**THE IMPACT OF COMPETITIVE TENDERING ON THE EXECUTION OF PUBLIC CONTRACTS AND CONCESSION CONTRACTS**

*France*

## 0. Preliminary remarks: the law applicable to (disputes regarding) the execution of public contracts under the scope of application of EU Directives 2014/24/EU and 2014/23/EU

A special law on public contracts has been existing in France since the "Ancien Régime". The dichotomy of public contracts and concessions existed even before the European rules formalised the distinction in the reform of the directives published in 2014. The French legal landscape was made up of a myriad of different types of contracts and diffrent sources (code des marches publics adopted by decree, various ordinances with their decrees).

The European directives of 2014 were initially transposed by specific ordinances: the ordinance of 23 July 2015 for public procurement contracts[1], and the ordinance of 29 January 2016 for concessions[2]. Three decrees supplemented them: the decrees of 25 March 2016 for public procurement contracts[3]and defense or security contracts and the decree of 1 February 2016 for concessions[4]. These texts were then codified in the Code de la commande publique enacted in 2018 which came into force on 1 April 2019. alongside specific French laws which have nothing to do with EU law but which regards public procurement and concessions contracts, A specific French feature remains: the delegation of public services codified in Article L.1411-1 of the General Code of Local Authorities (Code Général des Collectivités Territoriales - CGCT) which adds some specific rules for the award and the information of the public of local concessions. This new code also codifies certain principles specific to French administrative contract law (preliminary title of the Public Procurement Code).

The execution of public contracts in France is oftengoverned by public law. However, due to the extensive concept of wht is a public body in the EU directives, they apply to bodies which are private law bodies in the French meaning. The contracts signed by these entities with other private legal entities are by principle private law contracts (with very few exceptions)

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[1] Ordonnance n° 2015-899 du 23 juillet 2015 relative aux marchés publics
[2] Ordonnance n° 2016-65 du 29 janvier 2016 relative aux contrats de concession
[3] Décret n° 2016-360 du 25 mars 2016 relatif aux marchés publics
[4] Décret n° 2016-86 du 1er février 2016 relatif aux contrats de concession

For public contracts whose performance is subject to public law, the rules of performance include principles developed by case law during the 20th century and now codified in the preliminary title of the CCP as said above. These principles include the possibility of unilateral termination or modification of the contract. This is due to the *raison d'être* of these contracts: the general interest. The principle of continuity of public servicen which is at the core of most of these specific rules, has been elevated to the rank of a constitutional rule by the Constitutional Council[5].

In parallel with these hard law rules, many contracts include general administrative clauses which are modelled by the Ministry of Economy. They govern the relations between the co-contractors.

## (4) Parties hold differing meanings as to the interpretation of an ambiguous term in the contract

### *4.1 Description of the case study*

*Contracting authority A undertakes a tendering procedure. Subsequently, A concludes a contract with B. In the course of the performance of the contract, it becomes clear that A and B hold differing meanings as to the interpretation of an ambiguous term in the contract.*

*A dispute arises between A and B on the question whether the contract is to be performed by the parties in accordance with A's interpretation. If so, the result would be that B will suffer financial loss. In the event that the contract is to be performed according to B's interpretation, this would be detrimental to A.*

### *4.2 General contract law: overview of the law on interpretation of contracts*

Article 1103 of the Civil Code provides that "legally formed contracts take the place of law for those who have made them" and it has inspired administrative courts. However, it may happen that contractual provisions lack clarity about their meaning. Disagreements on the interpretation of administrative contracts are settled before the administrative judge. The judge has the power

[5] Décision n° 79-105 DC du 25 juillet 1979, *Loi modifiant les dispositions de la loi n° 74-696 du 7 août 1974 relatives à la continuité du service public de la radio et de la télévision en cas de cessation concertée du travail*.

of interpretation in all contractual disputes. It may also be seized of a direct appeal for interpretation of contractual clauses if the parties establish the existence of a born and current dispute.

