedent to entitlement to the relief sought and that only a letter dated 2 May 2007 to the chief executive of the defenders could be relied upon as a notice. The SPV submitted that there could have been no doubt as to what was intended to be conveyed by the letter of 2 May 2007 where the defenders had been kept fully informed of the relevant developments, albeit through reference to a letter from the building contractor (employed by the SPV). Therefore, the Authority could have inferred from the communications what was going on. Further, it was argued that all that was lacking in the letter of 2 May 2007 was a formal statement that the SPV was claiming for an extension of time, for payment of compensation and/or for relief from their obligations under the project agreement and to require such wording would be unduly formalistic (*Education 4 Ayrshire Ltd v South Ayrshire Council*, 2009).

Lord Glennie disagreed, holding that in cases where the two parties specified in clear terms what one of them should do to claim a specific compensation, the court should be slow in seeking to exempt that party from the consequences of his failure. Strict adherence to contract requirements is essential. Therefore, failure to provide proper notice results in the contractor's claim being denied. The relevant clause required that a notice be sent within a particular time to the chief executive of the defenders giving notice of what claim the pursuers were making, which the letter from the SPV did not do; it did not matter that, at certain levels, employees of the defenders might have been aware of what was going on or that the SPV's letter, when read with a letter from the building contractor, referred to therein, claiming an extension of time and compensation, would have enabled the defenders to infer that the claim by the building contractor against the pursuers was going to be passed up the line to them, while the

purpose of the clause was to avoid such uncertainty (*Education 4 Ayrshire Ltd v South Ayrshire Council*, 2009).

A good theoretical decision in favor of *pacta sunt servanda* and adherence to what the parties have agreed strictly, it has to be wondered whether this is the right practical decision given that effectively notice, albeit in a different form, had been given. The case serves as an important lesson for contractors, not just those involved in PPP / PFI, to take special notice of notice requirements under contracts (Ward G. , 2010).

2 . 4 . 1 . 4 Delay Claims by the Contractor in Egypt

According to Article 48 of the new Public Contracts Law No. 182 of 2018, if the contractor delays in implementing the contract beyond the time for completion set out in the contract or the date set in the approved time schedule for reasons attributable to the contractor, the public authority may, for public interest considerations, grant the contractor a time extension, as a grace period, to complete the project and apply delay damages. The delay damages shall be calculated and applied as of the start date of time extension, with no need to serve a notice or to take any other further action. On the other hand, if the delay is for reasons not attributable to the contractor, the delay damages will not be applied (Law No. 182 of 2018 Promulgating the Law Regulating Contracts concluded by Public Bodies, 2018).

Article 98 of the executive regulations of the new Public Contracts Law No. 182 of the year 2018 affirmed the same provision and added that the Contract administrator in the Public Authority is responsible, as much as possible, for removing the obstacles and solving the problems that may lead to delay in the implementation of the project (Executive regulation of Public Contracts Law, 2019).

Both the law and the executive regulations remain silent on compensating the contractor despite the losses he may incur because of extending the project period for reasons related to the public body.

When a delay is incurred to a construction contract, assuming it is a critical delay meaning it will cause a delay to the date for completion, a number of consequences follow. First, the activity or activities most directly involved will be delayed. Other activities may be able to proceed unaffected. That may mean that some, but not all, subcontract works are affected. Second, the delayed activities will usually delay those which follow. This may mean that project work that was due to be completed during the warm summer months, for example, must necessarily be carried out in a winter season with less available daylight hours. The effects can be significant on projects that must be carried out within defined weather conditions or outside winter months, as frequently arises on civil engineering projects. Third, if the project's duration is extended, the site management team and plant and site accommodation will need to remain on the site for a longer period, through to the end of the project. Fourth, it follows that the date at which the site management team will be released to the next project will also be delayed. Fifth, there may be some increased involvement by head office staff in managing the consequences of the delays. Sixth, the contractor might propose, or instigate some program or resource changes aimed to limit or reduce the likely delay (Champion, 2011).

2 . 4 . 2 Termination for Contractor's Default

A "termination for default" is the government's exercise of the right to terminate a contract, either in whole or in part, because of the contractor's actual or anticipated failure to perform its contractual obligations.

The repercussions of a contract termination for default might be severe for the contractor. There is a sudden omission of work, which has a negative impact on overhead, and the opportunity to get profit is dissipated. The contractor also has a risk of being ordered to pay back progress payments, being held accountable to the government for any increase in costs of re-procurement, and going to court to resolve the disagreement. Even worse, a default termination on a contractor's record may impede the contractor's ability to secure subsequent Government projects. (Seidman & Banfield, 1998).

Default termination might be based on the failure of the contractor to deliver or perform on time, failure to meet specifications, failure to make progress or prosecute the work or failure to perform other contract provisions. In the following section, the termination for contractor's default in various countries will be demonstrated along with some supporting cases.

2 . 4 . 2 . 1 Termination for Contractor's Default in France

According to the State Council decision of September 30, 1983, the contracting public authority has the power to terminate the administrative contract even in absence of the termination clause in the contract. Furthermore, if the contract states the reasons for termination, the judge has the right to consider that the list of such reasons is not exclusive (Sararu, 2011). This unilateral dissolution of the contract constitutes a privilege of sovereign authority justified by the defense of the public interest, and the termination shall be without recourse to the judiciary and without compensating the contractors for the damages incurred as a result of the termination. On the other side, if the public authority fails to fulfill its obligations and duties under the contract, the contractor has no right to unilaterally terminate the contract, instead, he has the right

only to be compensated for the damages incurred as a result of non-fulfillment of the public authority's obligations (Sararu, 2011).

In the case of SARL Comexp v Saint-Tropez Municipality, the Municipality entered into a contract with Comexp on April 17, 1969 to operate a household waste treatment plant built by the Municipality on its own land. After several fires which took place in the garbage accumulated around the buildings of the factory, the Municipality sent formal notice to the company to evacuate the residues of domestic waste treatment at its own expense. On November 14, 1974, the Municipality terminated the contract as a result of the deficiency of the Company in managing the plant. The company filed a lawsuit before the administrative court of Nice demanding the cancellation of the contract termination and compensation for such unlawful termination. On July 3, 1980, the Administrative Judge rejected the Company's claim and upheld the municipality's right to terminate the contract.

Comexp brought the case before the State Council seeking the annulment of the judgment of July 3, 1980 of the Administrative Court of Nice dismissing its claim for the annulment of the decision of the contract termination by the Municipality. In addition, Comexp required the condemnation of that Municipality to pay it an indemnity of two and half million French francs because of the unlawful termination of the contract and faults committed by the Municipality in the performance of the contract. Comexp claimed that the contract is not a concession contract, so the applicant company has not made any investment in fixed equipment to be amortized over the entire duration of the operation; therefore, it was the sole responsibility of the municipality of Saint-Tropez to bring the civil defense and other required equipment. Comexp also claimed that Clause 20 of the contract, which states that a notice should

be served giving it enough time to remedy any defect before termination, was not applied.

On September 30, 1983, the state Council rejected all Comexp claims on the basis of: (i) it is not for the administrative judge to annul the termination measure taken by this municipality and the irregularities alleged against this decision could, if necessary, only entitle the Company to compensation for the damage it would have suffered, (ii) the Company has been put on notice to remedy the serious situation caused by its default which seriously threatens public health and safety. Therefore, the Municipality of Saint-Tropez has committed no fault by proceeding with the termination of the contract (S.A.R.L. Comexp v commune de Saint-Tropez, 1980).

2 . 4 . 2 . 2 Termination for Contractor's Default in the United Kingdom

The Public Contracts Regulations 2015 “PCR 2015” states in Article 73 that the public authority has the right to terminate contracts in case: the contract has been substantially modified, the contractor should have never been awarded the contract on the basis that he was subject to the causes of mandatory exclusion at the time of awarding and where the Court of Justice has declared that the contract award involved a serious infringement of the public procurement rules. However, for public procurement contracts that do not contain explicit conditions stipulating those provisions, power for the public contracting authority to terminate in the circumstances set out above will be implied. Nevertheless, it is worth keeping in mind that:

- Public contracting authorities are obliged to include these provisions in the contract conditions and should not simply rely on the implied terms, and
- Termination right alone, in the absence of further details, leaves uncertain matters of compensation to the contractor and could result in a dispute (Public Law Today, 2017).

Meanwhile, there are no termination rights implied into the contract in favor of the contractor. In many cases, the extent to which the contractor objects to the provisions of termination by the public authority depends on the stipulated consequences of termination. If it is explicitly stated in the contract conditions that the contractor will be compensated for incurred losses and loss of profits, it is unlikely to object to the right of termination being added. Where such right is added with only partial compensation or no compensation, the contractor is likely to object and resist the provisions. Greater certainty can be achieved through the inclusion of specific drafting for the causes of termination and the consequences thereof (Public Law Today, 2017).

The case of *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar* provided clarity on the power of the public authority to terminate the contract. The proceedings are brought by *Obrascon Huarte Lain SA "OHL"*, a substantial Spanish civil engineering contractor, against the Government of Gibraltar "*GOG*" before England and Wales High Court (Technology and Construction Court), in relation to a contract for the design and construction of a road and tunnel under the eastern end of the runway of Gibraltar Airport. The contract was an amended form of the FIDIC Conditions of Contract for Plant and Design-Build for Electrical and Mechanical Plant and for Building and Engineering Works, Designed by the Contractor, 1st edition, 1999; the Yellow Book.

Unfortunately, after more than two and a half years of work on the two-year project and when just 25 percent of the work was completed, the contract was terminated. Issues arose about who is legally responsible and at risk for situations that have led to the termination of the contractual relationship. Although the overriding issue revolved around the termination and whose actions were or were not justified in relation

thereto, the main underlying issue was whether the extent and amount of contaminated materials in the ground to be excavated were or were not reasonably foreseeable by an experienced contractor at the time of tender; if not so foreseeable, that would not be OHL's risk. The case of OHL is that the amount of the contaminated materials was so large that it required a redesign of the work, especially in the tunnel area that took too long time.

In the first instance case, the Judge considered that the employer was entitled to terminate the contract. In addition, the judgment clarified that, under Sub-Clause 20.1 of the FIDIC Conditions "Contractor's Claims", time does not start running for the Contractor to give notice until the date on which he is aware - or should have been aware - of the delay resulting from a particular event or circumstance. The court only considered Sub-Clause 20.1 in relation to the extension of time, but the same principle is expected to apply to claims for additional payment made pursuant to the same provision.

The contractor appealed on the grounds that the court had incorrectly found that contamination encountered was foreseeable, failed to find that documents provided by the engineer constituted variations and failed to find that the employer had invalidly terminated the contract. The contractor's appeal against the decision was unanimously dismissed by the Court of Appeal. The appeal judgment provides contractors with some helpful explanation in respect of each of these grounds of appeal.

In respect to what constitutes unforeseeable physical conditions, the Court of Appeal was reluctant to overturn findings of fact made at the first instance, particularly in the case of appeals from a specialist court such as the English Technology and Construction Court. However, the Court of Appeal did note that the Judge had held that an experienced contractor would make its own assessment of all available data. In that

respect the judge was plainly right. Clauses 1.1 and 4.12 of the FIDIC conditions require the contractor at tender stage to make its own independent assessment of the available information. The contractor must draw upon its own expertise and its experience of previous civil engineering projects. The contractor must make a reasonable assessment of the physical conditions which it may encounter. The contractor cannot simply accept someone else's interpretation of the data and say that is all that was foreseeable.

Regarding the impact of the Engineer's instructions, the Court of Appeal found that the documents referred to it did not amount to instructions to vary the contract. They were either matters which were the contractor's obligations in any case, concessions by the employer which could be withdrawn and were not contractual or matters which the contractor had not, in fact, acted upon.

The Court of Appeal first addressed the contractor's claim that it was undertaking a re-design elected by both the employer and the contractor. However, the Court of Appeal found that neither GOG nor the Engineer made an election which committed them to adopt the re-design and rejecting the original design of the tunnel. The Engineer made it clear that the original design was quite satisfactory and capable of being constructed without any risk to health or safety. The Engineer was simply considering the re-design as a modification put forward by OH. In addition, when the engineer checked the contractor's design, he was considering whether the design was technically acceptable and whether, if the design was implemented, the completed works would accord with the contract. If the re-design is satisfactory in all those respects, it is not for the Engineer to reject the design because he thinks it will take too long to build as the contractor claimed.

The Court of Appeal then considered termination under Clauses 15 of the FIDIC Conditions and the obligation under Clause 8 to proceed with the works with due

expedition and without delay. The Court decided that the obligation under Clause 8 is not directed to every task on the contractor's work. Rather it is directed to activities that are or may become critical. The Court of Appeal then considered whether there was a reasonable excuse, within the meaning of Clause 15, for the contractor's failure to proceed with the works. On examination of the facts, it was found that there was no reasonable excuse. The appeal was unanimously rejected and agreed that the employer had validly terminated the contract. The decision provides helpful clarity and reasoning to understand the contract conditions and should, combined with the first instance judgment, provide some guidance in the areas considered (Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar, 2014).

2 . 4 . 2 . 3 Termination for Contractor's Default in the United States

Termination for default (or termination for cause as it is known in commercial contracts) has been a fundamental government right in public procurement since the nineteenth century. Despite the government's unquestioned need for this remedy, courts and boards frequently make negative observations about the procedure. Some cases declare that termination for default is a "harsh" remedy and "disfavored" in the law. A refrain with roots going back to 1875 is that "default terminations [are] a species of forfeiture." Along similar lines, courts and boards frequently state that the government has a "heavy burden" in proving the grounds for termination for default (which is a government claim under the Contract Disputes Act). Still, other tribunals observe that the remedy is "strictly construed" against the government and that it is a "drastic sanction" and an avenue of "last resort." Accordingly, courts and boards have asserted that "every reasonable presumption against the party seeking to invoke [termination for default] will be drawn." (Feldman, 2018).

When the contractor before a court or board successfully challenges the termination for default, the contractor's remedy under standard contract clauses is a conversion of the improper default termination to a termination for the convenience of the government. Putting it another way, an unjustified termination for default is a constructive termination for convenience. This conversion device protects the government from a separate action for breach of contract arising from an allegedly improper default termination. Thus, when the government legitimately invokes the convenience remedy, the contractor cannot obtain breach damages for anticipated profits (Feldman, 2018).

According to Federal Acquisition Regulation 49.401 - Termination for Default

- (a) Termination for default is the exercise of the government's contractual right to terminate the contract in whole or in part due to the contractor's actual or expected failure to fulfill its contractual commitments and obligations.
- (b) If the contractor establishes, or it is otherwise determined that the contractor was not in default or that the failure to perform is justified; For example, arose due to circumstances beyond the contractor's control and without negligence or fault of the contractor, the default clauses prescribed in 49.503 and located at 52.249 provide that a termination for default will be considered as a termination for the Government's convenience. Accordingly, the rights and obligations of the parties will be established.
- (c) The Government may, in appropriate cases mentioned in paragraph (h) of the Default clause at 52.249-8, exercise rights of termination or cancellation in addition to those in terms of the contract.
- (d) Notwithstanding the provisions of 49.401, the Contracting Officer may reinstate the terminated Contract by amending the notice of termination, with the

written consent of the Contractor, after deciding that the supplies or services are still required and reinstatement is beneficial to the government.

Moreover, the Contracting Officer must consider the factors noted at FAR 49.402-3(f) before terminating a contract for default. When determining whether or not to terminate for default, the contracting officer must fairly take into account the following factors:

1. The conditions of the contract and governing laws and regulations;
2. The particular failure of the contractor and the possible excuses for that failure;
3. The availability of alternate sources of supplies or services;
4. The urgency of the demand for the services, as well as the time it will take to obtain them from other sources, in comparison to the time the delayed contractor, will be able to finish the work;
5. The impact of a termination for default on the contractor's ability to liquidate advance payment, guaranteed loans, or interim payments;
6. The contractor's level of importance in the government procurement program; and
7. Any other relevant circumstances and facts (Federal Acquisition Regulation, 2019).

A recent case, *Alutiq Manufacturing Contractors v. The United States*, does a great job of breaking down the process for making a termination for default on a federal project. Alutiq Manufacturing Contractors, LLC ("AMC") has been contracted to perform construction work at a United States Air Force base in Colorado. The start of work was difficult; immediately, there were clashes between representatives of both contract parties; in addition, AMC struggled to fulfill the construction schedule. Furthermore, AMC's documentation process was terrible- the necessary reports were

not prepared, and record-keeping was poor, at best. Because of these issues, the Air Force provided AMC with a notice to remedy the documentation procedures. Essentially, Air Force contracting officers required that AMC clean up their work—otherwise, AMC's contract could eventually expire. Upon receiving this notice, AMC informed the Air Force that the issues would be resolved and that the project would not be delayed. However, as the problems persisted and the project's time schedule deteriorated, the contracting officers issued another notice to cure as a second warning. This time, AMC took immediate action. AMC made significant staff changes, improved their documentation with appropriate daily reports and photos, and put an acceleration plan in place to catch up on schedule. AMC also explained that unexpected issues were slowing down the project - specifically, there were different site conditions. The soil on the project property was not suitable to operate as planned. However, by all accounts, AMC has taken significant steps toward fixing the flaws.

The Air Force's contracting officers apparently did not believe that AMC's efforts were sufficient to bring the project back on schedule. They terminated the contract with AMC for default, giving 13 reasons why AMC's contract would be rescinded. The main reason was that the contracting officials believed that AMC would be unable to get the project back on the right track. This has been claimed despite AMC's acceleration plan, which, if succeeded, would bring the project back to the original time schedule. It is worth noting that at this point, there was a lot of animosity between the contract officers and AMC. It is also worth noting that AMC's replacement contractor faced many of the same problems as AMC, including a soil problem on the project. AMC filed a lawsuit claiming that the contract was not terminated due to its default, contracting officials claimed. Instead, the contract was terminated for cause, according to AMC.

In the end, the court ruled in favor of AMC. When it came to terminating the contract, it appears that the contracting officials did not follow the appropriate procedures. Instead, they relied on questionable and out-of-date project timetable estimates, failing to account for AMC's new accelerated plan.

The most serious problem, however, was that the failure of the contracting officers to consider the factors listed in FAR 49.402-3. That part of the Federal Acquisition Regulations lays forth specific procedures that should be followed when evaluating whether or not to dismiss a contractor who has defaulted on a contract. According to the court, even though AMC could not execute the work as stipulated in the contract, the contract could not be terminated for default because the required default procedures were not followed. Because these procedures were fully disregarded, the court determined that the contract was terminated for convenience (LEVELSET, 2020).

2 . 4 . 2 . 4 Termination for Contractor's Default in Turkey

Termination as a result of negligence on the part of the contractor is stipulated under the Procurement Contracts Code. A contract may be terminated in the following cases:

- the contractor's failure to comply with a notice expressly providing for the commission of breaches and giving a period of 10 days in which the contractor fails to fulfill its obligations;
- the bankruptcy of the contractor;
- the contractor commits acts prohibited under Article 25 of the Procurement Code; and
- following the completion of the tendering process, the contractor commits acts prohibited under the Procurement Code (Kesikli & Kaşka, 2016).

Article 20(a) is a catch-all article that covers all kinds of breaches. It provides that the bidding entity may terminate the contract after granting an extension to the contractor if the contractor fails to fulfill its obligations stipulated in the procurement documents or the agreement, or on time (Kesikli & Kaşka, 2016).

2 . 4 . 2 . 5 Termination for Contractor's Default in the Kingdom of Saudi Arabia

One of the most important characteristics of the administrative contract in the Kingdom of Saudi Arabia is the right of the contracting agency to withdraw the work from the contractor and terminate the contract or assign the execution of the work to a third party at the contractor's expense without prejudice to its right for compensation for damage incurred as a result. Such right exists in any of the following situations: (a) If the Contractor himself or through an intermediary, directly or indirectly, bribes an employee of the contracting agency, or if the contract is awarded to him by means of bribery; (b) If the contractor fails to commence the work without good reason, procrastinates in its performance, or if he is in breach of any of the terms and conditions of the contract and does not rectify the situation within fifteen days from the date of notifying him in writing to do so; (c) If the contractor assigns his obligations under the contract or subcontracts its performance without the prior written consent of the contracting agency; (d) If the contractor becomes insolvent, becomes bankrupt, files for bankruptcy, is put under receivership according to a court order, or, if the contractor is a company, the contractor is liquidated and dissolved; (e) If the contractor dies and the contract was awarded to him based on his personal qualifications, the contracting agency may terminate the contract or continue it with the heirs if they have proper technical and financial guarantees for the best implementation of the contract (Al-Jarbou, 2011).

