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THE LEGAL NATURE OF SOVEREIGN GUARANTEES: ONE LESS ADMINISTRATIVE CONTRACT?

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Abstract

Public guarantees may be issued in various forms, as the applicable legal provisions are permissive enough to allow the use of private law forms of guarantees. In this context, the legal effects of public guarantees are much close to those of private law guarantees, and such similarity is also explaining their intensive use as forms of public support to economic activity. This study aims to analyse the legal nature of public guarantees on two levels: first, to determine whether public guarantees, especially those issued by public authorities, are contracts or administrative acts, concluding on their contractual nature in all cases, and, subsequently, to qualify such contract as being administrative or belonging to private law. Still, describing the public guarantee contract as a private law contract does not preclude the application of imperative public law norms concerning the issuance of the guarantee and the further action of the issuer.

Keywords:

public guarantees, administrative contract, administrative act, administrative disputes, private law contract, legal nature

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Preliminary considerations

Whether they are issued by the government or by local authorities, the variety of public guarantees available is regulated by a fairly permissive regulatory framework and shaped by the confluence between the tendency towards standardization aiming at an optimal format, specific to administrative practice, and the flexibility necessary to adapt with ease to practical circumstances considered by the issuance of this category of guarantees.

The Government Emergency Ordinance Nr. 64/2007 regarding sovereign debt, as amended (hereafter „The Sovereign Debt Law"), does not prescribe a specific form that the state guarantee of sovereign debt should take, referring instead the authority to establish the appropriate sovereign debt instruments to secondary norms (article 3, paragraph 2).

The Methodological Norms themselves, in Article 3.2.1, identify only one type of public guarantee, that is the letter of guarantee, although it stipulates that other types of state guarantee (or at least those attached to sovereign debt) can also be established, such as the issue of promissory notes or the endorsement of promissory notes.

With regard to municipal guarantees, article 62, paragraph (2), letter e) of the Law of local public finances no. 273/2006 only includes a general mention of the „*local guarantee*". The law does makes particular mention of guaranteed promissory notes at paragraph (3), but the text remains general and permissive in character, as it does not explicitly prevent local authorities from choosing other forms of municipal guarantees.

In terms of guarantees issued by public companies on behalf of the state or on the state's account, within the framework of certain guarantee schemes, some of the applicable regulations refer to a guarantee assumed by a tripartite contract as „*instrumentum*", to be entered by the guarantor, the debtor (borrower) and the lender.

Such a diverse typology of public guarantees conceals, however, a legal nature set in fact within a common level, which is characterized by the obligation of payment assumed by the state or by the administrative-territorial units, performed through the issuance of public guarantees. According to the definition provided by article 2, letter (h) of the Sovereign Debt Law, a "*guarantee*" means "*the obligation undertaken on behalf*

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and on the account of the state by the Government, through the Ministry of Public Finances, or by administrative-territorial units, through local authorities, to repay on the maturity date the debts unpaid by the beneficiary of the guarantee [...]. There is nothing that distinguishes this definition from that of a guarantee in private law.

To determine a common framework for all types of public guarantees, that is to identify their legal nature, it is necessary to address two important issues, which could help identify the basic legal structure applicable to all types of public guarantees. The first is whether public guarantees are of a contractual nature or whether they are a unilateral legal act. The second question looks at qualifying the unilateral legal norm as either being of an administrative or of a private law nature, given the dualist nature of the Romanian legal system.

The public guarantee – a contract or an unilateral act?

To determine the legal nature of the public guarantee, it is necessary to consider two key aspects. First, the specific nature of the procedure of issuing public guarantees and the direct link between those and public funds. Second, given the general character of the norms regulating their effects, which appear to refer to an established operating mechanism, a thorough analysis of public guarantees is required in order to identify their legal nature.

