

International Network “Public Contracts in Legal Globalization”
Report of the Seminar “Internationalization of Public Contracts Law”

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1st day:

The seminar was started by a welcoming act taken by the dean of the German University of Administrative Sciences Speyer, Prof. Karl-Peter Sommermann. The dean presented the University of Speyer and its Research Institute of Public Administration, and highlighted the importance of the international cooperation undertaken for various research projects.

Subsequently, Prof. Jean-Bernard Auby and Prof. Rozen Noguellou, who are the coordinators of the International Network, as well as Prof. Ulrich Stelkens, who was organizer of the seminar, welcomed the participants and presented the general subject of the seminar. The seminar was committed to the questions raised from the internationalization of public contracts law, which should contribute to the production of the second book of the Network, whose publication is planned to 2010.

1st session: Public Contracts in the Law of Regional Integrations other than the European Union

Lecture: José-Luis Benavides

The first work session was devoted to public contracts in the regional integration law other than that of the European Union. Prof. José-Luis Benavides, professor at the University of Bogota (Colombia) and responsible for the first presentation, clarified that, as regard as South America, not the different organizations of regional integration (such as Mercosur, the Andean Community [CAN] or even the Caribbean Community [CARICOM]), but rather the several bi- and multilateral free trade agreements comprise the rules of public contracts. Indeed, the regional integration project FTAA, that is, the Free Trade Area of the Americas, which encompassed

rules about public procurement, was abandoned in 2005 and the FTAA has not been created so far. The regulation about contracts, and specially the public procurement prescribed within the framework of the FTAA, was widely inspired by the model of the agreements about public procurement provided by the WTO (GPA – Plurilateral Agreement on Government Procurement) and by the devices of the NAFTA (North American Free Trade Agreement). However, since the FTAA has not existed yet, the most important rules regarding public procurement are nowadays part of – apart from the GPA – the several bi- and multilateral free trade treaties that the South American countries have concluded among themselves or with other countries. In the second part of his presentation, Prof. Benavides outlined the most important contractual institutions that are present in the majority of these treaties. These institutions are very similar to those of the GPA, which leads to the same structural problems that characterize this agreement, such as the asymmetry among the different countries. The scope of these treaties is defined by the types of contracts, by the lists of entities and by the threshold amount of money to which the contract is applicable, which provoke a strong asymmetry among the countries. The ruling notions for the treatment of the public procurements prescribed by these treaties are the same of those contained in GAP: the national handling, the principle of the most favourable nation or still the investments and the indirect expropriations. The procedures to meet the conditions of the procurement contracts, which are set by the agreements, also established universal principles, such as the general obligation to promote an invitation to tender, the priority of the price criteria and the due to attribute to an independent administrative or judiciary authority the settlement of disputes. With reference to arbitration, the situation in the Latin American countries is particularly susceptible: in this sense, since the independency of the ICSID (International Centre for Settlement of Investments Disputes) vis-à-vis the World Bank is contestable, the neo-socialist countries, such as Venezuela, Bolivia, Nicaragua or even Equator, quitted this agreement. Besides, most of cases of Latin American settlement of disputes are concerned to Argentina. In addition, Brazil is a particular case: even though neither has the country signed the free trade treaties, nor has it taken part in the ICSID, it receives the most part of the direct investments in the continent.

