

# Research on the criterion of the invalidity of administrative agreement

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**Abstract:** Because of the dual attribute of administrative agreement, there is a conflict between administrative law and civil law in the concept value of effectiveness. The legal application of the invalidity of administrative agreement generally adopts the view of mixture theory. But because the law does not have the explicit stipulation, the academic circle also debates endlessly. That is to say, in judicial practice, there is also a dilemma in the application of the law to the determination of the invalidity of administrative agreements and how to apply the law, so it is necessary to construct the rules of the application of the law to the determination of the invalidity of administrative agreements, according to the general rules of priority application of administrative law norms, the specific rules of application of administrative law norms and civil law norms are established.

**Keywords:** Administrative agreement; invalid; applicable law

## 1. Introduction

On the issue of the criteria for the determination of the invalidity of administrative agreements, at present, both the academic circles and the judicial practice all agree that the validity of administrative agreements should be judged on the basis of two legal norms, they are respectively the invalidity stipulated in the public law norm and the invalidity stipulated in the private law norm. However, how to apply these two sets of legal norms, legislation is the lack of clear provisions, but also there are a variety of theoretical views.

In a word, because of different opinions in theory and the lack of legal norms, there is no uniform standard for judges to determine the invalidity of administrative agreement in judicial practice. Different adjudicators even apply different legal norms to the same case. For example, in the case of fan Kai v. Taihe County People's government of Guanzhen County, which signed the agreement on compensation for house removal and resettlement, the court of first instance judged the effectiveness of the administrative agreement involved in the case, in the process of judgment, it applied the 75th of the administrative procedure law on the invalidity of administrative acts. The court held that although the executive branch of signing the agreement was the People's government of Chengguan town, Taihe County, the relationship between the two was entrusted. The Taihe County government recognized the act of signing the agreement. The court, in accordance with the provisions of the administrative law, there is no such thing as invalidity. The plaintiff, fan Kai, was therefore dismissed. Van Kay appealed against the decision of the court of first instance. The court of second instance realized that the administrative agreement has the dual characteristics of administration and agreement, so it also applies the provisions of civil law on the invalidity of civil acts to judge the effectiveness of the agreement. But in the end, the court of second instance decided that the validity of the agreement did not violate the provisions of the above-mentioned law, so it upheld the sentence.

The author believes that in the trial of this case, the court of first instance and the court of second instance apply different laws to judge the validity of administrative agreement. The judges of the court of first instance still regard the administrative agreement as a Special Administrative Act, completely ignoring the difference between the administrative agreement and the Administrative Act. The administrative agreement also contains the characteristics of agreement as compared with the Administrative Act. However, the judges of the court of second instance realized the special attribute of the administrative agreement and applied both civil norms and administrative norms in the determination of its effectiveness. In a word, this case reflects that there is still no clear and unified standard for judging the effect of administrative agreement in judicial practice.

## **2. The theory of the application of law**

The judgment of the invalidity of the administrative agreement can not escape the application of the law. In theory, there have been three kinds of arguments: public law theory, private law theory and mixed theory.

### **2.1. Public law**

Some scholars in our country think that the subject of a party in the administrative agreement is usually the administrative subject, which is naturally with the color of public power. As the name implies, the judgment of the validity of the agreement should be applied to the determination of the invalidity of the Administrative Act stipulated in the administrative procedure law. Such as Huang Xuexian scholars think that although the administrative agreement has a contractual side, but mainly still the administrative dominant position. Some foreign countries adhere to the view of public law, the typical country is France, which is the origin of the administrative contract, issued an independent standard administrative contract laws and regulations. In the initial stage of French legislation, there was not enough attention paid to the character of "Agreement" of administrative contract, and the main criterion was "Administration". However, with the development of market economy, the number of administrative contract cases has been increasing, and the complexity has increased. According to the original review ideas, it is difficult to substantive administrative agreement cases to resolve. Therefore, in the later stage, the court integrated the examination of its nature of agreement, and gradually paid attention to the balance between the nature of administration and the nature of contract, especially in the litigation of the validity and performance of contract<sup>[1]</sup>. Although the later stage of the trial thinking has been changed, but its nature is still its administrative dominant position, the agreement of the secondary position<sup>[2]</sup>.

