

ADMINISTRATIVE CONTRACT AS A NEW LEGAL INSTITUTE IN THE LAW ON GENERAL ADMINISTRATIVE PROCEDURE OF THE REPUBLIC OF SERBIA

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Abstract: It is a known fact that, in addition to substantive acts, the administration adopts legal documents. The theory of administrative law has introduced the division of legal documents issued by the administration into documents pertaining to administration (administrative acts) and documents pertaining to businesses (contracts). The theory of comparative administrative law, and French administrative law in particular, makes a distinction in respect of contracts, dividing them into private law contracts and administrative contracts. Rules of law on obligations apply to private law contracts, while administrative contracts are subject to special rules of administrative law.

There is no universal agreement in comparative law regarding the issue of administrative contracts. Different solutions to this problem indicate that differences in the historical development of a specific society have influenced the acceptance of a specific solution.

Speaking about Serbia, the administrative contract was first mentioned as a separate legal institute in the new Law on General Administrative Procedure 2016. It has been envisaged as a form of legal action of a relatively independent legal regime.

The paper gives a general overview of administrative contracts, some comparative law solutions, and introduces this legal institute in the light of legal provisions of the Serbian law.

It is still early to speak about effects of these solutions in respect of the institute of administrative contract, given the fact that the full implementation of the Serbian Law on Administrative Procedure started on 1 June 2017. In any event, it is necessary to give a chance to the solutions offered in relation to this legal institute.

Keywords: administration, legal act, administrative contract, legal institute, breach of contract, type of administrative action, administrative procedure.

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INTRODUCTION

In addition to substantive documents that the administration uses to manage its activities, it also adopts legal documents in the course of its functioning. The legal documents of administration may be administrative ones, in which the administration - in respect to the other party - has stronger will, and contracts, when the administration has equal will as the other party to the contract. The administrative law theory knows the division of legal documents of the administration into the documents of government, i.e. administrative acts and business acts, i.e. contracts. The theory of comparative administrative law, and French administrative law in particular, makes a distinction in respect of contracts, distinguishing between private law contracts to which the rules of the Civil Code apply and administrative laws to which special rules of administrative law are applied.

As part of the public administration reform, Serbia has passed a new Law on General Administrative Procedure (the Law) introducing the institute of administrative contract into its legal system. The Law came into effect on 9 March 2016, and its full implementation started on 1 June 2017.²

This paper offers a general overview of administrative contracts, some of the administrative law solutions, and presents this legal institute in the light of the legal provisions within Serbian law.

ADMINISTRATIVE CONTRACT – GENERAL OVERVIEW

There is no universal agreement in comparative law regarding administrative contracts. As far as France is concerned, there are contracts concluded by the administration (*contrat de l'administration*) and administrative contracts (*contrat administratif*)³. The former are subject to the regime stipulated by the Civil Code and disputes related to them are resolved by the court of general jurisdiction. The legal regime which applies to administrative contracts is governed by special administrative law rules and disputes arising from them are resolved by administrative courts. As for administrative contracts, it is important that one party is always the state, i.e. the relevant state authority, that the contract is concluded concerning the functioning of the public service and that the contract includes the provisions that depart from the general rules of private law (*clauses exorbitantes du droit commun*).

In French law, administrative contracts are subject to a specific legal regime from the conclusion to the fulfillment or termination of a contract that is different from the general rules on contracts. This legal regime gives the administration,

² See: Law on General Administrative Procedure, *Службени гласник РС*, бр. 18/2016.

³ See: Jean Rivero, *Droit administratif*, Dalloz, Paris 1970, 35; André de Laubadère, *Tratté théorique et pratique des contrats administratifs*, 3 vol., Librairie générale de droit et de jurisprudence, Paris 1956; Georges Péquignot, *Théorie générale du contrat administratif*, Pedone, Paris 1945.

on the one hand, broader powers in respect of the other party, and on the other, it imposes certain obligations and restrictions regarding the procedure for concluding a contract. Greater powers, but also greater restrictions and obligations are in the spirit of the principle that the administration must protect general interest.

The departures of the regime of administrative contracts from the regime of private law contracts, whereby the administration is either favoured or restrained, are known in French law and practice as different modalities: a) accession contracts (*les contrats d'adhésion*), b) the theory of unpredictability (*la théorie de l'imprévision*), etc.⁴.

