

THE DISTINCTION OF THE ADMINISTRATIVE CONTRACT FROM OTHER TYPES OF CONTRACTS

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Abstract

There was a clear tendency in the past few years, and especially on a European level, to harmonize and conceptualize the regulations referring to the drafting, alteration, execution or cessation of contracts that would eventually lead to the emergence of a new branch of community law, i.e. contract law.

The issue debated here focuses on whether these European interests have any influence on the matter of administrative contracts, on the possibility of a European administrative contract law and whether specialists in the field have particularly addressed the sphere of civil contracts.

Key-words: administrative contract, limitation criteria, specific features, juridical competence.

JEL Classification: K12, K39

INTRODUCTION

At present, the law has no specific provisions for the organization of a public or civil law regime for contracts dealing with private property assets of the public authorities, but it is equally true that certain features bestow independent prerogatives on the private property of the state or of the administrative-territorial units: the derogatory procedure of forced sale, established by the G.D. no. 22/2002 published in the Official Monitor no. 81 of 01/02/2002; the prohibition of the voluntary alienation; a derogatory procedure for accepting donations; the prohibition of forming conventional privileges; mandatory annual inventory; sale by public auction.

The present paper analyses the distinctive features of the procedure applied to contracts signed by the administration, in its broadest sense, and by means of the wide range of bilateral agreements where one of the cosigners is the state, an administrative-territorial unit or another public authority - in order to reveal what type of contracts must observe the public law regulations.

CONTENTS

The French doctrine, which is based on solid statute law consolidated by the resolutions of the State Council, stipulates that, in order to qualify an agreement as administrative contract, it must meet two requirements: the existence of exorbitant terms in the tender book and the inclusion of one of the parties in the category of administrative authorities (Pequignot, 1945). Even though the present edition of the Constitution distinctly warrants and protects the public property that belongs to the state or to administrative-territorial units, the fundamental law provides that private property is also intangible, under the organic law regulations.

The French juridical literature argues that, unlike public law contracts, private law contracts of the administration have two distinctive features: on the one hand, they are not related to a public service and thus don't tackle public interest, and, on the other hand, they do not include exorbitant terms, and the administration acts like an owner. If a contract is signed by two public parties, it mainly acquires administrative status, at work being the so-called "**administrative law assumption**", which can be explained by the fact that the contract is normally situated between two public management structures that engage exorbitant administrative law regulations.

When identifying a contract as being of an administrative nature, one must ensure it meets a set of criteria. The doctrine (Le Mestre, 2006) has identified a series of **administrative contracts**

characteristics that would define their juridical nature, as opposed to other contracts that are governed by private law:

- The juridical inequality of the parties, determined by the need to defend the general interest, manifested by the public authority and thus outranks the other contracting party;
- The public administration authority or proxy quality, at least for one of the parties;
- Limitation of the freedom of will, for the public authority, by legal provisions;
- Serving the public interest by the public authority, thus conveying a special purpose to it;
- Extensive interpretation of the contract, as concerns the prevalence of the public interest of administration, manifested when the contract is cancelled by the administration and the private party is paid damages;
- The proper execution of the contract obligations by the private party who can be charged with delay penalties;
- The *intuitu personae* character of the contract, as cessation is only allowed with the permission of the public authority; speaking of *novatie*;
- Observing the principle of financial balance and material impossibility to execute the obligation, based on the two statute law theories, "fait du prince" (according to which the prince = the public power, can aggravate the contract terms by his deeds and thus be compelled to pay compensations for the prejudices caused) and the theory of unpredictability (when the terms that change the initial balance of the contract are enforced by an exceptional economic event, unlike the theory of unforeseen constraints that hinder the execution of the contract but could have been foreseen by reasonable thought);
- The single-sided denunciation of the administrative contract when the public interest requires it;
- The single-sided alteration of the regulatory part of the contract, i.e. the exorbitant terms, by the administration;
- The involvement of both parties in the provision of the same public service, in any of its forms;
- According to the manner of drafting the contract, the administrative contract qualifies as a solemn contract, with a certain standard form, ranging from simple written forms to very complex ones, as in the case of public purchases.

A contract can be classified as administrative according to various criteria as the main differences consist in identifying the proper juridical procedures to be applied. The easiest way to identify it is by deciding upon the law and where the law defines a certain contract as clearly administrative, without leaving room for any interpretation of the juridical procedures pertaining to it. This identification criterion is only used indirectly in Romanian legal proceedings, by referring contract litigations to administrative contentious courts of law. Such an implicit rule is stipulated in the E.D. no. 34/2006 on the assignment of public purchase, public works lease and service lease contracts, and E. D. no. 54/2006 on the usage of public property lease contracts.

