Book: Contrôles et Contentieux des Contrats Publics – Oversight and Challenges of Public Contracts (selected chapters – manuscript)

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INTRODUCTORY REMARKS

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1. - PURPOSE AND BACKGROUND OF THE RESEARCH

This work is part of the work carried out by the "Public Contracts in Legal Globalization Network" which was created almost 10 years ago. In this respect, it aims at deepening the issue of litigation and control of public procurement contracts which had already been partially addressed in previous collective works, starting with the book that inaugurated the series: Comparative Law on Public Contracts - Droit comparé des Contrats Publics (2010) edited by Rozen NOGUELLOU and Ulrich STELKENS. The first bilingual work presenting an overview of the legislation in place in 28 countries to govern public contracts, it also addressed the issue of litigation and dispute resolution. This concern also appeared in the following books of the series, in particular in EU Public Contract Law. Public Procurement and Beyond (2014) edited by Martin TRYBUS, Roberto CARANTA and Gunilla EDELSTAM, and in particular in the book Public Contracts and International Arbitration (2011) edited by Mathias AUDIT and the latest one entitled Transnational Law of Public Contracts (2016) edited by Mathias AUDIT and Stephan SCHILL.

In order to deepen these first analyses of the treatment of litigation related to public contracts, it was decided to bring together legal specialists from all over the world, members of the Network, to draw the national characteristics and to apprehend the main guidelines, convergent or divergent, of this litigation landscape. 4 continents, through 22 countries, are thus studied in this work. If the European Union is very present, with chapters devoted to Germany, Spain, France, Great Britain, Greece, Italy, the Netherlands or Romania, the chapters on South Africa and the combined analysis of 8 other African countries[1], on Brazil, Chile, China, the United States and Switzerland attest to the diversity of the legal systems represented. There is also a chapter on remedies related to contracts concluded by international organizations, which attests to the efforts and difficulties encountered by these entities in building reliable and independent mechanisms.

2. DEFINITION OF THE SUBJECT OF THE RESEARCH: PUBLIC PROCUREMENT CONTRACTS

While the first book in the series embraced a broad definition of public contracts, which included administrative contracts in France, the Network's work has progressively focused on the law applicable to public procurement, concession contracts and other Public-Private Partnerships (PPP). The European Union now uses the term public contracts in a generic sense and the new Directives of 2014 deal respectively with public contracts (French version), public procurement (English[2]) and concessions. In

[1] Bénin, Burkina Faso, Congo Brazaville, Île Maurice, Madagascar, Soudan, Tanzanie, Togo.

[2] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement. On notera que les Directives de 2004 dans la version anglaise portaient sur les « contrats publics », notamment : Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. Cette évolution sémantique recèle en

addition to the identification of these contracts, which has been progressively refined, and which is summarized today (at least in French[3]) under the expression "contrats de la commande publique" (public acquisition contracts), this more delimited field makes it possible to better understand the phenomenon of the globalization of law. For under names that may vary, all States, as well as their sub-State public entities (whether or not this concept is itself officially recognized in national law), and also international public organizations, engage in acts of purchasing goods and services. The similarity of these transactions thus makes it easier to compare the rules that govern them and, consequently, the remedies that are available to challenge the violation of these rules.

3. THE RESEARCH METHODOLOGY

The work of Rozen NOGUELLOU and Ulrich STELKEN inaugurated a working method that was subsequently adopted by all the works in the series: that of the initial elaboration of a single, bilingual questionnaire (appended to this introduction), used by the contributors to conduct the analysis of national law. In addition to the scientific interest of preparing this common document, this exercise makes it possible to clarify, beyond the vocabulary that may vary, the concepts and movements of the law that we are trying to grasp. While some authors have faithfully respected the order of the questions submitted, others have preferred to adjust their chapter to the particularities of their national system. In this respect, the authors of this book acknowledge that it is not entirely a book of comparative law, since its first part is rather a juxtaposition of national monographs. But, in addition to giving the reader the possibility of making stimulating comparisons himself, this presentation has made it possible to go into greater depth on certain points in the so-called transversal analyses that appear in the second part.

4. RESEARCH HYPOTHESYS

At the origin of the Globalization of Public Contract Law Network, Jean-Bernard Auby, in his book *La Globalisation, le droit et l'Etat* (Globalization, the Law and the State[4]), put forward the idea of a transformation of national public law under the effect of the globalization of trade, particularly in the hitherto preserved framework of public contracts. This intuition was then explored[5] and the first work of the Network presented above examined the phenomenon of the globalization of public contract law. Following on from this questioning, the present book has attempted to explore the hypothesis of globalization in the field of recourse and control of public contracts.

It was not an easy task to carry out this study, since a jurisdictional system can be so consubstantial with its national legal context. First, because in litigation, perhaps even more than in other areas of the law, the characteristics of the approaches of the so-called Common Law countries and those of Continental Law (or "Romano-Germanic" or "civil law" for the Anglo-Saxons) are manifested. But, above all, the possible duality of jurisdictional architectures, with on the one hand the model of a single jurisdiction and on the other the model of the coexistence of the administrative judge and the civil judge, is particularly questioned by the operation of the public order. Indeed, this operation is divided into two stages, initiated by an administrative procedure (that of the acquisition procedures imposed on public purchasers), it continues with a contract, an emblematic act of private law relationships. Here, the comparative law analysis of the remedies used in the context of public contracts unfolds all its richness,

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fait une évolution remarquable des concepts juridiques et de leurs périmètres respectifs. En revanche, la version espagnole des Directives de 2014 n'a pas été modifiée : « contratación pública ».