In the first level of analysis, one important aspect that ought to be clarified is whether the legal act that creates the guarantee is of a contractual or of an administrative nature. Such an analysis is, of course, pertinent to those guarantees issued by public authorities, such as the Ministry of Public Finances, on behalf of the state, and by the administrative-territorial units as only these entities can issue administrative acts. There is no doubt, however, based on the specific criteria provided by private law, about qualifying as contracts those public guarantees issued on behalf and on the account of the state by public undertakings which, although being part of the public sector, are regarded as legal persons subject to the norms of private law (private law entities).

As a legal construct created by private law, it is necessary for any attempt at qualifying the legal nature of public guarantees to start from this vantage point. This analytical exercise needs, however, to consider potential modifications of a legal nature instigated by the

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presence of public guarantees in an environment specific to public law, of this mechanism originating from private law as the issuers are public sector entities whose aim is subsumed to the general interest. In private law all guarantees are considered to be of a contractual nature as they are the result of an agreement, although in one (still solitary) view expressed by several Belgian authors, autonomous guarantees are considered as unilateral acts rather than contracts (Simler, 2006, p. 862).

Given this unanimous qualification of guarantees as private law contracts, the issuance of public guarantees by public authorities such as the Ministry of Public Finances, administrative-territorial or by public undertakings which were assigned such powers, raises a number of specific elements derived from the concurrent application of norms of administrative law, in addition to those of private law.

Thus, while the notion of contract in administrative law presumes the existence of the same elements related to the presence of an agreement as in private law (Apostol Tofan, 2004, p. 78), distinguishing a contract from an unilateral act requires a more complex analysis of guarantees, due to the much greater importance assigned to the unilateral act which represents the standard form of administrative act.

In addition, given the distinction made in administrative law, in terms of their legal nature, between administrative decisions, unilateral acts and acts of management, public guarantees can be qualified without any doubt as acts of management. The classification of administrative management acts as bilateral acts by most administrative law scholars tends to limit the qualification of public guarantees as unilateral acts, even from the perspective of public law. At the same time, a complete identification of administrative management acts with contracts will almost certainly be invalidated by the expansion of economic activities performed by the state and by administrative-territorial units, which will involve these entities expressing their will through unilateral acts that will ultimately remain administrative management acts.

Much of the scholarly work in this area has acknowledged that the general notion of contract cannot have different meanings in public and private law. What is different is the legal regime applicable to the contract in each of the two cases, with the administrative contract including those excessive clauses that distinguish it from the private law contract and

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being subject the special jurisdiction of administrative courts (Richer, 2008, p.9).

In private law, the basis of the contract is the consensual agreement, while in administrative law the request or the acceptance of an act by its beneficiary does not lead automatically to the execution of a contract but it can become the source of a unilateral administrative act. This situation was acknowledged by the French jurisprudence which has stated that a unilateral administrative act, requested or accepted after its issuance by its beneficiary does not become a contract. Such an acknowledgement of the unilateral character of the expression of will leads to a limitation of the applicability of the contract in administrative law. Here, an agreement is no longer sufficient by itself to determine whether the resulting legal act is a contract or not.

Considering the foundation and the scope of the notion of agreement expressed in a unilateral act as established in administrative law, it follows that this notion cannot be applied to public guarantees (Lignières, 1994, p. 389). Thus, the cases in which an agreement qualifies as an unilateral act are those where the public authority adopts an act which the beneficiary does, or does not, accept, without being in the position of formulating observations regarding the respective act, for example in the case of the acts of appointment of public servants or of those establishing selection criteria. If in all these cases the initiative clearly belongs to the authorized public authority, the issuance of public guarantees is the result of a special request made by the borrower. The latter initiates the administrative procedure of the application for and issuance of, a public guarantee by the public authority authorized by law, following the initial request by the creditor of a guarantee (a lending institution or an international financial organisation).

At the same time, it is important to emphasize that the acts discussed here are issued by the public authority as part of the normal exercise of its legal powers, within the legal framework specific to public law. The issuance of public guarantees represents an activity subsumed into the state intervention in economic life while, at the same time, is a legal construct specific to private law, the scope of this legal construct being, in this context, compatible with the interests of the state.

