

The contracts of public administrations

Los contratos de las administraciones públicas

Giuseppe FRANCO FERRARI*

ABSTRACT: There is virtually no aspect of the theory of contracts that has escaped a careful analysis in comparative terms. Some real masterpieces of comparative law literature have been composed in the effort of focusing this topic. The traditional reluctance of administrative law to be forced to some measure of homogenization might be a cause of such a lack of scholarly interest, but it also might stimulate the attention of comparative lawyers in search of more evident differences between domestic legal systems. It is therefore hard to explain why no treaty, book or extensive article has been dedicated to a comparative review of the contracts of public administrations.

KEYWORDS: contracts of public administrations; civil law; common law rules; government contracts; contracting methods.

RESUMEN: Prácticamente no existe ningún aspecto de la teoría de los contratos que haya escapado a un análisis cuidadoso en términos comparativos. Algunas obras maestras reales de la literatura de derecho comparado se han compuesto en el esfuerzo de enfocar este tema. La renuencia tradicional del derecho administrativo a verse obligada a cierta medida de homogeneización podría ser una causa de tal falta de interés académico, pero también podría estimular la atención de abogados comparados en busca de diferencias más evidentes entre los sistemas jurídicos nacionales. Por lo tanto, es difícil explicar por qué ningún tratado, libro o artículo extenso se ha dedicado a una revisión comparativa de los contratos de las administraciones públicas.

PALABRAS CLAVE: contratos de administraciones públicas; derecho civil; reglas de derecho común; contratos gubernamentales; métodos de contratación.

* Profesor de Tiempo Completo en Derecho Constitucional de la Bocconi University. Contacto: <ferrari.giuseppe@unibocconi.it>. Fecha de recepción: 06/02/2018. Fecha de aprobación: 01/06/2018.

I. INTRODUCTION

There is virtually no aspect of the theory of contracts that has escaped a careful analysis in comparative terms. Some real masterpieces of comparative law literature have been composed in the effort of focusing this topic¹. Such a fact is probably obvious: the idea of contract is pivotal to the evolution of all private law doctrines, from the theory of obligations to legitimation, capacity, and representation of parties, from the coexistence of form and substance in all the sectors of private law to the meaning, extent and limits of promises, from the interpretation to the enforcement of all acts of parties², from the breach to the remedies available, to the interpretation of legal acts. All categories of private law are conditioned by the meaning and evolution of features concerning contract, if not yielded by them.

To the contrary, no serious effort has been put into effect up till recent times in order to formulate reasonable conclusions as to the contracts of public administrations from the viewpoint of comparative law. The traditional reluctance of administrative law to be forced to some measure of homogenization might be a cau-

¹ Examples can be Zweigert, K., Kötz, H., *Einführung in die Rechtsvergleichung*, Tübingen, 1984, Band 2, Institutionen; LEVASSEUR, A., *Comparative Law of Contracts*, Durham, North Carolina, 2008. It is still useful to consult volume VII of *The International Encyclopedia of Comparative Law*, Contracts in General, Dordrecht, Boston, Lancaster, and in particular Ch.2, GORDLEY, J., *Contract in Pre-Commercial Societies*, 1997; Ch.7, TURPIN, C., COLIN, *Public Contracts*, 1982; Ch. 9, VON MEHREN, A. T., *The Formation of Contracts*, 1992; Ch. 10, VON MEHREN, A.T., *Formal Requirements*, 1998; Ch. 15, JONES, G.H., SCHLECHTRIEM, P., *Breach of Contract*, 1999; Ch.16, TREITEL, G.H., *Remedies for Breach of Contract*, 1976. See also ALPA, G., “Lineamenti di diritto contrattuale”, in ALPA, G., BONELL, M.J., CORAPI, D., *et al.*, *Diritto privato comparato*, Bari-Rome, Istituti e problemi, 5th ed., 1999, 2012, 165 ff.

² Using one of the expressions (the other one is acts in the law) coined by Salmond, J.W., *Jurisprudence*, 12th ed., London, 1912, 1966, to compensate for the absence in the English legal language of a term describing a more general notion than that of contract.

se of such a lack of scholarly interest, but it also might stimulate the attention of comparative lawyers in search of more evident differences between domestic legal systems. It is therefore hard to explain why no treaty, book or extensive article has been dedicated to a comparative review of the contracts of public administrations³.

In the absence of a systematic treatment of the topic, the first task is to sketch a kind of grid of the problems to be browsed. The dividing line is still, although old-fashioned it might be, the full applicability of the general rules of private law to the contracts of public administration or, alternatively, the application of separate rules of administrative law: this cleavage may be obvious, following the classical opposition between civil law and common law, but in this field the divide is always valid. Another issue to be verified is the capacity of public subjects of being part to a contract and the adaptability of public subjects to all kind of contracts or to some of them only: administrative law systems normally foreclose public administrations to enter some types of contracts, or, more recently, impose special precautions before stipulating; the distinction between onerous and gratuitous contracts might be relevant. The techniques presiding over the choice of the counterparts also need to be investigated: in this area European law has been occupying much space and forcing unification. Contracts between public subjects also offer a variety of solutions, due to the tendency of administrative law systems to apply them a special regime, strictly qualified as administrative. Special controls are often displayed on the stipulation and enforcement of the contracts of public administrations. The moment of meeting of offer and acceptance and the meaning of will and good faith in the expression of consent are open to possible modifications of general rules. The effects of contracts can be diversified, with an eye to the time and

³ Among the few works concerning public contracts see THAI, K. V., ARAUJO, A., CARTER, R.Y., *et al.*, *Challenges in Public Procurement: an international perspective*, Fla, Fort Lauderdale, 2005; THAI, K.V., *International Handbook of Public Procurement*, Boca Raton, Fla., 2008; NOGELLOU, R., STELKENS U., (eds.), *Droit comparé des contrats publiques*, Bruxelles, 2010.

extension of the obligations binding public administrations. Non-performance or partial performance can assume special features when a public body is part. The interpretation of contracts can also follow general rules or be adjusted to special operational needs deriving from the very nature of one of the parties.

II. THE INFLUENCE OF EU LAW AND ITS EXTENSION

The influence of EU law on the regulation of contracts of public administrations has been growing over time, but is still limited. Since the very beginning, European directives have concerned above all the procedure of selection of the private counterparts of public subjects. The main intent of the different “generations” of directives⁴ was and still is to guarantee higher and higher levels of competition in the inner market. Such was the aim imposed by the provisions of article 100A, then 95 and later 114 of the Treaty, authorizing the Council “to adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the international market”.

At least, the most important result pursued by the successive directives has always been the elimination of all discriminations among private operators yielded by possible domestic principles.

