The impact of competitive tendering on the execution of public contracts and concession contracts

Egypt

0. Preliminary remarks: the law applicable to (disputes regarding) the execution of public contracts

After the French invasion to Egypt (1798–1801) the Egyptian legal system was considerably influenced by the French legal system, through decades, in legislation, particularly when codifying the Egyptian Constitutions and the Egyptian Civil Code (ECC). In recent decades, the influence of the French Constitution of the Fifth Republic 1958 on the previous Egyptian Permanent Constitution of 1971 was clear.[1] Public procurement laws in Egypt have to be consistent with Egyptian constitutions' ideologies. The previous Egyptian Constitution of 1971 played a fundamental role in this respect as it was adopting Marxism ideology upon promulgation. The current Egyptian Constitution of 2014 which is valid until present adopts liberal ideology with the aim to encourage Foreign Direct Investments (FDI) in all economic sectors. Among these sectors are public contracts which deal with infrastructure, public utilities and services projects. Therefore, Egypt has promulgated new State Contracting Law in 2018.
The scope of analysis in this study focuses upon administrative contracts and concession contracts as traditional concessions are one of the administrative contracts' types.

- **Administrative contract '*le contrat administratif' in the Egyptian legal system*:**

The administrative contract (*le contrat administratif)* in the Egyptian legal system is a contract between a public juristic person on one hand, and private person whether the latter is natural or juristic person on the other hand. The administrative contract must have three conditions, together, in the Egyptian legal system to be qualified as an administrative and not private contract. Those conditions[2] are:
a) Public juristic person must be Party to the contract;
b) Contract must concern the running and/or the management of any of the public utilities;
c) The contract must contain excessive/exorbitant clauses *(clauses exorbitantes)* which aim to achieve public interests.
Administrative contract aims to achieve public interests. Therefore, the substantive nature of the administrative contract requires that the contracting state is not equal with the private person.

[1] Fathy Fekry, *Constitutional Law* (Cairo 2009) (in Arabic). The 1971 constitutional provisions in Egypt, particularly in the fundamental rights' section (core rights) and judicial power provisions, reflect this fact. The 1971 Constitution was applicable from its promulgation in 1971 and until the Egyptian revolution of 2011. After the Egyptian revolution of 2011, the Military Council in Egypt issued a constitutional declaration of 2011. The latter declaration was applicable till 2012 when the 2012 Constitution was promulgated. The current Constitution of 2014 entered into force in January 2014. The 2011 Constitutional Declaration, the 2012 Constitution, and the 2014 Constitution, have adopted most of the constitutional provisions of the 1971 Constitution, except for Marxism ideology. For more elaboration see: Mohamed AM Ismail, *Arab Constitutions between Facts and Prospects*, Al Halabi Publishing Co., Beirut, 2015 (in Arabic).

[2] Those three conditions called in the Egyptian doctrine 'administrative contract criterion', see: Soliman El Tamawy, *General Principles of Administrative Contracts* (5th edn, Dar El Fikr El Araby 1991).

Contracting state can achieve public interests through containing the administrative contract exorbitant clauses. Both parties to administrative contract, the public body and private entity, are not in an equal bargaining power. The justification of the substantive legal nature of administrative contracts is that contracting state aims to achieve public interests.

- **Private law contracts and adhesion contracts:**

It is worth noting that administrative contracts in the Egyptian legal system are different from adhesion contracts. Substantive rights in adhesion contracts are governed only by the (ECC) provisions and their disputes are subject to the jurisdiction of ordinary civil courts in the Egyptian judiciary. The legal framework of administrative contract is different and they are subject to the jurisdiction of the Conseil D'Etat courts.

In Egypt, State can enter into administrative contract and/or civil contract (civil or commercial contract).[3] It has been decided that the administration can enter into both administrative contracts and private law contracts[4] to achieve public interests.

