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Formal-legal Aspects and Characteristics of Concession Contracts in Kosovo

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Abstract

Concession relations in the Republic of Kosovo are not in a large volume, although there are cases where state institutions have signed such contracts with appointed operators. On the other hand Kosovo contract law doctrine regarding the treatment of concession contracts is extremely poor. The purpose of this paper is to examine the basis and the legal nature of the concession contract within the legal system of the Republic of Kosovo. We are focused on defining the scope of the concession agreement and its essential elements and materials that are most significant for making a decision on concession procedure. In addition, it will be concretized who are contractual parties and the terms concerning the contract. The possibilities of changing certain provisions of the concession contract that is associated with the will of one party or of both parties are analyzed. At the end is analyzed the importance and current issues of Kosovo contract law doctrine by determining its legal nature which has a special importance.

Keywords: concession; concession contracts; administrative contract.

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1. Introduction

According to [1] Concession is the right of exploitation of natural goods or performance of certain activities on the general interest allowed by competent authorities of the state (*concession provider*) for exploitation, respectively use by certain domestic or foreign subjects (*concessionaire*) for a specified or indefinite period based on set conditions (rules) for concession compensation payment.

B.O.T. Build - Operate - Transfer [2] considers concession as a construction or restructuring and financing system of the entire facility, regulation or refurbishing and use for a specified or indefinite time and delivery (return) to the state property after the contracted period. The concessionaire constructs, maintains and uses facilities granted for concession activities in accordance with the conditions specified in the contract.

Term for concession award is determined by law. Usually this term is specified depending on the subject of the concession and expected returns from the exercise of the concession activity. In determining this period, in particular in determining the exclusive rights, in particular the level of business risk related to the construction of the facility at the initial stage and the need for development of a competitive market field in the scope of activities given with concession. Under the strategy for encouragement and development of foreign investments, crucial importance is given to concessions in the form of cooperation of private - public partnership.

Concession also represents one of the forms to ensure investment funds since a foreign partner could be the concessionaire. The foreign entity that could be the concessionaire is a legal entity with headquarters outside the host country, a foreign natural person or a host country citizen residing abroad for a period longer than one year.

1.1. Purpose and legal conditioning of concession contracts by the administration decision of public authority

Decision on concession is a biased act of government respectively of public institutions. Extraction of this act does not mean that at this stage it is considered that concession relationship was established, but this legal relationship is considered established upon signing of the contract between the concession provider and the private person as a binding bilateral relation. According to [3] Upon signing of the contract, under the conditions set by the government decision, between the concession provider and the concessionaire, rights arise and mutual obligations are created, for some types of concessions being specified by law, and in concrete cases stipulated and supplemented by the decision of the administrative body.

What is important at this stage is the fact that under the concession contract, the party on the quality of the concessionaire takes over the liability to develop the concession activity, therefore exactly from this element importance of concession contract derives, due to the fact that under development of the concession activity concessionaire is obliged to perform sustainably in the interest of the community. There are times when the concessionaire interrupts or even does not start at all with the particular public development or activities, regardless of the division of concession in a certain area for a certain period. This is likely to happen if the concession activity affects in the exclusion of free trade which for the citizens of a certain territorial community could reflect with a series of negative impacts on their standard of living, which actually in circumstances of a

modern world we live in was not supposed to happen. It turns out that the concession contract is a source of obligations that cannot be imposed to the future concessionaire, according to the concession decision. Thus, with the act of administration, i.e. with the decision on concession, the concessionaire is granted the right to exercise the certain activity and that his right is extended as long as the concession contract is an act of approval of the private subject based on which it is obligated to exercise separate rights says [4].

Therefore, as long as the decision on concession is a source of rights, the concession contract is a source of obligations. However it should be noted that both acts are necessary for the regularity of the process of awarding concession, meaning that fate of these acts is mutual. Lack of one of these acts prevents transfer of rights belonging to the concession provider to the concessionaire as long as the latter is obligated to perform these rights in accordance to the legal provisions into force.