Commentary: Denis Lemieux

Prof. Benavides' presentation was commented by Prof. Denis Lemieux, professor at the University of Laval (Quebec), from the point of view of the North American countries that signed the NAFTA. First of all, Prof. Lemieux insisted on the exceptional character of the NAFTA's structure, since NAFTA is an agreement signed by two industrialized countries (the United States of America and Canada) and a developing country (Mexico), but it is equally conceived. Certainly, the fact that the compensation procurement is forbidden highlights the equality among the partners and demonstrates that Mexico is deemed an industrialized country for the purpose of the agreement. The rules regarding public procurement and established in chapter 10 of NAFTA are beyond the conditionalities of GAP on the matter. Moreover, in case of ambiguity, NAFTA's regulation prevails over GAP's one, although GAP has importantly influenced NAFTA. However, the latter frequently tends to go beyond: for instance, the threshold of the amount of the contracts is lower under NAFTA than under GAP. Mexican public enterprises are also concerned. On the other hand, the sub national entities (federal states and territorial colectivities) are not submitted to the agreement, which restricts its effects. Canadian provinces, for example, are allowed to use the "opt-in" process, which means that their voluntary adhesion is indispensable, since the agreement involves their competences. There is a high level of environmental requirements to the contracts submitted to NAFTA, whose procedural rules are very similar to those of GAP. Security and defence are subjects excluded to NAFTA, and these notions are widely understood by the United States, which do not hesitate to add new possibilities of interpretation, such as that applied to a contract for the population census. Likewise, they often demand a right of control over the employees of Mexican and Canadian enterprises, which really restrains the latter's field of action. A very interesting aspect regarding NAFTA is its system of settlement of disputes. Thus, as in the United States the federal courts of appeal have been available since 1927, the country required that the procurements submitted to NAFTA would take advantage of the same existing revision mechanism. Given the fact that there is no parallel institution in Canada and in Mexico, these countries had to create several interesting pieces of structure in order to directly apply the dispositions of NAFTA at the domestic level. Hence, Canadian enterprises can appeal to this organism even if the subject concerns an internal procurement. The very short deadlines and the extent discretionary power

are remarkable characteristics of the revision procedure: even though the procedure is only qualified as a recommendation, decisions are not contested in 80% of the cases. In fact, if one part of the conflict decides to not follow the recommendation, it is obligated to formulate a report in order to justify its decision. Therefore, the court can “strongly recommend” to grant an enterprise a procurement. The standing is understood in a large manner in this type of procedure. NAFTA, which has had a great influence on the other bi- and multilateral agreements in America, shows that a non-adherent to the public procurement WTO’s agreement (Mexico) can be submitted to the same rules due to another agreement. NAFTA’s dispositions were also taken by the Canadian common market. Canada is currently negotiating with the European Union to establish a free trade agreement to which all the procurements, including the PPP, and all Canadian provinces would be submitted.

As a result of this presentation, the discussion focused on the concrete impacts of the different agreements: have they really succeeded in opening the procurements to the foreign enterprises? Different assessments were put forward during the discussion, such as the existence of a strong asymmetry among the different signatory countries as well as the problem of articulation of public procurements and investments within the treaties.

2nd session: Contracts made by European and International Organizations

Lecture: Bernardo Diniz de Ayala

The second working session was devoted to the contracts of European and International organizations. Given the geographic provenience of those who intervened (Portugal, France and Italy) and the importance of the subject for the European Union’s member states, the following interventions and discussions were focused on the public contracts concluded by the European Community (EC). Firstly, Mr. Diniz de Ayala, a lawyer at the Uría Menéndez office in Lisbon, gave an overview of the contracting phenomenon by the EC, which has become more and more important. The EC’s contracting capacity is implicitly established in several articles of the European Community Treaty (238, 281, 282 and 288/1). Moreover, a certain number of the EC’s

regulation statue the contract as an instrument for the internal administration of the EC and the implementation of its public policies. Broadly speaking, the EC's contracts are submitted to the implicated member states' law, but sometimes it is the community law that is applied, especially regarding the matters already disciplined by specific common regulation, which cannot be derogated by the member states. If the parties have not made an explicit choice and if there is no specific regulation of the EC, the judge will determine the applicable law, according to the rules of the International Private Law (Rome Convention about the applicable law to the contracting obligations of 1980 and the future community regulation "Rome I"). The general principles of the Community Law (consolidated, for example, by the judgment "Telaustria" and by the directives "Public Procurement") are applicable to the pre-contractual phase, but several questions about the execution of the contracts remained unanswered. The EC's contracts have an obligatory effect on the member states (even when they do not take part in the contract) because the Court of Justice of the European Communities considers them an integrant part of the community legal order. This can challenge the direct effect of community legal acts, since it is normally the reciprocity principle that is applied to the contracts. The competent judiciary authority to appreciate litigation in community contract matters can be either a domestic jurisdiction or the Court of Justice of the European Communities. Depending on the contracts, the third part can attack either the pre-contractual acts or the contract itself, and the competent judge decides the consequences of the contract cancellation, according to the applicable law. In conclusion of his presentation, Mr. Diniz de Ayala asked the question of the need for elaborating a common code for the EC's contracts.