[3] Le droit français a désormais officialisé cette expression : utilisée par le Conseil Constitutionnel dans sa décision n° 2003-473 DC du 26 juin 2003, Loi habilitant le Gouvernement à simplifier le droit, elle est également reprise dans le cadre du futur *Code la commande publique* qui doit être adopté à la fin de 2018, comme l'indique la Lettre de la DAJ du 9 mars 2017, l'article 38 de la loi n° 2016-1691 du 9 décembre 2016 (dite Sapin 2) habilite en effet le gouvernement à codifier par ordonnance les règles de l'achat public.

[4] Clefs / Politique, Montchrestien, 2003, en particulier p. 37 et s.

[5] J.-B. AUBY, « L'internationalisation du droit des contrats publics », *Mélanges Th. Flory*, Bruylant, 2003 et « Les problèmes posés par le développement du contrat en droit administratif comparé », in : Mélanges Michel GUIBAL, Tome I, 2006, p. 411

since the foundations of these remedies, their procedures, their time limits, the quality of the claimants admitted to contest the decisions of the public entity, the nature of the challengeable acts, the powers allocated to the appeal bodies, the effect on the contracts of the contentious solutions, are all elements in which knowledge of the foreign approaches is of obvious importance. Moreover, this comparison is all the more necessary in the context of the European Union, since it makes it possible to measure the integration of common requirements in national review procedures (see the chapter by Simone TORRICELLI in this book) at a time when the Member States are seeing new requirements imposed on their public procurement contracts by the recent 2014 Directives.

In addition to this initial field concerning the main lines of litigation related to public contracts, the observation of current developments in all countries, with very few exceptions, leads to the expansion of the research towards jurisdictional interventions of all kinds that accompany the conduct of operations for the purchase of goods and services carried out by public persons or affiliated persons. The enrichment of the rules applicable to public contracts, which has characterized this area of law in recent years, has inevitably been accompanied by an increase in litigation. Firstly before the contract judge and/or the judge of the administrative procedure of the contract award phase, if it is distinct, but beyond that, before other bodies, testifying to the centrality of the act of public purchasing within public activities and the stakes involved.

Another phenomenon, parallel and linked to the previous one, should also be explored. This is the development of controls attached to the operation of the public contract. These controls, in the forefront of which are administrative controls, are not only very diversified but their methods have evolved. They are used, in particular, in the context of the policy of integrity and the fight against corruption which now permeates public procurement law, as demonstrated by the book Integrity and Efficiency in Sustainable Public Contracts. Balancing Corruption Concerns in Public Procurement Internationally (2014) edited by Gabriella RACCA and Christopher YUKINS. From these new demands come new forms of control. In developing or emerging countries, the fight against corruption is also inscribed on the front page of public procurement rules, but for reasons often related to the lack of resources and the weakness of existing institutions, the implementation of this policy requires new distributions of control competences. To seize the evolutions in these new fields in full change was also the second reason of this project[6].

Finally, the multiplication of the channels of control and the possibilities of intervention of parallel jurisdictions led us to question the place occupied, in the various countries studied, by pre-contractual litigation, and even the place it will occupy in the future. As a central and emblematic dispute in the construction of public procurement law, which it has accompanied in all countries in order to ensure the reality of competition, the linchpin of the transparency and reliability of public commitments, is its role not being transformed? From a tool for defending the rights of candidate companies, a privileged category among third parties, are we not witnessing, in many countries, its progressive limitation? Have not its conditions of triggering, perhaps too easy in some countries, been tightened (as R. NOGUELLOU points out in her chapter on France) in order to restrict actions that endanger concluded or pending contracts? Restriction of the interest to act, financial costs attached to the appeal, time limits, discretionary jurisdictional decision replacing the discretionary administrative decision, non-publication of decisions, are all levers used by the States to circumscribe a legal remedy that is a victim of its success. A form of instrumentalization of the recourse appears, sometimes open, sometimes limited, which, far from having to satisfy the greatest number, must above all serve to point out the most important failures, the most flagrant violations of legality, while preserving the flexibility of public contractual action. Pre-contractual review would thus become, first and foremost, an instrument for the improvement of public

[6] Une première recherche collective avait déjà permis d'identifier certaines de ces questions dans le domaine plus circonscrit des marchés publics : G. MARCOU, L. FOLLIOT-LALLIOT, D. I. GORDON, S. L. SCHOONER, Ch. YUKINS (dir.), *Le contrôle des marchés publics*, 2009.

acquisition[7]. This hypothesis of the transformation of the function of pre-contractual review, making the rejected candidates the vigilant guardians of the competitive tendering procedure, deserved to be studied through the various examples. If it were to be verified, it could thus contribute to recognizing the control function performed in turn by pre-contractual review.