⁴ References are normally made to Dir.26 July 1971, no. 71/305/EEC of the Council, regarding public works, and to Dir. 21 December 1977, no. 77/62/EEC, concerning public supply contracts, as to the first generation of Directives; Dir. 22 March 1988, no. 88/295 EEC, as to supplies and Dir. 18 July 1989, no. 89/440/EEC as to works, together with Dir. 21 December 1989, no.89/665 EEC, of the Council, Dir. 18 June 1992, no. 92/50/EEC, as to services and Dir.)3/36, 93/37 and 93/38 of 14 June 1993, respectively concerning supply contracts, works, and excluded sectors are mentioned as the second generation. The third generation consists of Dir. 31 March 2004 no. 2004/17/EC as to special sectors and works, supplies and services. The fourth one includes Dir. 2014/23/EU (concessions), 2014/24/EU (works, services and supply), 2014/25/EU (water, energy, transportation and postal services) of 26 February 2014.

The European system is organized within this framework. As of consequence, the number and types of contracts are irrelevant, in terms of principles. In a more evident manner at the beginning, but in a significant way even later and up till recently, the EU has not been interested, nor did it have the formal power to, in achieving uniformity in the kinds of contracts to be entered by public administrations. European rules have been directed to obtaining an almost complete uniformity in the choice of the contracting parties. In other words, the European regulation is incomplete, not covering the substantive rules governing the contract, nor their validity or efficacy, their execution or the consequences of the violation of obligations having their source in them.

Another field that EU norms have occupied, forcing homogenization between the member States, is the remedial area. Imposing publicity and openness on public procurement processes and justiciability on the criteria of choice among bids and on public body contracting decisions in general implies a certain amount of uniform regulation of the remedies available. The Directive concerning judicial remedies⁵, therefore, have introduced the external relevance of the administrative process of public contract awarding, the justiciability of formerly discretionary choices and of their procedural fairness, the powers and methods of elimination of the breach of rules, and even the minimum interval between awarding and stipulation, the precautionary measures to be granted including injunctions, the cases of annulment or elimination of the contract and of damage awarding. The member States remain free to organize the remedial framework and to fit it to their judicial organization, distributing the pertinent powers between ordinary and administrative judges and independent authorities, provided that the result be effective.

Some influence, however, has been necessarily, although indirectly, displayed by the European norms towards the substantive field of civil law. For instance, the extension of the rules concer-

⁵ Directives 89/663/EEC and 92/13/EEC, amended by Directive 2007/66/EC.

ning the selection of the contracting parties to all kinds of onerous contracts, however they might be named by the national legal systems, has generated an asymmetry between the domestic notions of the different models of onerous contracts and the overarching European concept, thought to include as many types as possible, in search of the elimination of all loopholes and subterfuges. The combination of rules formally included in directives, communications of the Commission, and case law of the Tribunal of first instance and the Court of Justice, therefore, has contributed to the gradual occupation by EU rules of greater ambits of regulation. Some examples are: the inclusion in the communitarian area of contracts concerning public works of the planning part of the work⁶, of the expropriation activities necessary to provide the property of the building site⁷, of the urbanization works to be implemented in the context of the parceling out of new, formerly unedified areas⁸.

Another unifying force, initially independent from EU law but later incorporated in it, has been the need to protect consumers. Some legal systems had provided measures against the introduction of “abusive clauses” since the ‘70s, such as Germany⁹, United Kingdom¹⁰, and France¹¹. The European Directive 93/13/CEE, aiming at promoting competition, circulation of goods and services in the inner market and protection of consumers, has made the judicial control of unfair clauses compulsory, although

⁶ Arts. 78-82 Dir. 2014/24/UE: “design contests”.

⁷ ZELLA, A., *Il diritto di proprietà tra ordinamento interno e CEDU*, Viccalvi, 2015, 11 ff. See also joint cases C-55/11 and C-58/11 (Fourth Chamber) Vodafone España SA v. Ayuntamiento de Santa Amalia and France Telecom España SA v. Ayuntamiento de Torremayor, 12 July 2012.

⁸ See case C-412/04 (Second Chamber), Commission v. Italian Republic: “public contracts for infrastructure works”.

⁹ AGB Gesetz of 1976.

¹⁰ Unfair Contract Terms Act, 1977.

¹¹ Lois Scrivener, 1978.

its effects are questionable¹². Such developments have concerned public contracts too, in a not quite marginal way.

Other efforts towards the building of a unitary legal space through the harmonization of the law of contracts have been made at European level. The most prominent example has been the so-called Common European Code of private law, but its implementation has proved impossible¹³. More recently, the European Commission¹⁴ has given up the very idea of a codification and has promoted the revision of the communitarian *acquis* in the area of private law and the adoption of a Common Frame of Reference (CFR), including principles and terminology covering the area of contract law¹⁵.

Following such an extension of the influence of European rules, some countries have been more capable of preserving the original structure of their law of contracts, even when applied to public administrations: such a kind of “resistance” to EU law has been opposed wherever the framework was deeply rooted in legal traditions and/or its codification had received a sturdy systematization in the national case law, sometimes even in order to consolidate some dividing lines between different jurisdictions. In other countries, either because of a lesser capacity of defending traditional features or of assimilating new inputs making them compatible with national models, the penetration of EU law has been deeper and more extensive, increasing the rate of assimilation of the respective legal systems.

¹² See TEUBNER, G., *Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergencies*, 61 Mod. L. Rev. 11, 1998. and ALPA, G., PATTI, S., *Commentario al codice civile. I contratti del consumatore*, Milan, 2002.

¹³ Its full story is told, among the others, by ALPA, G., *Lineamenti di diritto contrattuale*, *op. cit.*, pp. 260-300.

¹⁴ COM (2001) 398 of July 11, 2001; COM (2004) 651, of October 11, 2004.

¹⁵ See another short story in SIRENA, P., “Il diritto dei contratti nello spazio giuridico europeo”, in MEZZANOTTE, F. (ed), *Le “libertà fondamentali” dell’Unione Europea e il diritto privato*, Rome, 2012, 121, 134 ff.

The influence of EU law has added on and speeded up other and former trends towards uniformity deriving from the rules of international commerce and the projects of uniform codification, that have stimulated a process of natural convergence¹⁶ including the contracts of public administrations.

III. BRITISH LAW

From a general viewpoint, there is no special English law concerning the contracts of public administrations. Therefore, for instance, the judicial interpretation criteria of contracts are all alike¹⁷, although when the conduct of a decision-maker carrying out a public function is at stake, mainly when it operates in a quasi-judicial role, which is not the case of contractual matters, it is essential to understand its role and responsibilities¹⁸. Public authorities are ordinarily reviewable, even when the Crown is fulfilling prerogative powers. The area of non-reviewability of administrative action has been progressively restricted¹⁹. But even whenever the judicial control of administrative action, as a constitutional instrument of prevention of abuses against citizens by the unlawful exercise of executive power²⁰, is not available, the ordinary adversarial litigation according to common law is necessarily open to private subjects.

On the side of the administration, executive powers include not only statutory powers explicitly conferred by legal provisions,

¹⁶ Se Markesinins, B., *The Gradual Convergence*, Oxford, 1996, and ALPA, G., *Lineamenti di diritto contrattuale... op. cit.*, 169.