### **2.2. Private law**

"Private law theory" is the application of civil norms to solve the administrative agreement in the trial of the case. For example, Liang Fengyun believes that administrative agreement itself belongs to a special type of civil contract, so the legal application of its judgment on the validity of the contract should also follow the relevant provisions of civil norms on the validity of the contract.<sup>[3]</sup> In some foreign countries, the application of private law is preferred, for example, in England, there is no clear distinction between the public authority and the agreement between the private parties, the legal norms applicable to the agreement is different from the agreement between the private parties. The main reason for applying the same legal norms is that agreements between executive branch and private entities are also expressed through contracts, and it is through the form of a contract to bind the rights and obligations of both sides, then it should also be subject to the general rules of contract constraints. However, due to the continuous changes in the national policy, the scope of administrative management is also continuing to extend to the extension of the scope. The administrative contract is also regarded as one of the important tools of the national promotion policy. On the other hand, it is precisely because of the increasing number of administrative contracts, the application of private law alone can not fundamentally solve the problem. Therefore, in judicial practice to apply the principle of private law, appropriate public law can be applied to solve administrative contract cases.

### **2.3. Mixture theory**

The scholars of this theory think that the administrative agreement has the characteristics of both administration and contract, it is not feasible to apply the norms of civil law or administrative law alone<sup>[4]</sup>. In other countries, such as Germany, it is the use of the "Mixed theory." Article fifty-nine of the code of administrative procedure makes civil rules applicable to the invalidity of an administrative contract. Taiwan can also adopt the attitude of civil law norms when trying the validity of administrative contracts. The author believes that compared with the two theories mentioned above, this one is more in line with the actual situation of our country. It emphasizes the nature of contract at the same time, which shows that both parties are in the same equal position and adopt two legal norms in the application of law.

### **3. Rules for the determination of the invalidity of an administrative agreement**

#### ***3.1. The general rules of the applicable law for the invalidity determination***

The norms of administrative law take precedence while those of civil law are supplemented. The application of the law to the trial of cases in which an administrative agreement is invalid, The general rule of law application in the academic circle is that the administrative agreement should be examined first when the administrative act is invalid, and then when the civil law is invalid<sup>[5]</sup>. The fundamental nature of administrative agreement is administrative attribute, so it is reasonable to apply administrative law norms. In the judicial practice departments have also gradually adopted this mode of trial, such as Cao Xinggen v. Changzhou Wujin District housing expropriation and compensation management center administrative agreement expropriation compensation case, in the process of determining the validity of the agreement involved in the case, the court of first instance, based on the norms of administrative law, found that there was no significant and obvious violation of the law in the case. Then apply the civil law norms to examine the effectiveness of the case. Another example is the case of Huang Chengyu and Wang Junchao v. the invalidation of the administrative agreement of the Bureau of Urban Construction and urban renewal of the Chengdu Chenghua District Park. The court of First Instance held that the administrative agreement belonged to the type of administrative act, so it needs to comply with the administrative law first of all, but the administrative agreement is also the product of the two sides agree, in the premise of not violating the administrative law norms, can be applied to the civil law norms. The reasoning of the court of second instance was the same. To sum up, that is to say, the premise of applying the norms of civil law is not to violate the provisions of the norms of administrative law. However, in some special cases, the application of the above-mentioned methods can not resolve the disputes, then can be measured by the comprehensive value. <sup>[6]</sup>The value of administration according to law and the value of compliance with agreements, the Order of law and the stability of law maintenance and the protection of trust interests are considered. For example, in Liang Jiefeng v. Yueyang County Changhu Township People's government land and housing expropriation compensation agreement illegal, the court found invalid for three main reasons, first, it concluded that the principal qualification of the parties involved in the administrative agreement was that they did not have the authority to expropriate the houses. Second, the executive branch did not use the expropriated houses as agreed upon at the time of signing the administrative agreement, to a certain extent, the parties to the executive branch of the interests of trust. The third is that the agreement in question violates the provisions of Article 10 of the land administration law. On the basis of the above three reasons, the administrative agreement was judged invalid.

