

The Legal Nature of a Contracting Agreement in Algerian Civil Law

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Abstract:

This article deals with one of the forms of organized or codified business contracts that emerged in the financial and business environment, namely the contracting agreement, which has a prominent place in the field of developing economic relations in the completion of buildings and architectural facilities, stimulating economic investments by obtaining various works and services, as it aims to manage and develop strategic projects and achieve economic development. It was organized under the rules of the Algerian Civil Code under the title of contracts related to work.

This study concluded that this contract has a special legal nature, both in terms of the components and foundations on which it is based and in terms of its distinctive features. Despite being regulated or codified, its rules remain insufficient and do not fulfill its intended purpose, especially when it comes to international contracting agreements, as it remains subject to different and varied legal systems.

Keywords: Contracting agreement; contractor; employer; private nature.

Introduction

The issue of the emergence of business contracts raised several problems, whether in terms of their existence, whether they should be regulated or not, or in terms of concepts, and in terms of their organization and the legal rules to which they should be subject, and the position of legislation on regulating them, and the particularities that characterize them. In this context, the question arose as to whether business contracts are regulated in the law or not (Djebbar, 2020), especially since, in terms of the regulation of contracts in general, we find named contracts, that is, contracts that are regulated from a legal standpoint, i.e., codified, and unnamed contracts, meaning contracts that are not regulated legally, that is to say the legislator has not regulated them, but rather left them subject to what is known of commercial customs and traditions, such as the franchise contract (Gast, 1981).

The term "regulated contract" refers to a contract for which the Algerian legislator has allocated legal texts to govern it, foremost among which is the **contracting agreement**, which is defined as a form of business contracts. It is a private law contract concluded between two parties, the contractor and the employer, on the condition that the contractor performs a specific

work for the benefit of the employer independently, without subordination, supervision, or management by the employer. Its provisions are organized within the rules of civil law, and special legal texts have been allocated to it, giving it a special legal nature, as it has been allocated independent provisions that distinguish it from other contracts, on the basis that it may be a civil or commercial contract. These two characteristics are derived from its parties or from the nature of the work to be accomplished (Hamidi, 2012).

The importance of the construction contract is highlighted by its social and economic standing, especially in the field of building and construction projects, as it represents a vital area for investment and the utilization of funds, in light of the worsening housing crisis and the increasing need for it. This may push those in charge of construction to rush the completion of projects (Vidal, 1992), especially after relying primarily on machinery in construction operations, without regard to technical specifications, which may lead to the cracking and collapse of buildings, and the resulting human and material losses. The collapse and cracking of buildings not only poses a challenge to the feelings of those aspiring to shelter and stability, but also certainly constitutes a loss to the national economy, and a serious threat to people's lives, safety and property. Therefore, the Algerian legislator has used a strict approach with those in charge of construction operations, including contractors and architects, by obligating them to guarantee the architectural structures they erect (Zidani, 2010).

Given that the contracting agreement is one of the business contracts that responds to the needs of economic operators and contractors in the business, investment and development projects environment within the country, this prompted us to ask the following question: **What is the legal classification of the contracting agreement within the rules of Algerian civil law?**

To answer this question, we need to define the components of a contracting agreement, and then we will move on to mentioning the specific nature of this contract.

1- Essential elements of a contracting agreement

The contract of construction is mentioned in the first chapter of the ninth section on contracts related to work, within the second book entitled Obligations and Contracts, in Articles 549 to 570 of the Algerian Civil Code (Order No. 75-58). It is concluded between two parties, the contractor (Chikh, 2013) and the employer, with each having a different purpose for concluding it. The contractor often aims to make a profit from it, and is therefore considered a merchant, unlike the employer, who is often a non-merchant civil person. It is based on a set of components or foundations represented by: the basis of the work, the basis of executing the work independently, and the basis of the absence of representation.

a- Basis of work in a contracting agreement

The Algerian legislator defined the contract of contracting agreement within the provisions of the Algerian Civil Code as that agreement by which one of the contracting parties undertakes to make something or to perform a work in return for a wage undertaken by the other contracting party. In other words, it is that agreement concluded between the contractor and the employer on the condition that the contractor performs a specific work for the benefit of the employer, in return for a wage paid by the latter to the contractor (Article 549 of Order No. 75-58).