In addition to the termination for the contractor's default, the contracting agency has the right to terminate the contract for the public interest even when there is no fault on the part of the contractor. Prior approval of the contractor, or prior confirmation of the Board of Grievances, is not needed. Nonetheless, according to the Board of Grievances, if the contractor incurred costs or losses as a result of such early termination, the contractor shall have the right to be sufficiently compensated (Al-Jarbou, 2011).

The Board of Grievances Decision No. 79/T/1 in 1406 A.H. (1986) illustrates such a concept. The disputed contract, in this case, was a contract concluded between the Ministry of Health and a Saudi private corporation that was obligated, according to the provision of contract, to construct an expansion of King Abdul-Aziz Hospital in Jeddah. During the construction, the Ministry changed the hospital construction plans in order to have it function as a well-developed training and educational institution. Such changes made it very difficult for the contractor to continue the work. Consequently, the Ministry terminated the contract. The Board declared that the contracting agency has the right to terminate the contract for public-interest reasons. This right which is granted to the agency does not exclude the right of the contractor to be compensated (Al-Jarbou, 2011).

2 . 4 . 2 . 6 Termination for Contractor's Default in Kuwait

The old law of public tenders of the State of Kuwait, Law No. 37 of 1964 has been replaced and superseded by the new law, Law No. 49 for the year 2016. Although the new law, like the old one, did not mention cases of termination of the administrative contract, it is stated in Article 86 that the Central Agency for Public Tenders is committed to develop written model contracts which include the provisions and conditions under which the administrative contracts are executed, and they shall consist

of two booklets, one for the general conditions and the other for the particular conditions. The booklet of the general conditions determines the common general provisions of the administrative contracts while the booklet of the particular conditions determines the conditions relating to each contract separately, including the subject of the contract with reference to the place of works, contract amount and duration, payment terms, penalties imposed on the contractor in case of delay and nonperformance, documents listed in the contract according to their priorities and cases of contract termination (Law of Public Tenders of Kuwait, 2016).

2 . 4 . 2 . 7 Termination in Administrative Contracts in Egypt

According to Article 100 of the executive regulations of the new Public Contracts Law No. 182 of the year 2018, the public entity is obliged to terminate the administrative contract in two instances. First, the public entity has to terminate the contract if the contractor submitted incorrect or false data or documents for the purpose of fraud or tampering. Second, the public entity has to terminate the contract also if the contractor is involved in any fraud, corruption or monopoly practices, such as collusion with the administrative authorities or attempting to influence them for illegal purposes, or to prevent any competition of any other bidders or to agree with them for illegal purposes in violation of the fair competition and violation of the principles of transparency, competition and equal opportunity. Article 50 of the law added another case of obligatory termination, which is the case of contractor bankruptcy or financial insolvency. In the aforementioned cases, not only should the contract be terminated, but the contractor will be prohibited from entering into a future administrative contract with any of the public entities and authorities (Executive regulation of Public Contracts Law, 2019).

On the other hand, Article 51 of the new Public Contracts Law and Article 101 of the Executive Regulations of the Law state that public authority is entitled to terminate the administrative contract whenever the contractor has committed a material breach to any of the contract provisions. However, the relevant articles do not specify certain instances for such material breach and give the public entity the exclusive right to judge the seriousness and the performance of the contractor and take the decision of termination at its sole discretion.

2 . 4 . 3 Limit of Compensation under Performance Guarantee

The construction industry uses guarantees as security for the payment of compensation. Guarantees are used to ensure that the contractor's duties under the underlying construction contract are carried out.

A performance guarantee is defined as a contract entered into between a contractor and a surety whereby the surety guarantees to the project owner, the employer, the contractor's faithful performance of its contractual duties and completion of the project. From this definition, it is clear that a performance guarantee involves a tripartite contractual relationship. The surety's contractual obligation to the employer is limited to the "face amount" of the performance guarantee (Frakes, 2002).

Based on the definition, the guarantee has two characteristics:

1. There are two contracts, a contract of guarantee, and the underlying primary contract, which is to be guaranteed.
2. There are three parties: the guarantor, beneficiary (employer), and contractor. The guarantor and beneficiary are parties to the contract of guarantee. The beneficiary and the contractor are parties to the underlying primary contract (Gould, 2014).

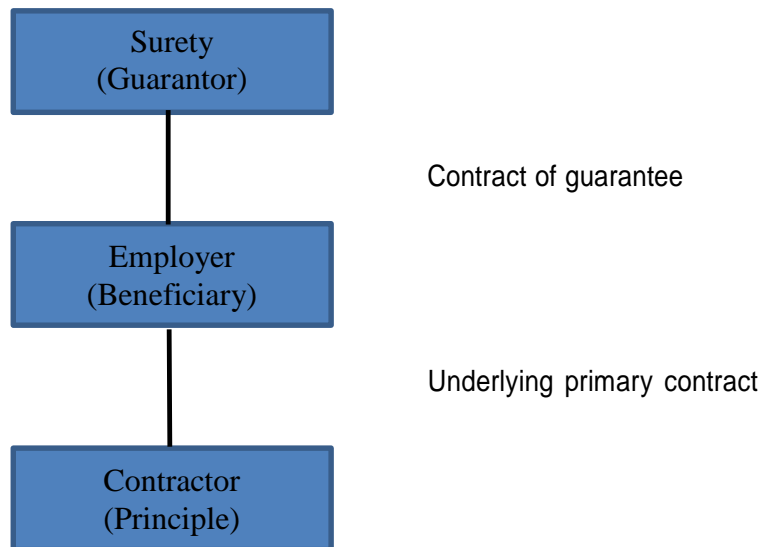


Figure 3: Guarantee Characteristics (Gould, 2014)

This security is intended to protect the public entity against the contractor's failure to perform his obligations under the construction contract. It is typically appropriate to provide the public entity with funds should the contractor fails to meet the performance standards set out in the construction contract or fails to rectify a defect during the defects notification period. It can be a source of compensation also if the contractor breaches the construction contract resulting in the public entity terminating that contract or in case the contractor is sequestrated or placed in liquidation or under business rescue (Lane, 2014). Such a guarantee is normally issued by a financial institution (usually a bank or insurer) and in most cases, an "on-demand" guarantee which is payable merely upon demand by the employer claiming that a payment triggering event specified in the guarantee has occurred and possibly providing the documents specified in the guarantee to the guarantor (without having to establish the contractor's breach).

The objective of a performance bond is to secure the contractor's obligations under a contract in a way that ensures the owner be compensated in case of non-

performance without the need for prior legal procedures. Instead of cash deposits, it has become a common practice internationally for public entities to accept bank guarantees payable unconditionally and on first demand. Therefore, in the case of non-performance, two relations become relevant: the contract agreement provides the details about whether the contractor performed well or not, and the bank guarantee provides that the bank has to pay "on first demand" and "unconditionally" (Meyer, 2002).

An assumed bank issued a performance guarantee 'for the proper and due performance of the contract' which is interpreted as implying that the guarantee should be valid in its entirety until the performance of the contract is completed. The performance guarantee shall therefore remain in full force and effect until all of the contractor's responsibilities under the contract have been fully fulfilled (Meyer, 2002).

The performance guarantee has a specific purpose: it is meant to recover the damages of the public entity as a result of the improper performance of the works. The guarantee is payable on first demand on the occurrence of a certain qualifying event such as poor performance or non-performance, i.e. a default in any form in respect to a specific contract or legal obligation. The purpose and the qualifying events are thus two essential, integral elements of the first demand guarantee. If there is no express reference to the qualifying event in the guarantee, the qualifying event is presumed or inferred. In such instances, in its request, the beneficiary may not have to state that there was a default. The reference to a certain contract means that owing to the default of that contractor, the public body calls a bond. The default is implied in the request of the beneficiary. The actual occurrence of default is left to the discretion of the public entity, provided that it acts in good faith and without the defrauding intention (Meyer, 2002).

2 . 4 . 3 . 1 Limit of Compensation under Performance Guarantee in the United States.

A threshold question that must be addressed when dealing with damages under common-law performance guarantees is whether the damages sought are actual damages or consequential damages.

Actual damages (also referred to as general or direct damages) are defined as damages that arise naturally or ordinarily from a breach of contract. Such damages arise in the natural course of events following a breach, thus are deemed foreseeable and hence recoverable, as a matter of law. In the case of a public work construction contract, actual damages are generally limited to the reasonable cost of labor and materials (and other expenses illustrated by the evidence) needed to bring the project into compliance with the contract specifications. Another potential measure of actual damages is the difference between the value of the project as contracted for and its value as constructed by the faulty contractor. This measure of actual damages is usually limited to situations where it is not easily possible to remedy the deficiencies in the construction project without substantial destruction (Sturges, 2001).

Consequential damages include all damages that result from intervening and unpredictable special circumstances. They are generally assumed not to flow ordinarily or naturally from a breach of contract and thus are not recoverable as a matter of law. As the Virginia Supreme Court has explained, consequential damages are those resulting from the interference of special circumstances not typically predictable. When damages are found to be consequential, they are compensable only if the special circumstances are determined to be within the contemplation of both contracting parties (Sturges, 2001).

It is a matter of law whether damages are direct or consequential and it is a matter of fact whether special circumstances were within the contemplation of the parties. Generally, contemplation must exist at the time the contract was executed. The surety has been held liable for damages if the contract is terminated for the contractor's default. Absent specific contract language, when the contractor fails to correct defective or incomplete work and has no valid reason for doing so, the governmental body can recover actual damages. The liability of the surety under a performance guarantee is generally limited to the costs necessary to rectify the defective work and bring the construction project into compliance with the construction contract (Sturges, 2001).

In the case of *Board of County Supervisors v. Sie-Gray Developers, Inc.*, as part of a subdivision plan, defendant developers entered into a contract with the plaintiff County to make improvements to an existing state-maintained road adjacent to the subdivision site. These improvements were identified in performance-based construction agreements accompanied by performance bonds. The defendants never reported to the county any difficulties in proceeding with road improvements. When the defendants were unable to complete the work, the county hired another contractor to do so. The County brought an action against the developers because of their failure to perform the improvements (*Board of County Supervisors v. Sie-Gray Developers, Inc.*, 1985).

The Supreme Court of Virginia stated that a performance bond guarantees completion of the improvement work it covers. When a developer breaches a contract for public improvements, the county may properly contract with another party for the work required and assign its due amount under the performance bond to that party. The county has the right to recover damages from a developer who breaches a contract to make improvements as part of a subdivision. That damage is limited to the reasonable

costs necessary to complete the work and not necessarily the entire face amount of the bond. In all cases, the damages will not exceed the face amount of the bond.

The court added that where the county proves that the costs of completing the work exceed the face amount of the bond, it may recover the full amount of the bond although the work has not yet been done given the assumption that public officials will lawfully perform their duties. However, if the evidence indicates that the County has assigned its rights under the performance guarantee for a purpose other than completion of the proposed construction, this assumption is rebutted. Recovery on the bond should be limited to damages arising from the breach of the bonded agreement (*Board of County Supervisors v. Sie-Gray Developers, Inc.*, 1985).

In the case of *Miracle Mile Shopping Ctr. v. National Union Indem. Co.*, the court of appeals held that as the contract was terminated for the contractor's breach, the surety would pay the employer in cash the reasonable cost to repair the defective work and complete the project within the limits of the guarantee. The cost of completion shall be determined by taking bids from three responsible contractors, one chosen by the Owner, one by the Architect, and one by the Surety. The Surety will promptly make such payment after the cost of rectification and completion shall have been so determined. The court added that if the cost of the rectification and completion was determined to be less than the amount of the guarantee, the employer would not be entitled to the whole amount of the guarantee, but only for the amount of this cost (*Miracle Mile Shopping Center v. National Union Indemnity Company*, 1962).

2 . 4 . 3 . 2 Limit of Compensation under Performance Guarantee in Australia.

Coverage of the performance guarantee in public work contracts is intended to assure the public entity that the project will be completed according to the contract documents without the public entity having to expend more than the contract amount.

Therefore, if the contractor faces financial problems during construction or is otherwise unable to complete the work, the surety remains liable to the public entity for all sums necessary for the completion of the project up to the penal sum specified in the performance guarantee (Hinchey, 1986).

However, an issue continues to present itself to the courts in cases where the beneficiary's demand for payment is completely correct and the bank has met its duty under the bond by making payment but the amount received was or found to be more than the beneficiary's actual loss.

In determining the beneficiary's obligation to repay any surplus, the starting point must be the provisions of the underlying contract since the performance bond under which the beneficiary has received the payment was issued to him pursuant to the provisions of that contract. There will be no difficulties if the contract includes express clauses defining who is to obtain the surplus. However, it is important to differentiate between the case in which the contract specifies that the account party will receive the overpayment and the case in which the contract stipulates that the beneficiary is to retain it. The reason is that in the latter case, there has been a question whether the relevant term was a penalty (Hinchey, 1986).

Another possible basis for the obligation of the beneficiary to pay off any surplus is unjust enrichment. It may be argued that the account party has a right to repayment of the surplus by way of a claim for compensation to reverse the beneficiary's unjust enrichment. It may be said that the beneficiary has been unjustly enriched at the expense of the account party, who will normally be under the responsibility to reimburse the bank (Enonchong, 2010).

Where an explicit provision in the underlying contract specifies that the account party is entitled to recover any surplus from the beneficiary, the courts shall not hesitate

to give effect to the agreement. Even where the contract does not clearly state that the account party is entitled to recover any surplus, if the terms of the contract provide sufficient indication to that effect, the court may interpret the contract to that effect and allow the account party to recover (Enonchong, 2010).

This is illustrated by the decision of the High Court of Australia in *Australasian Conference Assn Ltd v Mainline Constructions Proprietary Ltd*. A construction contract requires a performance guarantee as a security that the contractor will fulfill its obligations under the contract. The contractor committed a material breach of contract; therefore, the employer terminated the contract and made a demand for payment under guarantee, and received payment in full from the bank. The employer then prepared to use the amount received to pay subcontractors for the work performed but not paid for by the contractor before the contract was determined. There were two questions for the court: (a) whether the employer was entitled to pay the sub-contractors out of the amount received from the bank; and (b), if so, whether any surplus should be returned back.

As to the first question, it was held that the express conditions of the contract made it clear that the employer was entitled to use the money for fulfilling the contractor's obligations, which the contractor himself has not fulfilled. Therefore, the employer was entitled to make use of the money to pay the sub-contractors. For the second issue, it is worth mentioning that the contract did not explicitly provide for what was to happen to any surplus after the contractor's obligations had been fulfilled. However, clause 31(j) of the contract required the release of the guarantee to the contractor within seven days after the issuance of the performance certificate, but only if nothing was owed to the employer or, if anything was due, after the amount had been received by the employer. That clause did not apply in the circumstances because no

performance certificate had been issued. It was held that, since the guarantee was to be released to the contractor at the end of the project, it was the employer's responsibility to return any surplus.

Gibbs ACJ, with whose judgment Jacobs and Murphy JJ agreed, said that it seems to him that effect should be given to the indication stipulated in clause 31(j), which mentions that the guarantee should be handed over to the contractor. In his view, the employer is not entitled under the contract to any residual surplus of the money provided under the guarantee once the obligations of the contractor have been discharged (*Australasian conference association ltd. v. Mainline constructions Pty. Ltd*, 1978).

Therefore, the situation will be a matter of priority when there is an explicit condition in the contract or in the law stating that any surplus must be returned. Such a term is not a penalty because the overpayment is due to the account party as a debt.

2 . 4 . 3 . 3 Limit of Compensation under Performance Guarantee in the United Kingdom

The Association of British Insurers (ABI) produced a model form of performance guarantee (the ABI bond), which they recommend for use in the UK construction field, including public works. It should be noted that the ABI bond is a guarantee imposing an obligation on the guarantor subject to the beneficiary's determination of the amount of damage resulting from the contractor's default in the underlying contract. The drafting of the ABI guarantee bond states that the guarantor guarantees to the employer that in the event of a breach of the contract by the contractor, the guarantor shall compensate and discharge the damages incurred by the employer as established and calculated in accordance with the terms of the contract and taking into account all sums due or to become due to the contractor (Ward & Bruton, 2012).

Gould (2014) stated that under a performance guarantee, the bondsman is in contract with the beneficiary. Arguably, the fair remedies equivalent to the damages apply, and the amount in excess should be repaid to the bondsman. The letter of guarantee is however, a banking instrument and the bank would have no right against the beneficiary of the guarantee. This is based on the argument that a letter of guarantee should not be wrongfully called upon. Therefore, the principal should be allowed to sue the beneficiary direct (Gould, 2014).

In *Trafalgar House v General Surety*, the question of an overpayment by the bondsman arose. Overpayment means that the amount of the guarantee was more than the actual damages that the beneficiary suffered. Will the beneficiary be allowed to maintain the full sum of the bond in such circumstances? Without hesitation, the House of Lords accepted that the Beneficiary would have to repay any excess, even in the case of unconditional on-demand performance guarantee (*Trafalgar House Construction (Regions) Ltd V General Surety and Guarantee Co Ltd*, 1994).

Moreover, in the case of *Cargill International SA v BSFIC*, direct authority for a duty to account can be found. That case concerned the performance guarantee given in respect of a primary contract. The Court of Appeal held that it is implied in the essence of a performance guarantee that in the absence of clear contractual words to a different effect, there will be an accounting between the parties at some point after the guarantee has been called, in the sense that their rights and obligations will be determined at some future date. If the amount of the bond is not sufficient to satisfy the beneficiary's claim for damages, he can bring proceedings for his loss, given credit for the amount received under the bond. If, on the other hand, the amount earned under the bond exceeds the actual loss incurred, the party offering the bond is entitled to recover the overpayment.

Thus, there is an implied obligation of repayment based on equity principles. Nevertheless, the Court of Appeal considered that this was only in the absence of a clear contractual term to the contrary. Therefore, the obligation to account can be excluded by a clear contractual wording. The Court of Appeal did not consider this proposition further. Nevertheless, at first instance in *Cargill, Morrison J.* considered that if the terms of the contract provided for the beneficiary to retain monies even if no damages are suffered then he would have considered the contractual provision to be penal. (*Cargill International S.A. Antigua Geneva Branch v. Bangladesh Sugar & Food Industries Corporation*, 1997).

The same principle was adopted in the case of *Spiersbridge Property Developments Limited v Muir Construction Limited*. The court stated that where an employer has made a demand under an on-demand performance guarantee for more than it was entitled to obtain, the employer would need to account for this excess. The question arose in this case as to whether the employer was required to account to the contractor (under the construction contract) or the bank (under the performance guarantee), where neither the construction contract nor the performance guarantee addressed the issue. The court implied a term into the construction contract that an employer who had made a call upon an on-demand performance guarantee was required to account to the contractor for the proceeds, retaining only the amount equivalent to the damage incurred by the employer because of the contractor's breach of contract. The court rejected the argument that there should be a term implied into the performance guarantee requiring the employer to account for any excess to the bank. The court recognized the legal and practical difficulties that would arise if a bank were to engage in a dispute about the merits of the case (*Spiersbridge Property Developments Ltd. v. Muir Construction Ltd.*, 2008).

2 . 4 . 3 . 4 Limit of Compensation under Performance Guarantee in Egypt

According to Article 51 of the new Public Contracts Law No. 182 of 2018, the administrative body may terminate the contract or implement it at the expense of the contractor if it is proven that the latter is in breach of any essential condition of the contract. The contract termination or implementation at the contractor's expenses shall take effect according to a substantiated decision by the administrative body, which shall be communicated to the contractor by an express mail letter, with a concurrent confirmation of sending by e-mail, to address indicated in the contract. In all cases of termination of contract or implementation of the same at the contractor's expenses, the performance bond shall be confiscated by the administrative body (Law No. 182 of 2018 Promulgating the Law Regulating Contracts concluded by Public Bodies, 2018). The executive regulations of the new Public Contracts Law No. 182 of the year 2018 did not add, comment or provide details to the issue of forfeiture of the performance bond when the contract is terminated for contractor's default.

2 . 4 . 4 Price Adjustment

In general, construction projects are usually quite lengthy, ranging from several months to several years and construction projects are performed according to a pre-confirmed contract amount and contract agreement in principle. On the other hand, there is a strong probability that the cost of labor and materials will rise and fall periodically, to a greater or lesser extent, during the life of the project (Choi, Kim, & Kim, 2006).

Contractors working in volatile materials market find that estimating, bidding and financing the construction projects are challenges. Many contractors face considerable losses or erosion in expected profits because they are tied to fixed-price construction contracts and bear the risk of increased material prices and other supply

costs. Without a price escalation clause that provides for a contract price adjustment in the event of an unexpected rise in market prices for critical building materials, the contractor will be exposed to such increases. An escalation clause is required in the contract to protect against this sudden increase in the cost of materials. To reduce this degree of risk, it is necessary for the contractor to include large contingencies in initial estimates of the contract when he tenders the contract. If the contingencies are overestimated, the probability of the contract being awarded to another contractor is increased. On the other hand, if the contractor does not allow for inflation and interest rate correctly, his initial tender would be too low and he would suffer significant losses (Kalidindi, Maran, & Rajendran, 2011).