Examples of the main administrative contracts in France include: public work contracts (*les marchés de travaux publics*), public services contracts (*les marchés de fournitures*), contracts for the carriage of passengers and goods of public importance (*les marchés de transports*), contracts on concessions of public service (*la concession de service public*), public loans contracts (*l'emprunt public*), etc.

French administrative law has developed the theory of administrative contracts because France has a special administrative judiciary whose jurisdiction encompasses the settlement of disputes arising from administrative contracts. Disputes arising from private contracts concluded by the state are settled by a court of general jurisdiction, not a separate administrative court. However, it should be borne in mind that, if we look at these matters from the perspective of comparative law, we shall see that there is no universal solution to this issue.

Consequently, certain contracts shall be regarded to be administrative contracts in France, whereas the same contracts in Italy have the nature of private contracts. In some countries administrative contracts exist only when it is specifically stipulated by the law⁵. In the law of Switzerland, the disputes arising from administrative contracts are settled by the court of general jurisdiction. In legal theory, there is also no unique view regarding the issue of determining which contract is private and which is administrative one. Sometimes the terminology itself is not uniform. In France, these special contracts are referred to as administrative contracts, whereas in Germany and Austria these are public law contracts (*öffentlichrechtlichen Vertrag*), although the term administrative contract is also used (*Verwaltungsrechtliche Vertrag*).

The distinction is also made between the administrative contracts which are 'coordinative' in which there are equal wills of the parties and the 'subordination' contracts in which the state appears with stronger will⁶. On the other hand, in Germany, for certain contracts - that would be considered to be public law con-

4 See: Charles Debbasch, *Institutions administratives*, Librairie générale de droit et de jurisprudence, Paris 1966, 151; André Buttgenbach, *Manuel de droit administratif*, - er Partie F. Larcier S. A. Bruxelles 1966, No 381-ter, 358; Велимир Иванчевић, *Теорија административног уговора*, Информатор, Загреб 1969, 83; Marcel Waline, *Précis de droit administratif*, No 838, Montchrestien, Paris 1969, 430-443.

5 See: Enrique Sayagues Laso, *Traité de droit administratif*, Librairie générale de droit et de jurisprudence, No 349, Paris 1964, 530.

6 Hans Julius Wolff, *Verwaltungsrecht*, I Verlag, C. H. Beck, München 1968, 281-282.

tracts in some countries - there are authors who may claim that such a contract is not a public law contract, but "an administrative document upon request" or by voluntary subordination (*Verwaltungsakt auf Unterwerfung*). In this sense, there are also theoreticians in Germany, Switzerland and Italy who, for instance, do not see concession as a public law or private law contract, but an administrative document 'upon request' or an administrative document by which a party voluntarily agrees to be unequal⁷. However, it should be pointed out that there are authors who are opposed to such views as they find it necessary to look for new instruments that will better suit the transformation of the modern state and its administration and who perceive administrative contracts as such instruments⁸.

ADMINISTRATIVE CONTRACT IN THE LAW OF YUGOSLAVIA

a) Period until the establishment of Yugoslavia in 1918

Before the creation of the First Yugoslavia, until 1910, the legal regime in Serbia for contracts concluded by the state was the same as for all other contracts to which the rules of the Serbian Civil Code applied. Disputes arising from all contracts were settled by the court of general jurisdiction. However, the State Accounting Act of 1910 included certain provisions relating to procurement contracts which departed from the rules of the then Civil Code. In this way, the Civil Code had subsidiary significance for these contracts concluded by the state⁹.

b) Period from 1918 to 1941

Apart from some exceptions, there was not much writing or discussion regarding administrative contracts in the theory of administrative law of this period¹⁰. At that time, the papers and attitudes of our national authors regarding administrative contracts were greatly influenced by the French theory of administrative law. Yet, realistically speaking, they were aware that, given the substantive law of the time, it was premature to construct administrative contracts of French law in the existing circumstances in our country at that time¹¹.

