



Arbitration in administrative contracts : comparative law perspective

Ching-Lang Lin

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Arbitration In Administrative Contracts:

Comparative Law Perspective

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ARBITRATION IN ADMINISTRATIVE CONTRACTS: COMPARATIVE LAW PERSPECTIVE

SUMMARY

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INTRODUCTION

Law is a microcosm of society. Different societies evolve different legal systems. In other words, the law reflects the diversity and development of society. Thus, to study different laws and compare them is indeed interesting.

In most countries, there is a distinction between public law and private law. Arbitration and administrative law appear to live on two distant planets, and their paths do not ever seem to have to cross.

In observing administrative law, analyzing the activities of administrative authorities is a good way to realize the core of public law. Even administrative authorities are only “organizations” rooted in the evolution of their society and, without doubt, they would also impact the whole society. Thus, in the development of society, administrative authorities do seem a “living creature.”

On one side, with the requirement to well execute public mission and to satisfy citizens’ general social needs, beside the unilateral administrative decision, administrative agencies have much developed activities in accordance with “commercial” (of course, in the broadest sense) targets, and not only numerous but also multifaceted cooperation between the public and the private sectors. The administrative contract is one of the main tools used. Thus, the administrative contract becomes a special legal idea and it results in many interesting questions. On the other side, we can observe that the scope of public law extends to private actors in such situations¹.

Looking back over the development of systems for resolving disputes, we can see that conflicts and controversies have existed from the birth of human society. They reflect the internal contradiction between individuality and integrity. People have tried various ways to avoid conflict, but it is impossible to avoid the occurrence of conflicts. We can say that the history of human beings is a history of resolving conflicts.

The method of dealing with conflicts depends on the diverse requirements of human beings. At first, in ancient epochs, people adopted the self-help method

¹ On this subject in general, see Manuel Tirard, *Privatization and Public Law Values: A View from France*, 15 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES, Article 12 (2008). Available at: <http://www.repository.law.indiana.edu/ijgls/vol15/iss1/12>.

to protect their own rights from harm. But the self-help approach will lead to the collapse of social order, thus rulers hoped to establish the law system to replace the self-help method. Thus, we can say that law is a way for rulers to situate the “monopoly position” to deal with disputes. Thus, since rulers monopolized the position to deal with disputes, rulers has obligations to establish legal systems to accord with the needs of the people. Therefore, the litigation system was the symbol of this need.

However, for a long time, the litigation system has been criticized often for its cumbersome procedures, and high consumption of time and money. Thus, another requirement of efficiency in the litigation system has come into being. In reaction to this, various types of alternative dispute resolution, such as mini-trial, informal arbitration, conciliation and mediation independently from the legal system in question, have been properly implemented in civil, family and even criminal matters.

In this situation, especially when public juridical persons and private juridical persons are linked by agreements, the protection of mutual trust between them makes it necessary that they have the right to choose the method of alternative dispute resolution arising from their agreements. Thus, conciliation, mediation, and arbitration offer a variety of options for public juridical persons.

Even though there are various options to settle disputes, because of public policy, the question whether public juridical persons can submit their disputes to arbitration with freedom has for long been a question much disputed in arbitration law and administrative law. Thus, this is the motivation to study the relation between them.

TITLE I: DEFINITIONS

As for the question about arbitration in administrative matters it is necessary to begin by remarking on the scope of some legal terms, such as what is “arbitration” and what is “administrative law”? Or better, the sense in which we use them in this thesis.

CHAPTER I: ARBITRATION

“Arbitration” is a business technique initiated by many merchants to meet

their economic needs, such as the facilitation of financial operations.² However, “arbitration” remains undefined. Thus, we would observe “arbitration” from different perspectives in order to paint its outline. First, we want to observe it by its history.

The source of arbitration is the requirements of merchants. In commerce, some merchants take notice of rapidity and secrecy, and one advantage of arbitration is to keep secret the disputes which concern them. It is also one motive for the merchants. The progressive complexity of commercial disputes also brings the need for arbitration. That is, some commercial transactions based on enduring business activities and the whole legal relation between parties cannot be evaluated as individual contracts. The individual contracts have their common business target but they are relevant each other. Thus, it is difficult to resolve their disputes by the simple contractual interpretation. They need some flexible methods for resolution.

Besides, sometimes merchants do not know the applicable contract law well, or they insist on their own positions and then it is hard to reach a compromise. Thus, in such situations, they must rely on a neutral third person to deal with their dispute.

Thus, these considerations have pushed the commercial community to set up a special system to resolve their commercial disputes.

Traditionally, in many European countries, there were special jurisdictions such as “consular tribunals”³. However, even in such special tribunals, the merchants could not avoid the State taking over commercial jurisdiction. In nature, the special tribunals still belong to one part of the jurisdiction of the State. Thus the merchants aspired to divest the control of the State tribunals. In practice, merchants developed and introduced an agreement in their contracts – the arbitration agreement. In brief, from a historical perspective, we can define “arbitration” as “the agreement between parties in their contracts to divest the jurisdiction of State”.

However, we cannot ignore the superordinate concept of “alternative dispute resolution”, often called ADR for short. By “alternative dispute resolution”, we mean “a procedure that makes use of mechanisms such as mediation, conciliation, and arbitration to facilitate the resolution of issues in a

² See AMOR ZAH, L'ETAT ET L'ARBITRAGE 18 (1980).

³ JOSEPH HAMEL & GASTON LAGARDE, TRAITÉ DE DROIT COMMERCIAL, 59-60 (Dalloz, 1954); Marcel Belaich, Conseil du Commerce, Chambre de Commerce et Tribunal de Commerce, 167-242 (thèse Alger 1931), cited in Zahi, 18, *supra*.

dispute without recourse to a hearing before a tribunal”⁴. As jurist Dominique VIDAL has stated, the legal term “*alternatif*”(in French) refers to conduct a dispute by the recourse out of national courts⁵.

There is one point that is worthy of notice. That is, in Canada the jurisdiction of administrative litigation belongs to the “ordinary court.” Here the reason we use the quotation marks is that in the legal system of Canada there is no need to distinguish “ordinary court” from “administrative court.” In Canada, the importance of the administrative litigation revolution would focus on the administrative process especially in the process of the so-called “hearing”. John Swaigen, a scholar of administrative law in Canada, uses the phrase “... without recourse to a hearing before a tribunal.” In brief, the definition above is from the historical element.

Beside the historical perspective, we can observe it from the perspective of the features of arbitration. The jurist Jean-Marie Auby summed it up in three elements. One is that arbitration supposes the existence of a legal dispute. The second is that arbitration is operated by an arbitrator or an arbitral organ. In practice, these are called arbitral tribunals. The third is that the arbitration would result in an obligatory judicial act for the parties⁶. In this thesis, we will discuss these three elements.

CHAPTER II: ADMINISTRATIVE LAW

Trying to define “administrative law” is difficult. Administrative law comes from the different cultures of the political and legal systems. In addition, it is also about the development of human rights. Therefore, in this thesis, we will define administrative law in four dimensions. The first dimension is a discussion of what comprises administrative law. The second dimension is a discussion of what functions are assigned to administrative law. The third dimension is an analysis of the way in which it operates. The fourth dimension observes its principal contemporary and future development.

⁴ See JOHN SWAIGEN, ADMINISTRATIVE LAW: PRINCIPLES AND ADVOCACY 138 (2005).

⁵ Dominique Vidal, *Notions De Base De L'Arbitrage*, in YVES STRICKLER, L'ARBITRAGE QUESTIONS CONTEMPORAINES, 13,13-28 (L'HARMATTAN ed.,2012)

⁶ See JEAN-MARIE AUBY & R. DRAGO, 1 TRAITÉ DE CONTENTIEUX ADMINISTRATIF, 19 (1962).

SECTION I: WHAT COMPRISES ADMINISTRATIVE LAW?

First, traditionally speaking, we often think of administrative law as a subset of public law.

Public law can be technically divided into two sections. One is the international public law. The other is the internal public law, including constitutional law and administrative law.

Besides, in the modern Law School curriculum, administrative law has the closest relationship with constitutional law. Thus, to understand many legal questions about administrative law, we cannot ignore the legal system and some questions about constitutional law. In short, the concern of administrative law is to deal with the legal regulation of governmental power, both in the state's relations with citizens, and the allocation of public authority among various constitutional institutions.

As for the relationship between constitutional law and administrative law, we can say that while administrative law shares many of the characters of constitutional law. (In most cases, it also shares the characters of criminal law. And in administrative law, there is some penalty on the violation against administrative obligation. However, in Taiwan, criminal law has been regarded as a form of public law, but in France, criminal law belongs to a form of private law.) But relative to constitutional law, administrative law is nonetheless conceptually separate.

The composition of administrative law can be observed technically using two conceptions: the concept of its organization (*vision organique*)(1.THE CONCEPT OF ITS ORGANIZATION) or by the concept of its function (*vision fonctionnelle*)(2.THE CONCEPT OF ITS FUNCTION).

1.THE CONCEPT OF ITS ORGANIZATION

The object of administrative law is to regulate the relationships between the government and the governed, that is the population⁷. Under this vision of organization, administrative law is the law which regulates the administration, government or the executive power (*le pouvoir exécutif*).

In France, the principle of prohibition of arbitration is applied to state, local

⁷ E.g. GUY RÉGIMBALD, CANADIAN ADMINISTRATIVE LAW (1st ed. 2008).

authorizes and public legal persons. However, in some situations, contracts concluded by two private persons would not be authorized to arbitration.(see II. ENLARGEMENT OF THE PRINCIPLE TO ADMINISTRATIVE CONTRACTS MADE BETWEEN PRIVATE PERSONS).

2.THE CONCEPT OF ITS FUNCTION

Under another concept of function, administrative law is law that regulates administrative activities, including public service activities.

Administrative law regulates the function of execution by administrative bodies (or in French, “*l’appareil public*”). It also regulates the rules of the quotidian management that is applicable to the relationship between a public authority and the citizens (*au règlement des questions quotidiennement dans les rapports entre l’autohté publiques et les citoyens*).⁸

In addition, administrative law also regulates the satisfaction of the needs of citizens and it generally is linked to the public services provided by administrative bodies.

More precisely, administrative law is comprised of many legal principles, especially about public law, which govern all the delegation, implementation and oversight of a wide array of governmental functions. Another subset of public law is constitutional law. Constitutional considerations often figure prominently in the theory and jurisprudence of administrative law in many countries.

In Canada, there are some specific statutes to regulate certain fields of administrative law: labor relations, workers’ compensation, parole, employment insurance, and radio-television communications⁹.

Thus, fundamentally, administrative law concerns the relationship between the state and the individual citizens. In Canada, legal scholars Dussault and Borgeat have defined administrative law as follows:

Administrative law has been termed the “law of the public authority in its relations with ordinary citizens”, “the day-to-day public law”, the essential incarnation of public law outside of the constitutional sphere”. It may be defined as the entire set of rules relating to the organization, operation, and

⁸ Mohammed Amine Benabdallah, *Les rapports entre l’administration et les citoyens*, available at http://aminebenabdallah.hautetfort.com/list/droit_administratif/les_rapports_entre_l.pdf, last visited 20 April 2014.

⁹ NEIL BOYD, CANADIAN LAW 263 (Nelson College Indigenous 5th ed.2010).

control of the Administration.¹⁰

From the definition above, the definition of Dussault and Borgeat is focused on the “relation with ordinary citizens.” That is, to deal with the relationship between the state and citizens is the core of administrative law. Therefore, in thinking about the questions of administrative law, we cannot ignore the core. And the core is the same as the object of administrative law.

Besides, as for the definition of administrative law, we can find that the definition will change along with the different legal system among different countries. According to the legal scholar Lisa Braverman¹¹:

Administrative law is made up only of the principles that govern the actions of administrative tribunals. In reality, administrative law is made up of three components: 1. The actual by-laws, rules and regulations and other forms of subordinate legislation made by administrative tribunals. 2. The principles of law governing the actions of administrative tribunals and their decisions. 3. The legal remedies available to those affected by unlawful administrative action or improper decisions of administrative tribunals.

From the definition above, especially the third component, it concerns the recourse system. This is nearest the core of this thesis.

SECTIONII:WHAT ARE THE FUNCTIONS ASSIGNED TO THE

ADMINISTRATIVE LAW?

Three functions are successively assigned to administrative law: The first requires administrative bodies to respect rights. The second provides a legal arm against administrative bodies. The third is the protection of the rights of citizens against administrative bodies (ordinary public authorities).

Of course, in this thesis, we also need to define the “administrative litigation system.” This means the process whereby the judicature, especially the national judges (whether administrative judges, judicial judges, or judges in special courts)

¹⁰ *Id.*

¹¹ LISA BRAVERMAN ,ADMINISTRATIVE TRIBUNALS, 16(Canada Law Book INC., 2001)

reviews the legality of administrative acts. If the action is judged “illegal,” then the judges can proceed to decide the following legal effect, such as abolishment or annulment.

To understand the definition above well, we need to realize that the legal term “**administrative tribunals**” in Canada would have another meaning. This is because in Canada, unlike most countries, there is no another legal system for administrative disputes, there is no judicial tribunal like the “administrative courts” (in Taiwan) or *Conseil d’Etat* (in France). But in Canada, there is a special legal system and it has a similar name called “administrative tribunal”. We will introduce it in a discussion of the legal system of Canada.

In conclusion, these three functions will often appear in this dissertation (see CHAPTER I: ADMINISTRATIVE LITIGATION SYSTEM V.S ARBITRATION).

SECTION III: THE WAY IN WHICH ADMINISTRATIVE LAW OPERATES

Now, we will introduce the way or the mechanism by which administrative law operates. Generally speaking, administrative law operates through three types of legal structures.

The first corpus relates to standards of administrative law, for instance, administrative legality, the origin and composition of administrative law, its content standards and its sanctions.

The second corpus relates to the competence of administrative authorities, for instance, what justifies legal public intervention in a given field? What form should this intervention take and what kinds of legal acts should be used to accomplish it?

The third corpus relates to the administrative organs: How does the law apprehend administrative institutions and their configuration, the authorities that act on their behalf, the relationship between institutions and authority within an administrative body?

These three corpuses are related to the subject of this dissertation. Administrative bodies often use administrative contracts to carry out their public mission. All administrative decisions should comply with the law, and they must be made by the competent administrative bodies.

In France, particularly, the competent court to examine the judicial review of arbitration awards has provoked much debate between jurists (see 3.BEFORE WHICH COURT).

SECTION IV: DIFFERENT MODELS OF ADMINISTRATIVE LAW

There is, nevertheless, a plurality of models of administrative law throughout the world. They have different key factors.

The first factor is the place of administrative bodies in society, i.e., whether they are more or less centralized.

In China, administrative authorities are very centralized.

Although in France, Taiwan and Canada, administrative authorities are not very centralized, the control of administrative bodies over administrative contracts will influence the position of parties to administrative contracts.

The second factor is the role of judges. This refers to the importance of judges in the control of administrative bodies and in the "creation" of administrative law.

For example, in France and Canada, administrative law includes less legislation and more jurisprudence. In Taiwan and China, administrative law includes more legislation and less jurisprudence.

The third factor is judicial organization. This refers to whether or not there are separate administrative courts. In the administrative law field, we describe this as "dualism" (two jurisdictions) or "monism" (only one jurisdiction).

In Taiwan and France, there is dualism, while in Canada and China, there is monism.

The fourth factor is the greater or lesser centrality of the issue of the protection of fundamental rights. In this dissertation, we define this as the "subjective" function of the administrative litigation system. (see SECTION I: ADMINISTRATIVE LITIGATION SYSTEM HAS BOTH AN OBJECTIVE AND A SUBJECTIVE FUNCTION)

SECTION V: THE CONTEMPORARY AND FUTURE PRINCIPAL

EVOLUTIONS

There will be three principal evolutions in administrative law.

The first is globalization¹².

¹² In regard to the relationship between the globalization and administrative law, see

In France, this will include Europeanization¹³, the internationalization of administrative law and the strong impregnation of European law (EU law or the law of the European Convention on Human Rights) in French administrative law.

In Canada, this will include many North American, international and regional conventions.

In Taiwan and China, administrative law is influenced by its reception of common law and civil law.

The second development is the phenomenon of the "denationalization" of society. This includes the reduction in the role of the State for the benefit of the market and citizens.

The third development is the decentralization of governmental power. This includes territorial decentralization and the reduction of the complexity of state apparatuses themselves.

The first development is the most important for the purposes of our dissertation, especially with respect to urgent procedures regarding disputes that arise from administrative contracts and the judicial review and enforcement of international arbitration awards (CHAPER III:URGENT PROCEDURE("RÉFÉRÉ") and THIRD PART: JUDICIAL REVIEW AND EXECUTION OF ARBITRATION AWARDS).

TITLE II: AWARENESS OF PROBLEMS

After trying to define the signification of "arbitration" and "administrative law" it is relevant to note that administrative disputes arise from different causes. That is, in order to structure the analysis of this thesis, it is convenient to classify the different types of disputes according to their different causes.

The administrative authority can adopt a unilateral treatment, then the dispute arising from it, at least in the contemporary era according to major positive law and doctrine internationally, is not arbitrable. In other words, the dispute must be submitted to the judiciary to examine the legality of administrative acts.

Furthermore, the administrative authority can also adopt a bilateral method. This can be easily observed in the signing of an administrative contract. Thus, if a dispute arises from an administrative contract, whether it can be resolved by

JEAN-BERNARD AUBY, *LA GLOBALISATION, LE DROIT ET L'ETAT*, 240 (L.G.D.J, 2010).

¹³ Jean-Marc Sauvé, *L'avenir du modèle français de droit public en Europe*, available in <http://www.conseil-etat.fr/fr/discours-et-interventions/l-avenir-du-modele-francais-de-droit-public-en-europe-kmn.html>, last visited 20 April 2014.

submitting it to arbitration is often highly controversial, and it concerns the basic understanding about the administrative contract. Since, in the field of contract law, the freedom of contract is a dominant principle in the interpretation of a contract, the role such principle plays in administrative contract law should be an interesting question.

However, an important distinction should be made between the different legal terms “arbitration clause” (in French called “la clause compromissoire,” aim to resolve the future dispute) and “arbitration accommodation” (in French called “compromise clause,” aim to resolve a past dispute). If the parties decide to adopt the arbitration clause, they will write it in the administrative contract, thus the nature of this clause has not only substantive but also procedural character. On the other hand, if the parties decide to submit their dispute to arbitration during the procedure in a judicial court or an administrative court, the nature of agreement is easier, it has the nature of procedural law.

In summary, administrative law and arbitration law have their proper legal principles and they pertain to both public law and private law. Thus, when they meet, there will be sparks. The tension between administrative law and arbitration law arises from the contradiction of arbitration. On the one hand, arbitration is a private way to resolve disputes, especially private disputes, including civil disputes, commercial disputes and financial disputes, both in domestic law and international law. On the other hand, we cannot deny the fact that arbitrators indeed exercise some function of justice which is still considered as one part of national monopoly power¹⁴. Thus, arbitration law stands at the crossroads of these two contradictions.

Besides, in the traditional ideas, all the types of litigation in which public legal persons may be involved are subject to the presumption that the public interest is involved. Thus, in domestic public law, the arbitration system seems to be in contradiction to the public interest.

More concretely, because of the origin of private law and the nature of litigation which the arbitral institutions need to resolve, in the long term, the question about whether public legal persons can “willingly” submit to arbitration is an interesting one for administrative law doctrine.

Whilst it has been extensively discussed whether the arbitration system is

¹⁴ See Aleis Mourre, *Arbitration and Criminal Law: Jurisdiction, Arbitrability and Duties of the Arbitral Tribunal*, 209, in *ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES* (Loukas A. Mistelis & Stavros L. Brekoulakis ed., 2009), paragraph number:11-4.

applicable to deal with administrative disputes – whether arising from some administrative contract or without any relationship with administrative contract – has for a long time remained a vague and perhaps shadowy concept. It concerns the intersection of public law and private law. Thus, how to deal with them is a crucial issue.

Besides arbitrability, if a subject matter is arbitrable, the following questions about the extent, the conditions, and the effect of these concepts still leave many important issues to be discussed.

Therefore, in this thesis we want to analyze and review the circumstances and extent to which an arbitral tribunal is empowered to determine questions or disputes in which administrative agencies involve. In legal doctrine, this is the question of “arbitrability.”

However, the existence of blurring does not mean the “disappearance” of a distinction between them. Moreover, the blurring accents the requirement of judicial review after the issue of an arbitration award. In private law, the freedom of contract must stand under the judicial control of national public order. In public law, there is no exception. And because they pertain to both public law and private law, in some countries whose legal system is based on the distinction of public law and private law, the power of jurisdiction is shared by judicial tribunals and administrative tribunals. Thus, the allocation of jurisdiction regarding the judicial review of an arbitration award is the important issue.

In brief, the three specific questions are (1) Can arbitrators or arbitral tribunals decide issues involving administrative law? and (2) Is there, or should there be, any limitation on the authority of arbitrators or arbitral tribunals? (3) Moreover, after the issue of an arbitration award, what role should the State play in the judicial review phase? The first question, the issue of arbitrability, is discussed in part 1 (FIRST PART: ARBITRABILITY). The second question will be discussed in part 2 (SECOND PART: PARTICULAR QUESTIONS OF ADMINISTRATIVE MATTERS IN ARBITRATION PROCEDURE). Finally, on the question of what happens after the arbitration award, we will discuss judicial review in part 3 (THIRD PART: JUDICIAL REVIEW AND EXECUTION OF ARBITRATION AWARD).

We would observe these questions in comparative perspective. The documents we read are from English, French and Chinese. One function of footnote is to make reader find easily the original documents that we cited. Thus, generally speaking, the footnote style in this dissertation is presented in

“Bluebook” style, one citation form of Harvard Law Journal¹⁵.

But in French and Chinese documents, I did some adjustments as follows: In French consecutively paginated legal journals and French jurisprudence, I cited them in French style, such as “AJDA 2010.293”. In Chinese document, I translated the name of author, of paper, of journal into English and added their original Chinese citation within parentheses, such as “Xu Ying-Zhen(許瑩珍)”. And Chinese in Taiwan and China has nuances and thus I distinguished them depending on original document. Besides, if there is a suggested citation by author in the original documents that we cited, we would respect author’s suggestion, such as “H.A. Grétry inc. c. 9065-3627 Québec inc., 2009 QCCA 2468(2009) (CanLII), <http://canlii.ca/t/2744q>” (It’s a suggested citation in CanLII, official website about Canadian jurisprudence).

