Brief Considerations About "Quasi Contracts" and the Administrative Contracts in Romania

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Abstract

In the matter of administrative contracts, some problems arise related to what is known as "quasi contracts" in civil law, namely business management, restitution of unpaid payments and unjust enrichment. In such cases, as a rule, the corresponding provisions of the Civil Code are invoked. In administrative law, the provisions of the Civil Code regarding business management found a weak application. Instead, those regarding the restitution of the unpaid payment were constantly validated. As for unjust enrichment, this could occur when certain works were executed or services were performed based on a contract that was ultimately not concluded, that was struck by nullity, that reached its term. It was only in 1961 that its validity was recognized, qualifying it as a "general principle applicable, even in the absence of a text, in the matter of public works".

Keywords: *administrative contract, quasi-contracts, business management, restitution of unpaid payment, unjust enrichment.*

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1. Introduction. About "Quasi Contracts"

In the matter of administrative contracts, some problems arise related to what is known as "quasi contracts" in civil law, namely business management, restitution of unpaid payments and unjust enrichment[2].

In such cases, as a rule, the appropriate provisions of the Civil Code are invoked. In administrative law, the provisions of the Civil Code regarding business management found a weak application. Instead, those regarding the restitution of the unpaid payment were constantly validated.

As for unjust enrichment, this could occur when certain works were executed or services were performed based on a contract that was ultimately not concluded, that was struck by nullity, that reached its term. It was only in 1961 that its validity was recognized, qualifying it as a "general principle applicable, even in the absence of a text, in the matter of public works".

2. The administrative contract in Romania

The concept of administrative contract is the creation of the French legal doctrine which in its definition and characterization was based on the jurisdiction of the Council of State. In time, he traveled a winding path marked by two opinions: on the one hand, the absolute denial or ignorance of it and, on the other hand, its appropriation. As shown in the specialized literature[3] one of the first

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[2] See in this regards Cătălin-Silviu Săraru, *Tratat de contencios administrativ*, Ed. Universul Juridic, Bucharest, 2022, p. 75 et seq.; Cătălin-Silviu Săraru, *Cartea de contracte administrative. Modele. Comentarii. Explicatii*, Ed. C.H. Beck, Bucharest, 2013, p. 130 et seq.; Cătălin-Silviu Săraru, *Contractele administrative. Reglementare. Doctrină. Jurisprudență*, Ed. C.H. Beck, Bucharest, 2009, p. 75-80.

[3] Antonie Iorgovan, *Tratat de drept administrativ*, vol I, Ed. Nemira, Bucharest, 1996, p. 351-370.

French authors who developed the theory of administrative contracts was Laferriere in the work "*Traite de la jurisdiction administrative et du recours contantieux*", but the founder of the classical conception of the theory of administrative contracts is considered Professor Gaston Jeze, who for over three decades (1904 -1937) developed studies and articles. In Romania, this theory penetrated due to the development of legal relations between the components of the public administration system and private entrepreneurs - usually, companies with foreign capital and which concession various public works, public services. The Romanian specialists of the time were refractory to the concept of an administrative contract, the main representatives of the administrative legal doctrine - A. Teodorescu, P. Negulescu, C. Rarincescu - expressing the opinion that it is only "an exogenous institution", which could not evoke the essence of realities endogenous. For the historical stage of socialism, the work of the Bulgarian professor Petko Stainov[4] is best known for supporting the "obsolete" nature of the theory of administrative contracts. Valentina Gilescu[5], in 1970, he demonstrated that the "realizations specific to the socialist order" are compatible with the administrative contract, the basis of support being identified in art. 164, paragraph 2 of Law no. 11 of 1968, on education. From that moment, the concept was accepted by other authors. Currently, except for the point of view expressed by Valentin Prisăcaru[6] who opt for the term "administrative management act", the other specialists express their adherence to the notion of "administrative contract". Administrative litigation Law no. 554/2004 enshrined by art. 2 paragraph 1 letter c) the concept of administrative contract.

It must be specified that, although the interwar Romanian jurisprudence was generally refractory regarding the theory of administrative contracts, as well as the doctrine otherwise, there were still some decisions pronounced by the courts in which the influence of the theory of the administrative contract was felt. Thus, by Decision no. 1030 of 1929 of the Court of Cassation, section III, the existence of certain categories of contracts, namely those of appointments to positions or employments to positions, was admitted as being governed by other rules than the principles of law common. These contracts, being made by the administration for the satisfaction of a public service, were deemed to meet the characteristics of administrative acts of authority, being within the competence of administrative litigation courts[7]. Also in the interwar period, the opinion regarding the independent existence of administrative contracts was affirmed and the fact that the theory of unforeseeability that exceeds civil contracts is applied to this type of contract[8].

We believe that the practical reality fully proves the use and usefulness of contracts by public institutions, and the fact that at least one of the contracting parties is a public institution has the consequence that the completion of the contract is done by applying not only the rules of private law, but also the rules of administrative law that regulate the organization and functioning of the respective contracting authority from all points of view. In their activity, public institutions use both civil contracts and administrative contracts.