5. INITIAL ANALYSIS

5.1. A settled litigation

The vast majority of States now have a pre-contractual review mechanism, of varying degrees of sophistication. In its study analyzing public procurement law in 180 countries, published in 2017, the World Bank[8] mentions a few countries that have no form of review: Antigua, Iraq[9], Eritrea and El Salvador. In the vast majority of cases, the most common minimum form of appeal is an informal administrative appeal. In Africa, for example, out of 44 countries surveyed, 34 rely solely on administrative review by the contracting authority, 7 by an independent administrative authority (IAA) and 3 directly by the courts. In Europe and Central Asia, the Report establishes an inverse proportion: 17 States organize direct review before an IAA and 8 before the initial administrative authority. Other States prefer to seek a hierarchical administrative appeal, for example in Australia, Gambia, Mauritania, and Nepal. In addition to these different solutions, it is necessary to add practices that vary considerably from one country to another in the processing of these challenges, with periods that are too short to allow for a serious examination of the arguments raised by the applicant (e.g.: 2 days on average in Mali, 3 days in Taijikistan) or excessively long periods that reflect deficient systems: 1 year on average in India, 247 days in Lebanon or 180 days in Zimbabwe. More surprisingly in the European context, the World Bank Report states that it takes 450 days on average in Ireland and 360 days in Luxembourg to obtain a first decision. As for appealing the decision, this is possible in the vast majority of countries. But in the 153 countries where appeals are organized, they are most often costly: 89 countries impose legal fees, sometimes prohibitive (up to 6% of the value of the contract in Hungary). There is also a great disparity in the powers conferred on the body in charge of examining the appeal and its decision is not always published in more than forty States.

Admittedly, the legal traditions are the basis for original responses in the systems deployed, but the aims are identical: to ensure the regularity of the public procurement contract operation (administrative phase of award and contractual execution). The countries that have historically based their control on the verification of the financial and budgetary regularity of public contracts have thus entrusted the pre-contractual review to a jurisdiction/budgetary body (in the United States with the Government Accountability Office GAO: see the chapter by P. McKEEN, Brazil or Portugal), while those which have tried to regulate administrative activity in general have simply extended the control in force for administrative acts to public contracts (the French approach), while others have seen it as a question of respect for competition (the German approach) or more recently of good governance (North African States after the Arab Spring, African States, India), without forgetting those which introduced the right to pre-contractual review essentially to meet an obligation in terms of international trade (Australia,

[7] "Complaint mechanisms introduce a relatively low-cost form of accountability into procurement markets by providing an opportunity for citizens to hold public officials involved in tendering accountable for their decisions and behaviors", in World Bank Benchmarking Public Procurement 2017 préc. V. aussi : D. GORDON, "Constructing a Bid Protest Process: Choices Every Procurement Challenge System Must Make", Public Contract Law Journal (2006-3) 2013 and "Bid Protests: the Costs are real, But the Benefits Outweight Them", GWU Legal Studies Research papers n° 2013-41, GWU Law School, Washington DC.

[8] World Bank, Benchmarking public procurement. Assessing public procurement regulatory systems in 180 economies, 2017. http://bpp.worldbank.org/~/media/WBG/BPP/Documents/Reports/Benchmarking-Public-Procurement-2017.pdf

[9] Encore que, dans ce pays, le recours existe en théorie, porté devant le Conseil d'Etat Irakien (Shura Council), mais il n'est jamais mis en œuvre, pour des raisons de situations sur le terrain que l'on peut aisément comprendre.

New Zealand, Singapore) or entry into a regional economic union (such as the European Union for Eastern European countries or the WAEMU for West African States).

5.2. Divided litigation

In most of the countries studied, litigation concerning public contracts is divided, most often to accompany the chronology of the contractual operation marked by the phase of the competitive bidding procedure, the formalism of which calls for a control (objective) of the regularity of the acts of the public entity, and which is distinct from the phase of litigation (subjective) concerning the execution of the contract. But to this chronological division, a material division is sometimes added according to the acts in question (unilateral, preparatory or contractual), when the game of jurisdictional dualism is not superimposed when it exists. It is also often a multi-speed dispute: very rapid when it occurs upstream of the contract, thanks to various procedures ranging from summary proceedings before the judge to the jurisdiction of first instance entrusted to an independent administrative body, it can be diluted during the performance of the contract, when the issue at stake apparently concerns only the parties, and when exceptional procedures give way to ordinary law, thus justifying the use of arbitration. Behind the apparent cacophony, the variations in vocabulary[10], the divergent procedural details, one nevertheless notes, at the macro-legal level, an undeniable convergence of solutions.

5.3. The emergence of a model of pre-contractual review

a. International sources of harmonization

Sources of flexible law, but also binding international sources, have contributed to the emergence of a model of review open to unsuccessful candidates at the time of contract award. With this observation, which is shared in practically all countries, the phenomenon of the globalization of litigation relating to public contracts, and more specifically to pre-contractual litigation, takes on its full scope.