Appeals for interpretation represent a small part of French administrative litigation in terms of quantity. Interpretation appeals cover two hypotheses: silence of the contract, which does not interest us in this case, and a clause with an obscure interpretation or potentially contradictory with others. In the latter case, the judge looks for the common intention of the parties at the time the contract was concluded. This rule of interpretation is derived from Article 1188 of the Civil Code[6]. The administrative judge does not stop at the letter of the contract but adopts a subjective interpretation[7]. It refers to the initial will of the parties by seeking it by any means of proof. Sometimes, the administrative judge interprets the contract in such a way as to make the general interest prevail. In this sense, it departs from private law because it considers that the intention of the public entity is necessarily in the general interest.

*4.3 Application of general contract law to the case study*

The administrative judge mobilized the notion of common intention of the parties early on. Thus, this civil concept can be found in a decision of the Council of State as early as 1821 in a *Boerio, Veuve Saliceti et Consort C. Ministre de la guerre* decision[8].

In a judgment of 20 September 1999[9], the administrative judge had recourse to the common intention of the parties in the context of a dispute concerning an ambiguous clause.
The contract concerned the construction of a hospital. Disorders then appeared: the question of responsibility and its distribution between the various actors involved arose. The administration was bound by a contract with a design office. The contract stipulated that "within the framework of the laws and regulations in force on the date of the present contract, the design office will assume responsibility vis-à-vis the client for damage of any kind arising solely from its personal

[6] Art. 1188 Code civil : « Le contrat s'interprète d'après la commune intention des parties plutôt qu'en s'arrêtant au sens littéral de ses termes.
Lorsque cette intention ne peut être décelée, le contrat s'interprète selon le sens que lui donnerait une personne raisonnable placée dans la même situation. »
[7] V. LAMY, *Recherche sur la commune intention des parties dans les contrats administratifs : contribution à l'interprétation du contrat en droit public*, Thèse, Université d'Aix-Marseille, 2019.
[8] Conseil d'Etat, 7 Mars 1821, *Boerio, Veuve Saliceti et Consort C/ Min de la Guerre*, Rec. p. 139.
[9] Conseil d'Etat, 20 septembre 1999, *Société Lyonnaise d'études techniques et industrielles (SLETTI)*, n° 163141.

faults envisaged within the framework of the assignments entrusted to it, without being held responsible either personally or through the effects of joint and several liability for the actions of third parties other than its employees". This clause therefore limited the liability of the design office to its own personal faults, thus excluding solidarity with third parties. The administrative judge considered, by referring to the common intention of the parties, that "the design and execution of the screed work was part of the mission entrusted to the design office by the project owner". The Conseil d'Etat did not interpret the ambiguous clause strictly and condemned the design office in solidum.

## (5) Contract does not provide for a particular matter and may need supplementation with an additional term

### *5.1 Description of the case study*

*Contracting authority A undertakes a tendering procedure and decides to award the contract to tenderer B. Subsequently, A concludes a contract with B. In the course of the performance of the contract, it becomes clear that the explicit terms of the contract do not provide for a particular matter.*

*A dispute arises between A and B on the question what should be the content of the additional term to be implied in the contract in order to deal with the matter not provided for in the contract.*

### *5.2 General contract law: overview of the law on interpretation of contracts*

French public contract law is characterised by a regime that is exorbitant from ordinary law. Initially, the clauses were described as exorbitant from ordinary law[10], then the administrative regime itself[11]. This exorbitance confers on the administration party to the administrative contract a power of unilateral modification, first established in 1910. The *Compagnie générale française de tramways*[12], a judgment concerning a transport concession contract. The prefect of the Bouches-du-Rhône department had unilaterally modified the transport timetable for the

[10] CE, 31 juillet 1912, *Société des Granits porphyroïdes des Vosges*, n°30701.
[11] CE, 19 janvier 1973, *Société d'exploitation électrique de la rivière du Sant*, n°82338.
[12] CE, 11 mars 1910, *Compagnie générale française des tramways*, n°16178.

summer period. The private company referred the matter to the administrative judge, who validated this unilateral modification.