In the context of the issuance of guarantees, as private law institutions, by the public law sphere, it is difficult to argue that the transformation of guarantees from contracts into unilateral acts has

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generated a substantive change to their legal nature. The legal mechanism of the guarantee continues to function along the same coordinates, which continues to presume the consent of the creditor. Furthermore, the practical use of public guarantees shows that their effects are similar to those in the private law sphere, this justifying their increasingly extensive use. Lending institutions would not assign financial worth to public guarantees if they would only create the effects specific to a unilateral act.

The theoretical distinction remains, however, difficult to argue especially if we consider that subsidies, which present characteristics somewhat similar to public guarantees - they are granted at the request of the beneficiary, while the characteristic performance belongs to the public authority, represent mechanisms of state intervention in the economy and can, in turn, be assimilated with a private law contract such as donation- have been qualified by the French doctrine and the jurisprudence of the French State Council as unilateral administrative acts of management rather than acts of authority ((Lignières, 1994, p. 391).

It is important to note, however, that an important factor in the qualification of subsidies as unilateral administrative acts of management is that the decision to grant a subsidy is made, and the payment terms are determined, exclusively by the public authority.

The secondary regulations refer, in an inconsistent manner, to the existence of a contractual document that accompanies the public guarantee. Thus, article 4.2.5 of the Methodological Norms to the Sovereign Debt Law refer to „*state guarantee agreements*", article 63, paragraph (3) of Law 273/2006 refers to the conclusion of a „*agreement for a guarantee on revenues*", while the Decision of the Inter-ministerial Committee for Financing, Guarantees and Insurance nr. 129/2011, for the approval of the regulation „EximBank Guarantees on behalf and on the account of the State" refers, in article 4, letters d) and e), to the existence of both a „*guarantee agreement*" to be concluded between the EximBank, as the issuer of the guarantee on behalf and on the account of the state and the debtor, and of a „*risk allocation agreement*" concluded with the creditor.

In our view, the main arguments in favour of maintaining the qualification of public guarantees as contracts and not as unilateral administrative acts are as follows:

Firstly, the terms of the public guarantee are negotiated with the debtor in favour of whom the guarantee is issued and, most importantly,

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with the creditor benefitting from the guarantee having to accept it together with the terms of issue. Therefore, setting the terms of the guarantee is the result of a negotiation process.

An unilateral administrative act of management is a decision adopted by a competent authority, a decision which is subject to acceptance or rejection by its potential beneficiary. Any capacity of the beneficiary of the guarantee to formulate observations regarding the terms of the act is expressly provided by the legal norms regulating the issuance of the respective administrative act, and can only be exercised within the limits set out by these norms. Moreover, only the subsequent inclusion of the unilateral administrative act in the body of a contract, such as the inclusion of a tender book related to the selection procedure in a concession contract, can indicate the legal nature of the act as contractual.

In the case of the public guarantee, the parties can freely negotiate its terms, within the limits set by applicable norms, without being subject to specific provisions similar to those mentioned earlier in this paper. The public authority issuing the guarantee expresses its will to enter a contract which generates both, rights and obligations for the public authority concerned.

Furthermore, the utility of public guarantees is similar to that accepted especially in banking practice, due to the identical effects that public they create. These effects are specific to contracts and are acknowledged as such by law. Yet, the law, the doctrine and the jurisprudence indicate that unilateral administrative acts have very different legal effects as their application within the framework of public guarantees would lead to a significant decline in their financial worth, due to their rejection by lending institutions.

In view of these arguments, we believe that public guarantees are always created as a contract, regardless of the form taken by the repayment obligation thus assumed. Like any other guarantee, the public guarantee involves both a contractual relationship between the debtor and the guarantor and a contractual relationship between the guarantor and the creditor, which create the guarantee. The issuer of the guarantee undertakes an obligation of repayment to the creditor under certain conditions, depending on the type of guarantee, that is, on whether this is qualified as a surety or as an autonomous guarantee.

