

Judicial Settlement of Disputes Arising from the Exploitation of Industrial Real Property

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Abstract

Industrial real property has come to represent a major obstacle to the development and improvement of investment — the very opposite of the role it was expected to play. This is principally attributable to the proliferation of disputes it generates, stemming primarily from the absence of a comprehensive cadastral survey of real property assets, compounded by an extensive arsenal of legislative texts and an unstable real property policy that has shifted with each successive change in economic orientation.

Recourse to the courts is had to settle disputes arising from the contractual relationship governing the exploitation of industrial real property — whether effected by means of transfer contracts (contracts of cession) or concession contracts. Such disputes may be brought before the administrative courts where one of the parties is a person of an administrative character, or before the ordinary courts where the parties are private individuals and the legal basis of the contract is civil in nature.

Keywords: Industrial Real Property; Cession Contract; Concession Contract; Administrative Court; Ordinary Court; Investment Disputes.

Introduction

Industrial real property constitutes the essential foundation and infrastructure of the economic life of any country. Algeria, in common with other states, has devoted considerable attention to this domain in order to preserve and develop it — a commitment reflected in the vast and varied body of legislative texts that have regulated it from independence to the present day.

The contracts governing the exploitation of industrial real property have been numerous and varied, differing with the successive investment laws and the financial laws implementing them; this diversity has also manifested in the variety of industrial zones. These contracts have undergone qualitative development over the chronological periods in which they emerged, with the most important of them being the cession contract and the concession contract.

However, the exploitation of industrial real property through these contracts has not been free of legal lacunae and, at times, lack of clarity — whether in terms of legislation or application — giving rise to various categories of disputes, some of which are already before the courts and others of which remain potential.

The courts intervene in disputes connected to industrial real property either to determine the liability of the party contracting with the administration in the event of a breach of the obligations imposed upon him; to assess the lawfulness of the administration's conduct where such conduct may harm the contractor's interests; or to settle matters between private individuals where one contracting party has failed to perform the obligations incumbent upon him. Jurisdiction over disputes arising from the exploitation of industrial real property is accordingly divided between the administrative courts and the ordinary courts.

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The significance of this subject lies in the fact that the judiciary constitutes a mechanism for the resolution of disputes between parties and thereby brings them to a definitive end. It also prevents administrative arbitrariness by protecting the weaker party and enabling the recovery of rights. Furthermore, it works to achieve equality and justice, thereby guaranteeing the sound operation of the exploitation of industrial real property and, in turn, improving economic performance and advancing investment activity.

Research Question: Given the proliferation of disputes arising from the exploitation of industrial real property and the necessity of judicial intervention to resolve them — when is recourse had to the administrative courts, and when to the ordinary courts, for the settlement of disputes arising from the exploitation of industrial real property earmarked for investment?

To address this question, the study is structured as follows: Section One examines the jurisdiction of the administrative courts to adjudicate disputes arising from the exploitation of industrial real property; Section Two addresses the jurisdiction of the ordinary courts to adjudicate such disputes.

Section One: The Jurisdiction of the Administrative Courts to Adjudicate Disputes Arising from the Exploitation of Industrial Real Property

Administrative contracts in which the State, the wilaya, the municipality, or public establishments of an administrative character are a party fall within the jurisdiction of the administrative courts pursuant to Article 800 of the Code of Civil and Administrative Procedure, and in application of the organic criterion established by Article 7 of Law No. 01-03. From this principle, it follows that all administrative contracts concluded by the administration fall within the jurisdiction of the administrative courts. This principle finds expression both with respect to the cession contract (I) and the concession contract (II).

I. Jurisdiction of the Administrative Judge over Disputes Arising from the Cession Contract for Industrial Real Property

In linguistic terms, al-tanazul (cession) denotes the relinquishment of a thing or an act. As a technical legal term, it refers to the process of transferring ownership of real property belonging to the private estate of the State or of local authorities at a price no lower than its market value.

