THE USV ANNALS OF ECONOMICS AND PUBLIC ADMINISTRATION | VOLUME 16, ISSUE 2(24), 2016

ADMINISTRATIVE CONTRACTS. DELIMITATIONS

Lecturer PhD **Liana Teodora PASCARIU**
"Ştefan cel Mare" University of Suceava, Romania
lianateodorapascariu@yahoo.com

Abstract:
Article examines whether all contracts of public persons are administrative contracts; in other words, if the administration may conclude contracts that, according to their legal nature, are not administrative. to qualify a contract as an administrative contract, besides the determination of the law, we must pay attention to the case-law, the administrative contract concluded by a public or on behalf of a public person and that either contains within it derogation clause from the common law or is as object the execution of a public service.

Key words: administrative contracts, rules of private law, public law, legal nature of the contract

JEL clasification: K15, K23

1. INTRODUCTION

As we said in a previous article (Pascariu, 2010, p. 408), contract entered into by a public authority, if not received by Law no. 554/2004 or a special law qualification of administrative contract is either another type of public contract or a contract of private law. "Public contract" is defined in common law as "an enforceable commitment of a party's right to undertake improvement works required by a public authority" (according to http://legal-dictionary.thefreedictionary.com, a public contract is a legally enforceable commitment of a party to undertake the work or improvement desired by a public authority) .

It is well known that English and American doctrine and jurisprudence utilize the term "government contracts," the term "government" involving the broad sense of central and local administration (Anne C. L. Davies, 2008, 1)

Public contracts is not a relatively new concept in our legislation, but we can t fiind exactely this concept. Our legislation speaks about public procurement contracts, or about management contracts, not about public contracts. The 'genus–species' relation between 'contracts concluded by administration' and 'administrative agreements' has been described both in French judicial literature (Andre de Laubadère, 1956, 300) and in the Romanian one (Cătălin Silviu Săraru, 2009, 25-26). The first concept includes both private contracts, civil or commercial, concluded by

Legislation and practice in the field, inclusively in recent years, have provided sufficient examples of contracts concluded by the administration and regulated by the common law.

2. CONTENT

Without addressing the theory of public-private distinction, which exceeds this article, the softening trend of the legal system's bipolarity between the two categories must be recognized as being invoked with good reason in the doctrine (Ioan Alexandru, Mihaela Cărăuşan, Sorin Bucur, 2005, 406). The penetration of the economy market logic into the public politics influences the matters relating to administrative contracts, not only through the emergence of new legal entities, but also through the intervention of unprecedented legal situation.

Initially, the criticism of the "administrative contract" concept started from the idea that freedom of contract is the basis of liberalism, which is seen as a protection against the state, which made it impossible to apply freedom of contract to the theory of the state. French doctrine is the first to show that this was a false problem because the contractual freedom of the state refers to the choice of the procedures followed, the imposition of contract terms or elimination of rules of contract law, the existence of public property with specific features, alongside private property.

If a contract is concluded between two public persons, it acquires an administrative essence that operates the so-called "presumption of administrativity" explained by the fact that the contract is located at the encounter of two public managements, that apply strict rules of administrative law.

The importance of setting a regime of distinction is applicable to contracts concluded by the administration in the broader sense is given by the necessity to discover which contract concluded by an administrative-territorial or another public authority is subject for the public law.

In the effort of identifying such contracts, we must start from the qualification criteria of an administrative contract. The doctrine has highlighted a number of particular features of administrative contracts, that define their legal status, in contrast with other types of contracts governed by the private law: legal inequality of the parties, driven by the need to defend the general interest by the public authority; the quality of an administrative authority or a empowered of the administrative authority of at least one of the parties the limitation of the freedom of will, the goal of serving the public interest by public authorities, the broad interpretation of the contract, meaning the prevalence of public interest in the administration etc.

To qualify a contract as an administrative contract, besides the determination of the law, we must pay attention to the case-law, the administrative contract concluded by a public or on behalf of a public person and that either contains within it derogation clause from the common law or is as object the execution of a public service (Foillard, 2008, p. 224).

