

THE ADMINISTRATIVE AGREEMENT AS A LEGAL FORM FOR PUBLIC SERVICES IN COMPARATIVE AND ROMAN LAW

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Abstract: *Doctrinal discussions on the administrative agreement have arisen along with the economic, social and industrial development of European countries. The principle of separation of powers adopted in France after the Revolution of 1789, the need to protect private law subjects, has become increasingly necessary as private subjects may be affected by the exercise of public power. Gradually, given the need to protect the interest of both public and private sectors, it has been proceeded to create a system of administrative law, separate from the common law system.*

Key words: *administration, administrative agreement, comparative law, civil and commercial contracts.*

Doctrinal discussions on the administrative agreement have arisen along with the economic, social and industrial development of European countries. In the article published in the *Fordham International Law Journal*, volume 26, number 6, 2002^[1], Hector A. Amiral comments on the notion of "government contract" as variants of the administrative contract that originated in the French law. The French law, as the author believes, influenced the Latin - American legal system so that this variety of administrative contract has been adopted in several Latin American countries (Brazil, Chile, Uruguay).

Thus, the principle of separation of powers adopted in France after the Revolution of 1789, the need to protect private law subjects, has become increasingly necessary as private subjects may be affected by the exercise of public

power. Gradually, given the need to protect the interest of both public and private sectors, it has been proceeded to create a system of administrative law, separate from the common law system.

In the 19th century, the *Conseil d'Etat*, which was originally an organization intended to guide the French public administration has turned into an entity with jurisdictional powers, acting as a real court with general jurisdiction of modern times. Thus, in 1953, administrative courts were established, below the *Conseil d'Etat*, and in 1987 administrative appellate courts whose decisions could not be further appealed to the courts of common law. Creation of administrative courts of law gave rise to the need to separate those contracts, which were in the competent administrative courts (*contrats administratifs*) from the rest of the

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contracts remaining in the jurisdiction of the courts of law^[2].

The separation of the two types of contracts was often difficult. Initially all contracts, regardless of nature and their particulars were assigned to the competence of courts of law, except those that by special law which were considered and classified as administrative contracts. Also, in the nineteenth century, the contracts for the provision of public services were included in the area of administrative contracts. This aspect represents the first time the legislator had focused on the administrative law from the perspective of its characteristics.

Subsequently, the *Conseil d'Etat* came to complement this criterion to distinguish administrative contracts, supporting the idea that the administrative nature of a contract may result from the contractual terms and clauses inserted, thus arising the notion of "*exorbitant clause*"^[3].

Thus, in light of the above, in addition to those contracts that were qualified by law and express provision, the legal nature of an administrative contract was acquired by contracts that:

- contained a clause by which the public administration intended to exercise public powers;
- the contract had a special regime, which conferred certain powers of control to the public administration;
- the contract was awarded to a private law operator, the direct performance of a public service or of a related public service^[4].

This classification and demarcation from the rest of the contracts covered by common law contracts gave rise to controversy. One had to determine which types of clauses were to be considered "*exorbitant*", if the excessive, abusive clause was the rare and unusual clause in the common law contracts that was illegal, prohibited in common law contracts^[5].

The controversy regarding the legal nature of the administrative contract gave birth to a legislative package that governed this newly formed, legal institution for a long time. From this French legislative package we can extract two characteristics regarding the administrative contract, that are applicable nowadays, in the Romanian legal system:

- The public authority has a contractual position superior to the other contractual party, which is the holder of private subjective rights;

- The public authority has the opportunity and the faculty recognized by law not expressly mentioned in the administrative agreement being able to make use of these "unwritten" powers. For example, the public authority may unilaterally terminate an administrative contract for cause of "*public utility*" even if that power is not expressly mentioned in the contract^[6].

On the other hand, the contractor as well, the private subjective rights holder has the option to terminate the administrative contract for unforeseen circumstances that affect the economic balance of the contract – the so called *theory of imprevision* (law that is not recognized in some systems of administrative law). In the last century in the Romanian legal system, the theory of imprevision was applied only regarding the administrative contracts, unlike the civil contracts to which it was unapplicable^[7].

The theory of imprevision is founded on the following reasoning: if, due to unforeseen events, the execution of a contract would become too onerous, the administrative public administration is obliged to modify the conditions of execution of the administrative contract, otherwise risking to provide the poor performance (which affects the general public interest) can cause bankruptcy of the private subject and affects even the public interest, the proper functioning of

public services. The theory of imprevision is similar to the "*the rule of reasonableness*" of common law. This rule became a constitutional principle and an administrative one in the United States of America^[8].

This principle was one of the grounds for the Supreme Court of the United States to proceed to declare a law as being unconstitutional or a certain provision of a law as unconstitutional.

