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CONSIDERATIONS REGARDING THE OBJECT OF THE JUDICIAL ACTION IN ORDER TO RESOLVE DISPUTES ARISING FROM EXECUTION OF ADMINISTRATIVE CONTRACTS

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Disputes arising from the execution of administrative contracts constitute a continuous challenge to the social actors involved. The Republic of Moldova could take advantage of Romanian legislation if it started from the assumption that the theories and principles that govern administrative contracts in Romania are valid for it. In the case of Romania, the reconsideration of art. 8 para. (2) of the Administrative Litigation Law no. 554/2004 which requires a legislative intervention in order to cancel the negative consequences for the private entrepreneur, part of an administrative contract, as a result of the procedural defect of not invoking, ex officio, by the court, at the first term, of functional material competence. After such an approach, the legislature of the Republic of Moldova could also be inspired, and could improve and harmonize the provisions of the Administrative Litigation Law no. 793 of 10.02.2000 and the Administrative Code no. 116/2018. Anyway, in The Republic of Moldova, by virtue of its status as a candidate country for the EU, many legislative harmonizations will take place, and Romania's experience would help.

Keywords*: administrative contract, administrative dispute, law enforcement professionals, conflict, conciliation, litigation, commercial mediation.*

CONSIDERAȚII PRIVIND OBIECTUL ACȚIUNII JUDICIARE ÎN VEDEREA SOLUȚIONĂRII LITIGIILOR PROVENITE DIN EXECUTAREA CONTRACTELOR ADMINISTRATIVE

Litigiile provenite din executarea contractelor administrative constituie o provocare continuă la adresa actorilor sociali implicați. Republica Moldova ar putea profita de legislația românească dacă ar pleca de la ipoteza că teoriile și principiile care guvernează contractele administrative din România îi sunt valabile. În cazul României se impune reconsiderarea art. 8 alin. (2)al Legii contenciosului administrativ nr.554/2004 ce necesită o intervenție legislativă în vederea anulării consecințelor negative pentru întreprinzătorul privat, parte a unui contract administrativ, urmare a viciului procedural al neinvocării, din oficiu, de către instanță, la primul termen, a competenței material funcționale. După un astfel de demers și legislativul din Republica Moldova s-ar putea inspira, și, și-ar putea îmbunătăți și armoniza și dispozițiile Legii contenciosului administrativ nr.793 din 10.02.2000 și a Codului administrativ nr.116/2018. Oricum, în Republica Moldova, în virtutea statutului ei de țară candidată la UE, vor avea loc multe armonizări legislative, iar experiența României ar ajuta.

Cuvinte-cheie: *contract administrativ, litigiu administrativ, profesioniști ai dreptului, conflict, conciliere, litigiu, mediere comercială.*

CONSIDÉRATIONS SUR L'OBJET DE L'ACTION EN JUSTICE POUR RÉSOUDRE LES LITIGES DÉCOULANT DE L'EXÉCUTION DES CONTRATS ADMINISTRATIFS

Les litiges découlant de l'exécution des contrats administratifs constituent un défi permanent pour les

acteurs sociaux impliqués. La République de Moldova pourrait tirer parti de la législation roumaine si elle partait de l'hypothèse que les théories et principes régissant les contrats administratifs en Roumanie lui sont valables. Dans le cas de la Roumanie, il est nécessaire de reconsidérer l'art. 8 par. (2) de la loi sur le contentieux administratif n° 554/2004 CE exige une intervention législative afin d'annuler les conséquences négatives pour l'entrepreneur privé, faisant partie d'un contrat administratif, du fait du vice de procédure de la non-invocation, d'office, par le tribunal, au premier terme, de la compétence matériellement fonctionnelle. Après une telle approche, le Législateur moldave pourrait s'en inspirer et pourrait améliorer et harmoniser les dispositions de la loi sur le contentieux administratif n° 793 du 10.02.2000 et du Code administratif n° 116/2018. Cependant, en République de Moldova, en raison de son statut de pays candidat à l'Union européenne, de nombreuses harmonisations législatives auront lieu, et l'expérience de la Roumanie aiderait dans ce processus.

