

ANALYSIS OF THE LEGAL REGIME APPLICABLE TO CONCLUDE THE CONTRACT OF CONCESSION IN REPUBLIC OF MOLDOVA

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ABSTRACT: *Analyzing the judicial regime applicable to sign the concession contract there are made researches on concession contract parts, the validity conditions, as well as the concession procedure in order to choose the best joint person to sign the contract who will sign the contract. Presenting the aspect linked to the execution, modification and contracts' canceling the attention is kept by putting into evidence the particularities of the concession contract as administrative contracts, and especially the concession holder write to control the fulfilling way by leasing person of the stipulated clauses from the contract, the write to modify unilateral the settled part of the concede contract, the write to cancel one side the contract.*

In the thesis are puttied into evidence several gaps about the way of implementation the concession institution trough administrative process. In this way there should be modified law stipulation which stop using concession in practice, motivating by the fact that nowadays public services do not satisfy completely the citizens' needs because of the precarious state and administrative units' budget.

KEYWORDS: *concession contract; concession procedure, administrative contract, citizens' needs, public interests*

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With independence and sovereignty of Moldova, the legislator start to work on elaborating of the legal framework needed for the transition to market economy. As a consequence, Moldovan legislation was enriched with several new legal institutions, and

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traditional institutions of law is in the process of modernization, to adapt to current needs of society. Example for this process is the regulation of concession contracts, settled by the Law on Concessions no. 534-XIII of 13.07. 1995¹.

Said law regulate the concession as a means of enhancing public goods, to provide activities and public services, which is realized through a legal act called concession contract. Although adoption of the law was important at that time so that it establishes the legal application of the concession, as by emphasizing the main characteristics of the concession contract, it was still impossible to be taken into account all the circumstances was to be applied. Today, we find that there are some gaps that need to be abrogated, In order to correctly perceive the true meaning and reason of the existence of the concession contract as a contract administration, and the importance of his implementation in the public administration.

According to art. 1. paragraph. 1 of the Law on Concessions no. 534-XIII of 13.07.1995:

"The concession is a contract through which the state assigns (transmit) to an investor (individual or legal person, including foreign), in exchange for a fee, the right to develop prospecting activity, exploration, recovery or restoration of the natural resources in the Republic of Moldova, to provide public services, to exploit objects of state property (municipal) which under the law are fully or partially removed of civil circulation. and the right to conduct certain types of activities, including those representing the state monopoly, taking over the concession object management, presumptive risk and patrimonial responsibility."

Thus, the concession contract has as object transmission of more rights in exchange for a fee, such as the right to develop prospecting and exploration activity, recovery or restoration of natural resources in the Republic of Moldova; the right to provide public services, the right to exploit objects of state property, which under the law are fully or partially removed from the circuit civil; the right to carry certain types of activities, including those which are state monopolies.

In addition to the above, the art. 3.paragraph 2 of the Law provides that the object of concession may be:

- a. land and other natural resources, their prospecting, exploration and capitalization;
- b. movable and immovable property of public or private domain of the state or administrative-territorial units;
- c. public works and services nationally or locally.

Although these provisions should complete the object of the contract of concession, contained in their legal definition, it is obvious that doesn't exist a clear list of goods, which can make the object of such contract.

Parties of the concession contract are the concessionaire and the conceder. The quality of conceder has the Government for the concession of land and other natural resources, and specialized central bodies and local public authorities, within their competence, for concession assets of state enterprises (municipal), other economic objectives. (Article 4 of Law no. 534-XIII of 07.13.1995).

¹Law on concessions. No.534-XIII of 13.07.1995, published in the Official Gazette of the Republic of Moldova no. 67 of 30.11.1995.

As a concessionaire, according to art. 5 of the law, may be individual and legal entities of the Republic of Moldova and other countries that the execution of the contract, take over the concession object management, presumptive risk and asset liability.

The award of concession contracts is made either by auction or by direct negotiation, stating that at the second way is used only to request for the concession of a single bidder whose offer meets the conditions set by the conceder.

Auction, in turn, may be *public auction*, *tender pre-qualification* and *restricted auction*.

Note that the tender regulated for conclusion of concession contracts is extremely difficult, being a real impediment of the goods concession, public services and public works

Other specific issues are changing and unilateral cancellation of the concession contract.

According to art. 14 para. 2 of Law no. 534-XIII of 13.07.1995, the grantor has the right to unilaterally amend the terms of the contract of concession, when arise special circumstances that have been referred to the concession.

