The Termination of Administrative Contracts in the Romanian and French Law

Cătălin-Silviu SĂRARU[1]

Abstract: The overall objective of this paper is to present a topic of great interest for the present activity of the public administration that emphasizes the contractual procedures as a vital aspect of entrepreneurial governance. Thus, this article is devoted to a summary of the results of an exploratory research on the conditions for termination of administrative contracts. This study analyzed the conditions under which the administrative contracts can be terminated in the Romanian and French law. The analysis using the comparative method based on a descriptive documentary research, emphasizing the particularities of termination in administrative law in relation to private law. The research is finally recovered by „*de lege ferenda*" proposals which should, in our opinion, to be reflected in future of the Romanian Administrative Procedure Code. The study is first research in this field in Romania and respond to concrete problems arising in the practice of public administration. The work will have significant implications and for researchers of the administrative phenomenon that in future studies will deepen the problems analyzed here. The work captures doctrinal opinions expressed in comparative law and comes with new legal reasoning to support the research for the juridical institution of the administrative contracts termination.

Keywords: public law; administrative contract; public procurement; concession; termination of contracts; cancellation clause

1. Preliminary Considerations

The administrative contract may be terminated or the expiry or early, when there is agreement of the parties or the intervening force majeure or fortuitous event, unilateral withdrawal, termination or redemption (Rivero & Waline, 1992, p. 114; Alexandru, 2008, p. 541).

The termination as a penalty for breach of contract by the defaulting party is the cancellation of contract only for the future, leaving untouched successive benefits that have been made prior to termination (Stătescu, Bîrsan, 2000, pp. 86-91).

[1] Assistant Professor, PhD, The Bucharest Academy of Economic Studies, Romana Square no. 6, district 1, Bucharest, Romania. Phone: +4021.319.19.00; Fax: +4021.319.18.99. Corresponding author: catalinsararu@yahoo.com.

AUDJ, vol. VII, no. 3, pp. 17-24

Fault can be either the failure of one or more of its obligations, be unable to achieve them. Failure to comply with obligations must be due to the exclusive fault of the contractor and not an objective impossibility of performance which would result in invoking force majeure. The difference is that in case of termination will be able to claim compensation from the defaulting party, as opposed to cases of force majeure when you cannot claim compensation.

Mistake of one party may justify termination of contract by the other contractor, if this mistake is a particularly serious (default clauses, suspensions of work, refusal to comply with orders of government).

2. Conditions for Termination of Administrative Contracts in the Romanian and French Law

In France, the State Council stressed that the contracting public authority has the power to terminate the administrative contract even in silence of the contract (the State Council decision of 30 September 1983 – *SARL Comexp*); when the contract shall state the reasons for termination, the judge will consider that the list is not exhaustive (Richer, 2002, pp. 225, 226; Lombard, 2008, p. 194). Also in its jurisprudence the State Council pointed out that in the silence of the contract, termination operates with the principle of parallel competences: „in the absence of regulations to the contrary, cessation of public service concession contract through termination must be given in the same conditions and be subject to the same approval as the contract itself" (the decision of 16 March 1920 - *Compagnie générale des eaux*; the decision of 20 January 1965 - *Soc. des Pompes Funèbres Générales*) (Richer, 2002, p. 221).

Under the privilege of „*jus imperii*" justified by the defense of the public interest, the public authority has the right to terminate the contract without recourse to justice and to require its contractors to pay penalties and damages under the terms of the contract (Rivero & Waline, 1992, p. 115; Trăilescu, 2002, p. 114). Instead, when the government fails to meet its obligations, its contractor cannot unilaterally terminate the contract, he had only the right to seek justice for to compel the administration to execute the contract and pay damages (Rivero & Waline, 1992, p. 115; Trăilescu, 2002, p. 115).

In interwar Romania some authors have made a clear distinction between termination of administrative law (public law regime) applicable to acts of public management (administrative contracts) and termination of private law (private law regime). Thus, an author considered that the termination of administrative law is different from that of civil law, citing the following reasons (Costi, 1945, p. 68):

- termination of administrative law may be decided by the government; in the civil law is required prior involvement of the judge;

- the government can walk and to including termination without giving the debtor time to running before termination; in the civil law, termination requires a prior grant period;

- government has the exclusive right to judge the seriousness of the debtor's fault; in civil law, the debtor's fault it is considered by the court.

In the inter-war doctrine to put the question which court has jurisdiction to rule on administrative act which terminates the contract between the persons of private law and public administration (in the post-revolutionary doctrine arose the same issue concerning the interpretation of Law no. 29/1990 *on contentious administrative*[1]). In this respect the doctrine and jurisprudence have oscillated between two solutions: if the first opinion, the administrative court was jurisdiction in the administrative unilateral act by which the government terminates the administratives contract because unilateral act of public administration is considered an administrative act of authority; after the second opinion, ordinary judicial authorities had jurisdiction to rule on unilateral administrative act of public authority, which it canceled a administrative contract, considering that the administration committed an act of management that occasion.

