行政契约履行研究

步　兵◎著

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前 言

近年来，我国行政法理论研究有了明显的进步，行政法的基础理论、具体行政行为形态等研究均有了重大的理论突破，行政法理论的研究正在对行政执法发挥越来越大的影响和作用。同时，人们在深入研究传统行政管理手段的同时，也越来越重视那些日益对人们日常生活产生不容忽视的影响的柔性化执法方式，行政契约便是其中一个非常重要的问题。

行政契约是随着民主观念的深入，福利国家观的产生，行政法已经由作为专制的工具转变为管理和服务的手段的行政法理念转变而逐渐兴起的新式行政管理手段，极大地推动了行政执法观念的改变和行政法理论的发展。基于历史的原因，两大法系在运用契约方式完成行政职能的过程中，呈现出很大的差异性。例如，在英美法系国家，行政契约作为契约的一种，因直接适用于普通契约规则而至今未形成专门的行政契约理论和立法。大陆法系国家虽有内容丰富且发展成熟的行政契约理论和制度建设，但亦因历史条件、社会环境、行政技术等因素在理论内核和具体规范上不尽一致。我国行政契约制度尚处于启蒙和发展阶段，基本理论体系尚未完全建立，对行政契约的概念、适用范围、原则、价值和功能等认识不够深入，在制度建设上，对行政契约当事人的权利义务配置、程序规制和法律救济手段等均有待完善。

尽管如此，我国许多行政法学者也已经察觉到，尽管有关行政契约的理论上的争论还远远没有结束，行政契约却早已被用来作为推行行政政策的理想手段而为实践所接纳。与传统行政手段的研究相比，我国对行政契约的研究仍然是不深入的，但这一执法形态在实践中的运用广度和频度却逐渐提高，相关理论的相对滞后，使行政契约在实践操作中不能有效发挥其作用。

实践的需要呼唤理论的发展。针对目前国内外尚无专门针对行政契约履行的研究成果的现状，本书从行政契约履行的意义着手，对行政契约履行的原则和规则、不同效力情况下行政契约的履行、行政契约履行中的特权、行政契约履行中

的变更和解除，直至不履行行政契约的责任，作了系统性的论述和研究，从而对行政契约的履行在整体上予以把握，为对行政契约履行的具体问题的探讨打下基础。其次，本书还对行政契约履行的一些具体问题进行了细化研究。例如，行政契约履行与私法契约履行相比，具有哪些特殊的原则和履行规则，行政主体特权的行使方式和程序、行政契约的变更后转让的特殊性等。

基于以上研究思路，本书将研究内容大致分为三个部分：第一部分主要包括第一章，重点在于讨论行政契约及其发展，阐述行政契约履行对于行政契约以及依法行政的意义，以及对行政契约履行的原则和一般规则进行归纳。

第二部分包括第二、三、四章，是在第一部分的基础上，对不同效力形态的行政契约的履行、行政契约履行过程中的特权行使及其控制以及行政契约履行过程中的变更和解除进行了深入细致的论述。其中，第二章主要从行政契约的有效要件入手，讨论了行政契约之有效需要具备的条件，然后根据行政契约违反有效要件的不同情况，分析了行政契约的可撤销、无效和效力待定，以及不同效力状态下行政契约的履行或后果。第三章则是从行政契约中特权存在的原因谈起，在肯定行政契约中特权存在的合理性后，对大陆法系和英美法系国家的行政契约立法中的特权进行了实证分析，提出在我国行政契约立法中应当承认的特权范围；并在论证了特权与契约精神融合的可能及思路后，提出了对特权进行控制的制度设计。第四章是对行政契约的变更和解除进行论述，分别对协商解除和单方行使解除权解除、行政契约内容的变更和主体变更的情形及其限制进行了分析。

第三部分主要包括第五章，专门对行政契约不履行的违约责任进行考察分析。行政契约的契约性和行政性的结合决定了它不仅有别于专以相对人作为责任主体的行政法律责任，也不同于私法性质的契约责任，而系行政法属性的契约责任，在归责原则上应采用无过错责任原则，在责任类型上也因行政主体和相对人的不同而相异。