To cope with the price fluctuation problem, most countries regulated the escalation clause in the law or conditions regarding public construction contracts. The primary purpose of the escalation clause is to compensate the contractor for material price increases that are beyond the control of the parties. An escalation clause is a clause in a construction contract that allows the contract amount to be adjusted due to a price change. Most countries use the term "escalation" to describe the amount of these changes from project commencement to any point during its life. As equivalent terms, 'fluctuations', 'rise and fall' and 'contract price adjustment' are used interchangeably (Choi, *et al*, 2006)

Clients should state the computation method for price adjustment in the preparation of the escalation clause. In some of the countries, it has been allowed clients to use FIDIC or World Bank standard formula to perform price adjustment. On the other hand, government agencies have developed an escalation formula, and it has been obligatory to use these specified formulas to perform the price adjustment in some of the countries.

There are two main methods for measuring the price changes taking place in a construction material which are invoice method and index method. In invoice method, contractors submit an invoice form or a certificate that are provided by supplier to the client to show the current market price of any products. Price changes in this product are measured such the difference between the present invoice price and contract date invoice price. Indeed, the invoice method is the simplest and most accurate method in its pure form. However, the client should control that the materials purchased were actually integrated into the project. Additionally, the client also should control the truth of the value of the invoice to discourage fraud. The other method for measuring the price changes taking place in a construction material is the index method. This method is widely used to perform price adjustments. Index numbers measure relative price changes from one-time period to another. In fact, this method recovers the client from the control of invoices values and other possible tricky behavior of contractor but indices may underestimate or overestimate the price changes in the market because it is not always possible to find an index that actually reflects all the materials used for the construction of the project (Ndiokubwayo, 2009).

A typical escalation clause should define the conditions, the methods, and the terms of price adjustment. These are timing (base date, start date, and periodicity), value or the amount of work that is going to be adjusted, and the calculation method. Contracting authorities should also determine a computation method to calculate the price changes (i.e. index, invoices or a hybrid of these is used for calculation). Therefore, contracting authorities or the parties should be aware of the nature and structure of work, economic and other conditions in order to prepare the conditions, terms, timing and any other parameters of the clause appropriately (Ercan, 2017).

Considering the FIDIC formula that is either directly used for many countries or used as a basis for escalation formula, the form is:

$$P_n = a + b(L_n / L_o) + c(E_n / E_o) + d(M_n / M_o) +$$

Where:

P_n : It is an adjustment multiplier to be applied to the contract value of the related currency of the work carried out in period "n", if not otherwise specified in the Contract Data, this period will be a month.

a: It is a fixed coefficient, specified in the contract, standing for the non-adjustable part of contractual payments.

b, c, d, etc.: coefficients indicating the estimated weight of every cost element related to the implementation of the Works, as specified in the contract; they represent the inputs such as labor, cement, materials etc.

L_n , E_n , M_n , etc.: They are the present cost/price indices or reference prices for period "n", and they are applied to the related cost elements.

L_o , E_o , M_o , etc.: They are the base cost/price indices or base reference prices, and they are applied to the related cost elements on the Base Date.

The contracting parties can state either one formula for escalating the total value of all the works that is completed in a given period or they can state different formulas for the different work packages. After deciding the formula, contracting parties should determine the parameters of formula such as the non-adjustable portion, coefficients of cost element, indices or reference prices etc.

Mostly, public entities state the parameters of the escalation formula, but if they are not stated, every bidder has to propose their b, c, d values, and other parameters. The applicable frequency of price adjustment is a month, but this is default, so the public entities can change the periodicity of adjustment such as three months. All of these data

related to the adjustment clause are stated in the “adjustment data table” and also the particular conditions of the contract in the tender document (Seneviratne, 2013).

According to different countries' procurement guidelines, the price adjustment provision is put in contracts according to the project duration. Some government agencies put the adjustment clause in their construction contracts regardless of the project duration and some multi-development banks contracts include the adjustment clause for a project that takes more than 18 months (Seneviratne, 2013).

2.4.4.1 Price Adjustment in Turkey

Decree No. 8/505 for price escalation in public works entered into force on March 11, 1980. While the upper limit of the price increase coefficient was set at 25% in the previous escalation decrees, in Decree No. 8/505, no upper limit has been set for price increase coefficients, and in the first application year, the price increase factor of over 125% has been given. According to the decree, the contractors were compensated for the inflation taking place from a year to another. In addition, due to the severe price changes that taking place within the implementation year, contracting authorities also compensated contractors for price changes of specific materials: all kinds of iron and steel, all kinds of cement, fuel, pressure-resistant iron and steel pipes (Ercan, 2017).

Decree No. 88/13181 for price escalation entered into force on July 1, 1988 and it was applied to works executed since that date. The decree added another list of construction materials that are subject to price adjustment. The material list includes aluminum profiles, glass, copper, brick, timber, hard plastic (pvc) pipe and materials, fittings and electrical equipment (Ercan, 2017).

In accordance with changing conditions and needs in Turkey and within the framework of harmonization with the European Union Acquis, Public Procurement Law No. 4734 and Public Procurement Contract Law No 4735 have been published in

Official Gazette dated 22.01.2002 and entered into force in 01.01.2003. In 2002, according to these new Laws' provisions, the Council of Ministers published the price Escalation Decree numbered 2002/5039. While decree No.88/13181 involved comprehensive and complex calculations for escalation, Decree No.2002/5039 has greatly simplified the calculation of the escalation to a single formula:

$$[F = A_n \times B \times (P_n - 1)]$$

Wherein;

F: Price Adjustment Payment (TL), In the first interim progress ($n = 1$), and in the (n)th interim progress, for unit price contracts, it is the multiplication of contract price of the work item and the quantities of work amount that is executed in implementation month (TL); and for lump sum contract it is the multiplication of contract value and the percentage of progress rate of implementation month (TL),

A: value of performed work subject to price adjustment,

B: is a coefficient and equal to 0.90,

P_n: In the first interim progress ($n = 1$), and in the (n)th interim progress, it is an adjustment multiplier which calculated based on the above formula by taking into account the input weights and related price index,

To calculate the P_n value, the formula is used shown below.

$$P_n = [a (I_n / I_o) + b_1 (C_n / C_o) + b_2 (D_n / D_o) + b_3 (V_n / V_o) + + b_4 (K_n / K_o) + b_5 (G_n / G_o) + c (M_n / M_o)]$$

Entries in this formula to be used in the performance of work under the contract:

a, b₁, b₂, b₃, b₄, b₅, c: they are the coefficients representing the proportion weight of materials used for the execution of work which respectively are: labor, cement, steel, fuel, timber, other materials and depreciation of machinery and equipment. The sum of

these coefficients is equal to one. it required for the contracting authority to determine the weight of cost elements according to the nature of work.

Io, Ço, Do, Yo, Ko, Go, Mo, In, Çn, Dn, Yn, Kn, Gn, Mn; they are the base and current cost indices for related inputs specified in the formula respectively.

After performing the calculations based on the above formula, if the value of P_n is less than one (1), it means a price adjustment deduction has to be applied to the Interim Payment of the contractor. Conversely, if the value of P_n is more than one (1) it means the client has to pay to the contractor an adjustment payment (Ercan, 2017).

In 2013, some changes were made in the escalation decree 2002/5039. Escalation decree no.2013/5217, very similar to the previous one, has been published. In decree 2013/5217, the scope of the price adjustment provisions has been expanded. One of the differences between decree 2002/5039 and decree 2013/5217 is the name of the coefficient in the calculation formula. In new decree, a, b_1 , b_2 , b_3 , b_4 , b_5 , c represent respectively non-metallic products, basic metal products, coke and refined petroleum, wood products, other material, depreciation of machinery and equipment. Non-metallic products include glass, ceramic tiles, bricks, cement, lime and stone.

In fact, with this amendment, the price adjustment calculation will be more realistic and by detailing of the used index in the calculation, the price changes in construction inputs will be measured more accurately. Therefore, this amendment is a very important step for creating special index for the construction industry in Turkey (Ercan, 2017).

2 . 4 . 4 . 2 Price Adjustment in the United States

According to FAR 16.203 - 3, an economical price adjustment (EPA) clause should only be used if it is necessary either to protect the government and the contractor from considerable fluctuations in material or labor costs or to provide for a

contract price adjustment in the event of fluctuations in the contractor's specified prices.” FAR 16.203 - 4(d)(1) states that EPA clause may be convenient when:

- i. The contract has an extended performance period with significant costs incurred one year after the performance commencement;
- ii. the contract sum subject to modification is significant; and
- iii. labor and material economic variables are too volatile to allow for a rational risk division between the contractor and government without this such a clause (Federal Acquisition Regulation, 2019).

The EPA clause index must take into consideration economic conditions that have a direct and specific relationship to the performance of the contract. For that reason, DFARS instructs the contracting agency to build the index to include a large sample of related products while also bearing a logical association with the type of contract costs being measured. The items and the materials covered by the index should represent the major components of the contract; meanwhile, the base of the index should not be too large and diversified so that it is considerably affected by fluctuations not related to the performance of the contract. On the other hand, the weight coefficient of the items and materials addressed by the EPA clause should be set reasonably by the government according to the nature of the contract (Defense Federal Acquisition Regulation, 2020).

According to the courts in *Beta Systems, Inc. v. the United States*, the objective of an EPA clause based on an economic indicator is to accommodate changes in the contractor's actual costs of execution. Therefore, by providing for an upward price adjustment, the clause is designed to prevent the contractor from making an unexpected profit as a result of a lower cost of performance while also ensuring that an upward price adjustment is provided so that the contractor does not have to absorb significant

losses as a result of its higher costs. In fact, it is well established that when a government-drafted contract clause is inconsistent with legal requirements, the contractor's failure to challenge the clause in the procurement process or his approval of the clause as part of the contract will not prevent him from getting relief (*Beta Systems, Inc. v. U.S.*, 1988).

2 . 4 . 4 . 3 Price Adjustment in the Republic of Ireland

The standard contracts PW-CF1, public works contract for building works designed by the employer, must indicate the method to be used to calculate adjustments to the contract amount for changes to the cost of materials and labor that may take place and which are allowable under the conditions of the contract. The following are the alternatives available in the contract's price variation clauses:

- PV1, the Proven Cost Method requires the contractor to submit evidence in the form of invoices to support any claim for increases, including hyperinflation increases, in relation to the cost of materials used in the works and to also produce evidence of the cost of those materials at the Designated Date/Base Date. The employer independently verifies the authenticity of such claims by collecting pricing for the same materials in the same quantities and timeframes as in the project from various vendors and other sources and comparing them to the contractor's claim.
- PV2, also known as the Formula Fluctuations Method, uses equations to determine the necessary amount of contract sum adjustment for material cost variations. The equations are based on the Central Statistics Office's monthly Statistical Release, including price indices for materials, fuel, and the consumer Price Index. A similar formula is used to determine permitted labor increases using the difference between the Registered Employment Agreement (REA) hourly rate at the Base Date and the current REA rate (Department of Public Expenditure and Reform, 2016).

If the employer decides to use PV2 to deal with price changes, the schedule and form of tender issued as part of the tender documents should include the following two appendices of the Contract, duly filled in:

- Appendix 7, Proportions of Labour, Materials, Fuel, and Non-Adjustable Overheads, allocate a nominal percentage of the contract sum to each of five broad categories of work items (labor, materials, fuel, non-reusable temporary works and overheads). In the case of overheads, for example, ten per cent (10%) should be allocated to overhead costs that are not subject to price adjustment. The total of the percentages must equal 100.
- Appendix 8, Indices and Weightings for Materials and Fuel, allocates a nominal weighting to a range of material and fuel items that may be used on the project. The total of the weightings for Materials must equal 1, as must be the total of the weightings for Fuel. The prices of items in this list are tracked by the Central Statistics Office, who publishes the relevant price indices monthly (Department of Public Expenditure and Reform, 2016).

According to the Instructions to bidders, bidders may have the opportunity to comment on the employer's nominal percentages and weightings throughout the bidding period. Any modifications to the percentages and weightings that the employer intends to make will be communicated to bidders no later than the time specified in the Particulars under section 2.2 of the Instructions to Bidders. The completed appendices 7 and 8 should be attached to the Form of Tender and Schedule (FTS1 to FTS 4) (Department of Public Expenditure and Reform, 2016).

The relevant material and fuel categories for the PV2 clause of the Contract, and the weighting for each, are as indicated by the Employer. It is not envisaged that every category will be used on every contract. Some contracts that do not involve a lot

of diverse materials may use only a small number of categories. The Employer allocates work elements in the Bill of Quantities /Specification or other tender document to categories of material or to non-reusable temporary works, as deemed appropriate. The work items should be individually coded by the Employer to indicate which material category they fall into for price variation purposes.

In the absence of any relevant index or agreement, the Consumer Price Index is used in its place. The relevant formula is applied in respect of each material and/or fuel category, non-reusable temporary works and labor that has been subject to an increase in price, and the total increase for the relevant Adjustment Period is included in the Interim or Final Certificate as an adjustment (Department of Public Expenditure and Reform, 2016).

2 . 4 . 4 . 4 Price Adjustment in Egypt

According to the new Public Contracts Law No. 182 of 2018, for the work construction contracts with a time for completion of six months or more, the administrative body shall, at the end of each contractual quarter as of the date set for opening the technical envelopes or the contract signing date based on the direct award order, as the case may be, amend the contract's value according to the increase or decrease in the costs of contract items that emerge following the date set for opening the technical envelopes, or following the contract signing date based on a direct award order, as the case may be, and subject to the implementation timeline in light of the Producer Price Index issued by the Central Agency for Public Mobilization and Statistics. In addition, such amendment shall be binding upon the contract parties, and the content of the same shall be included in the contract. The administrative body shall determine the variable items or their components in the tender documents according to the list to be issued by the Ministry of Housing, provided that the contractor includes

their relevant weight coefficients in the technical envelope, and any agreement to the contrary shall be null and void (Law No. 182 of 2018 Promulgating the Law Regulating Contracts concluded by Public Bodies, 2018).

The executive regulations of the new Public Contracts Law set the following definitions:

- Variable items: the items subject to amendment and determined by the public authority (labor - raw materials ... etc.) from the list prepared by the Ministry of Housing.
- Weight Coefficients: the percentage determined by the contractor in his bid for each of the components of the variable items, taking into account that the total of the weight coefficients equals 100%.
- The percentage of compensation or discount: the amount owed to the contractor or the amount to be deducted from his dues resulting from calculating the change in the prices of the variable items, up or down.
- Percentage of price increase or decrease: is the difference between the price index of the variable item components when accounting and the price index at the date of opening the technical envelopes divided by the latter. The price indices are taken from the index numbers bulletin issued by the Central Agency for Public Mobilization and Statistics (Executive regulation of Public Contracts Law, 2019).

The amount of compensation or deduction is calculated as per the following equation:

The price adjustment = quantity executed of the variable item x the unit price x weight coefficient of the variable component x percentage of price increase or decrease.

Moreover, the executive regulations of the law set rules for the price adjustment, including:

- The public entity determines the variable items and their components based on the list issued by the Ministry of Housing. If not determined, the tender will be canceled.
- The technical envelope of the contractor's bid must include coefficients representing the weights of the components of the variable items, which were determined by the public entity and incorporated in the tender conditions. If the contractor's bid does not include those coefficients, the tender is excluded (Executive regulation of Public Contracts Law, 2019).

Despite the details mentioned by the law regarding the price adjustment formula, and although the law has paid great attention to the matter to ensure the balance of the contracts to the extent that it considered this rule to be a mandatory rule that it is not permissible to agree otherwise, two loopholes emerged upon the application of this provision. First, the law did not mention the amount of the variable materials or items that the public entity has to specify in the tender, and second the exaggerated estimation of the weight coefficients that the contractor places in his bid.

2 . 4 . 5 Arbitration

The administration always seeks to achieve the public interest through legal work, administrative decisions issued at its discretion, and the management of public utilities by concluding contracts with persons of the private law, and the administration of these contracts usually requires unfamiliar and exceptional conditions in the law which characterizes these contracts as administrative contracts. (Assar, 2001). These contracts sometimes lead to disputes between the parties, and the parties have the right to resort to the judiciary to resolve the disputes; However, as a particular case, the parties may agree to resort to arbitration to resolve such disputes (Sheikh, 2000).

The principle of arbitration is a departure from traditional litigation. It mainly depends on the parties to the dispute themselves choosing their judicial authority rather than relying on the judicial organization of the country in which they reside (Sheikh, 2000).

The ability to choose institutional or ad hoc rules conducive to the efficient resolving of a dispute is a significant advantage in arbitration. Parties may also select arbitrators best suited to resolve their dispute. An arbitrator with relevant experience and knowledge in an industry could significantly expedite the resolution of a dispute. This feature is particularly true in the construction industry, which requires a high level of technical expertise. Furthermore, arbitrations, unlike courts, are usually private, allowing for a high degree of confidentiality (Tomasich, Kakkar, & Firestone, 2020).

Arbitration as a tool in dispute resolution is strongly supported by civil society, especially in solving disputes arising from public procurement since numerous research carried out by civil society organizations emphasize the lack of efficiency in courts in solving such cases, either because of the heavy load cases or lack of sufficient expertise in the field of public procurement.

Arbitration has recently become one of the most viable means of resolving disputes between government entities and private parties. Invariably the government contracts provide arbitration evidently due to its relative advantages in terms of speed of disposition and technical knowledge of arbitrators (Ajay, 2016).

2 . 4 . 5 . 1 Arbitration in France

The doctrine of preventing arbitration in administrative disputes, i.e., those disputes to which the administration is a party, prevailed for a long period of time in France. This was considered a valid legal principle for most jurists. This principle was reflected in the Civil Code of France of 1803 and of 1972. However, starting from the

year 1957, a shift in that policy occurred. Ordinary courts began to accept arbitration in cases related to administrative contracts only if there was an international party to the contract. This step was first made by the Court of Appeal in Paris when it ruled in favor of the possibility of holding arbitration in cases of administrative contracts to which a foreign entity is a party. This was decided in the Myrtoon Steamship case, dated April 10, 1957 (*Myrtoom Steam Ship v Agent Judiciaire du Trésor*, 1957). As a further step, the French Court of Cassation declared that the principle of the prohibition of arbitration in disputes concerning the State and the public administration should not be enforced if those disputes involved international relations (Alhamidah, 2007). However, notwithstanding this trend, in *INSERM (Institut National de la Sante et de la Recherche Medicale) v Fondation Letten F Saugstad*, it was recognized that, while the judicial courts will normally review an award between a French public body and a foreign legal entity, public-private arbitration awards should be subject to review by the administrative rather than the judicial courts where "mandatory rules of French public law" are implicated (*INSERM v. Fondation Letten F Saugstad*, 2017). This decision can be interpreted as representing a resurgence of the public-private law divide in French arbitration law (Brekoulakis & Devaney, 2017).

An example for the application of this decision is *Fosmax v. a consortium of three contractors regarding execution of a construction contract* (*Conseil d'Etat, Société Fosmax LNG v. Groupement d'entreprises*, 2016). A construction contract initially entered into by Gas de France "GdF", formerly a public utility company, and a consortium of three engineering contractors was assigned by GdF to one of its affiliated companies, the private company "Fosmax", after GdF was turned into a private company. Following the refusal of the consortium to perform additional works, Fosmax decided to exercise step-in-rights by temporarily taking over the executing works and

awarding the remaining works to third-party companies at the cost and risk of the consortium. As the completion of the works led to a dispute between the parties to the construction contract, Fosmax submitted a request for arbitration to the Paris-based International Court of Arbitration (the "ICC"), in compliance with an arbitration clause inserted by way of an amendment to the contract. The award dated 13 February 2015, issued by the ICC, ordered Fosmax to pay the highest amount and rejected its claim for reimbursement of the amount spent to complete the works following the exercise of step-in-rights. Following the Issuance of the award, Fosmax brought legal action before the State Council seeking the annulment of the award. As a preliminary matter, the State Council had to determine whether the French civil or administrative courts had jurisdiction to hear the case. The State Council, therefore, referred the case to The Court of Conflicts to settle this question.

The Court of Conflicts held that the State Council had jurisdiction to perform the judicial review of the award because (i) the Construction Contract was initially entered into by a public utility company and a consortium of private companies and (ii) the State Council jurisdiction is in compliance with the INSERM case. Indeed, in the INSERM case, the Court of Conflicts held that the review of an international arbitration award which has been rendered in the context of an international administrative contract falls within the jurisdiction of ordinary courts (civil courts), unless it involves the issue of compliance with public policy rules of French administrative law relating to public property occupancy or public procurement. In the present case, since Fosmax's claim for annulment related to the examination of the award's compliance with the general policy rules of French administrative law, it was considered that the Council of State had jurisdiction over the case.

