ADMINISTRATIVE CONTRACTS IN THE CONTEXT OF THE NEW CIVIL CODE AND THE NEW CIVIL PROCEDURE CODE

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Abstract

The Romanian law concerning administrative contracts has evolved greatly in the last three decades; the New Civil Code, which came into effect in 2009, and the New Civil Procedure Code, which came into effect in 2010, have important stipulations in the field. The purpose of this paper is to create a short review on the Romanian legislation concerning administrative contracts, to analyze the legal requirements, to identify possible issues in the field and, eventually, to propose improvements. In order to achieve these objectives, the relevant legislation is reviewed, and Romanian authors Romanian authors with recent studies in the field of administrative contracts, such as L. Catana, O. Puie, and A. Tabacu, are cited. The legislation concerning administrative contracts includes organic laws, such as Law 554/2004, Law 98/2016, Law 100/2016, and Law 101/2016, as well as government decisions, such as Government Emergency Ordinances no. 54/2006 and no. 34/2006. Our main findings are that, although the law concerning administrative contracts assimilates this concept to the notion of the administrative act, and although there are examples of administrative contracts which are more thoroughly explained, a clear definition of the administrative contract is missing, which we consider to be a legislative gap which needs to be fixed in the future, when the relevant legislation will be revised.

Keywords: *administrative contracts, administrative acts, civil legislation*

1. Introduction

Administrative contracts have undergone a substantial legislative development over the last decades. They needed a major adaptation after the 1989 Revolution, and the French legislation became an inspiration. In the French legal literature, there are three types of administrative contracts, according to O. Puie: those concluded between two public figures, those concluded between a public person and a private person and those concluded between two private persons. Compared to private contracts, administrative ones are subject to additional requirements. Although both types of contracts share the principle of contractual freedom, in the case of administrative contracts there is a subordination to the principle of public interest. Therefore, as O. Puie explains, "at a legislative level, it has been sought to establish a hybrid structure that combines contractual freedom with the need to protect the public interest, which has been achieved by the provisions of Art. 8 par. (3) of the Law no. 554/2004".[1]

In this paragraph, Law no. 554/2004 indicates that litigations occurring prior to the conclusion of an administrative contract or related to the execution or application of an administrative contract, are within the competence of the administrative court to resolve the dispute. On these disputes, art. 8 par. (3) of the Administrative Litigation Act provides that "in the settlement of the disputes referred to in par. (2) shall be taken into account the rule that the principle of contractual freedom is subordinated to the principle of public interest priority".[2]

For a contract to be classified as an administrative contract, it is defined on certain criteria by private-law contracts. By means of case-law, some central elements of administrative contracts emerge. In order for a contract to be an administrative contract, at least a part must be a person of public law. At the same time, another condition for a contract to be classified as administrative, its object must depend on the execution of a public service (for clarification, the case-law has used the notion of "direct participation in the precise (precise) execution of the public service".[3]

This distinction is needed between the two types of contracts because "administration is no longer just in administration: the administrative action has finally come out of the proper public and, even beyond the most decentralized public establishments, it integrates today private individuals".[4]

The principles underlying the award of administrative contracts include: regulation, non-discrimination, free competition, equal treatment, mutual recognition, transparency, proportionality, efficiency in the use of funds, accountability and avoidance of conflicts of interest.

In the Law 554/2004, the subject of the administrative contract was expressly delimited, but it was not defined. Within this law, the administrative contract was assimilated to the administrative act.

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[1] Puie, O. (2014) *Contractele administrative în contextul noului Cod civil și al noului Cod de procedură civilă*. București: Universul Juridic

[2] art. 8, Law no. 554/2004

[3] Puie, *op. cit.*

[4] Puie, *op. cit.*, p. 10.

According to art. 2, the administrative act is an unilateral act, which may be of an individual or normative nature and which was "issued by a public authority in order to execute or organize the execution of the law, creating, modifying or terminating legal relations".[5]

Administrative acts include administrative contracts when they concern valuing public property assets, performing public works, performing public services and public procurement.[6] Therefore, Law no. 554/2004 specifies three types of possible administrative contracts:

- administrative contracts for valuing public property assets;
- administrative contracts for the execution of works of public interest;
- administrative contracts for the provision of public services;
- administrative contracts for public procurement.[7]

However, a distinction must be made between the administrative act and the act of the administration. The administrative act, which includes the concept of administrative contract, is a much wider concept, while the act of the administration is only a part of it.

