The interpretation of administrative contracts

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Abstract
The article analyzes the principles of interpretation for administrative contracts, in French law and in Romanian law. In the article are highlighted derogations from the rules of contract interpretation in common law. Are examined the exceptions to the principle of good faith, the principle of common intention (willingness) of the parties, the principle of good administration, the principle of extensive interpretation of the administrative contract. The article highlights the importance and role of the interpretation in administrative contracts.

Keywords: *public law, administrative contract, contractual clauses, contract interpretation, public interest, public service.*

JEL Classification: *K12, K23*

1. Preliminary considerations

The interpretation of the contract is the operation by which to determine the exact meaning of the terms of the contract, by researching of the manifestation of will of the parties, in close correlation with their own internal will[2].

The interpretation of contract is required when there is discrepancy between the real intention and willingness of the parties, when the contract terms are ambiguous, confusing or contradictory, also when the contract is incomplete[3].

In the public law, the purpose of general interest and the connection with the public service, based on the existence of government special powers compared to co-contractor, require special methods of interpretation of administrative contracts[4]. Therefore, the interpretation of administrative contracts is to be made by rules which differ substantially from those of civil law[5].

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[2] Constantin Stătescu, Corneliu Bîrsan, *Drept civil. Teoria generală a obligaţiilor*, All Beck Publishing House, Bucharest, 2000, p. 55.

[3] See Mircea N. Costin, Călin M. Costin, *Dicţionar de drept civil de la A la Z*, editia a 2-a, Hamangiu Publishing House, Bucharest, 2007, p. 518.

[4] Laurent Richer, *Droits des contrats administratifs*, 3e èdition, L.G.D.J, Paris, 2002, p. 204.

[5] Jean-Marie Auby, *Droit administratif*, Universite Bordeaux, Librairie Montaigne, 1975-1976, p. 184.

2. Principles of interpretation of administrative contracts

2.1. Derogation from the principle of good faith

In civil law applies the principle of good faith according to which the agreement must be executed in good faith. According to Art. 14 (1) of the Civil Code any natural or legal person shall exercise the rights and perform their civil obligations in good faith, in accordance with public order and good morals[6].

In the administrative contract law, the defending of the public interest may lead to derogate from the principle of *bona fides exigit ut, quod convenit fiat* (the good faith requires to fulfil what was agreed). This principle is defeated, in the administrative law by jurisprudential and legal dirigisme which allows of the contracting public authority to alter unilaterally the regulatory part in the administrative contract[7], and gives it the exclusive right to control and the right to denounce the contract when the public interest so requires .

2.2. The principle of common intention (willingness) of the parties

This principle is regulated both by the French Civil Code as well by the Romanian Civil Code. Thus in the Romanian civil law, according to art. 1266 of the Civil Code the contracts will be construed according with will concordant of the parties, and not in the literal sense of the terms[8]. Therefore, significant is their real intention, and not the declared/literal will. Initially, in the French doctrine has argued that it would be relevant the declared intention of the parties and not the real one, considering that "the literal execution of the conditions is only able to maintain the order and regularity in the service"[9]. Then, in the twentieth century, the optics of the doctrine has changed and argued that "the will declared is not a source of obligations than to the extent that it corresponds to the real intention. In case of divergence between the two is possible that the second to prevail over first"[10].

In Romania, the case law made by the Law no. 554/2004 highlighted the active role of the judge in determining of the juridical nature of the contract in relation to the real intention of the parties. Thus in Decision no. 1660 of 20 March

[6] See Flavius-Antoniu Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei (coord.), *Noul Cod civil. Comentariu pe articole*, C.H. Beck Publishing House, Bucharest, 2012, p. 14, 15; Carmen Tamara Ungureanu, Carmen Simona Ricu,Gabriela Cristina Frenţiu, Gabriela Răducan…, *Noul Cod civil. Comentarii, doctrină şi jurisprudenţă*, vol. I, Hamangiu Publishing House, Bucharest, 2012, p. 31-34.

[7] In civil law, the contract terms change can occur only through the consent of will expressed by the parties - see the decision no. 78/1995 of 14.02.1995, pronounced by the Commercial Section of the Supreme Court, BJ 1995.

[8] See Flavius-Antoniu Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei (coord.), *op. cit.*, p. 1330 ; Carmen Tamara Ungureanu, Carmen Simona Ricu,Gabriela Cristina Frenţiu, Gabriela Răducan…, *op. cit.*, vol. II, p. 572-575.

[9] Gabriel Dufour, *Traite general de droit administratif applique*, Paris, 1856, Tome V, p. 653.

[10] Laurent Richer, *op. cit.*, 2002, p. 202.