Mots-clés: *contrat administratif, conflit, conciliation, litige, médiation commerciale.*

РАЗМЫШЛЕНИЯ ОБ ОБЪЕКТЕ СУДЕБНЫХ ДЕЙСТВИЙ ПО РАЗРЕШЕНИЮ СПОРОВ, ВОЗНИКАЮЩИХ ПРИ ИСПОЛНЕНИИ АДМИНИСТРАТИВНЫХ ДОГОВОРОВ

Споры, возникающие в связи с выполнением административных контрактов, представляют собой постоянную проблему для вовлеченных социальных субъектов. Республика Молдова могла бы воспользоваться преимуществами румынского законодательства, если бы исходила из того, что теории и принципы, регулирующие административные договоры в Румынии, действительны для нее. В случае с Румынией пересмотр ст. 8 абз. (2) Закона об административных спорах № 554/2004, который требует законодательного вмешательства для отмены негативных последствий для частного предпринимателя, части административного договора, в результате процессуального недостатка, заключающегося в неиспользовании ex officio, судом, на первый срок, функционально-материальной компетенции. Такой подход мог бы вдохновить и законодательные органы Республики Молдова, которые могли бы улучшить и гармонизировать положения Закона об административных спорах № 793 от 10.02.2000 г. и Кодекса об административных правонарушениях № 116/2018. Республика Молдова, в силу своего статуса страны-кандидата в ЕС, может использовать опыт Румынии для гармонизации законодательства.

Ключевые слова: *административный договор, административный спор, юристы, конфликт, примирение, судебный процесс, коммерческое посредничество.*

Introduction

In Romania, in art. 8 para. (2) and para. (3) of the Administrative Litigation Law no. 554/2004 [13] provides: (2) *The administrative litigation court is competent to resolve the disputes that arise in the phases preceding the conclusion of an administrative contract, as well as any disputes related to the conclusion of the administrative contract, including disputes with the object of canceling an administrative contract. Disputes arising from the execution of administrative contracts are under the jurisdiction of the common law civil courts.* (3) *When resolving disputes provided for in para. (2) the rule according to which the principle of contractual freedom is subordinated to the principle of priority of the public interest is taken into account.*

In view of this situation, the courts notified in the matter of administrative litigation in Romania are obliged to retain for resolution the disputes that arise according to the thesis a-I-a. *in the phases preceding the conclusion of an administrative contract, as well as any disputes related to the conclusion of the administrative contract, including disputes having as its object the cancellation of an administrative contract.*

Instead, according to thesis II, *the disputes arising from the execution of administrative contracts are under the jurisdiction of the civil courts of common law.*

In the Republic of Moldova, for the first time the term *“administrative contract”* was used by the legislature in the Administrative Litigation Law no. 793 of 10.02.2000 [14], and from the provisions of art. 13 of this law we understand that the administrative contract “ *is the contract that can create, modify or extinguish a legal relationship under public law, if the law does not provide otherwise”.*

It is also worth remembering that Romania as the first state to recognize the independence of the Republic of Moldova and committed to constantly and actively support it, both through diplomatic efforts and through concrete assistance, in order to follow the irreversible European path, committed, at the same time, to give it assistance in the creation of democratic institutions compatible with the demands imposed by European legislation or transitional institutions with the perspective of a gradual harmonization, to the extent that reality will allow it [15, p. 62-80].

At the same time, according to the Moldovan authors Ion Guceac and Victor Balmus [7, pp. 2-10], the theories that govern administrative contracts in Romania are also valid for the Republic of Moldova, “ *because only after the consecration in art. 1, 2 of the Law on property, no. 459 of 22.01.91, and then in art. 9 and 126 of the Constitution of the Republic of Moldova, adopted on July 29, 1994, of public and private property, of the assurance by the state of the administration of “ the public property that belongs to it, under the conditions of the law and of the inviolability of “ investments of natural and legal persons, including foreigners”, in the Republic of Moldova a new stage of development of the theory of public* and civil contracts began [7, p. 2-10].

Research methodology

Starting from a retrospective, historical approach to the researched field, the article offers the possibility of understanding the importance of disputes arising from the execution of administrative contracts and the loopholes and traps hidden in this legislation.