Commentary: Marie Gautier Melleray

In the beginning of her comments, Mrs. Marie Gautier Melleray, professor at the University of Montesquieu-Bordeaux IV, emphasized the astonishing lack of literature regarding the EC's contracts. This fact clearly shocks with the abundant literature as regard as community unilateral acts and the community regime of national contracts. Likewise, even the 2008 report of the French "Conseil d'Etat" does not mention at all the EC's possibility of contracting out, although this report was devoted to the public contract subject and counted on the participation of a Court

of Justice of the European Communities' advocate-general. Therefore, it is difficult to quantitatively precise the contractual activities of the European administrations. The treaty establishes three possibilities of applicable law to the contracts of the community's institutions: the Community Law, one or several National Laws or the reference to both. In practical terms, it is often the last hypothesis that happens, that is, the Community Law complements the National Law (this constellation is the most complete on public servants legal regime). The community rules specially prevail on the matter of competence to conclude as well as on compromising clauses. Thus, we notice a somehow hybrid and lacking "community law of community contracts". This imposes a problem of equality and is not satisfactory from the point of view of common procurement. This framework is even more problematic on the subject of execution of the contracts because the Community Law unified only the national laws concerning the pre-contractual phase. Hence, it seems to be necessary to elaborate a theory of Administrative Law of the community contract.

Commentary: Simone Torricelli

The second turn of comments about the Mr. Diniz de Ayala's intervention was made by Mr. Simone Torricelli, Professeur at the University of Florence. Prof. Torricelli started by ascertaining that to study such a complex subject of internalization of public contracts, it is initially necessary to define the adequate method. Mr. Torricelli proposes the adoption of the method of "critical positivism" developed by Prof. Jean-Bernard Auby. On the basis of this method, Mr. Torricelli studied a fundamental point: the definition of "contract". Furthermore, he brought to mind the problematic lack of a common definition of contract in the different EU's member states, such as in the Italian Law. In order to define the conceptual framework of "contract" in the Community Law, he studied then the example of contracts between the EC and the Non-governmental organizations (art. 177 TCE). As far as this example is concerned, Mr. Torricelli stressed the difficult conciliation of public with private interests – being both ensured by public law – on contracting matters. Indeed, these two faces of the coin must be taken into account in order to try to achieve a sort of "cordial arrangement", according to Jean-Bernard Auby's expression.

The following discussion was mainly concerned about the manner to determine the applicable law to the contracts of the European Union institutions and the need to build up an applicable Community Law to these contracts. The risk of providing an unequal treatment in the absence of such a law was particularly claimed. Professor Laurence Folliot-Lalliot (University of Paris X - Nanterre) pointed out the lack of accountability of the appeals in the wake of procurements made by the European Union institutions. In order to overcome this problem, the EU should be based on the procedures proposed by the World Bank.

2nd day:

The second day of the seminar was opened by the dean of the German University of Administrative Sciences in Speyer, Professor Karl-Peter Sommermann, who presented a summary of the first results achieved. Mr. Sommermann underlined that the recurrent question of the interventions and debates on the first day of the seminar had been the definition of contract as well as the different conceptions of this instrument in the different represented legal orders. By taking this observation for granted, he introduced the questioning of the forthcoming second intervention, that of Mr. Ulrich Stelkens (Speyer). However, he firstly addressed to Professor Mathias Audit (University Cergy-Pointoise), who is an expert of International Private Law, to launch the debates of the second day with his presentation about the international private law of the public contracts.

3rd session: Conflicts of Laws on Public Contracts

Lecture: Mathias Audit

In the introduction Mr. Audit asked the following question: “The International Private Law – what is it?” He explained that the International Private Law is essentially a method, whose object is to solve the problem of the fractioning legal order in several orders and distinct judicial systems. The International Private Law tends then to solve conflicts that can rise from the friction of those different legal orders. The international public contracts face the same problem. For example, one could think about a contract to build an embassy in Germany by the French

state. We therefore observe the same problem as in International Private Law; but, can we also employ its methods in order to solve this problem? According to Mr. Audit, it is possible by slightly adapting the methods of International Private Law. Nevertheless, the internationalization is often rejected by the experts of public contracts law, who do not consider the methods of international private contracts applicable. Thus, we overall adopt the principle of exclusive applicability of the public person's original law for the public contracts made by state-owned entities. Afterwards, we cope with these international contracts as if they were internal ones. This exclusivity brings about the rejection of the internalization of the contract and of the adoption of the methods of international private law.