笔者对上述内容的研究，并不局限于从行政法的视角观察，也不拘泥于宏观或微观的某一层面之上，而是在充分把握行政契约的行政性和契约性的基础上，以宏观指导与微观考察相结合的论证方法，理论研究与实务考察相结合，在比较借鉴的基础上努力构建出合理的制度，在法律体系中为行政契约谋得一席之地，为行政契约理论的发展和实务操作提供借鉴。

当然，研究是困难的，尤其是对陌生领域的探索研究。本书历经重重困难，终得以面世，对笔者而言是极大的鼓舞和激励。当然，鉴于行政契约所涉及的领域十分宽泛，尽管笔者在研究过程中慎之又慎，但受学识和能力所限，难免有错漏之处，敬请读者批评指正。

内容摘要

行政契约是行政法中一个非常重要的领域，但行政契约制度在我国理论及实践中均存在许多问题。例如，对行政契约理论研究的深度、广度不够；对行政契约履行的原则、规则、权利和义务配置、法律救济的认识还较为模糊；私法契约履行方面的理论和立法在行政契约履行中如何运用也理解不一；私法契约履行的诸多规则适用于行政契约履行的特殊性尚待进一步研究，等等。本书在借鉴私法契约履行制度的基础上，结合行政法的特殊性，着力于行政契约履行的理论体系和制度构建，并将上述问题作为本书讨论的主要内容。

本书共分为五章。

第一章是行政契约履行的一般界说，重点在于讨论行政契约及其发展，阐述行政契约履行对于行政契约以及依法行政的意义，以及对行政契约履行的原则和一般规则进行归纳。笔者先对行政契约的含义作了说明，认为关于行政契约概念的用语并不重要，本书拟采用的“行政契约”与诸学者使用的行政合同、公法合同、公法契约等概念同义，系指行政主体与相对人之间缔结的，以发生、变更或者终止行政法律关系为目的的协议；行政契约同时具有契约性和行政性双重特征，从而使之区别于单方行政行为和私法契约。接着，笔者通过对行政契约制度在大陆法系和英美法系发展历史的考察，总结了行政契约得以产生和发展的原因，并提出行政契约的履行是行政契约制度的核心和法律目的，是实现行政法制的重要手段，也是契约效力的要求，并构成契约效力的主要内容，以此进一步说明了本选题的理论和现实意义。关于行政契约履行的原则，笔者指出，行政契约履行的原则有别于私法契约的履行原则；行政契约履行的原则，不仅包括行政程序法的基本原则如公开原则、公平原则、参与原则等，更主要的是专门指导行政契约履行的原则，即全面履行原则、情事变更原则和公益优先原则，同时诚实信用原则在行政契约履行阶段对行政契约权利义务的履行也具有重要的指导和规范意义。本书随后指出，在行政契约的履行中，履行规则直接调整行政主体和相对人的契约履

行行为，为行政主体和相对人设置了细化的、具体的权利义务；在认识行政契约的履行规则时，离不开对私法规则的借鉴，但考虑到行政契约的公法性质，适用私法规则时必须斟酌公、私法区别问题，应当合乎性质地准用私法规则，而非一体地直接适用。接下来，笔者具体探讨了行政契约履行中，涉及约定不明、涉及第三人因素等诸多复杂情事时的履行规则。