¹⁷ See e.g. M. Fordham, *Judicial Review Handbook*, London, 5th ed., 2008, 298 ff. The stratification of interpretative criteria and of the very idea of contract at common law is reconstructed by J. Gordley, *The Philosophical Origins of Modern Contract Doctrine*, Oxford, 1991.

¹⁸ *Ibidem*, 318 ff.

¹⁹ *Ibidem*, 365 ff.

²⁰ *R v Ministry of Defence, ex p Smith* [1996] QB 517, 556D-E.

but also prerogative and inherent powers. The Crown, for instance, is deemed²¹ to have an inherent general power to contract, that any department can exercise on its behalf. Such capacity increases the freedom of choice between different solutions and renders public subjects more attractive in terms of relationships. It does not imply, however, that the Crown is exactly on the same footing with private subjects. Before the adoption of the Crown Proceedings Act 1947, a breach of contract by a public administration had as only remedy a petition of right, having nature of a mere request²². Even if it abolished the sovereign immunity of the Crown, such a statute did not introduce the possibility of obtaining injunctions or specific performance orders against the Crown. Only in the sector of European procurement rules did the Public Contracts Regulations of 2006 allow courts to grant injunctions against public administrations. There are, however, still traces of possible unenforceability of agreements with the Government or other arrangements not having formal nature of commercial contract²³, lest future executive actions might be fettered²⁴.

Public authorities other than the Crown, according to the traditional common law rules, only have the specific powers endowed by the statute establishing them. The lack of sovereign power in this case forecloses extensive interpretations, though the authorization by Parliament would normally be construed to include implied powers too. Local authorities, in particular, traditionally lacked general contracting powers. The Local Government Act of 1972²⁵ partially remedied such problem, guaranteeing them the “power to do any thing ... which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions”. Apparently, the 1972 statutory provision was not sufficient to per-

²¹ See e.g. ARROWSMITH, S., *The Law of Public and Utilities Procurement*, London, 2nd ed., 2010, 40 ff.

²² See e.g. WADE, H.W.R., FORSYTH, C.F., *Administrative Law*, 9th ed., Oxford, 2004, 827 ff.

²³ See e.g. ENDICOTT, T., *Administrative Law*, Oxford, 2009, 571 ff.

²⁴ *The Amphitrite* [1921] 3 KB 500.

²⁵ S. 111.

suade the courts that a local council could create and operate a time share company together with a bank, in order to build and manage a swimming pool²⁶. Therefore, the Local Government (Contract) Act 1997 widened the power of local authorities to enter all kinds of “certified” contracts and stated that even in cases where a contract might be declared ultra vires, it will be binding on the public subject and justiciable by the private party²⁷.

The selection of the counterparts to the contracts of public administration started to be a theme in British public law when the Conservative Governments, during the 1980s, made contracting out a compulsory practice for local authorities²⁸. The idea was to introduce competition into the way public services and functions were being carried out. Private companies were then encouraged to make bids in order to provide better value for money, and bids internal to public bodies were allowed too. The compulsory competitive tender (CCT) formula was somehow softened at the end of the ‘90s by Labour Governments²⁹ through the introduction of the best value system (BVS), aimed at making public subjects responsible for a permanent search for economy, efficiency and effectiveness. The creation, always in the 1990s, of the Private Finance Initiative (PFI) and of other forms of Public Private Partnerships (PPPs) has stirred more and more careful controls by the National Audit Office (NAO), inaugurating a specific procedure dedicated to quantity and quality of the expenditure by government departments and non-departmental public bodies.

Following the first generation of Directives concerning public contracts³⁰, the efforts of the European Communities and later of the European Union towards the creation of a single market and the elimination of all barriers between member States forced all

²⁶ Credit Suisse v Allerdale BC [1997] QB 306.

²⁷ About the notion of contracting authority, see again ARROWSMITH, S., *The Law of Public and Utilities Procurement*, cit., ch.5.

²⁸ Local Government, Planning and Land Act, 1980 and Local Government Acts, 1988 and 1992.

²⁹ Local Government Act, 1990.

³⁰ See supra, par. 2.

governmental units to open up their procurement processes and to conform to the lowest price or to the most economically advantageous bid techniques in awarding their contracts. The criteria had to be necessarily defined in advance and applied carefully and transparently: such an obligation introduced new justiciable procedural rights, totally extraneous to both traditional common law remedies for the violation of due process and the judicial review of administrative action³¹. Since then the economic operators enjoy full procedural protection against public authorities for breach of contract³²: much of the traditional judicial deference to administrative discretion might have been set aside.

It is well known that after WW II English judges had autonomously extended their review of discretionary action, limiting Crown privilege against disclosing documents, restricting the limitations of the review of prerogative powers, awarding injunctions against Ministers, widening the access to judicial review itself³³. However, before the influence of EU law became so invasive, judicial review was not available in every case where some sort of irrationality was alleged by the claimant, nor was any kind of quasi-regulatory scrutiny admitted. Only significant deviations from public law objectives were justiciable, when it was evident that a relevant public interest required the courts to intervene in order to impose the rule of law, while on the other side a contract could not be the instrument to by-pass a legal duty to be pursued through administrative action, escaping an *ultra vires* scrutiny under judicial review, allowed by the Civil Procedure Rules when it is necessary to control the exercise of a public function³⁴. The new, wider procedural protection awarded by EU directives and their British progeny has now given economic operators many

³¹ Public Contracts Regulations 2006 SI 2006/5.

³² Directive 2007/66/EC.

³³ The starting point of these processes is generally assumed to have been *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

³⁴ CPR 54.1.

more procedural rights than ever before, whatever is now going to happen after Brexit.

Another trend towards the extension of judicial review into fields formerly uncovered has been triggered by the European Convention of Human Rights and consequently by the Human Rights Act 1998, whose sec.6 binds to safeguard Convention rights all public authorities defined as whoever has “functions of a public nature”. Such expression has been interpreted by the House of Lords³⁵, according to several parameters, as including the discharge of public services³⁶. In a country where many public services have been precociously privatized, such interpretation should widen the judicial review of administrative action in a very significant way.

Summing up, the contracts that have public administrations, or even public bodies in a very wide sense, as parties can be reviewed in a very limited way at common law, or otherwise under public law, within a growing trend towards the extension of the control over administrative action both from the procedural viewpoint and on the merit, and finally thanks to provisions of EU law regarding public procurements and 5. of the ECHR concerning the public nature of the activities carried out³⁷.

Finally, besides parliamentary control on government contracts, another important and very intrusive check has been mentioned above: it is entrusted with the National Audit Office (NAO), whose head is the Comptroller and Auditor General. It has been created in 1866 by the Exchequer and Audit Departments Act, and since then its powers have been greatly expanded, to include economy, effectiveness and efficiency of public expenditure, with

³⁵ *Aston Cantlow PCC v Wallbank* [2003] UKHL 37, extensively commented in T. Endicott, *Administrative Law*, cit., 595 ff.