One of the acts has the position of "the main act under such relationship" because through it rights are transferred. This means that these rights cannot be practiced unless another bilateral act is signed. With the decision for concession it is determined with what subject the public body will sign the concession contract, including terms of reference and in most cases the set deadline. On the other hand, within the hierarchy of acts and their legal power, concession decision, as an administrative act, is considered as an act of imperative nature with higher legal force than the provisions of the concession contract. For this reason the provisions of the contract should be adapted to the provisions of the act of administration. In case of non-compliance of the provisions of the decision of the administration and the concession contract, provisions of the decision of the administration are a priority. Concession contract in its core is existentially dependent from the concession administration location. In this way removal of the concession decision automatically results with repeal of the contract. Thus it can be proved according to [5] that contract time duration is dependent on the administrative concession decision.

1.2. Legal basis of concession in Kosovo

Viewed in terms of legal basis, concessions are primarily based on two systematic laws. The first is the Law on Public Procurement which ensures efficiency, transparency and regulates the right of use of public funds, public resources and all other funds and other resources, and the Law on Public Private Partnership, concessions in infrastructure, and procedures for granting them.

Both approved acts establish clear rules and procedures for public purchases, increase competition and transparency in public procurement, and ensure that all economic operators interested in public contracts are treated fairly. Its purpose is to protect the public interest by ensuring that public funds are spent appropriately, reliably and efficiently [6].

Article 2 of the Law on Public Private Partnership and concessions in infrastructure and procedures for granting them, respectively Article 2 of this disposition regulates the rights to utilize and/or exploit public infrastructure and/or provision of public services in the following economic and social sectors as follows: 1. transport (including railway system, transport in rails, airports, roads, tunnels, bridges, parking, public transport); 2.

Generation and distribution of power; 3. Generation and distribution of heat; 4. Production, distribution, treatment, collection and management of water, waste water, drainage, irrigation, channels, dams; 5. Collection, transfer, processing and administration of solid waste and recycling; 6. Telecommunication; 7. Education; 8. Sport and recreation; 9. Health; 10. Tourism and culture; 11. Prison infrastructure; 12. Rehabilitation of lands and forests; 13. Industrial parks; 14. Public housing and social work; 15. Government and public buildings; 16. Municipal affairs; 17. Service and maintenance of IT and data based service; and 18. Oil pipeline, gas pipeline, refinement and distribution [7].

2. Concession contract

Concession contract (germ. Konzessionsvertrag) is a special type of contract under which one party as the concession provider (state or lower state levels) is obligated to allocate some certain economic rights, usually by restricting some own property rights for a specific or undefined time (with the right for termination), in use to the other concessionary party certain natural, non-renewable or renewable goods, or other goods for use, e.g. facilities, space or plants with compensation.

When it comes to business concessions, they are regulated through the implementation of dispositions on business rights, while if the concessionaires is of a foreign subject, then international business right dispositions are applied despite the fact that one of the parties is a country, the natural person or the legal entity. If both parties are states then it comes to so-called political concession (military bases, ports, crossings, etc.) and for regulations norms are applied.

3. Form and content of concession contract

Upon review of concession contract special attention should be paid to its form and content. Binding a concession contract in an inappropriate legal form leads to its termination. In addition, avoiding some substantial essential elements can lead to major problems that manifest over execution of concession which often end up in court process. Concession contracts are always binded in writing, therefore, form represents an essential element for its validity (lat, form ad solemnitatem). Also the written form is a constitutive element of concession contract turning out that without complementing it this contract does not create any legal effect. Written form is a condition for the validity of contract even in the case of later supplements and changes.

Liability for a written form of this contract is regulated by Article 46 of Law no. 03 / L-090 on public-private partnerships and concessions in infrastructure and procedures of awarding them. Even though this law does not specify the form of contract, it is entered under the general principles of the law on liability relations.

4. Legal nature of concession

Concession contracts are bound by the concession provider and the concessionaire. Upon signing the concession contract, contracting parties are most often public institutions in the territory where certain rights would be practiced, respectively complied, on the basis of the decision on concession and other party which should use the agreed, respectively separated concessions. In Kosovo, typically concession contracts are entered by executive government institutions according to the law.

