Arbitration settlement of disputes concerning administrative contracts in Romania

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Abstract

The present study aims to analyze the conditions under which arbitration may be used in the administrative contracts provided by the Civil Code and the legislation on public procurement and concessions. In the administrative law doctrine, the provision on the possibility to resort to arbitration in litigation regarding the administrative contracts is often expressed, because the competent administrative court and, on the other hand, the arbitration is a specific institution of commercial law, where the parties are in a position of legal equality. In our opinion, in relation to the positive law provisions previously analyzed, we consider that it is no longer possible to deny the possibility of inserting, under the law, the arbitrary arbitration clauses in litigations concerning administrative contracts.

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JEL Classification: K23, K41

1. Introductory considerations

According to the provisions of article 542 (2) of the Code of Civil Procedure "the state and public authorities have the capacity to conclude arbitration conventions only if they are authorized by law or by international conventions to which Romania is a party". Also, according to article 542 (3) of the Code of Civil Procedure "legal persons governed by public law having their object of activity also economic activities have the capacity to conclude arbitration agreements, unless the law or their act of establishment or organization provides otherwise".

We note that the legislator creates a distinction, in our unjustified opinion[2], between the state and the public authorities, on the one hand, and the other legal entities of public law, on the other. In practice, the lawmaker introduces *a rule* prohibiting the state and public authorities from concluding arbitration conventions and introduces *the exception* of the possibility of resorting to arbitration only in the case of authorization by law or by international conventions to which Romania is a party. On the other hand, in the case of other legal persons governed by public law having their object of activity and economic activity, *the rule* of the possibility of

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[2] See in the same sense Bazil Oglindă, *Despre validitatea și caracterul operant al clauzelor compromisorii încheiate de stat, autorități publice și alte persoane juridice de drept public, în contextul noului Cod de procedură civilă și al legislației speciale aplicabile*, „Revista Transilvană de Științe Administrative", no. 1(34)/2014, p. 91.

concluding arbitration conventions and *the exception* of the prohibition of their conclusion is established when their law or their act of establishment or organization stipulates otherwise.

Also, the rules of the Civil Procedure Code provide for the premises that disputes concerning the same type of contract may be arbitrary or not depending on the type of legal person under public law that concludes them. For example, in the silence of the law that does not expressly indicate the possibility of litigation by arbitration, the same type of counterclaim will not be subject to arbitration when it is concluded by a public authority, whereas if the contract is concluded by a legal person under public law which has its object of activity and economic activities (an autonomous administration for example) it will be able to resort to arbitration if the act of establishment does not prohibit it.

2. Settlement of disputes concerning administrative contracts by arbitration

In the legislation on administrative contracts we observe that in the public procurement contracts regulated by Law no. 98/2016, in the sector procurement contracts regulated by Law no. 99/2016, as well as in the concession contracts for works and concession of services regulated by Law no. 100/2016, the parties may insert the arbitration or compromise clause that attributes the jurisdiction to resolve disputes to the arbitral tribunals[3]. This is expressly underlined by the provisions of article 57 of the Law no. 101/2016 on remedies and remedies in respect of the award of public procurement contracts, sectoral contracts and works concession contracts and the concession of services, as well as the organization and functioning of the National Council for Solving Complaints, which states that "the parties may agree that litigation regarding the interpretation, conclusion, execution, modification and termination of contracts shall be settled by arbitration".

Also, in order to resolve any litigation, the parties may stipulate, in the concession contract for public property, arbitration clauses, according to article 12 paragraph (2) of Annex no. 6 to the Government Decision no. 168/2007 approving the Methodological Norms *for the application of Government Emergency Ordinance no. 54/2006 on the regime of concession contracts for public property*[4]. But if we investigate the Government Emergency Ordinance no. 54/2006, as amended, we shall note that this does not refer to the possibility of resorting to arbitration, the regulation determining the competence of the administrative litigation court for the disputes. Therefore the Government Decision no. 168/2007 which includes the methodological norms for the application of the Government Emergency Ordinance

[3] Concerning the settlement of disputes concerning the award and execution of public procurement contracts and concessions through administrative jurisdictions, see Adriana Deac, *General aspects regarding jurisdictional administrative contest regulated by Law no. 101/2016 on the contracts of public procurement, sectoral contracts and work concession contracts or services*, „Perspectives of Law and Public Administration", vol. 7, issue 1, May, 2018, pp. 37-42.

[4] Published in the Official Gazette no. 146 of 28 February 2007.

no. 54/2006 adds to the law, which is unconstitutional[5] in relation to the provisions of article 108 paragraph (2) of the Constitution, which states that "Judgments shall be issued for the organization of the execution of the law". The term "law" is used here in its broad sense, by a normative act (including the ordinances adopted by the Government). So the Government's decisions are adopted by *secundum legem*, and they can not regulate a social relationship. By Government decision, the provisions of a Government Ordinance can not be completed. The illegality of this Governmental Decision may be invoked through administrative litigation.

