

Improvement of Additional Clause in the Atomic Energy Act

Kim Sang-won, Chang Gun-hyun, Koh Jae-dong, Kim Chang-bum, Ahn Hyung -joon, Ahn Sang-kyu

KINS (Korea Institute of Nuclear Safety), #19 Guseong-dong, Yuseong-gu, Daejeon, k346ksw@kins.re.kr

1. Additional Clauses regarding Administrative Acts

1.1 Significance of Additional Clauses

The additional clauses refer to "subordinate regulations applied to primary acts in order to limit the effect of administrative acts (conditions and time limits), impose special obligations (burden) or complement requirements (reservation of the right to withdrawal and reservation of posterior changes)." Its merits include the following: i) it is possible to work out a compromise between accepting and rejecting applications by attaching additional clauses to certain measures (flexibility in permitting administrative acts); ii) it is possible to prevent re-applications and re-examinations after rejection of applications (pursuit of economy of the proceedings); and iii) it is possible to take appropriate actions to protect the interest of third parties or the public interest. Its detriment is that any rescinding additional clauses including rescission conditions, time limit(expiring time) and reservation of the right to withdrawal may generate results where the costs incurred for adaptation of posterior changes after administrative act(measures taken) are transferred to the counter-party.

1.2 Type of Additional Clauses

1.2.1 Condition: This refers to the expression of intent by the administrative authority to generate or terminate the effect of administrative acts contingent upon "uncertain facts that may arise in the future." Among such conditions are conditions precedent that bring administrative acts into force upon fulfillment of certain facts and rescission conditions that terminate the effect of administrative acts upon fulfillment of certain facts.

1.2.2 Time Limit: This refers to the expression of intent by the administrative authority to generate or terminate the effect of administrative acts contingent upon "certain facts that are to arise in the future." Time limits are classified into starting time at which administrative acts enter into force and closing time at which the effect of administrative acts is terminated.

1.2.3 Burden: This refers to the expression of intent by the administrative authority to impose obligations including acts, omissions, provision of benefits and

tolerance under social convention to the counter-party of an administrative act, in addition to the relevant primary administrative act. Examples include the obligations to be equipped with certain facilities and to pay commissions.

1.2.4 Reservation of the Right to Withdrawal: This refers to the expression of intent by the administrative authority to reserve the right to withdraw administrative acts in certain situations, in addition to the expression of the primary intent concerning administrative acts. As regards reservation of the right to withdrawal, public interest must be served and there must be rational justification in light of the purpose of the primary measures, when exercising the right to withdrawal.

1.2.5 Partial Exclusion of the Effect of Laws: This refers to additional clauses that partially exclude the effect of administrative acts generally granted under the laws, in addition to the expression of primary intent concerning administrative acts.

1.2.6 Reservation of Posterior Changes in Administrative Acts (equivalent to the reservation of a burden): This refers to additional clauses that reserve, in advance, the right to posterior changes in administrative acts (excluding withdrawal) or the right to posterior changes in burdens.

1.3 Effect of Additional Clauses

1.3.1 Conditions or time limits: Conditions or time limits merely determine the effectuation or termination of administrative acts without resulting in such problem as non-performance of obligations under administrative laws. Thus, such are not subject to compulsory administrative execution.

1.3.2 Burden: Administrative acts with a burden are not necessarily invalidated as a result of non-performance of relevant obligations. In such case, withdrawal, compulsory administrative execution, punishment, etc. may apply by reason of non-performance of obligations.

1.3.3 Reservation of the right to withdrawal: If any matter reserved in the administrative act arises, the right to cancellation may be exercised to the extent that such cancellation is justified by serving a certain level of benefit to the public.

1.4 Limitations of Additional Clauses

In the past, it was deemed that additional clauses may be attached to administrative acts and discretionary acts with the nature of juristic acts. However, the prevailing view now is that it is also possible to use additional clauses in order to supplement the requirements of administrative acts with the nature of semi-juristic acts and administrative acts that completely excludes discretion of administrative authority.

Moreover, additional clauses may be attached to the extent that they do not violate the Constitution and other laws (limitation of legality), to the extent that is necessary for the purpose of the relevant administrative acts (limitation of purpose) and to the extent that such additional clauses respect equality within the minimum scope that is essential to the attainment of the purpose of the relevant administrative acts (limitation of proportionate equality).

1.5. Illegal Additional Clauses and Administrative Disputes

If any additional clauses are illegal, the general theories on the defects of administrative acts shall apply. Accordingly, additional clauses are deemed null and void if their illegality is grave and evident. If not, such additional clauses may only be annulled. As regards the effect of primary administrative acts in such cases where additional clauses are deemed invalid, the prevailing view holds that the relevant primary acts become simple administrative acts with no additional clauses, in principle. However, if additional clauses constitute an intrinsic part of the relevant administrative acts, such acts themselves must be invalidated according to the view above.

As to whether illegal additional clauses can be independently challenged to administrative disputes separately from the relevant primary acts (possibility of independent disputes), the general views and court rulings in the Republic of Korea hold that since additional clauses constitute a part of the administrative acts, it is not allowed to subject additional clauses, separately and independently, to administrative disputes and that any party who objects to an additional clause may challenge the entire administrative act by means of an administrative dispute in pursuit of partial revocation. However, a burden can be subject to independent administrative disputes, since it is not inseparable from the substance of administrative acts and can be practically deemed an independent administrative act itself.

2. Provisions on Additional Clauses in the Atomic Energy Act

Article 104 (1) and Article 104 (2) of the Atomic Energy Act provide that conditions necessary for securing safety may be attached to the permit or designation and that such conditions shall be the necessary minimum for the enforcement of this Act and not impose unreasonable obligations upon a person who has obtained the permit or designation. In other words, administrative acts to which additional clauses can be attached are limited to "permit or designation", and "conditions" are the only additional clauses that can be added.

3. Conclusion- Improvement of the Additional Clauses System

3.1 "Conditions" expressed in the Act academically refer to "additional clauses." Accordingly, it is deemed appropriate to replace "conditions" with "additional clauses" by means of amendment.

3.2 It is needed to seek ways to expand the scope of administrative acts to which additional clauses can be attached from the existing "permit or designation" to "approval, authorization, etc." based on a comprehensive review. As stated in Section 1.B above, recent general opinions hold that it is possible to use additional clauses regarding certain semi-juristic acts and administrative acts that completely exclude discretion of the administrative authority, beyond discretionary acts and juristic acts as previously opined.

1.3 Article 104 of the existing Atomic Energy Act limits the types of administrative acts to which additional clauses may be attached as well as the types of additional clauses that can be used. Therefore, as a solution, this issue can be left to the general theories of administrative laws by deleting Article 104 to eliminate the possibility of interpretation that it is impossible to attach additional clauses other than such additional clauses as provided in said article or to attach additional clauses to administrative acts other than those administrative acts as provided in said article.

References:

1. Chung Sang-ki, A Study on How to Divide and Recodify the Atomic Energy Act and Its Related Regulations (KINS/HR-606A)
2. Park Youn-heun, New Administrative Law, Parkyoung-sa, 2004