According to an author of the interwar period, the competent courts to rule on administrative act by which the government terminates a administrative contract varies as (Costi, 1945, p. 70):

a) the assumption that the government terminates a administrative contract for reasons of convention, it is an act of management within the jurisdiction of the ordinary judicial bodies;

b) when the public authority terminates a administrative contract for reasons related to public interest and that are outside and above the provisions of the contract, it is an administrative act of authority of the administrative courts jurisdiction.

Currently, in Romania, the typical case of administrative termination is provided by art. 34 of Law no. 129/1998 *on the establishment, organization and functioning of the Romanian Social Development Fund*[2] on the grant contract. The doctrine states that this contract is a administrative contract (Dragoş, 2009, pp. 112-114; Dragoş, 2000; Albu, 2006, pp. 58-59; Săraru, 2009, pp. 332-334). The law defines the grant agreement as that agreement between the Fund and representatives of the beneficiaries of law, under which the Fund transmits of the beneficiaries or, where appropriate, of the intermediate organizations, free, sums of money, called grants,

[1] Published in the Official Journal of Romania, Part I, no. 122 of November 8, 1990, as amended and repealed by Law no. 554/2004 of contentious administrative published in the Official Journal of Romania, Part I, no. 1154 of December 7, 2004.
[2] Published in the Official Journal of Romania, Part I, no. 238 of June 30, 1998, republished in the Official Journal of Romania, Part I, no. 483 of June 8, 2005, as amended.

solely for the purpose of execution of projects approved [article 2. (1). f)]. The Law stipulates in art. 34 that if "during the execution of grant agreement is found breaches of contract or disregarding the provisions of this law and provisions of the regulations of the Fund, it may suspend the execution until the deficiences will be remedied or grant agreement will be terminated, without the intervention of judicial court or court of arbitration". It is regulated as a typical case of termination, characteristic for administrative law.

In the French jurisprudence has held that the termination of contract by the public authority for the contractor's fault, without the intervention of judicial court, is a penalty to be motivated (the State Council decision of 19 June 1992 - *Min. Aff. Étr. c/Royère*) (Hoepffner, 2009, p. 239) and to the procedural level, in the imposition of such penalty must be respected the principle of the right of defense and the principle of contradictoriality (Council of State, April 21, 1989, *Féd. nat. des Établissements d'enseignement catholique*).

A particular case is the termination of the concession contracts of public property assets, the concession of public works and services. Under these concession contracts, in the case of non-observance of the contractual obligations by the concessionaire the contract may be cancelled by unilateral termination by the conceder, with payment of damages at the charge of the concessionaire; also in the case of non-observance of the contractual obligations by the conceder, the contract may be cancelled by unilateral termination by the concessionaire, with payment of damages at the charge of the conceder (article 57 (1) c) and d) of Government Emergency Ordinance no. 54/2006 *on the regime of public assets concession contracts*[1] and art. 54 (1). b) and c) of Government Decision no. 71/2007 *for the approval of the Rules of implementation of the provisions referring to the assignment of public procurement contracts and of services concession contracts stipulated in Government Emergency Ordinance no. 34/2006 on the assignment of public procurement contracts, public works concession contracts, and services concession contracts*[2]).

Making an exception to the regime of the contract administrative termination, the Government Emergency Ordinance no. 54/2006 and the Government Decision no. 168/2007 *for the approval of the Methodological rules of implementation of Government Emergency Ordinance no. 54/2006 on the regime of public assets concession contracts*[3] states the judicial character of the termination: in the event of negligence for breaches of obligations by either party by the concession contract or

[1] Published in the Official Journal of Romania, Part I, no. 569 of June 30, 2006, approved with amendments by Law no. 22/2007 (published in the Official Journal of Romania, Part I, no. 35 of 18 January 2007).
[2] Published in the Official Journal of Romania, Part I, no. 98 of 8 February 2007.
[3] Published in the Official Journal of Romania, Part I, no. 146 of 28 February 2007.

the inability to achieve them, the other party is entitled to ask the judicial court[1] in whose jurisdiction is registered the headquarters of the conceder to decide on the termination, with payment of compensation, unless the parties agree otherwise (article 58 of the Methodological rules of implementation of Government Emergency Ordinance no. 54/2006). We believe that the judicial termination of administrative contracts should be seen as a measure of protection for contractor, explained by the concern to give an additional guarantee for the investments made by it.