Due to combination of elements of public and private nature the concession contract is among the most complex contracts. Its form includes regulation of relations with the civil rights norms and also the concession decision, but at the same time the presence of concession is likely to avoid implementation of any of those dispositions, such as implementation of the norm for contract termination regulated by the Law on liability relations. The debate on unilateral amending and revocation of concession agreement by the concession provider represents one of the most interesting issues between different theoreticians of the nature of such contracts. In other words, this deals with providing an answer of what is actually the legal nature of this contract. Is it a contract dealing with public rights or private rights?

Some authors think that concession contracts are not contracts at all in the legal sense because the right the concessionaire gains when signed, it is possible to be revoked at any moment due to public interest. In this context, the authors Sorace and others, consider that if this was true, we could say that administrative contracts cannot be a proper ground for "*creating genuine and realistic rights and therefore they are not real contracts* Therefore, attention should be paid to the legal nature of the concession agreement.

On the issue whether the concession contract or is an international contract or not, Reference [8] estimate that "concession is somewhere between the contracts of private rights (between private entities) and contracts of public rights (between states) considering that we are dealing here with agreements between private entities and government institutions.

It is clear that in contracts when a state as the concession provider awards political concessions to another state as the concessionaire, it is qualified as an international contract. These contracts are concluded under rules of public international law between competent authorities having the necessary capacities to undertake certain obligations. Whereas, in contracts regulating business concessions it is different matter. Even though large and powerful international trading companies that sometimes have great financial capacities may not yet be subject to international public law. This due, according to Kissam and his colleagues [9] to the fact that only states are subjects of public international law and the classical theory of these contracts takes away the quality of international contracts.

Although some authors consider that the concession contracts are international contracts this theory does not seem very convincing. Reference [10] notes that today it is widely recognized that international organizations enter into international contracts with certain countries and that such contracts do not differ from contracts with only states as parties. By analyzing the above mentioned author’s opinion further it is noted that only international governmental organizations may be subject to international law and therefore have the ability to be the bearer of international rights and obligations, but it cannot be gained by international nongovernmental organizations since they are not subjects of public international law.

Science of law addresses the issue of international normative acts related to the contract. In this way, the Vienna Convention on international contractual law between states and international organizations, or between international organizations themselves, on disposition of Article 2/1 states that wording "contract" in the text of this Convention, in the sense international contract, treaty, is meant an international agreement which is

regulated by international law in writing, and concluded between two or more states, or one or more international organizations, so that this agreement would be administered by a single administration, or two or more administrations linked among themselves with mutual legal instruments regardless of their particular designation. This in fact means that international contracts under the rights of which only states and international organizations being intergovernmental and by no way nongovernmental can be concluded [11].

One of the contested matter debated in scientific network is whether a concession contract is a contract governed by private law, i.e. civil or commercial contract, or a contract of public law, i.e. administrative contract. A number of authors think that the concession contract does not differ from other contracts concluded between private entities, whereas other groups assess that such contract with its content is a typical administrative contract.

Division of the right into private law and public law is derived with the creation of private and public law contracts. Under public law contracts, administrative contracts are also listed. Administrative contracts were more widely developed in France and were gradually spread to other countries by finding a place in judicial legislation and practice. The base for administrative contract formation in modern community is found in the circumstances and features of administration bodies and other bodies which share responsibilities for state governance. These bodies enter into legal relationships with other subjects not only through administrative relations, characterized by the governing authority, but also through free will in relation to other subjects.

However, it should not be considered that such contracts concluded by the administrative authorities would immediately be administrative contracts. That is because administration under its principle of neutrality concludes contracts governed by the civil law. There are opinions that administrative contracts of French law have arisen mainly as a result of being concluded by the administration bodies and not being ranked in the same category as other contracts under commercial law. According to [12] the said author, the reason for the application of different contract rules, depending on the character of one of the parties under contractual relations, particularly when state bodies are one party, is the aim to meet the principle of “for *the good of public interest* ". In case the public authorities are accepted the position of practicing authority for purposes of implementing actions in the *"for the good of public interest”*, there is no reason that this privileged position not to be recognized from the scope of contract law. For carriers of state power and other public authorities creation of contracts in which they create a special position before concluding their contract is estimated to be reasonable. In this respect, the Croatian author Vukmir proves that administrative contracts, as a special contract category, are between the legal-civil instruments and administrative law. According to his viewpoint, administrative contract is classified under the administrative law, but not as an instrument of public bodies and their authoritative rights, rather as an act of both parties without the claim to be equal where the rules are more likely in favor of a party - public authorities.