The UNCITRAL Model Law on Public Procurement, revised in 2011, is one of the most flexible laws. Dedicated to the regularity of award procedures, this model law advocates the now classic principles of public procurement law such as transparency, equal treatment, integrity, efficiency and the right to review. In particular, it contains a very detailed chapter on review procedures, which includes, for example, the principle of sufficient time to exercise a right of review through the suspension of the signing of the contract (standstill). Although it has been transposed directly by certain states, it has above all contributed to forging a common approach to the requirements of a relevant review system for unsuccessful candidates.

On the other hand, the structural reforms advocated by international financing institutions, such as the World Bank[11] and other multilateral banks, or the OECD[12], have changed the landscape of public acquisition over the last 10 years. In order to establish the confidence of investors[13] and economic actors,

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[10] Dans les pays francophones, on parle de “recours”, “réclamations”, “plaintes”. Dans les pays anglophones : “challenges”, “reviews”, “protest”, “remedies”, “appeal”.

[11] World Bank Procurement reform 2015-2016, Bank Policy – Procurement in IPF and Other Operational Procurement Matters https://policies.worldbank.org/sites/ppf3/PPFDocuments/Forms/DispPage.aspx?docid=4002

[12]L’OCDE, conjointement avec des Institutions internationales, vient de réviser sa méthodologie d’évaluation des systèmes nationaux de marchés publics, la MAPS (2017). Au nombre de ses indicateurs, celle-ci évalue si l’Etat s’est doté d’un « système efficace de recours » grâce à des procédures de recours structurées, des mécanismes d’appel, des délais suffisants, des procédures transparentes qui assurent les droits de la défense. Methodology for Assessment of National Procurement Systems Version of 2016 (Draft for Public Consultations, July 2016), available at http://www.oecd.org/gov/ethics/benchmarking-assessment-methodology-public-procurement-systems.htm. Voir aussi : OECD, *Public Procurement for Sustainable and Inclusive Growth. Enabling reform through evidence and peer review,* available at *http://www.oecd.org*, p. 15.

[13] “Enhanced trust in the system will not only preserve the integrity of the process, but can act as an incentive that triggers increased participation of suppliers in public tenders, thus making prices more competitive and improving the quality of

these international organizations have participated in the recent establishment of new rules and new institutions in charge of public procurement in dozens of developing or emerging countries. As clients of these institutions, they find themselves today with very similar rules, which reflect a mistrust of traditional jurisdictions and a desire to set up administrative bodies, if possible with a tripartite composition (representatives of the Administration, businesses and civil society) to receive appeals. These countries also sometimes share the same difficulties with models that have sometimes been transposed into their national law without taking into account local particularities, as shown in the chapter by R. CARANTA, M. COMBA and C. CRAVERO.

It should also be noted that these international standards, in the area of pre-contractual review, have been heavily influenced by the text of the Agreement on Government Procurement (GPA), the latest revision of which negotiated under the WTO entered into force in 2014. Its Article XVIII on domestic review procedures, requires at the outset that "Each Party shall establish a timely, effective, transparent and non-discriminatory administrative or judicial review procedure through which a supplier may file a review." It constitutes the first example of a plurilateral agreement that interferes in the internal litigation organization of States. Above all, its binding effect for the signatory States of the Agreement (including the European Union, which must comply with its Directives, and Switzerland, as explained by E. POLTIER in his chapter) is accompanied by a formidable harmonizing effect: its 43 States Parties in turn use the text of the GPA in the negotiation of their trade agreements with third countries when considering access to public contracts for foreign companies. Thus the GPA rules, including those relating to the characteristics of pre-contractual reviews, are gradually becoming the lowest common denominator shared by a growing number of countries around the world. [14]

b. Direct litigation against the contract reserved for candidates

In her chapter on "third party remedies against the formation of a public procurement contract", Nina AOUDJHANE brings together the solutions set out in the national monographs in order to demonstrate that neither administrative nor jurisdictional procedures really make room for third parties other than the unsuccessful candidates, except in certain systems and under specific conditions, as in France. However, there is increasing pressure to give them access to the courts, as Gabriella RACCA suggests in her chapter on third party remedies during the performance of the contract. This will certainly be one of the challenges of the future evolution of the law of public procurement contracts: to give a place to third parties (users, citizens) either by involving them in the course of the procedures or by giving them access to recourse mechanisms.

c. The concern to reconcile the efficiency of public procurement with the right to appeal

The various national contributions have all pointed to the margin left to the judge or the body responsible for assessing the consequences of an established illegality for the survival of the contract. The fact that the suspensive effect of the review is usually optional has reinforced the impression that the review procedure must endeavour to spare the contract so as not to impede the action of the administration.

Few countries award damages for loss of chance of winning if the procedure is annulled by the judge. At most, they allow the unsuccessful candidate to obtain the reimbursement of expenses incurred during the tender. This is in line with the requirements of the GPA, which states: "in cases where a review body has determined that there has been a violation or non-compliance (...), corrective measures or

goods, works, and services". World Bank Benchmarking Public Procurement 2017 (préc.).