A contract between a public authority and a private person is administrative France only in one of the following assumptions: it contains clauses derogating from the common law or is concluded for the provision of a public service. If a contract is concluded between two individuals, it is presumed that rules of private law are applicable to that contract, with two exceptions: the first refers to the work for road infrastructure of the state, where a contract is considered to be administrative if it is demonstrated that one of the parties - for example, the concessionaire of a motorway link - acted in the name and on behalf of the national authority and the second exception is based on some indicators which demonstrated that one party has contracted in reality in the name and on behalf of the public authority, including a local authority, such as a concessionaire of activities for upgrading a tourist resort (Renan Le Mestre, 2006, pag. 59).

In Romania there is also the case in which the law expressly qualifies a contract as being a civil one, even though it meets the above criteria to be considered administrative. The new legislative package adopted in 2016 in public procurement (the Law on public procurement. 98/2016 on public procurement) regulates the realisation of public procurement procedures for the award of public procurement contracts and organizing design contests, tools and specific techniques that can be used for awarding public procurement contracts, as well as specific issues related to the execution public procurement contracts.

A situation that has also occurred was the possibility of applying two different legal regimes within the same contract that becomes administrative on one hand and civil on the other hand. As administrative rules protect the public interest, which prevails over the private interest, the solution identified from the interwar period and to which I agree is to dismiss the commercial law in the administrative contract (Pavel Strihan, 1946, 21).

According to art. 34 of Law no. 98/2016 on public procurement, where mixed contracts covered both acquisitions for which the provisions of the law are applied, and purchases for which the provisions of other laws are applied, and various mixed parts of a particular contract are objectively separable, the contracting authority has the right to choose between awarding separate contracts for separate parts and awarding a single contract. If the contracting authority chooses to award separate contracts for separate parties, the legal and regulatory act which applies to the award for each of these separate contracts are those determined by the characteristics of each party involved.

Law no. 100/2016 on concessions for works and services concessions stipulates that concession works is a contract assimilated by law to the administrative acts, in writing, by one or more contracting entities entrusts the execution of works of one or more economic operators, in the

consideration for the works is either exclusive right to exploit the outcome of proceedings under the contract or this right together with payment.

3. CONCLUSIONS

In conclusion, to qualify a contract as an administrative contract, besides the determination of the law, we must pay attention to the case-law, the administrative contract concluded by a public or on behalf of a public person and that either contains within it derogation clause from the common law or is as object the execution of a public service (Foillard, 2008, p. 224).

4. BIBLIOGRAPHY

1. Alexandru, Ioan, Cărăuşan, Mihaela, Bucur, Sorin, Administrative Law, Lumina Lex Publishing House, Bucharest, 2005.
2. Anne C. L. Davies, The public law of government contracts, Oxford University Press, New York, 2008.
3. Foillard, Phillippe, *Droit administratif*, Editure Paradigme, 13e ed., 2008, pag. 224.
4. de Laubadère, Andre, Traité theorique et pratique des contrats administratifs, 1956, Paris.
5. Le Mestre, Renan, Termes du droit administratif, Gualino éditeur, Paris, 2006.
6. Pascariu, Liana-Teodora, The distinction of the administrative contract from other types of contracts, The Annals of The "Ştefan cel Mare" University of Suceava. Fascicle of The Faculty of Economics and Public Administration Vol. 10, Special Number, 2010.
7. Săraru, Cătălin Silviu, Administrative Contracts. Regulation. Doctrine. Jurisprudence, C.H. Beck Publishing House, Bucharest, 2009.
8. Strihan, Pavel, Contractele administrative în dreptul român. Contribuţiuni la o teorie generală, Tipografia Curierul judiciar, Bucureşti, 1946.
9. http://www.anrmap.ro/ro/presa/comunicated//asset_publisher/2WdxNybI4VgL/content/informatii-utile-cu-privire-la-noul-pachet-legislativ, 2016.
10. http://lege5.ro/Gratuit/geytcnjsguya/legea-nr-100-2016-privind-concesiunile-de-lucrari-si-concesiunile-de-servicii, 2017.