The law and practice of this period did not recognize administrative contracts. The procurement contracts concluded by the state were subject to the Civil Code

7 Hans Kelsen, *Zur Lehre vom öffentlichen Rechtsgeschäft*, Archiv des öffentlichen Rechts, T. XXXI, H. 1, 25 и даље; Петко Стайнов, *Теорията за административния договор и социалистическото право*, Годишник на Софийския Университет, Юридически факултет, T. LVI, 1965, 48.

8 Martin Bullingen, *Vertrag und Verwaltungsakt*, Stuttgart 1962, 237.

9 Лаза Костић, *Административно право Краљевине Југославије*, књ. II, Београд 1936, 36. 10 Михаило Илић, *Административно право (литографисана предавања)*, Београд, 138-173; Иво Крбек, *Управно право*, књ. II, Загреб 1932, 59-92; Љубомир Радовановић, *Управни уговор*, Архив, књ. XIII (XXX), 1926, 181-192 and 281-298.

11 Л. Костић, *ibid.* 39.

regime, and all disputes arising from such contracts were under jurisdiction of courts of general jurisdictions, and not administrative courts.

c) Period following 1945

After 1945, there was almost no discussion of administrative contracts in Yugoslavia. An exception in this regard was Prof. Velimir Ivancevic, who in a concise and transparent way pointed out to the importance and meaning of French theory on administrative contracts, as well as Prof. Dragas Denkovic¹².

However, although there was is no mention of a special administrative contract in either our substantive law or in judicial practice, because all disputes related to contracts are settled in keeping with general rules of civil law, there are still examples from which it can be noted that our substantive law regulates many controversial situations regarding some contracts in a manner similar to the rules of the French theory of administrative contracts (the theory of unilateral changes of contractual obligations in the public interest, the theory of unpredictability, etc.). Observed in this way, all of this supports the motion which claims that there are reasons for us to introduce administrative contracts, especially as we also have an the institute of administrative dispute which is under the jurisdiction of the Administrative Court and which can be resolved in a dispute of full jurisdiction.

ADMINISTRATIVE CONTRACT IN THE LAW ON GENERAL ADMINISTRATIVE PROCEDURE OF THE REPUBLIC OF SERBIA

A decades-long dilemma that existed in Yugoslav and Serbian law has been resolved by the new Law, which provides for the administrative contract as a legal instrument.

The Law (Art. 22-26) in a most general way regulates only specific legal issues relating to all administrative contracts (their permissibility, modification due to changed circumstances, the right of the authority to terminate the contract, the party's objection due to failure to fulfill contractual obligations and the application of the Law and other laws governing obligation relations). In this way, as regards administrative contracts, three legal regimes will be applicable. First and foremost, for the particularity of certain types of administrative contracts, special laws in certain administrative areas will be appropriate. Issues regarding administrative contracts that are not regulated by the Law or by a special law shall be covered by applicable subsidiary regulations of the Law on Obligations (Article 26).

12 Велимир Иванчевић, *Теорија административног уговора, Уговорноправни аспекти уговора о инвестиционим радовима југословенских предузећа у страним земљама*, Инвестиције, Уредио др. А. Голдштајн, Информатор, Загреб 1969, 71-87; Драгаш Денковић, „Управни уговори и облигациони односи радних организација које врше јавна овлашћења“, *Анали Правног факултета у Београду*, бр. 1-2, 1970, 45-72.

The Law provides only for the basic elements of legal regulation of administrative contracts, as they are to be introduced only by special laws in the specific legal areas. It remains for special laws to gradually introduce administrative contracts into our legal system in keeping with the provisions of the Law, in order for this new legal instrument to have the desired effect. In this way, administrative contracts, as a new form of administrative activities within our administrative law, should contribute to a more effective regulation of certain public-law relations. As a bilateral legal act, a contract concluded regarding an administrative matter between a public law authority and a party, the administrative contract is primarily related to the field of concessions, public-private partnership and public services, but may also be used in other areas if provided for by a special law. The only limitation is that its content must not be contrary to the public interest or the legal interest of third parties.¹³ In that sense, Article 22 of the Law stipulates as follows: "The administrative contract is a bilaterally binding written document which, under provisions of a special law, is concluded between an authority and a party and which creates, changes or reverses a legal relationship in an administrative matter. The content of the administrative contract must not be contrary to the public interest or the interest of third parties."

