

ADMINISTRATIVE AGREEMENTS –CONVENTIONS SUBJECTED TO THE RULES OF TEMPORALITY, REVOCATION AND REDEMPTION

Associate Professor Dr. **Cristian Giuseppe ZAHARIE**

Department of Legal Sciences
Romanian-American University, Bucharest, Romania

Abstract

An issue that raises contradictions in the legal practice is represented by the possibility of unilateral termination or the modification of the clauses of administrative agreements, unilaterally, on the ground of public interest defense. The traditional conception of the administrative agreements derives from the principle of “*the agreement is the law of the parties*”, because such conventions pursue the public interest, as a legal tool for achieving the public administration.

Keywords: administrative agreement, concession, revocation, redemption, termination, public interest

The work undertaken in order to attain the general interests of the company, the bodies of public administration are not limited to the issuance of unilateral administrative deeds, but also they enter administrative contracts that are different from those of civil law, specially based on the fact that they are subjected to some rules of public law that are part of the administrative legal regime.

The administrative agreements are “*the legal deeds concluded by the public administration bodies with the administered ones, deeds containing an agreement that generates rights and obligations for the contracting parties*”¹. Until now, even if there were elaborated several projects of administrative procedure codes or administration codes, the lawgiver has not regulated unitary the matter of the administrative agreements. However, Law no. 54/2004 on the administrative contentious, in art. 2 paragraph (1) letter c provides that there are assimilated to the administrative deeds in the meaning of this law, also the agreements entered with public authorities that have as object the improvement of the public property goods, execution of works of public interest, rendering the public services and public procurements.

An issue that raises contradictions in the legal practice is represented by the possibility of unilateral termination or the modification of the clauses of administrative agreements, unilaterally, on the ground of public interest defense. The traditional French doctrine was considering, as a principle, these agreements as being revocable and redeemable in terms of public interest on their execution, being different comparative with the civil agreements subjected to the general principles of irrevocability, obligation of fulfilling the undertaken obligations and contractual freedoms. The temporality,

¹ Alexandru Negoită, *Administrative Law*, Sylvi Publishing House, Bucharest 1996, p. 173.

revocability and redemption are features deriving in the opinion of some authors from the principle of inalienability of the goods that are part of the public domain².

The Law on Administrative Contentious results from the corroboration of paragraph 2) and 3) of art. 8, where the instance of administrative contentious, for the settlement of the litigations that occur during the preliminary phases of entering an administrative agreement, and also for the settlement of the litigations concerning the application or execution of such agreement, will consider the rule based on which the principle of contractual freedom is subjected to the principle of public interest priority.

The traditional concepts of the administrative contracts derive from the principle *"the agreement is the parties' law"*, because these conventions are aimed to achieve the public interest, representing a legal tool for the public administration. However, these legal provisions are limited in application by the constitutional principle of the right to a fair trial, stated in art. 21 paragraph 3) of the fundamental law. Thus, it is understood that *"based on the principle consecrated in art. 21 of Constitution, the instance, towards the factual situation from a case, can appreciate that the public interest requires the amendment of certain clauses of the agreement that became, as an example, too burdensome for the concessionaire"*³.

But what aims the notion of *"public interest"*? This is defined in art. 2 paragraph 1) letter 1) as being the interest aiming the legal order and constitutional democracy, guarantee of the rights, freedoms and fundamental obligations of the citizens, satisfying the communitarian needs, achieving the public authorities' competency. The expression *"satisfying the communitarian needs"* concerns *"the social necessities that imply to restructure the public administration organization, perfecting the public service system to the level of cities, neighborhoods, and others"*⁴.

The attainment of the public administrative authorities' competence represents the fulfillment of its duties and obligations in regime of public power, fact determined by the public order, so by the public interest. These concepts can be found in the normative deeds regulating different types of administrative law agreements or conventions subjected to the regulations of public law and also of those of private law.

For the concession of the public goods, the concession provider may unilaterally modify the concession contract, with the previous notification of the concessionaire, due to exceptional reasons related to the national or local interest, by case. In case the unilateral modification of the contract determines a prejudice, the concessionaire has the right to receive without delay the fair compensation. In case of disagreement between the concession provider and concessionaire concerning the amount of compensation, this will be established by the competent law court. In any case, this disagreement cannot allow the concessionaire to not fulfill its contractual obligations⁵.

² See Antonie Iorgovan, *Treaty of Administrative Law*, Nemira Publishing House, Vol. II, Bucharest, 1996, p. 96.

³ Antonie Iorgovan, *New Law on Administrative Contentious – Genesis and explications*, Roata Publishing House, Bucharest, 2004, p. 318.

⁴ Antonie Iorgovan, *op. cit.*, p. 291.