¹⁵ See <http://guides.library.harvard.edu/content.php?pid=92680&sid=751504>, last visited 18 April 2014.

FIRST PART: ARBITRABILITY

Before discussing arbitration in administrative disputes, we must first address the issue of arbitrability. A dispute may only be submitted to an arbitration system when it is arbitrable. National legislators must decide under which conditions a dispute may be referred to and decided by arbitration. For jurisprudence, the tribunal has to decide if some concrete subject matter is arbitrable.

Even if there is a prevailing tendency to increase the scope of alternative dispute resolution systems, certain subject matters are regarded as so important in some countries that, according to the legislature or the judiciary, their resolution can only be entrusted to domestic tribunals.

Consequently, we must notice that not all matters submitted to arbitration may be arbitrated. What matters can or cannot be arbitrated is the subject of further discussion. In theory, this issue relates to “arbitrability,” and by the illustration above, arbitrability is a “floating” idea subject to change depending on different elements.

Arbitrability is essential to the legitimacy of the arbitral process; in other words, whether the dispute under the arbitration agreement could be settled by arbitration. However, in comparative perspective, there is one point worthy of note. That is the different concepts and functions of arbitrability in different jurisdictions. In the United States, arbitrability belongs to the interpretation of contract and thus the concept is relatively extensive. Outside the United States, the term “arbitrability” has a reasonably precise and limited meaning. Concretely, it is about whether specific disputes should be barred from arbitration because of national legislation or judicial authority. In this regard, the issue often discussed is about administrative disputes. The arbitrability of disputes arising from administrative contracts varies in different countries. Thus, a public interest consideration is often used, but the definition of “public interest” in such questions also appears fluid. In addition, the meaning of arbitrability often changes with time. There are different interpretations at different periods of time even in the same State or court. Thus, arbitrability is a mystery, like a woman wearing a veil.

Because of this mystery, the right of parties to submit their disputes to arbitration and arbitrators' authority to determine disputes involving administrative law or public policy in public law questions has long been a contentious issue in administrative law and arbitration law. It is a traditional dispute in doctrine and jurisprudence, but it has a floating and mysterious life.

In doctrine and jurisprudence, we try to define "arbitrability." However, after this analysis, we doubt the possibility of defining "arbitrability". Thus, we want to know the different definitions of "arbitrability". Besides, as to the question of public persons submitting their disputes to arbitration, we want to observe whether there are many different legal values involved and what they are.

In theory, for the supporters of party autonomy, when we think that the parties have entire freedom or the right to decide to submit their disputes to arbitration, what role do national laws play? National laws usually impose restrictions or limitations on what matters can or cannot be referred to and resolved by arbitration proceedings. Thus, there is a value in the comparative perspective.

Therefore, we want to discuss the question of arbitrability into three sections. One addresses to compare the different definitions of "arbitrability" and the different legal values involved between doctrines and different legal systems. (TITLE I: COMPARISON BETWEEN JURISTS AND BETWEEN PROVISIONS). The second one addresses to compare generally the difference between arbitration and civil or administrative litigation system. (TITLE II: COMPARISON BETWEEN SYSTEMS). The third one addresses to compare legal systems between the four countries: in France, in Canada, in China and in Taiwan. (TITLE III: COMPARASIONS BETWEEN FOUR COUNTRIES)

TITLE I: COMPARISON BETWEEN JURISTS AND BETWEEN PROVISIONS

Arbitrability consists of deciding whether a certain dispute can be submitted to arbitration. Or we can say, the legal idea of "arbitrability" is to decide whether an issue could be suitably determined by arbitrators or arbitral tribunals. In other words, if the subject matter is not arbitrable, the whole of the arbitration process and the arbitration award would be in danger of being declared invalid, which would result in serious damage for the parties.

However, as we saw above, the definition of "arbitrability" itself remains in question. Thus, we want to discuss this question in this section. It is worthy of

mention that there are many observation perspectives in this question. Thus, we want to analyze them.

In practice, the issue between parties about the arbitrability often arises in three different steps. One is at the beginning of the tribunal or arbitration procedure where the parties contest the validity of the arbitration agreement. The second step is in the process of annulment of an arbitration award where the contesting party challenges the validity of an arbitration agreement and furthermore may ask for annulment of an arbitration award. The third step is in the procedure of execution of an arbitration award. Thus although we discuss arbitrability in the first part of this thesis, it does not mean that the issue of arbitrability happens only at the initial phase.

We would examine first the different observation perspectives between jurists. Besides, the “arbitrability” is a common question often discussed in arbitration law field and thus here the comparison is based principally on the points of view of arbitration law jurists. (CHAPTER I: COMPARISON BETWEEN JURISTS), and second the contemporary situation with a comparative perspective (CHAPTER II: COMPARISON BETWEEN GENERAL PROVISIONS IN THE WORLD).

CHAPTER I: COMPARISON BETWEEN JURISTS

There are many different observation perspectives about “arbitrability” between jurists who have examined the question in turn below.

SECTION I: ARBITRABILITY IS A CONDITION PRECEDENT TO ASSUME

JURISDICTION OVER A PARTICULAR DISPUTE

Jurist Brekoulakis highlights the “functions” of arbitrability as follows:

Arbitrability is, thus, a specific condition pertaining to the jurisdictional aspect of arbitration agreements, and therefore, it goes beyond the discussion on validity. Arbitrability is a condition precedent for the tribunal to **assume jurisdiction over a particular dispute** (a jurisdictional requirement), rather than a condition of validity of an arbitration

agreement (contractual requirement).¹⁶

Thus, Brekoulakis focuses the definition of arbitrability on the “function” or “effect”. That is, if there is an arbitration agreement, the parties can argue about the jurisdiction before tribunals. That is, when a particular dispute or claim by a plaintiff is considered to be inarbitrable, the court will be prevented from assuming jurisdiction over the subject matter. Thus, in brief, the arbitration agreement in nature is a “private contract” between the contesting parties but it has the effect to prevent the tribunal from assuming jurisdiction. “A private contract has changed the allocation of jurisdiction” maybe a vivid way to portray it. However, we are curious why a “private contract” can change the allocation of jurisdiction.

In addition, a valid arbitration agreement does not mean arbitrability. One dispute maybe include many different claims. And some claims may be inarbitrable, whereas the other claims might be arbitrable.¹⁷ Thus, more precisely, we cannot say that “inarbitrability” will lead to the invalidity of an “arbitration agreement,” we should observe the validity of arbitration agreement separately by “individual concrete claims.” Thus, “arbitrability” is not the question about the “validity of an arbitration agreement”, it is the question about the jurisdiction of an arbitral tribunal. However, this definition cannot give us the operating standard to decide arbitrability.

SECTION II: CONCENTRATING ON THE DISTINCTION BETWEEN

SUBJECTIVE AND OBJECTIVE ARBITRABILITY

Another perspective involves the distinction between “subjective” and “objective” arbitrability. Generally speaking, arbitrability means, first, that the agreement must relate to subject-matter which is capable of being resolved by arbitration, and second, that the agreement must have been able to enter into by parties entitled to submit their disputes to arbitration. In other words, the question of arbitrability arises in two directions.

¹⁶ See the definition in Mistelis & Brekoulakis, 39, para 2-63, *supra* note 14.

¹⁷ See ANTHONY G. Buzbee, *When Arbitrable Claims Are Mixed with Nonarbitrable Ones: What's A Court To Do?*, 39 S. Tex. L. Rev. 663 (1997-1998), p.663-706; And see Mistelis & Brekoulakis, *supra* note 14.

The first direction is about whether certain individuals or entities are unable to submit their disputes to the arbitration system because of their special status or special function. The much discussed question is about States, local authorities and other public entities. In the arbitration field, this is well known as the issue of “subjective arbitrability” or “arbitrability *ratione personae*.” In some countries it is known as “substantive arbitrability”. Although it has met with criticism from some authors, the concept of subjective arbitrability is still accepted by the most influential scholars in the field of arbitration law.

The second direction is about whether the subject-matter can be resolved by arbitration. It focuses on the “individual concrete case”, not the “capacity” of contesting parties. This is known as “objective arbitrability” or “arbitrability *ratione materiae*”. The question concerns the explication of contact. According to Di Pietro:

This is a “*ratione materiae*” notion, which is normally referred to as “objective” arbitrability as it is independent of the quality of the parties or their will. It is distinguished from the so-called “*ratione personae*”, or “subjective” arbitrability, which is concerned with the capacity of the parties to submit disputes to arbitration.¹⁸

In other words, arbitrability *ratione materiae* depends on the subject matter of such a dispute, and arbitrability *ratione personae* relates to the ability of a party to submit their dispute to arbitration.¹⁹

Thus, as for the question whether public entities can conclude arbitration agreements, it seems to be a question of “subjective” arbitrability. On the issue of subjective arbitrability, however, in France the *Cour de Cassation* and French jurists have different opinions, to which we will return below.

This idea may have been accepted by arbitration doctrine, but this does not give an explicit definition of “arbitrability”. Neither does it give us the concrete criteria to apply. It only gives us an idea that we can try to realize “arbitrability” in two different ways. In other words, objective arbitrability is connected with elements outside the quality of the parties. On the other hand, subjective

¹⁸ Domenico Di Pietro, *Arbitrability Under the New York Convention*, 91, in Mistelis & Brekoulakis, *supra* note 14, paragraph number:5-18.

¹⁹ See Bernard Hanotiau & Olivier Caprasse, *Arbitrability, Due Process and Public Policy Under Article V of the New York Convention – Belgian and French Perspectives*, Volume 25 Issue 6, *Journal of International Arbitration* 721, p721-741 (2008).

arbitrability is connected with the elements which are due to the capacity of the parties.

In conclusion, since the question of whether states, local authorities and other public entities can submit their disputes arising from the administrative contracts to arbitration is a matter of subjective arbitrability.

SECTION III: ARBITRABILITY IS THE FUNDAMENTAL EXPRESSION OF

FREEDOM TO ARBITRATE

Introducing another perspective, Youssef emphasizes the contractual nature of arbitrability:

Arbitrability is also the fundamental expression of *freedom to arbitrate*. It defines the scope of the parties' power of reference or the boundaries of the right to go to arbitration in the first place.²⁰

Youssef further argues that arbitrability is the fundamental expression of "freedom to arbitrate". However, we think that this definition cannot resolve the question because we cannot know what the freedom is. How to define "freedom"? It is easy to result in the logical conclusion that "arbitrability is freedom of arbitrate" and "in arbitrability is that the parties have no freedom of arbitrate". However, where is the line between "freedom" and "restriction"? It is still in a vague position, and the arbitration agreement is a private contract between the contesting parties. If in private law freedom of contract has its limitations, then in public law there should be more limitation of the freedom of contract. For example, "public policy" often becomes the border of the parties' power or right.

In current legal systems, we can find that there the legal definition of arbitrability in accordance with Youssef. According to Article 786 of the civil procedure law of Japan: "An agreement to submit a dispute to one or more arbitrators shall be valid only where the parties have a right to make a compromise with regard to the subject matter in dispute." In this article, the question about arbitrability focuses on the parties' right to compromise. This is

²⁰ Karim Youssef, *The Death of Inarbitrability*, 49, in Mistelis & Brekoulakis, *supra* note 14. Paragraph number: 3-6.

like the definition proposed by Youssef, and also equates to the “dispositive freedom” or “dispositive right”.

In the Arbitration Act of 1986 of the Netherlands, we can also find another similar article. Article 1020(3) provides that “The arbitration agreement shall not serve to determine legal consequences of which the parties cannot freely dispose.”²¹ In this article, we can see that the legislators used the term “freely dispose” based on the same idea.

In short, we think that the definition of Youssef is not enough to resolve the question of arbitrability. But it still provides a good direction to think about the issue, and there is also legislation in some states adopting the same idea.

SECTION IV: ARBITRABILITY IS WHETHER SPECIFIC DISPUTES ARE

BARRED FROM ARBITRATION BECAUSE OF PUBLIC POLICY

Other scholars put forward other interesting opinions. According to Laurence Shore:

Arbitrability is a far broader concept in the United States than in other countries. Internationally, arbitrability refers to whether specific classes of disputes are barred from arbitration either because of public policy or because they are outside the scope of the arbitration agreement. In the context of international commercial arbitration, arbitrability thus generally refers to whether the specific claims raised are of a subject matter capable of settlement by arbitration, and are not subject to the exclusive jurisdiction of either party’s national courts ... the term in the US further includes the jurisdictional question that asks whether an arbitrator or a court should decide if a given dispute should be submitted to arbitration.²²

Laurence Shore’s mention has two levels. One is that arbitrability deals with the question about whether specific disputes are “barred from” arbitration. And what is the reason to “bar from” arbitration? Laurence Shore has mentioned

²¹ Refer to website: <http://www.jus.uio.no/lm/netherlands.arbitration.act.1986/1020.html>, 2012, October 11.

²² Laurence Shore, *US Perspective on Arbitrability* 70, in Mistelis & Brekoulakis, *supra* note 14, paragraph number: 4-2.

“public policy” or “outside the scope of the arbitration agreement”. In this place, we can say that “outside the scope of the arbitration agreement” is the question about the interpretation of arbitration agreement. Thus, it is a question of contract. It does not belong to the range of our discussion.

Shore mentioned “public policy”, which is indeed a common reason to bar from arbitration.

The second level is about the national jurisdictional question. In other words, the reason why we should discuss arbitrability first is to decide the jurisdiction question. It is to determine whether the specific dispute can enter into arbitral tribunal. If the specific dispute should not enter into the door, we will waste a lot of time and legal resources. At the same time, the wasted time and legal resources will not be used in the correct place to deal with the question which needs to be resolved.

From this perspective, we can conclude that arbitrability cannot be realized only from the freedom of contract, because it involves the allocation of national jurisdiction.

SECTION V: ARBITRABILITY IS THE ESSENTIAL DIVIDING LINE

BETWEEN PUBLIC AND PRIVATE JUSTICE

Another perspective on arbitrability is proposed by Carbonneau: “

Arbitrability establishes the respective domains of law and arbitral adjudication. It is the essential dividing line between public and private justice.”²³

This opinion is interesting. In doctrine, we often regard the tribunal as “public justice”, and arbitrators as “private justice”. This obviously means the arbitrators exercise the power of jurisdiction. Since they exercise the work of judges, there should be the same or similar requirements for them, and because of their special status, we need to compare national judges with arbitrators hereafter.

²³ Thomas E. Carbonneau, *Liberal Rules of Arbitrability and the Autonomy of Labor Arbitration in the United States*, 143, 8-1, in Mistelis & Brekoulakis, *supra* note 14. paragraph number: 8-1.

SECTION VI: IT'S NECESSARY TO DISTINGUISH SUBSTANTIVE OR

PROCEDURAL ARBITRABILITY

If either contesting party challenges the arbitrability of an issue, the arbitrator must resolve this “threshold” question before proceeding to a hearing. However, in theory there is also a different distinction, between “substantive” or “procedural” arbitrability.²⁴

As for substantive arbitrability, it is about whether the subject of the grievance falls within the proper scope of the arbitration process, and within the arbitrator’s jurisdiction. Thus, more precisely, have the workers and management contractually agreed to exclude the grievance from the internal dispute resolution process? It is a question about the explication of the contract. It involves whether the individual concrete claim belongs to the field of arbitration agreement concluded by the contesting parties.

As for procedural arbitrability, it comes from the limitations imposed by the contract. In other words, an arbitrable dispute may be rendered nonarbitrable by the “failure to follow contractually prescribed procedures for filing or processing grievances”.²⁵ It involves some “procedural obligation” for the contesting parties before submitting the dispute to arbitration. For example, the arbitration agreement may require the contesting parties to submit to conciliation or mediation before arbitration. If some contesting party submits the dispute to arbitration without meeting the requirement above, the case is “nonarbitrable”.

And it is worthy of note that the idea of “substantive” or “procedural” arbitrability involves mainly the interpretation of the arbitration agreement. Even if there is such idea in the arbitration field, it is not central to this thesis.

SECTION VII: CONCLUSION OF THIS CHAPTER

Since the question of “arbitrability” is a common question in arbitration law field, and thus, we can observe that mentioned different definitions or

²⁴ CLARENCE R. DEITSCH & DAVID A. DILTS, *THE ARBITRATION OF RIGHTS DISPUTES IN THE PUBLIC SECTOR* 33 (1990).

²⁵ *Id.* 35.

observation perspectives from arbitration law jurists are generally aiming to all disputes and cannot give us the sufficient standards to decide “arbitrability” on disputes arising from administrative contract.

Consequently, after introducing the definitions in doctrine, we want to observe the different legislation from a comparative law perspective.

CHAPTER II: COMPARISON BETWEEN GENERAL PROVISIONS IN THE WORLD

Arbitrability is regulated by different types of legislation. Legislation may take a positive approach by defining the standard of arbitrability, or a negative approach by excluding arbitrability in certain cases.

Generally speaking, there are three categories of legislation. The first category is more liberal, where freedom to arbitrate is regarded as a principle. The criterion is very large, and there are rare exceptions (SECTION I: LIBERAL TO ARBITRATION). The second category is intermediary. It is based on the classification by legislators. The legislators have specified legislative dispositions signifying the standards for “in-arbitrability” (SECTION II: INTERMEDIARY). The third category is more limited. The legislation defines arbitrability with vague and blurred legal terms, and there are many special laws to add exceptions. However, this category is the one adopted by the most countries. It is the most complex system (SECTION III: LIMITED TO ARBITRATION).

SECTION I: LIBERAL TO ARBITRATION

The first category is the most liberal legislation, and without doubt it is also the most simple. This is the form of the legislation in the USA, Canada, Germany, and Switzerland.

In the USA, the Federal Arbitration Act of 1925 (FAA) was enacted to establish the validity and enforcement of arbitration agreements. It encouraged the contesting parties to submit their disputes to arbitration. The general principle of the Act is that, in federal law, all the claims based on a written law (statutory claims) are subject to be submitted to arbitration, unless stipulated otherwise by law.

In the USA before the 1970s some matters were declared in-arbitrable by the federal tribunals for the reason of public order (the difference between “public order” or “public interest”, will be discussed below). However, after 1974, the

Supreme Court began to revise its jurisprudence in the main domains and commenced the liberal movement. These domains are the exchange security law²⁶, antitrust law²⁷, RICO legislation²⁸, author law²⁹ etc. This movement, commenced by jurisprudence, has influenced the following legislation.

In Switzerland, the same standard was adopted by legislators from the reform of 1987³⁰. All litigations about the natural patrimonial property can be submitted to arbitration³¹. Article 177 of the Swiss Federal Code on Private International Law provides that: “**All pecuniary claims** may be submitted to arbitration”³². The Swiss Federal Tribunal has precised the notion: “all the claims of pecuniary value ... could be appreciated by money”³³.

In Germany, this standard was introduced as law on December 22, 1997³⁴. As for the eligibility for arbitration, Article 1030 of the civil procedure law provides that:

Any claim under property law may become the subject matter of an arbitration agreement. An arbitration agreement regarding non-pecuniary claims has legal effect insofar as the parties are free to compromise about the dispute are entitled to conclude a settlement regarding the subject matter of the dispute. (2) An arbitration agreement

²⁶ Scherk v. Alberto-Culver Co., 417 US 506 (1974), relative to Exchange Security Act (in French: Sécurités Exchange Act) 1934; Rodriguez de Quijas v. Shearson/American Express, Inc., 490 US 477 (1989), relative to Security Act (in French: Sécurités Act) 1933. Recited from BERNARD HANOTIAU, L'ARBITRABILITÉ 25 (Recueil des cours de l'Académie de Droit International, 2002).

²⁷ Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 US 614 (1985) relative to Shearman Antitrust Act, recited from Hanotiau, *supra* note 26, at 25.

²⁸ Racketeer Influenced Corrupt Organizations Act: Shearson/American Express, Inc. v. McMahon, 482 US 220 (1987), recited from Hanotiau, *supra* note 26, at 25

²⁹ Saturday Evening Post Co. v. Rumbleseat Press, Inc., 816 F. 2d 1191 (7th Cir., 1987) recited from Hanotiau, *supra* note 23, at 25.

³⁰ On arbitration law in Switzerland and its development, see P. LALIVE, J. F. POUDRET & CL. REYMOND, LE DROIT DE L'ARBITRAGE INTERNE ET INTERNATIONAL EN SUISSE 303 (1989); A. BUCHER, LE NOUVEL ARBITRAGE INTERNATIONAL EN SUISSE 37 n. 86 ss (1988); A. BUCHER & P.Y. TSCHANZ, INTERNATIONAL ARBITRATION IN SWITZERLAND 41 ss, nos. 63 ss. (1988); Cl. Reymond, *La nouvelle loi suisse et le droit de l'arbitrage international. Réflexions de droit comparé*, Rev. arb. 385, 395-396 (1989); P. Lalive & E. Gaillard, *Le nouveau droit de l'arbitrage international en Suisse*, J. D. I., 905, 921-923 (1989). Recited from Hanotiau, *supra* note 23, at 25 n. 248.

³¹ Hanotiau, *supra* note 26, at 96.

³² On Switzerland's Federal Code on Private International Law, see <http://www.umbricht.ch/pdf/SwissPIL.pdf>, April 23, 2013.

³³ T.F., 1^{ère} Cour Civil, 23 juin 1992, Fincantieri-Cantieri Navali Italiani S.p.A., A.T.F. 118, II, 356 ; BULLETIN ASA, 1993, 58; Rev. arb. 691 (1993), refer to note of F. Knoepfler.

³⁴ On the 1997 reform of German law on arbitration see Rev. arb. 441 (1998); P. Schlosser, *La nouvelle législation allemande sur l'arbitrage*, Rev. arb. 291 (1998); G. Lörcher, *La nouvelle loi allemande sur l'arbitrage*, BULLETIN ASA, 275 (1998). Recited from Hanotiau, *supra* note 23, at 25 n. 250.

regarding legal disputes arising in the context of a tenancy relationship for residential space in Germany is invalid. This shall not apply to the extent the residential premises concerned are of the type determined in section 549 subsection (2) numbers 1 to 3 of the Civil Code (*Bürgerliches Gesetzbuch*, BGB). (3) Any stipulations of the law outside of the present Book, according to which disputes may not be subjected to arbitration proceedings, or only if specific prerequisites have been met, shall remain unaffected hereby.³⁵

It is worthy of notice that the German legislation has combined two standards: “pecuniary nature” and “free disposability”. All claims of a pecuniary nature are arbitrable, and as for the claims of non-pecuniary nature, if the contesting parties have free disposability, they also can be arbitrable.