The cession contract, the retrocession contract, and the sale contract are all designations for a single contract that produces the same outcome: the comprehensive and absolute transfer of ownership to the purchaser in the traditional sense well established in public law. A precondition for this contract is that the real property assets subject to cession — which relate primarily to national property belonging to the State or local authorities — must be unallocated, that is, available and not assigned to the service of any ministry or public establishment of an administrative character.²³

Examining all cession contracts for industrial real property concluded by an administrative authority reveals that such contracts were concluded under the following legislative frameworks: Law No. 66-284 containing the Investment Code; Law No. 82-11 on Private National Economic Investment; Law No. 88-25 on the Orientation of Private National Economic Investments; the Finance Law for 1985⁴

; the Finance Law for 1992⁵

; Law No. 93-12 on the Promotion of Investment; the Finance Law for 1994⁶

; and Order No. 11-06 determining the conditions and modalities for the grant of concessions and the transfer of lands belonging to the private property of the State earmarked for the realisation of investment projects, together with its implementing executive decrees.

²³Bujarda Makhluḥ. Al-'Aqar al-Sina'i [Industrial Real Property]. 3rd ed., Dar Houma, Algeria, 2008, p. 62.

³Mansour Asma. 'Aqd al-Imtiyaz ka-Wasila li-Istighlal al-'Aqar al-Sina'i [The Concession Contract as a Mechanism for Exploiting Industrial Real Property]. Master's thesis, Real Property Law specialisation, Faculty of Law, University of Algiers 1, 2014, p. 20.

⁴Article 151 of Law No. 84/21 of 24 December 1984 containing the Finance Law for 1985. Official Gazette No. 72, dated 31 December 1984.

⁵Article 161 of Law No. 91/25 of 18 December 1991 containing the Finance Law for 1992. Official Gazette No. 65, dated 18 December 1991.

⁶Article 117 of Law No. 93/18 of 29 December 1993 containing the Finance Law for 1994. Official Gazette No. 89, 1993.

All of the aforementioned texts are consistent in prescribing that the cession contract takes an administrative form — in other words, that it is an administrative contract of which the administration is a party. This accounts for the jurisdiction of the administrative courts over all disputes relating to its conclusion, execution, or rescission,⁷

meaning that the administrative courts have subject-matter jurisdiction to adjudicate such disputes at first instance, with judgments subject to appeal and cassation before the Council of State.

It should be noted that where the specifications schedule (*cahier des charges*) attached to the cession contract contains a resolatory clause concerning the investor's fulfilment of the agreed project within the stipulated modalities and timeframes, and the beneficiary fails to complete the project within the prescribed deadlines, the competent investment monitoring agency draws up a record to that effect and refers the file to the territorially competent Director of State Property to initiate rescission proceedings before the courts.⁸

II. Jurisdiction of the Administrative Judge over Disputes Arising from the Concession Contract for Industrial Real Property

The concession contract is defined as the contract by which the State grants, for a specified period, the right of usufruct over an available plot of land belonging to its private property to a natural or legal person governed by private law — whether resident or non-resident — or to a public economic establishment, for the primary purpose of establishing an investment project in one of the designated zones referred to above.⁹

The concession contract is a relatively recent form of contract, whose regulation oscillated between successive investment laws and finance laws until the issuance of Order No. 06-11¹⁰

- which was itself short-lived, having been repealed within two years by Order No. 08-04.¹¹

All of the aforementioned legal texts are agreed that the concession contract is drawn up in an administrative form, making the administration one of its parties and thereby subjecting all disputes concerning its conclusion, execution, or rescission to the jurisdiction of the administrative judge.

Where the right relating to disputes over the rescission of the concession contract or the withdrawal of concessions takes the form of a decision issued by the wali — before its transformation into an administrative contract — the basis of the administrative judge's jurisdiction is determined as follows:

- Where the matter relates to the grant of the concession right at its initial stage — such as the refusal to grant a concession or the failure to respond to a concession application within the prescribed deadlines — the aforementioned decision may be challenged before the administrative judge in application of the organic criterion under Article 7 of Law No. 01-03.
- The administrative judge likewise has jurisdiction over disputes relating to the partial withdrawal of concessions, in application of both the organic and the substantive criteria.¹²

Pursuant to Article 804, paragraph 3 of the Code of Civil and Administrative Procedure, territorial jurisdiction in matters of administrative contracts of any nature whatsoever is vested in the administrative court within whose territorial jurisdiction the place of conclusion or execution of the contract falls.