But there are also the cases in which the internalization of the contract, and thus the application of a foreign law, is accepted by the co-contracting public person. The emblematic example of this hypothesis is constituted by the state's contracts that are mostly used for investments in the southern countries. Nonetheless, in the northern countries there are also cases in which the foreign law is applied to a contract concluded by a public person, such as that judged by the French "Conseil d'Etat" in the so-called Société Colas Djibouti decision. In this case, a contract could be exempted of the French Administrative Law under the willingness of the public person concerned. Hence, we verify a directly related mechanism to international private law; but the internationalization of public contracts can be accepted, it is not compelled.

On the other hand, there is also the hypothesis in which the internationalization is compelled. In this case, the Community Law requires the implementation of techniques of international private law to the international public contracts. In fact, the EC has been competent to rule on international private law matters since the Amsterdam Treaty. Since then, a certain number of rules have been adopted, in particular on the topic of jurisdictional competence (regulation Brussels 1 and Rome 1). To be sure, these rules exclude the administrative subject; but the Court of Justice of the European Communities tends to provide a very restrict interpretation of this notion. Therefore, since the Rüffer decision (CJCE, Dutch State against Rüffer, 16th December, 1980, case 814/79, Rec. 1980, p. 3807) the court has only qualified as exclusively relevant to the administrative subject the acts that a public authority exerts *in the exercise of public power*. Yet, when a public person contracts out, it does not behave in the exercise of the public power.

The following discussion of the Mr. Audit's presentation addresses to him the question concerning the existence of a public contract that would be essentially of "public law". How could one define such a contract? Could one define it through the fact that it would directly serve to carry out public tasks? Answering this question is in fact necessary to be able to identify the types of public contracts to which the international public law would be applicable. This last issue was discussed in the context of the Regulation Rome 1.

4th session: The Europeanization of Public Contracts Law exemplified by Germany

Lecture: Ulrich Stelkens

The second session of the day was dedicated to the Europeanization of public contract law. Professor Ulrich Stelkens (Speyer) treated the subject in the light of the German legal order. In the introduction he asked the fundamental question of this theme, that is, if the legal consequences of the actions contrary to the Community Law are established by the different member states' laws or by the general principles of the Community Law, which are homogeneous and not written and which overlay the different member states' laws. The fundamental principles recognized in the Deutsche Milchkontor decision (case 205/82 of 21st September, 1983, points 17 ss.) of the Court of Justice allow us to start answering this question. The first part of the presentation was then dedicated to the problem of legal compatibility of the "pacta sunt servanda" principle, the legal principle and the national legal order's and community legal order's conception of public contracts. Mr. Stelkens emphasized the existence of two types of public contracts: those that, according to their object, can also be concluded by two private co-contracting parts (such as the purchase and labour contracts) and those that, according to their object, can only be concluded with the involvement of a public co-contracting part. The first type of public contracts is characterized by the fact that the structural equality of the co-contracting parts is possible, whereas in the conclusion of the second type of contracts there is an unavoidable inequality of the co-contracting parts. The different national concepts of public contracts are in general tagged by one of these models, or by a hybrid model, as we observe in the German case. Mr. Stelkens discussed thus, by using the example of the German law, the