³⁶ This interpretation reminds us of the doctrine concerning the nature and liability of the East India Company as private entity governing India: see again H.W.R. Wade, C. F. Forsyth, *Administrative Law*, cit., 841.

³⁷ A complete description of the remedies available and of the enforcement of public contracts in S.Arrowsmith, *The Law of Public Utilities and Procurements*, cit., ch.21.

a particular attention to contracts. It works as a private consultant, searching all kind of irregularities and procedural defects as well.

IV. FRENCH AND BELGIAN LAW

According to French administrative law, public law contracts have a longstanding tradition, founded at the beginning in case law and practice, mainly in the field of public works³⁸, than in the legal scholarship³⁹, and finally in legislative sources, soon collected in Codes: above all the Code des Marchés Publics (CMP), the Cahier des clauses administratives générales, the Cahier des clauses techniques générales (CCTG), and obviously the Code Civil⁴⁰.

Such rules all together form a special regime: it is considered located at the very border between civil contracts and administrative law, and not completely able to fit to the autonomy of will (“autonomie de la volonté”) principle, essentially created for civil law. Even in terms of interpretation, while the control of the Court of Cassation on the clauses of private contracts is limited, the control of the Conseil d’État on public contracts and their interpretation should be much more penetrating, in consideration of their capacity of producing binding effects on third parties and of creating objective rules, besides being dominated by the public law notions of function and mission “(but”) of public authorities⁴¹. The contracts of public bodies can however belong either to civil law or to administrative law, according to the clauses they include. Some clauses are common to both cases, such as the pro-

³⁸ See BIGOT, V.G., *Introduction historique au droit administratif depuis 1789*, Paris, 2002, 60 ff.;

³⁹ See e.g. JÈZE, G., *Les contrats administratifs de l’État, des départements, des communes et des établissements publics*, Paris, 3 vols, 1927-1934.

⁴⁰ At least with reference to several groups of articles: see RICHER, L., LICHÈRE, F., *Droit des contrats administratifs*, Paris, 10e éd., 2016, 37 ff.

⁴¹ *Ibidem*, 28 ff. and WALINE, J., *La théorie générale du contrat en droit civil et en droit administratif*, Mélanges Ghestin, Paris, 2001, 965 ff.

hibition of arbitration clauses, or the provisions concerning the competence of public organs. Some others lie outside of the usual structure and content of civil law contracts, and an enormous case law defines their eventually exorbitant character (“Critère de la clause impliquant un régime exorbitant”), implying the application of a public law regime. In most cases the presence of an exorbitant clause is supposed to disclose some link with a public service⁴², traditional basis, at French administrative law, of the administrative jurisdiction. Public work contracts were qualified as administrative contracts by the revolutionary statute of 28 Rainy of the VIII year. Other public law contracts also have received a formal a priori qualification.

Public authorities are considered able to enjoy full freedom of contract, amenable to art.4 of the Declaration of rights of 1789, in the same way than private persons, although the Conseil constitutionnel doubt that the constitutional protection enjoyed is the same⁴³. The expression of consent of a public subject depends above all on its competence⁴⁴, but the civil law theories concerning the vices of the will, the essential elements of consent, the need of a licit cause, and so on, are transposed into the field of administrative contracts⁴⁵.

⁴² In terms of ways of execution or participation in the execution: see *ibidem*, 98-104.

⁴³ CE 28 janvier 1998 Soc. Borg Warner, 138650, Rec. 20, AJDA 1988, 287. However, its violation can be invoked whenever it can lead to or result in a prejudice to the self-government capacity of local authorities (CC 26 janvier 1995, Lois d'orientation pour l'aménagement et le développement du territoire, 94-358, Rec. 183) or to other constitutionally protected rights (CC 3 août 1994, Rec.117). See e.g. T. Fleury, *La liberté contractuelle des personnes publiques*, RFDA, 2012, 231 ff.

⁴⁴ See e.g. RICHER, L., LICHÉRE, F., *Droit des contrats administratifs... op. cit.*, 137-146; GUETTIER, C., *Droit des contrats administratifs*, Paris, 2011, n° 433 ff.

⁴⁵ See e.g. PLESSIX, B., *La théorie des vices du consentement dans les contrats administratifs*, RFDA, 2006, 12; LOMBARD, F., *La cause dans le contrat administratif*, Paris, 2008.

In terms of remedies, there two different scenarios⁴⁶. Before the signing of the contract, the only remedy, introduced in the Code de justice administrative due to the influence of EU law⁴⁷, is the “référé précontractuel”: it can be filed by whoever has interest in concluding the contract and can be possibly prejudiced, is declared non receivable if proposed after the signing, and is decided by the president of the administrative tribunal, who can, “en plein contentieux”, suspend the procedure and the adoption of any other act, or stop it completely, declare some act null and void, suppress or modify some clauses or order any necessary adjustment. His powers are not strictly conditioned by the initial claim of the plaintiff, since no ultra petita objection can be raised. In 2000 the power to order a suspension was introduced into the Code, while in 2009 the suspension has been qualified as an automatic effect of the plea⁴⁸. Such remedy is available, according to its origin, against the violations of obligations of publicity and competition. Yet, The Council of State has over time admitted its use against not only procedural breaches of rules, but also the improper or restrictive use of technical clauses in the call for bids, the ways the bids have been assessed, and the competence of the public body and of its organs⁴⁹. Intermediate acts being part of the procedure preceding the contract (“actes détachables”), when severable form the procedure itself, also used to be attacked through a “recours pour excès de pouvoir”⁵⁰, which can be filed by the persons anyhow damaged

⁴⁶ There is an enormous amount of scholarship on this topic: see e.g. Lafaix, J.-F., *Essai sur le traitement des irrégularités dans les contrats de l'administration*, Paris, 2009; BERGEAL, C., LENICA, F., *Le contentieux des marchés publics*, Paris, 2010; LANGELIER, E., *L'office du juge administrative et le contrat administratif*, Paris, 2012; BOURDEAU, P., *Le contrat administratif illegal*, Paris, 2014.

⁴⁷ L. 551-1 and 551-5.

⁴⁸ L. du 30 juin 2000 et ordonnance du 7 mai 2009, modifying arts. 551-4 and 551-9.

⁴⁹ CE 30 juin 1999, Soc. Demathieu, 198993, BJCP 1999, 7, 640; CE 3 octobre 2008, Smirgeomes, 305420, Rec. 324.

⁵⁰ At least since the famous case Martin, 4 août 1905 (d. 1907, 3, 49). See e.g. Brenet, F., *Libres propos sur la “judiciarisation” du contrat administratif: un*

by the acts and even by the Prefect, whose plea is automatically suspensive for thirty days.