Administrative contracts are a kind of administrative documents, which, as we have already pointed out in the paper, are also recognized in comparative law. These are the contracts concluded between public law entities, on the one hand, and a private law entity, on the other. The objective of the administrative contract is the realization of the public interest. For example, it may be the construction of a motorway through a concession contract or the provision of public services (public transport, water supply, electricity supply) through a public-private partnership contract. The administrative entity concludes this type of contract for the purpose of achieving a public interest and certain public benefits in a certain area of social life for citizens and legal entities. Their legal specificity is reflected in departures from the general regime of contractual (civil) law. Regardless of the fact that it is a bilateral legal matter, the contracting parties are not equal, given the need to satisfy the public interest. Powers of a public law entity are more extensive in relation to the other party to the contract.¹⁴

The following provision of the Law shows that the contracting parties are not equal: "If due to circumstances arising after the conclusion of an administrative contract that could not have been foreseen at the time of concluding the contract, fulfillment of the obligation should become significantly difficult for a contracting party, it may demand from the other contracting party to modify the contract and adjust it to the existing circumstances. The authority rejects the request by a party in a decision if the conditions for amending the contract are not met or if

13 See: Драган Васиљевић, *Облици управног поступања по новом Закону о општем управном поступку Републике Србије*, Правни живот, бр. 10/2017, Том II, Београд, pp. 351-362.

14 See: Зоран Р. Томић, *Управни уговори-елементи правног режима у Србији*, Правни живот, Београд, 2017, бр. 10, Том II, pp. 249-265.

the change of the contract would cause damage to the public interest that would be greater than the damage suffered by the party” (Article 23).

It is clear that this provision places the authority in a more favourable position in relation to the other contracting party. It is possible that the newly arising circumstances significantly impede the fulfillment of obligations on the part of the authority, when it will request the other party to the contract for consent to amend the contract and adjust it to the arising circumstances. If the contracting party agrees, they will amend the contract and adjust it to the arising circumstances. Otherwise, if there is no consent, the authority can cancel the contract, due to what in their opinion constitutes the changed circumstances. However, it is possible that the new circumstances may significantly impede the fulfillment of obligations, not on the part of the authority, but the other contracting party. At its request, the authority may give consent, and the contract may be amended so as to adjust it to the arising circumstances. As the authority is the guardian of the public interest, it may adopt a decision to decline such a request of the party if it assesses that the conditions for amending the contract have not been met or if the change of the contract would cause damage to the public interest that would be greater than the damage suffered by the party. In such a situation, the other party may resort to administrative law means of protecting its rights and interests. This can be an appeal in the administrative procedure and/or a lawsuit in an administrative dispute, depending on the position of the authority that made the decision within the hierarchical ranks of the administration.

It should be pointed out that the provisions of the Law pertaining to the authority's right to terminate a contract place the authority in a more favourable position in relation to the other contracting party. In this regard: “The authority may terminate an administrative contract: a) if the party fails to agree on amending the contract due to changed circumstances; b) if the party fails to fulfill contractual obligations; c) if it is necessary to prevent a serious and imminent threat to life and health of people and public security, public peace and order or to eliminate disruptions in the economy, and it cannot be successfully resolved by other means that less affect the vested rights. The authority terminates the administrative contract by a decision in which it explicitly states and clearly explains the grounds for termination” (Article 24).

The fact that the right to terminate the contract and the assessment of the fulfillment of the abovementioned grounds for termination is reserved only for the authority, places it in a more favourable position in respect of the other party. However, the authority is obliged to state and clearly explain the reasons for termination in the decision on termination of the contract, which restrains its arbitrariness. The other contracting party may challenge the decision on termination of the contract in order to protect its rights and interests by administrative law means. This may be an appeal in the administrative procedure and/or a lawsuit in an administrative dispute.

The Law does not provide the other contracting party with the right to terminate the contract but allows it to raise an objection if the authority fails to fulfill its obligations. Thus: "If the public law authority fails to fulfill its obligation, the party cannot terminate the administrative contract, but it can file a complaint" (Article 25).

The complaint is a remedy which can be declared within six months from the failure of the authority to fulfill the obligations under the administrative contract. The rule is that the complaint is made to the head of the authority who will decide upon it in a decision that is passed within 30 days from the receipt of the complaint. The head of the authority may decide on the filed complaint in one of the following ways: a) to reject a complaint which is not timely, not permissible, or not filed by an authorized person and which is not regulated within the deadline set by the authority; b) to reject a complaint if it is not founded; c) to heed a complaint if it is found to be well-founded.