[14] Par exemple, l'article XVIII.3 dispose: « Il sera ménagé à chaque fournisseur un délai suffisant pour lui permettre de préparer et de déposer un recours, qui ne sera en aucun cas inférieur à dix jours à compter de la date à laquelle le fournisseur a eu connaissance du fondement du recours, ou aurait dû raisonnablement en avoir eu connaissance ». Voy. R. ANDERSON, "The WTO Agreement on Government Procurement: an emerging tool of global integration and good governance", EBRD, *Law in transition - online*, oct. 2010.

compensation for loss or damage suffered, which may be limited to the costs of preparing the tender or the costs of the review, or to all such costs" (Article XVIII - 7 - b).

By the framing of these conditions, the limitations of the damages to which it can give right, one can wonder about the transformation of the function of the pre-contractual appeal which becomes an element of control of the action of the public person through the objectivization of the appeal. Presented as a step forward in the defence of the subjective rights of unsuccessful candidates, pre-contractual review has attracted governments because it makes it possible to externalize the function of controlling the administrative regularity of the award.

5.4. The emergence of a system of public review and control

The notion of a system here must be understood in the sense of a systemic analysis: one observes the gradual development of a system of parallel, at best complementary and sometimes interdependent, reviews and controls, which endeavour to apprehend all the facets of the operation of the public contract, each State adapting these objectives to its legal tradition. However, this is a system in the making in most States, which sometimes explains the black holes (the fate of third parties to the contract, in particular subcontractors and users), the grey areas (between criminal sanctions and administrative sanctions for breaches of integrity) and the nebulous nature of the system: several poles of control, several judges, several administrative bodies whose competences sometimes become entangled. Just as we have argued for a systemic approach to public procurement, the need for a systemic approach to the modes of control and recourse is gaining in relevance.

a. Complementarity between contract litigation and peripheral litigation

The centrality of the public procurement operation within administrative action, and the economic (stimulus program, development, budgetary savings), political (fight against corruption, good governance) and societal (protection of minorities, objective of sustainable development) stakes that have now been grafted onto this operation, now call for more diversified responses. The pre-contractual appeal, raised only by the candidates to the act of purchase, as perfected as it may be, no longer responds to the diversification of the stakes of the public order.

The studies carried out in this book show that today public procurement contracts can trigger the intervention of jurisdictions that are not in principle in charge of direct litigation concerning these contracts, such as the criminal jurisdiction following the detection of fraudulent behavior or a financial jurisdiction following the discovery of an administrative or financial irregularity. The criminalization of public contract law is a notable phenomenon in several countries: the criminal judge, through the improvement of the understanding of corruption, fraud and, more broadly, integrity violations, finds himself having to assess the conditions under which the public contract is carried out in order to identify reprehensible public or private behavior. In order to detect failures in the management of public money, financial jurisdictions are also increasingly called upon to verify the accounting and budgetary regularity of the act of public purchase. Although indirect, and most often subject to mechanisms of preliminary questions before the courts mainly responsible for contractual disputes, this irruption of related litigation into the main litigation of public procurement calls for consideration of the coexistence of these different jurisdictional channels and the mechanisms that may have been put in place in the countries in order to articulate them, or even prevent conflicts of jurisdiction. Moreover, this diversification of jurisdictional interventions may call into question traditional direct litigation, i.e., for pre-contractual litigation, a form of recourse essentially designed to defend the interests of unsuccessful candidates attached to the objective of respecting competition, and, for contractual litigation, above all a mechanism geared to respecting the balance of contractual relations between the parties.

b. Complementarity between judicial and non-judicial controls

The most recent reforms, in particular those carried out in developing countries under the influence of the international financial institutions, have largely reproduced the model of a regulatory authority for public procurement (or public ordering) which also has jurisdiction to hear pre-contractual reviews (see R. CARANTA, M. COMBA and C. CRAVERO, "Remedies and Administrative review in award procedures for public procurement in selected African countries"). Behind the promotion of this institutional mechanism, the search for the independence of this authority to reinforce confidence in recourse hardly conceals the distrust of traditional jurisdictions considered unreliable, ill-prepared or even corrupt. These criticisms are also echoed in relation to the settlement of contractual disputes and often justify recourse to arbitration (see below).

c. Diversification of administrative controls

The emphasis placed on the remedies available to ousted firms, initially designed to strengthen the effectiveness of competition, is now showing its limits. While it is necessary, this recourse is not sufficient. The different issues at stake in public procurement give rise to other ways of verifying the regularity of decisions taken. As Gabriella RACCA's chapter shows, the control and therefore the recourse associated with it must now also open the door to the other actors of the public order: the subcontractors, the users and the citizens. But the latter also wish to be associated upstream: to participate in the definition of needs, to sit on the tendering committees, and sometimes to sit on the appeal bodies. But they may also prefer representatives of the private sector, as is the case in the institutional model defended by the Multilateral Banks, which is not without evoking a form of self-control or self-regulation. The very rhythm of controls is changing: whereas for a long time priority was given to a prior review, exercised before the choice of the contractor, pre-contractual or even contractual recourse (i.e., exercised against the contract itself), testifies to the desire to turn to an a posteriori verification (or post-review) which does not hinder, or only to a lesser extent, the administrative process.

d. The emergence of a new control tool: administrative sanctions against companies

Sanctions prohibiting companies from applying for contracts are increasingly present in national systems, but what rules and procedures do they follow[15]? How are they linked, for example, with sanctions for hindering competition? Which authority can pronounce them? What guarantees can companies benefit from? What publicity measures should accompany them while preserving the right to protection of private interests? Is it better to prevent than to repress? Most countries (except the United States, which already has a range of prohibition provisions - see P. Mc KEEN, this book) are still groping at these many questions. While Italy is exploring Integrity Pacts as explained by Carole CRAVERO, many governments are relying on the analyses carried out by international organizations, such as the OECD[16], which list state solutions, while the multilateral banks, which are at the forefront of these issues, are exploring the possibilities of cross-debarment sanctions which, if transposed into the law of states, would aim to give extra-territorial effect to the sanctions imposed.

