ABSTRACT

The Ph.D. thesis entitled "**Contentious administrative contracts**" represents a scientific approach concerned with the analysis of legal institutions present in the dynamics of contemporary public administration, equally dominated by certainties and inaccuracies. To understand the relevance of the theme, we have chosen as a starting point the presentation of the evolution of administrative contracts theory in order to shape the legal phenomena represented by the administrative contract.

As judiciously outlined by the recent doctrine, the administrative contracts show an increasing share in public administration activity: good service for citizens requires delegation of administration of public services through transfer agreements, achievement of continuity and regularity regarding public services requires public contracts, and access to public utilities service is made on the basis of administrative contracts of supply.

Administration has started to use and understand the advantage of the administrative contract, used especially under the form of transfer agreements, public contracts, lease contracts for goods, contracts for the execution of works, contracts for services and also under different forms of contracts which we identified within the national legislation - as the educational management contract, public management contract governed by Law no.95/2006 or the contract for administration of a hunting domain or the oil agreement – it is the first ever mention of an administrative legal nature of a matter.

The approach is structured, in an effort to maintain its unity and logical-discursive continuity, onto four main headings, divided in turn into chapters, whose content consists in a synthesized analysis of the current pattern configuration of administrative, contentious and jurisdictional litigations arising from administrative contracts: Title I. The juridical regulation of administrative contracts, Title II. Contentious administrative contracts governed by Law no. 554/2004, Title III. Contentious administrative contracts governed by special laws and Title IV. Brief examination based on Suceava Court of Appeal practice concerning administrative contracts.

Thus, the first chapter is devoted to analyzing the emergent theory of the administrative contracts; the same method of analysis, the evolutionary-comparative perspective, was maintained in Section 3 of the first chapter, which reviews the administrative contracts in the field of comparative law, and it is a non-exhaustive analysis, which otherwise would have appeared as excessive and lacked synthesis, contrary to the intended purpose

which is the foundation of a complete study of administrative contracts from a contentious point of view.

We continued the research with the second chapter of the first title, called *The legal regime of administrative contracts*, in which we analyzed both the concept of administrative contract and the identification criteria regarding the administrative contracts, a more precise delimitation of administrative contracts from other types of contracts. In a last section of this chapter we have highlighted the problems posed by the action of concluding and executing an administrative contract, underlining the inadequacies of current legislation – as the case of specific mention of contracts as being civil, although they meet the criteria to be classified as administrative. The case refers to the provision inserted in art. 69 of Law no. 95/2006 on healthcare reform, which stipulates that local government authorities may conclude with the legal representative of the family practice *a civil contract* on the provision of facilities and incentives afferent to the installing of a physician, medical establishment and operation of the family practice. Moreover, we have documented on the broad scope of the administrative contract with the support of Law. 95/2006.

We have noticed throughout our endeavour the common tendency to standardize and conceptualize the rules regarding birth, change, execution or deceleration of contracts, eventually leading to the emergence of a new branch of community law, the contract law. We believe that in the context of the present subject of the thesis, though specialists do not necessarily campaign for a common European body of administrative contracts - so difficult in many ways - we can identify common rules and similar principles. In such context, we have considered a concerted action of European institutions possible in order to standardize administrative contracts law and we have argued that the tangible assets represent a domain of community law by excellence, in matters of public contracts, where the directives adopted have led to the harmonization of national laws in EU Member States.

At the end of the chapter we have underlined the interest in the evolution of the French contentious administrative contracts, in order to distinguish whether the „import" of present-day field orientations would be appropriate for the Romanian legal environment and, especially, for the Romanian jurisprudence. This approach is justified, on the one hand, by the similarity of the two legal systems, the latter inspired by the former, and, on the other hand, due to the necessity to harmonize the contract law, including administrative, with the European Union, where a series of directives have already harmonized the common appliable laws on the matter (acquisitions, for example).

In order to maintain continuity of statements and complete the conceptual portrait of administrative contracts, we have analyzed in the first chapter of Title II the considerations regarding the type of contracts covered by Law no. 554/2004, focusing on issues that have not been clarified in theory or have not until now enjoyed a theoretical assertion. Where appropriate, we have identified possible adjustments to existing legislation and made *de lege ferenda* suggestions, expressing a point of view in favor of a specific concept or a distinct point of view when sufficient reasons supported a view of our own, different from the field literature.

We have highlighted, for example, that implementing a purely private legal regime in the field of concessions, as suggested by current doctrine, would diverge from the very principle of general public interest, which must be a priority. The legislator intended to equally preserve the private property goods as well as the public ones by adopting Directive 71/2002, which enumerates the principles governing the administrating services and does not differentiate between the two category of goods.

Currently, a monographic research of *all* types of administrative contracts does not exist, due also to the fact that juridic norms in the area are recent and, in this respect, a homogenous literature has not yet come together. The body of the thesis contains a concise analysis of all types of contracts identified in contemporary legislation and that we believe could be considered administrative: the contract for administration of a hunting domain, the oil agreement, the contracts concluded for the purpose of piscicultural exploitation of waters, concession contracts for the use of reed vegetation resources and mining concessions.