- **Contracts with hybrid/mixed legal nature:**

In addition, the influence of the cultural and legal globalization phenomena to the Egyptian legal system was clear upon the enhancements to and modernization of administrative contracts' traditional theory and practice[5]. New patterns of administrative contracts have appeared in Egypt and Arab countries such as BOT/BOOT and PPP contracts.

The current Constitution of 2014 in Egypt adopted liberal ideology as it did not adopt specific economic ideology as it left the door open for the presidential and parliamentary elections to determine the economic pattern and economic policies for each electoral term. Therefore, Egypt, in the light of the amendments to 1971 constitution and the new constitutions with new liberal

[3] Mohamed A M Ismail, *Globalization and New International Public Works Agreements in Developing Countries, An Analytical Perspective* (Routlegde 2016 & 2011), 1–8 with a foreword by HH Humphrey Lloyd QC.

[4] See the Egyptian Supreme Administrative Court (SAC) decision, case No. 41354/ 56, session 11/2/2017 and the Egyptian Supreme Constitutional Court Decision (SCC), case No. 7/22, session 5/5/2001 and SCC case No. 3 of 39, session 2/6/2018. For more elaboration in doctrine see:Soliman El Tamawy, *General Principles of Administrative Contracts* (5th edn, Dar El Fikr El Araby 1991) and Sarwat Badawi, *Administrative Contracts*, (Dar Al Nahda Al Arabia), 1992 (in Arabic). In the English legal text see: Mohamed A M Ismail, *Globalization and New International Public Works Agreements in Developing Countries, An Analytical Perspective* (Routlegde 2016 & 2011), ch 2.

[5] Legal globalization is a cultural socioeconomic phenomenon. Culture is influenced to a great extent by globalization and it represents a set of practices, values, beliefs and customs acquired by individuals as members of a distinctive society and resulting from interaction among people. With respect to the economic dimension of globalization, Stiglitz has highlighted the problems caused by globalization in some parts of the world, as it generates unbalanced outcomes, both between and within countries. See: Joseph Stiglitz, *Globalization and its Discontents* (W.W. Norton 2004); Joseph Stiglitz, *Making Globalization Work* (W.W. Norton 2007); Brian Snowdon, *Globalisation, Development and Transition* (Edward Elgar 2007). Nowadays, globalization plays a significant role in enhancing comprehension between legal cultures. '*Le contrat administratif*' theory and practice were directly influenced by the cultural and legal globalisation. Further, the influence of the Anglo-American legal culture is remarkable upon Arab Civil Law Legal Culture, particularly in legislation, case law, and the rise of new contractual patterns in state contracts such Private-Public Partnerships (PPP) and Built Own Operate (BOT) agreements. See: Mohamed A M Ismail, *Globalization and New International Public Works Agreements in Developing Countries, An Analytical Perspective* (Routlegde 2016 & 2011), 1–8 with a foreword by HH Humphrey Lloyd QC and for the same author see: *Public Private Partnership Contracts: The Middle East and North Africa*, (Routledge 2020).

ideology, could promulgate PPP law. Many Arab countries followed Egypt and promulgated PPP laws. [6]

- **The legal framework of administrative contracts:**

Administrative contracts are subject during procedural phase to public procurement law. During execution phase substantive rights (conclusion, performance, termination, etc.) are governed by ECC legislative provisions in addition to substantive principles established by the Egyptian Supreme Administrative Court (SAC) since 1955. The case law principles established by the Egyptian Conseil D'Etat courts play a fundamental role in administrative contracts' law and practice since the administrative law is not codified (written) in Egypt and in all Arab countries.