If a complaint is adopted as founded, then the decision will specify the way in which the undertaken contractual obligation shall be fulfilled and decide on the claim for compensation of damages.

There are administrative-law means to protect the rights and legal interests of a dissatisfied party against the decision made regarding the filed complaint. These include an appeal in the administrative procedure and/or a lawsuit in an administrative dispute.

Administrative contracts have also been introduced within the legal systems of Croatia and Montenegro, the states formed in the territory of the former SFRY, whose administrative procedures stem from the same legal tradition as the ones in Serbia. In this place, we shall discuss their solutions.

ADMINISTRATIVE CONTRACT IN CROATIAN LAW

The General Administrative Procedure Act of Croatia introduces the administrative contract as a new legal instrument¹⁵.

Part Six of the Act focuses on the administrative agreement (Art. 150-154) in respect of which it regulates the following issues: conditions for concluding agreements and the subject thereof, invalidity of administrative agreements, amendments to the administrative agreement due to altered circumstances, cancellation of administrative agreements, and objections to the administrative agreement¹⁶.

In the law of Croatia, an administrative agreement is concluded in writing between a public law authority and a party for the purpose of performing the rights and obligations determined under a decision (administrative act) by which an administrative matter is settled, when the entry into such agreements is stipulat-

15 See: <http://www.zakon.hr/z/65/Zakon-o-op%c4%87em-upravnom-postupku>, accessed on 9 March, 2017.

16 Иван Копрић, *Упознавање са новим Законом о опћем управном поступку*, Загреб 2010.

ed by law. If the administrative agreement has a legal effect on the rights of third persons, it shall be legally valid only upon the written consent of these persons.

An administrative agreement may not be contrary to the disposition of the decision, mandatory regulations or the public interest, nor to the detriment of third parties.

Administrative agreement is invalid in the following cases:

1. if it is contrary to the decision for the enforcement of which it was entered into;
2. due to reasons of invalidity laid down by the law regulating civil obligations;
3. when part of the agreement is invalid, save when the agreement would produce legal consequences without the part concerned.

An administrative agreement shall not produce any legal consequences, and its invalidity must be established by the court competent for administrative disputes. In order to achieve this, the complaint must be filed with the court either by the party or the public law authority.

If due to circumstances arising after an agreement is concluded, which could not have been foreseen at the time of its conclusion, fulfillment of the obligations becomes extremely difficult for one of the contracting parties, this party may request that the amendment be made according to the new circumstances. Parties must agree on the amendment or otherwise no amendments may be made.

Cancellation of an administrative agreement is also possible. Thus the public law authority is entitled to unilaterally cancel the agreement in the following cases (Art. 153):

1. when a public law authority and the party do not reach an agreement on the amendments to the agreement or when the public law authority or a third party included in the administrative agreement do not consent to those amendments;
2. when it is necessary to prevent a serious and immediate threat to the life and health of people and the public safety, when it cannot be prevented by other means which would involve smaller interference with the obtained rights;
3. when the party fails to meet the obligations arising under the administrative agreement.

The public law authority cancels the administrative agreement by a decision which must include the reasons for cancellation and the amount of damages if the public law authority incurred damages through the party's failure to meet the obligations stemming from the administrative agreement. A decision on the cancellation of an administrative agreement may be subject to an administrative dispute.

However, when the public law authority fails to meet the contractual obligations, the party may file a complaint which may also request the award of damages incurred from the failure to fulfill contractual obligations. The complaint is filed with the body responsible for supervision of the work of the public law authority. The body deliberates on the complaint in a decision. An administrative dispute may be instituted against such a decision.

ADMINISTRATIVE CONTRACT IN THE LAW OF MONTENEGRO

Montenegro adopted a new Law on Administrative Procedure towards the end of 2014, and it came into force on 1 January 2016¹⁷.

The second part of the law (administrative activities) and its chapter two focus on the legal institute of administrative contract (Art. 27-30) and regulate a number of issues related to it (an administrative agreement between a public law authority and a party, cancellation of an administrative agreement, amendments to and cancellation of an administrative agreement due to changed circumstances, unilateral cancellation of an administrative agreement).