possibility of foreseeing the standardization of the different conceptions as a result of the Community Law. Later on, he sketched out a European conception of public contracts that has been shaped by the jurisprudence of the Court of Justice of the European Communities on the subject of public procurement as well as the state's subventions, which are submitted to the art. 87 of the TCE and are contractually arranged. On the subventions matters, we can recognize the existence of a common principle, according to which, in the case of violation of the art. 87 of the TCE, the general Administrative law of the member states must not simply declare the violations insignificant, but make possible the restitution of the benefits attributed by an act contrary to the Community Law. The specificity of the contracts concluded as a result of the attributing procedure of a public procurement is that the evicted concurrent can effectively ensure his rights only before the conclusion of the contract. This is the reason for which the Court of Justice of the European Communities required in its Alcatel Austria decision (case C-81/98 of 28th October, 1999, points 29 ss.) that the state members establish in all the cases a procedure for appeal. This procedure for appeal would allow the petitioner to obtain the cancellation of the decision of attribution of public procurement, which is independent of the possibility of obtaining damages once the contract is concluded. This obligation is nowadays entrenched by the new art. 2 of the 89/665/CE directive in the version of the 2007/66/CE directive, which establishes that if a procurement does not comply with the public procurement law, it has to be declared ineffective by a national instance that is independent from the adjudicator power. In order to transpose this community rule, the German legislator created a legislative special reason for rendering a contract void in the case of violation of the fundamental principles enounced by the public procurement directives. However, the nullity has to be put forward during a limited delay and in the wake of the special procedure for appeal provided for public procurement. Conversely, this legislative reform does not answer the question discussed in the two decisions of the Court of Justice of the European Communities regarding the cases Bockhorn and Braunschweig (joint cases C-20/01 and C-28/01 of the 10th April, 2003, points 18 towards and case C-503/04 of the 18th July 2007, points 25 towards): How can we build up the possibility of unilaterally rescinding a public contract as a result of inequality if the legal system only establishes the nullity sanction in the case of irregularity of the public contract? The German Law will still have to adapt itself in the wake of this problematic. Prof. Stelkens

concluded then that in a long-term perspective the European influences will accomplish a conception of the public contracts law, which will be in charge of releasing the contracting administration from the bounds of the common law in the favour of a law more adapted to the conditions of the legal principle – but which is maybe less adapted to the conditions of the legal security and to the principle of the equality between the co-contracting parts.

Commentary: Herwig Hofmann

Prof. Herwig Hofmann (University of Luxembourg) took back the points stated by Prof. Stelkens concerning the potential conflict between the vertical obligation attributed to the member states of ensuring the application of the Community Law and their horizontal obligations towards their co-contracting parts. He suggested the study of Prof. Stelkens' considerations from the point-of-view of the contracts concluded by the organs of the EC themselves. Thus, Mr. Hofmann recaptured and completed the subject of EC's contract, which was the main theme of the session 2 hold one day before, by underlining the thoughts asserted by Mr. Stelkens concerning the member states' dilemma. Prof. Hofmann moved on the legal basis to the conclusion of these contracts by the Community organs, the applicable law, the criteria established by administrative law to ensure the legality of a contract as well as the determination of the possible objects for such contracts. To illustrate these different questions, M. Hofmann developed the idea according to which an harmonizing mix of different laws (Community Law and state-members' law) could allow us to deal with the several public interests that must be taken into account to ensure both the legality of the contracts between the community public authorities and the member states and the protection of the concerned fundamental rights. Such a combination of legal elements that is supported by Mr. Hofmann could allow us to find feasible solutions to different cases, by avoiding troublesome situations such as that one described by Mr. Stelkens as regard as the German law.

5th session: Consequences of the Internationalization of Public Contracts Law

Lecture: Laurence Folliot-Lalliot

The concluding conference, whose subject was the effects of the internationalization of public contracts law, was made by Prof. Laurence Folliot-Lalliot (University of Paris X-Nanterre). Mrs. Folliot-Lalliot initially insisted on the internationalizing elaboration of public contracts law. Indeed, the sources of the latter increasingly rise from the international structures, particularly through the elements of soft law. Even though the latter do not strongly impact the European Union state-members' law, they enjoy a great importance in the developing countries. One could for example think of the works produced by UNCITRAL (United Nations Commission on International Trade Law), of the United Nations in general or even of the International Banks' directives, which put into a frame the whole contract. The reception of these elements carries out a re-establishment of the national law on the topic of public contracts in the concerning countries. Obviously, the so created models always vary according to the own logic of the different states as well as with respect to the balance of power between the states and the contracting enterprises. Yet, broadly speaking this evolution brings about a harmonization of the national laws on public contracts. Certainly, this harmonization is particularly pushed in the European Union member states. However, this trend towards harmonization is specially centred on the phase of attribution of purchase contracts. Nevertheless, with reference to the execution of contracts this harmonization is even more difficult to achieve, although there are some signs that begin an evolution in this sense. In the European Union, for instance, this is revealed by the question of the maintenance of an illegal contract, which was discussed several times during the seminar. Therefore, the border between the phase of attribution and the phase of execution has become more and more porous. Accordingly, the consequences of this evolution to the national law should be analysed, especially within the framework of the network's work about the internationalization of public contracts law.