With regard to the definition of administrative contracts, the lack of clear definition and delimitation in legislation has translated into fragmented norms, focused on certain types of administrative contracts, elaborated due to the obligations arising from a series of European directives. In normative acts, such as Government Emergency Ordinances, more than one type of administrative contracts is specified and defined. For example, O.U.G. (in Romanian, *Ordonanță de Urgență a Guvernului*) no. 54/2006 identifies and defines the concession contract for public property[8], while O.U.G. no. 34/2006 provides a framework for the following types of administrative contracts: public procurement, service concession, public works concession and sectoral contract.[9]

All litigations generated by administrative contracts are within the jurisdiction of the administrative litigation court; however, certain special regulations in the past have established the competence of the common law court in solving the principles related to certain specific administrative contracts.

Moreover, it is worthwhile mentioning the possible solutions in a legal dispute that has an administrative contract as an object. According to art. 18 par. (4) of Law no. 554/2004, the court may give the following solutions if the subject of the administrative action is represented by an administrative contract: it may cancel it, in whole or in part; it may oblige the public authority to conclude the contract if the claimant is entitled; it may impose an obligation in respect of any party; it may, if the public interest so requires, amend the consent of a party; and, last but not least, it may order payment of damages.[10]

2. Administrative Contracts in context of the New Civil Code

The new Civil Code has made substantial amendments and additions to the legislation concerning contracts, which also apply to administrative ones. First of all, the definition of contracts has changed. In the old Civil Code, the contract was defined, in art. 942, as "the agreement between two or more persons to constitute or extinguish a legal relationship between them."[11] On the other hand, in the new Civil Code, the contract is defined in art. 1.162 as "the will of two or more people with the intention of creating, modifying or extinguishing a legal relationship."[12] Therefore, with the change of the civil code, administrative contracts may also have the intention of modifying a legal relationship. In addition, the notion of "will" is introduced as the basis for the agreement. The fact that any contracts, including administrative ones, fall under the provisions of the Civil Code is specified in art. 1.167: "All contracts are subject to the general rules in this chapter. Particular rules regarding certain contracts are provided in this Code or in special laws."[13]

According to art. 1.179 of the New Civil Code, the conditions necessary in order to make a contract valid are: the capacity to make a contract, the valid consent of the parties, a possible, determined, legal object and a valid cause for the obligations. Moreover, the same article states that if the law provides for a certain form of contract, „it must be complied with, subject to the sanction provided for by the applicable legal provisions".[14] For example, in the case of public procurements contracts, before signing the contract, the parties have to sign a framework agreement. Law no. 99/2016 establishes the meaning of framework agreements, which is defined as "a written agreement between one or more contracting entities and one or more economic operators which seeks to establish the terms and conditions governing the sectoral contracts to be awarded in a given period, the price and, where appropriate, the quantities concerned".[15]

[5] art. 2, Law no. 554/2004
[6] *Ibidem*;
[7] Law 554/2004
[8] O.U.G. 54/2006
[9] O.U. G. 34/2006
[10] art. 18, alin. (4), Law 554/2004
[11] art. 942, Old Civil Code
[12] art. 1.166, New Civil Code
[13] art. 1.167, New Civil Code
[14] art. 1.179, New Civil Code.
[15] Law no. 99/2016

Moreover, according to the Government Resolution no. 395/2016, the framework agreement has to include the obligations of the parties, especially regarding technical indicators linked to performance and function. The services or the products have to be described, and deadlines should be included as well as the prices. The procurement contract needs to have certain annexes, such as the specification, the offer, the performance guarantee and the association agreement.[16]

In the New Civil Code, it is pointed out in art. 1.187 that making and accepting an offer has to be done in the form requested by law in order for the contract to be valid. Several normative acts have indicated how offers should be made and accepted in the case of different types of administrative contracts. To continue the example of public procurement contracts, Government Resolution no. 395/2016 indicates how public procurement takes place, and what are the duties of both the public authorities and the economic operators, about which the law states that "the economic operator submits the offer, DUAE, qualification documents, answers to requests for clarification only by electronic means when participating in an award procedure that takes place through SEAP".[17]

The new Civil Code law stipulates rules concerning every contract. The law includes aspects of the parties' consent, what may be the object of the contract, but also the cause of the contract. At the same time, it indicates the obligations related to the form of the contract, whether in written or electronic form. In the New Civil Code, there are stipulated the situations in which a contract becomes null, how can it be validated and how it can be interpreted. Normally, contracts produce effects only between parties, but there are situations where the law provides effects for third parties.