The contracting agreement is based on a subject matter that does not exist at the time of contracting, but rather the contractor works to create it in the future after the contract enters into force between its two parties (Kraria, 2018). The work is the basis on which this contract is based and its subject matter, but the distinctive thing about it is that it is a dual subject matter. That is to say, the contractor works to perform the work required of him, and the other contracting party, the employer, is obligated to pay the wage. It is stipulated that the work, in order to be the subject matter of the contracting agreement, must meet the general rules regarding the conditions of the subject matter. In other words, the work must be possible, the subject matter must be specified if its nature and descriptions are mentioned or can be specified (Article 93 of Order No. 75-58 & Zidani, 2010), and it must be legitimate and not contrary to public order and public morals, which means something that can be dealt with (Elhamoui & Birkdar, 2013).

What must be noted at this particular point is that if the subject of the obligation does not exist or is impossible in itself, the contract is void. If the subject is capable of existing or of being something in the future, then the impossibility intended here is absolute impossibility for both parties, because relative impossibility, in the contracting contract in this case, is valid if it is impossible for the contractor himself to accomplish it for any reason (Zidani, 2010), such as due to a lack of capabilities or competence on the part of the contractor to accomplish it, although the employer in this case has the right to demand compensation from the contractor on the basis of contractual liability. However, the important thing is that the impossibility that prevents the contracting contract from being concluded is that it be absolute, such that the impossibility is not limited to the contractor himself, but rather it is impossible for any other person to accomplish the work (Chikh, 2013).

b- The basis for executing the work in the contracting agreement independently

The general principle is that a contracting agreement (Kara, 1992 & Marouch 2003) is concluded directly between the contractor and the employer on the basis that the original contractor himself will carry out the work required of him, or that a group of workers working under his supervision and direction will carry it out. However, the contracting agreement may require the contractor to resort to another contractor so that the latter can independently carry out part or all of the work that the first contractor has undertaken, that is to say what is called a subcontractor or sub-contractor (Zidani, 2010).

Knowing that a subcontract assumes the existence of two successive contracts, which have one legal nature, namely the contractor, the first contract links the employer with the original contractor, while the second contract links the original contractor with the subcontractor or sub-contractor, and accordingly, a subcontract (Articles 564 and 565 of Order No. 75-58) is defined as that undertaking by which one contractor undertakes to another contractor, under his responsibility, to execute part or all of the contracting agreement concluded with the employer, the owner of the project.

However, returning to the content of Article 564 of the Civil Code, we find that the Algerian legislator prohibits the contractor from subcontracting in the agreement between the employer and the contractor, stipulating that the latter may not entrust the work assigned to him to another contractor. This is called the explicit prohibitive condition (Chikh, 2013).

Meanwhile, what the contractor has committed to requires him to carry out various works that require numerous experiences and great efforts that the contractor cannot bear alone, which forces him to resort to an agreement with other people to carry out a specific work. This will create several relationships between the parties: the relationship of the original contractor and the subcontractor. This relationship is regulated in the subcontracting contract. Thus, there is an original contracting contract that governs the relationship between the employer and the original contractor, and a contracting contract that governs the relationship between the original contractor and the subcontractor (Zidani, 2010).

The relationship of the original contractor with the employer, and the latter is regulated in the original contracting agreement and the affiliation with the employer by the subcontracting agreement. This agreement does not give him a right nor does it impose an obligation on him, on the basis that he is considered, with respect to him, a third party, except for what the law stipulates regarding the contractor's recourse to the employer for the wage within certain limits (Zidani, 2010).

Finally, the relationship between the employer and the subcontractor: the general rule in this relationship is that there is no direct relationship between the employer and the subcontractor, as they are not bound by any contract, on the basis that the contract binds the employer to the original contractor, and binds the original contractor to the subcontractor (Zidani, 2010). Rather, the relationship between the employer and the subcontractor is an indirect relationship, as the original contractor mediates it. The employer does not demand anything directly from the subcontractor, but rather the original contractor does so (Paragraph 2 of Article 565 of Order No. 75-58).

5. The basis for the absence of representation in a contracting agreement

In accordance with the rules of civil law regulating the contract of construction, it is permissible for the contractor to subcontract, but there are exceptional cases in which this is not permissible, namely: The first case is the existence of a prohibitive condition, meaning that the agreement between the employer and the contractor stipulates that the latter shall not entrust the work entrusted to the contractor to another, and this is what is termed the "explicit prohibitive condition," and this is what the first paragraph of Article 564 of the Algerian Civil Code stipulates. The second case is if the nature of the work itself requires that the contractor perform it himself, and if the nature of the work that the contractor has entrusted is due to his competence and reputation, then he may not entrust the work to another contractor (Kara, 1992), and this in fact constitutes an implicit prohibitive condition, meaning that it prevents the contractor from entrusting the work required of him to another contractor (Zidani, 2010).

