THE FIELD OF ADMINISTRATIVE CONTRACTS IN THE ROMANIAN POSITIVE LAW RELATED TO THE PROVISIONS OF ART. 2 ITEM (1) LET. C) FROM LAW NR.554/2004 REGARDING THE ADMINISTRATIVE LEGAL DISPUTE

NICULAE GAMENȚ-ANTONIU

CRISTIAN GIUSEPPE ZAHARIE

Abstract:

This paper is an overview the administrative contracts as it shown in the contemporary practice of public administration authorities. Some observations and the point of view of authors regarding some practical aspects are presented. The paper submits for the specialist's different agreements realized by public administration authorities who show some specific features of administrative contracts. Post revolutionary regulations in the field of administrative law have refounded a judicial category which disappeared from the Romanian law at the end of the 40's: the administrative contracts.

Key words: *public administration, administrative contracts, regulations*

The provisions of art.2 item (1) let. d) from Law nr. 554/2004 regarding the administrative legal dispute consecrated in general terms in the Romanian law the field of administrative contracts, submitted under the aspect of the conclusion and the enforcement of jurisdiction to the tax and administrative legal dispute courts.

Broadly speaking, the administrative contract is a convention concluded between a public authority and a private person, a will consent submitted to a special judicial policy of administrative law, a convention which has a specific character due to the parties, object, applicable principles, conclusion, enforcement, ceasing, clauses and their solving.

These administrative contracts are judicial documents which the public administration bodies concluded with the administrative ones, documents which include a will consent triggering rights and obligations for the contracting parties.

They were also analyzed by distinguished authors from the interwar period. In prof. Erast Diti Tarangul's opinion "the contracts concluded by the administration with the private persons with the purpose of co-operating with a view to performing a public service or meeting a general interest are public law contracts or administrative contracts".

Administrative contracts are defined as the contracts concluded on the grounds of the will consent which interferes between an authority of public administration or a person authorized by it and a private person, submitted to the administrative law policy.

In Geoge Costi's opinion "by the administrative contract we understand the will consent, manifested under a certain form and concluded between the qualified representatives of an administrative person and private persons or the agents of other public administrations, upon certain determined objects, with the purpose of triggering judicial effects necessary to the meeting of the general interest".

The text let. c) item (1) of art.2 of Law 554/2004 limits the categories of contracts concluded by public authorities which are submitted to the jurisdiction of administrative legal dispute courts. In the determining and limiting of contracts which come under the jurisdiction of administrative legal dispute courts the legislator takes into account the criterion of their object, namely:

- the showing to advantage of goods which represent public property;
- the carrying out of the works of public interest;
- the carrying out of public services;
- public acquisitions.

The legal provisions do not confine only to the performing of these operations by the administrative procedures regarding the public acquisitions (including the assimilated contracts), granting and renting. Obviously, the conventions concluded by the public administration authorities cannot all be administrative contracts.

Despite some contrary opinions from the Romanian and foreign judicial doctrine we must exclude from the field of administrative contracts the civil, commercial and labour conventions, as well as the contracts regarding the goods from the state's private property and from its territorial-administrative centres.

It must also be pointed out that in the present drafting, the text of Law nr.554 from 2004 does not take into account the totality of the contracts concluded by the public authorities which the doctrine considers as being of an administrative judicial kind.

For the categories of the administrative contracts mentioned by art.2 item (1) let.c) from Law nr.554/2004 regarding the administrative legal dispute in the Project of the administrative procedure code there was suggested the assigning to the administrative legal dispute courts competence of public loan contracts and of the conventions regarding the selling of goods from the state's private property and from the territorial-administrative centres as well.

It is true that in the case of the selling of goods from the state's private property, the procedure of the approval of the contract is submitted to the administrative procedure, but, we must not omit the fact that the sold out good belongs to the state's private property and the enforcement of the contract is governed by the provisions of common law, which causes the judicial type of these contracts to be mainly of private law. But, this contract has some characteristics which bring it near to the administrative contacts.

In the case of the contracts of public loan, this sort is obviously administrative, of public law.

In the judicial doctrine, some contracts from the field of public transport and of irredeemable financing

(irredeemable financing contracts, grant contracts and collaboration contracts with a view to getting a financial aid) concluded by the authorities of the public adminis-

tration in the terms of administrative law are as well considered as being of an administrative judicial sort.

The relations between N.S.R.R. and the public institutions are regulated on the basis of the activity contract of the National Society of Romanian Railways, concluded between the Ministry of Transport, as a representative of the Government and N.S.R.R. The activity contract of N.S.R.R. is drawn up by N.S.R.R. together with the Ministry of Transport.

The contract of irredeemable financing is a contract by which within an administrative procedure a public authority offers an irredeemable sum of money to a beneficiary who has the obligation of carrying out the project for which he received the financing.