In Canada, generally speaking contracts concluded by administrative agencies are arbitrable. (Details would be discussed below in CHAPTER II: ARBITRATION IN ADMINISTRATIVE MATTERS IN CANADA)

In brief, in the first category, the legislators take into consideration whether the dispute concerns the financial interest or the nature of property.

SECTION II: INTERMEDIARY

In some countries, it is the legislators who decide which matters are inarbitrable. This category is found in the laws of Bulgaria and the People’s Republic of China.

In Bulgaria, Article 2 of the law of August 5, 1988, amended on November 2, 1993, provides that: “...disputes relative to rights *in rem* or to possession of immovable property or to labor relations could not be submitted to arbitration.”

In China, Article 3 of the Law of the People’s Republic of China on Arbitration of August 31, 1994, provides that: “The following disputes shall not be submitted to arbitration: (1) disputes over marriage, adoption, guardianship, child maintenance and inheritance; and (2) administrative disputes falling within the jurisdiction of the relevant administrative organs according to law.”

In this category, both Bulgaria and China have adopted the “negative”, “exclusive” method to define arbitrability. In other words, they illustrate the

³⁵ See: http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html, last visited 23 April 2013.

principle of “inarbitrability”. In the legislation of China, the arbitrability of administrative disputes is clearly provided for in the positive law; this legislation is unique in the world.

SECTION III: LIMITED TO ARBITRATION

The third category is the most complex, and unfortunately, it is also the type which the most countries adopt. This category still holds vague standards which result in many questions of jurisprudence and debates in the literature.

Generally speaking, there are two principal standards used in this category. One is the “authority to dispose” and the other is “public order”. Belgium has a mixed type. We will examine each in turn below introducing the limit by “authority to dispose” (1.LIMIT BY “AUTHORITY TO DISPOSE”) ,limit by “public order” (2. LIMIT BY PUBLIC ORDER) and limit in Belgium (3. LIMIT IN BELGIUM:MIXED STANDARDS).

1.LIMIT BY “AUTHORITY TO DISPOSE”

The first type of legislation in this category adopts the “authority to dispose” or “the free disposition of rights” (*la libre disponibilité des droits*) as the standard. The typical country is the France. Similar legislation is found in many countries worldwide, for example, Japan, Belgium³⁶, Colombia³⁷, Brazil³⁸, Portugal³⁹, Spain⁴⁰, Italy⁴¹, Netherlands⁴², Hungary⁴³, Greece⁴⁴, Croatia⁴⁵, Luxembourg⁴⁶, Norway⁴⁷, Macao⁴⁸, Argentina⁴⁹, India⁵⁰, Denmark⁵¹, Algeria⁵²,

³⁶ Article 1076 Code judiciaire.

³⁷ Décret no. 2279 of October 7, 1989, art. 1; REV. ARB., 161 (1992) and commentary of F. Mantilla-Serrano, *id.* 41.

³⁸ Article 1, law of September 23, 1996 on arbitration, REV. ARB. 297 (1997) and the commentary of J. Bosco Lee, *Le nouveau régime de l'arbitrage au Brésil, id.*, 199. Recited from Hanotiau, *supra*, 241, n. 223.

³⁹ Article 1, law of August 29, 1986.

⁴⁰ Article 867, Code de procédure.

⁴¹ Article 806, Code de procédure.

⁴² Article 1020-3, La loi de 1986.

⁴³ Section 3 of the law of November 8, 1994. See M. Bauer, *La nouvelle loi hongroise sur l'arbitrage*, BULLETIN ASA, 44, 48 (1995). Recited from Hanotiau, *supra* note 26, at.241, n. 228.

⁴⁴ Article 867 Code de procédure civile.

⁴⁵ Article 3 of the law of October 19, 2001 on arbitration.

⁴⁶ Article 1003 Code de procédure civile.

⁴⁷ Article 452 Code de procédure civile

⁴⁸ Article 2 of law 29/96/M of June 11, 1996.

⁴⁹ H.G. NAON, PUBLIC POLICY AND INTERNATIONAL COMMERCIAL ARBITRATION: AN ARGENTINE VIEW, 329

Bahrain, Morocco⁵³, Tunisia⁵⁴, Egypt⁵⁵, Libya⁵⁶, Qatar⁵⁷, Sri Lanka⁵⁸, Venezuela⁵⁹, New Zealand, and Yemen⁶⁰. In this legislation, the “free disposition of rights” decides the arbitrability of disputes. Thus, how to define the disposability of certain rights would become a battleground in doctrine.

As for the free disposition of rights, the doctrinal definition is “under the complete control of its holder so that he can do everything in accord with his intention, especially he can alienate it, even renounce it”⁶¹. And thus, in such concept, the legal disposition would be beyond protection. All the legal dispositions by the contesting parties are subject to freedom of disposition.

In short, “freedom of disposition” is a standard. Legislators also exemplify some matters as cases without freedom of disposition including but not limited the questions of State, of the capacity of persons, relative to divorce and the separation of body and corpse.

Unlike the legislation of China, in the second category, arbitrability of administrative disputes is not provided for in this category of legislation and hence not in the countries listed above, where it is an interesting point of doctrine.

2. LIMIT BY PUBLIC ORDER

The second vague standard is to take the “public interest” or “public order” into consideration as the standard for arbitrability. The Arbitration Act 1966 (UK) is an appropriate example. Pursuant to Section 1 (b) in 1966: “...the parties should be free to agree how their disputes are resolved, subject only to such

(Comparative Arbitration Practice and Public Policy in Arbitration, ICCA Congress Series, no. 3, 1986). Recited from Hanotiau, *supra* note 26, at 241, n. 175.

⁵⁰ L. IDOT, COMPETITION AND ARBITRATION LAW 20, no 29 (1993). Recited from Hanotiau, *supra*, 241, n. 176.

⁵¹ Article 7-4 of the law of May 24, 1972. Recited from Hanotiau, *supra* note 26, at 241, n. 178.

⁵² Article 1 du décret législatif sur l'arbitrage du 25 avril 1993. Recited from Hanotiau, *supra* note 26, at 241, n. 179.

⁵³ Article 527 Code de procédure civile. Recited from Hanotiau, *supra* note 26, at 241, n. 180.

⁵⁴ Article 7 du Code de l'arbitrage. Recited from Hanotiau, *supra* note 26, at 241, n. 181.

⁵⁵ B. Fillion-Dufouleur & Ph. Leboulanger, *Le nouveau droit égyptien de l'arbitrage*, REV. ARB. 665 (1994). Recited from Hanotiau, *supra* note 26, at 241, n. 182.

⁵⁶ Article 740 Code de procédure civile. Recited from Hanotiau, *supra* note 26, at 241, n. 183.

⁵⁷ Article 190 Code de procédure civile.

⁵⁸ Article 3 of the law on arbitration, April 7, 1998. Recited from Hanotiau, *supra*, 241, n. 184.

⁵⁹ Article 10 of the law on arbitration, 1996. Recited from Hanotiau, *supra* note 26, at 241, n. 185.

⁶⁰ Article 6 du décret présidentiel no. 22-1992 adoptant la loi sur l'arbitrage.

⁶¹ P. Level, *L'arbitrabilité*, REV. ARB. 213 (1992).

safeguards as are necessary **in the public interest**.

The standard of “public interest” or “public order” often appears with an “exclusion” method. That is, “public interest” or “public order” is not a “positive standard” to establish the concept of “arbitrability,” instead it is a “negative standard” to exclude the cases of “in arbitrability”. Take the legislation of France, for example: it exemplifies some of the matters interdicted such as questions of State and the capacity of persons, and divorce and the separation of body and corpse and also provides general principles such as **“in all the cases involving public order”**. And thus, the exemplified interdicted matters can be seen as exemplary of the “cases involving public order”.

However, public interest or public order is not an idea exclusive to public law. Instead, it plays a very important rule in many legal discussions. Plus, no explicit definitions of these terms are presented in any law. Therefore, scholars must attempt to define a more concrete and specified concept of “public interest” and “public order”. However, this attempt may turn out to be in vain because of its uncertainty. That is, the goal in each law is different. Thence, the public interest in different fields will lead to different explications.

However, as a preliminary matter, on the issue of arbitrability, we often see two different but similar concepts appear in the literature. One is “public policy” (or public order); the other is “public interest”. We are very curious about whether they are different.

According to Luttrell, “public policy can be defined as the set principles that protect the interests of a community.”⁶² Based on this definition, we can observe that “public policy” (public order) and “public interest” are two different sides of the same coin. In other words, “public policy” (public order) is the means, and “public interest” is the “target”. The existence of “public policy” aims to protect “public interest”.

In addition, common law countries tend to use “public policy”, and the civil law countries “public order”. Generally speaking, the term “public order” is broader than “public policy”⁶³. The New York Convention uses the term “public policy”. Furthermore, civil law countries tend to use “public order”; and common law countries “public interest”. In this thesis, to facilitate explanation, we use “public order”. But if we want to emphasize the concept of “interest”, we would

⁶² SAM LUTTRELL, BIAS CHALLENGES IN INTERNATIONAL COMMERCIAL ARBITRATION, 12 (2008).

⁶³ See Chia-hui Chu(朱家惠), A Study on the Recognition and Enforcement of Foreign Arbitral Awards from the Development and Practice of the New York Convention(從紐約公約之發展與實踐論外國仲裁判斷之承認與執行), p.162 (Master's thesis in Soochow University in Taiwan, 2006).

use “public interest” to compare with “private interest”.

Therefore, we now attempt to define “public order” in public law, we examine the functions of the concept and whether there are limitations to the concept of public order in public law.

It is very difficult to define the concept of “public order”, and impossible to have an absolutely clear definition of this concept, but we can try to draw an outline about the concept of public order.

The most important thing is to ask, about public order “whose interest does it protect?” That is, we should regard “whose interest” as the “public” interest. Conceptually, public interest must be the assemblage of private interests, but what is the range of the assemblage is a question worthy of discussion. In this regard, the scholar Virginia Held offers a special and helpful explanation, classifying “public interest” into three categories. According to Held’s classification, we can quote three kinds of theories to explain the public interest. Or we can say that she has observed “public interest” from three angles.

The first is “preponderance theory”. According to this theory, the public interest means the predominant interest in the community or among the citizens. We want to add that this “predominant interest” does not necessarily accord with the interest of all members of the community. Besides, this theory has considered that public interest is “the sum of individual interests.” Thence, it has adopted the idea of “majority” or “predominance” referring to the “predominance of force” or the “predominance of opinion”, or the “predominance of utility or preference of members”⁶⁴.

This theory is the one by which the standard can be decided easily. Besides, we can think of it as a “concrete” criterion. Because in modern society, it is very difficult to satisfy everyone’s expectations, this theory can be applied easily and it is the one nearest to the concept of “democracy”

However, as this theory is based on the majority or predominance there is some danger and we should pay attention to prevent unwanted consequences. The majority or predominant interest does not necessarily signify the correct values. Plus, upholding the interests of the majority may harm the interests of minority. Furthermore, the infraction of the interest of the minority will result from the danger of violence of by the majority. And finally, this theory risks falling

⁶⁴ Kim Yoo Hwan, *The Anglo-American Concept of Public Interest and its Legal Argumentation: Paradigm Shift and Confrontation of Administrative Law*, 9 SEOUL LAW JOURNAL 55 (The Law Research Institute, Seoul National University) (2006). Recited from Seong Wook Heo, *The Concept of Public Interest Demonstrated in Korean Court Precedents*, 6 JOURNAL OF KOREAN LAW 95 (2006).

into the logic of economic analysis, and we would doubt if justice can best be analyzed by economic principles.

The second theory is the “common interest theory”, that only the common interest of all the members of society can be regarded as the public interest. This concept is without doubt the simplest concept of public interest, but according to this theory, there is no possibility of conflicts between public interest and private interest. Plus, in modern society, it is very difficult to find a value that is common to all the members of society, to the extent that one could say that the “public interest” in this theory does not exist and cannot be attained in our modern complex and diverse society.

The third theory is “unitary theory”. This asserts a “frank normative position” for the public interest. This concept is the most abstract. It considers that claims about the public interest would be as valid as moral claims. Such claims should be capable of being judged in terms of a unitary and coherent system of values⁶⁵. Thus, in this theory, the “public interest” is a moral concept.

In practice, it is the judges who decide the public interest, however, we regard the first theory as the more easily accepted and applied.

And as we all know very well, modern society is so complex that not every citizen can give their opinions and participate in the decision-making process directly. Thus, the system of delegation of power and election is the way to present the majority of individual interests. People delegate their right to their representatives to participate the procedure. And this delegation is by voting and the democratic system. And thus, the law made by legislators is the basic form of majority interest.

Besides, this concept is in keeping with the explanation above. Since the law is the basic form of public order, the examination of “public order” is like the examination of “legality”. And without doubt, this examination is the “objective function” of the administrative litigation system.

As we said above, the meaning and role of public order in public law have not been satisfactorily discussed and illustrated. However, public order functioned as a social and national axiom on public law⁶⁶. The discussions about public order always persist.

In fact, since it is hard and almost impossible to define “public order”, we

⁶⁵ VIRGINIA HELD, *THE PUBLIC INTEREST AND INDIVIDUAL INTEREST*, 3 (1970). Recited from Wook Heo, *supra* note 64, n. 5.

⁶⁶ Wook Heo, *supra* note 64.

would change our angle of observation. Hence we now turn to analyze the functions of “public order.”

Roughly, the term “public order” is often used as a criterion to determine the legitimacy or legality of public intervention in the private sector. In other words, “public order” is like a boundary around administrative authorities’ activities. Thus, it is a line differentiating “public intervention” and “private sphere.” Whatever is outside the scope of public order belongs to the private sector.

The usual flow of reasoning is as follows: if it is determined that there is sufficient public order concern for public intervention to occur, then that intervention is legitimized even though some sacrifice of private right accompanies the public procedure⁶⁷. This can be termed the “legitimation function” of the concept of public order. It is the first function of the concept of public order.

Additionally, in the field of public law, whether in administrative law or constitutional law, the idea of “public order” is often used as an important criterion to decide if some concrete administrative action is illegal or inappropriate, and even if certain administrative action is legal, whether the citizens have the right to ask for revocation or compensation. Regarding arbitration in administrative litigation, it would also have two important functions and we can see it in two levels. The first level happens in the discussion on “arbitrability”, and the other level is in the recognition or enforcement of arbitration award.

In the first level, the legislation in France is a good example. Article 2060, paragraph 1 of the Civil Code (law reform of July 5, 1972), provides the expression, “matières qui intéressent l’ordre public” to express arbitrability.

Why is it that the “public order” can be a standard to exclude the competence of arbitration in administrative litigation? According to Redfern and Hunter:

The concept of arbitrability, properly so called, relates to public policy limitations upon arbitration as a method of settling disputes. Each State may decide, in accordance with its own economic and social policy, which matters may be settled by arbitration and which may not. In international cases, arbitrability involves balancing of competing policy considerations. The legislators and courts in each country must balance the importance of

⁶⁷ *Ibid.*.

reserving matters of public interest (such as human rights or criminal law issues) to the courts against the public interest in the encouragement of arbitration in commercial matters.⁶⁸

Thus, “public order” can be used by legislators to define the line between jurisdiction and other alternative dispute resolution methods.

In addition, Spelliscy noted that “there were areas where the interests of the general public were so intricately interwoven in a dispute that this essentially private form of dispute settlement was considered inappropriate”⁶⁹.

The reason in continental public law to explicate this issue is that only the public authorities or administrative authorities have the power to exercise public authorities. Besides, as for jurisdiction, only state tribunals may nullify acts of government. Traditionally, in continental public law, if we observe this question with an institutional perspective, we can say that it is about the function and legal position of state tribunals. From the institutional perspective, the state tribunal is one part of the whole complex system of legal review, balances of public authority between constitutional agencies, and guarantees of independence and human rights. In this complex system, the state tribunal stands in the position of having a monopoly of legal review.

Besides, as discussed above, in practice, every form of administrative litigation should have subjective and objective goals at the same time. And when a person brings a lawsuit against the administrative agency in his or her self-interest, the judges must not only review the administrative action challenged in the case, but also in the situation that the judges consider illegal. The judges should deter future illegal administrative actions that could possibly affect other citizens and improve the general quality of administrative actions. Thus, the consideration of “objective” goal should be the important criterion to decide whether a concrete dispute can be submitted to arbitration.

According to the doctrine in France, the principle of interdiction on public legal persons submitting to arbitration is also justified by the claim that the administrative judges have more respect for the public order⁷⁰. This is one of the

⁶⁸ See AL-AN REDFIERN & MARTIN HUNTER, INTERNATIONAL COMMERCIAL ARBITRATION 137 (2ND.ed, 1991).

⁶⁹ Shane Spelliscy, *Burning the Idols of Non-Arbitrability: Arbitrating Administrative Law Disputes with Foreign Investors*, 12, ARIA (AMERICAN REVIEW OF INTERNATIONAL ARBITRATION). 95 (2001), cited from SANTIAGO MONTT, STATE LIABILITY IN INVESTMENT TREATY ARBITRATION, GLOBAL CONSTITUTIONAL AND ADMINISTRATIVE LAW IN THE BIT GENERATION 139 (2009).

⁷⁰ JOSEPH KAMGA, L'ARBITRAGE EN MATIÈRE ADMINISTRATIVE 19 (2012).

important reasons to explain that the administrative judges are more eligible or have the competence to examine the administrative litigations.

Regarding the arbitrability, "public order" is about the judicial review of arbitration awards. The concept of public order also has an important role in the "recognition" and "enforcement" of arbitration awards, especially for international arbitration awards. In the following paragraph, we want to analyze the function of public order in judicial review, and the inspiration is from the doctrine of "democratic participation". At the level of judicial review, the main function of the concept of "public order" is to prevent an arbitration award from injuring the public interest or violating public order. However, this resembles the issue that we have discussed in the definition of public order: it has the value of philosophy. More precisely, the word "public" signifies "how many people's interests?" If we think that the function of "public interest" is a "contested arena"⁷¹ to form the context for debate, we can expect to find this idea at the heart of a liberal-democratic system⁷². However, if we define the public interest as the "many people's interests," there is a troublesome question. This concept of "public interest" will be weakened because the standard of "public" will easily amount to a formal idea like "head-counting." And all legal concepts face a predicament when they use counting as a definition, because counting is not a precise way, any numerical analysis would have its boundary. If we only add up the sum of individual interests to be the "public interest" without thinking of the guiding principles of every legal concept, we cannot put a boundary around the center of every legal item. For example, how many people's agreement is enough: 500 persons? 5000 persons? Or more? There is always another extension for the concrete amount.

Thus, at this level, the important matter is not to decide that how many persons' interests constitutes the public interest. Instead, the "majority" opinion has more functions in the definition of public order. In addition, the majority opinion also means the debate of opinions or meaningful deliberation. In this context, the public order not only means the opinions of the majority but it also signifies the debate of citizens. It means furthermore those opinions that have undergone sufficient debate. Therefore, as for the second function, we can realize "public order" as the democratic communication of citizens.

What then is the relation between judicial review and the democratic

⁷¹ MIKE FEINTUCK, *THE PUBLIC INTEREST IN REGULATION* 28 (2004). Recited from Wook Heo, *supra*.

⁷² *Ibid.* 28.

communication of citizens? It means that in the judicial review of an arbitration award, the judges should take into consideration the communication of all the contesting parties in the arbitration process. Thus, besides the question whether an arbitration award would injure the public interest, the judge should pay attention to the hearing procedure. Since the arbitration process is often held *in camera*, preventing illegal and unfair procedures is also a topic that judges should pay attention to.

In the phase of judicial review, the public order concern has one more function: to influence the effect of an arbitration award.

More precisely, the legal effect of the arbitration award is “relative” not “absolute”. For example, a public enterprise in Taiwan and a private enterprise in Canada conclude an international contract, a dispute arises from the contract, and the contracting parties submit their dispute to arbitration. Supposing the arbitral proceedings took place in Belgium and both the parties have money deposited in Swiss banks. Therefore, the law of the place of the arbitration would be that of Belgium, and the law of the place of execution would be Swiss. In this hypothetical case, the arbitration award is in accordance with international public policy, and in accordance with the law and the international public policy of the place of arbitration (Belgium), but infringes the law or international public policy of the country of execution (Swiss). In this situation, a Swiss court can reject the execution of the arbitration award. In contrast, if the arbitration award is also in accordance with the law in another country, and both the parties have funds in such a country, for example, Luxembourg, the parties can choose to execute the award in Luxembourg, and a Luxembourg court can admit the validity of the arbitration award and acknowledge the execution. Thus, the effect of an arbitration award is relative, and it depends on different legal systems and different laws.

In addition, we can think of some cases representing “objective arbitrability.” Historically, the mere allegation of bribery or other illegal activities associated with a dispute was sufficient to impact arbitration tribunals and to render the dispute inarbitrable. In practice, arbitral tribunals have often had to consider cases involving corruption. A famous award which has often been commented on was rendered in Paris in 1963 by Judge Gunnar Lagergren in ICC(The International Court of Arbitration of International Chamber of Commerce, hereafter called ICC) case no. 1110. The case involved an agreement entered into in 1959 between a public undertaking and an Argentinian businessman for the

payment to the businessman of a 10% commission for an energy project which also covered the sale of equipment by the same undertaking in Argentina in 1958 for a similar project. The judge observed that the commissions to be paid involved enormous amounts of money, and continued:

[A]lthough these commissions were not to be used exclusively for bribes, a very substantial part of them must have been intended for such use. Whether one is taking the point of view of good government or that of commercial ethics it is impossible to close one's eyes to the probable destination of amounts of this magnitude, and to the destructive effect thereof on the business pattern with consequent impairment of industrial progress. Such corruption is an international evil; it is contrary to good morals and to an international public policy common to the community of nations.