The concept of administrative act, to which the administrative contract is assimilated, is mentioned in the New Civil Code in the context of acquiring the right of ownership. Art. 557 par. 2 specifies that an administrative act may have the effect of acquiring a property.[18]

In our opinion, a major and interesting topic for practitioners is the concession of public property, which we shall briefly review next.

Both our Constitution and New Civil Code, together with other regulations, such as Law no. 15/1990 on the merger of State-managed companies into autonomously-managed public companies and trading companies, Law no. 215/2001 on local public administration, O.U.G. no. 34/2006 on the award of public procurement contracts, public works concession contracts and services concession contracts and O.U.G. no. 54/2006 on the regulations of public property concession contract, are governing the usability of the concession of public property belonging to the State or to the territorial entities thereof.

Article 866 NCC enumerates the right of concession among the real rights relating to the public property right, while art. 871-873 rule on its legal status. Yet, such provisions should be correlated with those included in a couple of the above-cited regulations, i.e. O.U.G. no. 34/2006 and O.U.G. no. 54/2006, whose enforceability survived the New Civil Code. Therefore, in the preamble of O.U.G. no. 54/2006 we can read that, in consideration of both the imperative and urgent full alignment of domestic law on concessions with the European Union's regulations and practice, and the recommendation of the European Executive – the Commission – for the full and express repeal of Law no. 219/1998 on concessions, as amended, after the coming into force of O.U.G. no. 34/2006 on the award of public procurement contracts, public works concession contracts and services concession contracts, also considering the provisions of art. 136 paragraph (4) of the Romanian Constitution, republished, passing this emergency ordinance regulating the concession of public property was of a large requirement.

Therefore, now we can distinguish between the legal statuses of the concession of public property, as it is governed by the provisions of O.U.G. no. 54/2006, on one hand, and the public works concession contracts and public services concession contracts, as governed by the provisions of O.U.G. no. 34/2006, on the other hand.

From this point of view, art. 2 of O.U.G. no. 54/2006 stipulates that the provisions of this regulation do not apply to those contracts which are not governed by the provisions of O.U.G. no. 34/2006 on the award of public procurement contracts, public works concession contracts and services concession contracts; in case of contracts awarded under O.U.G. no. 34/2006, for whose implementation an operation of a public property, the operation right for such property shall be transferred "under and pursuant to the procedure enforced for awarding such contract", Meaning that the contracting authority shall enter a single contract under O.U.G. no. 34/2006. Moreover, art. 220 letter c) of the latter provides that its provisions shall not apply if the concession contract has the scope of public property concession, but only when through the scope of such contract the contracting authority intends to acquire the performance of a work or provision of a service, which would classify such contract either as a public procurement contract or as a concession contract whose award is governed by its provisions, namely those of O.U.G. no. 34/2006.

Both ordinances basically aim to provide the performance of business, administrative and legal activities on concession within a competitive, non-

[16] Government Resolution no. 395/2016
[17] art. 123, Government Resolution no. 395/2016
[18] art. 557, New Civil Code.

discriminating and transparent European Union specific environment.

Without going into further details, we shall point out hereinafter several aspects on the public property concession contract, by reference to the provisions included in these special regulations an also by general regulations in this field from art. 871-872 NCC.

2.1. Notion and effects of public property concession contracts

Article 871 NCC does not include a definition for the concession contract; the text rules, as of its first paragraph, that a grantee ha the right and obligation, at the same time, to operate the chartered property, in exchange of a royalty and for a limited period of time, also observing the requirements of laws and the provisions of the concession contract. Instead, art. 1 paragraph (2) of O.U.G. no. 54/2006 defines such contract as a written and authenticated contract whereby a public authority (grantor), transfers for a limited period of time to another person (grantee), who acts on its own risk and liability, the right and obligation to operate a public property, for valuable consideration (royalty). Article 3 of such ordinance rules that the scope of such contract may include any goods in the State's public property or owned by its administrative-territorial units according to the Constitution and legal provisions on public property.