⁵ See art. 53 paragraph (1)-(3) from the Emergency Ordinance no. 54/2006 on the regime of concession agreements for public goods, published in the Official Gazette, part I no. 569 from 30/06/2006.

Lively debates were also raised by the provisions of art. 38 from the new regulation of the private-public partnership, being found their non-constitutionality.

The current regulation in force, the Law on public-private partnership no. 178/2010⁶, published in the Official Gazette of Romania, Part I, does not expressly provide the possibility of unilateral modification of the public-private partnership agreement by the public partner, but only the general possibility of unilateral termination of it.

In the new regulation instituted by Parliament it is provided that for exceptional reasons related to the national or local interest, the public partner can, with the previous notification of the private partner and the project company:

- to unilaterally modify certain provisions of the public-private partnership agreement, if this possibility was included in the awarding documentation in a clear, precise and non-equivocal manner and without being altered the generic nature of the initial agreement or in any other case, for the unilateral modification of the agreement, as provided by the Government Emergency Ordinance no. 34/2006, approved with amendments and modifications by Law no. 337/2006, with subsequent modifications and amendments, which will be adequately applied;

- terminates unilaterally the public-private partnership agreement, in legal conditions. The Constitutional Court found the non-constitutionality of the above-mentioned provisions.

The critiques raised against this article were aiming the notion of “*local interest*”, for not being defined, and thus, it can offer a free way for abuses from authorities and that are not clearly established the situations that can represent exceptional reasons of national or local interest that lead to the unilateral termination of the agreement and that in this form, the law provides a procedure that lacks the transparency concerning the replacement of the private partner, without performing a new awarding procedure. In fact, nowhere in law, it is not defined the notion “*exceptional reasons*”, or the terms “*national interest*” and “*local interest*”.

The constitutional court ruled by the Decision no. 390 from July 2nd 2014 concerning the objection of non-constitutionality of the provisions of art. 38 paragraph 1) and art. 42 of the Law on the public-private partnership⁷.

In grounding the objection of non-constitutionality, its authors sustain that art. 38 of the criticized law does not define, nor establish, the criteria for appreciating the “exceptional reasons related to the national or local interest”, by invoking which public partner can unilaterally modify or terminate the public-private partnership agreement. In such conditions, considering that the text is not sufficiently clear and precise, it is appreciated that there are breached the provisions of art. 1 paragraph (5) of the Constitution. Concerning art. 38 paragraph (1) of the Law, the Court retains that this, in the introductive phrase, contains the notion “exceptional reasons”, but without defining it; therefore, the public partner will be the one that will establish if a situation or another

⁶ Law on public-private partnership no. 178/2010 was published in the Official Gazette of Romania, Part I, no. 676 from October 5th 2010.

⁷ Decision no. 390 from July 2nd 2014 concerning the object of non-constitutionality of the provisions of art. 38 paragraph 1) and art. 42 of the Law on public-private partnership published in the Official Gazette no. 532 from July 17th 2014. The objection of non-constitutionality, recorded by the Constitutional Court under no. 2702 from June 19th 2014, represents the object of the Constitutional Court File no. 598A/2014.

represents or not an exceptional reason based on which the agreement could be unilaterally terminated. The Court retains that a legal notion can have an autonomous content and meaning, different from a law to another, with the condition that the law using such term might define it. Or, for this case, the Court finds that the lawgiver has not defined the notion of “*exceptional reasons*”.

In such conditions, the public partner will be the one that will establish the meaning of this notion from case to case, which can unbalance the contractual equality between parties. In addition, even though the public partner is the one that establishes in fact this meaning, it is raised the issue about establishing the elements that will represent the fundament of its appreciation. Or, the analyzed text does not offer such elements, which means that the appreciation of the public partner can be only subjective, and as a result, discretionary. Therefore, due to its lack of clarity, precision and prevision, art. 38 paragraph (1) of law creates the normative premise required for the execution of the agreement to imply the application of these arbitration procedures.

The term “exceptional” was and it is used in the Romanian administrative law. As an example, the text of the Government Emergency Ordinance no. 34/2006 on awarding the public procurement agreements, of the contracts of public works concession and contracts of service concession⁸, published in the Official Gazette of Romania, Part I, no. 418 from May 15th 2006, which, when makes reference to the exceptional cases, offers certain indications for the interpret in order to establish in context the sphere of this notion.

The court stated that *“the compliance with laws is mandatory, but it cannot be claimed for a law subject to comply with a law that is not clear, precise and expected, since this cannot adjust its conduit depending on the normative hypothesis of law. One of the requests of the principle on the compliance with laws aims to the quality of such legal deeds. Thus, any legal deed should fulfill certain qualitative conditions, respectively to be clear, precise and expected”*⁹.