Then, after having verified that no contesting party had been enabled "to reap the fruits of his own dishonest conduct by enriching himself at the expense of the other," Judge Lagergren concluded as follows:

After weighing all the evidence I am convinced that a case such as this, involving such gross violation of good morals and international public policy, can have no countenance in any court either in the Argentine or in France, or, for that matter, in any other civilized country, nor in any arbitral tribunal. Thus, jurisdiction must be declined in this case. It follows from the foregoing, that in concluding that I have no jurisdiction, guidance has been sought from general principles denying arbitrators to entertain disputes of this nature rather than from any national rules on arbitrability. Parties who ally themselves in an enterprise of the present nature must realize that they have forfeited any right to ask for assistance of the machinery of justice (national courts or arbitral tribunals) in settling their disputes.⁷³

In short, Judge Lagergren decided that any dispute in which bribery was

⁷³ See the award in ARBITRATION INTERNATIONAL 277[1994], with a note by Dr. J. Gillis Wetter, *Issues Of Corruption Before International Arbitral Tribunals: The Authentic Text And True Meaning Of Judge Gunnar Lagergren'S 1963 Award* IN ICC CASE NO.1110. The award was first made publicly available by a summary in JULIAN D.M. LES, *APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION* 553-555, 574-575 (1978). Recited in Mistelis & Brekoulakis 4, *supra* note 14.

involved would be exempt from the jurisdiction of international arbitration tribunals.

Thus, in the phase of judicial review, judges can also deny the effect of an arbitration award on the grounds of “public order.”

3. LIMIT IN BELGIUM:MIXED STANDARDS

It is worthy of notice that the legislation of Belgium combines the first and second categories of legislation outlined above. Paragraph 1 of Article 1676 of the Judicial Code of Arbitration (Code Judiciaire L'arbitrage⁷⁴) provides that: “Any dispute of a financial nature may be subject to arbitration.” Here it has obviously adopted the standard of the first category. But paragraph 2 of the same article provides that: “Cases of a non-financial nature on which it is permissible to compromise can also be subject to arbitration.”

Following paragraph 2, paragraph 3 proceeds to emphasize the idea: “Anyone who has the ability or authority to compromise may enter into an arbitration agreement.” This paragraph 3 is the most interesting provision in the Belgian legislation as it continues:

Without prejudice to specific laws, legal persons under public law can conclude an arbitration agreement only when its object is to settle disputes relative to an agreement ... In addition, legal persons under public law may enter into an arbitration agreement on all specific matters by law or by royal order deliberated in the Council of Ministers. And this order can also set the conditions and rules to be respected relative to the conclusion of the agreement.

In conclusion, the legislation of Belgium has its own specific traits.

4. BRIEF CONCLUSION

The discussion above is just a simple introduction and classification. Briefly, in conclusion, in this category the legislation has adopted relatively vague and

⁷⁴ Available at:

http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=1967101006&table_name=loi, last visited 11 August 2013.

uncertain legal ideas to define arbitrability. Regarding vague ideas such as “the authority to dispose”, “the ability or authority to compromise”, or even “the public interest” and “public order”, the relation between them is not mutually exclusive. Instead, they often exist mutually. Thus, one vague idea is added to another vague idea which leads to more and more difficulties for doctrine and jurisprudence. What is the “authority to dispose”? The answer must be referred to the “public interest”. And in contrast, how to define “public interest”? It should refer to “the authority to dispose”. And thus, the relation is a little like the famous question in philosophy of the chicken and the egg.

Thus, we can say that today arbitration in public law is bathed in a vague light between prohibition, exceptions and proliferation of uncertain adaptations of rules originally derived from private law.

TITLE II: COMPARISON BETWEEN SYSTEMS

To observe arbitration in public law, we need to compare arbitration with different systems, such as administrative litigation and civil litigation. First, we will compare arbitration with administrative litigation system (CHAPTER I: ADMINISTRATIVE LITIGATION SYSTEM V.S ARBITRATION) and then we will compare administrative litigation system with civil litigation system (CHAPTER II: CIVIL LITIGATION V.S ADMINISTRATIVE LITIGATION SYSTEM).

CHAPTER I: ADMINISTRATIVE LITIGATION SYSTEM V.S ARBITRATION

We want to at first introduce the fonctions of administrative litigation (SECTION I: ADMINISTRATIVE LITIGATION SYSTEM HAS BOTH AN OBJECTIVE AND A SUBJECTIVE FUNCTION). And then we want to observe the fonctions of arbitration system (SECTION II: ARBITRATION HAS ONLY SUBJECTIVE FUNCTION).

SECTION I: ADMINISTRATIVE LITIGATION SYSTEM HAS BOTH AN

OBJECTIVE AND A SUBJECTIVE FUNCTION

As we said above, the arbitrability of administrative disputes would have an influence on the distribution of cases between the administrative litigation

system and arbitration. Thus, the relationship between them is an issue worthy of discussion. In this subsection, we will compare the different functions of administrative litigation and arbitration.

As for the functions of administrative litigation, many are mentioned in the literature. One idea in particular concerns the subject of this thesis: that the functions of administrative litigation are twofold: subjective and objective. In other words, cases in administrative litigation can be classified as subjective and objective cases.

We want to at first emphasize that the administrative litigation system has both an objective and a subjective function.(1. SUBJECTIVE AND OBJECTIVE FUNCTIONS OF ADMINISTRATIVE LITIGATION SYSTEM) Secondly, we want to illustrate public interest litigation as a topic to explain the relationship between public interest litigation and the protection of human rights (2. PUBLIC INTEREST LITIGATION AND THE PROTECTION OF RIGHTS).

1. SUBJECTIVE AND OBJECTIVE FUNCTIONS OF ADMINISTRATIVE

LITIGATION SYSTEM

Generally speaking, the main purpose of a subjective claim is to protect individuals' rights or interests and furthermore to provide remedies for the individuals harmed. The main purpose of objective claims is to secure the legality of administrative activities and to assert the "total" legal order. That is, for an objective case, the function of administrative litigation is to secure that administrative activities will be performed legally and promote the public interest. In theory, we can distinguish the types of administrative litigation into different types of case. However, in practice, every form of administrative litigation contributes to subjective and objective targets at the same time. For example, when a citizen brings a claim against the administrative agency for his or her self-interest or private interest, the administrative judges should not only review the legality of the questioned activity but also examine the objective legal order. And the decision of the administrative judges should have an influence upon future administrative decisionmaking by the administrative agency. Thence, we can say that these two different functions of administrative litigation are two sides of the same coin.

Hence, in this sub-section, we want to realize the different functions of administrative litigation. First, we will analyze the subjective functions of administrative litigations, and, second, the objective functions.

The subjective function of administrative litigation is to protect the individual's rights. If an individual has been harmed, he would have a right to seek the agency responsible and claim compensation for his damage. Both public law and private law have this function. In private law, this function is to protect the private right from encroachment by another person. In public law, the function would be to protect the individual from encroachment by the State and other administrative agencies.

Without doubt, the subjective function is the basic function of the administrative litigation system. But it is worth noticing that many countries with a civil law legal system have an independent administrative law procedure. In contrast, many common law system countries have no independent administrative law, nor administrative litigation procedure. Such legal systems tend to focus on the reduction of administrative disputes, seeking to construct an ideal administrative process, such as an open hearing. But most civil law legal system countries, such as Taiwan, Germany and France, beside the reduction of administrative disputes, also focus on the resolution of administrative disputes. There is another independent "administrative litigation law".

As far as the subjective function is concerned, the issue is often about a certain claim, and such a claim often comes from certain subjective public right. Thus, if we focus the function of administrative litigation system on such a point, it is like the extension of private litigation. The difference is that in private litigation, both the contesting parties are private persons and their dispute comes from private contract or tort, but in administrative litigation, one of the contesting parties is the administrative agency.

In this thesis, our emphasis is on the objective function of the administrative litigation system. Besides resolving administrative law cases, and offering the parties remedies for their damages, the target of administrative litigation is also to ensure the administrative authority obeys the law and its imperative rules to achieve legal administrative actions.

Thus, the objective function of the administrative litigation system is the examination of the legality of administrative actions. At this level, the job for judges has largely passed the resolution of a particular dispute, it already concerns the "total" administration system. The interest that the judges should

take into consideration is not only the individual interest of the plaintiff but also the public, total, social interest. It aims to achieve social completeness.

In practice, for every administrative litigation case, the administrative judge must not only examine the claim of plaintiff but also review the legality of an administrative action, and thus, in fact, we can see the subjective and objective functions appear together in administrative litigation. The only difference is that the importance of particular systems or public law issues varies.

The historical development of the administrative litigation system was from the objective function. In the eighteenth and nineteenth centuries the function of the administrative litigation system is apt to be described as “objective”. In that epoch, administrative litigation was a way for the upper echelons to supervise the lower administration by admitting the right of citizens to bring a lawsuit against the administration. The target of such a lawsuit was to ensure the achievement of “policy” rather than the protection of individual rights. Decisions rendered by the first administration courts, could be appealed against by the citizens. The hierarchical authorities could ensure the imperative effect of the court’s decision by such procedure of appeal. In contrast with the present, the administrative court was not independent from the government. And thus, in brief, in the beginning of the administrative litigation system, its major function was for the upper echelons of government to fulfill the needs of governing.

As the independence of administrative courts increased and the examination of the legality of administrative actions advanced, the administrative litigation system gradually developed its subjective function to protect citizens from the abuse of power by government. Now the administrative court is not only the tool of the upper echelons to supervise the administration, but also a system to protect individuals’ rights and to resolve disputes⁷⁵.

Generally speaking, in the continental legal system, for example, in Germany, administrative litigation focuses more on the subjective function, while in France administrative litigation focuses more on the objective function.

After examining both the subjective and objective functions of the administrative litigation system, we want to analyze and observe the relationship between them. Public interest litigation is the topic that explains such a difference, especially in the relationship between public interest litigation and

⁷⁵ Jean-Bernard Auby, *About the Inquisitorial Character of Administrative Litigation Procedure in French Law*, in THE NATURE OF INQUISITORIAL PROCESS IN ADMINISTRATIVE REGIMES, 121, 113-23 (2012)

the protection of human rights.

2. PUBLIC INTEREST LITIGATION AND THE PROTECTION OF RIGHTS

Public interest litigation might be traced back to the Roman Empire, from the etymological perspective. It was relative to private litigations. According to the formula procedure of Roman law, private litigation (or actions *privatae*) aimed to protect individual rights and it could only be undertaken by a certain individual, often by the direct or indirect victims. Whereas the public interest litigations (or actions *publicae populares*) aimed to safeguard the public interest of the whole society and thus could be undertaken by any citizen unless stipulated otherwise by law. Public interest litigation is not the unique product of the continental legal system, it also exists in common law systems.

There remains another question to be resolved. That is, for what does such a distinction have a meaning? As for subjective and objective functions, the relationship between them will affect the nature and the span of administrative litigation. Besides, it will decide the force of judicial intervention about the execution of administrative power and will clearly define the relationship between administrative power and judicial power.

In addition, because of the reinforcement of functions of administrative litigation and the citizens' expectations of government, the types of administrative litigation are gradually increasing. Especially in modern society, the issue of environmental protection is becoming ever more important, for example. Traditionally speaking, we often define the goal of litigation to appeal or revoke a decision as the protection of individuals' legal rights or only the legal "interest". But in modern society, this traditional thinking may face a new challenge. This traditional thinking may be a barrier to judicial review in cases where the private interest damaged or individual's interest aggrieved is not yet recognized as a legal right. In Taiwan, for example, if an enterprise plans to establish an industrial plant somewhere, those citizens living nearby will bring a lawsuit for revocation against the administrative agency responsible for the administrative decision. They will stand for the point of view that an administrative decision should not ignore "the participation of the citizens". In such a case, we cannot say that the function of administrative litigation seeks only the protection of an individual's legal right. Thus, the traditional distinction about the "legal right", "legal interest" and "reflection interests" is a fluid concept.

The mixed interest, as in the example of environmental issues, is without doubt a good example. Thus, administrative court aims not only to protect the legal right of the citizens (*subjective function*), but also legality of all administrative actions (*objective function*).

Besides, the explanation of administrative court about the “legal right” is a very important point for observing the relationship between the subjective and objective functions of the administrative litigations. In other words, for the protection of an individual’s rights, the administrative court can enlarge the span of its judicial role by defining the “legal right” more broadly. In this regard, we can find that the relationship between the subjective and objective functions of administrative litigation is not contradictory but complementary. More precisely, when the administrative court expands the meaning of “legal right,” even broadening the possibility of “legal interest”, it signifies that the purview of protection of an individual’s legal right becomes greater.

However, judicial examination is not simply “subjective” or simply “objective”. The core function of the administrative litigation system is to review the legality of administrative actions. Since every authority should have limitations, administrative authority cannot be out of control. The administrative litigation system exists for such control and it should have the objective function to ensure that all the administrative actions are performed in the frame of legality.

In contrast, judicial examination cannot have only the objective function. To resolve the issue in a particular dispute is also the flesh of the administrative litigation system, and it should be regarded as the essential part. Although in the beginning citizens could bring a lawsuit against an administrative authority solely for the benefit of the upper echelons of the government hierarchy, the lawsuit also had a warning effect. It signified that the administrative authority had perhaps erred.

Therefore, in fact, the administrative litigation system has both an objective and a subjective function, but the difference is that the balance between them varies with different countries, particular systems, and specific issues.

SECTION II: ARBITRATION HAS ONLY SUBJECTIVE FUNCTION

Arbitration is one form of alternative dispute resolution (ADR), a legal technique for the resolution of disputes outside the courts. There also are various

other types of alternative dispute resolution, such as mini-trials, conciliation, and mediation that, depending on the legal system in question, have been properly implemented in civil, family and even criminal matters. Alternative dispute resolution is playing an increasingly important role in many legal domains. Particularly in the international commercial field, arbitration is a leading method for resolving disputes arising from international commercial agreements and other international relationships.

Turning now to the functions of arbitration, we have observed that the functions of arbitration will have an influence on the vexed question of arbitrability. We think that arbitration has both the feature of “private contract” and “allocation of jurisdiction”. Here, we want to observe the functions in two sections introducing its feature of an agreement (1.FIRST OBSERVATION PERSPECTIVE:ARBITRATION IS AN AGREEMENT) and of a “renunciation” of rights to initiate the litigation procedure (2.SECOND OBSERVATION PERSPECTIVE:ARBITRATION HAS BOTH THE EFFECT OF DEPRIVING THE PARTIES FROM INITIATING THE LITIGATION PROCEDURE).

1.FIRST OBSERVATION PERSPECTIVE:ARBITRATION IS AN AGREEMENT

Arbitration has long been regarded as a “private” or “extra-judicial” method of resolving disputes. The principal function of arbitration, without doubt, is to resolve disputes. Arbitration agreement is **a contract** and the contesting parties have **the obligation to submit their dispute not into national courts but into arbitral tribunal**. An arbitration award is binding on the contesting parties and, in general, has the same effect as a final judgment of the national court.

The contractual character means that the arbitration procedure comes from the consensus of the contesting parties. In the field of arbitration law, it is called as “arbitration agreement”. The jurisdiction of arbitrators or an arbitral tribunal can be established only by a valid agreement of the parties. Thus, without the arbitration agreement, the arbitrators or the arbitral tribunal could not obtain jurisdiction. Depending to the arbitration agreement, the contesting parties could have many dimensions of freedom. First, they can select and appoint the arbitrators or design the arbitral tribunal. Second, they can choose the place of arbitration. In the field of arbitration law, this is called the “seat of arbitration” (*siège d'arbitrage*). Third, they can choose the law or rules to be applied to the subject-matter.

However, if the arbitration had only a contractual character, it would not be enough to resolve a dispute. Thus, the second character occurs; the effect of depriving the parties from initiating the litigation procedure. This imperative effect of an arbitration clause gives the arbitration the character of jurisdiction.

2. SECOND OBSERVATION PERSPECTIVE: ARBITRATION HAS BOTH THE

EFFECT OF DEPRIVING THE PARTIES FROM INITIATING THE

LITIGATION PROCEDURE AND OF ENFORCEMENT

This observation perspective can be divided into two sections. One addresses an arbitration agreement has the effect of depriving the parties from initiating the litigation procedure (A. ARBITRATION AGREEMENT HAS THE EFFECT OF DEPRIVING THE PARTIES FROM INITIATING THE LITIGATION PROCEDURE). The other one addresses an arbitration award has the effect of enforcement (B. ARBITRATION AWARD HAS THE EFFECT OF ENFORCEMENT).

A. ARBITRATION AGREEMENT HAS THE EFFECT OF DEPRIVING THE

PARTIES FROM INITIATING THE LITIGATION PROCEDURE

We want observe this phenomenon from a different perspective. The interesting question of why contesting parties have the right to refer their disputes to third parties other than their national judges is impossible to explain only by “freedom of contract.” Other legal bases that are the source of this right should be discussed.

Contesting parties usually decide to submit their disputes to a binding resolution by one or more arbitrators who will apply adjudicatory procedures and who are selected by or on behalf of the parties by including a provision for the arbitration of future disputes in their contract. In fact, the practice of international arbitration has developed extensively enough to allow parties from different legal and cultural backgrounds to resolve their disputes without the

formalities of their respective legal systems.

For example, according to Article 2, paragraph 3 of the New York Convention:

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

This means that if the parties have chosen to resolve their dispute by arbitration, they must obey their agreement and may not submit their dispute to a court at will.

Thus, with the arbitration agreement, the parties in dispute “must” submit their dispute to arbitration. In such a situation, the arbitration agreement has the legal effect of excluding the jurisdiction provided by law.

This situation must have resulted from the practical needs of the contesting parties.

First, if we compare arbitration to litigation or mediation before a judge, we will find that **its flexibility and the technical expertise** of arbitrators are two of its advantages. In the resolution of disputes involving international commercial contracts, flexibility is particularly important. In practice, arbitration can be used by commercial companies to resolve their complex commercial disputes.

In addition to the flexibility of arbitration, the technical expertise of arbitrators is an important advantage. In the legal system, judges often have completed their legal education, but they frequently do not have the extensive career experience needed to deal with commercial disputes. In addition, in some disputes involving engineering, judges do not have adequate expertise.

Further, **celerity** is an advantage usually attributed to the arbitration process. However, celerity is a subjective concept. How do we decide whether arbitration is faster than the litigation system? It is not easy to evaluate this with objective numbers. It may only be relatively expeditious. However, conventionally, parties who are allowed to arbitrate usually are offered the opportunity to ask the arbitrator or arbitrators selected to make their decision or award within a time period acceptable to the parties.

Particularly in the French and Taiwanese legal systems, **the “efficiency of dispute resolution”** leaves much to be desired. The litigation systems in France

and Taiwan often are criticized as a result of the lengthiness and inefficiency of their processes. People's awareness of their rights is becoming increasingly important. There are more administrative disputes in the courts. The increasing number of administrative disputes is coming into the courts in a grand influx, creating a heavy burden for judges. Therefore, it is one reason for arbitration law jurists to consider whether parties involved in administrative disputes should have recourse to arbitration. The hope is that arbitration can relieve crowded court dockets.

Conclusively, arbitration is regarded having the many advantages mentioned above, balancing the efficiency of dispute resolution, the maintenance of justice, and the protection the public order or public policy is still a thorny subject.

Finally, we want to link “the effect of depriving the parties from initiating the litigation procedure” with “the standard of arbitrability: authority to dispose”.

As we mentioned above (1.LIMIT BY “AUTHORITY TO DISPOSE”), many countries have taken the “authority to dispose” into consideration as one standard of arbitrability. This suggests that arbitration means the “renunciation” of right: if arbitrability is based on the authority to dispose, then it means the contesting parties must dispose of their right in the arbitration process. On this basis, arbitration would lead to tension between arbitration and jurisdiction.

However, the hypothesis that the arbitration is a “renunciation” of rights is not necessarily agreed by administrative law jurists.

Many jurists, however, consider that arbitrators are like judicial judges: they should also apply the public order criterion to make the arbitration award, and the violation of public order would also be subject to punishment⁷⁶.

In Belgium, the legislation does not provide for the role of public order in the arbitrability of administrative disputes, but in many special laws there are similar provisions⁷⁷. And thus, in practice in Belgium the arbitrators also play a role in examining public order in administrative disputes. And thus, according to the Belgian jurist Bernard Hanotiau, arbitration in Belgium has been considered as a rival, competitor, and a substitute for the national court. But in contemporary era, arbitration is considered amicable to national court. Thus, in Belgium, the simple fact of analogy between “private judge” and “arbitrators” is

⁷⁶ Hanotiau, *supra* note 26, at.100.

⁷⁷ For example, see the preamble of Article 13 and 69 of the law relative to labor contracts of July 3, 1978; regarding the concession of selling, see law of July 27, 1961; and on the condominium system, see OLIVIER CAPRASSE, *LES SOCIÉTÉS ET L'ARBITRAGE* 65-74 (2002). Recited from Hanotiau, *supra* note 26, at 241, n. 196.

not enough to deny the arbitrability of administrative litigation. And thus, arbitration in Belgium does not mean the “renunciation” of right.

B. ARBITRATION AWARD HAS THE EFFECT OF ENFORCEMENT

Regarding the character of jurisdiction, we can furthermore observe two aspects. First, **the arbitration award has been rendered by arbitrators or an arbitral tribunal, and the result is decided by arbitrators or an arbitral tribunal**. This is different from the other methods of alternative dispute resolution. For example, in the mediation system, the mediation plan is decided by the parties. The role of the mediator in mediation procedure is not to render a decision but to help the parties to achieve a mediation plan.

The second aspect to observe in **the nature of jurisdiction is its “finality”**. It means **the arbitration award can be enforced as judgments made by judges**. After the arbitration award has been rendered, the parties “must” obey the arbitration award and execute their obligation.

The finality of an arbitration award and the imperative effect of execution of the arbitration award can be considered as the two sides of the same coin.

SECTION III: CONCLUSION OF THIS CHAPTER

Having introduced and compared the different functions of administrative litigation system and arbitration system, we offer two main observations. One observation is that the arbitration system can replace the “subjective” function but cannot replace the “objective” function of administrative litigation system. (1. ARBITRATION SYSTEM CAN REPLACE THE “SUBJECTIVE” FUNCTION BUT CANNOT REPLACE THE “OBJECTIVE” FUNCTION OF ADMINISTRATIVE LITIGATION SYSTEM) The other observation is to link “objective function of administrative litigation system” with “often used standard of arbitrability: public order and authority to dispose”. (2. TO LINK “OBJECTIVE FUNCTION OF ADMINISTRATIVE LITIGATION SYSTEM” WITH “OFTEN USED STANDARD OF ARBITRABILITY: PUBLIC ORDER AND AUTHORITY TO DISPOSE”)

1. ARBITRATION SYSTEM CAN REPLACE THE “SUBJECTIVE” FUNCTION

BUT CANNOT REPLACE THE “OBJECTIVE ” FUNCTION OF

ADMINISTRATIVE LITIGATION SYSTEM

First, both of them have the function to resolve disputes, but this is only the “subjective” function of the administrative litigation system.