One party of the contract is necessarily a public authority, her field of competence setting the specific character of the contract. Many times the sums of money totally or partially come from community funds, and the provisions of the contract have absolute power for the parties and they are set between them as norms of a technical, financial or administrative kind.

Related to a variant of these contracts there has been shown in the doctrine that "the grant contract is that contract included between the Romanian Social Developing Fund and the representatives of rural communities and disadvantaged groups on whose grounds the Fund assigns the beneficiaries or, depending on the situation, the intermediary organizations, free of charge, sums of money called grants, with the exclusive purpose of the carrying out of the approved projects".

As it has already been pointed out, the provisions of Law nr.554/2004 also take into consideration the contracts which show the public property goods to advantage.

By enforcing Laws nr. 69/1991, 15/1990, 213/1998, 219/1998, 528/2004, 337/2006, 470/2002, 215/2001 and so on, the public administration authorities concluded various contracts having as purpose the ceding of the use (exploitation) of some real estate or personal estate from the public property of the state or of the territorial-administrative centres.

In the case of concession (including the contracts of the commissioning of the administration of public services by concession) and of renting, the judicial nature of these contracts is obviously administrative.

At present, the judicial policy of the contracts of granting public works and of the contracts of granting services is regulated by the provisions of G.E.O. nr.34 from 19.04.2006 regarding the assigning of the contracts of public acquisition, the contracts of granting public works and the contracts of granting services. The G.E.O. nr.34 from 19.04.2006 regarding the assigning of the contracts of public acquisition, the contracts of granting public works and the contracts of granting public services was passed and modified by Law nr.337/2006. With a view to enforcing the ordinance, the Government issued the Framework methodological norms, passed by G.D.nr.925 from 19.07.2006.

The G.E.O. nr.54 from 28 June 2006 regarding the policy of the contracts of granting public property goods brought a new regulation to the granting of the goods which were part of the public property of the state or territorial-administrative centres.

The assigning, concluding and carrying out of the renting contracts which regard state's public property goods and in which a state body takes part, are the aims of the regulating of several governmental laws out of which the most important with a general aspect in this regard are:

- Law nr.213/1998, regarding public property and its judicial policy;
- Law nr.215/2001 regarding the local public administration.

By these contracts, a state body - central or local public authority - must provide a private law person with the temporary, total or partial use of a good belonging to the public property of the state, in exchange for a sum of money called rent.

Art.125 from Law nr.215/2001 stipulates the possibility which the local and district councils have to decide for the public property goods, (…) to be rented.

By norms included in the special law, the public-private partnership contracts (PPP) and the public-private partnership contracts for the concession of works were implicitly classified as administrative contracts and the litigations turned up in connection with them were passed on to the administrative legal dispute courts for solving.

The public-private partnership contract for the concession of works was a contract whose aim was the carrying out or, depending on the situation, both the designing and the carrying out of one or more building works, the way they were included in the official statistical classifications, or the carrying out, by all means of any combination of these building works, which met the requirements of the contracting authority and which led to a result meant to carry out a technical-economic function by itself. In return of the carried out works, the contractor, as a concessionaire, received the right to totally or partially exploit the result of the works, a right to which, depending on the situation, the payment of a sum of money could be added.

After 1989, public administration authorities concluded a large number of contracts which regarded the showing to advantage of public property goods. Some of them allowed the avoidance of the public auction procedure and their classification proved difficult. Such contracts are:

- Contracts of the location of the administration, considered as having an administrative judicial nature if they had as target the ceding of the use of some public property goods. These contracts, rarely encountered at present, were frequently concluded in the 90's. In general, they were carried out either by the ending of term, or by their replacing by other contracts of sale (privatization), renting or concession. Among these contracts, only those whose aim is the exploiting of public goods are of administrative judicial nature. These contracts are stipulated by Law nr.15/1990 regarding the reorganization of state economic units as autonomous state-owned companies or trading companies and regulated by the Government Decision nr.1228/1990 concerning the methodology of concession, renting and location of administration, being mentioned as well in other various governmental laws.

The association in participation contracts regarding the public property goods or the contracts whose purpose is the achieving of some objectives of public interest. On the grounds of the dispositions of art.20 let. v and art.28 (2) and art.63 let. t from Law nr.69/1991 (completed by Government Ordinance nr.22/1997), the local and district councils concluded various partnership contracts. Some of these contracts display the

characteristics of some private law contracts, submitted to civil judicial policy, others contain the defining elements of the administrative contracts. The association in participation contracts from the second category have the following characteristics:

- one of the parties is a public authority (local council or district council);
- their objective is the meeting of a public general interest ;
- the judicial inequality of the parties;
- the establishing of the clauses by law or by a unilateral manner by the public administration authority on the grounds of and by enforcing the law;
- when the public interest requires it or when the private law person has not carried out her contracting obligations, the public administration authority can modify or unilaterally cancel the contracts;
- they are meant to ensure the working of some public services, the carrying out of some works, activities or they concern the exploitation, the showing to advantage of a public property good;

The association contracts concluded between the public administration authorities have an administrative judicial nature if their objective is the financing or the carrying out of some actions, works, services or projects of local or district public interest, or if the local public authority takes part in the association with a good which belongs to the public property of the territorial-administrative centre.