It results that art. 38 paragraph (1) of law is equivocal from a double perspective, namely that it does not determine the contractual clauses and do not fix margins and value limits that might represent the object of unilateral modification, respectively that it does not clearly establish the obligations of the public partner concerning the method to include a clause of unilateral modification in the awarding documentation. The court observes that letter a) of the same paragraph concerns the Government Emergency Ordinance no. 34/2006 that regulates the public procurements.

⁸ Government Emergency Ordinance no. 34/2006 on awarding the public procurement agreements, public works concession contracts and service concession contracts, published in the Official Gazette of Romania, Part I, no. 418 from May 15th 2006.

⁹ See the following deeds of the Constitutional Court: Decision no. 903 from July 6th 2010, published in the Official Gazette of Romania, Part I, no. 584 from August 17th 2010, Decision no. 743 from June 2nd 2011, published in the Official Gazette of Romania, Part I, no. 579 from August 16th 2011, Decision no. 1 from January 11th 2012, published in the Official Gazette of Romania, Part I, no. 53 from January 23rd 2012, Decision no. 447 from October 29th 2013, published in the Official Gazette of Romania, Part I, no. 674 from November 1st 2013, Decision no. 1 from January 10th 2014, published in the Official Gazette of Romania, Part I, no. 123 from February 19th 2014, or Decision no. 183 from April 2nd 2014, published in the Official Gazette of Romania, Part I, no. 381 from May 22nd 2014.

The public-private partnership is not a public procurement agreement, part of the sphere of concession contracts, which means that it is in conflict with the reference to the Government Emergency Ordinance no. 34/2006 that regulates the public procurement agreements, and the correct reference to the “legal conditions” should be to the Government Emergency Ordinance no. 54/2006 on the regime of the contracts of public goods concession. Thus, it becomes obvious that the text suffers from its clarity, precision and expectance perspective. Therefore, the Court finds that art. 38 paragraph (1) of Law is against art. 1 paragraph (5) of the Constitution, in its part concerning the law quality, the recipients of the law not having the objective possibility to adjust their conduit to the hypothesis of the analyzed rule.

In such conditions, the Court finds that art. 38 paragraph (1) of law affects the positive obligation of the public authorities to correctly inform the private partner, obligation provided to art. 31 paragraph (2) of the Constitution. The legal text, also, affects the possibility of any person individual to initiate and perform an activity with lucrative purpose, by the discriminatory support of certain economic operators, in the meaning of a possible disturbance of the private partner, after entering the agreement¹⁰.

Bibliography:

1. Law on public-private partnership no. 178/2010, published in the Official Gazette of Romania, Part I, no. 676 from October 5th 2010.

2. Government Emergency Ordinance no. 34/2006 on assignment the public procurement agreements, public works concession contracts and service concession contracts, published in the Official Gazette of Romania, Part I, no. 418 from May 15th 2006.

3. Emergency Ordinance no. 54/2006 on the regime of the public goods concession agreements, published in the Official Gazette of Romania, Part I no. 569 from 30/06/2006.

4. Decision no. 230 from March 14th 2007, published in the Official Gazette of Romania, Part I, no. 236 from April 5th 2007.

5. Decision no. 903 from July 6th 2010, published in the Official Gazette of Romania, Part I, no. 584 from August 17th 2010.

6. Decision no. 743 from June 2nd 2011, published in the Official Gazette of Romania, Part I, no. 579 from August 16th 2011.

7. Decision no. 1 from January 11th 2012, published in the Official Gazette of Romania, Part I, no. 53 from January 23rd 2012.

8. Decision no. 447 from October 29th 2013, published in the Official Gazette of Romania, Part I, no. 674 from November 1st 2013.

9. Decision no. 1 from January 10th 2014, published in the Official Gazette of Romania, Part I, no. 123 from February 19th 2014.

10. Decision no. 183 from April 2nd 2014, published in the Official Gazette of Romania, Part I, no. 381 from May 22nd 2014.

¹⁰ See Decision no. 230 from March 14th 2007, published in the official gazette of Romania, Part I, no. 236 from April 5th 2007.

11. Decision no. 390 from July 2nd 2014 concerning the object of non-constitutionality of the provisions of art. 38 paragraph 1) and art. 42 of the Law on public-private partnership published in the Official Gazette no. 532 from July 17th 2014.

12. Iorgovan, Antonie, *The New Law of Administrative Contentious – Genesis and explications*, Roata Publishing House, Bucharest 2004.

13. Iorgovan, Antonie, *Treaty of Administrative Law*, Nemira Publishing House, volume II, Bucharest, 1996.

14. Negoită, Alexandru, *Administrative Law*, Sylvi Publishing House, Bucharest, 1996.