Both subject-matter and territorial jurisdiction of the administrative courts are matters of public policy¹³

⁷Khwadjiyya Hanan. *Al-Nizam al-Qanuni lil-'Aqar al-Sina'i fi al-Jaza'ir* [The Legal Regime for Industrial Real Property in Algeria]. Doctoral dissertation, Private Law specialisation, Faculty of Law, University of Constantine 1, 2014, p. 366.

⁸Bujarda Makhluḥ. *op. cit.*, p. 106.

⁹Clause 1 of the Model Specifications Schedule on the Grant of the Right of Concession over State-owned Lands for the Realisation of Investments in Designated Zones, pursuant to Article 5 of Executive Decree No. 94/322 of 17 October 1994.

¹⁰Order No. 06-11 of 30 September 2006 determining the conditions and modalities for the grant of concessions and the transfer of lands belonging to the private property of the State earmarked for the realisation of investment projects. Official Gazette No. 53, dated 30 August 2006.

¹¹Order No. 08-04 of 1 September 2008 determining the conditions and modalities for the grant of concessions over land belonging to the private property of the State earmarked for the realisation of investment projects, as amended and supplemented. Official Gazette No. 49, dated 3 September 2008.

¹²Article 46 of Law No. 93-12 of 5 October 1993 on the Promotion of Investment. Official Gazette No. 64, dated 10 October 1993.

¹³Article 807 of Law No. 08-09 of 23 February 2008 containing the Code of Civil and Administrative Procedure. Official Gazette No. 21, 2008.

; accordingly, the judge may raise them ex officio, and the parties may raise a plea of lack of jurisdiction at any stage of the proceedings.

Article 17, paragraph 3 of the Code of Civil and Administrative Procedure is explicit as to the obligation to register the initiating pleading. Consequently, any action seeking the rescission, annulment, execution, or amendment of a concession or cession contract must have its initiating pleading registered with the Real Property Conservancy, on account of its relation to real property or a real property right in rem — failing which the action shall be declared formally inadmissible. It suffices for the plaintiff to establish that the pleading has been submitted for registration; where it is formally rejected, this prevents any injustice from befalling the plaintiff.

Section Two: The Jurisdiction of the Ordinary Courts to Adjudicate Disputes Arising from the Exploitation of Industrial Real Property

The jurisdiction of the ordinary judge in resolving disputes arising from the exploitation of industrial real property is determined either by reference to the parties to the dispute, or by ascertaining the subject matter of the contract — whether it relates to private national property — as well as the object of the contract, and whether it is closer to the rules of private law or not. This section examines the jurisdiction of the ordinary judge over disputes arising from the cession contract (I), and then his jurisdiction over disputes arising from the concession contract (II).

I. Jurisdiction of the Ordinary Judge over Disputes Arising from the Cession Contract for Industrial Real Property

The ordinary judge at the level of the court of first instance (tribunal) has jurisdiction to adjudicate all disputes relating to the cession of industrial real property where the parties are subject to private law — such as disputes arising between the entities that own and/or develop or manage the real property and the beneficiaries of the relevant properties. In this context, the study examines disputes in which the following entities are parties: real property agencies (1); industrial zone development and management enterprises (2); and the National Agency for Real Property Mediation and Regulation (3).¹⁴

1. Disputes Involving Real Property Agencies

Real property agencies — which, following the enactment of the Real Property Orientation Law, take the form of wilaya-level agencies for urban real property management and regulation (formerly local agencies) — are of a commercial character. Their activities with third parties are governed by commercial law pursuant to Article 24 of Executive Decree No. 90-405¹⁵

and Article 4 of Law No. 11-04 on Real Property Promotion.¹⁶

Accordingly, any dispute arising from their activity — whether relating to sale procedures, transfer of ownership, rescission of contracts for breach of conditions, or otherwise — falls within the jurisdiction of the ordinary courts.¹⁷