c- The specific nature of the contracting agreement

The general principle in the field of regulating business contracts in general is that they are unregulated contracts. The reason for the Algerian legislator's inability to regulate them is due to their connection with important economic data (Irzil, 2019), state orientations, and market logic (Vidal, 1992), such as contracts for the transfer of technical knowledge, technology transfer contracts, digital contracts, artificial intelligence contracts, etc., especially since their parties are economically involved (Frier, 1998). However, as an exception, the Algerian legislator has tried to enshrine some of them in the Algerian legal system, such as regulating

the contract of construction under special provisions. The latter is subject to the conditions and elements upon which any contract is based in the Civil Code, and in Articles 59 to 105 thereof. Therefore, it is necessary to clarify the general and specific nature to which this contract is subject, whether in terms of its subjection to general provisions and rules or in terms of its distinctive features.

2- The contracting agreement is subject to general rules

The construction contract remains subject in general to the general principles established in the rules of civil law, just like all other contracts. Its formation is subject to the general theory of contracts, and its conclusion requires the availability of the general elements necessary for the formation of any contract, namely consent, subject matter, and finally the element of cause (Article 97 of Order No. 75-58). It should be noted that, given that the element of cause in the construction contract is subject to the general rules, there is nothing new to say about it, as it does not differ from what is established in the general theory of contracts. The Algerian legislator takes into account the motive that drives the contract, as well as the intentional cause, since it is inconceivable that the contractor or employer would bear the obligation without a cause (Zidani, 2010).

a- The element of mutual consent in a contracting agreement

The unique aspect of the agreement in contracting is that it takes a long time and is carried out according to the method of negotiations between the contractor and the employer. Thus, the contracting agreement takes longer than the time of its conclusion, especially since what results from it entails rights and obligations that fall on their shoulders when implementing the contract. As a result of the meeting of the will of the contractor and the employer with an offer and acceptance that are compatible, the contract is drawn up and signed to become effective and binding on both of them (Kara, 1992).

Consent is the foundation of a contracting agreement, as it cannot exist without it, especially since its absence leads to the termination of the entire contract. However, the specificity of consent in contracting agreements remains dependent on following a series of procedures based on the method of negotiation of the work to be done. Even if the consent is clear in this contract, it must be issued by someone who is competent to do so. By competence here we mean commercial competence, considering it to be a commercial contract, with their will being free from defects. Another advantage of consent in a contracting agreement is that it is linked to several conditions, such as the condition of consent to the nature of the contracting agreement, the condition of consent to the work, and the condition of consent to the wage (Zidani, 2010).

-The place in the contracting agreement

The defining characteristic of a construction contract is its dual nature: the work and the wage. The contractor's obligation is to perform the contracted work, while the employer's obligation is to pay the contractor the wage (Chachou, 2010). In this contract, the wage is the employer's obligation, representing the compensation the employer is required to pay the contractor for the work completed (Chanab, 2004). Like any obligation, the wage must be present, lawful, and specified or determinable. Therefore, a wage is essential in a construction contract; otherwise, it would be considered a gratuitous contract (Kara, 1992 & Marouch 2003).

It is important to note that a contracting agreement cannot be considered a gratuitous contract. Consequently, the wage must be lawful or permissible to trade, as stipulated in Article 93 of the Algerian Civil Code. Therefore, an employer cannot commit to providing a quantity of narcotics to a contractor as payment for work performed (Zidani, 2010). The wage in a construction contract is determined either by agreement between the contracting parties, that is to say, by agreement between the contractor and the employer, whether the agreement is explicit or implicit. In the event of their lack of agreement, the law shall determine the wage, which means that the wage shall be determined by the law, as explicitly confirmed by Article 562 of the above law.

- Distinctive features of a contracting agreement

The distinctive characteristics of a contracting agreement are highlighted by its fundamental features. It is subject to the general rules governing most contracts in civil law, and thus the principle of "a contract is the law of the contracting parties" applies to it. This is in addition to its specific form as a business contract, especially in the case of an international contracting agreement (Elmeknouzi, 2015). Therefore, we will explain the general characteristics of a contracting agreement and its specific characteristics.

d- General characteristics of a contracting agreement

General rules constitute the legal framework that defines the legal foundations of a contracting agreement, as they are the general law regulating all contracts in civil law. Examining their content requires identifying the general characteristics that distinguish this contract, which are primarily represented by :

1-The contracting agreement is a consensual contract : That is, it is concluded as soon as the parties agree to conclude it. The parties are not forced to conclude it and it is not put into a specific legal form (Chachou, 2010). In other words, it does not require a specific form for its conclusion, as it is sufficient with offer and acceptance. This implies that it may be concluded orally or in writing. In the latter case, there are those who grant the formality of the contract of construction if there is a text that requires it. The agreement in contracting is based on the element of the thing to be made or the work to be done by the contractor, and the element of the wage that the employer undertakes. The contract is the law of the contracting parties and always remains subject to the agreement of its parties and their will (Articles 59, 60 and 106 of Order No. 75-58). Therefore, the will is sufficient to conclude the contracting agreement.