In its own way, the European framework echoes these new requirements with Article 57 of Directive 2014/24, which has both increased the number of cases in which candidate companies may be banned and diversified the nature of the breaches of which they are accused: the list of mandatory cases is no longer limited to cases of established criminal offences, since the list of optional exclusion hypotheses has now been greatly enriched, including to punish the improper performance of a previous contract. We are witnessing, if not a retreat from the criminal approach, at least an increase in the power of the administrative sanction.

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[15] Voy. J.-B. AUBY, E. BREEN and Th. PERROUD (eds.), *Corruption and Conflicts Of Interest. A Comparative Law Approach*, Edward Elgar Publishing, 2014.

[16] OECD, *Implementing the OECD Principles for Integrity in Public Procurement*, *2009*.

e. From repression to prevention

Here again, the desire not to hinder public action and to allow contracts to be awarded and performed under the best possible conditions justifies a change of paradigm. The idea of repression gives way to that of preserving the interests of the public entity through the sanctioning of inadequate performance: the new system strives to encourage (1) prevention through unilateral commitments by the various participants in the public contracting process, (2) "compliance" with new ethical, environmental and social obligations that are added to the contractual obligations, and even (3) the "redemption" of companies, which can escape the sanction of prohibition if they demonstrate a clear desire to transform their operating methods.

5.5. The absence of convergence, for the moment, on the settlement of contractual disputes

While the administrative phase of the award of contracts, reinforced by the recourse available to unsuccessful candidates, has been largely marked out by the international standards mentioned above, and has been taken up in the European framework by the Remedies Directives, there is no international rule of equivalent scope that begins the beginning of harmonization in the area of contract performance and the settlement of their disputes. Faced with this disparity, the boldness of the 2014 European Directives with their first articles on the modification and enforcement of contracts is particularly interesting to follow as the solutions within the Member States are so disparate and even more so crossed by the furrow that divides civil law and public law. In this respect, the "national" chapters of this book dealing with the Member States are particularly revealing of the disarray into which these new provisions have plunged some States. Admittedly, the 2014 Directives, since they only deal with contract law, do not revise the Remedies Directive (which Albert Sanchez-Graells regrets in his chapter: *'If it ain't broke, don't fix it'? EU requirements of administrative oversight and judicial protection for public contracts*) but one can already guess that the fragmentation of solutions currently practiced in the substantive law of public contractual disputes in Europe will quickly call for interventions by the Court of Justice, at least to resolve disputes related to the modification or termination of these contracts. The Court will thus be called upon to rule on disputes relating to the performance of contracts concluded between contracting authorities and economic operators, thus laying the foundations for a common system of public contracts in Europe, which will necessarily have an impact on the globalization of public contract law.

But the issue is not only one of substantive law. It is also a question of the procedural law that must govern the settlement of contractual disputes. The debate surrounding the use of arbitration in public contracts, while obviously fundamental to the subject, has not been explored in detail in this book. Indeed, the book directed by Mr. AUDIT has already addressed the issue and it was necessary here to avoid redundancy of analysis. Nevertheless, the topic was addressed in the questionnaire, and some contributors paid close attention to it, as did their national systems.

Undoubtedly, a strong influence of the international model of arbitration can be noted today. There are countless soft law instruments that advocate recourse to arbitration or, more broadly, to alternative dispute resolution. They clearly express a distrust of the jurisdictional settlement of contractual disputes, as the MAPS (2017) drawn up by the OECD, which formulates it distinctly in relation to the indicator relating to contract management[17]. However, and in particular within the European Union, some states

[17] La version d'origine est en anglais : « The legal framework should determine the conditions for contract amendments and extensions to ensure economy and avoid the arbitrary limitation of competition. The legal framework should also define suppliers' rights in case of late payment. Disputes during the performance of a contract are a common occurrence. Naturally, disputes can be resolved through judicial proceedings. In some countries, litigation may however take very long, sometimes years, and the costs may be deterrent. To avoid long delays in resolving disputes, it should be the policy of the country to accept alternative dispute resolution (ADR). Methods of ADR refer to any means of settling disputes outside of the courtroom. Arbitration and mediation are two major forms of ADR. A framework should be in place that provides for fair and timely resolution including procedures to enforce the final outcome of a dispute resolution process. For example, there should be an

either maintain a position of principle hostile to arbitration of public contracts (such as France, but with numerous exceptions), or are returning to this attitude after having admitted arbitration for some time. The solution of institutionalized and public arbitration that was recently adopted during the negotiation of the CETA between the European Union and Canada can be linked to this reluctance.