The Egyptian judicial system in Egypt is unique as it has a *dual* judicial system; the first is the ordinary courts for civil, commercial, criminal and all other disputes and the second, which is the Conseil d'Etat, is specialized in administrative disputes. The Egyptian Conseil d'Etat is an independent judicial organ, pursuant to the Egyptian constitutions of 1971, 2012 and 2014, specialised in the settlement of administrative disputes which arise between public juristic entities and private persons whether the latter persons are natural or juristic persons. Pursuant to the Conseil d'Etat law no. 27/1972, the Conseil d'Etat is composed of three sections. Firstly, the Judicial Section which contains the SAC at the top, and below it the Appeal Administrative Courts and then the Administrative courts are the lowest step in the judicial hierarchy. The Conseil d'Etat courts are responsible for the settlement of disputes between public juristic persons and private persons. Secondly, the Legal Opinion Section which contains at the top the General Assembly for Legal Opinion and Legislation and the three committees for legal opinion below the Assembly, and then departments for legal opinion as the lowest step at the hierarchy. The legal opinion department is responsible for submitting opinion in legal matters for public juristic persons and in addition, pursuant to Article 66/d of the Conseil d'Etat law No. 47 of 1972, The General Assembly is responsible for settlement of the disputes which arise between two or more public juristic entities with a binding decision. Thirdly, the Legislation Section which is responsible for reviewing legislation before promulgation by the parliament. The Egyptian Conseil d''Etat was established in 1946 and is tasked with creating sensible balance between safeguarding public interests, on one hand, and protecting private liberties on the other as one of the democracy guarantees in Egypt.

The Egyptian Constitution of 1971 was of great significance to administrative contract theory and practice in Egypt, since the Egyptian previous public procurement laws No. 9 of 1983 and No. 89 of 1989 respectively were promulgated during the validity of the 1971 Constitution. The 1971 Constitution stipulates in Article 172 to the Egyptian Conseil d'Etat[7] exclusive jurisdiction, which is concerned exclusively with administrative disputes[8]. The Egyptian Conseil d'Etat has built on the principles of the administrative contracts' theory[9] through decades, because administrative

[6] Egypt has promulgated PPP law No. 67 of 2010; Kuwait PPP law No. 116 of 2014, and Jordan PPP law No. 31 of 2014 as amended in 2020, Morocco PPP law No. 86-12 of 2014, Dubai PPP law No. 22 of 2015 and Tunisia PPP law No. 45 of 2015.

law in Arab countries is not yet codified through legislation[10]. Administrative law and administrative contracts principles in Egypt and in Arab countries have been established through the Egyptian Conseil d'Etat decisions, in particular the SAC decisions, which were influenced to a great extent by the decisions of the French Conseil d'Etat[11]. The substantive legal nature of the administrative contract has a special significance to this study, as these contracts' disputes fall in the light of their substantive legal nature, within the jurisdiction of the Egyptian Conseil D'Etat[12]. The administrative contracts thus are unique with their special substantive nature through implementing excessive/exorbitant clauses (i.e liquidated damages as a penalty for delay, unilateral termination of the contract by the contracting state, forfeiture of the performance bond by the contracting state, etc.). Those exorbitant clauses aim at achieving public interests and protecting public funds. Further, Arab legal systems have been considerably influenced by the French legal culture through the Egyptian Conseil d'Etat decisions of the excessive/exorbitant clauses, '*Les Clauses Exorbitantes*' of the administrative contracts, which was transferred from France to the Egyptian Conseil d'Etat jurisprudence, and which aim to promote public interests of the contracting State[13].

Procedural phase:

Previous Public Procurement Laws Nos. 9 of 1983 and 89 of 1989 and their executive regulations respectively were promulgated in Egypt to govern the procedural phase and awarding public contracts.

The new promulgated public procurement law (State Contracting Law No. 182 of 2018) was promulgated and came into force on 3/11/2018.[14] The new law has modern approach which is consistent with international standards in public procurement. It reflects innovation in public procurements in the Egyptian legal system. Disputes arising from the latter law have not yet reached courts, therefore, there are no judicial principles concerning the application of this new law until present. The Conseil D'Etat courts' decisions through decades illustrate the procedural principles of administrative contracts in Egypt and Arab countries while interpreting public procurement legislation.

Performance phase:

[10] Sarwat Badawi, *Administrative Law*, Dar El Nahdah El Arabia, 1985, and for the same author see: *Administrative Contracts*, Dar El Nahdah El Arabia, 1992. See also: Soliman El Tamawy, *General Principles of Administrative Contracts* (5th edn, Dar El Fikr El Araby 1991). (in Arabic).