The State Council took the opportunity to define, for the first time, the scope of control to be exercised by it over claims brought for the annulment of an international arbitration award. The State Council's judicial review function is limited and only focuses on the following elements:

1. The ability of the parties to bring the dispute before an arbitration tribunal;
2. The validity of the State Council's review of the award is strictly limited to:

(a) A review of the procedure followed by the arbitral tribunal, i.e. whether the tribunal followed the correct procedure. The judicial review must be confined to the arbitration tribunal's jurisdiction, composition and mission. This includes a review of whether the award respected certain rights and principles such as the right to an impartial and fair trial, the compliance with the principles of due process of law and the obligation to expressly set out the grounds on which an award was rendered.

(b) A review of the award's compliance with the public policy rules of French administrative law. The State Council's review must be limited to monitoring the proper application by the arbitration tribunal of the public policy rules of French administrative law.

The State Council's judicial review over an award is akin to the civil court's judicial review except on one issue, the preliminary analysis of the ability of the parties to bring the dispute before an arbitration tribunal. This specificity can be easily explained because, under French law, French public entities can resort to arbitration only when permitted by legislative provisions and international treaties.

Regarding the parties' ability to bring the dispute before an arbitration tribunal, the State Council confirmed implicitly that Fosmax and the Consortium were allowed to bring the case before the ICC, by directly reviewing the validity of the award. Indeed, the arbitration clause was lawful because Decree No.2002-56, dated 8 January 2002,

expressly allowed GdF, at this time a public entity, to insert such a clause in the administrative contracts, i.e. such as the Construction Contract it entered into.

However, the State Council decided that the award breached a public policy rule of French administrative law. This rule relates to the legal ability of the grantor to exercise step-in-rights on the construction works when the contractor no longer performs its duties under the public contract. Consequently, the State Council annulled the award on one issue: the rejection of Fosmax's request for reimbursement of the costs for the works performed by third-party companies once the exercise of steps-in-rights on the works was decided by Fosmax due to the non-performance by the Consortium of its duties under the Construction Contract (Bouillon, Vaissier, & Houriez, 2016).

2 . 4 . 5 . 2 Arbitration in the United Kingdom

Arbitration has become the prevailing mechanism for settling contractual disputes if both contract parties are private sector entities. However, in recent years, the role of arbitration in dispute resolution, particularly with the collapse of the non-arbitrability doctrine, has increased to include contracts to which the public sector is a party. For example, it is acceptable now in commercial arbitration that the arbitrators have the authority to assess not only claims concerning the formation of the contract and its interpretation and the claims arising from its implementation but also adjudicate in cases having significant societal impact such as tax claims, competition law claims or claims arising out of securities transactions (Carbonneau & Janson, 1994). Therefore, the term 'public-private arbitration' has been significantly raised in the course of dispute resolution. That term does not only mean that one of the parties in dispute is the public authority or a governmental body, but also that the dispute deals with a public utility or service.

While recourse to arbitration to resolve disputes between a public body and a private party has become more widespread, English law does not distinguish between private arbitrations and public-private arbitrations (Wald & Kalicki, 2009). The English arbitration law has adopted party autonomy as a basic principle while moving towards the private law model of a commercial dispute involving private and public actors. Based on that concept, the referral of the dispute to arbitration is considered as a process in which the contracting parties choose to settle the dispute arising between them not by public justice but by a private dispute resolution mechanism. Therefore, and in accordance with this legal understanding of arbitration, the Arbitration Act 1996 “the 1996 Act” requires the English courts to adopt a non-interventionist approach in respect of the arbitration process. This means that the court will not have any role in the dispute until the arbitral tribunal issues its award and its subsequent role does not depend on whether a public body is a part of the dispute or not (Brekoulakis & Devaney, 2017). Consequently, after the arbitration is concluded and arbitration awards are issued, the scope of review of such awards by English courts is not affected by the nature of the dispute or its parties, i.e., by whether or not the arbitration involves a public body or implicates the public interest. Therefore, once the arbitration tribunal renders the award, a party may only challenge it based on a serious irregularity affecting the tribunal, proceedings or award or, in certain limited cases, on a question of law.

A recent example of a public-private arbitration with public interest implications is the dispute between the Secretary of State for the Home Department and the US defense company, Raytheon Systems Limited, in respect of a contract executed in 2007 for the design, development and delivery of a multimillion-pound technology system "e-Borders" which would reform UK border controls by establishing an electronic system to examine travelers entering and leaving the UK. (The Secretary of

State for the Home Department v Raytheon Systems Ltd, 2014). When the Home Office terminated the contract in 2010 for significant delays in the progress of the works, Raytheon commenced arbitration proceedings claiming substantial damages for unlawful termination. The arbitration proceedings under the rules of the London Court of International Arbitration were confidential with the arbitrators being English and American, nominated by the Home Office and Raytheon respectively, and the chairman being Canadian. The arbitrators decided that the Home Office had unlawfully terminated the contract and awarded Raytheon compensation of approximately £ 190 million in addition to £38 million in respect of interest and the claimant's costs. The e-Borders award raised serious concerns in the British government and attracted intensive media and public interest, with the focus being on the impact of the award on the public finances and on UK border security. While the award was challenged by the Home Office and was subsequently set aside by the High Court for serious irregularity, the High Court ultimately determined that the dispute should be referred back to arbitration before a different panel of arbitrators. Despite the Home Office's success in challenging the arbitration award, the Home Office announced in March 2015 that it had reached a negotiated resolution with Raytheon and was to pay £150 million to Raytheon in full and final settlement of the dispute (Brekoulakis & Devaney, 2017).

2 . 4 . 5 . 3 Arbitration in Turkey

Important steps have been taken in the resolution of disputes through arbitration in Turkey, in order to incentivize contracts' parties to include arbitration clauses into their agreements. After establishing the Istanbul Arbitration Center "ISTAC" in particular, the parties were advised to use arbitration in resolving disputes and were encouraged to include arbitration clauses in their agreements. Within this context, new

laws and regulations have been adopted in order to facilitate the inclusion of arbitration clauses by public authorities and institutions (Schwander, 2018).

Especially, and subsequent to the establishment of the ISTAC, important steps have been taken to ensure that public authorities and institutions may select this mechanism. A very important example is the Prime Ministry Circular numbered 2016/25. This circular sets forth that “in order to provide that disputes would be resolved in an efficient, impartial, flexible and confidential manner, in accordance with international standards, by saving time and monetary sources, it should be ensured that public authorities and institutions are informed of arbitration as a dispute resolution mechanism, and further action to be taken, through considering arbitration as a dispute resolution mechanism in the agreements to which public authorities and institutions are parties”.

Following this initiative, essential regulations in the matter of arbitration selected in public procurement contracts were adopted through the implementation of the regulations published in the Official Gazette on December 30, 2017, and numbered 30286 (reiterated), related to the amendment of the regulations on the agreements to be concluded under the Public Procurement Contracts Law. These regulations pave the way for choosing arbitration as a dispute resolution mechanism, particularly using ISTAC arbitration, in standard contracts that can be found in the appendices of implementing regulations regarding construction work tenders, framework agreement tenders, merchandise procurement tenders, and consultancy procurement tenders (Schwander, 2018).

The new regulations include specific procedures regarding the selection of arbitration as a dispute resolution mechanism. Different provisions shall apply, depending on whether the matter in question falls within the scope of Article 2/1/1 of

the International Arbitration Act No. 4686 “IAA”. The relevant provision is to be found under the Article in the IAA regulating foreign elements and providing for the existence of a foreign element if the parties to the arbitration agreement have their legal seat, place of business or habitual residence in different states.

In line with the explanations above, the provisions that provide for the resolution of disputes through arbitration set forth the selection of ISTAC arbitration for the cases outside of the scope of Article 2/1/1 of the IAA. In these cases, it is possible to select the seat of the relevant administrative authority or Istanbul as place of arbitration. Other provisions pertaining to the arbitration clause are the selection of the Turkish language as the language of the arbitration proceedings, an arbitral tribunal of three arbitrators, and Turkish law as the law to be applied as substantive law (Schwander, 2018).

Another possibility if the parties select arbitration as the dispute resolution mechanism is whether the case at hand is within the scope of Article 2/1/1 of the IAA. In such case, the parties have discretion in light of the new regulations. Accordingly, it is possible to select ISTAC arbitration, or arbitration within the provisions of the IAA, as the dispute resolution mechanism.

If it is selected to resolve the dispute under ISTAC rules, it is possible to select the seat of the relevant administrative authority or Istanbul as a place of arbitration. These disputes with a foreign element are regulated differently other than the explanations above, and it is possible to agree freely on the language of the arbitration and substantive law to be applied in the arbitration proceedings. The arbitral tribunal shall be composed of three arbitrators (Schwander, 2018).

On the other hand, if it is agreed that the dispute shall be resolved within the IAA, the provisions to be included in the relevant agreements differ. In such case, as

there is no institutional arbitration, more detailed provisions may be found concerning the selection of arbitrators.

In arbitrations to be conducted in accordance with the IAA, it is possible to select the applicable substantive law in conformity with the preference of the parties. Similarly, the language of arbitration may also be selected accordingly. As a place of arbitration, the seat of the relevant administrative authority, or Istanbul, may be selected. Pursuant to the IAA, the competent court for the matters that are within the authority of state courts is the civil court of first instance located at the seat of the relevant administrative authority (Schwander, 2018).

2 . 4 . 5 . 4 Arbitration in the Kingdom of Saudi Arabia

Arbitration in Saudi Arabia was governed by the Board of Grievances' Statute of 1982, under which the Board could assess and resolve any dispute in which a Governmental body or a public agency was a party to the contract. This lasted until the new Arbitration Law of 1443H (2012G) has been issued on July 9, 2012, according to the Royal Decree No. M/34 on April 16, 2012 (Saudi Arbitration Law, 2012). Although neither Statute of 1982 nor the New Arbitration Law of 2012 defined the term "administrative contracts", it has been accepted through judicial jurisprudence that if an administrative entity or a public agency constitutes a party of the contract, then it can be considered an administrative contract and can be adjudicated by arbitration procedure (Ceil, 2015).

The spirit of the new arbitral law issued in 2012 was to replace the prior statute that had lost relevance and effectiveness. The government, by enacting the new law, wanted to develop arbitration by broadcasting fresh jurisprudence in it. This was a part of a plan initiated by all Gulf countries to reform the arbitration and maximize its role to make it effective in the business to which a foreign entity is a party (Al-Samaan,

1994). On the other hand, the application of arbitration to the administrative contracts has raised a number of significant issues, such as the capacity of the public authority to enter the arbitration with the consequent derogation of the sovereignty of the government (Ceil, 2015).

Although arbitration has been widely accepted as an alternative dispute resolution mechanism in administrative contracts in Saudi Arabia and the new arbitration law contains several clauses and provisions that give autonomy and freedom to the contract parties to choose the seat of the arbitration and the procedures of the arbitration, in most administrative contracts, the Saudi government still exercises the role of the upper hand authority by choosing Saudi Arabia as a seat of the arbitration and Saudi Arabian law for the arbitration procedure (Ceil, 2015). According to Article 2 of the new Saudi Arbitration Code, the arbitration will be held in accordance with the Arbitration Law of Saudi Arabia if the parties have agreed to do so (Saudi Arbitration Law, 2012). However, resorting to arbitration in administrative contracts needs the approval of the King or the ministers' council according to Saudi law. This shows that the autonomy of contracting parties who enter into contracts with Saudi Arabian governmental bodies and departments is to some extent limited (Saudi Arbitration Law, 2012).

Therefore, although the government's intention was to move towards a reform of the law of arbitration and allow more freedom to the contracting parties in choosing the seat and the procedural law of arbitration, in case of administrative contracts, there still remain much of governmental upper hand and authoritarianism.

2 . 4 . 5 . 5 Arbitration in Kuwait

Despite the tendency of Kuwaiti legislation to apply the arbitration as a dispute resolution mechanism, the Kuwaiti Cabinet prohibited ministries, governmental

agencies and state companies from resorting to arbitration in their contracts with individuals and legal persons. The Kuwaiti Cabinet issued its decision No. 11/88, dated 13 March 1988, which stated that it is not allowed for the mentioned governmental bodies to include arbitration clauses in their contracts. Therefore, it has to be clearly stated in the administrative contracts that all disputes will be referred to Kuwaiti courts and the law of the State of Kuwait is the applicable law. However, the decision added that the arbitration might be acceptable in cases of extreme necessity taking into consideration the nature of administrative contracts. In such cases, strict measures must be taken when appointing arbitrators. On the other hand, the Kuwaiti Cabinet emphasized that the administrative bodies have to make serious attempts to reach an amicable settlement in disputes that may arise from its administrative contracts when such contracts include arbitration as a means of solving disputes. Afterward, the cabinet issued a further decision on May 20, 1990, in which its previous decision was restricted to the administrative contracts in which the other contracting party is a foreign entity. It is clear that this amendment to the resolution was issued to reassure foreign enterprises and institutions as the latter were looking suspiciously at the local judiciary expecting that its awards would be biased to the public interest (Alhamidah, 2007). In a further step of the Kuwaiti legislation towards the adoption of arbitration, a new law was issued, law No. 11 of 1995, to organize judicial arbitration.

2 . 4 . 5 . 6 Arbitration in Egypt

The executive regulations of the new Public Contracts Law No. 182 of 2018, contrary to the old Law No. 89 of 1998, concluded in article 180 that in the event of a dispute arising between the parties to the administrative contract and the parties cannot reach an amicable settlement, the dispute is referred to either litigation or arbitration according to the contract conditions (Executive regulation of Public Contracts Law,

2019). However, the Egyptian Arbitration Law No. 27 of 1994 states in Article 1-2 that for the disputes concerning administrative contracts, agreement on arbitration shall be reached upon the approval of the competent minister or the official in charge with respect to public juridical persons (Egyptian Arbitration Law, 1994). In fact, Article 1-2 did not exist in the arbitration Law at the time of its first issuance but was subsequently added under Law No. 9 of 1997.

Historically there have been two opposing trends for the interpretation of Article 1-2 of the Arbitration Law in Egypt: one of which is pro-arbitration and in line with the principle of good faith, while the other is not in favor of arbitration in administrative contracts and is likely to be compatible with the intention of the legislator. The first trend in interpretation was adopted by several arbitral tribunals and was applied in many cases in Cairo Regional Center for International Commercial Arbitration. Such trend considers that the absence of the minister's approval does not invalidate the arbitration clause in the contract but rather blames the administrative official who consented to the contract without obtaining such approval. The other trend in interpretation was adopted by the Administrative Courts of the Council of State and considers that the arbitration clause stipulated in the administrative contract will be void in the absence of ministerial approval (Selim, 2015).

Despite its position in favor of arbitration, the Egyptian Court of Cassation issued a relatively anti-arbitration ruling dated May 12, 2015, regarding the interpretation of Article 1-2 of the Egyptian Arbitration Law. The Court of Cassation stated that in case the judge is unable to identify the intention of the legislator through the plain wording or the indications of a statutory provision, the judge may consider extrinsic elements like historical sources, preparatory works of the law, and the legal rationale behind the context of the law provision. Moreover, the Court of Cassation

reiterated its definition of public policy, which has constantly been affirmed as a set of rules aiming to achieve the public interest, whether economic, political or social, pertaining to the high order of society and which prevails over the individual's interest (Selim, 2015).

The Cassation Court referred to the preparation works for the law to determine the legal basis for its provisions and found that the law aimed to resolve the dispute over the possibility of arbitration in administrative contracts through a conclusive statutory provision leaving no room for more controversy. Accordingly, the Arbitration Law was amended by adding Article 1-2, which explicitly recognized the possibility of arbitration subject to the approval of the competent minister or the official in charge with respect to public juridical persons not subordinated to any ministry. The purpose of this approval was to achieve a balance between the arbitration agreement and the realization and maintenance of the public interest (Selim, 2015).

CHAPTER 3 : LEGISLATION COMPARISON

In this chapter, comparisons will be made between the application of the five subjects in the Egyptian procurement law that the thesis focuses on and their application in the laws and legislations of other countries based on the literature review presented in the previous chapter. The purpose of these comparisons is to highlight differences in application and then suggest amendments to the context of the Egyptian procurement law to avoid some of the shortcomings that may negatively affect administrative projects in Egypt.

3 . 1 Delay Claims by the Contractor in Egypt Compared to the other Countries

Based on the previous review, the provisions of delay claims by the Contractor in administrative contracts in Egypt can be compared with those in the other countries as follows:

Under the Federal Acquisition Regulation ('FAR') in the United States, the willingness of the contractor to recover additional costs arising from delays would depend on the cause of the delay, the extent of the delay's effect on the contractor, and the contractual provisions dealing with delay reimbursement. There are, generally speaking, two kinds of compensable delays, suspensions ordered by the government and constructive suspensions. Government-ordered suspensions occur when an instruction to stop or suspend work is given by the public entity. In general, these suspensions are covered by Federal Acquisition Regulation 52.242-14 addressing work suspension and FAR 52.242-15 addressing work stop orders.

For the government's convenience, FAR 52.242-14 allows the public authority to unilaterally suspend, delay, or interrupt all or part of the contractor's work. An adjustment shall therefore be made for any increase in the cost of executing the contract, excluding profit, caused by the unreasonable suspension, delay, or interruption (Federal

Acquisition Regulation, 2019). Under the FAR suspension of work provision, the U.S. Court of Appeals for the Federal Circuit put four requirements for any fair adjustment: excessive period extending the time for completion of the contract, the delay must have been induced by the intervention or inaction of the government, the delay resulted in damages, and there is no delay caused by the contractor that is concurrent with the suspension. The contractor will bear the burden of proving the extent of a delay and the causal link between the government's conduct and the delay.

FAR 52.242-15 provides the contracting officer with the unilateral right to stop any or part of work under a contract for 90 days (Federal Acquisition Regulation, 2019). After those 90 days, the public entity may extend the order with the contractor's consent, cancel the order, or terminate the contract for convenience; otherwise, the contractor is expected to resume work at the expiry of the stop-work order. If the stop-work results in an increase in time or costs and the contractor claims his right to the adjustment within 30 days after the end of the period of work stoppage, the public entity can amend the contract to account for the effects on the schedule or price.

If the contract is terminated for default or convenience, reasonable costs arising from the stop-work order can still be recovered by the contractor by equitable adjustment or settlement.

As for Constructive Suspensions, according to the 2006 edition of "Administration of Government Contracts," Constructive suspensions occur when work is stopped in the absence of an express order by the public entity and the government is found to be responsible for the work stoppage. If a contractor's performance is suspended, but the government does not officially order a suspension of performance, the law considers that what should have been done is done and defines

the suspension as a constructive suspension. In that case, the contractor may be compensated under the applicable "changes" clause.

The requirements for a constructive suspension claim are similar to those needed for a suspension directed by the government. Importantly, the contractor must notify the government that work has been constructively halted by the government's actions. Common examples of constructive suspensions include the inability of the government to approve specifications or submissions in a timely manner, delaying the contractor from proceeding with relevant work unreasonably. Furthermore, a constructive suspension may occur when the public entity informs the contractor that it intends to issue a variation.

In *Howard Contracting, Inc. v. G.A. Macdonald Construction Co., Inc.*, the California Supreme Court decided that the contractor could recover extended overhead for delays even if the project was completed before the contractual end date. Such compensation is subject to prove that, at the time of concluding the contract, the contractor had the intention and capacity to complete early and that government actions prevented him from early completion.

In Ireland, Clause 10 of the standard Public Works Contract PWC-CF1 version 1-9 published in January 2014 (PWC) deals with contractors' claims, together with variations and extensions of time. The clause considered that the compensation events include suspension of the work by the employer, incorrect site or setting out information, early employer occupation of works, late instructions, failure to provide access; failure to provide a work item, or other things required by the contract and unforeseeable interference by employer's personnel. Pursuant to sub-clause 10.7. 1. If the substantial completion date of the works has been extended due to a compensation event, an amount for delay costs is added to the contract sum. That amount is

determined as the daily rate of delay cost tendered by the Contractor or the expenses, excluding profit and loss of profit, incurred by the Contractor as a result of the delay.

In addition, sub-clause 10.3 deals with the notice that the contractor has to issue if he considered that, under the Contract, there should be an extension of time or an adjustment to the Contract Sum.

In the United Kingdom, the court in the case of London Borough of Merton v Stanley Hugh Ltd (1985) case 32 BLR 51, held that the contractor is entitled to an extension of time and the associated cost as a result of the disruption caused by the employer. However, the court linked the sending of notice to claim to the granted extension of time, and mentioned that failure to send the notice in time can result in the limitation of the extension of time. Furthermore, if the notice is a precondition for granting the extension of time, the contractor's entitlement to time extension will lapse. The same was held by the court in the case Education 4 Ayrshire Ltd v South Ayrshire Council [2009] CSOH 146. The court considered that failure to give a valid notice was fatal to the contractor's claim.