Of course, the power to terminate the administrative contract in French law is not absolute. It is likely to prejudice the private contractor that has a legally recognized right to obtain damages and even to compensate for the profit loss^[9]. Note however that these clauses regarding the compensation of the private contractor are rarely found in the applicability of the public service concession contract, where this clause might prove extremely costly for the public authority.

It should be noted that some French authors do not share the view that the administrative contracts would be diametrically opposed, distinct from the common law. We consider in this regard, the opinions of **Charles Debbasch** - *Droit administratif*, edition VI, 2002, page 531. On the other hand, some authors believe that, although there are some differences between two types of contracts: the administrative contracts and the common law contracts, the doctrine and the jurisprudence tend to exaggerate this distinction. We consider in this respect the opinion of the author **Francois Llorens**, *Contrat d'Entreprise et Marche des Travaux Publics*, 1981, pages 651-658.

Currently, however, the opinion of the French authors who consider that the two types of contracts: administrative and common law gradually present similarities was materialized because of the European Community law which establishes a clear distinction between the administrative

contract and the common law contract. This supports the similarity between the two types of contracts and the last legislative changes. In France for example, the legislation has seen changes which "threaten" the specific administrative contract in that there is a specific regulatory framework that allows different private structures to get involved in projects and services. Accessing EU funds in order to carry out various services and public works, in all EU Member States, including Romania, appears for the administrative law doctrine as a specific threat to the institution of the administrative contract. Although, at first sight it appears as a tendency to unify the administrative contract with the common law, the issue involves discussion and requires a thorough analysis that we intend to approach separately.

In Argentina for example, non-EU state, the Constitution is similar to the Constitution of the United States. So, unlike in the European countries and the French model where the Court of Appeal decisions are not appealed in the superior courts of common law this is possible in Argentina. Although the Argentine legal system had important French and American influences, the fundamental differences between the Argentine and the French legal system has created the legal and doctrinal controversies that have not been resolved over time in favor of the American model. Currently, due to the American influence on the legal system, there is a clear distinction between administrative contracts and the other types of common law contracts.

The Constitution of Argentina in 1853 paved the way for the Argentine Supreme Court jurisdiction to settle all civil disputes (general competence to settle disputes), the notion of civil covering every dispute that was not of criminal nature. As "civil" disputes have become increasingly

numerous, this area includes both civil, and commercial litigations, administrative and fiscal, labor disputes a.s.o. In the twentieth century, the Supreme Court has limited jurisdiction on the notion of "civil" trial, starting to relate to the notion of "civil" as opposed to the notion of "administrative".

Although this role avoided overcrowding the Supreme Court, it had a double meaning, automatically leading to the expansion and jurisprudential recognition of the concept of "administrative" which gradually acquired the meaning of any contracts in which one party is a government agency (in the sense of public authority). Thus, the notion of "administrative contract" is now widespread in Argentina as well, but without an explicit regulation^[10].

On the current status of the administrative contract in Argentina, the same author^[11] mentions that the administrative contract is currently defined as the contract executed by a government agency (with the meaning of public authority) having as contracting parties the holders of private subjective rights, and provided that the contract will fulfill or perform public services.

The definitions given by various Argentinean authors^[12] in the administrative law offer broad and leave room for interpretations and a similar application of the French legal system:

- The administrative contract aims to satisfy a public interest and purpose;
- The existence of a direct, immediate, express connection between the conclusion of the administrative contract and the state functions;
- This public interest in each administrative contract.

According to these definitions, it is hard to find a civil agreement where one of the parties is a public institution. Even the Argentinean jurisprudence makes a clear distinction, just as the French system does

between the contracts that have been always considered administrative contracts (involving public works, public assets and services) and those considered by courts as being administrative, qualified as such by the legal practice. For instance, mail distribution services have been classified by Argentinean courts as public services covered by administrative contracts. In the Argentinean legal system, the latest legislation changes gave birth to the hypothesis according to which all contracts signed by a public authority are administrative, except for the contracts where their civil, private nature is expressly stipulated^[13]. Thus, as a similarity to the French system and the Argentinean legal system, there are traits specific to the administrative law in general and to the administrative contract, in particular:

- The private contracting parts are in a subordination relation with the contracting public authority;

- The administrative contract is governed by the administrative law, whose regulations are specific as compared to the general civil law regulations;

- The public authority has certain "powers", prerogatives over the other private contracting parts (but not "rights" that are specific to the civil law and the civil contract);

- Actions ordered by a public authority to perform an administrative contract are genuine administrative acts, enjoying a relative validity presumption and claiming immediate enforcement;

Inapplicability of civil provisions, such as the *exception of non-performance of the contract* "*exceptio non adimpleti contractus*" on the private contracting party (this exception cannot be invoked unless failure of performance comes from the public authority and thus makes impossible the performance of its own obligations by the private law contractor^[14].