If we retain the hypothesis that free will is the sole foundation for the binding force of the contract, one can argue that the state can

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undertake obligations based on its sovereign rights. Hence, its rights and obligations thus assumed are expressed in the contract.

At the same time, the application of the free will principle to contracts concluded by the state, has been contested on the basis that the concepts of function and scope prevail in public law, both concepts integral to the broader notion of public interest, thus setting important limitations to the concept of free will that prevent the recognition of the free will of a public authority which can only function within the powers expressly granted by law for the purpose of serving public interest. The dominant doctrine today is based on a classic theory of contract originating from Aristotle, adopted by Thomas d'Aquino and later by the modern doctrine of natural law. According to this theory, the parties to the contract are not only bound by the rights and obligations expressly agreed but also by the obligations derived from the essence or the nature of the contract.

The latter theory appears to be also accepted as valid for contracts concluded by public authorities entitled to assume rights and obligations within the limitations established by the norms applicable to the areas in which public authorities express their free will. The use of elements extraneous to the will of the parties also seeks to explain the application of principles specific to administrative contracts, representative of the inequality of parties. An example of such inequality is the possibility for the public authority to amend or unilaterally terminate the contract on grounds of public interest, which is the key feature of the behaviour of public authorities.

Qualifying the public guarantee contract

Having acknowledged the contractual nature of public guarantees without distinction to the issuer, one other aspect that needs to be addressed is how they should be qualified, that is whether they belong to private or public law. The French doctrine has established that the notion of public law contract includes a public authority endowed with legal personality as a party to the contract and the application of a public law regime, that is, of regulations belonging to the sphere of public law. The existence of this category of contracts does not exclude, however, the possibility for public authorities to conclude contracts that are subject to private law.

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A relatively recent legal construct, created by the French doctrine and jurisprudence at the beginning of the 19th century, the institution of administrative contract was developed and refined during the 20th century as a category distinct from the classic contract, which is based on the Civil Code norms, and having the public service as its defining feature. Structured by Gaston Jèze around the concept of public service, the notion of administrative contract is seen as distinct from that of the private law contract, especially with regard to the effects it produces and the inequality of the parties.

The creation of this new legal institution was further refined in 1945 by Georges Péquignot's whose important clarifications sought to establish the elements of a general theory of the administrative contract which was focused on its object (the public service connection) and the presence of excessive clauses in favour of the public authority, which is unusual in private law. The most comprehensive study of administrative contracts, which remains the reference work in this area, was *Traité théorique et pratique des contrats administratifs* (Theoretical and practical treatise of administrative contracts), published in 1957 by André de Laubadère. These developments have emphasized two significant characteristics, intrinsic to the administrative contract: limited rights to dispose and inequality.

A limited right to dispose suggests that public law entities have prerogatives that cannot be qualified as subjective rights, meaning that the exercise of such rights cannot represent the object of a contract. As to the inequality of parties, this presumes the superiority of the public entity, derived from the exercise of its public authority prerogatives (of course, within the framework of executing the contract) and the final aim of any contract concluded by a public authority, which is the protection of the public interest. These characteristics have also been adopted by the Romanian doctrine.

However, the identification of these characteristics cannot offer precise criteria for distinguishing administrative contracts from private law contracts concluded by public authorities. With the exception of express or implicit by legal norms qualifications (by specific reference to the jurisdiction of the administrative courts), the responsibility for qualifying the contract concluded by a public authority lies with the court.

The Romanian legal doctrine has largely adopted the French theory of administrative contract and, with it, the difficulties of qualifying

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contracts concluded by public authorities, due to absence of differentiation criteria unanimously accepted.