第二章论述了不同效力行政契约的履行。本书从行政契约的有效要件入手，讨论了行政契约之有效需要具备的条件，然后根据行政契约违反有效要件的不同情况，分析了行政契约的可撤销、无效和效力待定，以及不同效力状态下行政契约的履行或后果。在行政契约的有效要件部分，笔者参考私法契约的效力规则，并结合行政契约的公法性特点，提出行政契约的有效应当符合主体要件、方式要件、形式要件、内容要件和程序要件的要求；不完全具备合法要件的，即存在瑕疵时，借助私法契约和行政行为的效力规则，除确认行政契约无效之外，也宜承认可撤销等多种状态的存在。为此，笔者首先提出，当行政契约存在严重瑕疵时，如当行政契约准用私法契约无效规则无效时，或者代替行政行为之行政契约，原行政行为为无效的，或者基于行政契约的特性为无效者无效的，该行政契约应为无效；行政契约无效的，在契约当事人间不发生约束力和履行效力，行政主体抑或相对人均无须履行，不承担契约规定的义务，不发生当事人预期的法律效果，行政主体和相对人也都可以主张其无效；有过错的一方给对方造成损失的，应承担缔约过失责任；双方都有过错的，由双方根据自身过错的程度和性质，各自向对方承担相应的赔偿责任。其次，当行政契约存在的瑕疵其严重程度尚不足以导致无效时，行政契约属于可撤销的契约。在行政契约可撤销的情况下，撤销权主体可以依照法定程序撤销行政契约，也可以不撤销行政契约而选择变更行政契约或者采取法律允许的其他补救措施；但可撤销的行政契约一旦被撤销，该契约对双方均无拘束力，此时，正在履行的行政契约应当被终止履行。如果该契约已经被部分履行，则被履行的部分原则上应当恢复原状，包括返还财产，不能返还的应当折价补偿、赔偿损失等。再次，当行政契约的有效要件是否具备不明朗时，该契约的效力处于待定状态，行政契约在当事人间尚不发生拘束力。当该有效要件具备时，契约确定生效；反之，如有效要件确定无法具备时，契约则确定不生效力；笔者还讨论了基于不同情况而效力待定的行政契约的法律后果。最后，笔者认为，在行政契约这种双方行政行为中，行政主体和相对人可以通过在行政契约中约定有可能发生的、用来限定契约效力的某种合法事实，作为契约所附的条件，这种行政契约为附款的行政契约；笔者根据附款的种类，分别讨论了附条件行政契约和附期限行政契约的履行规则。

第三章论述的是行政契约履行中的特权及其控制。笔者先从行政契约中特

权存在的原因谈起，论证了行政契约中特权存在的合理性，并总结了特权的特征；接着对大陆法系和英美法系国家的行政契约立法中的特权进行了实证分析，提出在我国行政契约立法中应当承认的特权范围；其后研究了行政契约中特权与契约精神的融合的可能及思路，最后提出了对特权进行控制的制度设计。在分析契约特权存在的原因时，笔者认为，公共利益是行政主体特权存在的重要基础，行政契约的公法属性也决定了特权存在的必然性，而特权的存在使行政契约目的得以更好地实现；笔者还提出，特权的主体仅限于行政主体，且应以法律规定或契约约定作为其存在依据，特权的行使虽然不受契约合意的限制，但须以维护公共利益之需要为限。关于特权的范围，笔者对法国、德国、英国和美国行政契约制度中的行政主体特权进行了评析，并提出了我国应当承认包括监督和指导权、契约解释权、变更与解除权、强制执行权等多方面的特权。本章还重点论证了契约特权与契约精神的共存，认为特权并不否认契约精神，且不构成对个体权利和利益的剥夺；特权与契约的最佳融合方式是在对特权承认的基础上予以必要的限制。为了对契约特权进行限制，一方面要强化对特权行使的程序控制，完善公开制度、事先告知和说明理由制度、听证制度等程序性制度，同时限定特权行使的实体条件；另一方面，还应通过赋予相对人足够的权利以对抗行政主体的特权；而且，亦应当完善特权行使的救济途径。

