The Settlement of Litigations Arising from the Interpretation and Enforcement of Administrative Contracts

Vasilica NEGRUȚ[1]

Abstract: Regarded nowadays as an instrument of strategy implementation of government policy and establishment mechanism of public administration, the administrative contract raises many debates on its applicable regime, but also on the jurisdiction, to solve litigations arising from their interpretation and execution. In this paper we proposed, based on the analysis of the laws in force, doctrine, jurisprudence, and previous research results related to the subject, using the comparative method, to clarify the mentioned issues. The conclusions of this paper will strengthen the practice on the referral of courts competent to solve litigations arising from the implementation of the administrative contracts in the context where the administrative contract has profound implications in the administrative, economic and social field.

Keywords: administrative contract; legal status; administrative contentious; litigation

1. Preliminary Aspects

A controversial legal institution in the administrative doctrine (Iovănaş, 1997, p. 74), the administrative contract is currently regarded as a "tool for achieving governance strategy" with an essential role in the reconciliation between public law and private law, "recreating the unity of the law" (Săraru, 2009, p. 11).

In the French legal literature (Laubadère, 1956, p. 307) it can be noted that the identification of the administrative contracts, the legal practice has taken into consideration two aspects: exorbitant clauses (derogation of the common law) and the direct participation of contractors to achieve the same public services. The quoted author defines the administrative contract using two alternative criteria.

[1] Professor, PhD, Dean of Faculty of Law, "Danubius" University of Galati, Romania. Address: 3 Galati Boulevard, 800654 Galati, Romania. Tel.: +40.372.361.102, fax: +40.372.361.290. Corresponding author: vasilicanegrut@univ-danubius.ro

Another French author, J. M. Auby, summarizes the definition of administrative contract, by understanding the contract concluded by one or more public persons subject to a public law regime (Auby, 1966, p. 28). Later, in another paper, the author considers the administrative contract as being the "*administrative contract which is subject to different rules of common law*." (Auby, 1975, p. 164)

In the current French doctrine, the administrative contract is identified as being the contract concluded by a public person or in its name, being submitted to the jurisdiction and administrative law, either by express provisions of the law, either due to exorbitant clauses (derogatory) from the common law in its content, either because the contract grants the holder a direct participation in the execution of a public service activity. (Guillien & Vincent, 2001, p. 151)

In Romania, the administrative contracts theory has developed at the same time with the development of relations between the administration and private entrepreneurs, relations, which dealt with the concession of public works or public services. (Tofan, 2009, p. 80)

In the interwar period, in the absence of special courts of administrative contentious in our country, the administrative contracts theory can be appreciated by some specific features (Tofan, 2009, p. 81): a) rejection of the theory of administrative contracts in the narrow sense; b) rejection of any theory of administrative contracts; c) the acceptance of the theory of administrative contracts, in the broad sense. (Lilac, 2005, p. 108)

Nowadays, the theory of administrative contracts, as shown in the specialized literature (Tofan, 2009, p. 83), is more current than ever, being closely linked to the three constitutional notions, respectively the public domain, public property and public service.

In a recent paper (Vedinaş, 2014, p. 138), the administrative contract is defined as "*an agreement of will, of a public authority, which is on the legal position of superiority, on the one hand and other subjects of law on the other (physical or legal entities or other state bodies subordinate to the other party), which aims at satisfying a general interest by providing a public service, performing public works or enhancement of a public good, subject to a regime of public power*".

2. The Legal Regime Applicable to Administrative Contracts

In one paper of specialized literature it is emphasized that in France, for example, the administrative regime of a contract can be decided in three ways: by the legislator, whenever he considers that the administrative regime is more appropriate than the private law regime; of certain jurisdictions (administrative), which may establish that the administrative legal regime should be applied to a particular type of contract; by the agreement of the parties. (Petrescu, 2009, p. 359)

In the Romanian doctrine there are different views on the legal regime applicable to the administrative contract. Thus, in an opinion (Popa, 2002, p. 293) it is stated that it borrows some features of private law, such as, for example, the conditions of validity of the contract, but it is distinguished by two important elements: it relies on the inequality of the parties, and the public authority, part of the contract, does not have the same freedom of will to that regulated by the private law. According to the author, the public authorities' jurisdiction is determined by law, being circumscribed to achieve the general interest and for this reason it is expressly determined by the constitutive act or the legislative act of organization and functioning of the concerned public authority.