Furthermore, this qualification is all the more difficult as even classic theories of administrative contract have been affected by recent developments, driven by the influence of EU law which does not distinguish between public and private law, but also by the increased pressure to recognise the private law character of the contracts concluded by public authorities with private law entities, pressure caused by the challenge to the French theory of administrative contracts. The French administrative jurisprudence constantly resorts to adapting civil law norms and their application in administrative law, as a common level of rules (Guettier, 2008, p. 32 *et seq*.).

In fact, the tendency in the legal systems of other states, including those that recognize the existence of administrative law as a distinct branch of law, is to recognize that a contract concluded by a public authority always involves the application of contract law as private law in addition to the special norms applicable to the respective contract, when such specific norms are in place. One can distinguish, for example, unitary legal systems where there is a single set of norms appplicable to all participants in legal relations and subject to a single judicial system, such as English and US law, and dualist legal systems that recognise the distinction between administrative and private law.

In English law, contracts concluded by the state are subject to private law ("common law"), like any contracts concluded by a private person (Turpin, Brown, 1989, p. 97). The application of this principle does not prevent, however, the acknowledgement of consequences specific to the presence of a public authority as a party in a contract, including the possibility for the unilateral modification or termination of the contract by the public authority. As to German law, the notion of administrative contract refers to contracts concluded between public authorities, while contracts concluded by public authorities with private entities are subject to private law, that is, public authorities being presumed to act in the same manner as private entities (Fromont, 2006, p. 306). Finally, in Italian law contracts concluded by public authorities are subject to private contract law, while in Spain such contracts could be either public law or private law contracts.

Unlike legal systems which do not distinguish between various types of contracts, the Romanian legal system continues to retain the

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duality of legal regime applicable to such contracts by separating, at least in formal terms, between administrative contracts and private law contracts to which a public law entity is party. In the absence of legislative expression, in Romanian law administrative contracts are also a doctrinal construct modelled on French law, rather than a creation of jurisprudence, but they also differ from the French model in which the legal regime of administrative contracts is a creation of jurisprudence.

In the absence of a legal regime applicable to all administrative contracts, their effects are subject to specific regulations but the general derogatory effects from private law remain too ambiguous to justify the practical value of the distinction between administrative contracts and private contracts. In terms of applying the delimitation criteria proposed by the French doctrine (which retains the advantage of originality) and recognised as such by the jurisprudence, our view is that in the case of contracts not qualified expressly by law, the main effect of a contract concluded by a public entity and qualified as an administrative contract could be that the public law entity acquires rights normally denied in private law, giving them unique leverage to protect the public interest.

This leverage refers to the right of the public authority to unilaterally amend the regulatory part of the contract and the right to unilaterally terminate the contract - subject, in both cases, to the payment to the other party of damages determined by law or by the contract. The exercise of such rights is presumed to always be subordinated to the public interest regardless of the presence or the absence in the contract of specific clauses referring to public interest. What has to be expressly stipulated in the contract are clauses detailing and clarifying the circumstances in which such rights can be used. Unlike French law, such effects are not yet recognised by Romanian law as being generally applicable to all types of administrative contracts. Instead, these rights are recognised for specific cases. For example, in articles 53 and 57, paragraph 1, letter b) of the Government Emergency Ordinance Nr. 54/2006 regarding the legal regime of concession contracts, by repeating the provisions of the abrogated Law nr 219/1998, are stated the rights of the conceding authority to unilaterally amend or terminate the concession contract.

Another important consequence of qualifying the contracts concluded by public authorities as administrative contracts, namely the

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exclusive competence of administrative courts, is also not recognised as being of general applicability in Romanian law.