In Egypt, although the law imposed delay damages on the contractor in the event of his delay in implementing the project beyond the time for completion specified in the contract, it remains silent on the contractor's compensation in the event of extending the project period for reasons related to the public body.

Table 1 below summarizes the comparison between the new Egyptian Procurement Law 182 of 2018 and the laws and the legislation of other countries in dealing with "delay claims by the contractor".

Table 1: Delay Claims by the Contractor in the Administrative Contracts in Egypt Compared to the other Countries

USA	Ireland	UK	Egypt
There are two kinds of compensable delays, suspensions ordered by the government and constructive suspensions. Government-ordered suspensions occur when an instruction to stop or suspend work is given by the public entity. These suspensions are covered by FAR 52.242-14 and FAR 52.242-15. In both cases, an adjustment shall be made for any increase in the cost of executing the contract excluding profit. The U.S. Court of Appeals put four requirements for the fair adjustment. According to the "Administration of Government Contracts," Constructive suspensions occur when work is stopped in the absence of an express order by the public entity. In that case, the contractor may be compensated under the "changes" clause.	Clause 10 of the standard Public Works Contract PWC-CF1 considered a list of compensation events and stated that if the substantial completion date of the works has been extended due to a compensation event, an amount for delay costs is added to the contract sum. That amount is determined as the daily rate of delay cost tendered by the Contractor or the incurred expenses, excluding profit and loss of profit. Sub-clause 10.3 deals with the notice to claim.	According to court decisions, the contractor is entitled to an extension of time and the associated cost because of the disruption caused by the employer. This entitlement is contingent upon sending a notice to claim.	The law remains silent on the contractor's compensation in the event of extending the project period for reasons related to the public body.

3 . 2 Termination for contractor’s default in Egypt Compared to the other Countries

Based on the previous review, the provisions for termination of administrative contracts in Egypt can be compared with those in the other countries as follows:

In France, according to the State Council decision of September 30, 1983, the public authority has the power to terminate the administrative contract even in absence of the termination clause in the contract. Furthermore, if the contract states the reasons for termination, the judge may consider that the list of such reasons is not exclusive.

In the United Kingdom, the Public Contracts Regulations 2015 “PCR 2015” states that the public authority has the right to terminate contracts in certain cases and the public contracting authorities are obliged to include these provisions in the contract conditions and should not rely on the implied terms.

In the United States, according to Federal Acquisition Regulation, the Contracting Officer must consider certain factors before terminating a contract for default: the failure of the contractor and the possible excuses, the urgency of the project, the time it will take to reprocurement, the contractor's importance in the government procurement program and the contractor’s ability to liquidate advance payment or interim payments. The court ruled in several; cases that, because these factors were fully disregarded, the contract was terminated for convenience not for default.

In Turkey, Termination for contractor’s default is stipulated under the Procurement Contracts Code. Article 20 which covers all kinds of breaches.

In the Kingdom of Saudi Arabia, the contracting agency has the right to withdraw the work from the contractor and terminate the contract or assign the execution of the work to a third party at the contractor's expense in some specific cases exclusively. In addition to the termination for the contractor's default, the contracting

agency has the right to terminate the contract for the public interest even when there is no fault on the contractor's part.

In Kuwait, the new law of public tenders No. 49 of 2016, as well as the old law, did not mention cases of termination of the administrative contracts.

In Egypt, Article 51 of the new Public Contracts Law and Article 101 of the Executive Regulations state that the public authority is entitled to terminate the administrative contract whenever the contractor has committed a material breach to any of the contract provisions without specifying certain instances for such material breach. Accordingly, the public entity has the exclusive right to judge the seriousness and the performance of the contractor and take the decision of termination at its sole discretion.

Table 2 below summarizes the comparison between the new Egyptian Procurement Law 182 of 2018 and the laws and the legislation of other countries in dealing with "Termination for Contractor's default".

Table 2: *Termination of Administrative Contracts in Egypt Compared to the other Countries*

France	UK	USA
According to the State Council decision of September 30, 1983, the public authority has the power to terminate the administrative contract even in the absence of the termination clause in the contract. Furthermore, if the contract states the reasons for termination, the judge may consider that the list of such reasons is not exclusive.	Public Contracts Regulations “PCR 2015” states that the public authority has the right to terminate contracts in certain cases and the public contracting authorities are obliged to include these provisions in the contract conditions and should not rely on the implied terms.	According to Federal Acquisition Regulation, the Contracting Officer must consider certain factors before terminating a contract for default: the failure of the contractor and the possible excuses, the urgency of the project, the time it will take to reprocurement, the contractor's importance in the government procurement program and the contractor's ability to liquidate advance payment or interim payments. The court ruled in several cases that, because these factors were fully disregarded, the contract was terminated for convenience not for

Turkey	KSA	Kuwait	Egypt
Termination for contractor's default is stipulated under the Procurement Contracts Code. Article 20 which covers all kinds of breaches.	The contracting agency has the right to withdraw the work and terminate the contract or assign the execution of the work to a third party at the contractor's expense in some specific cases exclusively. In addition to the termination for the contractor's default, the agency can terminate the contract for the public interest without fault on the contractor's part.	The new law of public tenders No. 49 of 2016, as well as the old law, did not mention cases of termination of the administrative contracts.	Article 51 of Law and Article 101 of the Executive Regulations state that the public authority is entitled to terminate the administrative contract whenever the contractor has committed a material breach to any of the contract provisions without specifying certain instances for such material breach.

3 . 3 Limit of Compensation under Performance Guarantee in Egypt Compared to the other Countries

Based on the literature review, the differences in the provisions of the Limit of Compensation under the performance guarantee in administrative contracts in Egypt and the other countries can be demonstrated as follows:

In the United States, it has been established by jurisprudence and the case law that unless the contract clearly states otherwise, when the contractor fails to rectify defective or incomplete work without good reason, the governmental body can recover actual damages, not the consequential damages, under the performance guarantee. The surety's liability is limited to the costs necessary to correct the defective work and bring the construction project into compliance with the construction contract. Several cases, among them the case of Board of County Supervisors v. Sie-Gray Developers, Inc. and the case of Miracle Mile Shopping Ctr. v. National Union Indem. Co. confirmed that principle. In the two mentioned cases, the court held that the employer has the right to recover damages under the performance guarantee from the contractor who breaches a contract within limits to the reasonable costs necessary to complete the work or repair the defective work. In all cases, the damages will not exceed the face amount of the bond. The courts also held that if the cost of the rectification or completion was determined to be less than the amount of the guarantee, the employer would not be entitled to the whole amount of the guarantee, but only for the amount of this cost.

In Australia, the obligation of the beneficiary to return the surplus amount of the performance guarantee depends on the provisions of the underlying contract. Therefore, it is a matter of priority to incorporate an explicit condition in the contract stating that any surplus must be returned. However, if the contract provisions provide sufficient indication for this purpose, even if it is not explicit, then the court may

interpret the contract in this sense and allow the account party to recover. Another basis for the obligation of the beneficiary to return the surplus is the principle of unjust enrichment. The High Court of Australia in the case of *Australasian Conference Assn Ltd v Mainline Constructions Proprietary Ltd.* ruled that the employer is not entitled under the contract to any residual surplus of the money provided under the guarantee once the obligations of the contractor have been discharged, although there was no clear provision of the contract in that regards.

In the United Kingdom, the Association of British Insurers (ABI) has produced a model form of performance guarantee, ABI bond, which is recommended for use in UK construction projects, including public works. According to the ABI bond, the guarantor is obliged to compensate and discharge the damages incurred by the employer as established and calculated in accordance with the terms of the contract, and at the same time, taking into account all sums due or to become due to the contractor.

In addition, the judiciary in the UK has determined that fair remedies equivalent to the damages apply under the performance guarantees and that the excess amount should be returned to the guarantor. The House of Lords, in *Trafalgar House v General Surety*, accepted that the Beneficiary would have to repay any excess, even in the case of an unconditional on-demand performance guarantee. Moreover, in *Cargill International SA v BSFIC*, the Court of Appeal held that it is implied in the essence of a performance guarantee that in the absence of explicit contractual provisions to the contrary, there would be an accounting between the parties after the guarantee has been called. Accordingly, the amount earned under guarantee over the actual loss incurred has to be recovered. The same was adopted in the case of *Spiersbridge Property Developments Limited v Muir Construction Limited*, in which the court stated that

where an employer, under an on-demand performance guarantee, obtains more than its entitlement, the employer will need to account for this excess.

In Egypt, Article 51 of the new Public Contracts Law No. 182 of 2018 stipulates that in case of a material breach of contract by the contractor, the public entity may terminate the contract or complete the work at the contractor's expense. In all such cases, the public entity has to call the performance guarantee. The law did not link this right to the amount of actual damage suffered by the public entity and did not deal with a situation where there were payments owed to the contractor, and these payments were sufficient to rectify the damages or part thereof.

Table 3 below summarizes the comparison between the new Egyptian Procurement Law 182 of 2018 and the laws and the legislation of other countries in dealing with "Limit of Compensation under Performance Guarantee".

Table 3: *Limit of Compensation under Performance Guarantee in the Administrative Contracts in Egypt Compared to the other Countries*

USA	Australia	UK	Egypt
It has been established by jurisprudence and the case law that when the contractor fails to rectify defective or incomplete work, the governmental body can recover actual damages under the performance guarantee. The surety's liability is limited to the costs necessary to correct the defective work. The courts held that the employer has the right to recover damages under the performance guarantee within limits to the reasonable costs necessary to complete the work or repair the defective work. The courts also held that if the cost of the rectification or completion was less than the amount of the guarantee, the employer would not be entitled to the whole amount of the guarantee.	The obligation of the beneficiary to return the surplus amount of the performance guarantee depends on the provisions of the contract. It is crucial to incorporate an explicit condition in the contract stating that any surplus must be returned. However, if the contract provisions provide sufficient indication for this purpose, even if it is not explicit, then the court may interpret the contract in this sense. Another basis for this obligation is unjust enrichment. The High Court ruled that the employer is not entitled to any residual surplus of the money under the guarantee once the contractor's obligations have been discharged.	According to the ABI bond, the guarantor is obliged to compensate the damages incurred by the employer taking into account all sums due to the contractor. The judiciary has determined that fair remedies equivalent to the damages apply under the performance guarantees, and that the excess amount should be returned. The House of Lords accepted that the Beneficiary has to repay any excess, even in case of an unconditional on-demand guarantee. The Court of Appeal held that there would be an accounting between the parties after the guarantee has been called.	Article 51 of Law stipulates that in case of a material breach by the contractor, the public entity may terminate the contract or complete the work at the contractor's expense. In all such cases, the public entity has to call the performance guarantee. The law did not link this right to the amount of actual damage and did not deal with a case where the payments owed to the contractor are sufficient to rectify the damages.

3 . 4 Price Adjustment in Egypt Compared to the other Countries

Based on the foregoing literature review, the price adjustment in administrative contracts in Egypt can be compared with those in the other countries as follows:

In Turkey, Decree No. 8/505 for 1980 did not define an upper limit for price increase compensation. Besides, the decree specified certain materials that contractors would be compensated for in the event that their prices rise. All kinds of iron and steel, all kinds of cement, fuel, pressure-resistant iron and steel pipes were part of the material list. In a further step, Decree No. 88/13181 of 1988 expanded the scope of compensation to include aluminum profiles, glass, copper, brick, timber, hard plastic (PVC) pipe and materials, fittings and electrical equipment. In 2002, Public Procurement Law No. 4734 and Public Procurement Contract Law No 4735 came into force. Accordingly, a price Escalation Decree no. 2002/5039 has been issued by the Council of Ministers to simplify the application of the price adjustment formula and expand the range of the price adjustable items to include labor, cement, steel, fuel, timber, other materials and depreciation of machinery and equipment. The public entity is responsible for determining the weight of cost elements according to the nature of work. Another escalation decree No.2013/5217, very close to the previous one, was published in 2013 to expand the implementation of price changes, covering a broader variety of materials and goods, such as non-metallic products, basic metal products, coke and refined petroleum products, wood products, other materials, machinery and equipment depreciation.

In the United States, the Federal Acquisition Regulation (FAR) requires adjusting the contract price to protect the contractor and the government against significant fluctuations in labor or material costs. The items and the materials subject to the adjustment should represent the major components of the contract. On the other

hand, the public entity should reasonably specify the weight coefficients of the items and materials addressed by the Economic Price Adjustment clause according to the nature of the contract.

In the Republic of Ireland, the standard contracts PW-CF1 adopts the Formula Fluctuations Method to calculate the adjustments to the Contract Sum for changes to the cost of labor and materials. To apply the formula, the tender document should include a nominal percentage of the contract sum to each of five broad categories of work items (labor, materials, fuel, non-reusable temporary works and overheads) and specify which category shall be subject to price adjustment. The tender documents should also include the weight coefficients for the material and fuel items subject to adjustment. During the tender period, bidders may comment on the employer's nominal percentages and weightings in accordance with the "Instructions to Tenderers" section. The formula is applied in respect of each material and/or fuel category, non-reusable temporary works and labor that has been subject to an increase in price.

The new Public Contracts Law No. 182 of 2018 in Egypt stipulates that for construction contracts with a time for completion of six months or more, the contract amount has to be amended according to the increase or decrease in the cost of contract items in light of the Producer Price Index issued by the Central Agency for Public Mobilization and Statistics. Such amendment shall be binding to the contract parties. The administrative body has to determine the variable items or their components in the tender documents and the contractors have to include the relevant weight coefficients in their technical envelopes. Although the law has paid great attention to the matter to ensure the balance of the contracts to the extent that it considered this rule to be a mandatory rule that it is not permissible to agree otherwise, two loopholes emerged upon the application of this provision. First, the law did not mention the amount of the

variable materials or items that the public entity has to specify in the tender, and second, the exaggerated estimation of the weight coefficients that the contractor places in his bid.

Table 4 below summarizes the comparison between the new Egyptian Procurement Law 182 of 2018 and the laws and the legislation of other countries in dealing with "Price Adjustment".

Table 4: *Price Adjustment in the Administrative Contracts in Egypt Compared to the other Countries*

Turkey	USA	Ireland	Egypt
Decree No. 8/505 for 1980 did not define an upper limit for price increase compensation. The decree specified certain material that contractors would be compensated for in the event that their prices rise. Decree No. 88/13181 of 1988 expanded the scope of compensation to include more materials and equipment. The price escalation Decree no. 2002/5039 and no.2013/5217 have been issued by the Council of Ministers to expand the range of the price adjustable items. The public entity is responsible for determining the weight of cost elements according to the nature of work.	The Federal Acquisition Regulation (FAR) requires adjusting the contract price to protect the contractor and the government against significant fluctuations in labor or material costs. The items and the materials subject to the adjustment should represent the major components of the contract. The public entity specifies the weight coefficients of the items and materials addressed by the Economic Price Adjustment clause according to the nature of the contract.	The standard contracts PW-CF1 adopts the Formula Fluctuations Method to calculate the adjustments to the Contract Sum for changes to the cost of labor and materials. To apply the formula, the tender document should include a nominal percentage of the contract sum to each of five broad categories of work items (labor, materials, fuel, non-reusable temporary works and overheads) and specify which category shall be subject to price adjustment. The tender documents should include the weight coefficients for the material subject to adjustment. Bidders may comment on the nominal percentages and weightings.	The Law stipulates that for contracts of six months or more, the contract amount has to be amended according to the increase or decrease in the cost of items. Such amendment is binding to the contract parties. The administrative body has to determine the variable items or their components in the tender documents and the contractors have to include the weight coefficients in their bids. Two loopholes emerged: the law did not mention the amount of the variable items that the public entity has to specify in the tender and the exaggerated estimation of the weight coefficients that the contractor places in his bid.

3 . 5 Arbitration in Egypt Compared to the other Countries

Based on the previous review, arbitration in administrative contracts in Egypt can be compared with the arbitration in various other countries as follows:

In France, the French Court of Cassation declared that the principle of the prohibition of arbitration in disputes concerning the State and the public administration should not be enforced if those disputes involved international relations.

In the United Kingdom, the Arbitration Act of 1996 requires the English courts to adopt a non-interventionist approach in respect of the arbitration process. This means that the court will not have any role in the dispute until the arbitral tribunal issues its award and its subsequent role does not depend on whether a public body is a part of the dispute or not.

In Turkey, if the contractor in the administrative contract is local, the arbitration shall be held according to Istanbul Arbitration Center “ISTAC” rules, seat of the arbitration will be Istanbul, Turkish language shall be the language of the arbitration, and Turkish law is the applicable law. If the contractor is foreign contractor, the International Arbitration Act “IAA” shall be applied. In that case, the applicable law, the arbitration seat and language shall be according to the parties agreement.

In the Kingdom of Saudi Arabia, the new Arbitration Law of 1443H (2012G) contains several clauses and provisions that give freedom to the contract parties to choose the seat and the procedures of the arbitration, however, in most cases, Saudi Arabia is chosen as a seat of the arbitration, and Saudi arbitration law is the applicable law for arbitration. In addition, resorting to arbitration in administrative contracts needs the approval of the King or the ministers' council according to Saudi law.

In Kuwait, the Kuwaiti Cabinet issued a decision on May 20, 1990, permitting, without limitations, arbitration in administrative contracts in which the other contracting party is a foreign entity.

In Egypt, the Egyptian Arbitration Law No. 27 of 1994 states that for the disputes concerning administrative contracts, agreement on arbitration shall be reached upon the approval of the competent minister or the official in charge with respect to public juridical persons. Practically, such approval is rarely granted. Article 91 of the new Public Contracts Law 182 of 2018 stipulates that the approval of the competent minister has to be obtained if the public authority and the contractor choose to resort to arbitration.

Table 5 below summarizes the comparison between the new Egyptian Procurement Law 182 of 2018 and the laws and the legislation of other countries in dealing with "Arbitration in Administrative Contracts".

Table 5: *Arbitration in Administrative Contracts in Egypt Compared to the other Countries*

France	UK	Turkey
The French Court of Cassation declared that the principle of the prohibition of arbitration in disputes concerning the State and the public administration should not be enforced if those disputes involved international relations.	The Arbitration Act of 1996 requires the English courts to adopt a non-interventionist approach in respect of the arbitration process. This means that the court will not have any role in the dispute until the arbitral tribunal issues its award and its subsequent role does not depend on whether a public body is a part of the dispute or not.	if the contractor in the administrative contract is local, the arbitration shall be held according to Istanbul Arbitration Center “ISTAC” rules, seat of the arbitration will be Istanbul, Turkish language shall be the language of the arbitration, and Turkish law is the applicable law. If the contractor is foreign contractor, the International Arbitration Act “IAA” shall be applied. In that case, the applicable law, the arbitration seat and language shall be according to the parties agreement.

KSA	Kuwait	Egypt
<p>The new Arbitration Law contains several clauses and provisions that give freedom to the contract parties to choose the seat and the procedures of the arbitration, however, in most cases, Saudi Arabia is chosen as a seat of the arbitration, and Saudi arbitration law is the applicable law for arbitration. Resorting to arbitration in administrative contracts needs the approval of the King or the ministers' council.</p>	<p>The Kuwaiti Cabinet issued a decision on May 20, 1990, permitting, without limitations, arbitration in administrative contracts in which the other contracting party is a foreign entity.</p>	<p>The Arbitration Law states that for the disputes concerning administrative contracts, agreement on arbitration shall be reached upon the approval of the competent minister or the official in charge with respect to public juridical persons. Practically, such approval is rarely granted. Article 91 of the new Public Contracts Law stipulates that the approval of the competent minister has to be obtained if the public authority and the contractor choose to resort to arbitration.</p>

CHAPTER 4 : PROPOSED AMENDMENTS TO THE NEW PUBLIC CONTRACTS LAW

In this chapter, amendments to the provisions of Law 182 of 2018 are proposed in line with the conclusion of the comparisons made in Chapter three between the application of the concerned five subjects in the Egyptian procurement law and their application in the laws and legislations of other countries based on the literature review presented in Chapter two. The amendments represent the notions and concepts proposed to be added to the law articles and provisions, which can be included in any context so that they fulfill the purpose and tenor of them.

4 . 1 Delay Claims by the Contractor

As a consequence of government intervention, delays or stand-by periods suffered by contractors are matters of considerable concern to the contracting parties. Delays are costly to the contractor, who typically incurs excessive costs as a result thereof, and to the government due to a postponement of deliveries (Bragdon, 1961).

The contractor's losses due to delay attributable to the public entity may include one or more of the following:

- Preliminaries, which are the costs of running the project including site staff, site demobilization, electricity and security.
- Head office overheads, which include head office staff such as engineers, accountants and non-work specific directors, head office costs such as rental and power and overall company insurance.
- Idle equipment, including carnage, excavators and concrete pumping.