[11] Sarwat Badawi, *Administrative Law*, , Dar El Nahdah El Arabia, 1985, and 2010 editions. (in Arabic).

[12] Mohamed AM Ismail, *International Construction Contracts Arbitration*, (Al Halabi Publishing Co., Beruit 2003), (in Arabic); and for the same author see: Ismail, *Public Economic Law and the New International Administrative Contract***,** **(**Al Halabi Publishing Co., Beruit 2010), (in Arabic). The latter book was awarded the State Prize in Academic Legal Research in Egypt, 2011.

[13] Sarwat Badawi, *Administrative Law*, Dar Al Nahda Al Arabia, 2010; and for the same author see: *Administrative Contracts*, Dar Al Nahda Al Arabia, 1992.

[14] Article 5 of the promulgation articles of Law No. 182 of 2018 stipulates that law has to come into force after 30 days from the date of its publication at the *Official Gazette*. The Law was published at the *Official Gazette* on 3/10/2018.

The ECC is applicable to both the conclusion, the execution and performance of administrative contracts and also applicable to private contracts. Similar to private law contracts, substantive rights of the administrative contracts are governed by the ECC provisions.

In administrative contracts, parties to these contracts, a public body and a private entity, have the same contractual obligations and can seek the same remedies as the two private parties to private contract of a private nature. In addition, administrative contracts are unique with their exorbitant clauses which do not exist in private contracts. The justification for adopting exorbitant clauses in administrative contracts is to achieve public interests.[15] In the absence of written legislation in most cases, the Conseil D'Etat courts' decisions through decades created the substantive principles of administrative contracts in Egypt and Arab countries (exorbitant clauses, contract performance, *exceptio non-adimpleti contractus*, termination and etc.) .

The legal framework of contracts of mixed legal nature:

Contracts of mixed nature such as PPPs and BOT/BOOT are governed with special legislation. For instance, PPP law 67 of 2010 and its executive regulations govern procedural phase and contain some other legislative provisions to govern substantive phase (performance phase) in addition to basic substantive principles stipulated in ECC provisions. Therefore, awarding PPP contracts is not subject to ordinary public procurement law.[16] BOT/BOOT contracts are subject during procedural phase to ordinary public procurement law. They are subject to some substantive provisions stipulated in some laws which relating to some public utilities' sectors (i.e electricity, public roads, specialized ports, civil aviation, etc.)[17], in addition to ECC legislative provisions which govern substantive rights.

Case study 4: parties hold differing meanings as to the interpretation of an ambiguous term in the contract

4.1. Description of the case study (The Problem)

Contracting authority A undertakes a tendering procedure. Subsequently, A concludes a contract with B. In the course of the performance of the contract, it becomes clear that A and B hold differing meanings as to the interpretation of an ambiguous term in the contract.

A dispute arises between A and B on the question whether the contract is to be performed by the parties in accordance with A's interpretation. If so, the result would be that B will suffer financial loss. In the event that the contract is to be performed according to B's interpretation, this would be detrimental to A.

[15] For the aims of administrative contracts *(le contrat administratif)* in France See: André de Laubadere, Frank Modern and Pierre Delvolvé, *Traité des contrats administratifs* (LGDJ 1983) Tome I, 210 et seq; see also *ibid*, Tome II; Laurent Richer, *Droits des Contracts Administratifs* (LGDJ 1995) 85 et seq; and for the same author see (6th edn, L.G.D.J , 2008) 90; see the same aims in Egyptian and Arab doctrine, Soliman El Tamawy, *General Principles of Administrative Contracts* (5th edn, Dar El Fikr El Araby 1991) and Sarwat Badawi, *Administrative Contracts*, (Dar Al Nahda Al Arabia), 1992 (in Arabic).

[16] See Article 1 of the promulgation articles of the Egyptian PPP law No. 67 of 2010.