At the same time, the article outlines the perspectives of this issue and helps to acquire its theoretical foundations and the practical applicability of this obtained theoretical knowledge.

Administrative law as a distinct branch of law is regulated by legal norms that substitute the same methods of application to knowledge and the legal action as of any branch of law.

The same methods used in the study of any branch of law were used.

Administrative law, by nature and its destination is a phenomenon with many and deep connections and social and human interferences.

The research of the phenomenon part of administrative law, in this case, aspects regarding the execution of the administrative contract, part of the research of the legal phenomenon, is carried out by using the same methods used in the study of law: general methods and concrete methods.

In this article, different general methods could be used, such as: the generalization and abstraction method, the logical method, the historical method, the comparison method, the sociological method, the systemic analysis method and the prospective or forecasting method.

Aspects of Romanian court practice

It should be noted that according to art. 7 para. (6) from Law no. 554/2004 in its original form [18] in the case of actions with administrative contracts, the prior procedure had the significance of conciliation in the case of commercial disputes, with the appropriate application of the Code of Civil Procedure.

As an expression of a monistic approach to civil law, and to eliminate the distinction between the legal regime of civil obligations and that of commercial obligations, the direct

conciliation procedure as it existed in the Code of Civil Procedure from 1865 updated by Law no. 202/2010 – The Small Reform Law, and, in which art. 42 provided: " *Article 720^1, paragraph 1 is amended and will have the following content:*

"Art. 720^1 In the lawsuits and claims in commercial matter that can be assessed in money, before the introduction of the summons, the plaintiff will try resolving the dispute either through mediation or through direct conciliation" [19], was removed.

This legal institution could still show its effectiveness [16].

The monistic approach of civil law whereby the prior procedure is provided for by art.193 NCPC [20] "***1*** *The referral to the court can only be made after the completion of a prior procedure, if the law expressly provides for this. Proof of completion of the preliminary procedure will be attached to the summons application.*

(2) *The non-fulfilment of the preliminary procedure can only be invoked by the defendant through a response, under the penalty of forfeiture",* does not give a sufficient guarantee to the holder of the right to action in the matter of the administrative dispute, and, in particular, of a merchant party to an administrative contract.

The current wording of art. 7 of the Administrative Litigation Law no. 554/2004, does not contain any reference to the possibility of the parties to meet and negotiate those aspects that could prevent the initiation of litigation regarding the execution of an administrative contract.

The current form of art. 7 of the Administrative Litigation Law no. 554/2004 allows the injured person, within 30 days, to request the issuing public authority or the hierarchically superior public authority, the revocation in whole or in part, of the contested administrative act, and in practice there are few cases when such an enterprise has success.

In the Republic of Moldova, art. 19 of the Administrative Code [3], provides that: "*The prior request is the institution that offers a way of prejudicial resolution of administrative disputes"*, and according to art. 60 para. (1) *"The general term in which an administrative procedure must be completed is 30 days, unless the law provides otherwise",* and it can be according to para. (4) *"For justified reasons related to the complexity of the object of the administrative procedure, the general term can be extended by no more than 15 days. This extension is effective only if it is communicated in writing to the participants in the administrative procedure within 30 days, along with the reasons for the extension",* and according to para. (5) can be extended" *Exceptionally, when cases of particular complexity are registered in the administrative procedure that require time for the processing of documents, the public authority can establish a longer term for the completion of the administrative procedure, which will not exceed 90 days".*

Art. 14 para. (1) and (2) of Law no. 793/2000 on administrative litigation in the Republic of Moldova requires that: "(1) The person who *considers himself/herself injured in a right of his/her own, recognized by law, through an administrative act shall request, through a prior request, the issuing public authority, within 30 days from the date of communication of the act, its revocation, in whole or in part, if the law does not provide otherwise.*

(2) If the issuing body has a higher hierarchical body, the prior request can be addressed, at the petitioner's choice, either to the issuing body or to the higher hierarchical body if the legislation does not provide otherwise", and if in disputes arising from contentious reports administrative situations are found that do not contravene the legislation that regulates the negotiation and conclusion of transactions with the participation of persons under public law, then, in our opinion,

conciliation or mediation would be possible. This possibility should, in our opinion, *expresis verbis*.