This position has been confirmed by judicial decisions issued by both the Supreme Court and the Council of State, which have consistently held that the ordinary courts have jurisdiction over disputes in which local — now wilaya-level — real property agencies are a party. Among the most notable decisions are:

Supreme Court, Decision No. 130998, dated 30 April 1995: "Where it is established that local real property agencies are public establishments of a commercial character — maintaining their accounts in commercial form in accordance with Order No. 75/35 — the administrative judge lacks jurisdiction to adjudicate disputes in which these establishments are a party."

Council of State, Decision No. 4841, dated 15 April 2003: "The competent judicial authority is the ordinary court: local agencies for urban real property management and regulation are establishments of an economic

¹⁴Satutuh Ghanniyya. *Al-Nizam al-Qanuni lil-'Aqar al-Sina'i fi al-Jaza'ir* [The Legal Regime for Industrial Real Property in Algeria]. Doctoral dissertation (LMD), Private Law specialisation, Faculty of Law, Yahia Fares University of Médéa, 2017, p. 213.

¹⁵Article 24 of Executive Decree No. 90-405 of 22 December 1990 determining the rules for the establishment of local agencies for the management and urban real property regulation. Official Gazette No. 68, 1990.

¹⁶Article 4 of Law No. 11-04 of 17 February 2011 determining the rules governing real property promotion activity. Official Gazette No. 14, dated 6 March 2011.

¹⁷Satutuh Ghanniyya. *op. cit.*, p. 114.

and commercial character and, accordingly, their disputes with litigants subject to private law do not fall within the jurisdiction of the administrative judicial authority."

2. Disputes Involving Industrial Zone Development and Management Enterprises

Industrial zone enterprises or their management enterprises are public establishments of an economic character, subject to the rules of commercial law in their dealings with third parties pursuant to Law No. 88-01 containing the Orientational Law for Public Economic Enterprises.¹⁸

The ordinary courts have jurisdiction to adjudicate disputes arising from their functions.¹⁹

Moreover, cession contracts for industrial real property concluded by industrial zone development and management enterprises with operators are notarial contracts; consequently, disputes arising therefrom fall within the jurisdiction of the ordinary judge. This position was affirmed in several judicial decisions, including:

Council of State, Decision No. 5680, dated 11 February 2002: "The administrative judge lacks jurisdiction to adjudicate a challenge raised against two documents drawn up by a notary."

3. Disputes Involving the National Agency for Real Property Mediation and Regulation

The National Agency for Real Property Mediation and Regulation is a public establishment of an industrial and commercial character, subject to private law in its dealings with persons other than those governed by public law.²⁰

By reference to Article 7 of the repealed Code of Civil Procedure, Article 800 of the Code of Civil and Administrative Procedure currently in force, and Article 4 of Law No. 11-04 on Real Property Promotion, these legislative texts vest jurisdiction in the ordinary judge to adjudicate all disputes relating to the cession of industrial real property in which the National Real Property Mediation and Regulation Agency is a party — unless the action is brought by or against a person governed by public law.

As a general rule, the ordinary courts have jurisdiction over all disputes in which the establishments responsible for the promotion and management of industrial real property are a party, provided that the action is not directed against a person governed by public law. Actions are brought before the courts of first instance and are subject to appeal before the courts of appeal (judicial councils) and to cassation before the Supreme Court.

II. Jurisdiction of the Ordinary Judge over Disputes Arising from the Concession Contract for Industrial Real Property

The concession contract confers only a right of usufruct, not a full right of ownership. Upon its registration, it creates a real property right in rem that is transferable, sub-leasable, and subject to forced execution.²¹

The ordinary judge has jurisdiction to adjudicate disputes in which the concession contract relates to private national property — as opposed to public national property, which falls within the jurisdiction of the administrative judge.²²

This is because the concession contract is closer in nature to a civil contract than to an administrative contract: it is a long-term lease contract, by virtue of the characteristics referred to above, and constitutes a commercial act falling within the category of exceptions mentioned in Article 7 of the former Code of Civil Procedure, which excluded commercial acts carried out by the administration from the jurisdiction of the administrative judge. This position is supported by analogy with agricultural leases — which are long-term leases explicitly excluded from the jurisdiction of the administrative courts.²³

¹⁸Article 5 of Law No. 88-01 of 12 January 1988 containing the Orientational Law for Public Economic Enterprises. Official Gazette No. 25, dated 13 January 1988, as amended.