In this case, the showing to advantage of public property goods is being achieved.

The possibility of concluding these contracts by the local public administration authorities is stipulated by Law nr.215/2001 within three distinct articles. In art.104 item (1) let.(s) from the law it is stipulated that "the district council as a deliberative authority of the local public authority formed at a district level, (…) decides, on the terms of the law, the cooperation or the association with Romanian or foreign judicial persons, with nongovernmental organizations and with other social partners, with a view to financing and carrying out, together, actions, works, services or projects of district public interest". Art.95 item (2) let.(r) from the law also stipulates the attribution of local councils of the districts of the Municipal town of Bucharest of deciding "under the terms of the law, with the beforehand consent of the General Council of the Municipal town of Bucharest, the cooperation or the association with Romanian or foreign judicial persons, with nongovernmental organizations and with other social partners, with a view to financing or carrying out, together, actions, works, services or projects of local public interest";

- The commodate contracts regarding some public property goods concluded by the public administration authorities.

The issue of establishing the administrative judicial nature of the commodate contracts concluded by the administrative authorities is to be taken into consideration in the case in which their objective is represented by one or more public property goods.

The concluding of some commodate contracts regarding goods from public property is regulated by art.136 item(4) from the Constitution, art.17 from Law 213/1998 and art.126 from Law nr.215/2001. In art.126 from Law 215/2001 it was stipulated that local and district councils can turn over for free of charge use, for a limited time period, local or district public or private property movables or real estate,

depending on the situation, to judicial persons, non-profit making, who carry out charitable activities of public utility, or to public services".

By these contracts, in the case of the carrying out by the private law person of an activity of public interest a showing to advantage of the public property goods is performed;

- The partnership contracts regarding public property concluded by the public administrative authorities.

Law nr.215/2001 regarding the local public administration, republished, within art.36, item7 letter a) stipulates that "the local council can decide the association with judicial persons in order to carry out some works of local public interest".

Local councils concluded such contracts on the grounds of the provisions of art.36, item 2, letter c and item 7 letter a and art.45 from Law 215/2001 republished regarding the local public administration.

This category of contracts concluded by the local public administration authorities can refer to operations which involve the taking hold of public property;

- The contracts concluded by the public administration authorities regarding the ceding of the right to administer a public property good.

Regarding a real right concerning public property, the concluding of such a contract involves the enforcement of the administrative judicial policy. The objective of this contract is represented by the free of charge ceding of the right to administer one or more public property goods;

- The collaboration contracts concluded by the public administration authorities regarding the showing to advantage of the public property.

The objective of the contracts is represented by the collaborating of the contracting parties, in order to exploit a public property good, contracting parties who meet the contracting obligation of mutually providing each other with certain services, complying with the terms and conditions stipulated by the contract.

The main objective of the collaboration contract is represented by the exploiting of the public good in the location stipulated by the contract.

Obviously, the contract shows to advantage property goods, a characteristic which renders to it an administrative judicial nature.

We can thus conclude that, as in the present positive law, the applications of the notion of administrative contract do not confine only to the contracts of concession of services and public works or to the totality of the public acquisition contracts, but they are to be found in a variety of contracts which the administration concludes with third parties.

For the future, we can anticipate, taking into account the regulations from the West-European community states that the field of administrative contracts will enjoy a broader regulation which will trigger the enhancing of the variety and role of these contracts in full accord with the new exigencies and the general public interest.

REFERENCES

Balan, E, 2007, *Financial Law*, Bucharest, C.H. Beck.

Costi, G., 1945*, The Administrative contract notion*, Bucharest, The Official Journal and State's printing offices.

Giurgiu, L., Zaharie, C.G., 2008, *Theoretical and practical aspects regarding the provisions of art.155 from the project of the Code of Administrative Procedure and Decision nr.765 from 24 February 2004 of the tax and administrative legal*, dispute Section of the High Court of Cassation and Justice, Bucharest, Judicial Universe,

Mrejeru, T., Florescu, D.A.P., Lazar, R., Mrejeru, B., 2000, *The international and internal contract of association in participation, commented legislation and jurisprudence*, Bucharest, Continent Publishing house.

Negoiță, A., 1996, *Adinistrative Law*, Bucharest, Sylvi Publishing house

Petrescu, R.N., 2001, *Administrative Law*, Cluj-Napoca, Cordial Lex Publishing house.

Rarincescu, C.G., *The Romanian administrative legal dispute*, Universal Alcalay and Co. Publishing house

Tarangul, E.D., 1944, *A Treaty of Romanian Administrative Law*, Cernauti, „Bucovina's Voice" Publishing house