Civil servants from the hierarchically superior public authority act according to a *customary practice* from the period of the Phanariot regimes and are, as a rule, joint with those of the issuing public authority. In the spirit of conservation, they sacrifice the entrepreneurial spirit of the merchant in favor of preserving the benefits resulting from membership in the bureaucratic body of the public authority.

In this way, the lack of real reform in the public authorities will be supplemented by burdening the small entrepreneur without any real justification, part of an administrative contract.

Public entities, of local interest, are obliged to have efficient management, to secure the necessary money from their own sources and, in addition, from allocations from the local budget, within the limits of the amounts approved for this purpose.

In this context, it is much easier to procure the necessary income from the over-indebtedness of tenants, in the conditions where the current ambiguous legislation allows them to achieve their goals [16].

In our opinion, reaching the merchant in this situation cannot be in line with the general interest of society, nor with the letter and spirit of the law. However, the legislation in force allows such a trader to legally retaliate against such a situation.

The legal foundation, in the case of Romania, derives its strength from the Romanian Constitution [5] - *art. 1 paragraph "(3) Romania* ***is a state of law*** *, democratic and social, in which human dignity, citizens' rights and freedoms, the free development of the human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and are guaranteed...*

(5) In Romania, compliance with the Constitution, its supremacy and laws is mandatory".

Therefore, ***the rule of law*** presupposes, on the one hand, ***the principle of legality***, without being reduced to it, and, on the other hand, it allows the public administration, implicitly the local or county one, to exercise its discretionary power, namely *"that margin of freedom left to the discretion of an authority so that, in order to achieve the goal indicated by the legislator, it can resort to any means of action within the limits of its competence".*

However, this discretionary power, or right of appreciation, or opportunity, as it is also called in the specialized literature, is not unlimited, its *"censorship"* can intervene when the very legality is affected and when, in practice, one acts with excess power, no longer being able to talk about good administration.

Specifically, the contracting public authority can unilaterally modify or terminate the administrative contract [1, page 130] only with prior notification to the contractor and only when the public interest requires it.

If the unilateral modification of the administrative contract damages him/her, the contractor has the right to promptly receive adequate and effective compensation. In case of disagreement between the public authority and the contractor regarding the amount of the compensation, it will be determined by the competent court. This disagreement may not, under any circumstances, allow the contractor to evade its contractual obligations.

The right of the contracting public authority to modify unilaterally concerns only the regulatory part of the contract and is based on its exclusive right to ascertain the modification of the public interest and to adapt accordingly to the public service. The contractor will not be able to dispute the appropriateness of the measure. This right of the administration

cannot be exercised discretionarily, but only if the respective modification is required by a better adaptation of the contract to the needs of satisfying the public interest.

Competent public authorities organize public services, under public law, in order to satisfy a public interest. To the extent that the contracting authority finds a change in the public interest, it can, through administrative acts of the authority, modify the conditions for the performance of the public service or even abolish the public service, modifying or, as the case may be, ending the contract.

Within an administrative contract there are contractual clauses as well as regulatory clauses.

The contractual clauses can be changed by the agreement of the parties, and the regulatory clauses can be changed unilaterally by the public authority for reasons related to the national or local interest, as the case may be.

Therefore, the disputes arising from the execution of an administrative contract are under the jurisdiction of the common law civil courts.

Art. converges in the same sense. 53 para. 1^1 of Law no. 101/2016 [11] which has the following content: *"Litigation and claims arising from the execution of administrative contracts and those arising from the termination, resolution, unilateral denunciation or early termination of public procurement contracts for reasons independent of the contracting authority are settled first court, emergency and above all, by the civil section of the court in whose jurisdiction the contracting authority is located or in the jurisdiction where the applicant has its registered office/domicile."*

The current economic crises have certainly captured the entire public agenda, and the commercial issue has aroused the interest of commercial actors, and the fragile limits of the commercial regulations included in the New Civil Code are already showing their weaknesses.

Indisputably, the actors in the local business market and beyond, face, as is natural, an avalanche of conflicts of a commercial nature, and the number of insolvencies is constantly increasing [22].

These conflicts can only be resolved extrajudicially and judicially. Out-of-court disputes can be resolved quickly through negotiation, mediation and arbitration.