We have maintained a principle-guided structure and discussed in the following chapters the preliminary administrative procedure, the court settlement of the disputes deriving from administrative contracts and also the enforcement of court orders which solved such litigations. The detailed analysis of the actual conduct of disputes started with the discussion on the subject of alternative ways to solve legal conflicts and answered to the question whether mediation or arbitration procedure may be used in solving litigations regarding administrative contracts. We have underlined the personal opinion according to which this possibility should not be excluded *de plano*, taking into account that the legal bodies have the obligation to inform the parties of the possibility and advantages of the mediation procedure - on the one hand, and on the other hand, the fact that law expressly states the exceptions that cannot be subject to that mediation - strictly personal rights such as those concerning the person’s status as well as any other right that the parties, under the law, may not exert through convention or otherwise allowed by law .

We have analyzed the legitimacy, constitutionality and utility of the preliminary procedure in the field of contentious administrative contracts, especially in the view of the modifications brought to the art. 21 in the Constitution, namely the two new paragraphs, 3 and 4, which harmonize with the stipulations of art. 6 of the European Convention on Human Rights. In this context we have outlined the idea that the trial court represents the final filter in the matter of establishing legality of an act or of a legal action and it is imperative that any litigation of any nature, and those in the field of administrative law all the more so, must be solved by specialized judges, as wisely pointed out by professor Ioan Alexandru in his work entitled *Public Administration. Theories. Realities. Perspectives.* (Lumina Lex printing House, 2001, page 534 and 535).

The proper study of resolutions of litigations deriving from administrative contracts naturally started from determining the competences of law courts and continued with the classical procedure structure, with the analysis of the admissibility terms regarding disputes over contentious administrative contracts, the proper development of the court action and stages of appeal.

The last chapter exhaustively discusses the writ of execution in administrative contracts litigations, the legal nature of court orders, the proper enforcement procedure and also special issues such as responsibility of public authority concerning administrative contracts and seeking methods of redress.

The third title of the thesis targets the contencious administrative contracts governed by special laws, starts from range determination of administrative contracts governed by special laws and continues with the jurisdictional administrative procedure governed by G.E.O. 34/2006. Court settlement of these disputes is the subject of Chapter 3, which suggests in a separate section a comparative approach to contentious public procurement in community law. We believed that an overview research on the issues regarding administrative contracts from the perspective of European Union law is also necessary, in order to provide solutions to the problems arising from the courts practice and advance *de lege ferenda* proposals in this respect.

The last section of Chapter 3 of Title III has been devoted to research valuation and suggestions of *de lege ferenda*, argumenting in the favor of implementing the five contract models used in public procurement in international practice, explaining the necessity to apply them to the Romanian legal and economic environment. The five models are: DBO – design-construction-operation; DBFO – design-construction-financing-operation; BOT –

construction-operation-transfer; BOR – construction-operation-renewal and ROT – rehabilitation-operation-transfer.

We have also examined the implications of the abrogation of the *Guide for awarding public contracts*, which must necessarily lead to a re-evaluation of legislation in this area. We also sustain that, as far as *de lege ferenda* is concerned, now is the most appropriate time to establish a public procurement code to incorporate and synthesize both Ordinance 34/2006 as well as the secondary legislation, and correlate it with the European directives and the present economic situation.

The last title of the thesis, Title IV, closely analyzes the practice of Suceava Court of Appeal in the matter of administrative contracts and underlines the view of the court concerning cases of different objects of interest. We examined the special issues arising from court solutions on complaints against CNSC decisions and one of the problems we encountered during analysis of files in Suceava Court of Appeal was suitor observance of stipulations of art. 7 paragraph 6 in Law 554/2004.

The Court's view on disputes related to public procurements, highlighted after empirical research of case solutions, was expressed in the sense of analyzing the reliability and legality of the decisions given by the National Council for Claims Settlement, the complaint being settled observing the stipulations of art. 304 in the Civil Code. Other decisions regarded observance of the concession contract, competence infraction due to conclusion of a contract in the absence of a decision given by the local council and in the absence of a power of attorney, obligation to observe stipulations of standard contract concluded between the parties by compelling the defendant to pay a quantum from the amount of money contracted in the form of nonrefundable financial grant in the case of special pre-accession programme for agriculture and rural development.

Empirical, comparative, logical and historical research methods have been completed by the statistical method, starting from data analysis found on the official web sites and continuing with the questionnaire method, which consists of three questions (1. Are you or were you participant in any procedure concerning award of public procurement contracts?; 2. Have you appealed in case you did not win? 3. If yes, to whom did you direct your complaint?) and the results were summarized and pertinently commented.

The conclusions of the doctoral thesis, together with the suggestions *de lege ferenda*, state that although general practice requires the use of the administrative contract, the legislation and doctrine are still insufficient and fragmented. The paper aims to highlight the theoretical but mainly the practical importance of institutions analysed in order to clarify

some issues concerning doctrine views and jurisprudence which are contradictory or insufficiently shaped.

The thesis followed a systematic research plan, supported by a rich critical background, valorizing the most important contributions in the field and pointing out the *lex ferenda* suggestions.