#### ***3.2. Specific rules of application of the law***

##### ***3.2.1. The specific rules governing the application of the norms of administrative law***

First, the determination of the qualifications of the executive branch of a party to an administrative agreement requires the application of administrative law norms. Because there is no special stipulation on the determination of administrative subject qualification in administrative agreement, and there is no difference between the determination of subject qualification and the requirement of subject qualification of unilateral administrative act. Therefore, it is also necessary to follow the administrative law norms for the administrative act with the identification of the subject qualification. However, sometimes in judicial practice it is common for a executive branch to entrust a company to carry out the corresponding work of the agreement on its behalf. For example, in Wang Huifang v Longyou County Government of the People's Republic of China, the court of first instance held that the subject of the expropriation was a private entity, i.e. the Longyou County city development investment company was not a executive branch, therefore, the legal relationship is between equal subjects, not the scope of administrative proceedings, rejected the plaintiff's claims. The court of second instance in the trial that the real implementation of the main expropriation is the government organs, the case is entrusted to the government functions of the situation. Therefore, the expropriation agreement is an administrative agreement. This further shows that for such agreements can not only observe the form of the agreement signed by the main body, signed by the main body does not have the status of the main body that the agreement is invalid. If the parties to the agreement are acting in accordance with the will of the executive branch, then the parties are merely trustees and the subject of the agreement is or is executive branch.

Second, the "No basis" in the "Administrative Procedure Law" of the administrative act is also invalid. Although the "Basis" in this article does not carry out further analysis, but according to the

experience of judicial work, generally refers to the factual level or evidence level analysis of the case. Or whether there are corresponding legal provisions. For this provision can be applied in the administrative agreement, has been used by some courts to hear administrative agreement cases. When an administrative judgment or ruling is reasoned, it refers to the fact that the case has no legal basis for invalidating the agreement.

Third, in the determination of effectiveness, the revision of the application of administrative law norms. Compared with unilateral administrative act, the effect of administrative agreement can not be negated easily because it contains the expression of will between the parties. At the same time, the provisions of administrative litigation need to be amended to a certain extent, and the determination of the invalidity of administrative agreements should be applied with caution in the application of the legal provisions on invalid administrative acts.<sup>[7]</sup> After signing the administrative agreement, maintain the stability of the agreement. First of all, if there is an executive branch, even if there is a flaw in the capacity, it may not be strictly judged to be null and void. If one of the parties to the agreement, that is, the executive branch, acts beyond his authority or in breach of jurisdiction, it can be determined according to the degree of the case or can be remedied through a certain way after the fact is not necessarily invalid. Secondly, the content of the administrative agreement on the application of administrative law norms, if the agreement in the administrative agreement is the result of mutual agreement agreed by both sides, there is no fraud, coercion, etc. , however, if the agreement is violated for executive branch reasons, the agreement can not be deemed null and void by consensus. Finally, the validity of an administrative agreement is not always null and void once it has been found to be null and void. Its effectiveness state may carry on the variation according to the actual situation. The invalidity of an agreement is the result of the executive branch alone, and its validity is not affected by the measures taken by the executive branch. At the same time, the invalidity of administrative agreement can be divided into partial invalidity and overall invalidity. Where the invalid part does not affect the other contents, is not related to each other and can be separated, the other parts of the contents are still binding on the parties. At the same time, it is necessary to grasp the corresponding degree to identify the “Significant and obvious violation”, because the identification of significant and obvious involves the intervention of subjective factors, there is no specific measure. Once used improperly, may lead to misuse of the situation. Therefore, it is not conducive to promoting the realization of the modernization of national governance. In judicial practice, if the contents of the agreement can not be realized, it is classified as a major and obvious violation of the law. In the case of He Jinhua Government of the People's Republic of China housing expropriation V. Liuzhou, the court of second instance, in examining the facts of the case, found that the contents of the agreement claimed by the appellant did not exist and that the subject of the executive branch was not mentioned at all, it is not the content that both sides agree on, so it can not be carried out objectively, so a judgment that the original judgment is null and void has been made.