The administrative litigation system resolves disputes in many dimensions. It examines the legality of administrative actions, and it also resolves disputes arising from administrative contracts and the extra-contractual responsibility. As for the first dimension (legality of administrative actions), since it is more a feature of objective disputes, and then it is hard to break through the interdiction in doctrine or jurisprudence. But in the second and third dimension (disputes arising from administrative contracts and the extra-contractual responsibility), because they are about financial claims, different views are possible.

Thus, for example, in France, article 2061 of the French Civil Code (FCC) provides: “ Except where there are particular statutory provisions, an arbitration clause is valid in contracts concluded by reason of a professional activity.” Thus, it provides an open space of explanation. In France, some jurists think that Article 2061 of French Civil Code has arbitration possible in administrative litigations.⁷⁸

However, in France the Cour de Cassation clarified in its decision of 29 February 2012 that such “professional activity” means that both parties should be business professionals⁷⁹.

Applying the concept of literal interpretation, some administrative contracts would belong to the field of “contract concluded by reason of a professional activity”. Thus, the attempt to place some administrative contracts into the field of “professional activity” seems positive for the French supporters of arbitrability of administrative disputes.

In France, we can find some cases to indicate that not all administrative contracts are arbitrable. In the AREA case, in a decision of March 3, 1989, the *Conseil d'Etat* declared “inarbitrable” contracts concluded between two private

⁷⁸ See Yves Gaudemet, *Arbitrage et droit public*, DROIT ET PATRIMOINE 83, 86 (June 2002). Recited from Hanotiau, *supra* note 26, at 241, n. 701.

⁷⁹ Cass. Civ.1re, 29 Feb.2012. N° 11-12782. Mme Thomas ép. Lepage v Époux Chiron. And « Éclairages sur l'appréciation du critère de l'activité professionnelle de l'article 2061 du Code civil », note sous Cass. civ. 1re, 29 février 2012, *Revue de l'arbitrage*, 2012 n°2 p. 359.

persons but where the object of the contract was similar with the administrative contract.

Previously, French courts had held that the right to hear disputes arising from contracts for highway construction by the concession company belongs to the administrative judges. That is, the legal nature of such a contract is the administrative contract. In the AREA case, the *Conseil d'Etat* extended its position into all contracts of public works concluded by the concession holder for highway constructions. Referring to Article 2061 of the Civil Code, the *Conseil d'Etat* declared the arbitration clause null in the judgment with the term “if it is not provided by law”.

In conclusion, as for the first category of administrative litigation, because the “objective” character is more dense, arbitrators are regarded as lacking competence to examine the legality of administrative action. And for the second and third category, even though they are financial claims and apt to the subjective function, in jurisprudence they still face many difficulties. Besides, because the subjective and objective functions of the administrative litigation system are mixed and exist for all the administrative litigation cases, the two functions cannot be clearly separated.

An arbitration agree is made between “the parties” and the effect is also to deprive “the parties’ from initiating a litigation procedure. Thus, both the base and the effect are established on the parties’ willing or intervention. Consequently, arbitration mainly aims to replace the “subjective” function of the administrative litigation system.

Traditionally, arbitrators are not competent to appreciate the legality of the administrative action. That is, dispute about the legality of administrative action was for a long time regarded as an objective dispute which will exclude the possibility of arbitration. In the public field, arbitrators would not have jurisdiction about these disputes. Thus, the administrative judges’ task of objective examination cannot be substituted by arbitrators. In this dissertation below, we will give more examples to illustrate this point (such as in SECTION III: DISPUTES CONCERNING THE CONTENT OF CONTRACT).

2.TO LINK “OBJECTIVE FUNCTION OF ADMINISTRATIVE LITIGATION

SYSTEM” WITH “OFTEN USED STANDARD OF ARBITRABILITY: PUBLIC

ORDER AND AUTHORITY TO DISPOSE

As discussed above, many countries have adopted the standard of “possibility of disposition”, or “ability to dispose”. Here, we want to ponder if this standard is a mistake or is not concrete enough.

To make the idea more concrete, the jurist Pierre Level has tried to classify it. And according to his classification, there are some degrees of “in-disposability”. The first one is the totally and definitively “disposable” or “in-disposable” right, such as the capacity of person being definitively in-disposable. The second type is partially disposable, such as the pecuniary right arising from inheritance or the quantum of a pension. The third type is the right which is in-disposable for a future right but becomes disposable for an incurred right, such as the right arising from a labor contract⁸⁰.

The jurist Racine also emphasized that the reference to public order does not exclude disposability, a right might become “in-disposable” because of considerations of public order. Racine considered that the idea of “disposability” is not an independent concept. Instead, it depends on the idea of public order⁸¹. Thus, disposability is not a satisfactory standard.

Furthermore, the standard of disposability is easily replaced by another similar standard, whether a case is of a “heritage” (*cause de nature patrimoniale*) or pecuniary nature. As noted above, the Swiss and Germany legislation has adopted this standard.

In brief, since one of the functions of arbitration is to renounce the parties’ rights, therefore we consider that it is a reason to take disposability as the standard of arbitrability. However, after referring to the function of arbitration and administrative litigation system, we prefer that **the real convenient standard is the public order and the examination of “public order” should be in conformity with the “objective function” of administrative litigation.**

CHAPTER II: CIVIL LITIGATION V.S ADMINISTRATIVE LITIGATION SYSTEM

As for the comparison between administrative litigation and civil litigation,

⁸⁰ Level, *supra* 61, 222.

⁸¹ J.B. Racine, *L'ARBITRAGE COMMERCIAL INTERNATIONAL ET L'ORDRE PUBLIC*, 43 (1999). Recited from Hanotiau, *supra* note 23, at 25. n. 246.

in some common law countries, perhaps they apply the same legal principle. But in most continental law countries, indeed they have difference. Thus, in this part, we want to compare the difference between them.

First, we explore whether the procedures would seek different target. Second, we analyze the difference between them.

As discussed above, the task of administrative judges and the function of the administrative litigation system are not only to resolve disputes. They must not only “safeguard the protection of human rights” but also “ensure total administrative actions to be legal”.

The question that arises then is whether “justice” a relative or an absolute concept? More precisely, could the contesting parties choose to seek a particular “justice”?

First, we can say that “fact” can be observed in two perspectives. The first is “real fact”: the fact that happened in reality and thus we can call it “objective fact” which means the non-changeable fact. The other is “acceptable fact”: a fact that is accepted by the contesting parties. We can also call this “subjective fact” which means the changeable fact. This is only a conceptual distinction.

As with the idea of fact, justice has different meanings in different domains.

In the civil litigation system, most facts and rights may be variable and renounceable; it is the most efficient and reasonable result for the contesting parties. The “real fact” is not necessarily the best for them. Instead, the aim is to find “reasonable facts” meaning that the fact can be negotiated or conciliated.

For example, if a person has injured another in a motor vehicle accident, the victim wishes to seek for compensation. If the victim had paid 1,000 euros for medical expenses, and 500 euros to repair her own vehicle, it means the victim’s total damages will be 1,500 euros. For the victim, the ideal situation would be to receive 1,500 euros to remedy her all losses. We call the 1,500 euros “objective damage” or “objective profit”. And the fact that the victim suffered harm and paid 1,500 euros is the “objective fact”.

Civil responsibility is based on the default principle, however, and the existence of default must be proved by the plaintiff. Thus, the plaintiff has the responsibility to confirm the truth of the default or failure of the defendant’s behavior. This is often difficult: a victim may have to pay a great deal of money to gather the evidence and take the defendant to court. Although the successful plaintiff will also be entitled to an award of her legal costs against the defendant in addition to the award of damages, the plaintiff may still incur a lot of cost that

are not legally recoverable, such as the attorney's fees⁸². In this situation, the victim would be caught between a rock and a hard place. She must make a difficult choice. Even if the plaintiff in our hypothetical case wins the case, she can get 1,500 euros (objective profit) and her legal costs, but she has had to pay to get the matter to court. If the plaintiff paid 1,200 euros or 1,800 euros to make her case (not including her legal costs that can be legally recoverable), her gain would be 300 euros or even a further loss of 300 euros. Thus, the 300 euros or -300 euros would be the final profit for the plaintiff.

In contrast, if the plaintiff loses the case, her costs will greatly surpass the original losses (damage of objective profit and expense of proof). Thus, if the plaintiff chooses conciliation or mediation in the civil litigation system, she will not only save money, but also save time and expense for proof. For example, the plaintiff and the defendant may achieve a mediation plan, whereby the defendant offers 1,000 euros as remedy and the plaintiff gives up her claim. In such a situation, for the plaintiff, although she cannot get as much as the objective profit (1,500 euros), she can get her remedy faster, and she can save her legal costs, especially the costs of a court hearing. And thus, the 1,000 euros and its fact is not the "objective interest" or "objective fact" but it is indeed the fact most convenient for the contesting parties. And thus, we call the fact "subjective fact" because it is not the "objective fact" or "real fact", but it is the fact most acceptable for the contesting parties. Thus, in civil litigation process, the target is not to seek the real, objective fact, and efficiency must be taken into consideration. The contesting parties have the freedom to make different choices, and the result is also one that best suits the parties.

Conclusively, in the civil litigation process (or alternative dispute resolutions, such as mediation, conciliation or arbitration), the task of the judge (or mediators and arbitrators) and the function of civil litigation process is to look for what is **the most efficient result** for both contesting parties. The decision rendered by the judge is not necessarily the best and expected result. The role of the judge is to seek the most acceptable justice for them. Therefore, to resolve the civil litigation well becomes the most important function.

In contrast, in the administrative litigation system, most fact principally cannot vary and most rights are non-renounceable. We do not allow the phenomenon to happen. If the facts change, the legal relationship would change.

However, in some domains such as tax filed in Taiwan, many tax laws grant

⁸² In Taiwan, the attorney's fees are not legal costs recoverable from defendant.

tax authorities the ability to conclude a “conciliation contract” in which the administrative body and the citizens enter into a resolution regarding tax facts. Tax authorities can save calculation costs (otherwise, it must calculate the real tax-based facts in detail) and citizens possibly can reduce their tax burden (because, in a conciliation contract, tax authorities often will reduce the amount of taxes due in order to seek an agreement).

Both the civil litigation system and administrative litigation system seek the protection of rights and offer a way to get remedies. But the civil litigation system also prefers to seek efficiency while the administrative litigation system seeks the legality of administrative action. The essential and different bases would lead to different concepts in resolving disputes, and this is reflected in the process. **In the civil litigation system, most process is conducted by the contesting parties, and it has an adversarial character. In the administrative litigation system, it is conducted and controlled by the administrative judges. Thus, it has an inquisitorial character.**

In brief, because of the different functions of the administrative litigation and civil litigation systems, they seek different “justice”. In the civil litigation system, “subjective fact” or “subjective justice” is expected, while in the administrative litigation system, “objective fact” or “objective justice” is expected.

Table 1. Civil litigation and administrative litigation systems compared

	Civil litigation system	Administrative litigation system
Fact	Subjective	Objective
Justice	Variable	In-Variable
Process	Adversarial	Inquisitorial
Judge	Passive	Active

The difference between the two systems is exemplified by the issue of contract. Hence we now make a digression to compare private contracts and administrative contracts. Regarding the legal position in contract, as far as the administrative contract and the private contract are concerned, they both have the appearance of “contract”, but we question whether these two contracts have the same “essence”? That is to say, in the field of administrative contract, are the legal position and power between the parties the same? Is it possible to come to a balance between the State and a private person? Does the State have the “factual” dominant position?

In fact, the administrative authority has more resources than private persons. In the process of concluding a contract, the information, the capacity for bargaining, and competence is much different between them. And thus, in fact their position in contract is not in balance. However, in a private contract, usually the contracting parties are in balance. They have the same information and capacity to decide if they would conclude the contract and the way, form, and the context of the contract. They can thus apply the principle of “freedom of contract” in private law. In brief, in such different position in contract, the administrative contract should apply the different principle from private contract. (more details will be discussed in below 1.PREROGATIVES OF ADMINISTRATIONS IN CONTRACTS)

Beside the different positions of the contracting parties, administrative contracts are often characterized by continuity. Thus, administrative authorities have more capacity and experiences to deal with the conflicts arising from administrative contracts. And because of such continuity, the contracting private person is often willing to give up some of their rights in order to be successful at the next contracting opportunity. Thus, even if conflicts occur, the contracting private person has more worries and often cannot argue with the administrative authority. Thus, in administrative litigation procedure, the position between the administrative authority and private persons is also different.

When citizens decide to bring a lawsuit against an administrative authority, it signifies that the citizens consider that their rights have been violated by the administrative authority. Even in the administrative contract, the administrative authority has still enjoyed its dominant position against the citizens. Thus, in the administrative litigation system, if the administrative authority takes the benefit of its position of advantage one more time and makes citizens succumb and agree under unfair conditions, it would be probably be a “secondary injury” for the plaintiff. Thus, the administrative litigation system should apply different legal principles from the civil litigation system.

The freedom of the contesting parties in administrative litigation and civil litigation processes must be different to protect the citizens from pressure from the dominant position of administrative authorities.

In contrast, in the civil litigation system, conflicts usually arise from problems of private law, especially from private contracts. In addition, for the contracting parties, “the contract is their law”. Thus, in nature, the interest can be treated or disposed of by the parties with freedom. Especially in the civil

litigation process, there are many cases involving the issue of the contract. The parties have more freedom than in administrative litigation process. They can decide whether they will bring a lawsuit, and whether they will continue the lawsuit, of course, they can decide whether they will close the lawsuit.

Therefore, as for arbitrability in administrative litigation, we can observe from another angle that in the field of administrative law “what is the litigation subject to be negotiated by the parties?” And based on the above discussion, in the administrative litigation process, we expect that the administrative judges can play a role to control the balance between them, in contrast to the judge in the civil litigation process.

Table 2. Relations of parties in private contracts and administrative contracts compared

	Private contracts	Administrative contracts
Position of parties	Balanced	One party dominant
Freedom of parties	More freedom	Less freedom

TITLE III: COMPARASIONS BETWEEN FOUR COUNTRIES

To compare between four states on arbitration in administrative matters, in this thesis, we would divide into two main parts to discuss introducing at first the principle and secondly the exceptions.

Generally speaking, the arbitrability of disputes is not limited to private law. In many countries, including Germany, Switzerland, and Taiwan, it is established that arbitration can apply to claims derived from public law, and in particular, to rights conferred by contracts subject to administrative law. However, there also are different rules around the world.

We have discussed different positions from the perspective of comparative law (CHAPTER II: COMPARISON BETWEEN GENERAL PROVISIONS IN THE WORLD). However, that was only a brief discussion. In this section, we have chosen four countries to examine for an in-depth discussion.

French administrative law is called the “primogenitor” of administrative law. Arbitration in administrative litigation is a very important and interesting question in France. In discussing this question, it is impossible to ignore French law.

Secondly, Taiwan and China utilize the same language, but systematically, they have developed differently; for example, they have different political and legal systems. The powerful business capacity of Taiwan and China has resulted in an increasing number of financial contracts between them and other countries. Accordingly, international arbitration has become progressively more important for them. Questions of arbitration in administrative litigation will become more important in the future. Canada, because of its historical background, has a mixed legal system. It is interesting to observe developments regarding this issue.

Thus, we will analyze different dispositions regarding arbitrability in France, Taiwan, China, and Canada.

CHAPTER I: ARBITRATION IN ADMINISTRATIVE MATTERS IN FRANCE

SECTION I: IN PRINCIPLE: INTERDICTION

1. PRINCIPLE OF INTERDICTION OF ARBITRATION IN ADMINISTRATIVE

MATTERS

A. FOUNDATION OF INTERDICTION

I. CIVIL CODE

Aside from its historical elements, in France, there is, in fact, no express disposition relevant to the arbitration of administrative law. The principles underlying it are created by the interpretation of legal doctrine and jurisprudence. Up to the present time, it also has been a dominant principle. The principle of the “interdiction of a public legal official to engage in arbitration” applies to domestic arbitration. International arbitration has had its own course of development and we will discuss it hereinafter.

Based upon the combined interpretation of Article 83 and 1004 of the old Civil Procedural Code of France (hereinafter OFCCP, which will be addressed in the following paragraph), the entirety of legal doctrine and jurisprudence essentially have a coherent voice,⁸³ which asserts that, in France and Belgium, it is prohibited for territorial public collectivities (including the country, regions, provinces, and communes) and public establishments to become parties in an arbitral procedure.

This provision was introduced by the Law of July 5, 1972. Article 1004 of (the 1806 version) of the French Civil Procedure Code provided: “disputes subject to notification to Public Ministry cannot be referred to arbitration.” Article 83 of the same Code applied to “actions . . . concerning . . . state, public domain, local authorities and public entities referred to public prosecutor.” These two provisions were interpreted by the courts to mean that state and local authorities could not validly enter into arbitration agreements with respect to

⁸³ See VOY ALFRED BERNARD, *L'ARBITRAGE VOLONTAIRE EN DROIT PRIVÉ* 48 and 78 (LGDJ 1937); J.-M. Auby, *L'arbitrage en matière administrative*, A.J.D.A., 1955, I, 81.; G. Vedel, *Le problème de l'arbitrage entre gouvernements ou personnes de droit public et personnes de droit privé*, Rev. arb. 1961. 116; Fettweis & Arets, *L'ARBITRAGE ENTRE GOUVERNEMENTS OU PERSONNES DE DROIT PUBLIC ET PERSONNES DE DROIT PRIVÉ*, a Belgian report presented in the International Arbitration Congress in Paris on May 1961, 154 (2 RA 1961). All the information above is quoted in MAURICE-ANDRÉ FLAMME, 2 *TRAITÉ THÉORIQUE ET PRATIQUE DES MARCHÉS* 1004 (Etablissements Emile Bruylant, S.A., Bruxelles 1969).

domestic disputes. These articles were repealed because of the introduction of the New Civil Procedure Code, but at the same time, the principle of prohibition was reiterated by Articles 2059 and 2060 of the Civil Code. These two articles contain abstract formulations that we can consider to be the outline of the general contours of substantive inarbitrability.

Article 2059 provides the recourse to arbitration about contractually accessible rights. It provides that "*All persons may make arbitration agreements relating to rights of which they have the free disposal.*" Thus, arbitration cannot violate the strictures of public policy.

However, under Article 2060 of the Civil Code, domestic disputes involving the state, including public entities (such as municipalities) and public establishments, may not be referred to arbitration. Article 2060 provides that "there may not be arbitration agreements on questions of status and capacity of persons, on those relative to divorce and judicial separation or **on disputes involving public organizations and public institutions and more generally in all matters which concern public policy.**"

Pursuant to the combined interpretation of Articles 2059 and 2060, Article 2059 still impliedly precludes arbitration in certain areas by law despite the fact that it permits arbitration in the contractual domain. Accordingly, Article 2060 reinforces the implied content of Article 2059 by generally prohibiting arbitration in all matters pertaining to public policy. Article 2060 specifically lists areas in which public policy acts as a bar to arbitration, including matters of status and capacity, divorce cases, and other disputes in which the state is involved.

This viewpoint is based on the idea that the actions of administrative authorities involve the execution of the prerogatives of their public authority and are relative to the public order.⁸⁴

In conclusion, based on the issues discussed above, French legal doctrine and jurisprudence consider administrative law forbids public legal person to submit to arbitration. Litigation arising from administrative contracts is, in principle, within the exclusive competence of the administrative courts. This concept, deeply rooted in French public law, has long been considered to be of a nature that is, at the very least, incompatible with the ability to engage in arbitration proceedings. In this respect, French law traditionally has been

⁸⁴ J. ROBERT, *L'ARBITRAGE, DROIT INTERNE, DROIT INTERNATIONALE PRIVÉ* 22 (DALLOZ 6th ed.1993) quoted in JULIEN, *supra* note 105.

described as restrictive in permitting arbitration for administrative law disputes.

This principle arises out of certain psychological considerations. Jurist Edouard Laferrière wrote:⁸⁵

Arbitration agreement could not find its place among contracts of the state because it is a principle that the state cannot submit his dispute to arbitrators because of the random consequence of arbitration and the consideration of public order, and then the state can only be judged by the jurisdictions instituted by the law.

In addition to the separation of administrative and ordinary jurisdiction, another reason underlying the French legal doctrine justifying the principle of the interdiction of arbitration in public law is that the use of arbitration in administrative litigation may be contrary to the public order or it may cause concerns regarding public policy.⁸⁶

The idea mentioned above would lead to certain consequences. It would violate the public order for litigation arising from administrative actions to be entrusted to arbitrators, who are considered to be judges outside of the institutions established by law.

On this ground, the protection of the public order becomes a foundation in French legal doctrine in support of the principle of interdiction.

Government Commissioner Gazier also elaborated that *the principle was traditional and accepted generally in doctrine and in jurisprudence, and unless there is an exception, **public administrative agencies cannot be authorized to submit to arbitration.***⁸⁷

In addition, Government Commissioner Romieu also explained that *according to the principle of interdiction, **ministers cannot give their hands to arbiters to resolve litigation because they cannot escape the established jurisdiction.***⁸⁸

French jurisprudence also support this legal doctrine; in the judgment in the

⁸⁵ EDOUARD LAFERRIÈRE, TRAITÉ DE LA JURIDICTION ADMINISTRATIVE DES RECOURS CONTENTIEUX (1887), quoted in JOSEPH KAMGA, L'ARBITRAGE EN MATIÈRE ADMINISTRATIVE 18(2012).

⁸⁶ Julien, *supra* note 105.

⁸⁷ C.E. ass., 15 December 1957, Société Nationale des Ventes de surplus : Rec. CE 1957, p. 678; D. 1958, jurispr. p. 517, concl. Gazier; JCP G 1958, II, 10800, concl et note H. Motulsky. Recited from JOSEPH KAMGA, "L'ARBITRAGE EN MATIÈRE ADMINISTRATIVE" 19(2012).

⁸⁸ C.E. 17 March 1893, company of Nord, East v. Ministry of War, Rec.p.245, recited from JOSEPH KAMGA, *supra* note 87

Évêque de Moulins case, the Conseil d'État declared an arbitration agreement null on the basis that it was contrary to the public order.⁸⁹

How could arbitration possibly injure the public order? This ban is based primarily on the idea that arbitrators may be less concerned about the public interests than state judges. Their education and formation are different. Administrative court judges are accustomed to analyzing legal issues and they have many opportunities to apply imperative provisions.