第四章论述行政契约履行中的变更与解除。本章先分析了行政契约履行过程中不同的变更及其后果，然后从协商和单方行使解除权两个角度，分别讨论行政契约协议解除和单方解除的情形。关于行政契约的变更，笔者首先研究了经行政主体和相对人协商一致变更契约的条件；其次，本书考察了情事变更适用于行政契约的合理性，提出无论行政主体抑或相对人均有权基于情事之重大变化行使变更权，并总结了情事变更的适用条件；再次，本书重点讨论了行政主体对行政契约的单方变更，通过对法国和德国的不同立法例的分析，提出我国应当承认行政主体为了避免公益之重大损害，有权对行政契约予以单方变更，但必须符合一定的实体条件并符合程序要求；最后，本书对属于变更的特殊形式——行政契约的转让，分析了权利转让、义务转移和权利义务概括转移的适用及其限制。在行政契约的解除部分，笔者针对行政契约的特殊性，总结了协商解除契约的限制条件；阐述了双方当事人通过行使约定解除权解除契约的后果；分析了行使法定解除权时解除权的类型，以及行政主体或相对人行使法定解除权的限制和法律后果。

第五章讨论了不履行行政契约的责任。文章先对行政契约违约责任的性质和特征进行了分析，其后论证了行政契约违约责任应当采用的归责原则，最后研究了行政契约违约责任的具体责任形式。在分析违约责任的性质时，笔者认为，行政契约违约责任同时含有契约性和行政性，它不仅有别于专以相对人作为责任

主体的行政法律责任，也不同于私法性质的契约责任，而系行政法属性的契约责任。关于行政契约违约责任的归责原则，笔者通过对私法契约归责原则的分析，论证了行政契约适用无过错责任原则的结论及理由。在该章的最后部分，基于相对人和行政主体在行政契约中权利义务的不同，分别讨论了相对人和行政主体承担的违约责任类型。

Abstract

Administrative contract is a very important field in the administrative law. However, there still exist many problems with the administrative contract system in both theory and practice in China. For instance, the theoretical research on administrative contract is not thorough and extensive enough, the awareness of the principle, rule, right and obligation allocation and legal relief is still vague, there are still disagreements over how to apply the theory and legislation of fulfilling the private law contract in the fulfillment of administrative contract, and the particularity of the numerous rules of fulfilling the private law contract applying to the fulfillment of administrative contract is yet to be studied. This work focuses on the construction of the theoretical system of the fulfillment of administrative contract on the basis of the reference to the system of fulfilling the private law contract in connection with the particularity of administrative law and treats the above problems as the major contents for discussion in this work.

This work is divided into five chapters:

The first chapter is the general introduction to the fulfillment of administrative contract, focusing on discussing administrative contract and its development, illustrating the significance of the fulfillment of administrative contract for administrative contract and administration according to law, and how to understand the principle and general rules of the fulfillment of administrative contract. The author first makes a demonstration of the connotation of the administrative contract, thinking that the conceptual vocabularies of administrative contract are not important. The "administrative contract" to be adopted by this work has the same meaning as the conception of administrative covenant, public law contract and public law covenant, etc., all meaning the agreement concluded between the administrative

subject and object for the purpose of starting, altering or terminating administrative legal relationships. Administrative contract has double characteristics: of both contract and administration, thus differentiating itself from unilateral administrative behavior and private law contract. Next, the author also infers the cause of occurrence and development of administrative contract from the survey of the development history of administrative contract system in continental legal system and British and American legal system, and proposes that the fulfillment of the administrative contract is the core and legal purpose of administrative contract system and the important measure for realizing administrative legal system, and it also meets the requirements of contract's effectiveness and constitutes the major contents of contract's effectiveness. With this the author intends to further illustrate the theory and realistic significance of the topic selection of this work. On the principle of the fulfillment of the administrative contract, the author points out that the principle of the fulfillment of the administrative contract is different from that of the fulfillment of the private law contract, because the principle of the fulfillment of the administrative contract includes not only the basic principles of administrative proceeding law such as the principles of publicity, fairness and participation, but its most important principle is the principle that specially guides the fulfillment of administrative contract, namely the principle of complete fulfillment, the principle of change of circumstance and the principle of public interest first. In addition, as the principle of honesty and credit also has an important guiding and standardizing significance for the fulfillment of administrative contract during the fulfillment of administrative contract, the author next points out that the rules of fulfillment directly regulate the contract fulfilling behaviors of administrative subject and object and set up detailed and specific rights and obligations for administrative subject and object. While understanding the fulfillment rules of administrative contract, we cannot leave out the reference to private law rules. However, considering the public law nature of administrative contract, we must think over the difference between the public and private law when applying the private law rules, and we should permit the use of the private law rules in accordance with their nature instead of directly applying them wholly. Next, the author makes a particular probe into the fulfillment rules applied under vague agreement, the third person factors and many other complicated circumstances.