[17] In Egypt, there is no coherent BOT/BOOT legislation but a partial legislative reform was adopted by the Egyptian government on the late 1990s. Egyptian government has promulgated some legislation relating to some economic sectors.

4.2. General contract law: overview of the law on interpretation of contracts

When interpreting an ambiguous or unclear term in a contract, ECC requires a court to do so by applying rules of interpretation. These rules are different from one case to another. The rules that are to be applied in a particular case depends mainly on the intention of the contracting parties and the nature of the transaction (the contract) of the case. In practice, in the case of the administrative contracts and concession contracts, the contracting authority has the power, in most cases, to unilaterally interpret the ambiguous or unclear terms of the contract. Thus, when a contract term in is unclear or ambiguous and the contracting authority has to provide the right interpretation of such term. Such interpretation has to be consistent with public interests constraints. However, in many cases the contracting authority and the private entity may negotiate the interpretation of an ambiguous term. In fact, both parties do not re-negotiate the contract, but they are trying to achieve an interpretation to the ambiguous term of the contract, and such interpretation has to be consistent with the common and real intention of the contracting parties. The absence of specific provisions in public procurement law and other relevant laws means that the contracting authority has to conduct this interpretive task pursuant to the criteria established in ECC whilst taking into account the public interests' constraints and the SAC principles.

Article 150 of ECC provides that: '(1) if the term of the contract is clear, it is not permissible to deviate from it by interpreting it to identify the intention of the contracting parties. (2) If there is a need to interpret the contract, then the common intention of the contracting parties must be discovered without considering the literal meaning of the words, in the light of the nature of the transaction, and what is assumed to be available of integrity and confidence of the contracting parties, according to the current custom in transactions.'

Article 151/1 provides that: '(1) Doubt is interpreted in favor of the interest of the debtor.' The term 'doubt' here means when the courts has doubts regarding controversial interpretation of an ambiguous contract term not doubts of the disputing parties to the said term.

Interpretation has to be exercised in a *bona fide* manner and in the light of the customs of the transaction. Article 148 of the ECC provides that: '(1) a contract must be performed in accordance with what it contains (contractual provisions) and in a manner that is consistent with good faith (*bona fide* manner).'

While explaining the nature of a contract, obligations and the transaction's nature, customs and contract supplements according to law and justice principles, Article 148/2 provides: '(2) The contract is not limited to obligating the contracting party to what is stated on its provisions, but also deals with what is required of it, in accordance with the law, custom, and justice according to the nature of the obligation.'

It is worth noting that Article 90 of the ECC, while explaining contract rules as a source of obligations, sets the general principle that the parties may express their intention in contract impliedly as it provides that: '(1) Expressing the intention is done either verbally or in writing. It can be done with a common sign, as well as by taking a position that does not raise any doubts that

the circumstances are evident of the real (specific) intention. (2) The expression of the intention may be implicit, if the law does not provide or the parties did not agree that it should be express.'[18]

4.3 Application of general contract law to the case study

SAC has to Apply ECC legislative provisions, the valid and applicable public procurement law, in addition to judicial principles established by the Court itself in the absence of a mandatory rule in legislation. The public procurement law provisions are procedural rules deal with procedural phase of the contractual process, it does not directly deal with interpretation of the contract terms which are dealt with in Article 150 the ECC. SAC has considered the legal context of the competitive tendering procedure preceding the conclusion of the contract and the factual background of each case. SAC considers factual background and competitive tendering process on case by case scenario. It is important to assure that SAC has interpreted ambiguous or unclear terms considering previous factors but in the light of public interest principle constraints. Through decades, SAC reasoning and decisions were influenced to a great extent by public interest principle as a governing principle to all state contracts whether administrative, private or contracts of mixed/hybrid legal nature. The test adopted by SAC in interpreting ambiguous or unclear contract terms is *dual* test in its nature as it is a mix of subjective and objective tests. The test and methodology adopted by SAC are different from some cases to another.