The second scenario is composed by the remedies available after and against the contract⁵¹. Traditionally, the Council of State, out of a secular judicial policy, used to deny admissibility to claims against the contract by third parties, such as the bidder not awarded the contract, because the “recours pour excès de pouvoir” did not look like a remedy suitable to the kind of act to be annulled⁵². Therefore, the only alternatives were the “référé précontractuel” before the contract coming to legal life or a suit for damages after that dividing line, filed in an ordinary court invoking the nullity of the contract itself. In 2007, in the famous case *Tropic*⁵³, the Council of State in General Assembly decided to overrule the traditional judicial doctrine, allowing pleas against the contract by third parties in form of *pleine jurisdiction*, although excluding for the future all former remedies against the *actes détachables*: the *révirement* was justified by reasons of simplification, defensive efficiency; rumors that the European Parliament was going to modify the remedies Directives, which eventually happened a few months later, in December 2007, in order to introduce a few months later, in December 2007, in order to introduce in each member State an obligation to deprive an illegal contract of all effects, were probably quite relevant. Later on, in 2014⁵⁴, the Council of State, again in General Assembly, opened up the interest to such claim from

nouveau juge pour un nouveau contrat administratif?, Paris, Melanges Richer, 2013, 529.

⁵¹ See e.g. MENEMENIS, A., *Le juge administratif et le contrat: libres propos sur un agenda chargé*, Paris, Melanges Fatôme, 2011, 329.

⁵² See e.g. CE 30 octobre 1998, Ville de Lisieux, 149662, Rec. 375, RFDA 1999, 128. A possible exception was reserved to contracts for the recruitment of temporary civil servants.

⁵³ CE Ass. 16 juillet 2007, Société Tropic travaux signalisation Guadeloupe, 291545, RFDA 2007, 696.

⁵⁴ CE Ass. 4 avril 2014, Département du Tarn-et-Garonne c/ Bonhomme, 358994, GAJA, 910.

the losing tenderers to all economic subjects even when disputing the awarding of a contract in full lack of competition⁵⁵.

Another kind of protection in contractual matters of public administrations is the action for damages linked to, for example, loss of chances, pre-contractual responsibility, premature execution, and so on: the jurisdiction in all cases belongs to administrative tribunal and Council of State. Finally, according to Art. L.410-1 of Commercial Code, the Autorité de la Concurrence (formerly Conseil de la concurrence) can operate in order to impose competition rules on public bodies and their contracts⁵⁶.

The French administrative law of public contracts shows many other special features, that have often circulated towards countries adopting the same administration model. For instance, the public party of an administrative contract has always the power of putting an end to its execution unilaterally (“résiliation unilatérale”), even without fault of the private party, due to public interest reasons, under duty of full indemnification of the relevant damages⁵⁷, which also belongs to the competence of administrative judges. In the same manner, it can also modify the contract unilaterally (“modification unilatérale”)⁵⁸, again indemnifying the counterpart, normally excluding the essential clauses and in particular the main financial balance. The controversies concerning the execution of the contract, penalties due to faults of the private

⁵⁵ The whole story is told in details, for instance, by RICHER, L., LICHÈRE, F., *Droit des contrats administratifs... op. cit.*, 188-216. See also DELVOLVÉ, P., *Précisions sur la validité et le contentieux des contrats*, RFDA 2015, 907.

⁵⁶ See e.g. CABANES, C., NEVEU, B., *Droit de la concurrence dans les contrats publics*, Paris, 2008.

⁵⁷ CE 17 mars 1864, Paul Dupont, D. 1864, 3, 87. See e.g. DENIZOT, A., *Les modalités d'indemnisation du cocontractant à la suite d'une résiliation unilatérale dans l'intérêt general*, JCP, 2012, 2395.

⁵⁸ CE, 11 mars 1910, Compagnie general française des tramways, GAJA, 1910, 113. See e.g. HOFFNER, H., *La modification du contrat administratif*, Paris, 2009.

party, and damages are also encompassed in the perimeter of the administrative jurisdiction⁵⁹.

Belgian administrative law has been much more deeply conditioned by European law of contracts: the level of penetration of EU principles is very high. Belgian handbooks⁶⁰ actually describe administrative contracts almost exclusively in terms of complete permeation by directives and regulations. Such an approach is evident both from the viewpoint of principles and of the case law: the precedents of the Luxembourg Court are cited much more often than those of the Belgian Conseil d'État. The general rules of the EU contract law have been long applied extensively even under threshold and to types of contracts, such as sale of real estate or concessions of goods, that could have been exempted from their punctual application⁶¹. The main derogations to general civil law apparently concern the execution⁶². In terms of jurisdictional protection, the competence belongs to the administrative tribunals and the Conseil d'État as far as the awarding of contracts is concerned and to civil judges for their execution.

V. SPANISH LAW

The influence of French administrative law on the Spanish public law system is undisputable. Yet, Spanish legal historians and ad-

⁵⁹ E.g. OUM OUM, J.F., *La responsabilité contractuelle en droit administrative*, Paris, 2014.

⁶⁰ See e.g. NIHOUL, P., *Éléments de droit public de l'économie*, Bruxelles, 2017, 105 ff. BOUVIER, P., BORN, R., CUVELIER, B. and PIRET, F., *Éléments de droit administratif*, Bruxelles, 2013, 145-156.

⁶¹ See again NIHOUL, P. *Éléments de droit public de l'économie... op. cit.*, 125.

⁶² See e.g. F. VISEUR, S. Ben Messaoud, *Principes généraux de droit administrative*, Bruxelles, 2017, II.3.

ministrative law scholars⁶³ emphasize several elements of distinction. First of all, the entrusting of the controversies related to public contracts to the administrative jurisdiction in 1888⁶⁴ helped the figure itself to be carved out more precisely; furthermore, the doctrine of public service, clearly conditioned by its French counterpart, had the effect of add strength to some features of public contracts in comparison with the ordinary characters of the civil law agreements, founded on the absolute equality of the parties⁶⁵. Another typical feature of the evolution of the administrative contract in Spain seems to have been the precocious preference of the legislation for auctions (“subastas”) in the adjudication of contracts and for some measure of transparency in the selection of bidders (“postores”). Royal decrees of 1852 and 1883⁶⁶ compelled all local authorities to make recourse to competitive comparisons among bids (“remates”), with very limited exceptions⁶⁷, and such principle was codified for State contracts in 1911⁶⁸. In other words, Spanish administrative law did not follow the French example in applying to public authorities a general principle of freedom of choice of private parties nor did it except concessions of services from the general rule, like in France. Already in 1975⁶⁹ was the elimination of the *intuitus personae* principle clearly secured. Conclusively, the implementation of the EU Directives in their various cycles has not created any problems to the Spanish legal system, simply reaffirming obvious regulations.

⁶³ See e.g. PARADA VÁZQUEZ, R., *Los orígenes del contrato administrativo en el derecho español*, Sevilla, 1963; García de Enterría, E., “La figura del contrato administrativo”, *Rev. Adm. Púb.*, 1963, 115.

⁶⁴ Ley de lo contencioso administrativo, revised in 1894 and 1952.