The possibility of unilaterally modifying the contract is justified in particular by the principle of mutability of public services (CE, 1902, *Compagnie nouvelle du gaz de Deville-lès-Rouen*). This possibility of unilaterally modifying the contract is nevertheless regulated. It is thus not possible to touch the financial clauses because the financial equation of the contract must be respected. The economy of the contract cannot be changed; otherwise, it will be a new contract that must be put out to tender.

The holder of the administrative contract cannot therefore intervene within the framework of this unilateral amendment power. However, he is entitled to compensation for the loss, in accordance with the theory of the financial equation, also set out in the *Compagnie générale française de tramways* decision.

*5.3 Application of general contract law to the case study*

The judgment that best illustrates this power of unilateral modification is the 1983 judgment, Union des transports publics. The Council of State was asked to examine a decree on the operating procedures for local public transport services. The applicant sought the annulment of several provisions, including Article 14(1), which provided that "the organising authority may, during the course of the contract, unilaterally modify the nature of the services and their operating procedures, [and] that the use of this prerogative may lead to a revision of the financial clauses of the contract. The few doctrinal doubts that might have remained since the 1910 *Compagnie générale des tramways* decision were swept away by the Conseil d'État in 1983. The administrative judge considered, with regard to the power of unilateral modification, that "the authors of the contested decree merely applied the general rules applicable to administrative contracts".

**(6) Contracting authority invokes an allegedly unfair contract clause**

*6.1 Description of the case study*

*Contracting authority A undertakes a tendering procedure and decides to award the contract to tenderer B. Subsequently, A concludes a contract with B. In the course of the performance of the contract, A decides to invoke a particular contract clause. The consequences of this are, however, detrimental to B.*

*B argues that A cannot invoke the contract clause for reason that the clause is unfair. A dispute arises between A and B on the question whether A can invoke the contract clause.*

*6.2 General contract law: overview of the law on interpretation of contracts*

The concept of unfair terms exists in French contract law. Articles L.212-1 et seq. of the Consumer Code define and prohibit them. Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts provides that these clauses are also applicable in the context of "trades, businesses or professions of a public nature". The European and French texts concern contracts concluded between a professional and a consumer (or non-professional according to the French typology). However, the Conseil d'Etat refused to treat public contracting parties as "consumers" or "non-professionals" in a judgment of 23 February 2005[13].
These clauses may nevertheless be contained in public contracts governing private law relationships, such as contracts for users of public industrial and commercial services. These are private law contracts.

*6.3 Application of general contract law to the case study*

The administrative judge occasionally applies the legislation on unfair terms. The best known judgment is a judgment of 2001, *Société des Eaux du Nord*[14]. In this case, two companies applied to the court for compensation following water damage. The court referred a question to the administrative court for a preliminary ruling. The court asked the administrative court to interpret a provision of the water service regulations. The relationship between a user and a public service that manages an industrial and commercial activity (SPIC) is private law. The content of the contract is partly determined by the concession contract, making the administrative judge competent. The Council of State first recalls that "the unfairness of a clause is assessed not only with regard to the clause itself but also taking into account all the

[13] CE, 23 février 2005, *Association pour la transparence et la moralité des marchés publics*, n° 264712.
[14] CE, 11 juillet 2001, *Société des Eaux du Nord*, n°221458.

stipulations of the contract" and the particular characteristics of the service - in this case, water management. Secondly, the judge noted that the disputed provision leads "to a user bearing the consequences of damage that is not attributable to him without it being possible to establish a fault on the part of the operator". The context in which this litigation is taking place is a contract of adhesion: the user has no room for manoeuvre in his choice of contract. These elements lead the Council of State to judge the provision as an abusive clause.

This solution was adopted more recently in a case with similar facts, decided in 2015[15]. The disputed clause exempted the water company from any liability.

[15] CE, 30 décembre 2015, *Société des eaux de Marseille*, n°387666.