¹⁹Supreme Court, Decision No. 351919, dated 24 January 2007. Supreme Court Journal, 2007, Issue 1. (The obligation of an enterprise located in an industrial zone to pay charges and subscriptions is a statutory obligation.)

²⁰Article 1 of Executive Decree No. 07-119 of 23 April 2007 establishing the National Agency for Real Property Mediation and Regulation, as amended and supplemented. Official Gazette No. 27, dated 25 April 2007.

²¹Khwadjiyya Hanan. op. cit., p. 376.

²²Bujarda Makhluuf. op. cit., pp. 109–110.

²³Ibid., p. 110.

Pursuant to Article 515 of the Code of Civil and Administrative Procedure, the real property division (*chambre immobilière*) has jurisdiction to adjudicate actions seeking the nullity, rescission, amendment, or reduction of rights arising from registered exploitation contracts relating to real property earmarked for investment that are drawn up by public establishments of an industrial and commercial character.

Territorial jurisdiction is vested, as of right, in the court within whose territorial jurisdiction the real property is located.²⁴

In courts where no real property division has been established, the civil division retains jurisdiction over disputes connected to contracts granting plots of land earmarked for investment projects.

Conclusion

On the basis of the foregoing analysis, it is apparent that disputes arising from the exploitation of industrial real property are adjudicated either: by the administrative courts, where the administration is one of the parties — the administrative courts having jurisdiction over all disputes arising from the cession contract and the concession contract, whether relating to their conclusion, execution, or rescission, given that both contracts take an administrative form as prescribed by the relevant legislative texts. Subject-matter jurisdiction in such disputes lies with the administrative judge, while territorial jurisdiction is determined pursuant to Article 804, paragraph 3 of the Code of Civil and Administrative Procedure, before the administrative court within whose territorial jurisdiction the place of conclusion or execution of the contract falls. Or, alternatively: by the ordinary courts, where the parties are subject to private law — as in cession contract disputes arising between the entities that own and/or develop or manage the real property and the beneficiaries of the relevant properties — or by reference to the subject matter of the contract, where it relates to private national property, or by reference to the object of the contract, where it is closer to civil law — as is the case with the concession contract. Subject-matter jurisdiction in such cases is vested in the real property judge within the ordinary courts pursuant to Article 515 of the Code of Civil and Administrative Procedure, while territorial jurisdiction is vested, as of right, in the court within whose territorial jurisdiction the real property is located, pursuant to Article 40 of the same Code.

The study has yielded the following principal findings:

- The proliferation and fragmentation of the legislative texts governing industrial real property, combined with the frequent absence of the implementing regulations prescribed therein, complicates the work of the judge in determining the applicable law having regard to the principle of the temporal scope of legislation. The judge may find it difficult to master all laws in force and may erroneously adjudicate a dispute on the basis of a law that has been repealed.
- The concession contract is drawn up in an administrative form, which confers upon the State as the grantor broad powers derived from the administrative character of the contract. This subjects all disputes relating to this contract or its execution to the jurisdiction of the administrative courts.
- The concession mechanism has the capacity to forestall the ownership disputes that arose from cession contracts — by granting a right of usufruct whilst retaining State ownership of the land, with the possibility of transferring the buildings constructed on the concession land to the investor upon request.
- The absence of a competent and efficient judiciary, and the protracted pace of litigation that characterises the Algerian courts — manifested in the accumulation of cases and delays in adjudication — tends to depreciate the very right in dispute and constitutes one of the causes of weak economic performance and impediments to investment activity.

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