The right of unilateral changes are based on the conceder exclusive right to determine changes of general interest and this interest has to adapt to public service².

Competent public authorities organize public services under public law, in order to satisfy a general interest. To the extent that conceding authority finds a change in the general interest, it may, by administrative acts to modify the conditions for public service or even to abolish the civil service, changing or, where appropriate, ending the concession contract.

As noted teacher. A. Iorgovan "public good concession of public services and, as a consequence, the concession contract are not goals in themselves, they are legal ways created by civilization of XIX. century, but especially the twentieth century, to make possible to emphasize better the public goods, which will be transmitted to the future generations to be provided at the highest levels of people, essential public services such as water supply, the house heating, public transport, and other"³.

Because the terms related to the organization, operation and conditions of exploitation of public service, are those which made the subject of the regulatory part of the concession contract, we believe that only these can be changed unilaterally by the conceder.

Financial clauses, those regarding the duration of the concession or in redemption, although provided in the book tasks of the concession, however, according to some authors⁴, does not constitute regulatory part of the concession contract. As a result, the contract will remain subject to common law rules regarding the effects of contract.

Therefore, unilateral modification of the concession contract cover issues related to the organization, operation and conditions of exploitation of public service, but it should be noted that any contractual provision that would prohibit or restrict the ability of unilateral changes conceder will become fully null, unable to produce legal effects for the future.

² A. Iorgovan, Administrative Law Treatise, Volume II, Bucharest: ALLBECK, 2002, p. 237

³ A. Iorgovan, p.237

⁴ P. Negulescu, Administrative Law Treatise, Bucharest, Institute of Graphic Arts' E. Marvan, "1934, p. 157-160.

In addition, concession authority "will change exclusive the conditions of development of public service". Change must not be incompatible with chosen management mode "and cannot change the object of the contract."⁵ If it is necessary to change the subject concession, grantor must first proceed to the unilateral denunciation of the contract to modify the public interest.⁶

According to art. 14 paragraph 2 of Law no. 534-XIII, the modification of the terms of the concession contract become "*if arise special circumstances of those that have been referred to the grand concession*".

Without going into details, we emphasize that the term "special circumstances" refers to "those situations which appear in the organization, operation or operating mode, which go beyond the normal, admissibility of predictable and objectively, requires changing the "mode of operation" of the concessionaire "⁷.

Remember also that unilateral modification of the regulatory part of the concession contract, the grantor in unilaterally way has the obligation to not modify the contract, than the terms set by law.

In our opinion, this change must have as a result the notification of the concessionaire, to not create inconsistencies between what exists in the contract and new conditions that appear in the contract as a result of new-onset unilateral modification of the concession contract. As for obligation of prior notification (which is not expressly provided in the law, but not prohibited), we consider that can be satisfied by any means of communication, together with proof of reception by the concessionaire, a means can be a phone note, a recommended letter, fax, etc.

The same article of the law regulating the concession right to receive compensation⁸ from conceding authority when unilateral modification of contractual clauses give its harm. But we should not forget that the concessionaire has assumed the risk of such changes.

Disputes about the amount of damages appeared from conceder and concessionaire are of the administrative contentious competence. Also "*disputes is not a reason for avoiding contractual obligations of the the concessionaire*".

You also need to specify that administrative courts are competent to censure if the act of unilateral change takes place, actually, as a legislator called "*special circumstances*".

Regarding the unilateral termination of the concession contract, the Law on Concessions no. 534-XIII of 13.07.1995, regulating the the art. 14 paragraph. 5, among the cases of termination of the concession contract and its termination before term.

According to the article 14 paragraph 3 of Law 534-XIII of 13.07.1995, the conceder has the right to request before term, the termination of the concession contract if:

⁵ France's State Council Decision of 2 February 1983, "Revue française de droit administratif", 1986, p. 21; in Gherghina S., A. Sebeni, effects and termination of the concession. - New York: Law Journal no. 11/1999. p. 6.

⁶ France's State Council Decision of 17 February 1978 (the "Grands Judgments ..."), in S. Gherghina, A. Sebeni, work cited., p. 6.

⁷ A. Iorgovan, work cited., pag.238.