The second chapter discusses the fulfillment of administrative contracts with

different effectiveness. The work discusses the necessary conditions for the effectiveness of administrative contract by beginning with the effective important conditions of administrative contract. Then the work analyses the fulfillment or consequences of administrative contract under different effective states of administrative contract including revocability, ineffectiveness and indefinite effectiveness according to different circumstances of violating the effective important conditions of administrative contract. In the part of the effective important conditions of administrative contract, the author proposes that the effectiveness of administrative contract should meet the requirements of the important conditions of subject, method, format, contents and procedure by referring to the effectiveness rules of private law contract and combining the public law characteristics of administrative contract; when the legal important conditions are not completely met, namely when there exist flaws, we should refer to the effectiveness rules of private law contract and administrative behaviors; in addition to confirming the ineffectiveness of administrative contract, we should recognize the existence of many states such as revocability. For this purpose, the author first points that when the flaws of administrative contract are not serious enough to lead to ineffectiveness, the administrative contract belongs to revocable ones; if an administrative contract is revocable, the subject with revoking right may revoke the administrative contract according to legal procedure, or it may choose to alter the administrative contract or adopt other remedial measures allowed by law instead of revoking the contract; however, once a revocable administrative contract is revoked, the contract will be not binding upon both parties; at this time, the administrative contract being fulfilled should be terminated; if the contract has been partially fulfilled, the fulfilled part should be restored to its original state in principle in ways including return of property; if the property cannot be returned, it should be converted to money for compensating or making up for the losses, etc.. Next, the author deems that when there exists series flaw in administrative contract, e. g. , when the ineffectiveness rules of administrative contract permitting the use of private law contract are ineffective, or when the administrative contract substitutes the ineffective administrative behavior, or is ineffective because the characteristic of the administrative contract is ineffective, this administrative contract should be regarded as ineffective. Under this circumstance, there is no binding force and fulfillment effectiveness between the two parties of the contract, and the administrative subject

or object needn't fulfill or undertake the obligations stipulated by this contract, and the expected legal effects of the two parties should not occur, and the administrative subject or object may also claim its ineffectiveness; if the faulty party causes any loss to the other, the former should undertake the contracted negligence obligations; if both parties are faulty, they should undertake their corresponding compensation obligations to the other according to the degree and nature of their own faults. Next, if whether the effective important conditions of administrative contract are met is still vague, the effectiveness of this contract is yet to be decided. The administrative contract is not yet binding upon the parties owing to lack of effective important conditions. When the effective important conditions are met, the contract will be certainly effective. Contrarily, if the effective important conditions are not met, the contract will be certainly ineffective. The author also discusses the legal consequence of administrative contract whose effectiveness is yet to be decided under different circumstances. Last, the author deems that in the administrative behavior of both parties of administrative contract, the administrative subject and object may define a certain legal facts by agreeing upon possible occurrences in administrative contract as the conditions attached to the contract. This sort of administrative contract is attached with articles. The work respectively discusses the fulfillment rules of the administrative contract attached with articles and administrative contract attached with terms.