Initially, Law nr 554/2004 regarding administrative litigation, in article 2, letter c), second thesis, included in the jurisdiction of administrative courts, together with administrative acts, "*the contracts concluded by public authorities the object of which is the exploitation of public assets, the execution of public works, provision of public services, public procurement*", thus linking the jurisdiction of administrative courts to contracts having such exclusive object. At the same time, various regulations established the exclusive jurisdiction of administrative courts to contracts that are already subject to the provision included in article 2 of the Administrative Litigation Law. In 2010, the Government Emergency Ordinance no. 34/2006 regarding the award of public procurement contracts, concessions of public works and concessions of public services contracts was amended to include a new paragraph (1^1) to article 286 which establishes the jurisdiction of commercial courts in litigations regarding the performance, annulment, cancellation, or termination of public procurement contracts.

The 2010 amendment to the Emergency Government Ordinance no. 34/2006 transferred a significant category of contracts from the jurisdiction of administrative courts to that of commercial courts without, however, qualifying those contracts. The legislator that adopted the amendment appears to have expressed a unitary view of these contracts as it seems to suggest that the qualification of contracts as administrative or commercial is irrelevant, to the extent that the aim (or at least the declared aim) of the text is to establish the jurisdiction of commercial courts to the detriment of administrative courts. The same text that assigns nullity, cancellation and termination of the public-private partnership contracts concluded with a public authority is also inserted in article 28, added to Law no. 178/2010 regarding the public-private partnership by the Emergency Government Ordinance no. 39/2011. In this context, the category of contracts subjected to the stipulations of article 2 of the Administrative Litigation Law includes, in principle, concessions, other contracts regarding public assets (according to Law 213/1998 regarding public property assets, or according to the new Civil Code), and the delegated service contracts for local utilities services (concluded according to the laws regulating this type of services), because specific regulations

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include explicit provisions assigning the jurisdiction over this type of contracts to administrative courts.

In this context, the criteria for the identification of an administrative contract remain susceptible to diverse interpretations. The French doctrine and jurisprudence continue to employ two criteria for identifying the administrative nature of contracts concluded by a public entity: (i) the existence of at least one exorbitant clause in relation to private law, or (ii) the object of the contract, meaning a commensurable link with public services (Richer, 2008, p. 91 *et seq.*). The Romanian doctrine has adopted several characteristics of the administrative contract, such as the aim, consisting of the efficient management of a public service or the exploitation of a public asset and the existence of regulatory clauses established by law or by another regulation according to law. Given the non-unitary character of the regulations discussed here, which establish the jurisdiction of administrative or commercial courts in litigations derived from contracts concluded by public authorities, it is probable that this type of jurisdiction will also be considered in order to qualify a contract concluded by a public authority as an administrative contract or a private law contract.

Considering the absence of both a unitary concept of administrative contract and an express, legal, qualification of public guarantees and the criteria for identifying an administrative act discussed earlier, it follows that these criteria do not apply to guarantees issued by a public authority as such. Public guarantees do not contain terms different from those normally used for guarantees subject to private law, which do not include exorbitant clauses that would grant public authorities any special rights, hence a "superior" position. Moreover, if we consider that such special rights would exist even if they are not expressly included in the contract, a public guarantee that could be modified or unilaterally terminated by the issuer by invoking the public interest would, most likely, not have economic or legal value as it is difficult to imagine that a creditor would assign financial value to this type of guarantee, especially when prudential norms require the application of certain standards for the valuation of guarantees.

With regard to the connection between the object of the guarantee and the public assets and services, this connection could, of course, be identified through an indirect rationale built on the mechanism of using or enhancing of public services usually borne by the public guarantee.

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In itself, the public guarantee cannot be qualified as an administrative contract. The issue raised by the scholarly literature is whether can public guarantees acquire an administrative nature, which they otherwise could not have in themselves, due to the subordinated status it would have in relation to an administrative contract (Eckert, 2006, p. 71).

Given the accessory nature of the guarantee as surety to the loan contract that it secures, whether concluded by the state or by an administrative-territorial unit, another issue that needs to be addressed is qualifying a loan contract as an administrative contract or a private law contract. Following some hesitation, the French doctrine has qualified the public loan contract as a private law contract (Cabannes, 2005, p. 155).