Another author (Corbeanu, 2002, p. 107) believes that the legal regime applicable to the administrative contract is exorbitant, especially in public law, having negotiated clauses, which grants them a mixed regime of public and private law.

By the administrative contract, it is also mentioned in the specialized literature (Iovănaş, 1997, p. 75), the aim is a better functioning of the public service, highlighting thus the distinction between the administrative and civil contracts and trade, which are based on the principle of equality of the Contracting Parties and therefore it does not require a perfect balance of interests, the administrative authority following the general interest.

In the administrative contracts the elaboration of contractual terms is not submitted to the negotiation process between the parties, as the administration unilaterally sets the clauses content, while the other party can accept or refuse. (Popa, 2002, p. 297)

There are authors who identify the administrative contracts with the management administrative documents, analyzed separately by the authority of administrative acts (Corbeanu, 2002, p. 107; Trăilescu, 2008, p. 199).

The document of public management, also known as administrative contracts are subject to a mixed legal system of public law and private law, the public law regime having a leading role, while private management documents, also known as common law contracts, are subject to the private law regime. (Tofan, 2009, p. 85)

The Law of administrative contentious no. 554/2004, when defining the administrative act in a broader sense, it includes also the administrative contracts, having as object the enhancement of public property, the execution of works of public interest, public services, public procurement. Hence the conclusion that in the case of administrative contracts it is applicable the legal regime of administrative law, as regards the litigations relating to assigning these contracts by the public authorities, as well as regarding the litigations arising in connection with the conclusion, performance and termination of the administrative contracts (Albu, 2008, p. 69).

3. The Settlement of Litigations Arising from the Interpretation and Enforcement of Administrative Contracts

In the specialized literature there were made various views on the settlement of disputes arising from the interpretation and enforcement of the administrative contracts.

Some authors consider them to be settled by the courts of common law, while other authors consider that these litigations are within the jurisdiction of the administrative contentious courts. Thus, Professor Catalin - Silviu Săraru shows by the given definition in the broad sense of the administrative act was intended for the litigations concerning the the contracts concluded by the public authorities falling within the competence of the administrative contentious court (Săraru, 2009, p. 370). The author believes that the legislator has resorted to "legal fiction procedure" assimilating the administrative contract to the unilateral administrative act. But, he continues, acquiring the contracts concluded by the public authority of the administrative acts is achieved only in the legal sense, i.e. only in procedural terms (Săraru, 2009, p. 370), not being possible an assimilation in terms of substantive law, as between the administrative act and administrative contract there is a tie breaker, having a mixed nature.

Law no. 554/2004, as amended, uses the phrase "contracts concluded by the public authorities". However, the administration may conclude both administrative

contracts, to which the rules of public law are applied and also contracts of private law, governed by common law. There are submitted to the public regime only those public contracts having as their object the enhancement of public property assets, execution of works of public interest, public services, public procurement. According to article 2, paragraph (1), letter c), it may be provided by special laws other categories of administrative contracts subject to the jurisdiction of the administrative contentious courts. Given these aspects, Professor Tudor Drăganu emphasizes that, in this case, it is not taken into account the fact that today the enhancement of public assets, the execution of public interest works and public services are achieved, in some cases, by private law contracts (Drăganu, 2004).

In article 8, paragraph (2) of Law no. 554/2004, it shows that the administrative contentious court has jurisdiction to settle any litigation that arises in phases prior to the conclusion of an administrative contract, and any litigation relating to the conclusion, amendment, interpretation, execution and termination of an administrative contract. According to the analysis of the law, it does not result what it is meant by "phases prior to the conclusion of an administrative contract", imposing, with necessary amendment, by mentioning the exact indication of the acts and transactions which may be challenged.