The law of Montenegro envisages that an administrative agreement between a public law authority and a party is to be concluded in writing. It is concluded for the purpose of establishing, altering or cancelling a specific legal relation in an administrative matter within the scope of the public law authority jurisdiction when it is laid down in a special law, when concluding such an agreement is in the public interest and when the agreement does not threaten the rights of third persons.

Once concluded, an administrative agreement may be cancelled due to the following reasons:

1. when the conditions for the conclusion are not met;
2. in cases in which there is mandatory cancellation of a decision in accordance with the Law on Administrative Procedure.

The cancellation of an administrative agreement is deliberated on in an administrative dispute when a procedure is instituted by the party or the public law authority.

Changed circumstances or other reasons may lead to a change or cancellation of an administrative agreement. Thus the administrative agreement may, due to circumstances arising after its conclusion which could not be foreseen at the time of conclusion, and which significantly impede the fulfillment of contractual obligations or for other reasons, be changed or cancelled in accordance with a special law.

The public law authority has the right to unilaterally cancel the administrative agreement when:

1. the party fails to meet the obligations arising from the administrative agreement;
 2. it is necessary for the prevention of threat to the life and health of people or property or when such a threat cannot be prevented in other way.
- In the aforementioned cases, the administrative agreement is cancelled by a decision which must include and explain the reasons for the cancellation of the administrative agreement. A party may institute an administrative dispute against such a decision.

¹⁷ See: <http://www.ti.gov.me/biblioteka>, accessed on 9 March, 2017.

CONCLUSION

From this concise overview of the regime of contracts concluded by the state it may be noted that there is no complete agreement in jurisprudence, either national or international, on the legal nature of these contracts. The diversity of solutions regarding this issue suggests that differences in the historical development of a certain society influence the acceptance of a certain solution. It was due to the rich practice of the National Council that French administrative law influenced the questions of the existence of administrative agreements. It should be noted that this problem occurred in French law because of a practical reason, i.e. special administrative courts demanded more extensive theoretical justification. Given the influence of French legal science in comparative law, it is natural that certain theoreticians in other countries, under such influence, posed the problem of a theoretical explanation for the existence of a separate administrative contract. Hence the contradiction in theoretical explanations of the legal nature of the administrative contract and the uncertainty in justifying the existence of these contracts in countries where there is no special administrative judiciary.

Bearing in mind that legal science in comparative law has not yet achieved a unified theoretic view on the legal nature of the agreement concluded between the state and other public law entities, it is obvious that the solution to this question is factual and that it will depend on an assessment of all circumstances which solution would be best suited to each particular state.

In our country, this dilemma has been resolved by the new Law on General Administrative Procedure, which in the most general way regulates specific legal issues related to administrative contracts. Special laws from specific administrative fields shall apply to the features of special kinds of administrative agreements. The countries in our neighbourhood (Croatia and Montenegro) have acted similarly. This is understandable, given that Croatia and Montenegro, just like Serbia, have innovated their laws on administrative procedure, harmonizing them with the European Union law, so that we, in a way, had the same models and acted upon the same recommendations. Similarly, the fact should be noted that these three countries have a shared legal tradition and that they had applied the same Law on General Administrative Procedure before the adoption of these laws, with small amendments.

It is still too early to speak about the effects of these solutions related to the institute of administrative agreements given that the Serbian Law has been fully applied since 1 June 2017 and in Croatia and Montenegro the implementation of the relevant acts is not long enough to draw valid conclusions. In any event, bearing in mind that it is a new institute, for its successful implementation in practice, it is necessary to give a chance to the provisions offered by the Law regarding this institute, as it is gradually introduced by special laws in respective administrative areas.

When adopting or amending such special laws, their compliance with the relevant provisions of the Law should be ensured. Otherwise, there is a risk that the provisions of the Law pertaining to administrative contracts could remain 'a dead letter' and that in practice various regulations are applied to the same kind of contract or that there are different interpretations, which would create legal uncertainty and exacerbate the business environment, thereby rendering the new legal institute pointless.

In any case, the real defence against this is to be provided by the legislator taking precautions when introducing the administrative contract in specific administrative areas by adopting special laws.

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