- The contracting agreement is a binding contract for both parties : This means that it establishes a set of reciprocal and mutual obligations between the contractor and the employer. If the contractor is obligated to complete the required work, then the employer receives it and pays the contractor a wage for the work completed, then each of them is a creditor and a debtor at the same time (Elhamoui & Birkdar, 2013).

- The Contracting agreement is a fixed-term contract : The contracting agreement is considered a fixed-term contract and not a contingent contract, meaning that the duties and rights of the contractor and the employer are defined throughout the duration of the contract, which is based on the agreement made between them. Therefore, its implementation is within the framework of that duration. The element of time is an essential element in it, as it has a significant impact on the assessment of the subject matter of the contracting agreement, so it

cannot be implemented except within the period specified for it (Zidani, 2010).

- **The contracting agreement is a structured contract** : Regulated contracts are those contracts that the Algerian legislator has designated with legal rules that have been organized under specific names, even if some of them may be called by a specific name in practice. As long as there are special rules for them, they will inevitably be subject to them. A contracting agreement is a regulated contract, a named contract, or a codified contract. This is the result of the existence of rules that regulate its legal framework, meaning that it is a named contract (Chanab, 2004).

- **The special features of a contracting agreement**

Although the contracting agreement is subject to a specific and regulated legal system, this does not mean that it lacks its own template or form, especially if it is linked to major economic projects within countries or what is termed strategic projects to achieve economic development or economic efficiency (Elmeknouzi, 2015 & Chachou, 2010). Therefore, this characteristic is evident through its being :

- **A contract of adhesion** : By "adhesion" here, we do not mean adhesion in the sense of general rules, as that is governed by a specific legal framework. Rather, the acceptance referred to in contracting agreements is of a particular type or nature—namely, economic acceptance. This is because the business world is constantly evolving, influenced by economic conditions, current technological advancements, market logic and language, mega-projects within the country, and strategic investments. No matter how much we strive to achieve economic equality between contracting parties, there will always be a stronger party and a weaker one, whether in terms of competence, experience, financial liquidity, or advanced technology and techniques in the construction and public works sector, etc. (Vidal, 1992).

Therefore, the reason for the economic gap, the disparity in the contractual relationship between the parties, and the economic imbalance in construction contracts, especially those with an international dimension, is that there is a weaker party that will inevitably submit to the conditions imposed upon it (Racine, 2007).

We cannot always understand that the employer in a contracting agreement is always the weaker party in the contractual relationship, because the economic position of each party in the contract has an effect on the idea of adhesion (Chamolaud-Trapiers, 1998). It is noteworthy that the idea of adhesion is a characteristic shared by most business contracts, regardless of their legal nature (Racine, 2007). The decline of the employer's will is a result of the imbalance that characterizes the contractual relationship between the contractor and the employer. This is due to the business environment and the commercial milieu (Elmeknouzi, 2015 & Chachou, 2010), which dictates many objective reasons, which are legal and economic circumstances, represented in the expansion of the principle of the supremacy of will and the economic reality of the two parties to the contract (Chamolaud-Trapiers, 1998).

- **A contract based on personal considerations** : The contracting agreement is one of the contracts based on the idea of personal consideration, on the basis that the personalities of its two parties are subject to trust and consideration (Saad Ellah, 2009). The issue of personal consideration appears in the reputation, technical competence, credit, and trust between its two parties, such that this contract does not pass to the heirs except in the case of a condition that

stipulates this (Chanab, 2004). The personal qualifications of the contractor are subject to consideration in the contracting agreement because in the event of his death, the contract is terminated (Article 569 of Order No. 75-58).

- **A business contract** : Business contracts are contracts that are the product of a business environment characterized by diversification, integration, high supply and demand, and free competition (Mahrez, 2004). They are also known as contracts of a special nature because they are related to the business environment and are based on the need of one businessman for another in a complex market characterized by high supply and demand, strong competition, and the required expertise (Chone, 2010).

- **A contracting agreement** : has characteristics closely related to the economic environment and the business field, which necessitates its subjection to a legal system that is compatible with its environment, so that it is subject to the rules of business law that arose as a result of the inability of civil laws to keep pace with the business environment, scientific and technological development and economic changes (Chaput, 1991).