Theorist Borkovič [13] defines administration contracts as “mutual legal acts concluded by the state, i.e. other public institutions, with third parties (natural or legal) in order to achieve the goals set for a certain social - public interest under the conditions set by law ". Based on this viewpoint for administration contracts as a whole, three essential characteristics are identified. The first characteristic of this contract has to do with its

subjects, the second with purpose and objectives for which this contract is concluded, and the third with the special conditions that apply at the conclusion and execution of administrative contracts which are usually covered by special rules.

The first characteristic regarding the subjects as a rule, in administration contracts, one of the parties in the process of binding is always a public entity, state or public body that has certain public competences. Therefore administration contract cannot be considered as contracts which are bind between the individuals. In French legal practice according to the State Council decision, when contract is concluded between individuals, it is not an administrative contract, even in cases when one of the parties represents the general interest. According to judicial practice only in an emergency situation contracts between individuals can be considered administrative contracts and only if one of the contracting parties is acting on behalf of the public legal person.

The second characteristic of administrative contract is identified at the objectives, respectively goals which condition its conclusion. Purpose and objectives may be different but in principle they are always directed to meet the general interest, respectively meeting the needs of the social community. Objectives of this contract are usually encountered in its designation such as contract for the execution of public works, contract for concession award of Adem Jashari[a] airport, etc ,.

The third characteristic of administrative contracts is reflected with the fact that it is subject to specific conditions for both, its conclusion and execution of rights and fulfillment of obligations arising from the contract. These conditions arise as a result of attitudes deriving from legal practice, but largely it considered as a result of the work of lawmakers who regulated a large number of them in the normative process. Prior to concluding an administrative contract, in its principles, a special process should be implemented in advance.

Within the legal systems of different countries regarding the conclusion of administrative contracts, it is required to proceed according to public auction procedure which part is not included in this paper.

5. Conclusion

Concession is a separate legal institution through which state institutions allow certain entities, natural or legal persons, state or foreign entities to use and exploit certain benefits, to execute certain works, or develop certain activities. In the concession procedure there are two different legal acts: the first is administration act and the second is the concession contract.

Legal aspect of concession is regulated by the decision on concession, respectively the administration act, presented unilaterally and authoritative according to the law by the concession provider, whereas with the concession contract the concessionaire is obligated to perform the concession activity. Time of commencement of implementation of concession rights is conditioned with signing of the contract, signature being considered as an element of special value. Content of concession contract is substantially closely related to the decision on concession because with the administration's decision it is determined with what subject the competent state body – concession provider, will conclude the concession contract including conditions and manner of completion, respectively eventual termination. Concession contract on the one hand, is always concluded by

public state body in the territory of which particular concession rights would be practiced, on the other hand is the private entity designated by decision on concession to which concession was awarded.

As a rule, the concession contract is concluded for a specific term. This term is determined by the legal provisions or regulated by the concession provider itself. Most frequently this term commences from the date of entry into force of the concession decision, but it is possible to start 15 days after signing the contract depending on the work to be undertaken by the concessionaire.

Concession contracts are always concluded in writing. Its content may be variable depending on long-term goals usually being provided by separate laws. However, means of contracting before signing a concession contract depends on the legal ways of concession under a given system. The more detailed the legal regulations and obligations of the contracting parties are, the smaller is the possibility of disputes and vice versa.

The concession contract in its nature is an administrative contract and as such the possibility of amending certain provisions of the so-called réglementaires clauses is foreseen. But in Kosovo legislation the term "administrative contract" is not stipulated anywhere and civil law contracts are taken as concession contracts in our country. Based on this approach it is proceeded in cases of solving eventual disputes including court competences on civil disputes in the contractual scope.

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