The judicial way, through the medium of the Civil Code, monistic, anachronistic and considered a failed experiment by the majority of commercial law practitioners should be avoided, the speedy resolution of the dispute in a reasonable time will certainly be preferred. It could also be the case for conflicts resulting from the conclusion, execution or modification of administrative contracts, if the law opted for a less rigid system.

In the face of these waves of commercial conflicts, it is preferable that they be resolved quickly, amicably, with low costs and a high degree of compliance with the agreements that will be concluded.

The situation of suffocation of the civil courts through the adoption of the current monist system was also foreseen by the late professor Stanciu Carpenaru in the work Romanian Commercial Law [2, page 16], when he referred to the conclusions regarding the importance of commercial law in contemporary society. The renowned professor considered that *"Commercial law, as a particular right and as a sub-branch of private law, must find its source in the Commercial Code and special commercial laws, and not in a single regulation, that of the Civil Code", and "*The *Role of commercial law in the regulation of commercial relations, during the formation of the market economy in our country, calls for the improvement of the Commercial Code, at the level of modern standards existing in other countries".*

The opinions of commercial law specialists, such as that of the renowned professor,

converge towards the idea that the inclusion of commercial law in the New Civil Code [21] was a step back in the commercial matter, thus generating through the effect of this approach a regression in terms of the commercial issue, an effect fully felt by our society.

In another vein, the High Court of Cassation and Justice has ruled countless times on the importance of going through the prior conciliation or mediation procedure in the old civil legislation.

Thus, in a Guidance Decision it was established that: *It should also be mentioned that, from the entire regulation, it follows that, by establishing the prior conciliation procedure, the legislator sought to put into practice the principle of speed the settlement of disputes between the parties - more important in commercial matters - and to relieve the activity of the courts. Thus, the role of the criticized procedural rule is to regulate an extrajudicial procedure that gives the parties the opportunity to agree on the possible claims of the plaintiff, without the involvement of the authority competent courts* [9].

High Court of Cassation and Justice also ruled in the sense that *“the procedure developed for the purpose of speed settlement of disputes, takes into account legal certainty and the stability of the commercial circuit* [9].

Summing up, we can say that, by establishing the prior conciliation procedure, the legislator sought the rapid resolution of misunderstandings between traders without resorting to the more complex and slower judicial procedure, and the relief of the activity of the judicial courts.

As it was said above, we consider this last point of view correct and legal, which we support and with the following arguments: Not only are the provisions of art. 131 and 720^7 different from those of art. 720^1, but also the purpose pursued is different, respectively, in the case of art. 720^1, the resolution of misunderstandings between traders before court notification and therefore the prevention of disputes and the relief of the courts. Against this, we believe that the necessity and, above all, the usefulness of prior conciliation is obvious and , as a result, it cannot be regarded as a procedure whose completion can be left to the free discretion of the plaintiff [10].

In the matter of the administrative dispute, ÎCCJ (High Court of Cassation and Justice) by Decision 75/2018 [23] regarding the pronouncement of a preliminary decision for the resolution of the following legal issue: *“Concerning the express repeal of the provisions of art. 720^1 of the old Civil Procedure Code, it is mandatory to go through the preliminary procedure, regulated by art. 7 para. (6) from the Administrative Litigation Law no. 554/2004, with subsequent amendments and additions, in the case of actions having as their object the nullity, annulment, execution, termination or resolution of an administrative contract, including in the situation where the action is formulated by a public authority, as well as in the situation where the action is formulated by a public authority on the recommendation/proposal of an internal or international control body?”*, the Court decided that*:”Regarding the express repeal of the provisions of art. 720^1 of the old Code of Civil Procedure, it is mandatory to go through the preliminary procedure, regulated by art. 7 para. (6) from the Administrative Litigation Law no. 554/2004, as subsequently amended, in the case of actions having as their object the nullity, annulment, execution, termination or resolution of an administrative contract, including in the situation where the action is formulated by a public authority, the recommendation/proposal of an internal or international control body”.*

In Romania, according to the provisions of art. 36 paragraph (3) which regulates the organization of appeal courts, tribunals, specialized tribunals and courts of law from