While analyzing SAC decisions through decades, it is clear that SAC has considered the following factual and legal points:

- If the contract terms are clear, there is no point to interpret those terms far beyond the contract terms direct meaning;
- SAC focuses, as a start, on the customary linguistic meaning of the wording of the term in normal language;
- If the contract terms are not clear or ambiguous, SAC has considered parties' intention within the nature of the transaction, assumed integrity and confidence between the contracting parties in the light of the customs adopted in such transactions;
- Sentences and phrases of the contract have to be clear to reflect parties' intention, but if the contractual circumstances provide that the contracting parties have used misleading phrases, at the latter case SAC will not follow the wrong direct interpretation but it has to reach the common and real intention of the contracting parties;
- Where the literalness of the terms of the contract seems to be contrary to the real intention of the parties, the latter shall prevail over the former;
- SAC in many reasoning refer to objective criterion in discovering the common and real intention of the contracting parties;[19]

[18] For more elaboration in doctrine see the leading authority in the Egyptian and Arab doctrine: Abdelrazak Al Sanhory, *Al Wassit in Civil Law, Sources of Obligation*, , First Part, Dar Al Shourouk, 2010, 143; see also Abdelwadood Yehia, *Sources of Obligation*, Dar Al Nahda Al Arabia, 1989, 30. (in Arabic).

[19] SAC, case No. 3364/27, session 15/12/1985.

- Intention of the contracting parties prevail over the typological and linguistic errors as parties' intention reflect party autonomy principle;[20]
- SAC has adopted party autonomy principle in reasoning its decisions in all cases;
- Contract sentences and phrases are interrelated while interpreting parties' intention to discover the real intention of the contracting parties. While interpreting contract terms meaning, SAC did not isolate one single phrase from the contractual context. As the term is part of a contract, it must be interpreted in accordance with the contract as a whole;[21]
- Contract performance technique is one of the factors that lead to the parties' intention;
- Contract obligations have to be performed in the light of *bona fide* principle in Article 148 of the ECC and therefore, contract terms' interpretation has to follow *bona fide* principle in ECC and contract law in particular;[22]
- Clear terms mean clear intention of the contracting parties. If the contracting parties misuse sentences, phrases and terms of the contract and therefore interpretation of contract terms is not clear, SAC shall not follow such misleading interpretation and it shall search for the real intention of the contracting parties in the light of objective criterion of the contract circumstances, nature of the contract and the customs of such transaction;[23]
- If the contract stipulates that pre-contractual documents are an integral part of the contract terms and provisions, SAC has to scrutinize and analyses pre-contractual documents to discover the real intention of the contracting parties. This is a real adoption of party autonomy principle.[24]

It is important to refer to the following findings reached from analyzing SAC reasoning to its judgments:

- Public interest principle constraints have special significance as it is an important factor behind any interpretation adopted by SAC;
- Parties' intentions have to be interpreted not only in the light of public interest principle but also within the fundamental principle of how to promote public fund protection;
- the factual context of competitive tendering was of fundamental importance during reasoning of the SAC decisions;
- Despite that the administration can unilaterally amend or terminate the administrative contract due to specific mandatory legislative provisions or specific contractual provisions, it is not possible to introduce any unilateral modifications by either party, or to re-negotiate the contract without the consent of the contracting parties;
- The factual background of the case is an important factor to SAC to rely on upon interpreting the contract terms;
- SAC supersedes party autonomy principle in all its judgments' reasoning within public interest principle constraints;

[20] SAC case No. 31525/ 55, session 22/5/2016 and case No. 34646/56, session 6/3/2016.
[21] SAC case No. 16621/52, session 26/5/2009.
[22] *Ibid.*
[23] SAC case No. 2348/36, session 7/3/1995 and case No. 4708/41, session 5/1/1999.
[24] SAC case No. 5997/58, session 28/2/2015.