⁶⁵ See in details GONZÁLEZ-VARAS IBÁÑEZ, S., *Tratado de derecho administrativo*, t. IV, Cizur Menor, 2008, 419 ff.

⁶⁶ R.D. de 27 de febrero de 1852 (Bravo Murillo) y de 4 de enero de 1883.

⁶⁷ Such as cases of urgency, limited amounts of the goods to provide, the unsuccessful carrying out of a “subasta”.

⁶⁸ Ley de contabilidad de la Hacienda Pública de 1 de julio de 1911, art.49, revised in 1952 (Ley de 20 de diciembre de 1952).

⁶⁹ R.D. 3410, de 25 de noviembre, Reglamento General de Contratación, art. 212.

After the adhesion to the European Communities, therefore, Spain did not have to alter her public procurement system substantially. The old names of the awarding procedure (“subasta” and “concurso”) were kept up, without prejudice for the conformity of the domestic features to European rules, as the ECJ has repeatedly certified⁷⁰.

Spain has also been one of the first member-States to give full execution to the Remedies Directive 2007/66 CE, however choosing a quite unusual solution: the creation of a special quasi-judicial body, the Tribunal Administrativo Central de Recursos Contractuales (TACRC) inside the Ministry of the Economy (Ministerio de Economía y Hacienda)⁷¹. It is composed by civil servants having at least fifteen years of experience in the field of public contracts: they are not removable during good behavior for six years. New regional tribunals are created within each Comunidad autónoma⁷².

Claims can be filed against the call for bids or any contract documents, the criteria for the award of a contract, their application giving rise to possible discrimination against some tenderers, the

⁷⁰ See J.F. Mestre Delgado, *El derecho de la contratación pública en España*, in M. Sánchez Morón (Ed.), *El derecho de los contratos públicos en la Unión Europea y sus Estados miembros*, Madrid, 2011, 289, 310. The commentaries edited by MORENO GIL, Ó., *Contratos administrativos, Legislación y jurisprudencia*, 5^a ed., Cizur Menor, 2008, 6^a, 2012, and GARCÍA MACHO, R., *Comentarios a la ley de contratos de las administraciones públicas*, Valencia, 2008, contain a careful description of the traditional features of the Spanish system together with the modification introduced due to EU law reasons.

⁷¹ Ley 34/2010. The pertinent literature is enormous: see e.g. PULIDO QUECEDO, M., *El Nuevo Tribunal Administrativo Central de Recursos Contractuales*, Cizur Menor, 2010; DÍEZ SASTRE, S., *La tutela de los licitadores en la adjudicación de contratos públicos*, Madrid, 2012; Number 25, 2010 of the *Rev. Gen. Der. Adm.*, with articles of RAZQUIN, J.A., MORENO MOLINA, J.A. *et al.*, (eds.), *La contratación pública a debate: presente y futuro*, Madrid, 2014.

⁷² See the state of the regional tribunals in GIMENO FELIÚ, J.M., “Los Tribunales Administrativos Especiales de Contratación Pública y su principal doctrina (en especial la de Aragón). Hacia un control efectivo de los contratos públicos?”, in FERNÁNDEZ ACEVEDO, R., VALCÁRCEL FERNÁNDEZ, P. (eds.), *La contratación pública... op. cit.*, 25.

adjudication concluding the procedure, and the decision of the contracting authority to revoke the whole procedure. All terms are very short, often not exceeding five days, and the decision (“resolución”) must take place within five days from the production of evidence or of papers by the parties. Injunctions can be requested before the main remedy or in it. The proposition of the remedy against the award of the contract has a suspensive effect up till the adoption of the decision. The annulment of the award implies the elimination of the contract, when already signed, or a preclusion to its signing, while the general rule in similar cases, according to traditional administrative law, should be that the contract should not be voided and its enforcement should continue. A common criticism to the TACRC system is that it should be applied uniformly, independently of any thresholds⁷³.

VI. ITALIAN LAW

The first Italian statute concerning public contracts mounts back to 1865, when the unification legislation was approved⁷⁴. Such text was dedicated mainly to public works, which were distributed between the three levels of government (State, Provinces and municipalities) according to their importance and the presumable interest in their implementation and maintenance. The statute remained in force longer than a century. A royal decree dated 1895⁷⁵ was then approved in order to create and regulate the figure of the construction manager, designated by the public authority in charge of the work, operating as a link with the economic operator: he is supposed to give instruction during the work progress, to monitor the accounts and arrange payments, to test and try out

⁷³ See e.g. JIMENO FELIÚ, J.M., *Las reformas legales de la Ley 30/2007, de contratos del sector público*, Madrid, 2011, 93 ff.

⁷⁴ L. 20 marzo 1865, n. 2248, Schedule F.

⁷⁵ R.D. 25 maggio 1895, n. 350.

the work at its end, securing its correspondence to the contract. Since 1923⁷⁶, the public auction (“*asta pubblica*”), that originally was the only awarding technique, was put in alternative with a more restrictive method, consisting in the call for tenders of no more than five private subjects. The first one was presumed to be the ordinary way of awarding a contract, but the second soon became predominant. The same royal decree of 1923 imposed a complete projects, including measures and costs, as pre-requisite for the announcing of any public procurement. In 1962, almost at the end of the reconstruction period, a national roll of public work operators was created⁷⁷, while in 1972⁷⁸ the two methods of awarding were fully equalized, the choice between them being left with the discretion of the public authorities. It must be noted that at the time being the exclusion from a call for tenders limited to five or more operators was not assisted by any remedies, since the administrative tribunals, created the previous year⁷⁹, and the Council of State would have declared all claims inadmissible.

After that, and before the influence of EC law became predominant, the only two important modifications to existing legislation were: the acceleration of public works in 1978⁸⁰, imposing the prevalence of any work labelled of public interest on town and country planning rules, in order to prevent all obstructions at the local level; further simplifications were introduced in 1981⁸¹.

The first generation of EC Directives⁸² was implemented during the ‘70s⁸³ through the introduction of homogeneous rules concerning the publication of all calls for bids and concessions in the Official Gazette of the European Communities, the requisi-

⁷⁶ R.D. 18 novembre 1923, n. 2440. Its regulation was then approved with r.d. 23 maggio 1924, n. 827.

⁷⁷ L. 10 febbraio 1962, n. 57.

⁷⁸ D.P.R. 30 giugno 1972, n. 627, art. 2, modifying the 1923 royal decree.

⁷⁹ L. 6 dicembre 1971, n. 1034.

⁸⁰ L. 3 gennaio 1978, n.1.

⁸¹ L. 10 dicembre 1981, n. 741.

⁸² Dir. 71/305 and 72/277.

⁸³ L. 2 febbraio 1973, n.14 and L.8 agosto 1977, n. 584.

tes of the economic operators and the adoption of the awarding method of the most economically advantageous offer, opening some room to technical evaluations, previously unknown in the Italian legal system.