Law no. 304/2004 on the judicial organization [12] provides: (*3) Within the courts, there are sections or, as the case may be, specialized sets for civil cases, criminal cases, commercial cases, cases with minors and family cases, administrative and tax litigation cases, cases regarding labor disputes and social insurance, as well as, in relation to the nature and number causes, maritime and fluvial sections or for other matters.*

By RIL (The decisions pronounced in the appeal in the interest of the law) Decision no. 17/2018 [24] it was ruled that: "*In the interpretation and uniform application of the provisions of art. 129 para. (2) point 2, art. 129 para. (3), art. 130 para. (2) and (3), art. 131, art. 136 para. (1), art. 200 para. (2) of the Code of Civil Procedure and of art. 35 para. (2) and art. 36 para. (3) from Law no. 304/2004, the procedural material incompetence of the specialized section /completion is of public order".*

The material procedural incompetence of the court can be successfully invoked in the matter of the appeal, since the provisions of art. 489 para. (3) C.proc.civ (Code of Civil Procedure) [4] provide that: *3) If the law does not provide otherwise, the grounds for annulment that are of public order can be raised ex officio by the court, even after the expiry of the appeal's motivation term, either in the filtering procedure, either in public session.,* and if we consider the provisions of art. 488 para. (2) Civil Procedure Code. which disposes: *2) The reasons provided for in para. (1) cannot be received unless they could not be invoked during the appeal or during the appeal trial or, although they were invoked within the deadline, they were rejected or the court failed to rule on them.,* it can be stated that is in contradiction with the provisions of art. 178 Civil Procedure Code para. (1) in the matter of the appeal because: *(1) Absolute nullity can be invoked by any party to the process, by the judge or, as the case may be, by the prosecutor, in any state of the trial of the case, unless the law provides otherwise.*

As a consequence, invoking the absolute nullity of public order ex officio is a possibility and not an obligation that belongs only to the court, not to the parties, who must also invoke the public order cancellation grounds within the deadline.

The reasons for annulment can be invoked directly in the appeal when the decision is not amenable to appeal, this being the hypothesis in which the absolute nullities could not be invoked by way of appeal.

In the case of the Republic of Moldova, the theories that govern the administrative contracts in Romania, as well as the principles according to which these contracts are implemented, are similar [7, p. 2-10].

Conclusions

In the case of Romania, a plausible opportunity to counteract the effects of the current prolonged crises and help to simplify and expedite the resolution of disputes arising from the execution of administrative contracts would be: reconsideration, art.7, art. 8 para. (2) and para. (3) of the Administrative Litigation Law no. 554/2004, of Law no. 101/2016 which transposes two European directives into Romanian domestic law and art. 131 Civil Procedure Code. Romanian, in which we consider that a legislative intervention is required in order to clarify and cancel the negative consequences for the private entrepreneur, part of an administrative contract, as a result of the procedural defect of not invoking, ex officio, by the court, at the first term, the functional material competence , or the opportunity offered by the platform of the organization of the Romanian Institute of Commercial Law [8] whose main objectives are: *"to carry out scientific research in the field of commercial law and matters related to commercial law; encouraging and facilitating debates on major topics of commercial law,*

topical for doctrine, jurisprudence, for the European Union and for Romania; promoting and supporting the increase in the quality of legal training in the field of commercial law; the development of legal sciences, with priority in the field of commercial law and its related subjects; proposing and supporting the theses of the new Romanian Commercial Code to the competent bodies of the Romanian state, scientific bodies, the business environment and any interested entities and institutions - with a view to adopting the new Commercial Code; supporting a project of a new Commercial Code - appropriate to the current and future requirements of Romanian society”.

In the case of the Republic of Moldova , a solution would be the implementation of points 8-13 of the Recommendation of the Committee of Ministers of the Council of Europe no. 9/2001 [17] regarding alternative ways of resolving disputes between administrative authorities and natural persons - arbitration, mediation, conciliation, the guidelines of this procedure are drawn.

De lege ferenda, the obligation to try to amicably resolve commercial conflicts and those resulting from the conclusion, execution or modification of administrative contracts should be introduced into Romanian and Moldovan legislation, since there may be situations in which the parties can communicate and de-tension on their own, instantly, any conflict.

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