- SAC has applied the correct rule of interpretation by considering the customary linguistic meaning of the wording of the term in *bona fide* manner if the contract terms are clear and straightforward;
- The execution of the contract may also have an impact on the interests of the other tenderers (third party rights) that participated in the preceding tendering procedures. If the interpretation of contract terms will result to financial consequences which may affect the financial priority of tenderers upon entering into the tender and before awarding the contract, SAC shall reject such interpretation as it leads that the financial offers will be different in priority and lowest bidder in price will not be in the same position. Despite the fact that priority of financial offer (the lowest bid has to remain the lowest during contract performance as a general rule) is stipulated in the executive regulations and not in the legislation itself[25], this rule is of a fundamental importance to promote faire competition and equality between bidders and maintain the lowest bid as it is the lowest price during contract performance;
- SAC takes into account the public procurement law provisions and the legislative policy behind such law when interpreting contracts concluded following competitive tendering procedures;
- SAC adopts reasonable justification to its approaches in many judgments which is the Court while interpreting contract terms cannot violate the legitimate economic expectations of the contracting parties. Those legitimate economic expectations were expressed during the competitive tendering process;
- SAC considers both factual and legal context of the competitive tendering procedures when interpreting an ambiguous term in the contract;
- In addition to interpretation rules, SAC considers on its reasoning in implied words the principle of transparency under public procurement law, international standards and principles of SAC.

SAC principles through decades have established substantive coherent and solid frameworks of judicial principles in administrative contracts in general. For the purposes of this case study, SAC has established remarkable principles based on the interpretation of the ECC provisions, the competitive tendering process and the contract terms itself which have to reflect contracting parties' intentions. SAC has adopted both objective tests and subjective tests. SAC approaches are consistent, to great extent, with the international practice whether in the comparative law or the international standards illustrated by international organizations (OECD and The World Bank). Nevertheless, judicial approaches of the Egyptian Conseil D'Etat courts in general need more developments to adopt the latest international standards and innovation in public procurement. The new Egyptian public procurement law 182 of 2018 is expected to enhance the practice of state contracting from many aspects as this new law is following international organizations' standards.

[25] This are a fundamental concerns to stipulate the priority of financial offer (lowest bid stipulation) in the executive regulation of the previous public procurement law No. 89 of 1989 ant not in the legislation itself. This approach raises concerns of unconstitutionality of this provision in the executive regulations as the latter regulations cannot impose stipulations but it can only provide details of how to implement legislation. Stipulations have to be provided only by legislative provision not regulatory provision. Lowest bid stipulation is to promote fair competition between tenderers and is one of the guarantees of competitive tendering, therefore it has to be stipulated by legislative provision as it is a mandatory rule. Executive regulations cannot contain mandatory rules.

This new law shall be a fundamental factor to modernize and develop judicial approaches as SAC creates substantive rules only at the absence of legislative mandatory provisions. In addition, during the procedural phase and during contract drafting, it is fundamental that the contracting authority realizes the importance of the proper drafting of the contract to define the obligations of each contracting party precisely and sharply to avoid any future unpredictability.

In conclusion, in each contract, there is no one authentic interpretation of the terms of the contract or no one specific meaning. The right interpretation of the contract terms has to be in line with the documents during procedural phase, contract documents whether pre-contractual documents or the contract document itself, documents and correspondences which are relevant to contract performance and exchanged by the parties during contract performance and other relevant documents (documents which parties may exchange upon contract completion or upon the starting of a dispute whether in litigation or arbitration). Courts have to consider existing mandatory legislative framework, the SAC principles, regulatory framework. It is clear from analyzing SAC judgments, that there is a need for an objective interpretation of the contract, instead of the ordinary subjective-objective interpretation which has *dual* nature as an interpretation to contract terms. When interpreting the terms 'objective test' and 'subjective test', it is suggested that objective, in the sense that the linguistic meaning of the ambiguous term as it is understood in relevant legislation, SAC principles and relevant regulations. The linguistic meaning of the term has to be interpreted in the light of an objective rule that is relevant to the term use in the contractual context (transaction nature and customs). Subjective, in the sense that relevance will be attached to the parties' subjective intentions that can be derived from their conduct and statements before and after entering into the contract.