- **The relationship of independence or the absence of a relationship of subordination in the contracting agreement** : This means that the contractor is obligated to carry out the work covered by the contract without any relationship of subordination to the employer. The main performance in this contract is required of the contractor, which is to carry out the work agreed upon with the employer. Although this work is done in exchange for something, and the latter may be the transfer of ownership of something fungible or non-fungible to the contractor, the main performance in describing the contract is the work and not the exchange, whatever its nature (Zidani, 2010).

It is understood that the contractor performs the work independently of the employer and that the work is done in exchange for a wage, which will make the contracting contract distinct from other contracts, whether those related to work or other contracts, since the work subject to the contracting contract, which the contractor is obligated to accomplish, although originally of a material nature, with development, the performance of a moral or intellectual nature has entered into the obligations that fall on the contractor, as technical and engineering consultancy contracts or expert contracts have become common contracting contracts. Accordingly, the essence of the contracting contract is the performance of work for the benefit of another person, which makes the contracting contract embody a model of contracts that generate an obligation to perform work, even though the obligation to perform work goes beyond contracting contracts and extends to other contracts (Zidani, 2010), and this is what was approved by Article 549 of the Algerian Civil Code.

13. Conclusion

The contracting agreement has become one of the most important contracts in private transactions between individuals, aimed at obtaining services and work. This has led to its widespread use in practice, as it is linked to the fields of construction, urban development, and public projects, among others. It is regulated under the rules of the Algerian Civil Code. Research into the legal nature of the contracting agreement within the Algerian Civil Code yielded the following results :

- These legal texts regulating the contracting agreement in Algerian law were not amended until

2005, when the Algerian legislator amended only two of them, namely Articles 553 and 583, pursuant to Law No. 05-10 of June 26, 2005, amending and supplementing Law No. 75-58 of September 26, 1975, which includes the Civil Code.

- The Algerian legislator's definition of a contracting agreement is an agreement in which one of the contracting parties undertakes to make something or perform work in exchange for a wage that the other contracting party undertakes, without being subordinate to or acting as his representative. It pertains to a subject that does not exist during the contracting process, but rather the contractor works to create it in the future after the contract enters into force between its two parties. This definition raises some confusion and ambiguity, as it may be confused with an employment contract, since the worker in an employment contract also performs work in exchange for a wage that the other contracting party undertakes.
- The Algerian legislator has authorized subcontracting, whereby the original contractor can use another contractor while remaining responsible to the employer, and the subcontractor has the right to file a direct lawsuit against the employer to obtain his rights.
- The contracting agreement is characterized by its consensual and reciprocal nature (binding on both parties), and it is executed according to an agreed time period, with two forms for concluding the contracting agreement : the original contracting agreement and the subcontracting agreement, that is to say the subsidiary contracting agreement.
- The contracting contract is characterized by a special legal nature, both in terms of the components and foundations on which it is based. Despite being subject to the general rules established for it, it has distinctive features and characteristics that make it a contract of a special legal nature that develops with the development of economic and investment conditions and development projects within countries, especially if it is related to international contracting contracts that were not referred to by Algerian law during its organization.
- The distinctive thing about a contracting agreement is that it has a special legal nature, as it is subject to different and varied legal systems, including the law that regulates it which is civil law, as well as commercial law and finally administrative law, especially if the state or one of its bodies is a party to the contract.

In light of these results, we offer the following suggestions :

- The Algerian legislator should be alerted to the need to define the contract of construction stipulated in the Civil Code, specifically Article 549 thereof, and to include the features that distinguish it from other similar contracts, namely the characteristic of an independent relationship or the absence of a relationship of subordination, while specifying its parties and allocating a special law for it that defines all its details, given that this type of contract is related to the social and economic field, especially if it is related to public projects.
- Removing ambiguity from the legal texts that specify the appointment of a specialized engineer to implement the contract, with emphasis on the control mechanisms during the implementation of development projects within the country, and practical reality has proven this to us.
- Creating a well-organized and controlled legal framework for the contracting agreement that would keep pace with the economic, technological, technical and technological developments in the field of business and finance.

- The need to expedite the removal of the ambiguity and error stipulated in the content of Article 569 of the Algerian Civil Code.

- Note the failure of the Algerian legislator to include some business contracts, including contracting contracts, which he stipulated within the provisions and rules of the Civil Code, whether in terms of their formation or their conditions. He should have allocated a special law for them in view of their economic importance and their connection to the fields of works, construction and major projects, especially since the regulation that they received was merely general concepts without addressing their details, particularly with regard to the methods of concluding them and settling their disputes if they are related to the international aspect.

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