Clearly, there should be no doubt that a public guarantee issued as surety for a loan contract between two private persons/entities, should be qualified as a private law contract.

With regard to Romanian law, it is our view that both the loan contracts concluded by the state or by administrative-territorial units and the public guarantees, whether as accessory or autonomous guarantee, are private law contracts. Neither existing legal norms nor the aim of these contracts, as identified by the Sovereign Debt Law, let alone the intrinsic structure of the contract, justify qualifying public guarantees as administrative contracts. Similar to clauses included in public guarantees, clauses included in public loan contracts are similar to those of contracts concluded by private law entities as it is difficult to imagine the inclusion of special or exorbitant clauses (as defined in French law), such as the right to unilaterally modify or terminate the contract by invoking the public interest.

The qualification of loan and guarantee contracts concluded by the state or by administrative-territorial units does not exclude, however, the application of imperative norms of public law regarding the execution and performance of the contract. There are always common rules, applicable to all contracts concluded by public entities, regardless of whether they are administrative or private law contracts. The object of these contracts is the exercise of the powers of the public entity, the impossibility for these entities to dispose of certain rights, the application of competitive procedures for the selection of private partners and the application of the transparency principle.

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It is important to note here that French law completes the imperative norms common to all contracts concluded by public entities with the prohibition of recourse to arbitration, meaning the insertion of a compromise clause in these contracts or the execution of an arbitration agreement by public law entities, this prohibition being based on the idea of the impossibility for public authorities to dispose of their rights. An express prohibition of compromise clauses in administrative contracts does not exist in Romanian law. Some authors view the exclusive jurisdiction established by law for administrative courts as a limitation derived from the notion of assimilation of contracts described in article 2, letter c. of the Administrative Litigation Law with the unilateral administrative act (Prescure, Crişan, 2010, p. 92). In principle, the idea of excluding de *plano* administrative contracts from the arbitration is not one accepted by the Romanian doctrine. At the same time, the new provisions of article 286, paragraph (1) of the Emergency Government Ordinance no. 34/2006 and of article 28 of Law no. 178/2010 regarding the public-private partnership can be seen as a return to the idea expressed by the provisions of article 3, paragraph (2) of Law 219/1998 regarding concessions, which established the possibility for the parties to the concession contract to insert a compromise clause. Given the uncertainty caused by the legal norms regulating this aspect and the non-unitary character of the doctrine regarding the arbitration of contracts concluded by public authorities, it is difficult, in Romanian law, to retain this delimitation criterion for administrative contracts.

Even in this context, the absence of express legal provisions regarding litigation caused by public guarantees, or even by public loan contracts to which guarantees are surety, can allow for the application of private law norms in this area.

Conclusions

The common law of guarantees, as established by private law, is the common law that regulates public guarantees, especially with regard to their effects. Also applicable are the special provisions included in regulations regarding public debt, in particular as concerns the issuance and the performance of public guarantees.

If public guarantees have the legal nature of a private law contract, thus generating the effects recognised to private law guarantees, and if the

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status of guarantor assumed by the state or by administrative-territorial units presumes the application of the general norms regarding the execution and performance of contracts concluded by public entities, the qualification and the aim of the guarantee contract should not be ignored. It will always be a public law act, subsumed to the public interest. In addition, the analysis of the aim has consequences with regard to the identification of the cause of the guarantee contract. Moreover, the inclusion of public guarantees in the area of public finances will affect the execution of the obligations of the state and of the administrative-territorial units as guarantors.

The legal regime applicable to public guarantees, as private law contracts, will be a mixed one (Stoica, Rizoiu, 2002, p. 30). Thus, it will comprise public law rules regarding the pre-contract stage and the performance of payment obligations of the issuer of the guarantee, as well as private law norms with regard to the effects of the guarantee. Their harmonization, in the absence of a unitary approach to incidental norms, still rests with the doctrine and the practice.

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