De lege ferenda, it should be mandatory that, in the case of certain standard contracts and in the administrative law practice, as well as with public assets lease, public works or purchases, for the law to include the specific reference to the administrative nature of the contract, as in the case of the French legislation that clearly specifies the administrative nature of certain contracts – for example – contracts referring to public property possession or public works execution or purchase contracts signed by the local authorities or their proxies according to the new Code of public purchases.

The second manner of classifying a contract according to its juridical nature is the statute law determination, in which case juridical literature (Dacian, 2008) has identified two situations: the first, where the contract is thus defined by each trial court, in the event of a litigation, and the

second case when the contract is defined after an appeal has been resolved for the convenience of the law by the High Court of Cassation and Justice.

So far, the High Court hasn't been notified of such an appeal but, hypothetically, should it be promoted, it would lead to its statutory eligibility, since the doctrine unanimously considers that an appeal in the interest of law is either a primary or a secondary law source. Now is not the time to further research the matter but the statement could be debated since there is no constitutional decree that would empower the High Court to proceed to the general compulsory interpretation of the law.

In France as well, apart from deciding upon the law, a contract is also defined from a statute law viewpoint, thus establishing two criteria used to identify the administrative nature of a contract: an organic criterion which entails the presence of a public representative as a contractor, and an alternative criterion which refers either to the presence of exorbitant terms of common law or to the fulfillment of a public service as the purpose of the contract. Thus, the doctrine has identified another definition of the administrative contract: administrative contract is any agreement entered by a public individual or on behalf of a public individual and which either includes common law derogatory terms or has as purpose the fulfillment of a public service (Foillard, 2008).

First of all, one must establish whether all contracts entered by public law individuals are administrative contracts; in other words, could the administration enter contracts which, according to their juridical nature, are not administrative? If we start from the definition of administrative contracts as stated in Law no. 554/2004, these include contracts entered by public authorities and focusing on the capitalization of public property, the execution of public interest works, provision of public services, public purchases and other categories of administrative contracts specified by special laws and subject to the competence of administrative contentious courts.

Therefore, this very definition states, *per a contrario*, that any contract entered by a public authority, unless defined by Law no. 554/2004 or another special law as administrative, is either another type of public or private law contract. The "public contract" is defined by the common law as "a legally enforceable commitment to undertake the work or improvement desired by a public authority". Both the English and American doctrine and jurisprudence rather use the term "government contracts", as the term *government* largely incorporates the meaning of central and local administration (Davies, 2009).

The Romanian doctrine only incidentally mentions "public contracts" or "public law contracts", justified, of course, by the lack of the proper notion in legislation and statute law. Our opinion is that, at this normative stage, no reason, at least no didactical reason, prevents us from speaking of "public contracts" or "public law contracts", as the relation between these and administrative contracts is similar to that existing between gender and species. Both the French and Romanian (S raru, 2009) juridical studies mention the gender-species relationship between "contracts entered by the administration" and "administrative contracts". The first notion includes private, civil or commercial contracts entered by the administration under common law regulations, and the latter covers the administrative contracts entered by the administration under public law regulations.

The practice and regulations in the field, applied in the past few years, provide numerous examples of contracts entered by the administration and governed by common law. At this moment, mention must be made of the dichotomy between private and public in the legal entity of the public administration, based on the original definition from the 4th paragraph of Law no. 69/1991 of public administration, also mentioned above, concerning the ability of administrative-territorial units as civil legal persons to own private property and as public legal persons to own public property of local interest, according to the law. This easily confused dual legal statute has been regulated by Law no. 215/2001, which stipulates in Article 21 that administrative-territorial units are public law legal persons.

Without further discussing the public-private dichotomy, that exceeds the purpose of this paper, we must acknowledge the decreasing bipolarity of the juridical specifics for the two categories, justly invoked in the doctrine. The intromission of the market economy principles in the field of public finance also influences the matter of administrative contracts, not only through the emergence of new legal persons, but also by the occurrence of unprecedented juridical circumstances. Neither should one favour the other tendency, that of ranking as principle the supremacy of common law regulations over contracts concerning assets that belong to the private property of administration. Some argued (S raru, 2009), as a *de lege ferenda* proposal, on the exclusion of the concession contracts concerning the above mentioned assets, from the realm of administrative law contracts, justified by the omission of such contracts from the E. D.(Emergency Decree) no.34/2006 and E. D. no. 54/2006.