### ***3.2.2. Specific rules governing the application of civil law norms***

At present, the application of administrative agreement to civil law is not controversial in law and judicial practice, but how to apply it is always the focus.

First, the determination of the qualifications of the person concerned in an administrative agreement may be governed by the provisions of the Civil Code, specifically, the capacity provisions of the Civil Code apply where one of the parties to the agreement is a natural person. The main reason is that there is no provision in administrative law for the qualification of private capacity. At the same time, because the administrative agreement itself has the characteristics of agreement, it is not different from the determination of subject qualification in civil contract in essence.

Secondly, the provisions of the Civil Code on false intention and malicious collusion can also be applied in administrative agreement cases. Moreover, Article One hundred and fifty-three of the Civil Code may also apply to the determination of the validity of an administrative agreement. Specifically, first of all, the restriction in this article is reduced to “Violation of law and administrative regulations”, which leads to the invalidity of civil contract. But the process of invalidating an administrative agreement case needs to be extended to Local ordinance made by local people's Congresses or regulations made by government agencies.<sup>[8]</sup> If only laws and administrative regulations are used to bind the executive branch in an administrative agreement, it may lead to the abuse of power and is not conducive to safeguarding the legitimate interests of the parties to the administrative agreement. There are many government charter regulations that bind administrative agreements.

Once again, the “Mandatory legal provisions” stipulated in the law, which has a big controversy in the Civil Law Circle, most civil law scholars have made a distinction between “Mandatory provisions”,

they are the mandatory provisions of validity and administrative nature respectively, and think that only the violation of the mandatory provisions of validity will lead to the invalidity of administrative agreement. However, in the application of administrative agreements, whether the mandatory provisions need to be differentiated as in civil law. Moreover, the mandatory provision of validity is also an unclear legal concept. Secondly, whether it is necessary to distinguish scholars has not formed a unified point of view, some scholars believe that there is no need to restrict the mandatory provisions to the effectiveness of mandatory provisions.<sup>[9]</sup>The reason for this is that Peremptory norm needs to be weighed against a range of interests, as well as the extent to which interests are violated, and some minor circumstances do not affect invalidity. In short, the “Mandatory provisions” can not be defined too limited scope<sup>[10]</sup>.

Finally, it is invalid for the civil legal act that violates the principle of public order and good customs, and this provision can be applied when the administrative agreement is considered invalid.<sup>[11]</sup> Since administrative agreements are one of the most flexible means of executive branch administration, their most important purpose is also the preservation of social ethics. Therefore, the administrative agreement runs counter to the provisions of this principle and is bound to be considered invalid. However, the principle of public order and good customs should be applied cautiously in the trial of administrative agreement cases, which has a wide range and can not be abused to cause harm to the counterpart of the agreement.

#### 4. Conclusions

Because of the immaturity of the whole development of the administrative agreement in our country at present, it is in the process of constant in-depth exploration both on the basis of theory and in judicial practice. At the same time, it also leads to many problems such as the standard of recognition, the way of judgment and so on. The identification of invalidity is also a representative problem, the dual nature of the agreement is Unity of opposites, that is, there are points of disagreement also overlap. It is still the direction of further efforts to form a set of perfect standards for the determination of the invalidity of administrative agreements as soon as possible.

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