The third chapter discusses the privilege and control in fulfillment of administrative contract. The author demonstrates the rationality of the existence of the privilege in administrative contract by beginning with the cause of the existence of the privilege in administrative contract, and draws a conclusion of the characteristics of privilege. Next the author makes a demonstrative analysis of the privilege in the legislation of the administrative contracts in the countries of the continental and British and American legal system, and proposes that the privilege scope that should be recognized in the administrative contract legislation of China, and then studies the possibility and methods of blending the privilege and contract spirit in administrative contract. Last the author proposes the systematic design of controlling privilege. When analyzing the cause of the existence of contract privilege, the author thinks that public interest is the important basis for the existence of the privilege of the administrative subject. The public law attribute of administrative contract also decides the necessity of the existence of privilege, while the existence of privilege makes the

purpose of administrative contract better achieved. The author further proposes that the subject of privilege is only limited to administrative subject its existence should be based on legal stipulations or contract agreements. However, although the exercise of privilege is not limited by the contract's desirability, it should be limited by the requirement of safeguarding the public interest. As the scope of privilege, the author makes an evaluation of the administrative subject privilege in the administrative contract system of France, Germany, Britain and America, and proposes China should admit the all-round privileges including supervision and guidance right, contract interpretation right, alteration and interpretation right and compulsory enforcement right, and also thinks that the interpretation right when circumstance is changed and the interpretation right as sanction measures are not administrative contract privileges. This chapter also focuses on demonstrating the coexistence of contract and contract spirit, thinking that privilege does not deny spirit of contract, and does not constitute deprival of individual right and interest, and the optimal mode of blending contract privilege and spirit is to give necessary limitation to privilege while admitting it at the same time. To control contract privilege, we should strengthen the program control exercised on privilege, improve the publicity system, prior notice and cause explanation system, witnesses hearing system and other proceeding systems while clarifying the substantial conditions of restricting exercise of privilege at the same time on the one hand, and counter the privilege of administrative subject by endowing the object with enough right; last, we should also improve the relief approaches of exercising privilege.

The fourth chapter discusses the alteration and termination in fulfillment of administrative contract. This chapter first analyses different alterations and consequences in fulfillment of administrative contract. Then it respectively discusses the circumstances of the termination and unilateral termination of administrative contract agreements. As to the alteration of administrative contract, the author first studies the conditions of altering the contract through unanimous negotiation between the administrative subject and object. Next, the work reviews the rationality of change of circumstance applying to administrative contract, proposes both administrative subject and object have the right to exercise right of alteration when circumstances are seriously changed. The author also sums up the applicable conditions of change of circumstances. Thereafter, the work focuses on discussing the unilateral alteration of administrative subject to administrative contract and

proposes that China should admit that administrative subject has the right to unilaterally alter the administrative contract to avoid serious damage to public interest by analyzing different legislation cases of France and Germany. However, this alteration must meet a certain substantial conditions and proceeding requirements. Last, as to the administrative contract transfer as a special form of alteration, the work analyzes the application and limitation of right transfer, obligation shift and right and obligation general shift. In the termination part of administrative contract, the author sums up the qualifications of terminating contract through negotiation according to the particularity of administrative contract, illustrates the consequence of both parties terminating contract by exercising and agreeing upon the right of termination, analyses the types of termination rights when exercising legal termination rights and the limitation and legal consequence of administrative subject or object exercising legal termination rights.

The fifth chapter discusses the obligations arising from default of administrative contract. The work first analyses the nature and characteristics of default obligations of administrative contract, then demonstrates the accountability rules to be adopted for default obligations of administrative contract, and last studies the specific obligation forms of default obligations of administrative contract. When analyzing the default obligation, the author thinks the default obligations of administrative contract contain both the nature of contract and administration. They are different from the administrative legal obligations that specially take the object as the obligation subject and the contract obligations with the nature of private law. Instead, they are contract obligations with the nature of administrative laws. As to the accountability rules of default obligations of administrative contract, the author demonstrates the conclusion and cause of administrative contract applying non-fault obligation principle by analyzing the accountability principle of private law contract. In the last part of this chapter, the work respectively discusses the types of default obligations to be undertaken by the object and administrative subject on the basis of different rights and obligations of the object and administrative subject in administrative contract.

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