The majority of the contractual regimes and even the general terms and conditions of the contract do not provide specific details of the rules governing the evaluation of time extension claims, leaving that up to the practitioners involved with

each project. It is the duty of contractors to establish and substantiate the claims, and engineers are responsible for assessing them (Yogeswaran, *et al*, 1998).

Since Article 48, “delay in implementing the contract” of the new Public Contracts Law No. 182 of 2018 deals with the application of delay damages in case the contractor delays beyond the time for completion of the contract, it is proposed to amend the article to deal with the compensation owed to the contractor if the delay is attributable to the public entity as well.

In light of the Public Contracts Regulations 2015 “PCR 2015” in the UK, Public Works Contract PWC in Ireland and Federal Acquisition Regulation FAR in the USA, the proposed amendment has to address several issues related to the delay caused by the public entity:

Cause of delay

The delay should be not attributable to the contractor’s performance and should be a result of public entity’s activities such as delay to furnish and deliver the site to the contractor, variation orders, slow decisions, delay in review and approval of material submittals and shop drawings, failure to coordinate with government authorities and Suspension of work.

Duty of notification

The Contractor has to provide a written notice to the public entity explaining the event or occurrence-giving rise to the delay, the estimated duration of the delay, and the impact of the event or occurrence upon the critical path, controlling operation and completion of the Project. The contractor expressly waives any claims for delay or adjustment to the time for completion if the contractor fails to provide the said notice within a specified number of days from the event or occurrence-giving rise to the delay (as the case in the Public Contracts Regulations 2015 “PCR 2015 – the UK)

Mitigation of delays

The contract should impose an explicit duty to mitigate the delays caused by the public entity soon after notifying an intention to claim an extension of time. The contractor is obliged to expedite the progress to eliminate the negative impact of delays. It may be possible to revise the sequence of works and thus meet the original time for completion. However, the contractor may be entitled to cost compensation if he incurs additional expenses in the revision the sequence of works (as the case in Federal Acquisition Regulation FAR – USA).

Compensation for delay

The entitlement of the contractor shall be limited to an adjustment in the contract price in a sum equals to the actual additional labor costs, material costs, and unavoidable equipment costs incurred by the Contractor as a result of the compensable delay, plus the actual additional wages or salaries of supervisory and administrative personnel necessary and directly employed at the project site for the supervision of the work during the period of delay. Otherwise, the contractor shall have no claim for damage or compensation for any delay, interruption, hindrance, or disruption (as the case in Federal Acquisition Regulation FAR – USA and the Public Contracts Regulations 2015 “PCR 2015 – the UK). There shall be no compensation unless the event or occurrence giving rise to the delay extends the actual completion of the project past the contractual time for completion. The contractor shall not be compensated for profit, loss of profit, or indirect damages (the case in the Public Works Contract PWC – Ireland).

The mentioned compensation shall be full indemnification to the Contractor, all subcontractors, and anyone for whom they may be legally responsible for the delay caused by the public entity or anyone for whom the public entity is legally responsible.

Availability of records

The contractor and all subcontractors shall maintain accurate and complete records of the expenses and extra time incurred in respect of any claim for which additional costs are sought. The Engineer shall have access to those records and all other records that may be required to assess the contractor's entitlement under the claim. The Contractor acknowledges that the claim is waived by failing to provide access to those documents.

4 . 2 Termination (Article 51 of the Law and 101 of the Executive Regulations)

Although the right of termination of the administrative contract is a guarantee for the fulfillment of the obligations by contractors and a penalty for any breach of contract, it has to be fully justified in order for the contract to be balanced and the contractor is given a guarantee for the investments made by it.

The termination for default in administrative contracts occurs due to the contractor's failure to work, meaning that he failed to perform something that was required to be done. Therefore, cases giving the public authority the right to terminate should be specific. The law provisions have to set out certain situations where termination is appropriate, such as missing an important project milestone or failing to provide certain information or documentation. Where the law and the contract have specifically designated the situations in which the agreement will be terminated, it can be quite clear when the public authority has the right to terminate the deal. On the other hand, when a termination for contractor's default provision takes a more generic form, things can get murkier for the public authority that wants to terminate the contract. If the contractor's failure to perform its duties is minimal, or if it can be easily corrected and mitigated, then the termination of the entire contract might not be the most appropriate choice. In fact, termination for cause or default must be done due to a

material breach that has a crucial effect of defeating the terms of the contract and clearly opposes the public interest.

It is suggested that the Public Contracts Law of Egypt is amended to include a clear regulation stipulating the cases under which administrative contracts can be terminated for the contractor's default. In light of the Public Contracts Regulations 2015 "PCR 2015" in the UK, Public Procurement Law No. 4734 -in Turkey and Federal Acquisition Regulation FAR in the USA, the following erroneous cases, which represent the prominent breaches that the contractor may commit, are proposed for such amendment:

- 1. The Contractor fails to comply with its obligations under the Contract and, if the failure can be remedied, the public entity directed the Contractor to put the matter right, and the Contractor did not do so within a certain time (to be specified in the contract) from receiving the direction.*
- 2. The Contractor abandons or, except where required or permitted by the Contract, suspends the execution of the works without a reasonable cause and without getting permission from the public entity.*
- 3. The Contractor fails to proceed regularly and diligently with the execution of the works despite the multiple notifications from the public entity.*
- 4. The contractor fails to remove or rectify defective works.*
- 5. The Contractor fails to maintain the required performance security or insurance policies.*
- 6. The contractor failed to commence the work on the site within a certain time (to be specified in the contract) of the date the contract requires.*
- 7. Any of the Contractor's warranties regarding ethics are untrue.*

8. *The Contractor has committed or caused the employer to commit, a serious breach of the legal requirements concerning the Works.*
9. *The contractor or its personnel have committed a breach of the safety, health and welfare at work acts, laws or any regulations or code of practice concerning the works.*
10. *The Contractor has subcontracted all of the works without the consent of the public entity.*
11. *The Contractor has assigned the contract to a third party without the consent of the public entity.*
12. *The contractor or its personnel have committed corruption, fraud or bribery actions*
13. *The contractor became insolvent or bankrupt.*

It is worth mentioning that the aforementioned cases for termination of the contract for contractor's default are the suggested alternative to the phrase "any material breach to any of the contract provisions" mentioned in Articles 51 of the new Public Contracts Law and 101 of the executive regulations of the Law. Such cases are without prejudice to any other causes of termination other than for the contractor's default. Moreover, the cases of termination for the contractor's default have to be stipulated in much more detail in the relevant clause of the administrative contract.

4 . 3 Limit of Compensation under Performance Guarantee (Article 51)

Performance guarantees are designed to ensure that the contractor delivers goods and performs works according to the terms of the contract. If the contractor fails to perform the contract, the employer will likely suffer a loss, usually because of nonperformance or bad performance. The guarantor thus undertakes to pay the employer a sum of money if the contractor fails to perform the contract as compensation for damages already suffered. Like any other enforceable contract, a performance

guarantee usually includes a tacit agreement of good faith and fair dealing for all parties involved.

In Egypt, the new Public Contracts Law No. 182 of 2018 grants the public entity, as a part of the administrative contract, an entitlement to forfeit the performance guarantee if the contract is terminated as a result of a breach of any fundamental provision of the contract. However, the law did not address the situation in which the contractor has payments that have not yet been made, whether interim payments, final payment, or retention money. All these amounts may be sufficient to compensate the public authority for damages incurred because of the contractor's breach of the contract. Therefore, they may be an alternative to forfeiture of the letter of guarantee, or at least part of the damage may be compensated by these amounts so that the public entity does not have to forfeit the total value of the letter of guarantee. In such a case, if the public entity forfeits the total value of the performance guarantee, it will receive undue amounts that will not be used in compensation for the damage suffered, which is the case of unjust enrichment.

The theory of unjust enrichment means that no one should be unjustly enriched at the expense of another. It also means that no person should take advantage of another person's position, which causes some loss to one party and gain to another party. The Egyptian Civil Law has addressed the theory in Article 179, which states that any person, even he lacks discretion, who gains without legal reason at the expense of another person, shall, within the limits of his gains, compensate that person for the loss he has sustained. This liability shall remain unchanged even that gain later disappears (Egyptian Civil Law, 1948).

Based on the foregoing, it is proposed to amend Article 51 of the new Public Contracts Law No. 182 of 2018 to avoid unjust enrichment and to take into account the

possibility of recovering the damage incurred by the public entity or part thereof from the amounts owed to the contractor instead of calling on the performance guarantee in whole or in part.

If the contractor commits a material breach of the contract and consequently the public entity terminates the contract or performs the remaining work at the expense of the contractor, the public entity shall have the right to recover all the damages incurred sufficient to rectify the defective work and complete the work up the end of the project. In recovering damages, the cost of rectification or completion has to be determined and accounting between parties has to take place in a proper time.

In the course of accounting, the public entity will count the cost of the works to be rectified and the remaining works to be performed at the contractor's expense. On the other hand, it will count the amounts due to the contractor, whether the interim payments, the final payment, the retention money, the materials on site that the contractor has not been paid for, or the equipment on the site that the public entity intends to use permanently.

The public entity shall use the monies owed to the contractor in the course of the rectification and completion of the work. If it is found that these sums are sufficient to remedy the defects and complete the project, the public entity shall release the performance guarantee. On the other hand, if these sums are found to be insufficient, the public entity shall have the right to call on the performance guarantee and use its amount to recover the damages. The public entity does not necessarily forfeit the entire face value of the performance guarantee; the entitlement of the public entity is limited to the amount required to complete the work and remedy the defects.

4 . 4 Price Adjustment (Article 47 of the Law and Article 96 of the Executive Regulation)

The fluctuation in construction input costs is one of the wide-ranging problems facing the construction industry, causing most projects to be undertaken at amounts higher than the initial contract prices. To overcome the effect of price fluctuations, certain contract clauses are required to deal with this uncertainty. The main purpose of the price adjustment clauses is to allow contractors and clients to adjust the increase or decrease in prices along the project duration, thus avoiding potential losses and, at the same time, avoiding the high and inaccurate contingency percentage that can be added by the contractor to take into account the risk of price fluctuation.

Article 47 of Law no. 182 of 2018 set rules for price adjustment in administrative construction contracts, imposing an obligation on the public authorities, in the case of contracts which duration is six months or more, to amend the contract amount every three months based on the increase or decrease in the price of items after the date of opening of the technical envelopes. The law obliges the public authorities to determine the variable items in the tender documents and obliges contractors to set the coefficient of the weights for the components of those items. The law considered such obligations a condition for the tender's validity and the validity of the bid submitted by the contractor. Article 97 of the executive regulation of the law added details of the formula used for price adjustment and set rules for applying such formula.

Nevertheless, neither the law nor the regulation addresses two critical issues: the amount of the variable materials or items and the illogical and unfair weights coefficients that the contractor may place in his bid. These two issues have long raised problems in implementing the price adjustment clause in administrative contracts.

Amount of the variable items and materials

The first issue is the amount of the variable items and materials. The law has not imposed a certain amount or percentage from the contract price for such items and materials. For example, the Turkish administrative legislation stipulated certain items that must be subject to adjustment, including non-metallic products, basic metal products, coke and refined petroleum, wood products, other material, and machinery and equipment depreciation. The same was adopted by the standard contracts PW-CFI in the Republic of Ireland and the Federal Acquisition Regulation in the USA, which stated that most of the contract price components such as fuel, labor and materials should be subject to adjustment.

The public procurement law in Egypt left the matter to the sole discretion of the public entity. To achieve the law, it is sufficient for the public entity to make one item subject to adjustment, such as reinforcement steel, for example, in the reinforced concrete item. Thus, the context of article 47 of the law is fulfilled, and the tender shall not be not subject to cancellation. However, this way of achieving the law is not realistic; instead, it is a simulated achievement that does not fulfill the law's aim: protecting the contract parties from significant price fluctuation. The steel reinforcement almost does not represent a significant percentage of the total contract price. Therefore, the public entity did not achieve the goal of including the price adjustment clause, which compensates the contractor and the administrative body when the prices increase or decrease after the contract's conclusion.

There are two proposed scenarios to rectify the issue of the variable items in the new Egyptian Contract Procurement Law:

- *The first is to identify a list of items and materials that, where applicable in a particular contract, shall always be subject to price adjustment, as the case in Turkish administrative legislation.*
- *The second is to specify a significant percentage of the contract price representing the minimum amount subject to price escalation. Such percentage includes a group of items and materials according to the nature of the contract as the case of the FAR in USA and PW-CF1 in the Republic of Ireland.*

Weight Coefficients:

The second issue that causes a lot of debate in applying the price adjustment in administrative contracts in Egypt is the determination of the weight coefficients of the variable items' components. According to the executive regulation of Law no. 182 of 2018, the contractor has to specify the weight coefficients of the variable items' components in his tender. Failing to do that, his tender will be excluded.

It sometimes happens that contractors set illogical and unfair weight coefficients for the variable items' components to maximize their profit from the increase in those items' prices after the conclusion of the contract. For example, in case the contractors expect a rapid increase in the steel rebar price, they specify a weight coefficient of 90% for the steel rebar in reinforced concrete items while the actual coefficient ranges between 40% and 60%". Hence, they are compensated for 90% of the reinforced concrete item's value if the price of steel increases, while they are entitled to compensation for the actual percentage only. Therefore, one of the two scenarios is suggested to amend Article 97 in the executive regulation of the law:

- *First, the public entity, not the contractor, is responsible for determining the weight coefficients, as is the case in most administrative legislation in the world. The*

contractor may have the right to comment on the coefficients as in the Republic of Ireland's case.

- *Second, the public entities are responsible for determining a reasonable range for weight coefficients, and the contractor chooses the appropriate coefficient from that range according to the contract nature.*

4 . 5 Arbitration (Article 91)

Arbitration, as an alternative dispute resolution mechanism, is preferred in most of the countries all over the world because it offers a solution to the problem of access to justice faced by investors and business firms due to three issues: the large number of disputes brought before courts, the lengthiness of the proceedings and the complexity and technical obscurity of the litigation (Alsaia, 2015). In addition, arbitration has several advantages such as flexibility regarding the form, place and procedures of the arbitration, limited duration, confidential and private procedure, final and binding award and the availability to choose the arbitrators by the parties of the dispute.

In administrative contracts, the public authority is the strongest party because it has exceptional powers to exercise pressure on the contractor to fulfill his obligations. Such powers enable the administration to ensure the systematic and consistent function of the utility and that the contract is performed in the best way.

However, during the arbitration process, the public authority loses its strong official position, which leads to abandonment of its special privileges, as it is treated as an equal to the other disputing party. Those who oppose the use of arbitration in administrative contract disputes allege that the removal of exceptional powers wastes one of the fundamental principles of administrative contracts. It is contended, however, that treating the public authority in the same way as a private individual does not contradict the principles of administrative contract theory because exceptional powers

are only granted to the governmental bodies in their contracts, but not in cases of disputes arising from these contracts. Furthermore, it is essential to note that, since the Constitution states that all individuals or entities are equal before the law, the government is also treated as a private individual who has no special powers within the litigation system (Al-Shibli, 2018).

In 1997, article 1 of the Arbitration Law was amended to condition the validity of any arbitration clause in a government contract upon the express approval of the concerned minister. That is, an arbitration clause in an administrative contract concluded between a public authority and a private person is effective only upon the approval of the concerned minister or the head of the public authority where the authority is not subject to a specific minister. As a result of this condition, arbitration is almost ineffective in administrative contracts in Egypt as the concerned minister rarely approves arbitration as a dispute resolution mechanism despite the extensive advantages of arbitration.

Therefore, it is suggested to add a paragraph at the end of Article 91, "Resolution of Disputes between the Contract Parties", of the new Public Contracts Law No. 182 of the year 2018, to express that the failure to obtain the approval of the competent minister, required under the Egyptian Arbitration Law, shall not affect the validity of the agreement on arbitration in respect of administrative contracts in the event that the public authority maintains the invalidity of this agreement due to failure to comply with this restriction. This is because the approval of the minister is considered an internal legal restriction that the public authority should not adhere to in order to avoid the arbitration that it has already accepted and stated in the contract. Otherwise, the principle of good faith in the implementation of the contractual obligations will be violated, and this act of the public authority will contradict a stable

rule in commercial arbitration that it is not permissible to circumvent the agreement on arbitration by raising defenses derived from the national law of the contracting party.

CHAPTER 5 : AMENDMENTS VERIFICATION

In this chapter, verification of the proposed amendments to the new public contracts law takes place. Verification is intended to check that amendments are comprehensive and achieve their intended purpose of reforming the law and facilitating its application in line with the international standards for similar laws.

5 . 1 Verification of the proposed amendments

The proposed amendments to the new public contracts law are verified using experts' opinions. The assessment of four experts having a wide experience in the field of contract law and administration and public procurement were investigated regarding the proposed amendments. All the four experts have legal backgrounds in addition to their engineering backgrounds. Only four experts were selected due to the limited number of those who combine specialization in administrative contracts and administrative law and, at the same time, knowledge of the engineering and technical aspects of construction projects. Engineers and engineering experts having a working knowledge of the laws and legal background are able to follow regulations, comply with local, state and international regulations, understand the boundaries of their personal and professional liability; negotiate contracts, develop a relationship with the law firms that understand the engineering business and can provide solid legal counsel when needed.

The first expert has over twenty years of experience in the field of contract law and administration in Egypt and abroad and has a wide experience in the public work contracts. He works in a construction company in Saudi Arabia, and his work extends to the entire Gulf region. The second expert also has nearly twenty years of experience in contract administration and administrative contracts in particular. He works in an American project management firm with several branches in the Middle East, Africa,

and Asia. The third expert has around ten years of experience in construction contract management and extensive knowledge in both civil and public procurement law contracts. He works in a leading international Egyptian company that has projects in all fields of construction in Egypt, Africa and the Gulf region. The fourth expert has about ten years of experience in the field of contract law in consultancy services and construction. He works as a contract manager in a leading Chinese company that implements huge national projects in Egypt and many African countries. All the four experts have dealt with several types of contracts that are governed by civil law and public procurement law.

The investigation included all elements of the amendments in the five subjects in addition to the effect of the provisions of the amendments on the obligations of the contract's parties. The opinions and analysis of the experts suggestions regarding the amendments to the concerned five subjects of administrative contracts are as follows:

5 . 1 . 1 Delay Claims by the Contractor

The first expert agrees with the researcher about the silent nature of the Egyptian procurement law in dealing with contractor delay claims, as one of the shortcomings that negatively affect administrative projects in Egypt compared with the other countries' legislation such as the Federal Acquisition Regulation 'FAR' in the United States and Standard Public Works Contract in Ireland and the English case law perspective. However, the expert suggested some modifications to the amendments proposed by the researcher.

Regarding the causes of the contractor's delay that entitle him to claim time and/or cost, the expert suggested adding delay in the contractor's due payments and delay in issuance permits. The researcher agrees with the expert to add the delay in issuance permits but disagrees with him about adding the delay in the contractor's due

payments as the Law in article 45 has set a compensation mechanism for the contractor in such case. The article states that if the public entity fails to pay o the contractor the amounts due to him at the specified dates, it shall be required to pay to him financing charges on the amount unpaid during the period of delay. The financial charges are calculated at the discount rate of the Central Bank of Egypt. The researcher believes that this compensation has to be the unique one because the subject of the administrative contract is the public utility, which must not be delayed in consideration of the public interest. Moreover, Paying the financing charges to the contractor implies that he has got finance, equals to the amount of the late payment, from a bank or a financial institution in order to be able to continue working on the project without interruption, therefor he is entitled to get the financing charges without need for time extension.

The expert went on - with regard to the duty to mitigate the effects of the delay - and explained that it is a fundamental duty to minimize the delay as to make it less severe or serious, even if the delay event is caused by the counter party. However, he suggested that the contractor would not be entitled to compensation for the measures he took in this regard if these measures did not result in actual mitigation of the effects of the delay.

Furthermore, the expert suggested adding some types of damages to the compensation due to the contractor as a result of the delay, which are the cost of extending the validity of the insurance policies and the bank guarantees, and the labor and material price escalation directly resulted from the delay. On the other hand, the expert supports the researcher in excluding the compensation for loss of profit or indirect damages.

Finally, the expert emphasized the significance of records and documentation role in the successful management of construction claims. He asserted that the proposed

amendment, which stipulates that the contractor waives his entitlements in case he failed to provide the public entity access to the records, is a good approach and will facilitate the disclosure of documents required by the public entity to reach a reasonable and fair assessment

In the context of mitigating delays, the second expert explained that the contractor would be entitled to cost compensation if he incurred additional expenses not only in the revision of the sequence of works but in taking any action or arrangement that results in extra costs such as increasing resources, working more than one shift and contracting with more suppliers and subcontractors.