Although art. 871 NCC does not specify, when the scope of a concession contract is represented by State's public property, the grantor capacity shall belong to ministries or other specialized bodies of central public administration; if it is represented by County's, City's or Commune's public property, such capacity shall be exercised accordingly by county or local councils, Bucharest City General Council or the local concern public institutions (art. 5). Article 871 NCC rules that any legal or natural person can act in the capacity of grantor. Moreover, art. 6 of O.U.G. no. 54/2006 provides that any Romanian and foreign natural or legal person can be a Grantor. The ordinance also provides that, irrespective of nationality or citizenship of the grantor, the concession contract shall be entered under the Romanian law (art. 7).

In respect of the royalty, calculation and payment shall be established by the relevant ministries or other specialized bodies of central public authorities or by local public authorities and it shall be an income to the State's or local budgets, as applicable (art. 4 of O.U.G. no. 54/2006). Therefore concession contracts are onerous.

Another feature of the contract under discussion is that it shall be entered on a definite period. Indeed, Pursuant to art. 7 paragraph (1) the final phrase of the Ordinance, duration of the concession contract shall not exceed 49 years since its signing date; such duration can only be extended with at most half of its initial term, by the mere agreement of the parties. Concession term shall be established by the grantor based on the concession's operational study. Basically, sub-granting is forbidden, unless expressly provided for by the ordinance (art. 8). The concession contract shall be entered in authentic written form [art. 1 paragraph (2) din O.U.G. no. 54/2006]. Such requirement is for ad validitatem, not for ad probationem purposes

2.2. Entering procedure and contents of a concession contract

Article 871 paragraph (3) NCC rules that the concession procedure and also the signing, execution, and termination of concession contracts are subject to the legal provisions. Such general rule is further developed by the provisions included in O.U.G. no. 54/2006 and Methodology thereto. Thus, O.U.G. no. 54/2006 includes rules on the preliminary administrative procedure before the signing of a concession contract, "awarding" of concession contract, which can occur after a tender or following direct negotiation, the contents of the concession contract, how the "concession file" is drafted and also the applicable rules for the control of all operations pertaining to the signing of concession contracts and the settlement of any disputes on concession.

We are interested in the rules of the ordinance which are in fact determining the legal status of the public property in the scope of concession. From this point of view, art. 52 of O.U.G. no. 54/2006 from the section concerning the contents of the concession contract rules that the contract must include a clear provision the types of property that may be used by the grantee under such concession, i.e.:

a) the so-called return property, which were subject to concession and shall rightfully return at the end of the contract, gratuitously and free from any liens, to the grantor;
b) own property of the grantee, which were used by him during concession and which shall naturally remain in his property at the end of the contract.

In consideration of the exercise of the concession right, art. 872 NCC provides that the holder of such right may carry out any material or legal acts required for the operation of granted property. However, under the penalty of absolute nullity, the grantee shall not alienate or burden the granted property or the goods designed for or resulting from concession, as applicable, property which must be returned to the grantor at the end of the contract, irrespective of cause, according to enforceable laws or articles of association.

Instead, art. 872 paragraph (2) NCC allows the grantor to acquire ownership of fruits and also products resulting from the chartered property, within the limits of enforceable laws and articles of association.

In turn, art. 47 paragraph (2) of Enforcement Rules for O.U.G. no. 54/2006 on the public property concession contracts indicates that, during contract implementation, the grantee has the right to use the chartered property and to collect its fruits, according to the nature thereof and purpose established by the parties within the contract. Yet he shall provide efficient, continuous and permanent operation of the

public property in the scope of concession [art. 48 paragraph (1) of Rules). From these legal regulations it results that, based on the concession contract, the grantee shall acquire a real right upon the chartered property, opposable erga omnes\ within the limits of contract provisions, and such right shall be also opposable to the grantor. Yet, since the grantee must return the "return goods" - public property in the scope of concession at the end of the contract, it means that the older thereof has no right to dispose on the chartered property, as required by art. 872 paragraph (1) NCC, under the penalty of absolute nullity of the executed act in breach of such principle.

2.3. Demarcation of concession right for certain public property vs. the administration right pertaining to public property

We may find some similitude and important differences between these two rights.

As for the similitudes, we can note that both are real rights originating in the public property right and each represent a specific method of exercising such right.

Moreover, none of such right represent a fragmentation of the public property right.