Following this intervention, the discussion was focused on the role of the multilateral banks, which are new actors in the law-making process. For example, the World Bank elaborated a

“country procurement system”, by attributing a label of the public procurement implemented by different states. Consequently, this allows a standardization of the applicable law to the concerning states. Prof. Martin Trybus (University of Birmingham) underlined the importance of the exchange of ideas on the matter, which is a result of this trend of internationalization. This allowed Prof. Jean-Bernard Auby to pronounce the final words of the scientific debates of the seminar and concomitantly to introduce the session reserved to the network’s management and mainly to the edition of the Internationalization of Public Contracts Law Treatise. Given the discussed evolution, Prof. Auby insisted on the importance of scientifically conceptualizing the observed phenomena, in order to influence on the future progress of such a fundamental sector in a globalized world.

Work session on the Internationalization of Public Contracts Law Treatise

A short work session then started to discuss the preparation of the Internationalization of Public Contracts Law Treatise, which is the second publication of the network, edited by Mrs. Laurence Folliot-Lalliot and Mr. Mathias Audit. The treatise is planned to be published in 2010. Subsequently, Mrs. Folliot-Lalliot distributed a work paper to the participants, which is later on reproduced. To sum up the discussion regarding the book, given the several different questions related to either the Europeanization or the Internationalization of the public contracts law, the idea of editing two different books, one of each theme, was adopted.

Laurence Folliot-Lalliot

Proposition of the outline for the Internationalization of Public Contracts Law Treatise

4 levels:

- Internationalization of public contracts (multiplication)
- Internationalization of the sources applicable to public contracts;
- Transfer to the national laws of the International and European concepts of public contracts law;
- Emergence of a global public contract law?

I. Internationalization of public contracts

- Multiplication of the international/intra-European contracts
 - ⌘ Global sources in the purchase contracts
 - ⌘ Types of aimed contracts
 - Purchase contracts: procurement, infrastructure contracts
 - Particularity of State's contracts?
 - Transnational contracts
 - ⌘ Contracts of international organizations
 - ⌘ Contracts of the European Agencies
 - ⌘ External actions of EU, USAID, China: effects of the tied and the united assistance

II. Internationalization of the applicable sources to the public contracts

Sources:

- International sources:
 - AMP
 - Bilateral treaties/Free trade treaties
 - Regional integration: ASEAN, COMESA?
- European sources
 - Directives (+ Directive of Defence procurements)
 - European directives, position about the PPP contracts: regional harmonization?
- Directives of multilateral banks (World Bank, ADB, IDB) (procurement and execution)
- Rules FDA

- Methodology public procurements World Bank/OECD: Country Procurement System (2008)
- Model law UNCITRAL (revision)
Legislative guide on public infrastructure projects under private investment (procurement and execution)

III. Harmonization of national laws: effect of the international concepts of public contracts law

Country reviews?

To evaluate:

- Effect on the conditions of procurement
 - Applicable rules
 - Appeals
- Effects on the rules of execution: risks, protection, circumstantial changes, maintenance, adaptation of the service, end of the contract
- Conflicts settlement
 - Which applicable law? Position of the national courts
 - Arbitrage?
- Articulation of the state and contractual rules of conflicts settlement

IV. An emerging global public contract law? (transversal questions)

Effects:

Regarding the rules of procurement: structuring effects of the concepts of transparency and compulsory competitive tendering

- Sophistication v. Simplification?

- Ex: the framework agreements
- The electronic procedures
- Competitive dialogue
 - Regarding the execution: compensation of power of the Administration? A room for third parts?
 - Regarding the conflicts settlement: expanding appeal to arbitration rather than mechanisms of prevention of conflicts?
 - Impact of the co-lateral international questions:
 - State's contracts framework;
 - Investment law
 - Competition law
 - Environmental law
 - User Rights
 - Free movement of workers (Europe)
 - Fund-raising
 - Concerning the recognizing particularity of public contracts and of purchase contracts

Which definition of public contract?

- Effect on the distinction of the contractual categories
- Vertical Harmonization (downwards, upwards?)/ Horizontal harmonization?
- Hierarchy of the national models?