In case of termination, the part which has complied with obligations under the contract (the conceder or, where appropriate, the concessionaire) bring an action before a judicial court which will decide on the basis of the evidence. If the judicial court pronounces the termination, the cessation of the concession contract takes place at the expiry the term of the grace or at the date of when the decision which has upheld the action becomes final and irrevocable (Chelaru, 2008, p. 99).

The conditions for termination of the concession contract are the same as for termination of contracts subject to common law, namely: a culpable breach of some contractual obligations, breach must be important enough to do without cause the execution of mutual obligations (Gherghina, Sebeni, 1999, p. 21). In French jurisprudence has held that the administrative judge should consider the proportionality of punishment to the gravity of the contractor mistake: the mistake justifying the termination penalty must show a serious enough nature (State Council decisions of 21 November 1934 - *Soc. Dupart*, of 11 July 1941 – *Grenouiller*, of 8 Januaray 1958 – *Crouzat*) (Richer, 2002, p. 227). The severity is determined in relation to the consequences of the mistake for public service and in relation to the essential character of the contractual obligation breached.

On the way in which judge the court, A. Iorgovan believes that the court proceed to trial when a termination action, seeking to establish defendant's guilt and the amount of damages, can not stop only at the principle of financial equilibrium of the concession, but must consider the principle of safeguarding the public interest, the public interest priority to private interests of the concessionaire (Iorgovan, 2005, p. 251). All these aspects have advocated removal of the concession, as a contested issue in the sphere of competence of courts of common law, commercial courts, in this case (as originally stipulated Law no. 219/1998 *on the regime of concessions*[2]) and include this kind of litigation within the administrative court, which is made today by the Government Emergency Ordinance no.

[1] It is the administrative contentious department of the tribunal in whose jurisdiction is registered the headquarters of the conceder, as specified in art. 66 para. (2) of Government Emergency Ordinance no. 54/2006.

[2] Published in the Official Journal of Romania, Part I, no. 459 of 30 November 1998, as amended, repealed by the Government Emergency Ordinance no. 34/2006 regarding the award of public procurement contracts, public works concession contracts and services concession contracts.

34/2006 *regarding the award of public procurement contracts, public works concession contracts and services concession contracts*[1], the Government Emergency Ordinance no. 54/2006 *on the regime of public assets concession contracts* and Law no. 554/2004 *of contentious administrative* (Alexandru, Cărăuşan, Bucur, 2005, p. 418).

If the concessionaire cause any damage of the conceder through the breach of contractual obligations, and in the concession contract is expected a penalty clause, enforcement of obligations under the concession contract will be according to law of enforcement of budgetary claims (Gherghina, Sebeni, 1999, p. 21). The title of claim under which the enforcement will be achieved is the concession contract. Enforcement will be through the bodies of the Ministry of Public Finance.

According to the article 33 (1) of Law no. 129/1998 *on the establishment, organization and functioning of the Romanian Social Development Fund*, the contracts between the beneficiaries of grant and third party suppliers and service providers are the enforceable titles. In the absence of stipulation to the contrary, in case of termination of the concession by the fault of the concessionaire, the loan taken out to achieve the public service incumbent to concessionaire and after termination of the contract (Gherghina & Sebeni, 1999, p. 22).

The French jurisprudence on termination stated that if the contractor has made investments that benefited the public authority, despite his serious mistake, he will receive compensation up to the depreciated value of the installations (State Council decision of 20 March 1954 – *Soc. des Établissements thermaux d'Ussat-les-Bains*) (Richer, 2002, p. 228).

In the special law governing the various types of concessions is provided another way to stop the effects of contract - *revocation of license/permit by the competent authority.* Thus, mining concession may be terminated under Article 31 point c) of *Mining Law no. 85/2003*[2], upon revocation of license/permit by the competent authority, as provided in Arts. 34 and 35 of the law. According to art. 34 of Law no. 85/2003 the competent authority *shall annul* the license/permit of the sanctioned title holder, at 30 days from the receipt of notification, when it is found out that:

a) does not fulfill its obligations regarding the authorization and date of commencement of mining activities;

b) continues to interrupt the operations for a period of more than 60 days, without the agreement of the competent auuthority;

[1] Published in the Official Journal of Romania, Part I, no. 418 of May 15, 2006 approved with amendments by Law no. 337/2006 (published in the Official Journal of Romania, Part I, no. 625 of July 20, 2006), as amended.