Accordingly, the judgment of the Assembly of the Conseil d'État on December 13, 1957 established the position of administrative judges in this area. Government Commissioner Gazier stated: **"Ministers can't remit the solution of litigation to hands of arbitrators because they can't evade established courts."**

This point of view stems from the basic thinking underlying public law. It means that the State and public collective organs should only be judged by jurisdictions instituted by law in France.

Concerning the rights of administrative authorities, one justification for supporting the principle of interdiction utilizes the imagery of private law. **In private law, we determine the legality of an individual's private act by establishing a concept called "capacity" or "incapacity."** For example, the acts of minors or those affected by mental retardation are null because of their incapacity to enter into a contract or to accomplish any legal act. We borrow this idea from private law and make an analogy. **We treat administrative authorities as incapable persons in the field of arbitration.** Jurist Pacteau asserted that the **nature of legal public persons is like an obstacle to arbitration and then arbitration is interdicted for persons of "incapacity."**⁹⁰

However, this position has encountered a challenge. In the case of minors, regardless of whether we consider the "factual" or "legal" aspects of minors' capacity, we can agree that minors do not have the capacity to enter into a valid contract. However, in the case of administrative authorities, capacity is merely a question of explanation and definition. It is, indeed, a legal question. In private law, there are three categories regarding the capacity of a physical person. One is complete incapacity. Another is partial capacity, whereby some acts require the consent of a guardian. The final category is full capacity. By contrast, regarding

⁸⁹ JULIEN, *supra* note 4.

⁹⁰ B. PACTEAU, *Quelles Perspectives Pour L'Arbitrage En Contentieux Administratif?*, note sous C.E., 3 March 1989, Société autoroute Rhône-Alpes, R.F.D.A. 1989, at 619, quoted in Julien, *supra* note 105.

the capacity of a moral person, the only categories are “incapacity” and “having capacity.” It is a question of “yes” or “no.” There is no category of “partial capacity” for a moral person. The basis underlying capacity for a physical person and a moral person is different, and consequently, a comparison between administrative authorities and minors in private law is not very appropriate and is subject to challenge.

In France, Stillmunkes said that minors who really are incapable of compromise never are able to compromise, and this is because of their incapacity. Moreover, it is the proper nature and incapacity of minors that establishes the prohibition of arbitration in this situation. However, there is no incompatibility between a public official and compromise. It is preferable to say that arbitration and most of the litigation in which administrative authorities are involved are incompatible.⁹¹ In brief, incompatibility exist between “arbitration “and “disputes arising from administrative contracts”, not between” arbitration “ and “public legal persons”.

In addition, most jurists in the arbitration community and many practitioners have tried to substantially drain the substance from Article 2060 of the Code Civil.⁹²

In light of the menace involved in allowing arbitration in public law, French legal doctrine has been strengthened, providing arguments to confront foreseeable challenges. For example, Rivero has asserted that the immense framework establishing the separation of power would be ruined because of damage caused by the recourse to arbitration ... and public authorities should not surrender to any individual’s personal willingness or abandon to arbitrators their duty to decide the public interest, which they are obligated to safeguard.⁹³

In addition, French dispositions regarding the principle of interdiction are bolstered by similar provisions around the world. In Saudi Arabia, according to Article 3 of its Arbitration Law: “Government bodies may not resort to arbitration for settlement of their disputes with third parties **except after approval of**

⁹¹ P. STILLMUNKES, *L'ARBITRAGE EN DROIT ADMINISTRATIF*, Paris, 1960, at 26, , quoted in JULIEN, *supra* note 105. And A. PATRIKIOS, *L'ARBITRAGE EN MATIÈRE ADMINISTRATIVE*, 35-36(LGDJ,1997).

⁹² See J-B RACINE, *L'ARBITRAGE COMMERCIAL INTERNATIONAL ET L'ORDRE PUBLIC* 34 (LGDJ 1999), quoted in KARIM YOUSSEF, *The Death Of Inarbitrability*, in *ARBITRABILITY-INTERNATIONAL AND COMPARATIVE PERSPECTIVES*, 3-32, 58, n. 58(Loukas A. Mistelis and Stavros L. Brekoulakis eds., Wolters Kluwer, 2009).

⁹³ J. Riverro, *Personnes Morales de Droit Public et Arbitrage*, Rev. Arb. 268 (1973), quoted in JULIEN, *supra* note 105.

President of Council of Ministers.”⁹⁴ It needs an “approval” system to control arbitrability.

There also is law around the world similar to Article 2060 of the Civil Code of France. Article 1 (b) of the Arbitration Act of England of 1966: “... parties can be liberal to agree how their disputes are resolved, subject only to such safeguards as are necessary **in public interest**”.

In addition, French provisions have resulted in a dispute concerning the definition of “subjective arbitrability.”

As mentioned above, legal doctrine has distinguished “subjective arbitrability” from “objective arbitrability.” Many jurists consider “subjective arbitrability” as a question regarding the “capacity” of a contesting party. However, the conclusion that subjective arbitrability addresses “capacity” is not certain.

In a judgment of the Cour de Cassation (Supreme Court of France, hereinafter Cour de Cassation) dated on May 2, 1966, the Cour de Cassation stated that **arbitrability was not a matter of capacity**.⁹⁵ According to the opinion of Fouchard, Gaillard and Goldman:

*“French provision prohibiting public entities entering into arbitration agreements was in fact based on public interest considerations, entirely unconnected with the rationale behind the law on capacity, which is the need to protect those unable to defend their own interest.”*⁹⁶

However, there were other jurists that believed that subjective arbitrability is based on capacity in French law. Bernard Hanotiau and Olivier Caprasse believed that there are other elements in favor of characterizing the issue to be one of capacity. They used Article II of the 1961 European Convention on International Commercial Arbitration as an example. That convention deals with the topic using the heading “capacité” in its French version.⁹⁷

In addition to the aforementioned basis, there are other jurists that hold a

⁹⁴ The disposition of the Arbitration Law of Saudi Arabia, available at http://www.wipo.int/wipolex/zh/text.jsp?file_id=239182, (last visited April 18, 2013).

⁹⁵ Cas., 2 May 1966, Galakis, Rev. arb. 1966, p.99 = JDI 1966, p.648 = RCDIP 1967, p.553; and BERNARD HANOTIAU and OLIVIER CAPRASSE, Arbitrability, *Due Process And Public Policy Under Article V Of The New York Convention-Belgian And French Perspectives*, 25 J. INT’L ARB. 721 (2008).

⁹⁶ EMMANUEL GAILLARD and JOHN SAVAGE, FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, 313 (1999).

⁹⁷ HANOTIAU & CAPRASSE, *supra* note 95, at 724.

different opinion. Julien Antoine reasoned that Article 2059 and 2060 of the Civil Code have only “second line position” (“*la valeur auxiliaire*”, means administrative judges can decide liberally to apply them or not) in administrative law. Based on the autonomy of administrative law, an administrative judge cannot be forced to mention these civil dispositions and it can make its decision regarding arbitration referring only to general principles of administrative law. According to Government Commissioner Gazier, sources from private law are only “tokens” of general legal principle and they have limited pertinence to public law. The general principle that “arbitration is prohibited in public law” signifies that the principle is independent of all written rules. That independence does not prevent an administrative judge from referring to private law. Accordingly, administrative judges can decide independently what provisions they want to consider.

In conclusion, jurists Julien Antoine and Gazier have reinforced the legal basis underlying the principle of the interdiction of arbitration. Regardless of whether the principle issues from Article 2059 and 2060, or is an independent principle in administrative law, we think the result is the same, and the difference is only in the logical explanation supporting the result. Disputes regarding subjective and objective arbitrability in France are not of profound importance because all contracts entered into by administrative agencies are administrative contracts. Therefore, the principle of interdiction is concerned not only with subjective arbitration, but also with objective arbitration.

II.COMMERCIAL CODE

In considering French doctrine, it is interesting to discuss the Commercial Code (or Code of Commerce) in addition to the Civil Code.

Following the reform of the law on December 31, 1925, Article 631 of the Code of Commerce authorized the use of arbitration clauses in commercial law. Generally speaking, arbitration clauses were permitted to be inserted into commercial transactions between all persons.

The attitudes underlying the legal doctrine regarding this article are somewhat diverse. Jurists L. Mazeaud and Vedel held that the article could be applied to a new category of public establishments. L. Mazeaud and Vedel believed that Article 83 and 1004 of the old Civil Procedure Code were not applicable to industrial and commercial public establishments. Their reasoning

was not only based on the fact that industrial and commercial public establishments were not mentioned in the law prior to the redaction of the old Code of Civil Procedure, but also because Article 631 of the Code of Commerce allowed arbitration.⁹⁸

In addition, some jurists at that time were in favor of permitting arbitration for public establishments of an industrial and commercial character.⁹⁹ They often quoted Article 631 of the Commercial Code as the main reason for their support. Hence, they believed that administrative agencies engaging in commercial acts could submit to arbitration.

Jurist Auby reasoned that Article 631 could be applied only to public officials whose commercial character was expressly indicated in their organization statute.¹⁰⁰

Regarding the application of Article 631 to industrial and commercial public establishments, jurisprudence has established that the **principle of interdiction applies to all public establishments, including those establishments presenting an industrial and commercial character, and that only legislators could create an exception to that principle.**¹⁰¹

Thus, this is the situation of the law regarding the extension of the principle of interdiction to arbitration. The next interesting element we will examine is special law.

⁹⁸ L.MAZEAUD and G.VEDEL, *E.D.F et G.D.F Ont-Ils la Capacité de Compromettre?*, C.J.E.G.(Cahiers juridiques de l'électricité et du gaz), at 224, quoted in Julien, *supra* note 4.

⁹⁹ G.E. Lavau, notes ss. CA Paris 22 déc. 1948, JCP 1949-II-4729; P. DURAND, *Le Règlement Par Voie De Transaction Et D'Arbitrage Des Différents De Droit Privé Intéressant Les Établissements Publics À Caractère Industriel Et Commercial*, Dr.Soc.,1949, p. 325; L. MAZEAUD and VEDEL, *Electricité De France Et Gaz De France Ont-Ils Capacité De Compromettre?*,1950(Cahiers de docum. Jurid.élect. et gaz.),238; R. Houin, *La gestion des entreprises publiques et les méthodes de Droit commercial*, Archives de Philosophie du Droit, Sirey 1952,p79s; J.ROBERT, note D., 1958,p. 695. Note S. 1953.III.72 et suiv. C.P., Toulouse, 23 décembre 1952. Recited from JEAN-MARIE AUBY et R.DRAGO,*supra* note 6,at 20

¹⁰⁰ J.M.AUBY,*L'ARBITRAGE EN MATIÈRE ADMINISTRATIVE*, A.J.D.A.,1955,I,85. Recited from ANTOINE JULIEN,*supra* note 105 , at 4. And JEAN-MARIE AUBY et R.DRAGO, *supra* note 6,at 20.

¹⁰¹ C.E., Ass., 13 décembre 1957, Société nationale de vente des surplus, Conclusion GAZIER, note L'HUILLIER, J.C.P., 1958, II, 10.800, note MOTULSKY, R.P.D.A., 1958, at 83, note BORELLA. Recited from JEAN-MARIE AUBY et R.DRAGO, *supra* note 6, at 21.

B. EFFECT OF INTERDICTION: APPLY TO ADMINISTRATIVE

JURISDICTION

I. MONOPOLY OF ADMINISTRATIVE JUSTICE

Arbitration is used much less frequently in France than in other countries on administrative matters. It has not been lawful for public legal officials to incorporate arbitration clauses in administrative contracts. This is because only the competent national court is considered to be empowered to assess the facts and to decide applicable law in disputes arising from administrative contracts. Even when the parties wish to submit disputes to arbitration, the arbitration tribunal is required to decline jurisdiction. Doctrinally, it is generally called the principle of prohibition in administrative matters.

This principle arises out of several considerations.

First, pursuant to the theories of “reserved justice” (*La Justice retenue*), “delegated justice” (*La Justice déléguée*), and “minister-juge” (*Le ministre-juge*)¹⁰², administrative jurisprudence has interdicted a minister from delegating his rights and, without doubt, jurisdictional rights are included.¹⁰³

Arbitration has many advantages, but in France, those advantages are overshadowed by many questions, including “impartiality” and “conflicts of interest.” The French do not regard arbitration as a system they can trust.

Judicial review of administrative actions requires sophisticated legal analysis, particularly in cases whose threshold issue is the legality of concrete administrative actions. Administrative disputes are considered to be ill-suited to the arbitral process and too important to be determined by arbitrators or arbitral tribunals.

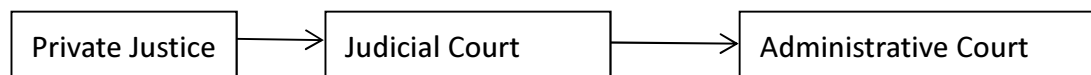
In contrast, even if arbitration is allowed in certain cases, judges also must play a very important role. Arbitrators are described as “private judges,” whether arbitration is based on a contract, the consensus of the parties, or an arbitration

¹⁰² Guylain Clamour, *Arbitrage et Contrats Publics libres propos sur un conflit d'indépendances*, in *Indépendance(s)*. Mélanges en l'honneur du professeur Jean-Louis Autin, Presses de la Faculté de droit de Montpellier, 2012.

¹⁰³ JEAN RIVERO AND JEAN WALINE, *DROIT ADMINISTRATIVE* 459 (20th ed.2004).

agreement; however, arbitration does not avoid the control under the national legal order. Rather, judges often “jump in” to the arbitration system. For example, in the organizational phase, national judges can intervene in an arbitral tribunal as a “*juge d’appui*”(we would talk it below in :CHAPTER II: DIFFICULT AND RESOLUTION IN CONSTITUTION) In the latter phase, national judges can declare an arbitration award null, and in the enforcement process, they can transfer the authority to execute it from the arbitrators to judges.

II. SEPARATION OF JURISDICTION



In France, the issue also involves the separation of administrative courts and judicial courts. The relationship between those courts and private justice is illustrated above.

However, the separation of these two powers is the choice of legislators. It is not a matter of constitutional law. The relationship between administrative and judicial jurisdiction varies between countries. Questions regarding their separation have been a far-reaching problem for a long time.

There is an intermediate between private justice and administrative justice. As French legal jurist Edouard Laferrière said: How can we admit, indeed, that the state could accept arbitrators in cases where it is not even allowed to accept civil judges?¹⁰⁴

In France, because of the separation of administrative and judicial jurisdiction, administrative courts have the exclusive authority to resolve litigation involving public legal persons. Jurisprudence has affirmed that exclusive competence is inconsistent with the use of arbitration in public law. In a decision dated December 23, 1887, a minister was held to have no right to delegate his powers to arbitrators and no right to remit his duty to decide an issue to a jurisdiction that was not legally instituted.¹⁰⁵

Government Commissioner Romieu, in his conclusion in the decision of

¹⁰⁴ Edouard Laferrière said in French: “Comment admettre, en effet, que l’État puisse accepter des arbitres dans des causes où il ne lui est même pas permis d’accepter des juges civils?” See EDOUARD LAFERRIERE, 2 TRAITE DE LA JURISDICTION ADMINISTRATIVE 145(1st ed. 1888), quoted in CHARLES JARROSSON, *L’ARBITRAGE EN DROIT PUBLIC*, AJDA,16 (Jan. 20, 1997).

¹⁰⁵ Évêque de Moulins, C.E., 23 December 1887, Rec.Leb., 842(1887), quoted in ANTOINE JULIEN, *L’ARBITRAGE EN DROIT ADMINISTRATIF*,156 Petites Affiches 4, Le Quotidien Juridique (August 6, 2003).

“Chemin de fer du Nord,” mentioned that the prohibition of arbitration for administrative authorities did not arise out of the Code of Civil Procedure, but from the fact that it is impossible for an administrative authority to escape his established jurisdiction.¹⁰⁶ The established jurisdiction is the administrative court.

Jurist Antoine Julien had a different opinion. He believed that the separation of administrative and judicial jurisdiction was not a proper ground to justify the interdiction of arbitration. According to his logic, because the separation of administrative and judicial jurisdiction is not a constitutional matter, it cannot be the basis of the prohibition.

It must be noted that there are two different questions worthy of being discussed regarding this issue. One of these questions is the historical development and foundation of this separation.

The other question is the relationship between this separation and the principle of the interdiction of arbitration.

In addition, at the time, even if provisions had been enacted and legal doctrine had been established, there was no special court that could review administrative actions. What court eventually undertook this mission?

The answer that is most likely is the Conseil d’État. However, the Conseil d’État was created in 1799. At its creation, it was not a real judicial body. Rather, it had only limited judicial powers and could only suggest legal solutions to the head of France. Its position was auxiliary until 1872. The law of May 24, 1872 gave the Conseil d’État an independent legal position; according to French legal doctrine, this position was called “delegated justice.”¹⁰⁷ At that time, it was expressly recognized as a court and exercised complete jurisdictional power¹⁰⁸. It asserted its independence from the control of the ministries in 1889.¹⁰⁹ In 1953, its authority was transferred to new administrative tribunals.¹¹⁰ Until now, CE’s position was not only that of a judge. It was, and still is, simultaneously the

¹⁰⁶ ROMIEU, concl. sur C.E.17 mars 1893, Société des chemins de fer du Nord de l’Est et autres, S. 1894, III, p. 119; For the same opinion, refer to F. Gazier, Concl. C.E. Ass., December 13, 1957, quoted in JULIEN, *supra* note 105.

¹⁰⁷ RIVERO, *supra* note 103, at 459 and 501.

¹⁰⁸ The power of “delegated justice” permitted the Conseil d’État to make contentious judgments “in his own name”. see M.LONG, P.WEIL, AND G.BRAIBANT, *LE GRANDS ARRÊTS DE LA JURISPRUDENCE ADMINISTRATIVE*, 28(8th ed, 1984).

¹⁰⁹ For the details regarding this history, see Alec Stone Sweet, *WHY EUROPE REJECTED AMERICAN JUDICIAL REVIEW-AND WHY IT MAY NOT MATTER*, 1297 (2003), Faculty Scholarship Series, available at http://digitalcommons.law.yale.edu/fss_papers/1297.

¹¹⁰ SUSANA GALERA, *JUDICIAL REVIEW: A COMPARATIVE ANALYSIS INSIDE THE EUROPEAN LEGAL SYSTEM* 74(Council of Europe,2010).

central government's advisory body on legal matters¹¹¹.

We can conclude that there are philosophical reasons underlying the separation of judicial and administrative courts. The philosophical reasons were deeply influenced by Montesquieu. The separation of judicial and administrative courts is a separation of powers. French revolutionaries believed that disputes regarding the exercise of administrative authority should not be heard by judiciary courts because this would subjugate the executive branch to the judicial branch. This perspective manifested French revolutionaries' distrust of judicial courts; they remembered the question of the king of France along with the conservative opposition of the Parliament.

The aforementioned discussion addresses the development of jurisprudence. However, what about provisions in the Constitution of France? Title VIII of the 1958 Constitution provides the constitutional grounds for the separation, expressly establishing an independent system of ordinary courts. However, it does not expressly provide for administrative courts. Thus, in the context of the French Constitution, there is no explicit provision regarding the foundation of administrative tribunals.

Rather, it was based on two important decisions in the Conseil Constitutionnel (July 22, 1980 and January 23, 1987). These decisions established the dual system constitutionally.

First, in a decision dated July 22, 1980, the Conseil Constitutionnel first recognized administrative jurisdiction. The Conseil Constitutionnel based its reasoning on Article 64 of Constitution, the provision concerning judicial jurisdiction and the "*fundamental principles recognized by laws of Republic*" that had been established since the adoption of the law of May 24, 1872 regarding administrative jurisdiction. The Conseil Constitutionnel determined from the rules and principles above that administrative courts' *independence of jurisdiction should be guaranteed and that the specific character of their inherent functions should not be encroached either by legislators or by government.*

In addition, on the basis of the law of May 24, 1872, the Conseil Constitutionnel found a fundamental principle recognized by the laws of République¹¹² which establishes administrative jurisdiction at the same level of

¹¹¹ Jean-Bernard Auby, *supra* note 75, at 114.

¹¹² M. Verpeaux, *Les Principes Fondamentaux Reconnus Par Les Lois de la République Ou Les Principes Énoncés Dans Les Lois Des Républiques*, Petites Affiches 9 (July 14, 1993) and Petites Affiches 6 (July 16, 1993) quoted in Julien, *supra* note 105.

authority as ordinary jurisdiction.

In a decision dated January 23, 1987, it was mentioned that, **on the basis of the disposition of Article 10 and 13 of the law of August 16 and 24, 1790, the principle of the separation of administrative and judicial authority has no constitutional reasons (“la valeur constitutionnelle”).**¹¹³

Jurist Antoine asserted that the Conseil Constitutionnel in this decision insured the constitutional independence and the special functions of both of the jurisdictions.

In the January 1987 decision mentioned above, the Conseil Constitutionnel reaffirmed that the French conception regarding the separation of powers is a fundamental principle recognized by the law of the Republic. Further, it points out the competence of administrative jurisdiction to nullify or reform decisions made by administrative authorities during the execution of the prerogatives of their public authority. In this decision, the Conseil Constitutionnel has defined “administrative authorities” as having the authority to exercise executive power, including the territory collectivities of Republic, and public organizations placed under their authority or control.

In brief, the Conseil Constitutionnel explicitly stated that the existence of an administrative court system having the power to judicially review administrative actions was based upon fundamental principles recognized by the laws of the Republic.

Following this analysis of the historical development and foundation of this separation, we need to analyze the relationship between it and the interdiction of arbitration in public law.

Even if the principle of separation merely has a legislative foundation, we believe that this does not have a direct relationship with the principles underlying the interdiction of arbitration for public legal persons.

The difference in a constitutional or legislative foundation lies in whether legislators can change it by modifying or abolishing it. Generally speaking, when certain principles have a constitutional foundation, it means that these principles cannot be encroached by law. However, this is irrelevant to the interdiction of arbitration for public legal officials. The principles underlying a legislative

¹¹³ Cons. Const., 23 January 1987, déc. n° 86-224, Conseil de la concurrence, préc. V. And the judgement in 1987, déc. 28 juillet 1989, police des étrangers, Rec.p. 81 (19^e consid.); A.J.D.A 1989,p. 619, note by J.Chevallier; D.1990, p. 161, note by X.Pretot;R.F.D.A. 1989, p. 619, by note B. Genevois. Recited from ANTOINE Julien, *L'Arbitrage En Droit Administratif*, 156, Petites Affiches,4(August 6,2003) at note 30.

foundation also can be asserted to justify other principles.