2007[11] pronounced by the Section of Administrative and Fiscal Contentious of the High Court of Cassation and Justice stated that "under art. 129 para. (5) of the Code of Civil Procedure judges have a duty to insist by all legal means to prevent any mistake regarding the finding the truth in question, on the basis of establishing the facts and the correct application of the law in order to rule a valid and legal judgment; they may order the administration of evidence it deems necessary, even if the parties are against"[now, according to art. 254 para. (5) of the new Code of Civil Procedure, in force since February 15, 2013, the judge may, ex officio, put in discussion of the parties the need to administer some evidence that he may order even if the parties are against]. In administrative contentious court are applicable those legal provisions in relation to art. 28 of Law no. 554/2004 which allows completing law with the provisions of the Code of Civil Procedure, to the extent they are not incompatible with the specific of the power relations between public authorities, on the one hand, and individuals injured in rights or legitimate interests on the other hand. In this case, the High Court found that the court of first instance did not sufficiently active role in the settlement of the trial, saying that, given the object the action, the priority was to determine juridical nature of the contract whose cancellation was requested within the administrative court.

2.3. The principle of good faith

Unlike private law, in the administrative contract law intervenes a specific principle: the principle of good administration, according to which the interpretation must be made with the prevailing needs of the public service. Thus, in France, in the nineteenth century there was a conflict between gas companies and municipalities[12]. The municipalities have concessioned the monopoly of lighting at the gas companies. With the discovery of electricity, municipalities wanted to transform the mode of lighting, but they were hindered by the monopoly of the gas. The State Council has remedied this situation through an analysis subtle of the contracts. The State Council considered that the gas companies' monopoly was the right not to be competed by any other contractor, provided that the operator to ensure through the its service, serving as best of the public interest, and therefore the public should benefit from new discoveries. Therefore, the operator have a duty to change the mode of lighting. If he refuses to comply, the municipality may grant a concession of the electrical distribution to another entrepreneur.

Currently, at European level, citizens or residents of the European Union member states have the right to good administration in its relations with the European Union institutions and bodies, according to art. 41 of the Charter of Fundamental Rights of the European Union.

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[11] Decision referred to in Antonie Iorgovan, Liliana Vișan, Alexandru Sorin Ciobanu, Diana Iuliana Pasăre, *Legea contenciosului administrativ cu modificările şi completările la zi*, Universul Juridic Publishing House, Bucharest, 2008, p. 334.

[12] See Cătălin-Silviu Săraru, *Contractele administrative. Reglementare. Doctrină. Jurisprudenţă,* C.H. Beck Publishing House, Bucharest, 2009, p. 282.

2.4. The principle of extensive interpretation of the administrative contract

In civil contracts the obligations shall be construed in favor of the party who is obliged (*in dubio pro reo*), since it is a restrictive interpretation. Thus, according to art. 1269 (1) of the Civil Code if, after applying the rules of interpretation, the contract remains unclear, it shall be construed in favor of the person who is obliged[13].

In the administrative contracts, the obligations are always construed in favor of protecting the public interest, since it is a extensive interpretation. Obligations of the contracting party shall be construed as being spread over all that is absolutely necessary to ensure regular and continuous operation of the public service[14]. Thus, in the concession contract of a public service the concessionaire has the obligation to ensure the exploitation of the public service under continuity and permanence regime, the public interest being prioritarily over the interest of the concessionaire. The obligation of continuity stretches also at public servants of the service[15].

In the interpretation of the clauses in the administrative contracts will consider the rule that the principle of contractual freedom is subordinated to the principle of priority of public interest, as provided in art. 8 (3) of Law no. 554/2004 on administrative contentious.

3. Conclusions

The democratization and the modernization of public administration determines currently the changing trend of the gravity center of the administrative work from the management and efficiency to the detriment of command actions, under the conditions in which the administration seeking the agreement of its partners, supporting the need for cost effectiveness and, in some cases the existence of competition, he places his interventions under the sign of the market economy[16]. In the entrepreneurial governance that emphasizes the market mechanisms instead of bureaucratic mechanisms[17] are used increasingly more the administrative contract procedure.

The principles of interpretation of an administrative contract are designed to determine the exact content of the contract. The contents of an administrative

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[13] See Flavius-Antoniu Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei (coord.), *op. cit.*, p. 1333 ; Carmen Tamara Ungureanu, Carmen Simona Ricu,Gabriela Cristina Frenţiu, Gabriela Răducan…, *op. cit.*, vol. II, p. 580-582.

[14] Gaston Jèze, *Les contrats administratifs de l'Etat, des departements, des communes et des etablissementes publics*, vol. I, Giard, Paris, 1927, p. 16.

[15] Mihai T. Oroveanu, *Concesiunea serviciului public*, „Studii de drept românesc", April-June 1995, p. 160.

[16] Ioan Alexandru, *Tratat de administraţie publică*, Universul Juridic Publishing House, Bucharest, 2008, p. 799

[17] David Osborne, Ted Gaebler, *Reinventing Gouvernment: How the Entrepreneurial Spirit is Transforming in the Public Sector*, Plume, 1992, p. 20.

contract is determined by regulatory part and the conventional part[18]. The regulatory part contains the binding clauses prescribed by laws and administrative provisions (clauses derogating from the common law) and the conventional part contains clauses negotiated by the parties (contractual clauses on financial competition promised by governments or on the period for performance of contracts, arising from the agreement of the contracting parties; this agreement may be restricted sometimes of regulatory clauses content).

In interpreting of an administrative contract will have to be prioritized protect the interests of the communities represented by public contracting authorities to the detriment of the principle of contractual freedom and equality.

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[18] See Cătălin-Silviu Săraru, *op. cit.*, p. 240-245