5.4. National differences and rich legal traditions. Is harmonization inevitable?

The analyses contained in the book attest to the wide variety of protection and control models deployed in the public procurement sector. While the general framework constituted by supra-state law is increasingly rigid in terms of the requirement to ensure the legality of administrative action, as such, or to protect the interests of individuals, the framework of national/local law is characterized by a polymorphism that reflects the diversity and richness of national traditions. This is particularly true for the Member States of the European Union, as the chapter by Simone TORRICELLI shows. History, legal traditions, customs, social ties, the very idea of the Administration and its role: all these factors explain the heterogeneity of the country choices that are imposed in spite of the force of homogenization that accompanies the phenomena of globalization, including, and it is even more surprising, Europeanization.

This raises the crucial question of whether harmonization is necessary and appropriate. The answer must be, without hesitation, positive as far as standards of protection are concerned. General requirements, such as the promotion of integration and competition, the protection of investments, the promotion of the participation of individuals in the realization of public interests, the deterrence, prevention and control of irregularities and violations of integrity, call for convergence and even harmonization. Jurisdictional protection, as a fundamental right, must remain the common core. On the other hand, the responses or antidotes to illegalities can be very different, because they are a matter of national identity. The line of distinction, theoretically clear, is in reality very subtle because it is based on a circumstantial balance specific to each system of controls and protection attached to public contracts. Here again, the analytical tool of comparative law is indispensable.

6. - The public procurement sector: a field of experimentation with expansive potential?

The specificities of the contractual activity of public administrations, which have already been mentioned several times, have obliged States and other international organizations that have studied the subject to develop original solutions to deal with the problems of legality that the awarding and execution of contracts pose. The analyses contained in this book show the widespread effort to create adapted tools that make it possible to go beyond the traditional methods of control. Sometimes this involves adapting traditional instruments, sometimes completely new forms of intervention, even original ones. We are thus witnessing the multiplication of controls (which, after a phase of decline, are now highly valued), the proliferation of administrative appeals (which are no longer confined to the outdated image of the Administration-Judge and which, on the contrary, show great potential), the creation of new ways of appealing to the judge or the transformation of existing appeals brought before courts or independent bodies exercising quasi-judicial powers. The situations of the different systems are very diverse, because the combination and synergy between "controls" and "litigation", to evoke the title of this book and underline its common thread, generate a real plurality of solutions. Their common feature consists in going beyond formalism in order to ensure the legality and effectiveness of contractual acts resulting from administrative activity.

Arbitration Law in the country and the law should be consistent with generally accepted practices for neutrality of arbitrators, due process, expediency and enforceability. The country could accept as a matter of course international arbitration as appropriate. The following are some proposed examples providing for enforcement of the final outcome of an arbitration process: a) the country is a member of the New York Convention on enforcement of international arbitration awards; and b) the country has procedures to enable the winner in a dispute to seek enforcement of the outcome by going to the courts".

Thus, it can be observed that the development of the most suitable remedies in the field of contracts has forced legal systems to thoroughly review the relevance of their mechanisms for reacting to violations surrounding contractual operations and to accept the need for a drastic modernization, overturning the boundaries of litigation and integrating the transnational or cross-border dimension of public procurement. It is already clear that the results of this reflection go beyond the scope of this work and that they bear the seeds of a reflection that the Network can continue to develop.

7 - ACKNOWLEDGEMENTS

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Paris, Firenze, November 2017

QUESTIONNAIRE

Actions relating to the procurement phase of the public contract: challenging the public authority's decisions

1.0 Is there a particular judge and / or a specific administrative body to deal with pre-contractual disputes/protests in the case of a public contract? If several legal actions are open in parallel, is there a stay or suspension mechanism? What are the mechanisms used to organize or limit parallel remedies?

1.1 What are the laws governing the remedies related to the procurement phase of public contracts? Are there statistics on the controls and the remedies? Are they available on a website (please, enter the website or related link)?

1.2 What are the organs (administrative and / or judicial) in charge of challenge and protest against the administrative procedure for awarding the contract? What are the procurement acts/decisions that can be appealed during the bidding procedure? Is it possible to directly challenge the future contract? What are the possible remedies? Is the action necessarily an appeal against a decision (cancellation remedy) or are there other remedies of a different nature (such as: arbitration? Mediation? Compensation/damages?) What are the consequences for the contract if it is already in force? What are the other remedies available if the contract is not actually canceled or void?

1.3 Where there is an administrative body to rule on the legality/validity of the award procedure, is it independent vis-à-vis the contracting authorities? What are the investigative measures it may order? What are its powers? What is the scope of its interventions (single opinion or decision)? Should the

decision to intervene within a specific time? Is it published (if so, please specify the website or document)? Is its decision subject to judicial appeal?

1.4 Is there a particular judge/court dealing with disputes related to the award of public contracts? If not, what are the courts that may be in charge (administrative court, civil court, criminal court, financial judge, competition court or other)? What decisions it can take (suspension, cancellation, modification, awarding the contract to another candidate, compensation, damages, fine)? Is the judge bound by the request or can he decide by himself? Are its decisions published and easily accessible (insert website reference and/or document)? Is there a specific time frame?