Furthermore, it is stated that the settlement of litigations provided for in paragraph (2) it is intended to rule on the principle of contractual freedom, being subordinate the priority principle of public interest (article 8, paragraph (3) of Law no. 554/2004).

In the specialized literature it is considered that the legislation is "a culmination of efforts of the administrative law doctrine undertaken since the period between the wars to shape the concept of administrative contract", a legal institution submitted to the public law regime (Săraru, 2009, p. 383). The philosophy of administrative contracts presupposes for the agreement of will of the parties to subordinate the public interest.

The article 8, paragraph (3) of Law no. 554/2004 was the subject of the unconstitutionality exception before the Constitutional Court, arguing that these provisions infringe the provisions of article 16 and article 52 of the Constitution, as "*the recognition by law of a subordination of the interest of one party compared to the other party interests*" infringes "*the principle of equality of parties, placing a public authority - as a representative of the public interest – on a preference*

procedural position" and it brings prejudice to the prejudiced person to appeal an administrative act adversely affecting its interests.

The Constitutional Court ruled that article 8, paragraph (3) of Law no. 554/2004 are constitutional in relation to article 52, paragraph (1) of the Constitution, establishing the rule of law established by the criticized text "it does not mean placing the public authority on a preferential position proceedings, as not the quality part will be considered by the court settling the litigation, but the principle of priority of public interest, whose definition is found in article 2, paragraph (1), letter I) of Law no. 554/2004, according to which the public interest is the "*interest concerning the rule of law and constitutional democracy, guaranteeing the rights, freedoms and duties of citizens' needs, achieving competence of public authorities*."[1]

According to the new legal framework created by the Government Emergency Ordinance no. 54/2006 on concession contracts of public assets, these litigations shall be given for resolution to the administrative courts. Article 66, paragraph (1) states that the settlement of litigations which arise in connection with the granting, conclusion, execution, amendment and termination of the concession, as well as those concerning granting compensation, shall be achieved according to the Administrative Contentious Law. The legal action is presented at the administrative contentious of the court in whose jurisdiction the registered grantor is.

Regarding solving complaints on the administrative-jurisdiction path under article 257, paragraph (1) and (4) of the Emergency Ordinance no. 34/2006 regarding assigning public procurement contracts, concession contracts of public works and services concession contracts, the National Council for Solving Complaints, an independent body with administrative-jurisdiction activity, "*examines in terms of legality and merits the contested act and it may deliver a decision by which it cancels it in part or in whole, it requires the public partner to issue an act or decides any other steps necessary to remedy the acts affecting the assigning procedure*."

Another issue is related to the prior administrative procedure obligation before the notification of the competent court. In this context there are relevant article 256, index 1, paragraphs (1) and (2) of the Emergency Ordinance no. 34/2006, which states that, before notifying the competent Court, the aggrieved party shall notify

[1] Decision no. 464 of 6 June 2006, published in the Official Monitor of Romania, Part I, no. 604 of 12 July 2006.

the contracting authority of the alleged breach and the intension of notifying the competent court. The legislator shows that the lack of notification does not prevent the initiation of proceedings to the court. It is the case where the party does not opt for solving the complaint before the Council, but it directly addresses the court, and also the hypothesis when attacking the Council decision. In these cases, the substantive jurisdiction lies with the administrative contentious and fiscal department of the Court of Appeal in whose jurisdiction the contracting authority headquarters is situated.

As emphasized in the specialized literature, by setting this course of judicial control of Council decisions it has been effectively given free access to justice principle, established in article 21, paragraph (3) of the Constitution and article 13 of the European Convention on Human Rights which enshrines the right to an effective remedy (Puie, 2014, p. 133).