The second expert also suggested adding the cost of the Insurance, bank guarantees and site running expenses such as security, safety and guarding during the delay period to the items for which the contractor is entitled to compensation.

Finally, the expert considered that an approved updated time schedule is one of the documents that the contractor has to maintain and provide the engineer access to in order to enable the assessment of the contractor's entitlement under the claim.

The third expert suggested, in the context of delay mitigation, adding that the contractor would not be responsible for a particular mitigation measure, which was not taken, as such measure was not suggested or notified by the employer at the beginning of the event occurrence.

The fourth expert suggested adding discrepancies, ambiguities and errors in the contract documents to the causes of delay that are attributable to the public entity and entitle the contractor to an extension of time. In the opinion of the expert, the inconsistency of the contract documents has always been a reason for delaying the contractor and thus the emergence of claims and disputes between the parties to the contract. The researcher agrees with the expert to add this event to the causes of the

compensable delay provided that the inconsistencies, ambiguities and errors are latent and not easily discovered by the contractor at the bidding stage and in the early stages of the contract.

5 . 1 . 2 Termination (Article 51 of the Law and 101 of the Executive Regulations)

The First expert explained that the researcher indicated one of the privileges granted by the Egyptian Procurement Law and its executive regulations to the public authority, which is the right to terminate the contract in the case of the contractor's breach of one of its material provisions. The expert expressed his agreement with the researcher that this privilege must be accompanied by specific limits and restrictions represented in the cases in which the public authority should use this privilege. Furthermore, the expert believed that the researcher has to outline that The public authority should notify the contractor before taking the termination decision and grants him a reasonable time to rectify the breach he committed. The termination will take place if the contractor fails to rectify his breach and comply with the public entity instruction. This duty of notification is without prejudice to the cases of immediate termination such as bankruptcy, insolvency, corruption and fraud actions.

The second expert fully agrees to append certain cases of termination for contractor's default to the phrase “any material breach to any of the contract provisions” mentioned in Articles 51 of the new Public Contracts Law and Article 101 of the Executive Regulations of the Law. Moreover, the expert suggested adding another case of the termination for the contractor's default, which is non-compliance with the duty of confidentiality in relation to the contract. The researcher fully supports the expert’s opinion, especially in projects that require confidentiality and non-disclosure of contract information.

On the first case under which administrative contracts could be terminated for the contractor's default, the third expert suggested adapting the paragraph so that termination may take place if the Contractor did not remedy his failure to comply with its obligations under the Contract within a certain time, to be specified in the contract or to be agreed upon as the case may be, from receiving the direction from the employer. The expert considered the cases where the time to remedy the defects is not explicitly mentioned in the contract.

On the second case of termination, the expert explained that the delay in payment the interim payments of the contractor does not constitute a reasonable cause to suspend the work on site. The reason behind this addition is to ensure that the implementation of the public facility will not be delayed.

The fourth expert was satisfied with the modifications proposed for this subject.

5 . 1 . 3 Limit of Compensation under Performance Guarantee (Article 51 of the Law)

The First expert supports the researcher 's conclusion that there are two major pitfalls in Article 51 of the new Public Contracts Law No. 182 of 2018. The two pitfalls are the extreme right of the public entity to call the full amount of the performance guarantee without considering the incurred damages and the public entity's right to call the performance guarantee even if the contractor's due payments are sufficient to rectify the damages. Both exaggerated rights are applicable in case of termination or execution of the works at the contractor's expense. However, the expert argued that the legislator's intention might not have been to grant the public entity full authority to call the total amount of the performance guarantee in all cases. This argument is based on the context of Article 40 of the Public Contracts Law No. 182 of 2018 and Article 120 of the

executive regulations of the law. Both articles stipulate that promptly upon the expiry of the defects liability period, all sums due to the contractor will be returned, including the “refund of the performance guarantee or the remaining part thereof”.

The researcher opposed this argument because the said articles of the Law and the Executive regulations deal with the general case, which is the normal expiration of the contract after the contractor has successfully completed the project. Therefore, the performance guarantee is returned to the contractor, and if part of its value is used to repair some defective work, the remaining part is returned. While Article 51 of the Law deals with a specific case in which the public entity terminates the contract or executes the work at the contractor's expense if the contractor commits a material breach of the contract. The article states that in all such cases of termination for default or execution at the contractor's expense, the performance guarantee shall be an entitlement to the public entity. It is an established legal rule that the specific provision prevails over the general provision.

The second, third and fourth experts were satisfied with the modifications proposed for this subject and had no comment to them.

5 . 1 . 4 Price Adjustment (Article 47 of the Law and Article 96 of the Executive Regulation)

The first expert, as he put it, agrees with the researcher’s conclusion that the issues highlighted in the price adjustment articles in the Public Procurement Law No. 182 of 2018 and its executive regulations were practically impeding the proper and fair application of the price adjustment under the former Procurement Law No. 89 of 1998 and will undoubtedly continue to exercise such hindrances under the new Procurement Law. The two issues are that the materials subject to price adjustment are not specified and that it is left to the contractor to unilaterally determine the weight coefficients to be

used in the price adjustment calculation. To overcome the first issue, the expert tends to the alternative adopted by several countries, including Turkey, to specify a list of items and materials that are always subject to price adjustment, where applicable in a particular contract. On the other hand, the expert supports, concerning the other issue, the alternative applied in most of the world countries, which is for the public authority to determine the weight coefficients used in the equations of price adjustment while the contractor may have the right to comment on the coefficients as in the Republic of Ireland's case.

The second expert commented on the two proposed scenarios for amending Article 97 of the executive regulations of the law regarding variable items and materials. The expert explained that it is not enough to identify a list of items and materials that shall always be subject to price adjustment where applicable in a particular contract. Further, he suggested adding that this list should be subject to a periodic review and update by administrative decrees to consider new items that involve risks.

The third expert commented on the two proposed scenarios for amending Article 97 of the executive regulations of the law regarding weight coefficients. The expert suggested that the percentage chosen by the contractor in the second scenario could be linked to the evaluation of the contractor's financial offer. The researcher opposes such opinion as it is impractical and not viable to predict at the bidding stage the cost elements whose prices will increase and the value of this increase if it occurs.

The fourth expert was satisfied with the modifications proposed for this subject.

5 . 1 . 5 Arbitration (Article 91)

In the opinion of the first expert, the researcher touched the hottest stone in the dispute resolution mechanism, under the new Public Contracts Law No. 182 of 2018,

which is the arbitration clause validity under the administrative contracts, that is a matter of legal debate since the effectiveness of the arbitration law No. 27 of 1994 as amended by Law No. 9 of 1997. The expert illustrated that while the proposed amendment to Article 91, “Resolution of Disputes between the Contract Parties” of the Law seems reasonable to provide some trust for the contractors, especially the international ones, regarding the effectiveness of the arbitration agreement, the efficiency of this proposed amendment is still, in his opinion, doubtable without amending the arbitration law itself.

The fourth expert considered adding a paragraph expressing that the failure to obtain the approval of the competent minister, required under the Egyptian Arbitration Law, shall not affect the validity of the arbitration agreement, will waste the power of the minister's approval.

He suggested, as an alternative, that the public authority would be obliged to get the minister's approval at an early stage of the procurement cycle, for instance, before the start of the bidding process. In this case, the proper dispute resolution mechanism will be incorporated in the tender document without any possibility of being unilaterally violated by the public authority. The researcher considers that this solution might lead to an early refusal of the competent minister to the arbitration as a dispute resolution mechanism in the contract. However, this suggestion could be taken into consideration as an alternative to the proposed amendment.

The second and third experts were satisfied with the modifications proposed for this subject and did not have any comments.

Tables 6-10 below summarize the opinions of the four experts and the additions and modifications suggested by them regarding the proposed amendments for each of the five subjects.

Table 6: *Modifications suggested by the experts to the subject “Delay Claims by the Contractor”*

First Expert	Second Expert	Third Expert	Fourth Expert
Adding delay in issuance permits and delay in contractor's due payments to the causes of delay that entitles the contractor to claim time and/or cost. The researcher agrees with the expert regarding the first cause but disagrees regarding the last.	Adding that, in the context of mitigating delay, the contractor would be entitled to cost compensation if he incurred additional expenses not only in the revision of the sequence of works but in taking any action or arrangement that results in extra costs such as increasing resources, working more than one shift and contracting with more suppliers and subcontractors.	Adding that, in the context of mitigating delay, the contractor would not be responsible for a particular mitigation measure, which was not taken, as such measure was not suggested or notified by the employer at the beginning of the event occurrence.	Adding discrepancies, ambiguities and errors in the contract documents to the causes of delay that are attributable to the public entity and entitle the contractor to an extension of time.
Clarifying that the contractor would not be entitled to compensation for the measures he took to mitigate the effects of delay if these measures did not result in actual mitigation.	Adding the cost of the Insurance, bank guarantees and site running expenses such as security, safety and guarding during the delay period to the items for which the		

	contractor is entitled to compensation.		
Adding some types of damages to the compensation due to the contractor as a result of the delay, which are the cost of extending the validity of the insurance policies and the bank guarantees, and the labor and material price escalation directly resulting from the delay.	Considering that an approved updated time schedule is one of the documents that the contractor has to maintain and provide the engineer access to in order to enable the assessment of the contractor's entitlement under the claim.		

Table 7: *Modifications suggested by the experts to the subject “Termination”*

First Expert	Second Expert	Third Expert	Fourth Expert
Adding that the public authority should notify the contractor before taking the termination decision and grant him a reasonable time to rectify the breach he committed. If the contractor fails to rectify his breach and comply with the public entity instruction, termination shall take place. This duty of notification is without prejudice to the cases of immediate termination such as bankruptcy, insolvency, corruption and fraud actions.	Adding another case of the termination for the contractor's default, which is the non-compliance with the duty of confidentiality in relation to the contract	Adapting the first case for termination so that termination may take place if the Contractor did not remedy his failure to comply with its obligations under the Contract within a certain time, to be specified in the contract or to be agreed upon as the case may be, from receiving the direction from the employer.	The fourth expert had no suggestions regarding this subject.
		Clarifying, on the second case of termination, that delay in payment of the interim payments of the contractor does not constitute a reasonable cause to suspend the work on site.	

Table 8: *Modifications suggested by the experts to the subject “Limit of Compensation under Performance Guarantee”*

First Expert	Second Expert	Third Expert	Fourth Expert
The First expert supports the researcher's conclusion. However, the expert argued that the legislator's intention might not have been to grant the public entity full authority to call the total amount of the performance guarantee in all cases based on the context of Article 40 of the Public Contracts Law No. 182 of 2018 and Article 120 of the executive regulations of the law. The researcher opposed this argument.	The second expert had no suggestions regarding this subject.	The third expert had no suggestions regarding this subject.	The fourth expert had no suggestions regarding this subject.

Table 9: *Modifications suggested by the experts to the subject "Price Adjustment"*

First Expert	Second Expert	Third Expert	Fourth Expert
The expert tends to the alternative adopted by several countries, including Turkey, to specify a list of items and materials that are always subject to price adjustment. The expert also supports the alternative applied in most of the world countries, which is for the public authority to determine the weight coefficients used in the equations of price adjustment while the contractor may have the right to comment on them as in the Republic of Ireland's case.	Adding that, the list of items and materials that will be subject to price adjustment should also be subject to a periodic review and update by administrative decrees to consider new items that involve risks.	Linking the percentage chosen by the contractor in the second scenario of weight coefficients to the evaluation of the contractor's financial offer. (The researcher opposes such opinion)	The fourth expert had no suggestions regarding this subject.

Table 10: *Modifications suggested by the experts to the subject “Arbitration”*

First Expert	Second Expert	Third Expert	Fourth Expert
The efficiency of the proposed amendment to Article 91 is doubtful without amending the arbitration law itself.	The second expert had no suggestions regarding this subject.	The third expert had no suggestions regarding this subject.	Adding an alternative whereby the public authority would be obliged to get the minister's approval at an early stage of the procurement cycle, for instance, before the start of the bidding process.

5.2 The updated Proposed Amendments

The proposed amendments to the New Public Contracts Law have been updated by implementing most of the experts' valuable additions. The following are the final proposed amendments after incorporating the mentioned additions. All the added words and paragraphs are underlined.

5.2.1 Delay Claims by the Contractor

The proposed amendment to Article 48, “delay in implementing the contract” of the new Public Contracts Law No. 182 of 2018, has to address several issues related to the delay caused by the public entity:

Cause of delay

The delay should be not attributable to the contractor’s performance and should be a result of public entity’s activities such as delay to furnish and deliver the site to the contractor, variation orders, slow decisions, delay in review and approval of material submittals and shop drawings, failure to coordinate with government

authorities, Suspension of work, delay in issuance permits and the existence of discrepancies, ambiguities and errors in the contract documents provided that such discrepancies, ambiguities and errors are latent and not easily discovered by the contractor at the bidding stage and in the early stages of the contract.

Duty of notification

The Contractor has to provide a written notice to the public entity explaining the event or occurrence-giving rise to the delay, the estimated duration of the delay, and the impact of the event or occurrence upon the critical path, controlling operation and completion of the Project. The contractor expressly waives any claims for delay or adjustment to the time for completion if the contractor fails to provide the said notice within a specified number of days from the event or occurrence-giving rise to the delay.

Mitigation of delays

The contract should impose an explicit duty to mitigate the delays caused by the public entity soon after notifying an intention to claim an extension of time. The contractor is obliged to expedite the progress to eliminate the negative impact of delays. It may be possible to revise the sequence of works and thus meet the original time for completion. However, the contractor may be entitled to cost compensation if he incurs additional expenses in revision the sequence of works or taking any action or arrangement that results in extra costs such as increasing resources, working more than one shift and contracting with more suppliers and subcontractors as long as such actions and arrangements result in actual mitigation of the effects of delay.

Nevertheless, the contractor would not be responsible for a particular mitigation measure, which was not taken, as such measure was not suggested or notified by the employer at the beginning of the event occurrence.

Compensation for delay

The entitlement of the contractor shall be limited to an adjustment in the contract price in a sum equals to the actual additional labor costs, material costs, and unavoidable equipment costs incurred by the contractor as a result of the compensable delay, including the labor and material price escalation directly resulted from the delay, plus the actual additional wages or salaries of supervisory and administrative personnel necessary and directly employed at the project site for the supervision of the work during the period of delay, in addition to the cost of the Insurance, bank guarantees and site running expenses such as security, safety and guarding during the delay period. Otherwise, the contractor shall have no claim for damage or compensation for any delay, interruption, hindrance, or disruption. There shall be no compensation unless the event or occurrence giving rise to the delay extends the actual completion of the project past the contractual time for completion. The contractor shall not be compensated for profit, loss of profit, or indirect damages.

The mentioned compensation shall be full indemnification to the Contractor, all subcontractors, and anyone for whom they may be legally responsible for the delay caused by the public entity or anyone for whom the public entity is legally responsible.

Availability of records

The contractor and all subcontractors shall maintain accurate and complete records of the expenses and extra time incurred in respect of any claim for which additional costs are sought, in addition to an approved updated time schedule. The Engineer shall have access to those records and all other records that may be required to assess the contractor's entitlement under the claim. The Contractor acknowledges that the claim is waived by failing to provide access to those documents.

5 . 2 . 2 Termination (Article 51 of the Law and Article 101 of the Executive Regulations)

It is suggested that the Public Contracts Law of Egypt is amended to include a clear regulation stipulating the cases under which administrative contracts can be terminated for the contractor's default. The following erroneous cases, which represent the main breaches that the contractor may commit, are proposed for such amendment:

- 1. The Contractor fails to comply with its obligations under the Contract and, if the failure can be remedied, the public entity directed the Contractor to put the matter right, and the Contractor did not do so within a certain time (to be specified in the contract or to be agreed upon as the case may be) from receiving the direction.*
- 2. The Contractor abandons or, except where required or permitted by the Contract, suspends the execution of the works without a reasonable cause and without getting permission from the public entity. It is worth mentioning that the delay in payment the interim payments of the contractor does not constitute a reasonable cause to suspend the work on site.*
- 3. The Contractor fails to proceed regularly and diligently with the execution of the works despite the multiple notifications from the public entity.*
- 4. The contractor fails to remove or rectify defective works.*
- 5. The Contractor fails to maintain the required performance security insurance policies.*
- 6. The contractor failed to commence the work on the site within a certain time (to be specified in the contract) of the date the contract requires.*
- 7. Any of the Contractor's warranties regarding ethics are untrue.*
- 8. The Contractor has committed or caused the employer to commit a serious breach of the legal requirements concerning the Works.*

9. *The contractor or its personnel have committed a breach of the safety, health and welfare at work acts, laws or any regulations or code of practice concerning the works.*
10. *The Contractor has subcontracted all of the works without the consent of the public entity.*
11. *The Contractor has assigned the contract to a third party without the consent of the public entity.*
12. *The contractor or its personnel have committed corruption, fraud or bribery actions*
13. *The contractor became insolvent or bankrupt.*
14. *Non-compliance with the duty of confidentiality in relation to the contract especially in projects that require confidentiality and non-disclosure of contract information.*

It is worth mentioning that the aforementioned cases for termination of the contract for contractor's default are the suggested alternative to the phrase "any material breach to any of the contract provisions" mentioned in Article 104 in the executive regulations of the new Public Contracts Law.

The public authority should notify the contractor before taking the termination decision and grants him a reasonable time to rectify the breach he committed. If the contractor fails to rectify his breach and comply with the public entity instruction, termination shall take place. This duty of notification is without prejudice to the cases of immediate termination such as bankruptcy, insolvency, corruption and fraud actions.

5 . 2 . 3 Limit of Compensation under Performance Guarantee (Article 51)

It is proposed to amend Article 51 of the new Public Contracts Law No. 182 of 2018 to avoid unjust enrichment and to take into account the possibility of recovering the damage incurred by the public entity or part thereof from the amounts owed to the contractor instead of calling on the performance guarantee in whole or in part.

If the contractor commits a material breach of the contract and consequently the public entity terminates the contract or performs the remaining work at the expense of the contractor, the public entity shall have the right to recover all the damages incurred sufficient to rectify the defective work and complete the work up the end of the project. In recovering damages, the cost of rectification or completion has to be determined and accounting between parties has to take place in a proper time.

In the course of accounting, the public entity will count the cost of the works to be rectified and the remaining works to be performed at the contractor's expense. On the other hand, it will count the amounts due to the contractor, whether the interim payments, the final payment, the retention money, the materials on site that the contractor has not been paid for, or the equipment on the site that the public entity intends to use permanently.

The public entity shall use the monies owed to the contractor in the course of the rectification and completion of the work. If it is found that these sums are sufficient to remedy the defects and complete the project, the public entity shall release the performance guarantee. On the other hand, if these sums are found to be insufficient, the public entity shall have the right to call on the performance guarantee and use its amount to recover the damages. The public entity does not necessarily forfeit the entire face value of the performance guarantee; the entitlement of the public entity is limited to the amount required to complete the work and remedy the defects.

5 . 2 . 4 Price Adjustment (Article 47 of the Law and Article 96 of the Executive Regulation)

It is suggested to amend Article 47 of Law no. 182 of 2018 and Article 97 in the executive regulations of the law to address the two critical issues of “the amount of the

variable items and materials” and “the illogical and unfair weight coefficients” as follows:

Amount of the variable items and materials

There are two proposed scenarios to rectify the issue of the price adjustment in the new Egyptian Contract Procurement Law:

- *The first is to identify a list of items and materials that, where applicable in a particular contract, shall always be subject to price adjustment, as the case in Turkish administrative legislation. This list should be subject to a periodic review and update by administrative decrees to consider new items that involve risks.*
- *The second is to specify a significant percentage of the contract price representing the minimum amount subject to price escalation. Such percentage includes a group of items and materials according to the nature of the contract as the case of the FAR in USA and PW-CF1 in the Republic of Ireland.*

Weight Coefficients:

One of the two scenarios is suggested to amend Article 96 in the executive regulation of the law:

- *First, the public entity, not the contractor, is responsible for determining the weight coefficients, as is the case in most administrative legislation in the world. The contractor may have the right to comment on the coefficients as in the Republic of Ireland's case.*
- *Second, the public entities are responsible for determining a reasonable range for weight coefficients, and the contractor chooses the appropriate coefficient from that range according to the contract nature.*

5 . 2 . 5 Arbitration (Article 91)

It is suggested to add a paragraph at the end of Article 91, “Resolution of Disputes between the Contract Parties”, of the new Public Contracts Law No. 182 of the year 2018, to express that the failure to obtain the approval of the competent minister, required under the Egyptian Arbitration Law, shall not affect the validity of the agreement on arbitration in respect of administrative contracts in the event that the public authority maintains the invalidity of this agreement due to failure to comply with this restriction.