The key point does not lie in the nature of its foundation. In accordance with the historical development of this principle, administrative jurisdiction and ordinary jurisdiction have different attributes and they have separate responsibility for disputes in different fields. There is a wide gap between them that cannot be spanned.

However, in Taiwan, there also is dual system. Administrative jurisdiction is responsible for administrative disputes. Ordinary jurisdiction deals with other disputes. In Taiwan, however, administrative disputes are generally regarded as arbitrable, in contrast to the situation in France.

In addition, based on the historical development, we can determine that all disputes arising out of administrative actions should be subject to the same jurisdiction as a result of their nature. We doubt that we could treat contracts entered into by administrative authorities differently. Could they escape the principle on “unity of jurisdiction” (It means all the administrative acts, including unilateral and bilateral administrative acts, should be submitted to the same jurisdiction: administrative courts) and have their own system? The answer should be negative.

2. DEVELOPMENT AND INFLUENCE OF PRINCIPLE OF INTERDICTION OF ARBITRATION IN ADMINISTRATIVE MATTERS

A. DEVELOPMENT: ENLARGEMENT OF APPLICATION FIELD

The evolution of the principle of prohibition of arbitration in France has gone in two directions. One deals with public legal persons and the other with private legal persons. The common point is, precisely, the enlargement of the application scope of the principle of prohibition of arbitration.

In the first section below, we will analyze the enlargement of the principle to public persons other than the state (I. ENLARGEMENT OF THE PRINCIPLE TO PUBLIC PERSONS OTHER THAN THE STATE), and then we will analyze the enlargement of the principle to administrative contracts made between private

persons. (II. ENLARGEMENT OF THE PRINCIPLE TO ADMINISTRATIVE CONTRACTS MADE BETWEEN PRIVATE PERSONS).

I. ENLARGEMENT OF THE PRINCIPLE TO PUBLIC PERSONS OTHER THAN THE STATE

Regarding the definition of ‘public legal person’, French jurisprudence has adopted the criterion of an ‘organization’. In addition to the traditional public legal persons such as the state and the territorial collective organs, jurisprudence has enlarged the application of this definition to include public establishments, public industrial establishments, and public commercial establishments.

The principle forbidding a submission to arbitration was first laid down in the 19th century. At first, the doctrine applied this principle simply so as to limit the state.

For example, in case “*Évêque De Moulins* (1887)”, the Conseil d’État (hereinafter the CE) has traditionally affirmed the nullity of arbitration clauses in public construction or public purchase contracts. In the case of *Évêque de Moulins* of 23 December 1887, the CE denied that arbitration clauses concluded by the Ministry of Public Instructions (in French, “Ministres de l’instruction publique”) had any legal effect. The CE considered that the Ministry had no right to delegate its power to arbitrators or to submit to any jurisdiction except that of legal institutions. The CE concluded that neither the arbitration clause nor the arbitration award would be declared valid and binding on the state.

Besides this, the principle of interdiction of arbitration was again adopted in the case of *Company of Railways of North, East v. Ministry of War* (1893).¹¹⁴

The CE held that public legal persons could not submit their contractual disputes to arbitration. The main reason of the “*commissaire du gouvernement*” (traditional institution in French administrative law, the “*commissaire du gouvernement*” is not a representative of the government, but a member of the jurisdiction whose function is to analyze the case and suggest orientations for the judgement: nowadays, it is called “*rapporteur public*”, in French, “*Commissaire du Gouvernement*”) was ‘*to avoid administrative agencies expressing a deplorable dislike to national courts, and neglecting, while defending the public interests with*

¹¹⁴ As for the judgment, refer to supra note 88.

which they are entrusted, the safeguards which only this justice produces'.¹¹⁵

Thus, regarding the traditional jurisprudence, Apostolos Patrikios considered:

The doctrine of the 19th century was excessively conservative towards allowing arbitration, but the consequences do not matter since the role of the state does not extend to economic activities.¹¹⁶

In addition, in France the courts progressively enlarged the range of application of this principle. Besides the state, jurisprudence enlarged the application to include all local territorial collective authorities.

Besides this, for public corporations (ie public legal persons other than the State and local governments: in French, “établissements publics”), there were some doctrines at that time that were slightly in favor of allowing public establishments having an industrial and commercial character to submit disputes to arbitration.¹¹⁷ Those doctrines often quoted Article 631 of the French Commercial Code as their reasons. Hence, they considered that administrative persons carrying out commercial acts could also submit disputes to arbitration.¹¹⁸

However, in case “Société Nationale De Vente Des Surplus (1957, hereinafter SNVS)”, jurisprudence adopted different opinion of view from abovementioned doctrine.

This case was also a landmark case.¹¹⁹ SNVS was a commercial and industrial public entity (in French, ‘*Etablissement Public Industriel et Commercial*’)

¹¹⁵ Organized from PIERRE HEITZMANN, THE CONTRACT DE PARTENARIAT: A NEW FORM OF FRENCH PUBLIC PRIVATE PARTNERSHIP ALLOWING THE USE OF ARBITRATION TO ADJUDICATE DISPUTES, 23-1, International Construction Law Review, 20-38(2006).

¹¹⁶ A. Patrikios, *supra* note 91, p. 49.

¹¹⁷ H. MOTULSKY, *La capacité de compromettre des établissements publics à caractère commercial*, 1958, Rev. Arb., 39; A. MESTRE, *Les établissements publics industriels et commerciaux et le recours à l'arbitrage*, 1976, Rev. Arb., 3. quoted from ANTOINE JULIEN, *supra* note 105, at note 44

¹¹⁸ LAVAU, note 1949, II, n° 4729, J.C.P.(1949) P. DURAND, *Le règlement par voie de transaction et d'arbitrage des différends de droit privé intéressant les établissements publics à caractère industriel et commercial*, 1949, D.S.p. 325(1949). L. MAZEAUD and VEDEL, *Electricité de France et Gaz de France ont-ils capacité de compromettre?* 1950, Cahiers de docum. Jurid. élect. et gaz., p. 238(1950). HOUIN, ARCHIVES DE PHILOSOPHIE DU DROIT, 79(1952). J. ROBERT, note D., 1958, p. 695. Note S. 1953.III.72 et suiv. C.P., TOULOUSE, 23 décembre 1952. Recited from Jean-Marie Auby et R. Drago, *supra* 6, at page 20 note (4)

¹¹⁹ See C.E. 13 Décembre 1957, Société nationale de vente des surplus, p. 678. D., 1958, p. 517. Conclusion Gazier, note L'Huillier, J.C.P., 1958, II, 10.800, note Motulsky, R.P.D.A., 1958, p. 83, note Borella. Recited from JEAN-MARIE AUBY et R. DRAGO, *supra* 6, at page 21 para 12.

and had agreed to arbitrate an existing dispute with CGTT, a private company located in Tangier, about the performance of a contract for pipeline transportation. An arbitration award affirmed SNVS's obligation to pay a substantial amount to CGTT. SNVS challenged the award, arguing that the arbitration agreement was void.

In his recommendations to the CE, the government counsel acknowledged two points:

1. Validating such an arbitration agreement would be consistent with the provisions of the Commercial Code allowing arbitration between merchants.
2. Declaring the arbitration void would be shocking, since SNVS had agreed to arbitrate an existing dispute and had challenged the arbitration agreement only after an award adverse to it had been given.

Nevertheless, for the following reasons he recommended that the arbitration agreement be declared void:

1. The provisions of the old French Civil Procedural Code (in French, "*Code de Procédure Civile*" FCPC) only constituted some legal 'window dressing' to the principle of the interdiction of arbitration.
2. Only a law could authorize commercial and industrial administrative agencies such as SNVS to arbitrate.
3. Approving the arbitration agreement would create a precedent for commercial and industrial administrative agencies, even those whose activities were more administrative than commercial.¹²⁰

Finally, the court declared the arbitration agreement void. This case reflected the traditional opinion about the principle of the interdiction on arbitration.

However, the jurist Rivero criticized it and considered that public establishments are like national enterprises under private statute. Thus they can submit disputes to arbitration. Moreover, he criticized the solution adopted by the administrative judges about the criterion of "organization", saying that it belonged to 'pure nominalism' and was not 'defendable in reason'.¹²¹

Even so, different opinions exist. At a conference held on Wednesday 3 September, 2008 by Assemblée Nationale (France Parliament) with the topic of "contentions between the Realization Consortium (CDR) and Bernard Tapie

¹²⁰ Organized from PIERRE HEITZMANN, *supra* 115.p20-38(2006).

¹²¹ J.RIVERO, *Personnes publiques et arbitrage*, 1973, Rev. Arb.p.271(1973).recited from ANTOINE Julien, *surpa* note 77, at note 45.

group”(in French, “*relatif au contentieux entre le Consortium de réalisation (CDR) et le groupe Bernard Tapie*”), the jurist Thomas Clay considered that the law of 28 November 1995 (hereinafter the ‘1995 Act’) set up the ‘Public Establishment of Finance and Restructuring’ (in French, ‘*l’établissement public de financement et de restructuration*’, hereinafter the ‘EPFR’). Thomas Clay stated that EPFR was only a “national public administrative institution’ (in French, “*l’établissement public administratif national*”, hereinafter an ‘EPA’), with financial autonomy and under the supervision of the Minister of Economy. With respect to financial resource, EPFR belonged to EPA category and then was not a “public industrial and commercial establishment” (in French, “*les établissements publics industriels et commerciaux*”, hereinafter EPIC. In France, EPIC can submit their disputes to arbitration). Thus, EPFR could not submit their disputes to arbitration unless there is a special provision. Obviously the 1995 Act does not provide this authority. Furthermore, a CDR is a kind of offshoot of an EPFR.

Thomas Clay doubted whether a CDR has the capacity to compromise because it takes its power and existence from an organization which does not have this capacity. His reasons were based on two aspects. One was that a CDR had no autonomy. The other was from general principle of law that ‘*No-one can transmit to others more rights than he has himself*’.

Thus, Thomas Clay concluded that, without doubt, a CDR did not have the competence to compromise, unless further legal analysis could be carried out about legal relationship between an EPFR and a CDR. Furthermore, Thomas Clay considered that complicated and unpublished questions should be presented on the jurisdiction of legal control, and according to his observation, an action for annulment of arbitration award could be successful on the basis of Article 1484 of the Civil Procedure Code.¹²²

Let’s restate that the jurisprudence in France has also endorsed this restrictive opinion. The jurisprudence has enlarged the category of public legal person to include all public establishments, including those of an administrative, industrial or commercial character. Moreover, the jurisprudence considers that

¹²² See the record of statement of Thomas Clay in the conference in Wednesday 3 September, 2008, conference unit at 19:00 (the number of session is n° 114) “*Rapport d’information déposé en application de l’article 145 du règlement par la commission des finances, de l’économie générale et du contrôle budgétaire relatif au contentieux entre le Consortium de réalisation (CDR) et le groupe Bernard Tapie*”, at the page 140. This document is available in the website: <http://www.assemblee-nationale.fr/13/pdf/rap-info/i3296.pdf>, la date : 2013/04/15.

only legislators can create exceptions to this interdiction.¹²³

Briefly, regarding 'public legal person', jurisprudence has adopted criteria that judge the type of 'organ'. That is, regardless of its 'concrete administrative actions', so long as an organ is a public corporation, whether it has an administrative nature, or a commercial or industrial one, the principle that forbids it from submitting disputes to arbitration must apply¹²⁴.

The critics from arbitration law jurists wanted to limit the range of application of this interdiction in two dimensions. One dimension was to exclude commercial and industrial public establishments (an exclusion based on the type of organ) and the other was to exclude administrative public establishments that carry out commercial actions (an exclusion based on the type of actions).

After considering these two different opinions, we think that criticism of the doctrine is not entirely unreasonable. In fact, questions of whether a certain subject-matter is arbitrable involve a division of jurisdiction. Certainly, it is a question of great public interest. Safeguarding stability and predictability is very important in the application of the law. As we see above, jurisprudence has adopted a criterion that can be applied more easily (organ standards). The criticism is not entirely unreasonable, but in practice, we can imagine that the criteria about 'commercial' and 'industrial' acts would be difficult to operate. For example, how should 'commercial' and 'industrial' be defined? Should we define them by the wording of the administrative contract or by the purpose of the administrative contract? Are all claims about compensation or about money payments 'commercial' claims? As for the supply of water and electricity, this has a political purpose and the state has a 'monopolistic' interest. There must be a special right of concession. Thus it is not entirely a 'commercial' affair. Consequently, how should some of the matters of importance referred to above be decided? It is difficult for the parties to judge. If we go down this way, the understanding of 'commercial' or 'industrial' would often be subject to alteration. The parties would face uncertainty about the division of jurisdiction, and would not know which procedure to follow. Thus, if the doctrines prefer to limit the standard of organs, they need to offer more precise definitions.

II. ENLARGEMENT OF THE PRINCIPLE TO ADMINISTRATIVE

¹²³ CE, Ass., 13 December 1957, D, 1958, pp. 517 and 519.

¹²⁴ Pascale Gonod, Fabrice Melleray, and Philippe Yolka, *Traité de droit administratif* : Tome 2, 614 (Dalloz, 2011)

CONTRACTS MADE BETWEEN PRIVATE PERSONS

According to the abovementioned criterion of prohibition of arbitration for state, local authorities and mentioned public legal persons, contracts concluded by two private persons should be expected to be authorized to arbitration.

However, jurisprudence did not follow this logic. In the case of Société des Autoroutes de la Région Rhône-Alpes of March 3, 1989, the Conseil d'État decided that the principle prohibiting the submission to arbitration in Article 2061 of the Civil Code was also applicable to an "administrative contract" concluded between two private persons, and therefore quashed the arbitration award (as mentioned below).

This case was about the construction of a highway. The company (Société Aréa) was the concession holder for the construction of the highway. It had concluded a subcontract with another private company that contained an arbitration clause. A dispute occurred, and the parties submitted it to arbitration. The arbitral tribunal rendered an arbitration award ordering Aréa Company to pay 46 million Francs to the subcontractor. Aréa appealed against this arbitration award. Finally the Conseil d'État quashed the arbitration award, citing the principle of interdiction on arbitration from the old Article 2061 of the Civil Code in France.

The old jurisprudence asserted that contracts entered into for the construction of roads by an authorized road company were under the administrative judges' competence and so should be regarded as administrative contracts.¹²⁵ At that time, the old Article 2061 provided that *'The arbitration clause is void unless otherwise provided by law'*.

In this case, the administrative judges deduced from the words in the old Article 2061 *'...unless otherwise provided by law'* that the field to which the principle of interdiction applied was defined under Article 2061. They asserted that the interdiction on arbitration agreements applied to all contracts under the competence of the administrative judges, and consequently even included contracts between private persons.¹²⁶ Obviously, the CE enlarged the field to which the prohibition principle applied to contracts concluded by private

¹²⁵ Tribunal des conflits du 8 juillet 1963, Société entreprise Peyrot c/ Société de l'autoroute Estérel Côte d'Azur (n° 01804, GAJA, 18^{ème} édition, 2011 n° 81).

¹²⁶ C.E. Sect., March 3, 1989, Société des autoroutes de la région Rhône-Alpes, Rec., p. 69, concl. E. Guillaume, p.245. recited from ANTOINE Julien, supra note 105, p.4. at note 47.

persons if the contractual object meant that the contract should be considered as an administrative contract.

We can understand the CE's opinion that, even if the contract is concluded by two private persons but its context or purpose concerns administrative affairs, the contract also falls under the interdiction on arbitration. Even if its legal nature is not an 'administrative contract', it also belongs to the field of competence of the administrative judges, and must be under the constraint of such an interdiction.

We agree with the CE's opinion. In France, an administrative contract means a contract concluded by an administrative authority. Therefore, a contract concluded by two private persons, cannot on its face be classified as an 'administrative contract'. But if the actual context or purpose of the contract concerns administrative affairs, the legal nature of the contract should not vary according to whether the signatory is an administrative authority or a private person. The essence of administrative affairs does not disappear due to a change of the contract party. Moreover, we can regard the concession holder as an extension of the administrative authorities. The justifying reason is that such a decision can prevent the evasion of judicial control by the administrative courts.

Observing this case from another perspective, we can say that the opinion of the CE followed the famous decision of the TC in the *Société Peyrot* case¹²⁷ about the 'unity' of the regime for national highway works.

In the decision in the *Aréa* case, the CE reasoned that 'the construction of national roads has the character of public works and in essence it belongs to the state'.¹²⁸ Besides giving confirmation about the 'unity' of the construction of a national highway, the CE emphasized the essence of public interest.

Looking from another perspective, we can also conclude that the CE intended to safeguard the 'unity' of 'public law'.¹²⁹ A contract will be regarded as an administrative contract regardless of the identity of the contracting parties. Even if an administrative contract is concluded between private persons, the interdiction on arbitration applies. More precisely, the use of an arbitration agreement is interdicted in an administrative contract, even if the party is a private commercial company.

Besides, in the *Aréa* decision, under the idea of the 'unity of public law' (in

¹²⁷ Trib. Confl., 8 July 1963, *Société Entreprise Peyrot*. N° 01804 Publié au Recueil Lebon.

¹²⁸ C.E. Sect., March 3, 1989, *Société des autoroutes de la région Rhône-Alpes*, Recueil Dalloz 1990. p. 67.

¹²⁹ See ANTOINE Julien, *supra* note 105, p.4.

French, this is '*ensemble du droit public*'), certain interesting points are worth discussing. As mentioned, a concession holder can be viewed as a '*mandataire*' or '*agent*' of the administrative authorities in the field of his concession. In this case, we can smell a little scent that the CE also intends to enlarge the idea of '*agent*' to include not only '*concession holder*' but also '*subcontracting party of concession holder*'. That is, under the '*unity of public law*' and the '*unity of public works*', the legal relationship in such an administrative contract should apply the same principle. This identification of the legal relationship would not change because there are different contracting parties. This would usually happen in contracts in which a delegation of public works is involved and the contract is concluded, by applying Law No. 85-704 of July 12, 1985(it was about the control of public works and its relationship between private works, in French, "*Loi n° 85-704 du 12 juillet 1985 relative à la maîtrise d'ouvrage publique et à ses rapports avec la maîtrise d'oeuvre privée*", well known as the M.O.P. law).

The old Article 2061 of Civil Code was modified on 15 May 2001. The new Article 2061¹³⁰ of Civil Code resolved the difficulties from the AREA case and permitted arbitration clauses in contracts between private persons that have administrative qualities.¹³¹

In brief, the case law in France has defined the principle of interdiction from submitting a case to arbitration by adopting an '*organic*' criterion: in other words, all contracts concluded by '*administrative organizations*' belong to the field of interdicted contracts. This is mainly important for public legal persons.

Besides, the jurisprudence in France has also enlarged the field of this interdiction principle by adopting '*material*' criteria. That is, all contracts in which "*administrative contract law*" is involved would also belong to the field to which the principle applies. Even if the contracting parties are private persons, the contract would still belong to field to which the principle applies. This is mainly important for private legal persons. The reason and purpose of the jurisprudence in France is to safeguard the '*unity of public law*' and the '*unity of administrative works*'. It is based on the fact that administrative works have the character of a '*public interest*', and should belong '*exclusively*' to the state. Thus, if the state has delegated its competence to a private person, then from a material

¹³⁰ See Yves Gaudemet, *supra* note 78.

¹³¹ Philippe Fouchard, *La Laborieuse Réforme De La Clause Compromissaire par La Loi du 15 Mai 2001*, 3, *Rev. Arb.* 397 (2001); CHARLES JARROSSON, *Le Nouvel Essor De La Clause Compromissaire Après La Loi Du 15 Mai 2001*, *La Semaine Juridique Edition Générale* n° 27, 4 Juillet 2001, 1333; and Yves Gaudemet, *supra* note 78.

point of view the legal features of a public works contract would still have their public law character. Hence, because of the consideration of the 'unity of public law' and the 'unity of administrative work', public work contracts concluded by administrative agencies would be classified as falling within the public law field. Equally, if contracts are concluded between private persons but relate to the same material, they would be also classified as falling within the public law field. Consequently, the principle forbidding their submission to arbitration would apply.

Briefly, regardless of whether the parties are public or private legal persons, the tendency of jurisprudence in France has been to enlarge the field to which this principle of interdiction applies. Jurisprudence in France has concluded that only legislators have the competence to change this principle, and therefore, generally speaking, it is still a dominant principle in public law in France.

B. INFLUENCE: MATTERS SUBMITTED TO ALTERNATIVE DISPUTE

RESOLUTION (ADR) SYSTEMS

Under the dominant principle of interdiction of arbitration in administrative matters, the administrative jurisdiction is faced with more and more agreements to settle disputes, especially through 'non-judicial' institutions such as mediation.¹³²

In France, there is more life to the development of 'mediation-conciliation' than to that of arbitration. It's to counterbalances the prohibition of arbitration.

Mediation and conciliation have two common points: one is that an intervention is made by a third person; and the other is that a resolution may be found by the parties and that third person.

However, there is a distinction between mediation and conciliation. Conciliation just leads the two parties to find an agreement between them with the help of the third person; in mediation the mediator proposes a resolution plan to the parties and the parties consider whether it can be accepted by them.

Even if mediation and conciliation are different (as mentioned), generally speaking they are often aggregated together under the heading

¹³²Jean-Bernard Auby, *La bataille de San Romano. Réflexions sur les évolutions récentes du droit administratif*, AJDA, 2001, 913.

‘mediation-conciliation’.

In the field of public construction, there are at least four different mechanisms for ‘mediation-conciliation’:

1. Mediation by an institutional committee.
2. Mediation by an expert chosen by the parties.
3. Mediation by an administrative judge.
4. Mediation by an expert chosen by the emergency judge.

The first two types of mediation are limited to contractual litigation, while the last two types would also be used in non-contractual litigation, such as remedy lawsuit.

I. MEDIATION BY AN INSTITUTIONAL COMMITTEE

The first type of mediation is provided for by law in France, where there is a mechanism to institute consultative committees for amicable resolution (in French, the phrase is “*des comités consultatifs de règlement amiable*”, abbreviated to CCRA). In France, there is a national committee, some regional committees, and some interregional committees. The division of jurisdiction mirrors that of the administrative appeal court.