The comparison between the two systems the French and the Argentinean shows that the Argentinean administrative contract is based on the French administrative contract model. The notion of French administrative contract in the Argentinean law has a wider range of applications than in the French system. For instance, rental of a private area by a public institution in the French law is governed by the civil law, therefore being considered a civil contract, while in the Argentinean law it is considered an administrative contract^[15].

As regards the Roman law system, we believe that in order to begin a detailed analysis of the administrative contract, it is of utmost importance to start from the definition of this type of contract, especially given that this concept experienced various changes of opinion.

Notes

1. Hector A. Amiral. *Government Contracts under Argentine Law: A Comparative Law Overview*. Law no. 273/2004 regarding the Regime of Adoptions, as subsequently modified. In: *Forhham International Law Journal*, vol. 26, issue 6, 2002, article 6, p. 1716 “.
2. Rene Chapus, *op.cit.*, *Droit Du Contentieux Administratif, (The Law of The Administrative Proceedings)* edition XIX, 2001, pp. 53-97.
3. The first case of this type was *Societe des Granits Porphyroides des Vosges, Conseil d’Etat*, July 31, 1912.
4. Andre de Laubardere, *op. cit.*, *Traite des Contrats Administratifs, (Treaty of the Administrative Contracts)*, 2nd edition, 1984, pp.125 – 240.
5. Laurent Richer, *Droit des Contrats Administratifs, (The Law of the Administrative Contracts)* 3rd edition, 2002, page 88-90; Examples of clauses exorbitant, unfair: permission public authority to unilaterally modify the contract, although this clause was not considered to be "exorbitant" abusive always.
6. Andre de Laubardere, *op. cit.*, *Traite des Contrats Administratifs, (Treaty of the Administrative Contracts)* 2nd edition, 1984, page383 – 408, page. 658-671; Laurent Richer, *Droit des Contrats Administratifs, (The Law of the Administrative Contracts)*, 3rd edition, 2002, page. 219 – 225, 231 – 235, *op. cit* V. Vedinas, *Drept administrativ, the 6th edition,(Administrative Law)*, Publishing House Universul Juridic, page. 125-130.
7. A. Iorgovan, *Tratat de drept administrativ,(Administrative Law Treaty) vol. II*, the 4th edition. Bucharest. All Beck Publishing House, 2005, page 109.
8. M. Lepadatescu, *Teoria generala a controlului constitutionalitatii legilor; (The General Theory Regarding The Control Over The Law Constitution)*. Bucuresti. Didactic and Pedagogic Publishing House, 1974, pag.199 si urm; A. Iorgovan, *Tratat de drept administrativ, vol.II, (Administrative Law Treaty)* the 4th edition, Publishing House All Beck, 2005, pag. 109.
9. Andre de Laubardere, *Traite des Contrats Administratifs, (Treaty of the Administrative Contracts)* 2nd edition, 1984, pp. 668-671.
10. Hector A. Amiral. *Government Contracts under Argentine Law: A Comparative Law Overview*. In: *Forhham International Law Journal*, vol. 26, issue 6, 2002, article 6, page 1719, “
11. Hector A. Amiral. *Government Contracts under Argentine Law: A Comparative Law Overview*. In: *Forhham International Law Journal*, vol. 26, issue 6, 2002, article 6, page 1719.
12. Miguel A. Bergaitz. *Teoria General de los Contratos Administrativos, (The General Theory regarding Administrative Contracts)* 2nd edition, 1980, pp. 246-247; Rafael Bielsa, *Derecho Administrativo, (Administrative Law)* the 3th edition, 1955, pag. 142- 153; Juan Carlos Casagne, *La Sustantividad del Contrato Administrativo y sus Principales Consecuencias Juridicas, (The Consistence of the Administrative Contract and it is Primary Judicial Effects)*, *The Administrative Law Revue* (1994) pag. 15-16; Hector Escola, *Tratato*

- Integral de los Contratos Administrativos, (Full Treaty of Administrative Contracts)* 1977, pag 127-131.
13. Hector A. Amiral. *Government Contracts under Argentine Law: A Comparative Law Overview*. In: Forhham International Law Journal, vol. 26, issue 6, 2002, article 6, pag. 1721.
14. Hector A. Amiral. *Government Contracts under Argentine Law: A Comparative Law Overview* In: Forhham International Law Journal, vol. 26, issue 6, 2002, article 6, pag. 1721. “”
15. Andre de Laubardere, *Traite des Contrats Administratifs, (Treaty of the Administrative Contracts)* 2nd edition, 1984, pag. 341-342; Laurent Richer, *Droit des Contrats Administratifs, (The Law of the Administrative Contracts)*, 3rd edition, 2002, pag. 87.