In accordance with the current legislation, the following specific features of the administrative contract have been highlighted in the specialized literature: it represents an agreement of will between a public institution and a private individual (natural person or legal entity); involves the performance of works, the provision of services by a private individual in exchange for remuneration; the object of the contract being determined; the contracting parties do not enjoy legal equality, so the determining subject has a position of superiority over the other subject of the contract (always the individual co-contractor); the contracting parties must accept some clauses that are established either by normative administrative acts, or by law, or by

[4] Petko Stainov, „La Theorie de contrats administratifs et le droit socialist", *Revue de droit public et de la science politique en France et a l'etranger*, no. 1/1966, p. 232 et seq.
[5] Valentina Gilescu, *Natura juridică a contractului de specializare universitară*, "Revista Română de drept", nr.7/1970, p. 122 et seq.
[6] Valentin Prisăcaru, *Tratat de drept administrativ roman, Partea generala*, 2nd edition, revised and added, Ed. All, Bucharest, 1996, p. 187-188.
[7] George Costi, *Noţiunea contractului administrativ*, Monitorul Oficial şi Imprimeriile statului, Imprimeria centrală, Bucharest, 1945, p. 9.
[8] Erast Diti Tarangul, *Tratat de Drept Administrativ Român*, Ed. Glasul Bucovinei, Cernăuţi, 1944, p. 480-482.

convention[9]; in the situation where the individual does not fulfill his obligations under the contract, due to his exclusive fault, the other subject of the contract can unilaterally modify or terminate the contract without resorting to justice; the written form of the administrative contract[10]; the resolution of disputes is the competence of the administrative litigation court, unless the law provides otherwise.

The category of administrative contracts includes: the public works contract, which has as its object the execution of public real estate constructions; the administrative transport contract, with the purpose of carrying out the transport of people and goods of a public nature for the account of the state; the supply contract, having as its object the supply and manufacture of movable material objects; the concession contract of a public service; the public loan contract, through which a private individual lends statues or a public institution a sum of money; service lease contract; contribution offer.

Constitutive elements of administrative contracts. These are: the parties to the contract (in an administrative contract, one of the parties must be a person under public law), the object of the administrative contract, which consists in entrusting a private individual with the performance of the specific services of a public administrative service, and the clauses of the contract. The derogatory (exorbitant) clause from common law is in most cases the decisive criterion for identifying administrative contracts.

Regarding the form of administrative contracts, although in principle they are concluded in the form of an offer followed by acceptance, nevertheless the validity of these declarations of will is subordinated, in relation to public institutions, to a series of conditions and special forms regarding the authorities in the institutions public that have the power to contract, at the choice of the private co-contractor and the procedure established for this purpose, which is, most of the time, the adjudication.

With regard to the execution and effects of these contracts, the legal regime is distinct from that of private law, because the conditions of exercise are more rigorous, and the sanctions more energetic.

The public institution seeks to satisfy the general interest and must constantly be able to adapt the content of the contract to its purposes, so that it has prerogatives with its co-contractor that have no equivalent in private contracts. The public institution can unilaterally modify the obligations of its co-contractor, either increasing them, changing them completely, or reducing them. In private law. the contract is considered as law between the contracting parties.

Under the administrative contract, the public institution may ask the other party to perform the obligations as established in the administrative contract. This type of contract gives the public institution the right to either lead or control the execution operations. This right is expressed in issuing service orders.

For the public institution, the contractual procedure involves the cumulative meeting of two aspects [11]:

a) the power to contract;

b) the choice of the co-contractor.

Regarding the conclusion of administrative contracts, in the theory of administrative law, the point of view was expressed that public institutions can use the following methods: open public adjudication, when all those interested in the object of the contract and who meet the general conditions required have the right to participate; restricted public awarding, when the public institution addresses a limited number of nominally designated enterprises; by call or competition; by direct agreement. (The public institution is free to carry out the negotiations that seem the most appropriate and, following them, to freely choose the co-contractor).

[9] Ion Rus, *Drept administrativ*, Ed. Lumina Lex, Bucharest, 2001, p. 227.
[10] Alexandru Negoiță, *Drept administrativ*, Ed. Sylvi, Bucharest, 1996, p.177.
[11] Mihai T.Oroveanu, *Tratat de drept administrativ*, 2nd edition, Ed. Cerma, Bucharest, 1998.

3. Conclusions

The administrative contract is terminated by the execution of the obligations by the parties or upon the expiration of the period for which it was concluded. As in private law, the contract can be terminated by the will of both contracting parties or by force majeure.

As a particularity of this type of contract, it should be remembered that its termination can also operate in the following situations:

- termination by the public institution, as a sanction, in case of fault, but without the fault of the co-contractor when the general interest requires it;

- the termination pronounced by the court;

This can intervene at the request of the individual, in case of serious fault of the public institution, or when the changes to the contract imposed on him unilaterally are not justified by the need to adapt the public service to a new situation or there is no case of force majeure;

- termination at the request of the public institution, when it voluntarily renounces to use its right of termination and prefers to refer to the courts.

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