With the entry into force of the new Code of Civil Procedure, there were amended and completed several special laws, including the Law of administrative contentious no. 554/2004[1]. Thus, article 28 of Law no. 554/2004 become applicable, in the sense that the provisions of the Administrative Contentious Law "*completes with the provisions of the Civil Code and the Code of Civil Procedure, to the extent that they are not inconsistent with the specific of power relations between public authorities on the one hand, and on the other hand, the injured parties in their legitimate rights or interests*".

4. Conclusions

The administrative contract is undoubtedly an instrument of public interest, but, as noted in the doctrine, it has an essential role in the "reconciliation between public and private law". However, the administrative contract is an instrument by which the state can influence the economy. Because of these issues, it was necessary to clarify the practice in solving litigations arising from the interpretation and application of administrative contracts.

In conclusion, the principle of contractual freedom is subordinate to the principle of public interest priority, as defined by law and the competent courts to settle such litigations are the administrative contentious courts.

[1] Law no. 76 of 24 May 2012 for the implementation of Law no. 134/2010 on the Code of Civil Procedure.

5. References

Albu, Emanuel (2008). *Dreptul contenciosului administrativ/Administrative Contentious Law*. Bucharest: Universul Juridic.

Apostol Tofan, Dana (2009). *Drept administrativ/Administrative Law*. Volume II, 2rd Edition. Bucharest: C.H. Beck.

Auby, J.M. (1966). *Droit administratif speciale/Special administrative law.* 2nd Edition. Sirey.

Auby, J.M. (1975-1976). *Droit administrative/Administrative Law*. Université de Bordeaux. Bordeaux: Library Montaigne.

Corbeanu, Ion (2002). *Drept administrativ*/*Administrative Law*. Bucharest: Lumina Lex.

de Laubadère, André (1956). *Traité théorique et pratique des contrats administratifs/ Theoretical and practical treaty on administrative contracts*. Vol. I. Paris: Librairie générale de droit et de jurisprudence.

Drăganu Tudor (2004). Câteva reflecţii pe marginea unui proiect de Lege a contenciosului administrativ/Some reflections on a draft of administrative contentious law. *R.D.P.* No.3.

Guillien, Raymond et Vincent, Jean under the directions of Serge Guinchard, Gabriel Montagnier. (2001). *Lexique des termes juridiques*/*Glossary of legal terms*. 13th Edition. Dalloz.

Iorgovan, Antonie (2005). *Tratat de drept administrativ*/*Treaty of Administrative Law*. Volume II. 4th Edition. Bucharest: All Beck.

Iovănaş, Ilie (1997). *Drept administrativ. Activitatea administraţiei publice. Controlul exercitat asupra activităţii administraţiei publice/Administrative Law. The activity of public administration the control over public administration activity*. Arad: Ed. Servo-Sat.

Petrescu, Rodica Narcisa (2009). *Drept administrativ*/*Administrative Law*. Bucharest: Hamangiu, taken from Bénoit, F.P. (1968). *Le droit administratif français*/*The French administrative law*. Paris: Librairie Dalloz.

Popa, Eugen (2002). *Mari instituţii ale dreptului administrativ. Curs universitar /The large institutions of administrative law. University course*. Bucharest: Lumina Lex.

Puie, Ovidiu (2014). *Contractele administrative în contextul noului Cod civil şi al noului Cod de procedură civilă/The administrative contracts under the new Civil Code and the new Code of Civil Procedure*. Bucharest: Universul Juridic.

Săraru, Cătălin-Silviu (2009). *Contractele administrative. Reglementare. Doctrină. Jurisprudenţă/ Administrative contracts. Reglementation. Doctrine. Jurisprudence*. Bucharest: C.H. Beck.

Trailescu Anton (2008). *Drept administrativ*/*Administrative Law*. 3rd Edition. Bucharest: C.H. Beck.

Vedinaş, Verginia. (2014). *Drept administrative*/*Administrative Law*. The 8th edition revised and updated. Bucharest: Universul Juridic.