As an alternative, the public authority would be obliged to get the minister's approval at an early stage of the procurement cycle, for instance, before the start of the bidding process or during the bidding stage. If the public authority fails to take that early action, the first alternative shall take effect.

CHAPTER 6 : CONCLUSIONS

6 . 1 Overview and Contributions

This research is concerned with administrative contracts and administrative law, in particular the new Egyptian Public Procurement Law. The main objective of the research is to propose amendments to the law, in line with relevant laws in many countries of the world, to make it more fair and equitable and to avoid unbalanced provisions that make international contractors refrain from dealing with major national projects in Egypt. The suggested amendments address five subjects: delay claims by the contractor, contract termination, limit of compensation under performance guarantee, price adjustment and dispute resolution mechanism. These subjects have often been a source of debates and disputes in the implementation of administrative contracts and a source of imbalance between the contract parties, which leads many contractors to avoid entering into such contracts.

In order to achieve the objective of the research, an extensive literature review was conducted comprising the definition of the administrative contracts, the legal regime applicable to that type of contract, and the object and parties of the administrative contract. The literature reviews have also covered the principle of administrative contracts in Egypt and various countries around the world and how public procurement laws or regulations in these countries deal with the five subjects involved in this research. These countries include France, Romania, Germany, the United Kingdom, Spain, Italy, Belgium, Turkey and the Republic of Ireland in Europe, along with Saudi Arabia, Kuwait, Qatar and the United Arab Emirates in the Middle East, as well as the United States and Australia. The reasons for choosing these countries are that they reflect the two most popular legal systems in the world, namely civil law and common law legal systems; they represent the geographical and cultural

diversity, and the legislations in these countries represent exemplary models for reforming the provisions of the Egyptian Procurement Law.

From the study, it is concluded that the administrative contract is defined as a legal instrument through which authorities, bodies, entities and institutions of the public administration system carry out their duties to meet the public interest. The administrative contracts are concluded by selecting a partner by the public administration through the means provided by the law. Unlike private law contracts, where terms are negotiated and determined by the mutual consent of the parties to the contract, administrative contracts contain binding terms and contractual clauses that are not normally subject to negotiation.

The special legal regime to which the administrative contracts are subject is the administrative law or the public procurement law, which governs the public procurement planning, requirements, manner and procedures. In Egypt, the new public procurement law is Law No. 182 of 2018, promulgating the law regulating contracts concluded by public bodies and its executive regulations.

Whether through the texts of laws or court rulings, many countries deal with the five subjects under the research in a way that avoids the shortcomings of the Egyptian law texts related to these subjects. By reviewing those countries' laws, regulations and court decisions, proposed amendments to the new Egyptian procurement law were formulated to make the law more balanced and impartial. The proposed amendments are briefly as follows:

1. Delay Claims by the Contractor: It is proposed to amend Article 48 of the new Public Contracts Law to address several issues related to the delay caused by the public entity: the identification of the cause of delay, the contractor's duty to notify the public entity of the event occurrence and its impact on the critical path, the

contractor's obligation to mitigate the effect of the event and eliminate the negative impact of delays and the contractor's entitlements whether an extension of time or an adjustment in the contract price.

2. Termination for Contractor's default: It is proposed to amend the Public Contracts Law to include cases under which administrative contracts can be terminated due to contractor default. Among these cases, the contractor's failure to comply with its obligations under the Contract, suspending the execution of the works without a reasonable cause, failure to rectify defective works, failure to maintain the required performance security and insurance policies, breach of safety, health and welfare, subcontracting all of the works without the consent of the public entity, insolvency or bankruptcy, and other cases.
3. Limit of Compensation under Performance Guarantee: It is proposed to amend Article 51 of the new Public Contracts Law to avoid unjust enrichment and to take into account the possibility of recovering the damage incurred by the public entity or part thereof from the sums owed to the contractor instead of calling on the performance guarantee in whole or in part. If these sums are found to be insufficient, the public entity shall have the right to call on the performance guarantee and use its amount to recover the damages. The public entity does not necessarily forfeit the entire face value of the performance guarantee; the entitlement of the public entity is limited to the amount required to complete the work and remedy the defects.
4. Price Adjustment: It is suggested to amend Article 47 of Law and Article 97 in the executive regulations to address the issue of "the amount of the variable items and materials" by specifying a list of items and materials that are always subject to price adjustment, or by setting a significant percentage of the contract price representing the minimum amount subject to price escalation. It is also suggested to amend the

articles mentioned above to address the issue of “the illogical and unfair weight coefficients” by enabling the public entity to determine the weight coefficients with the contractor's right to comment on such coefficients or by specifying a reasonable range for weight coefficients, and the contractor selecting the appropriate coefficient from that range according to the contract nature.

5. Arbitration: It is suggested to add a paragraph at the end of Article 91, “Resolution of Disputes between the Contract Parties”, of the new Public Contracts Law to express that the failure to obtain the approval of the competent minister, required under the Egyptian Arbitration Law, shall not affect the validity of the agreement on arbitration in the event that the public authority maintains the invalidity of this agreement due to failure to comply with this restriction. Alternatively, the public authority would be obliged to get the minister's approval at an early stage of the procurement cycle, for instance, before the start of the bidding process or during the bidding stage. If the public authority fails to take that early action, the first alternative shall take effect.

The verification of the proposed amendments is done through interviews with four experts in the field of contract administration in the construction industry. The experts’ recommendations were applied to make the proposed amendments more comprehensive and applicable to achieve their intended purpose.

The main contribution of this research is to attempt to reform the new Egyptian Public Procurement Law No. 182 of 2018 in line with the international standards of the similar laws by proposing amendments to five important issues that have always been a source of disputes between the administrative body and the contractors and were also the basis for certain contractors' refusal to enter into contracts with government agencies under that law. The study aims to find a fair and proper formulation of some

of the law provisions to attract the most efficient contractors, which is reflected in the better implementation of vital projects in Egypt.

6 . 2 Limitations and Future Research

The suggested amendments are verified, as previously demonstrated, by experts' assessment. However, the amendments have not been validated as such validation requires incorporating it into the text of the law and future contracts and getting the feedback of their applications

Moreover, the research covers only the five most dominant subjects in construction administrative contracts under the new public procurement law in Egypt, namely; delay claims by the contractor, contract termination, limit of compensation under performance guarantee, price adjustment and dispute resolution mechanism. Future researches could cover other important aspects such as delay damages, keeping the priority of the bid after issuance of the variations and application of the price adjustment formula, terms of payment, compensation for late payments, and all other subjects that may need to be amended in order to achieve a fair, balanced and equitable administrative contract.

In addition, a broader study could be conducted, based on the findings on this research, to include not only the provisions of the law that deal with the implementation of the administrative contract, but the procurement delivery methods stipulated in the law and used by the public entities to select the suppliers and service providers and contractors for the purpose of acquisition of goods, delivery of services and construction of public facilities. The application of such delivery methods has to be assessed and evaluated. Their advantages and disadvantages should be highlighted, especially with regard to the direct award, which has become widespread and widely used in government projects of all sizes and types.

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**APPENDIX A: Articles of the Law no. 182 of 2018 Related
to the Proposed Amendments**

Article (45) Payment and Progress Payments

Subject to the contract conditions, the price of items supplied or services provided shall be disbursed at the earliest possible time and no later than thirty days commencing as of the date of examination, acceptance and approval. Concerning the work construction projects, the Administrative Body shall disburse progress payments depending on the progress of work, within sixty days commencing as of the date of submitting the relevant invoice accompanied by the supporting documents as set out in the contract conditions, subject to acceptance of such documents by the Administrative Body, which is required to review the invoice amount and to pay the approved invoice. In case the Administrative Body refuses to receive the invoice that fully satisfies the contract conditions, the contractor may send the same accompanied by all relevant documents set out in the contract documents by an express mail letter through the National Postal Authority, so that the Administrative Body's receipt date of the post service-sent invoice shall be the start date of the timeframe for initiating the disbursement procedures.

In all cases, if the amounts due to the contractor are not paid on the scheduled dates, the Administrative Body shall pay to the contractor an amount equal to the finance cost of the approved claim or invoice amount for the delay period, according to the credit and discount rates announced by the Central Bank at time of payment, provided that official documents proving the claimed amount are furnished, while whoever at fault shall both be referred to investigation and charged with the relevant expenses.

Article (47) Amendment of the Construction Contracts' Value

For the work construction contracts with an implementation term of six months or more, the Administrative Body shall, at the end of each contractual quarter as of the date set for opening the technical envelopes or the contract signing date based on the direct award order, as the case may be, amend the contract's value according to the increase or decrease in the costs of contract items that emerge following the date set for opening the technical envelopes, or following the contract signing date based on a direct award order, as the case may be, and subject to the implementation timeline in light of the Producer Price Index issued by the Central Agency for Public Mobilization and Statistics. In addition, such amendment shall be binding upon the parties to the contract, and the content of same shall be included in the contract.

The Administrative Body shall determine the variable items or their components in the RFP according to the list to be issued by the Ministry of Housing, provided that the contractor includes their relevant transactions in the technical envelope, and any agreement to the contrary shall be null and void.

The Executive Regulations of this Law shall set out the applicable rules and procedures in this regard, along with the price variance equation and the application requirements thereof.

Article (48) Delayed Implementation of the Contract

If the contracting party is late in implementation of the contract beyond either the date set in the implementation timeline or the implementation period set out in the contract, the Competent Authority may, for public interest considerations, grant the contracting party a time extension to complete the implementation without charging a delay penalty, if such delay is attributable to a reason beyond its own control.

In the event of failure to implement the contract for any reason attributable to the contracting party, the delay penalty shall be calculated and collected as of the start date of time extension, with no need to serve a notice or notification or to take any other action as follows:

1. If case of work construction projects, the total delay penalty shall not exceed (10%) of the contract's value, if the delay period does not exceed (10%) of the total period of the contract, and the delay penalty shall move up to (15%) if the delay period exceeds such ratio.

The delay penalty shall be charged only to the delayed work's value if the Administrative Body is convinced that the delayed part does not preclude perfect exploitation of the already completed part, directly or indirectly, on the scheduled dates. However, if the Administrative Body is convinced that the delayed part does indeed prevent exploitation of the already completed part, the delay penalty shall be calculated based on the contract's total value.

Price variance equation shall be applied to the quantities carried out within the time extension, provided that the delay is attributable to any reasons beyond the control of the contracting party, provided that the timeline is amended as mutually agreed between the parties, if necessary, and in proportion to the delay period.

2. For the remaining contracts, the total delay penalty shall not exceed (3%) of the contract's value if the delay period does not exceed (10%) of the total period of the contract, and the delay penalty shall move up to (5%) if the delay period exceeds such ratio.

The delay penalty shall be charged only to the delayed work's value if the Administrative Body is convinced that the delayed part does not preclude perfect exploitation of the already completed part, directly or indirectly, on the scheduled dates. However, if the Administrative Body is convinced that the delayed part does indeed prevent exploitation of the already completed part, the delay penalty shall be calculated based on the contract's total value.

In all cases of collecting the delay penalty, exemption shall be granted under a decision of the Competent Authority, if it is proven that the delay has occurred due to reasons beyond the control of the contracting party. In other cases, the Administrative Body may exempt the contracting party from the delay penalty, either partially or completely, if the delay does not cause damage. Moreover, the Competent Authority may consult the competent Fatwa Department of the State Council, if necessary.

Collecting the delay penalty shall not prejudice the right of the Administrative Body to claim from the contracting party the entire compensation due for any damage sustained as a result of the delay.

Article (51) Optional Rescission of the Contract or Implementation at the Contracting Party's Expenses

The Administrative Body may rescind the contract or implement the same at the contracting party's expenses, if the latter is proven to be in breach of any essential condition of the contract.

The Contract rescission or implementation at the contracting party's expenses shall take effect under a substantiated decision by the Competent Authority, which shall be communicated to the contracting party by an express mail letter to be sent through the National Postal Authority, with a concurrent confirmation of sending by e-mail or fax, as the case may be, to the address indicated in the contract.

The Administrative Body may not combine both procedures stipulated in the preceding paragraph for any reason.

In all cases of rescission of contract or implementation of the same at the contracting party's expenses, the performance bond shall be confiscated by the Administrative Body, and the latter may also deduct the delay penalty due and the value of any loss sustained by it from any amounts due or payable to the contracting party. In case the contracting party's entitlements are not sufficient for such a deduction, the Administrative Body shall resort to deduct the excess amount from the contracting party's entitlements with any other Administrative Body, whatever the cause of such entitlements may be, without the need to initiate any judicial proceedings, all without prejudice to the right of the Administrative Body to claim, by judicial means, all amounts not collected by administrative means.

Article (91) Dispute Settlement between Contracting Parties

The parties to the contract may, in case of a dispute arising during the implementation of the contract and before resorting to courts or arbitration, agree that the dispute be settled by way of amicable conciliation or mediation, if the conditions of the tender or contract so permit, subject to the approval of the Competent Authority, and provided that both parties continue to perform their respective obligations under the contract. Moreover, the contracting party may resort to the Court to claim compensation for the damage sustained thereby due to the failure of the Administrative Body to perform its obligations set forth in the contract, unless the Competent Minister of the Administrative Body agrees to resort to arbitration as provided in the contract conditions. Both parties shall agree on arbitration according to the rules and procedures set forth in the Arbitration Law on Civil and Commercial Matters promulgated by Law No. (27) of 1994.

**APPENDIX B: Articles of the Executive Regulations of the
Law no. 182 of 2018 Related to the Proposed Amendments**

Article (97) Equation of Price Adjustment in Construction Work Contracts and the Conditions for its Application

In construction work contracts which implementation period is six months or more, the Contracts Departments is obligated at the end of every three contractual months to adjust the contract value according to the increase or decrease in the cost of the contract items that occurred after the date specified for opening the technical envelopes or after the date of concluding a contract based on the letter of acceptance in case of a direct award. This amendment shall be binding on both parties, and any agreement to the contrary shall be null and void.

The calculation of the change in prices and the accounting of the contractor for the price differences, whether it is increased or decreased, shall be in accordance with the following definitions, equations and rules:

First: Definitions

- Execution period: the period specified for the completion of the works, calculated from the date of handing over the site free of obstacles or receiving the contractor of the advance payment or receiving the approved drawings required to start implementation, whichever is later.
- Variable Items: Items or their components that are subject to adjustment as determined by the Contracting authority in the tender documents (labor - raw materials etc.) in accordance with the list prepared by the Ministry of Housing.
- Coefficient: are the percentage determined by the contractor in his bid for each item of the variable items or its components, taking into account that it is not equal to (zero) and it is less than 100% for each item and its components.

- The value of compensation or deduction: is the amount owed to the contractor or the amount to be deducted from his due payments as a result of calculating the change in Prices of variable items, up or down.
- The percentage of increase or decrease in prices: the price index of the item or its components when applying the equation, minus the price index of the item at the date of opening the technical envelopes or direct award, as the case may be, divided by the price index at the date of opening the technical envelopes or direct award, as the case may be. The price indices are based on the bulletin of standard indices issued by the Central Agency for Public Mobilization & Statistics.

Second: The Equation

The value of compensation or damages = the value of the work subject to adjustment based on the contractor's bid x its weight coefficient x the percentage of the increase or decrease in prices.

Third: Accounting Rules for Price Differences

1. The Contracting authority determines the variable items or their components within the tender conditions. The variable items are extracted from the list issued by the Ministry of Housing.
2. The contractor's bid (technical envelope) must include coefficients representing the weights of the cost elements of the variable items or their components determined by the contracting authority. The contract price adjustment will be based on these weight coefficients. If the contractor does not include these coefficients in his bid, the contracting authority will exclude his bid.
3. The amount of the approved installment shall be paid on the specified dates according to the contract rates without waiting for the application of the price adjustment equation.

4. The contractor shall be accounted for the price adjustment, up or down, for the variable items or their components every three contractual months from the date of opening the technical envelopes or direct award, as the case may be, taking into account the time schedule and its modifications agreed upon by the contract parties.
5. The contractor shall be accounted for the price differences, up or down, within sixty days at most from the date of submitting the claim, during which these differences shall be reviewed and disbursed. The contractor's priority in the bid order shall be determined after applying the same equation to the rest of the other bids.
6. The price adjustment formula and the rules for its application do not apply in the following cases:
 - a) Contracts which implementation period is less than six months and the implementation is delayed for a reason attributed to the contractor.
 - b) Contracts which implementation period is less than six months, and the implementation is delayed for a reason attributable to the administrative authority. In this case, the contractor shall be accounted for the quantities executed after the six months according to the inflation rates issued by the Central Agency for Public Mobilization and Statistics.

Article (98) Delay in executing the contract

The contract administration official shall, as far as possible, do his best to remove obstacles and problems that may lead to delay in the implementation of the contract, whether for reasons due to the administrative authority or the contractor. If the contractor is delayed in performing the project beyond the time schedule for reasons out of his control, the competent authority may, for the sake of public interest, grant the contractor a grace period without applying the delay damages. On the other hand, if the delay is attributable to the contractor, the delay damages shall be applied starting from the beginning of the grace period with maximum percentages as stipulated in the law, as follows:

First: in Construction Contracts

- If the delay period does not exceed 1% of the total execution period, delay damages of 1% of the total final contract amount, or the amount of the delayed part, as the case may be, shall be applied.
- The percentage of delay damages calculated from the total final contract amount or of the amount of the delayed part, as the case may be, shall be increased by the same percentage of the delay period until the delay reaches (10%) of the total execution period.
- If the delay period exceeds a percentage (10%) of the total execution period, the delay damages shall be applied at a percentage of (15%) of the total final contract amount, or the amount of the delayed part, as the case may be.

Second: in other Contracts

- If the delay period does not exceed (3%) of the total execution period of the contract, the delay damages shall be applied at a rate of (1%) of the total final contract amount or the amount of the delayed part, as the case may be.
- If the delay period does not exceed (6%) of the total execution period of the contract, the delay damages shall be applied at a rate of (2%) of the total final contract amount or the amount of the delayed part, as the case may be.
- If the delay period does not exceed (10%) of the total execution period of the contract, the delay damages shall be applied at a rate of (3%) of the total final contract amount or the amount of the delayed part, as the case may be.
- If the delay period exceeds (10%) of the total execution period of the contract, the delay damages shall be applied at a rate of (5%) of the total final contract amount or the amount of the delayed part, as the case may be.

Article (101) Optional Termination of the Contract or Execution on the Contractor's Account

The contractor shall exert endeavor to comply with his contractual obligations in accordance with the contract provisions. In the event of a breach of any essential condition included in the contract terms, the contracting authority has to exhaust all possible alternatives to reach solutions consistent with the terms of the contract. If an appropriate solution cannot be reached, the contracting authority shall take one of the following measures for the public interest:

1. Termination of the contract. In this case, it is not permissible to re-tender the project in the same fiscal year in which the execution was scheduled.
2. Executing the works at the contractor's expense as long as the need to implement the project still exists, provided that the execution is carried out with the same conditions and specifications announced and contracted based on, in one of the legal methods stipulated in Article (7) of the law.

Article (180) Settlement of Disputes Between the Contract Parties

Without prejudice to Article 51 of the law, the contract parties have to exert every effort to abide by the terms of the contract throughout the time for completion of the project in accordance with the contract provisions and in a manner consistent with good faith. Taking the provisions of Article 91 of the law into account, tender and contract conditions may include steps and mechanisms for resolving disputes between its parties. In this case, the administrative body may, before proceeding in the contract termination, take the following procedures:

1. Examining the terms of the contract carefully and take the appropriate solution to the problem.
2. Preparing a conception of the subject of the dispute and submits a technical, financial and legal opinion to the competent authority, and it may Hire a specialized consultant to help study the dispute and provide his opinion.
3. Settlement of disputes that arose by amicable means without prejudice to the rights and obligations of the contract parties. If the amicable settlement entails any financial burdens, it must be agreed upon and submitted to the competent authority for approval after submitting all documents, data and justifications for settling the dispute.
4. Inviting the contractor to a meeting with the representative of the administrative entity within fifteen days from the date of the emergence of the dispute in order to discuss it.
5. If an agreement is not reached, litigation or arbitration shall be resorted to as stipulated in the contract provisions.

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**APPENDIX C: Articles of the Arbitration Law no. 27 of
1994 Related to the Proposed Amendments**

General Provisions – Article 1

Subject to the provisions of international conventions applicable in the Arab Republic of Egypt, the provisions of this Law shall apply to all arbitrations between public or private law persons, whatever the nature of the legal relationship around which the dispute revolves, when such an arbitration is conducted in Egypt, or when an international commercial arbitration is conducted abroad and its parties agree to submit it to the provisions of this Law. With regard to disputes relating to administrative contracts, agreement on arbitration shall be reached upon the approval of the competent minister or the official assuming his powers with respect to public juridical persons. No delegation of powers shall be authorized in this respect.