⁸ Simona Gheorghina, A. Sebeni, op., P.7. We subscribe to the thesis which the cover of damage can be done through other means than payment of money, such as increase of the tariffs for provided services, reduction of the fee or extension of the concession term.

a. *detect or occurrence of events or facts which give him the right to terminate the contract.*

At first sight seems to be a termination when the conceder determine the existence of illegal acts in the activity of the concessionaire, which gives the right to terminate the concession contract.

However, this idea cannot remember, because even the point. b) of this article is provided the termination of contract when the terms are violate by conceder.

The conceder right to terminate unilaterally the contract has the same foundation as the the right to unilaterally change of the regulated part of the concession contract, exists independent of her mention in the concession contract, and its exercise may be limited by the concession contract, under penalty of nullity.

Regarding the phrase "national or local interest", can remember to be those circumstances or events of a nature to affect national or local interests and require the compliance conduct to ensure general or local good.

Thus, the concession provider will can denounce unilaterally the concession contract then the necessity of the public servicedisappeared⁹, when is necessary a new form of exploitation of public service¹⁰, in case of serious disagreements between the two concessionaires who collaborate to provide the same public service¹¹ or in case of disagreement between the concessionaire and beneficiaries.

In the case of concession of public goods, the conceder may terminate the concession if the good concessioned is disaffected (eg dissolution of a cemetery or a market, etc..) Or in its damage situation to realize a public service.

In the case of the activities concession we consider that the concession authority may terminate the concession for reasons related to national or local interest¹².

Before proceeding to the unilaterally terminate of the contract, the conceder must notify the concessionaire. Notification will be made in writing within a reasonable time so as to ensure the concessionaire with take note of the intention of conceder and to establish, by mutual agreement, the amount of compensation payable by conceder and payment method of them.

Compensation should also cover the actual damage suffered (*damnum emergens*) and lost profit (*lucrum cessans*).¹³

The interwar Romanian legal doctrine and current French legal doctrine, the denunciation of the concession contract is synonymous with redemption concession.

The right of unilaterally denunciation must be particularly of termination of the contract for defaults in the first case unilateral denunciation can operate independently of the existence of any fault of the concessionaire in non-contractual obligations.

⁹ France's State Council Decision of 26 February 1975 in "Grand arrêts..." ,p. 133, quoted by S. Gherghina, A. Sebeni, work cited., p. 20.

¹⁰ France's State Council Decision of 23 May 1962, in the "Grand arrêts..." , p. 133, quoted by S. Gherghina, A. Sebeni, work cited, p. 20.

¹¹ France's State Council Decision of 31 January 1968, in the "Grand arrêts ...", p. 133, quoted by S. Gherghina, A. Sebeni, work cited, p. 20.

¹² S. Gherghina, A. Sebeni, work cited, p. 20-21.

¹³ French State Council Decision of 29 June 1983 "Grand arrêts ...", p. 133, quoted by S. Gherghina, A. Sebeni, work cited, p. 21

According to an opinion, unilateral denunciation (redemption) is a way of extinguishing obligations of the parties, specific to administrative contracts – and especially the concession contracts - through which the public contracting authority (the conceder in the case of the concession contracts), invoking reasons of general interest, has the right to terminate a contract without a contractual fault of its contractual partners, but only after a prior and equitable compensation for it.¹⁴

b. *violation of contract terms by the concessionaire.*

Is the way to terminate the concession contract for non-compliance of the obligations assumed by the concessionaire .

"Violation of contract terms" believe that is the same with " culpable non-execution of the contractual obligations" from common law..

The conditions of termination of the concession contract are, we believe, the same as for termination of contracts subject to common law, namely a culpable failure of some contractual obligations, failure must be sufficiently important to do without question the execution obligations.

This fault can be either the contractual non-execution obligations or inability to fulfill it. Incapacity to fulfill the concessionaire obligations must be due to its fault and not exclusive of objective impossibility of non -execution, because in the latter case, involved the renunciation of concession and not its termination.¹⁵

Today, the institution concession is less known in Moldova, which determines to be applied in practice as much - very little or not at all.

However, it has applicability in the management of municipal public services, and namely water service, sewage service and wastewater treatment and sanitation service is managed in some localities in the country by concession.

Lack of experience of public authorities for organizing tenders, on the one hand, and the discrepancy between the legislation acts that establishing the mechanism of realization of the concession, on the other hand, are great obstacles in providing local quality services.

¹⁴ I. Abram, concession contracts. - Bucharest: Rosetti, 2003, p. 195.

¹⁵ Idem, p. 197.