By the compromise clause, the parties agree that the disputes that arise from the contract in which it is stipulated or in connection with it shall be settled by arbitration, showing, under the sanction of nullity, the way of appointing the arbitrators. In the case of institutionalized arbitration it is sufficient to refer to the institution or rules of procedure of the institution that organizes the arbitration. The validity of the compromise clause is independent of the validity of the contract in which it was entered. In case of doubt, the compromise clause is interpreted as applying to all misunderstandings deriving from the contract or from the legal relation to which it refers (article 550 of the Civil Procedure Code)

Subject to observance of public order and good morals and mandatory provisions of the law, the parties may establish, by arbitration agreement or written instrument subsequently concluded, at the latest upon the establishment of the arbitral tribunal, either directly or by reference to a particular regulation the arbitration tribunal, the rules on the establishment of the arbitral tribunal, the appointment, the revocation and the replacement of the arbitrators, the term and the place of arbitration, the rules of procedure that the arbitral tribunal must follow in the dispute, including any preliminary dispute settlement procedures, arbitration costs and, in general, any other rules on the proper conduct of arbitration (Article 544 (2) of the Civil Procedure Code).

The possibility of resorting to arbitration in the concession issue was first regulated by the Law on the Organization and Administration on a Commercial Base of Enterprises and Public Benefits, no. 27/1929 which, in art. 28 stipulated that "in order to hear disputes arising from the execution of the concession contract, the arbitrators may also be heard. Their designation and the way they can be replaced during the contract will be made through the concession contract itself".

In the administrative law doctrine, the prohibition on the possibility of arbitration in litigation concerning the administrative contracts is often expressed, because the competent administrative court[6] is being circumvented, and on the other

[5] The Constitutional Court has established that the unconstitutionality of an administrative act is nothing but an aggravated form of unlawfulness and administrative acts are legally controlled by the administrative courts. This conclusion is also necessary when the illegality of the administrative act concerns the non-observance of the fundamental law itself, being issued by excess power, ie by exceeding the limits and the conditions for exercising the competence of the issuing body - Decision no. 37 of July 6, 1993, published in the Official Gazette no. 215 of 1 September 1993.

[6] Constitutional Court by decision no. 203/2006, published in the Official Gazette no. 267 of March 24, 2006, stated that by the will of the parties that chose the way of institutional arbitration, all the duties attributable to the court under the provisions of Chapter III regarding the establishment of the arbitral

hand arbitration is a specific institution of commercial law, where the parties are in a position of legal equality[7]. It is emphasized that the use of arbitration in administrative contracts gives a commercial note to these contractors, avoiding the need to defend the public interest by applying a procedure that takes account of the specificities of public services and goods[8]. In addition, the arbitration clause can be designated by the arbitration clause and a foreign arbitral tribunal, which can not be accepted because the national public interest may be circumvented.

3. Conclusions

In our opinion, in relation to the positive law provisions previously analyzed, we consider that it is no longer possible to deny the possibility of inserting, under the law, the arbitrary arbitration clauses in litigations concerning administrative contracts. We appreciate, however, that in relation to the specificity of these contracts which requires the rule underlined by article 8 (2) of the Law no. 554/2004, after which the principle of contractual freedom is subordinated to the principle of public interest priority, the law should require the arbitrators appointed to resolve these disputes to be specialists in administrative law, and in the institutionalized arbitration[9] a body of arbitrators specializing in contracts public.

In France, the use of arbitration in disputes concerning administrative contracts is considered to be contrary to the general principles of French public law, as confirmed by the provisions of the first paragraph of article 2060 of the Civil Code which states that "arbitration may not be invoked in appeals involving public authorities and public establishments and generally any matter of public policy

tribunal in Book IV of the Code of Civil Procedure [by 1865] shall be exercised by the institution which organizes arbitration in accordance with its rules which are imposed on the parties. Currently art. 553 of the Code of Civil Procedure in force expressly states that "the conclusion of the arbitration agreement excludes the competence of the courts for the dispute which it is the subject of."

[7] About prohibition of arbitration in public law see Laurent Richer, *Droits des contrats administratifs*, 3e èdition, L.G.D.J, Paris, 2002, p. 293, 294. Antonie Iorgovan points out that there can be no question of the insertion of arbitration clauses in administrative contracts, the basis of incompatibility being determined by the principle enshrined in article 8(3) of the Law no. 554/2004 *of the administrative litigation* which shows that the settlement of litigations having as object of administrative contracts takes into account the rule according to which the principle of contractual freedom is subordinated to the principle of the priority of the public interest – see Antonie Iorgovan, *Considerații teoretice pe marginea unor soluții ale instanțelor de contencios administrativ*, „Revista de Drept Public" no. 1/2006, p. 86.

[8] In order to eliminate disputes regarding the administrative contract by the sphere of arbitration, to pronounce also Antonie Iorgovan, *Tratat de drept administrativ*, vol. II, 4th ed., All Beck Publishing House, Bucharest, 2005, p. 230. The same author points out that "since the principle of freedom of will in administrative contracts is subordinated to the principle of public interest, it is logically deduced that the texts of the Code of Civil Procedure relating to arbitration are incompatible with such a principle and are inapplicable" – Antonie Iorgovan, *op.cit. (Considerații teoretice…)*, 2006, p. 86.

[9] An institution of tradition in the field of arbitration in Romania is the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania.

concern" [10]. Consequently, any compromise or any compromise clause ended with the failure to observe these principles is attained by a nullity of public order. Legal persons under public law can not evade the rules that determine the jurisdiction of national jurisdictions.

In art. 2060 par. (2) of the French Civil Code states that "however, public industrial and commercial establishments may be authorized by decree to resort to arbitration", but such a decree has never been adopted[11]. On the other hand, there are special laws for certain public establishments which allow the use of arbitration, such as the Law of 2 July 1990 authorizing by article 28 Post and France Telecom for insert the compromise clause into their contracts.

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[10] Georges Vlachos, *Droit public économique français et européen*, 2e édition, Dalloz, Paris, 2001, p. 386, 387.
[11] *Ibidem*.