Yet, important differences are among them. Thus, first of all, administration right may belong only to certain public law subjects – state-managed companies, prefectures, central and local public authorities [art. 868 paragraph (1) NCC], while concession right may belong only to private law subjects, Romanian and foreign natural or legal persons (art. 6 of O.U.G. no. 54/2006).

Secondly, administration right arises only by means of an administrative act of authority issued by the relevant state body - Government, County council, respectively Bucharest City General Council, local council [art. 867 paragraph (1) NCC] -, while concession right arises exclusively based on a contract entered by an between the grantor (owner of public property right) and grantee (beneficiary of the concession) [art. 1 paragraph (2) of O.U.G. no. 54/2006].

Thirdly, in term of prerogatives, the administration right holder may possess, use and even dispose, within certain limits, of the granted good, while the concession right confers to the grantee only the rights of possession, use according to the purpose designed in the contract and collect the fruits or even the products of the chartered good, within the limits of applicable laws and articles of association.

Last, administration right is a real, basically perpetual and inalienable right, while the concession right is a real, temporary and inalienable right.

2.4. Termination of concession contract

Pursuant to art. 871 paragraph (3) of NCC, the termination procedure for concession contracts is subject to legal provisions, that is applicable special regulations. The concession contract may be terminated in various ways pursuant to O.U.G. no. 54/2006. Thus, firstly it can end on its expiry date. Actually, the concession contract shall be rightfully terminated on its expiration date, unless it was extended under the parties' agreement for a period which shall not exceed half of its initial term [art. 57 letter a) of the ordinance].

Then, art. 57 letter b) of the ordinance rules that, if required by national or local interests, concession contract can be unilaterally terminated by the grantor. In this case, it shall pay in advance a reasonable compensation to the grantee, as agreed by the parties, or, if such agreement cannot be reached, it shall be established by the court of law.

Should the grantee fail to fulfil its contractual obligations, art. 57 letter c) of O.U.G. no. 54/2006 entitles the grantor to unilaterally terminate the contract and to oblige the grantee to pay compensation for any damages thus incurred by the grantor, if applicable. In turn, the ordinance allows the grantee to use the same possibility with the same consequences should the grantor fail to observe its contractual obligations [art. 57 letter d)].

Finally, the contract may be terminated through the extinction of the concession scope pursuant to a force majeure case or by waiver, in case of the grantee's objective impossibility to operate the property, no compensation being due under such circumstances [art. 57 letter e) of O.U.G. no. 54/2006].

3. Administrative contracts in the context of the new Civil Procedure Code

The new Civil Procedure Code does not have specific references to administrative contracts. However, there are stipulations which apply to them. First of all, several articles provide provisions on contracts. For example, art. 289 discusses other categories of inscriptions and specifies that the contracts concluded on standardized or standardized forms or incorporating general conditions shall be considered as private signature, unless the law provides otherwise.[19]

In case of sale at a public auction, the new Civil Procedure Code indicates in art. 778 the conditions for maintaining or terminating contracts, which also apply to administrative contracts. The law stipulates that "settlements and other legal acts relating to the adjudicated good remain in existence or, as the case may be, cease according to the law".

Conclusions

In this paper, we have presented and analysed the concept of the administrative contract in the Romanian legislation, in which this concept is assimilated to the

[19] art. 778, New Civil Procedure Code

concept of administrative act. However, the laws concerning contracts, as are those in the Civil Code and in the Civil Procedure Code, still apply. Taking this into consideration, in order to analyse the administrative contract in the context of the New Civil Code and the New Civil Procedure

Code, we undertook an analysis of other relevant legislation, such as Government Emergency Ordinances and Government Resolutions, but also of laws such as the law of public procurements. Several laws that apply to administrative contracts were introduced in 2016: Law no. 98/2016 concerning public procurements, Law no. 99/2016 concerning sectoral procurements, Law no. 100/2016 concerning work and services concessions and Law no. 101/2016, concerning remedies in the case of the attribution of public procurement contracts.

Analyzing the relevant legislation, we notice that administrative contracts are assimilated to the notion of administrative act, and that several types of contracts (e.g. of public procurement, of provision of public services) are assimilated to the concept of administrative contracts. However, the Romanian legislation does not include at the moment a clear definition of administrative contracts. This is one of the reasons why other authors, such as L. Catana,[20] are in favor of introducing a law that will establish this terminology in the special legislation.

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