The second generation of Directives⁸⁴, implemented at the beginning of the '90s⁸⁵, introduced the feature of the negotiated procedure in cases of urgency or unsuccessful experiment of other awarding methods. In the same period⁸⁶ the provisions regarding supply contracts were codified, following the pertinent Directives⁸⁷. Soon thereafter a framework statute⁸⁸ was approved, which should have put together all the European rules in force and the relics of the traditional domestic regulations, but it turned to be so complicated for the state of the Italian bureaucracy to be suspended shortly after⁸⁹. Finally two delegated decrees of 1995⁹⁰, implementing new Directives of 1992 and 1993⁹¹, covered the ambits of services and excluded escorts respectively. At that point, however, virtually nothing had changed in terms of remedies available in the area of contracts of public administrations. The ordinary administrative remedies were open to all economic operators, without special rules concerning either standing or procedure. The only significant trend in the carrying out of administrative justice was the inclusion of some motivation in the injunctions of the suspension phase, which formerly were very poorly motivated with reference either to *periculum in mora* or *fumus boni juris* or to both. Such a trend, however, was general in the '90s, not limited to public contract litigation.

The reception of the second and third generations of Directives

⁸⁴ Mainly Dir. 89/44/CEE.

⁸⁵ By L. 19 dicembre 1991, n. 406.

⁸⁶ D. lgs 24 luglio 1992, n. 358.

⁸⁷ Dir 77/62, 80/767, and 88/295.

⁸⁸ L. 11 febbraio 1994, n.109.

⁸⁹ D.l. 29 aprile 1994, n. 257, art.71; d.l. 31 maggio 1994, n. 331; d.l. 30 novembre 1994, n. 658.

⁹⁰ D. lgs. 17 marzo 1995, nn. 157 and 158.

⁹¹ Dir. 92/50 and 93/38 CEE.

created a clear divide between contracts over and under EC threshold, the second ones enjoying a simplified regime in terms of procedures to be followed for the selection of private parties, often left to secondary or even local provisions.

In the new millennium the Italian legislator opened the way to two important developments. First, all the rules concerning public contracts were unified in a Code, applicable to works, supplies and services, together with the former excluded sectors⁹² together with its statutory instrument⁹³. They required a long and demanding elaboration, inclusive of several revisions by the Council of State. After the publication of the last generation of EU Directives⁹⁴, the Code was reformulated and readopted⁹⁵, but has been in need of a complete revision only one year later⁹⁶. The final version has been harshly criticized, nonetheless, due to its supposed rate of bureaucratic difficulty, may be after the reception of many suggestions coming from the recently created Anti-corruption Authority (Autorità nazionale anti-corruzione, ANAC)⁹⁷.

The second development refers to the judicial protection to be conferred to bidders or third parties against the choice of the winner, on both procedural and substantive grounds, and decisions of direct award or of in house providing. From this viewpoint, starting in 1998, but with growing speed and intensity after 2005, the rules governing the administrative process before administrative Tribunals and Council of State as of appeal have been modified in order to increase efficiency and diminish the time necessary for reaching precautionary and merit decisions⁹⁸. The remedies concerning public contracts have been endowed of a kind of fast

⁹² D. lgs. 12 aprile 2006, n.163.

⁹³ D.P.R. 5 ottobre 2010, n.207.

⁹⁴ Dir. 23, 24 and 25/2014/UE.

⁹⁵ D. lgs. 18 aprile 2016, n. 50.

⁹⁶ By the D. lgs. 19 aprile 2017, n. 57.

⁹⁷ See e.g. MERUSI, F., *L'“imbroglio” delle riforme amministrative*, Modena, 2016.

⁹⁸ See e.g. GALLO, C.E., *Manuale di giustizia amministrativa*, Torino, 2016, 312 ss.

track. The terms now assigned for the claim is thirty days since the knowledge of the end of the procedure or of the exclusion of the claimant, or since the publication of the call for bids, when an irregularity in the criteria implies the exclusion of an economic operator. The injunction can be awarded or denied after five days, during which collateral remedies can be opposed. In case of further urgency, the president of the Tribunal or a judge delegated by him can adopt a provisional monocratic measure. The final hearing on the merits shall also be set in a very short term, and the parties can request that the decision be published in three days. The procedure before administrative judges has therefore become the shortest in the whole of the Italian judiciary, fully complying with the EU remedies Directives.

VII. GERMAN AND AUSTRIAN LAW

German scholarship has long elaborated a punctual dogmatic classification of the different types of administrative contracts⁹⁹, distinguishing for instance between public and administrative law contracts (“öffentlich-rechtliche” and “Verwaltungsrechtliche Verträge”), coordinated, cooperative and subordinated contracts (“koordinationsrechtliche, kooperationsrechtliche, subordinationsrechtliche”); it has analysed their special characters, among which the peculiar nature of the responsibility of private and public parties, and the kinds of clauses to be inserted. The classical *Leistungsklage* used to be the main remedy in case of non-execution. From the viewpoint of remedies, lately the German system relies on a main division between public procurements over the EU threshold, governed by the principles of the successive generations of Directives in the form taken through their adoption in

⁹⁹ See e.g. WOLFF, H.J., BACHOF, O., STOBER, R., *Verwaltungsrecht*, München, 13. Auflage, 2017, III, 54 ff.; MAURER, H., BARTSCH, B., *Die Praxis des Verwaltungsvertrags im Spiegel der Rechtsprechung*, 2. Auflage, 1999, 13-48.

the domestic legal system, and contracts below such threshold, whose relevance escapes European rules.

The general regulations adopted in 1926 and revised over time on several occasions¹⁰⁰ were originally applicable to all procurements of public administrations and its perimeter has been restricted after the implementation of the EU Directives. Its content was oriented towards the economic efficiency of the choices of public authorities, so that no procedural or substantial rights for the bidders were included. The justiciability of private interests for breach of process rules and/or violation of award criteria is still barred, due to the accounting rationale of the traditional legislation.

The peculiarity of the public contracts over threshold after the implementation of the EU Directives is the entrusting of a sort of quasi-judicial review with semi-independent administrative agencies, created both at the federal and State level. The federal Vergabekämmer are structured in the Antitrust authority, while the similar bodies at the Länder tier are located in the State Ministries of the Economy, where the competition functions are situated.

The plea must take place immediately after the violation; if it concerns the call for tenders, it must precede the term for the bids. The standstill between award and stipulation is of fifteen days. After contract signing, there is room only for a suit for damages, with the possible exception of total voidness, that includes the lack of communication of the final choice and of its reasons to the losers. Before that point the Kammer works as an administrative body, which can modify and integrate the acts in order to conform them to full legality. The appeal has the effect of automatically suspending the procedure till the decision and the expiration of the term for further dispute. The appeal against the Vergabeentscheidungen can be filed in the civil chamber of the Courts of appeal, and not in the administrative one: contracts are considered not amenable to the category of the Verwaltungsakt, but belonging to

¹⁰⁰ *Verdingungsordnung für Bauleistungen* (VOB).

private law. Instruments of consensual administration and even of informal agreements do exist in the German legal system, but their area belongs to classic administrative law¹⁰¹, while in this sector private law aspects are still considered predominant.