[2] Published in the Official Journal of Romania, Part I, no. 197 of March 27, 2003, as amended.

c) makes use of exploitation methods or technologies other than those provided in the development plan, without the agreement of the competent authority;

d) conducts mining activities by violating the provisions of art. 22, para. (1), e);

e) the authorization regarding the protection of environment and/or the safety of the workers has been annulled;

f) Intentionally, provides the competent authority with false data and information as to its mining activities or violates the confidentiality requirements set forth in the license;

g) does not pay within 6 months fom the date the taxes and royalties owed to the State are due;

h) failure to fulfill the conditions and term provided in art. 33, para (2) regarding the suspension of the license/permit.

We note that the legislature uses the terms of *annulment* and *revocation* inappropriate; in fact the contract is *terminated* by the public authority if the concessionaire fails to perform its contractual obligations or, for reasons attributable to the concessionaire, it can no longer fulfill contractual duties (Avram, 2003, pp. 197, 198). In this sense it expresses the legislature when the *Petroleum Law no. 238/2004*[1] states, in art. 42 (1) point g), that the competent authority terminates the concession if it finds that the holder of the petroleum agreement "does not comply with clause provided by the oil agreement, with the sanction of revocation of the concession."

In case of termination, the contractor is required to ensure continuity of the work , public service or asset exploitation until its takeover by the public authority. Moreover, the Methodological rules of implementation of Government Emergency Ordinance no. 54/2006 (approved by Government Decision no. 168/2007) provide in the art. 51 that if the concession contract is terminated for reasons other than expiration, force majeure or unforeseeable circumstances, the concessionaire is obliged to ensure continuity of operation of public assets, as stipulated in the contract, until their takeover by the conceder.

3. Conclusions

The termination is a guarantee for fulfillment of the obligations by contractors and a penalty for any breach of the contract (Lombard, 2008, p. 195; Hoepffner, 2009, p. 237). Unlike private law, in public law the termination of administrative contracts must consider the financial balance principle and the subordination of freedom of contract to the principle of public interest priority.

De lege ferenda we propose that in a future Administrative Procedure Code of Romania to be included a general regulation stipulating the conditions under which

[1] Published in the Official Journal of Romania, Part I, no. 535 of 15 June 2004, as amended.

administrative contracts can be terminated: „*The termination of administrative contracts may occur in case of breach of contractual obligations, with the payment of compensation charged to the defaulting party. The instance of contentious administrative will decide on the termination, taking into account the subordination of freedom of contract to the principle of public interest priority*".

4. References

Albu, E. (2006). *Drept administrativ şi ştiinţa administraţiei/Administrative law and administrative science*. Part II. Bucharest: Fundaţia România de Mâine.

Alexandru, I; Cărăuşan, M. & Bucur, S. (2005). *Drept administrativ / Administrative Law*. Bucharest: Lumina Lex.

Alexandru, I. (2008). *Tratat de administraţie publică / Treaty of public administration*. Bucharest: Universul Juridic.

Avram, I. (2003). *Contractele de concesiune / Concession contracts.* Bucharest: Rosetti.

Chelaru, E. (2008). *Administrarea domeniului public şi a domeniului privat / Administration of public and private domain*. Edition 2. Bucharest: C.H. Beck.

Costi, G. (1945). *Noţiunea contractului administrativ / The notion of administrative contract*. Bucharest: Imprimeria Centrală.

Dragoş, D. C. (2009). *Legea contenciosului administrativ. Comentarii şi explicaţii / Administrative Litigation Law. Comments and explanations*. Edition 2. Bucharest: C.H. Beck.

Dragoş, D. C. (2000). Despre Fondul Român de Dezvoltare Socială şi contractul de grant / About the Romanian Fund for Social Development and the grant contract, *Dreptul*, no. 5/2000.

Gherghina, S. & Sebeni, A. (1999). Efectele şi încetarea contractului de concesiune / Effects and termination of the concession contract, *Dreptul*, no. 11/1999.

Hoepffner, H. (2009). *La modification du contrat administratif.* Paris: L.G.D.J.

Iorgovan, A. (2005). *Tratat de drept administrativ / Treaty of administrative law.* Volume II. Edition 4. Bucharest: All Beck.

Lombard, F. (2008). *La cause dans le contrat administratif*. Paris: L.G.D.J.

Richer, L. (2002). *Droits des contrats administratifs*. 3e èdition. Paris: L.G.D.J.

Rivero, J. & Waline, J. (1992). *Droit administratif.* 14e èdition. Paris: Dalloz.

Săraru, C.-S. (2009). *Contractele administrative. Reglementare. Doctrină. Jurisprudenţă / Administrative contracts. Legislation. Doctrine. Case-Law.* Bucharest: C.H. Beck.

Stătescu, C. & Bîrsan, C. (2000). *Drept civil. Teoria generală a obligaţiilor / Civil Law. General theory of obligations.* Bucharest: All Beck.

Trăilescu, A. (2002). *Actele administraţiei publice locale / Local government acts.* Bucharest: All Beck.