1.5 What are the consequences of the challenge/protest? Is there an automatic suspension of the award of the contract? Is the appeal/review body able to adapt the duration of the suspension? Is there a way for the contracting entity to overcome the suspension?

1.6 Are there emergency or interim procedures?

1.7 Is the litigation objective or subjective in nature? Who has locus standi/standing to bring an action challenging the procurement phase? Do third parties not participating in the award procedures (ex: citizens, tax payers, associations, sub-contractors, banks and financiers, other public authorities) have ways of action against the procurement phase or the awarded contract?

1.8 How is the challenge/protest organized? Is the initial complaint/challenge necessarily subject to the Contracting entity in the first instance? Is it subject to time limits or specific procedures? What are the guarantees offered to the applicant? Are there techniques or legal means used to reduce the number of challenges/protests from competitors? What's happening in case of dilatory conduct?

1.9 Is the challenge subject to the payment of a fee? What is its value? What will happen if the tax is not paid?

2.0 Is the contracting entity entitled to cancel or withdraw the award of the contract? What are the consequences on the contract? What are the remedies?

Actions relating to the performance phase of the public contract

2.1. Does the national legislation on public contracts provide for any provisions relating to dispute settlement? Can the parties refer to an administrative authority or a judge (which one?) to settle their dispute? Are there special procedures for public contracts or PPP?

2.2 Are there alternative dispute resolution mechanisms used for public contracts claims, such as: Mediation? Conciliation? Institution in charge of amicable settlement? Ad-hoc body installed by the parties to the contract? Is the intervention of the judge needed to validate non-contentious decisions? What are the possible remedies against these solutions? How is the transparency of such solutions organized? Are third parties informed?

2.3. Is Arbitration available for all public contracts?

Is the Arbitration Act providing for any specific procedures for public contracts? Are there distinctions between domestic arbitration and international arbitration of public contracts? Are there limits to the powers of arbitrators? Is it possible to challenge the arbitration award? Is the arbitration award published

and accessible? Can third parties participate in the proceedings or can they challenge the award? What is the role of the judge, if any?

2.4 Can third parties (users, competitors, subcontractors, for example) exercise litigation or administrative proceedings during the performance of the public contracts? What contractual acts and decisions can be challenged contract amendment, suspension, termination)?

2.5 How can the other party deny a modification of the contract? Can he rely on stabilization clauses and / or clauses on the financial balance of the contract?

2.6. Are the judge's powers in respect of a public contract similar to those they can exercise in respect of a commercial contract - or a private law contract concluded by the administration?

2.7 What are the powers of the judges towards the public contract? For example:

- Can he change/modify the contract terms?

- Can he issue injunctive orders against the public entity? Can he order the continuation of the contract?

What can he decide when there are delays? When there is a fault committed by the contracting party? Or when there is a fault committed by the contracting public authority? What about the consequences of a decision taken by a public authority external to the parties/contract?

2.8 What are the consequences of discovering the illegality of the existing contract? Is it void *ab initio* (*Ex tunc*)? Or may it be only cancelled for the future (*Ex nunc*)? What are the consequences on related contracts (financing contracts, outsourcing contracts, subcontracts)?

2.9 What are the (judicial) methods of interpretation of the contract? Is the principle of good faith considered? How the judge appreciate the change of facts or change of the law during the life of the contract? Can the judge modify the terms of the contract? What are the consequences of the enactment of a law or of an international treaty which contradicts the existing contract?

Actions relating to controls over public contracts

3.1 From the procuring entity point of view, (= the administrative point of view, and not the contractor's) what are the organs (administrative and / or judicial, including financial courts/auditors) which are responsible for the oversight of administrative acts and procedures during the procurement phase? How to articulate the various controls on this phase? Are there any prior controls preventing the award of an irregular contract or correcting the award?

3.2. Can financial jurisdictions control public contracts? What are the audits and controls over the procuring phase and / or the execution phase? Are the auditing reports and surveys published? What are their consequences (legal action, disciplinary, civil or criminal))?

3.2 What are the possible actions before the Authority in charge of Competition, in public contracts? Is this role clearly identified in the national system? What powers are vested into the Anti-trust/Competition Body in case of collusion in public contracts? What are the possible sanctions? What are their effects with regard to the contract and contractors? Is it possible to challenge the sanctions?

3.3 Which is the authority responsible for preventing corruption in public contracts? Which powers are implemented in cases of fraud or corruption? Or in case of conflict of interests? What are their effects

with regard to the contract and contractors? How these decisions are articulated with the decisions made by other bodies responsible for monitoring the award of contracts? Is it possible to challenge these decisions?

3.4. What are the possible actions before a criminal court in the context of public contracts? What are its powers? What are their effects with regard to the contract and contractors?

3.5 Can companies be prohibited from participating in the award of public procurement contract (debarment)? Which is the competent authority for deciding debarment? Following which procedures and on what basis? How do the companies regain their right to participate in bidding process? What remedies do they have? Are the debarment decisions published and available on the Internet under a blacklist (please provide website)?

3.6 What other forms of checks are in place (parliamentary control, political, administrative by a higher authority, ombudsman, central control in the context of decentralization, societal control (monitoring, referendum ...)?