European Commission and Luxembourg Court have put pressure on Germany in order to force it to allow third parties to plea against lack of public procurements, such as in house providing¹⁰².

Recently has German scholarship put much attention on Public-Private-Partnership as new Kooperationsformen, implying the adoption of different benchmark contracts both in the phase of their creation and of their implementation¹⁰³.

Austrian law explicitly recognizes the administrative contract as a general category, adopting classification that closely resemble the German ones: between a public body and a private subject (subordinationrechtliche Verträge), as distinguished from those between two public parties (koordinationsrechtliche Verträge)¹⁰⁴. Much emphasis is usually put on the obligations of this kind of administrative action, though carried out in the shape of private law, to conform to the Constitution (verfassungsrechtliche Zulässigkeit) and to stick to the rule of law (Legalitätsprinzip)¹⁰⁵. Much attention, therefore, is paid also to the admissibility of many clauses peacefully admissible according to the civil code¹⁰⁶. The pecu-

¹⁰¹ See e.g. SCHMIDT-ASSMANN, E., *Das allgemeine Verwaltungsrecht als Ordnungsidee. Grundlagen und Aufgaben der verwaltungsrechtlichen Systembildung*, Berlin-Heidelber, 2. Auflage, 2004, 3411 ff.

¹⁰² See European Commission and PWC, *Public Procurement – A Study on Administrative Capacity in the EU*, German Country Profile, 2016.

¹⁰³ See again e.g. WOLFF, H.J., BACHOF, O., STOBER, R., *Verwaltungsrecht*, Band 3, 5. Auflage, 2004, 609-622 .

¹⁰⁴ See e.g. ANTONIOLLI, W., KOJA, F., *Allgemeines Verwaltungsrecht*, Vienna, 3. Auflage, Kap. 15; RASCHAUER, B., *Allgemeines Verwaltungsrecht*, Vienna-New York, 5. Auflage, 2016, Kap. XVI; FÜRST, S., TAKACS, O., *Allgemeines Verwaltungsrecht*, Vienna, 8. Auflage, 2015 , 73 ff.

¹⁰⁵ See also FÜRST, S., TAKACS, O., *Allgemeines Verwaltungsrecht... op. cit.*, 74 ff., 83 ff.; RASCHAUER, B., *Allgemeines Verwaltungsrecht*, cit., VIII.

¹⁰⁶ See again e.g. RASCHAUER, B., *Allgemeines Verwaltungsrecht*, XVI.

liar character of the remedial system at Austrian law is that both subordinationrechtliche Verträge and verwaltungsrechtliche Verträge between private subjects, which are also admissible, belong to the ordinary jurisdiction, while only the verwaltungsrechtliche Verträge are encompassed in the administrative jurisdiction¹⁰⁷.

8. The U.S. procurement system is almost entirely governed, at the federal level, by the Federal Acquisition Regulation (FAR), which regulates the whole process of acquisition of goods and services by the executive agencies. Created in 1974¹⁰⁸, it is part of the Code of Federal Regulations¹⁰⁹ and binds all federal executive agencies, with some explicit exemptions, such as the Federal Aviation Administration. Its “uniform policies and procedures” allegedly cover need recognition and acquisition planning, contract awarding, formation, and management, trying to guarantee customer’s satisfaction from the viewpoint of costs, quality and timeliness. Every time a federal agency issues a solicitation, it has to declare which FAR provisions are applicable. Small businesses, disadvantaged businesses, veteran-owned small businesses, and a few other categories¹¹⁰ are ordinarily exempted from most requisites. In fact about two thirds of federal contracts follow FAR completely, though some clauses are optional and others are compulsory when compatible. In the event of omission of a required solicitation clause in a Government clause, it can be deemed automatically included in its text by the judge, according to the so-called Christian doctrine¹¹¹.

¹⁰⁷ See e.g. FÜRST, S., TAKACS, O., *Allgemeines Verwaltungsrecht... op. cit.*, 74-75.

¹⁰⁸ P. Law 93-400, codified as U.S. Code, Title 41, Ch.7.

¹⁰⁹ Title 48, Ch. 1. A complete scholarly treatment of this theme in NASCH, R.C., *et al.* (eds.), *Government Contracts Reference Book*, 4th ed., Chicago, Ill., 2013 and CIBINIC, J., *et al.* (eds.), *Administration of Government Contracts*, 5th ed., Washington, D.C., 2016.

¹¹⁰ FAR, 19.302, 19.305-307.

¹¹¹ *Davies Precision Machining, Inc. v. U.S.*, 35 Fed. Cl. 651 (1995).

Contracting methods¹¹² include a variety of types: the formalized seal bidding procedure, but also simplified acquisition procedures, contracting by negotiations, emergency negotiations, and other special contracting methods.

Subchapter E, Part 33, covers protests, disputes and appeals. The first and simplest remedy is the protest, aimed at requesting the solicitation authority to revise its decision concerning an exclusion, the award of the contract or other circumstances previous to the execution. The protester may be any interested party, and the responsible officer can postpone the award, extend the expiration of time for the acceptance of the offers, or adopt any other necessary measures, unless urgent or other public interest circumstances suggest otherwise. Decisions will be made within 35 days and will be well reasoned.

Alternatively, a protest can be addressed the General Accountability Officer (GAO), independent authority created in 1921¹¹³, presided over by the Comptroller General and supporting Congress in checking fairness and balance in the spending of public administrations. It has the main seat in Washington and a dozen more seats in some of the most important cities all over the country. The governing officer is required to cooperate with GAO. The filing of the protest before award, the contract shall not be signed unless after express authorization of the head of the administration under urgent and compelling circumstances. The decision must be issued in form of recommendation within 100 days from the filing of the protest, or in 65 in case of express option. When a solicitation or award is demonstrated not to comply with a statute or regulation, the protester may receive the cost of filing and pursuing the protest, including reasonable attorney fees, by the administration.

¹¹² FAR, Subchapter C.

¹¹³ By the Budget and Account Act, Pub. L. 67-13, 42 Stat. 20. The name has been changed in 2004 by the GAO Human Capital Reform Act, Pub. L. 108-271, 118 Stat. 811.

The last available remedy is the suit filed in the U.S. Court of Federal Claims¹¹⁴. Such judicial review is carried out according to the standards contemplated by the Administrative Procedure Act and elaborated by the case law since 1942. The Court can decide any controversy concerning solicitations or their revoking, exclusion of bidders, award of public contracts. Its statements include injunctive reliefs, declaratory judgements and all equitable and extraordinary relief, even concerning decisions by contracting authorities after protests.

¹¹⁴ The jurisdiction of Federal District Courts has been excluded by the Administrative Dispute Resolution Act of 1996, Pub. L. 104-320.