It is true that, unlike the former concession law, no. 219/1998 which, as stated by Article 1, was concerned with the regulation and organization of the concession standards for the private or public property of the state, county, city or village, the present edition of the two Decrees (more specifically, the E. D. no. 34/2006, since the very title E. D. no. 54/2006 suggests the field of interest – the regimen of concession contracts for public property assets) do not clearly state whether their provisions still apply to the concession contract for private assets pf the state or of the administrative-territorial units.

As stated before, a contract entered in France, between a public authority and a private person is qualified as administrative under one of the following circumstances: it includes derogatory terms from common law or is entered with the purpose of providing a public service. On the other hand, if a contract is entered between two natural persons, that contract is assumed to comply with private law regulations, with two exceptions: the first refers to state infrastructure works, when a contract is administrative if it is demonstrated that one of the parties – e.g. the concessionaire of a connecting motorway – has acted on behalf of the national authority, while the second exception occurs when indices prove that one of the parties has actually contracted, on behalf of the public authority or a territorial community, as is the case of a concession organization dealing with the landscaping and design of a tourist resort.

On the other hand, in our country, the law specifically defines a contract as being of a civil nature, even though it meets the above mentioned criteria that qualify it as belonging to the administrative law. More specifically, we are referring to the provision inserted in article 69¹ of Law no. 95/2006 on the healthcare reform that stipulates that the authorities of the local public administration can enter a civil contract with the legal representative of the family doctor and decide upon the provision of facilities and incentives associated with the setting up and organization of the family doctor's office, in compliance with the current legal regulations and thus set forth the rights and obligations of the parties. The administrative contract has a very wide application in Law no. 95/2006, an issue that will be further discussed.

The altered E.D no. 34/2006 specifically provides for the possibility of entering an administrative contract of public purchase between two private entities, under the provisions set out by Art. 8, letter e) that defines the contracting authority as any law subject, other than those mentioned at letters a) to d) and developing one or more of the activities described in Chapter 8, section 1, based on a special or an exclusive right, as defined in Article 3, letter k), granted by a competent authority, when the latter assigns public purchase contracts or enters agreements referring to the development of those activities. The article refers to the contracts entered in the public utility sector – water supply, mail, transport – by a private law individual empowered by a public authority through the provision of a special right.

Further discussions also tackled with the possibility of applying the two different juridical frameworks within the same contract which thus becomes administrative for one party and commercial for the other party. The theory has been demonstrated by corroborating article 8 (the

village, county and commune cannot act as business entities) with article 56 which provides that if an agreement is commercial for one party only, all contractors are subject to commercial law, apart from the provisions aimed at the business owners and the cases when the law provides otherwise. Since the administrative regulations protect the public interest, which prevails above private interest, the solution arises, identified ever since the inter-war period and upon which we agree, to reject the commercial law in the administrative contract.

The doctrine has identified certain interferences between the administrative contract and other types of contracts, such as the adhesion contract, transient contracts and international treaties and thus concluded that the type of contract whose analysis is hereby presented is a contract with distinctive features, of an administrative juridical nature and framework and subject to the public law regulations.

CONCLUSIONS

The implementation of a strict juridical private law framework in the case of certain contracts that, according to the delimitation criteria, belong to administrative law, such as concession contracts, we think that it would be against the general public interest, which should be a priority; and, when the concession is directed at a private property of the state or of the administrative-territorial unit, certain derogatory terms from common law are required to ensure the efficient use of the resources of the authorities as well as the yield resulted from the use of these assets.

This opinion is supported by the fact that, for example, the mayor, as main credit coordinator on the administrative-territorial level, in compliance with Law no. 273/2006 on public finance, analyses the manner in which the budget credits are handled through the local budgets and the budgets of public institutions whose managers are tertiary credit coordinators and approve expenditures from their own budgets, in agreement with the legal provisions. But, since the exploitation of private and public property assets also weighs in the drafting of the budget, increased legal protection in asset management would be of great use for the proper management of the administrative-territorial unit.

Even though Article 551 of the new Civil Code includes in the category of real estate rights both the concession and the administration and use rights, mentioned in the chapter "general real estate rights", and even if we accept the possibility of applying the private law framework in the concession of the assets that are not part of the public property of the administrative-territorial units, the introduction of the derogatory rules for the contracts entered under the above mentioned circumstances, is justified in the same Civil Code: on the one hand, the provisions of article 554 which stipulates that if the law doesn't state otherwise, the rules applied to private property rights also apply to public property rights but only to the extent of their compatibility and, on the other hand, the provisions of article 602 that states that the law can restrict the property right either for a public or a private interest reason.

As a *de lege ferenda* proposal, we think that, in the future, one could also opt for a concession, administration or use contract for the assets belonging to the private property of administrative-territorial units, provided that certain terms are also included and thus allow the public authority to observe the above mentioned principles and responsibilities.

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