These committees are administered by an administrative judge. Their mission is defined by Article 127 Paragraph 2 of the CMP: ‘It should find some elements of fact or rights to achieve an amicable and equitable solution’.

The time for these committees to meet is up to the parties. During the whole process of the execution of public business and public works, contesting parties might bring a lawsuit at any moment, and these committees would accept the demand.

The allotted time to complete the procedure is six months. According to Article 127 Paragraphs 3 and 4 of the CMP, the allotted time begins when the ordinary procedure begins. If an indictment is accepted, this can have the legal effect of interrupting the legal scheduled period and suspending the time for recourse to litigation.

In this system, the contesting parties need to appoint a ‘rapporteur’. In practice, the person often chosen is a public works engineer. The rapporteur needs to investigate the dispute. He can read all the administrative documents relating to the dispute, and make written or oral enquiries of the representatives. The rapporteur can also summon people if this is necessary.

When the rapporteur has finished his investigation (in French, the investigation is called the '*instruction*', a special investigative procedure), the committee meets again in private. In this closed meeting, the rapporteur presents his report orally. The committee hears statements from the officers of the public department and the representatives of the tenderer.

Finally, the committee gives notices of its proposed solution. In practice, this solution is accepted in over 90% of cases.

Thus, because of the efficient procedure for public construction, a legal jurist has called this the '*power of persuasion and experience*' of the members of the committee.¹³³

II MEDIATION BY AN EXPERT

In the same way as the first type of mediation, the second type is also used in the field of administrative contracts. More precisely, it is used for PPP contracts.

Article 11 Paragraph 1 of the PPP Act provides that these contracts contain some prevention clauses of disputes and regulations for litigation.¹³⁴ Thus, a PPP contract usually provides for conciliation or mediation by one expert designated by both parties who is an 'independent' expert. Sometimes PPP contracts contain a clause which provides for recourse to conciliation led by a group of three experts. One of these is nominated by each party, and the third member is nominated by these two nominated experts.¹³⁵

III. MEDIATION BY AN ADMINISTRATIVE JUDGE

The third mediation-conciliation system is led by an administrative judge. Mediation or conciliation led by administrative judges is carried out informally, depending on the administrative judges' availability and temperament.

Until 1986, the recourse to judge-led conciliation was provided for by Article

¹³³ N.Boulouis, concl. sur CE 4 nov. 2005, Sté Amec Spie, BJCP 2006, P.55. recited from Olivier Le Bot, *Les Modes Alternatifs de Règlement des Litiges Droit Public de La Construction*, Vol. 37, No. 142, Revue de la recherche juridique. Droit prospectif, 882, note 24 (2012).

¹³⁴ See Ordonnance n° 2004-559 du 17 juin 2004, art 11.I. refer to the site : <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000438720&dateTexte=&categorieLien=id>, last visited 29 January 2013.

¹³⁵ See N.CHAHID-NOURAI et R.LAZERGUES, *La résolution des litiges dans les contrat de partenariat*, AJDA, 2009, p. 1924.

L.211-4 of the Code of Administrative Justice (in French, the *Code de Justice Administrative*, or CJA).¹³⁶ This provided that 'The administrative tribunals also exercise a mission of conciliation'. Article L.211-4 was modified by Article 49 of Law No. 2011-1862 of 13 December 2011, which governs the hearing of disputes and the granting of relief for certain judicial processes.¹³⁷

However, the formula above is very brief, and obviously no further precision has been laid down either by legislation or by regulations. Thus, conciliation led by administrative judges appears to be a flexible and open area.

To respond to this absence of regulation for application, the CE has affirmed the validity of the article L.211-4 by holding that it is not necessary to have regulations for application measures, and thus the article L.211-4 suffices and takes effect immediately.¹³⁸

Administrative judges have two methods to invite the contesting parties to begin an amicable process: they can conduct a conciliation mission or they can order a mediation plan.¹³⁹

From another point of view, the flexible and open nature might give the administrative authorities much more space to develop judicial conciliation. But in fact, this is not so. In practice, the possibility is hardly used. Every year on average there are one or two cases in each administrative court. In some administrative courts, there are no cases. From observation, there are several reasons to explain this situation.

According to Olivier Le Bot, the first reason is that the system is unknown to parties. Usually both parties and their advisors ignore the existence of this system. Another jurist Jean-Marc Le Gar observes that a multiplicity of intervening parties, the existence of judicial and administrative bodies to enforce judgments, the possibility of recourse to a third person, the absence of preparation, and the availability and methods of judges are possible reasons.¹⁴⁰

Secondly, even administrative judges demonstrate a certain attitude of reservation towards this conciliation method. They are unwilling to exercise their power in this way. The exercise of a conciliation mission would take a certain time, and if it failed the case could still return to the normal litigation procedure.

¹³⁶ See article 22 of the law in 1986 January 6, result from a senatorial amendment.

¹³⁷ Elsa Costa, *La conciliation devant le juge administratif*, AJDA, 2012, p.1834-40.

¹³⁸ CE ass. 23 June 1989, Vériter, Lebon 146; E. BAPTISTE, *Chronique C.E., Ass.*, 23 juin 1989, Vériter, AJDA 1989, p. 424.; Jean-Marc Le Gars, *La conciliation par le juge administratif*, 2008, AJDA, 2008, p.1468.

¹³⁹ Elsa Costa, *supra* note 137.

¹⁴⁰ Jean-Marc Le Gars, *La conciliation par le juge administratif*, AJDA, 2008, p.1468.

Besides, administrative judges are not well prepared to exercise this function. They are accustomed to resolving questions by a precise and normal procedure, because they regard this as more concrete. But the method of finding a conciliation plan or compromise seems more vague and difficult.

The third reason to explain the phenomenon is that a successful conciliation is based on several chances. The parties or their lawyers or advisors should be convinced of their rights. When a transactional agreement involves a local community, the local community must get authority from the local assembled organization. The local assembled organization might refuse the transactional agreement. In 2007 in Nice, there was a public construction of the Grand Stadium. After the delegation of the public service was annulled by the administrative court, the dispute about compensation occurred. A compromise was made between the mayor of Nice and the private company that was responsible for the construction. The compromise provided compensation for this construction, but the settlement agreement in the conciliation procedure was not yet signed. The mayor signed the protocol of agreement despite of the disagreement to sign the settlement agreement in deliberation procedure. Finally the settlement agreement was refused by local assembled organization due to the mayor's violation of deliberation.¹⁴¹

The final reason to explain the unpopularity is that if an agreement is signed, it can still become subject to litigation or can give rise to demands of third parties.

Thus, for the reasons mentioned, the third mechanism (mediation or conciliation by an administrative judge) cannot yet achieve success.

Even so, other practical applications about the conciliation by an administrative judge are worth noting. They are separated into two different categories. The first is serial litigations (in French, "*les litiges en série*"). The other is occasional litigations (in French, "*les litiges ponctuels*").

Serial litigations mean litigations occurring "serially". This category is to deal with serial, periodic or continual litigations, such as compensation given in the neighborhood of administrative works during public construction works. In practice, the local authority (in French, "*collectivité locale*") often asks an administrative judge to exercise his mission of conciliation. The administrative judge would decide the criteria and process for compensation. Usually, the administrative judge would define the criteria of remedy by referring to the

¹⁴¹ Olivier LE BOT, *supra* note 133, at 883, note 30.

jurisprudences in cases which the administrative authorities have no responsibility for negligence, and the compensation would be granted as public charges. Further, because these cases often involve many citizens, the procedures are, in practice, often open. The administrative authorities publish a notice in the local general press to ensure that most people know about the conciliation procedure and the possible criteria for compensation. If the claimants or the citizens are satisfied with the proposed amount, they sign a settlement agreement with the local community as soon as possible.

In French history, this procedure has been followed for reparation for damage caused by the construction of tramways in Nantes, Grenoble, Bordeaux, and Nice.¹⁴² What is amazing is that the procedure was very successful every time. Compensation was given to the claimants very rapidly (usually in a few months) and there was almost no recourse. In Nantes, for example, there were 138 claimants and only one investigation procedure. In Grenoble, there were 187 claimants and only four had recourse to litigation. Thus, in France, the procedure for litigation in series features rapidity and uniformity.

In addition, conciliation by administrative judges can also be used in the field of public construction for occasional litigation. In Nice, there are several examples of conciliation that are worth quoting.

The first case was in 2001, and concerned the extension of Nice-Côte d'Azur airport. The private enterprise participating in the construction of the airport encountered certain financial problems for several reasons, such as unforeseen constraints, some unpredictable cost elements and some unexpected occurrences in the financial markets. Thus, the private enterprise demanded compensation. But the litigation was very difficult and the procedure did not work well. The process continued with difficulty until 2006. In September 2006, conciliation was organized. After conciliation, a settlement was signed in February 2007 and was recognized by the administrative court in April 2007.¹⁴³

There are another two examples. One was in 2007, and the other was in 2008. They are similar cases concerning conciliation arising from claims for compensation by private enterprises because they carried out additional work providing equipment for public transport systems.

The smallest case is also the most interesting one. It involved a conciliation

¹⁴² *Id.*

¹⁴³ See TA Nice, 20 avril.2007, Sté Cari, req.n° 0506374, NP. Recited from Olivier LE BOT, *supra* note 133, at 884, note 34.

organized between a coastal community and a sponsor. This litigation was also very difficult. One reason for the difficulty was that the facts dated back to the 1990s. At that time, the coastal community had suspended public work during the construction of many buildings, and illegally refused to issue construction permits. Thus, the sponsor suffered large damages because it could not complete the construction. After several years of litigation, the claim was not resolved. Thus, conciliation began in 2007-2008, and finally successfully achieved an agreement, providing for the payment of compensation by the local community. The case, given the lengthy court procedure, was a very good example to show that conciliation led by an administrative judge might be operated profitably. The success of this case circulated quickly in the relevant fields, and after this conciliations led by administrative judges have developed rapidly in recent years in France.

However, administrative judges are still convinced that the rapid development of this type of conciliation came from another system, conciliation led by a designated expert. This is the fourth type of mediation mentioned.

Finally, conciliation by administrative judges is now only carried out by the administrative courts, not by the administrative appeal court, or by the CE.¹⁴⁴

In addition, there is also another type of conciliation in France in which administrative judges are involved. This is called 'extra-judicial conciliation' (in French, '*la conciliation extra-judiciaire*'). This comes under French Law No. 78-381 of 20 March 1978 which defined the regime and fixed the status of conciliators of justice. At first, extra-judicial conciliation was intended to deal with small civil litigation cases such as consumer claims or neighborhood disputes. Now it can deal with disputes with administrative bodies. It is necessary for citizens to make a claim to the 'defender of rights' (in French, the '*Défenseur de droits*').

Conciliators of justice in France are volunteers. They are nominated by the Premier President of the Appeal Court. Their tenure is one year, which can be renewed once.

In 2008, conciliators of justice dealt with 112,828 cases, which can be compared with 493,939 cases in 475 Grand Instance courts. The rate of conciliation was 59.6%.¹⁴⁵ Thus, this type of conciliation cannot be ignored.

¹⁴⁴ Jean Marie LE GARS, *La conciliation par le juge administratif*, AJDA. 2008,p.1471, note 1.

¹⁴⁵ In 2012, number of conciliation was 130,863 cases. Terminated cases in Grand instance were up to 657,246 cases, and rate of conciliation was 55.1%. Regarding information about 2012, available to http://www.justice.gouv.fr/art_pix/chiffres_cles_2012_20121108.pdf, last visited 20

IV. MEDIATION BY AN EXPERT CHOSEN BY AN EMERGENCY JUDGE

The fourth type of mediation-conciliation was not a new system. From the end of the 1970s, there has been a practice through which the administrative courts have authorized experts to try to conciliate between parties by giving their expert advices.

However, the authority to conciliate by giving expert advices was not always recognized, and the practice was judged to be illegal by the CE in 1979.¹⁴⁶

Even so, legal jurists still considered that an expert could, after producing an expert report, do his best to try to influence the parties by analyzing their weak points to bring them into a conciliation agreement.¹⁴⁷

In addition, following the proposition of the CE about the alternative dispute resolution in 1993¹⁴⁸, a great change in jurisprudence occurred in 2005 to authorize the conciliation by experts again.¹⁴⁹ Furthermore, on 22 February 2010 a decree was passed that supported this practice. This decree was then recognized in the CJA. Article R.621-1 of the CJA provided that the mission of experts would be to achieve conciliation between the parties.

The jurist Olivier considers that Article R.621-1 does not give experts a task in the nature of 'conciliation-referral' but instead a task of 'expertise-referral' (in French, the terms are '*référé-conciliation*' and '*référé-expertise*', an urgent process in French administrative law), because experts have technical knowledge about disputes that may lead to a rapprochement between the contesting parties.

Article R. 621-7-2 of the CJA added that *'If the parties are going to achieve conciliation, and thus the expert thinks that he has completed his mission, he should make a report to the administrative judge immediately. His report should be accompanied by a note of his fees and expenses, and a copy of the conciliation agreement signed by both parties. And it belongs to the range of the expert fee.'*

In this conciliation process, the role of the administrative judge is very important. He or she should choose a suitable expert-conciliator and convince

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¹⁴⁶ See CE 12 oct.1979, *Secrétaire d'État aux postes et télécommunications c/Devilleus, Lebon* 375, recited from Olivier LE BOT, *supra* note 133, at 885, note 35.

¹⁴⁷ Jean Marie LE GARS, *supra* note 144..

¹⁴⁸ See CE, *Régler autrement les conflits*, 1993, p.42. and p.144, recited from Olivier LE BOT, *supra* note 133, p.885, note 37

¹⁴⁹ See CE 11 févr. 2005, *Organisme de gestion du cours du Sacré-cœur*, req. n° 259290, *Lebon* 65, *GACA* n° 19. Recited from Olivier LE BOT, *supra* note 133, at 885, note 38.

the contesting parties of the possibility of achieving a conciliation plan.¹⁵⁰ But the case law reminds us that it is useless to demand experts to conciliate if the situation between parties is such that it will be impossible to achieve any amicable rapprochement.¹⁵¹

Finally, whichever amicable arrangement is followed, the principles of allowing argument, of neutrality, of equality of rights between the parties, and of transparency should be obeyed in amicable processes.

SECTION II: EXCEPTION: ACCEPTABLE

1.IN LEGISLATION

As mentioned above, the prohibition of arbitration is considered as a principle of legislative base, unless there is a special provision to the contrary. Thus, as for the exceptions in France, we want to at first introduce exceptions in positive law. And at first, we want to observe exceptions in substantial law (i. SUBSTANTIAL LAW), then procedural law (ii. PROCEDURE LAW)

A.SUBSTANTIAL LAW

Article 2060 of the French Civil Code provides that public entities cannot enter into arbitration agreements. Nevertheless, there is a series of exceptions to this rule. Exceptions are mainly in two categories. The first is about legal exceptions.(I.LEGAL EXCEPTIONS). The other is about legal exceptions by specific public contract.(II. SPECIFIC PUBLIC CONTRACTS)

I.LEGAL EXCEPTIONS

First, pursuant to the literal wording of section 2 of Article 2060, “certain categories” public institutions having commercial and industrial character may be excluded by decree from that prohibition, opening the possibility of arbitration in administration matters.

¹⁵⁰ TA Nîmes, ord.3 May 2011, Sté Ecoval 30, req. n° 1100986, NP, recited from Olivier LE BOT, *supra* note133, at 885, note 40.

¹⁵¹ Olivier LE BOT, *supra* note133,at 884.

In addition, because arbitration has certain advantages which have been mentioned previously, such as flexibility, technical expertise and celerity, legislators have established exceptions to the prohibition of arbitration. For example, there are some rules for special public juridical persons.

The rules regarding public establishments are as follows: for SNCF (Société Nationale des Chemins de fer français; "French National Railway Corporation", hereinafter SNCF), it is found in Article 25 of Act No. 82-1153 of 30 December 1982; for ONERA (the French national institute for aeronautical studies and research), it is found in Decree No 84-31 of 11 January 1984; for the postal service, it is found in Article 28 of Act No. 90-568 of 2 July 1990; for Réseau ferré de France (RFF), it is found in Article 3 of Act No. 97-135 du 13 of February 1997.

In special matters, according to the guidance of the "Cour de Cassation," administrative agencies have the authority to conclude arbitration agreements with foreign persons. This regulation has been recorded clearly in Article 9 of Act No. 86-972, dated August 19, 1986: "If state and its entities contract with foreign companies for purpose of projects that are of national interest to France, they may enter into an arbitration clause under certain conditions." Therefore, they are permitted in certain factual situations.

Thus, despite the general prohibition set forth in Article 2060, international arbitration with French public entities has been permitted in many instances. Because of the previously mentioned exceptions, the prohibition has been described as "a principle riddled with exceptions."

Despite these exceptions, the principle of the prohibition of arbitration for public juridical persons continues to be a dominant principle in French administrative law.

The French notion of "arbitrability" was originally based on the criteria of "public policy," as mentioned above. This understanding referencing "public policy" has been interpreted restrictively for a long time. In a decision of the Cour de Cassation on January, 9, 1854, the Court reasoned that disputes that touch the public order ("touchait à l'ordre public") will exclude arbitrability.¹⁵² In addition, another decision made by an administrative court considering a dispute involving the public order held that an arbitration agreement was null when the resolution of the arbitration involved the interpretation and application of a rule of public order.¹⁵³

¹⁵² See Cass. Civ.9 January, 1854, D.P. 1854, 1, 69, quoted in YOUSSEF, *supra* note 92.

¹⁵³ In this decision, the court provided: "le litige concerne l'ordre public et que le compromis est

Presently, in France, the situations in which the state, collective organs, and public establishments may submit to arbitration are provided by particular laws. These provisions escape the general interdiction.

Article 311-6 of the French Administrative Justice Code (Code du la Justice Administrative) provides a list of cases in which recourse to arbitration is authorized, regardless of the other provisions establishing administrative jurisdiction.

They are as follows:

Situation 1:

Article 69 of the Act of April 17, 1906, which lays down a general budget of revenue and expenditure for execution in 1906, is set forth again in Article 132 of the new public procurement code. It provided that territorial collective organs or local public establishments could submit to arbitration for disputes regarding the balance of their expenditures for public construction and public supplies.

However, this article has been interpreted restrictively by jurisprudence. The jurisprudence has excluded its application in cases in which public establishments are involved.¹⁵⁴

There are two kinds of arbitration agreements in this situation. One is in a contract providing for litigation in the future. The other type of arbitration agreement is aimed at litigation that already has occurred. Jurisprudence has also held that Article 69 was applicable to litigation that already has occurred but that Article 69 did not authorize arbitration agreements for future disputes.¹⁵⁵

Nevertheless, Article 52 of the decree of July 25, 1960, regarding the public construction of political departments, communes, labor-unions of communes, public establishment departments and public establishment communes, has authorized certain public legal persons to submit to arbitration under the conditions set forth in Section 2, chapter III of the Civil Procedure Code to recover the balance of their expenditures for public construction, buildings and supplies.

Hence, the application of Article 69 would allow the arbitration of certain imperative demands. In cases involving the state, it is necessary to obtain a decree in the Counsel of Ministries (Conseil des Ministres) which is

nul chaque fois que la solution de l'arbitrage suppose l'interprétation et l'application d'une règle d'ordre public," quoted in YOUSSEF, *supra* note 92, at 59.

¹⁵⁴ C.E., 26 December, 1948, Hospices de Marseille, Rec., p.146; AUBY & DRAGO, *supra* note 6, at 21.

¹⁵⁵ C.E., 17 July, 1946, Ministry of Public Works ("*ministre des Travaux publics*"), Rec., p. 473; AUBY & DRAGO, *supra* note 6, at 22.

countersigned by the Minister of Finances and the Ministers of the corresponding political departments. The political department must consult with the General Counsel provided by the Minister of the Interior. A commune must consult with a Municipal official provided by a Prefect.¹⁵⁶

Situation 2:

Article 7 of Law (No. 75-596 of 9 July 1975) addresses various provisions relevant to civil procedure reform. It provides that public establishments having an industrial and commercial character may be authorized to submit to arbitration by decree.

Situation 3:

Article L.321-4 of the Research Code provides that, after obtaining the approval of administrative counsel, public establishments having a scientific and technological character may be authorized to submit to arbitration in cases involving litigation arising from the execution of **research contracts** concluded with foreign organizations. In addition, in cases involving research contracts, the parties also can compromise. One decree establishes the conditions under which this authorization will be granted (conditions d'octroi), and if necessary, the period of delay after which they will be deemed to have been accepted.

Situation 4:

Article 25 of Law (No. 82-1153 of December 30, 1982) addressed inland transportation and also defines the authority of the SNCF. This law was replaced by Article L. 2141-5 of the Transports Code, pursuant to ordinance 2010-1307 on October 28, 2010. It provided SNCF with the ability to compromise and conclude arbitration conventions, including arbitration agreements involving future or previous litigation.

Situation 5:

Article 9 of Law (No. 86-972 of August 19, 1986) addresses various rules regarding local government; it provides that, regardless of Article 2060 of the Civil Code of France, the State, territorial collective organs and public establishments are authorized to consent to arbitration clauses (it refers to arbitration agreements applying to future litigation) in contracts entered into with foreign companies concerning the realization of operations involving the national interest, and dealing with litigation relevant to the application and interpretation of these contacts.

Situation 6:

¹⁵⁶ AUBY & DRAGO, *supra* note 6, at 22.

Article 28 of Law No. 90-568 of July 2, 1990 addressed public service organizations involving the postal service and telecommunications; however, it was overridden by Article 15 of the law on February 9, 2010, which applies to the public enterprises of the postal service and postal activities.

Situation 7:

Article 24 of Law (No. 95-877 of 3 August 1995), addresses the transposition of Directive 93/7, dated March 15, 1993, of the Council of European Communities regarding the restitution of cultural objects that were unlawfully removed from the territory of a member state; it provides that the State is authorized to submit to the arbitration of issues involving the operation of the procedures for the return of the cultural objects under the condition that the owners, possessors or holders of the cultural objects must provide their consent.

Situation 8:

Article 3 of Law (No. 97-135 of February 13, 1997) regarding the establishment of the public institution called the "France railroad network" for the renewal of the rail transport system, was replaced by Article (L.) 2111-14 of the Code of Transports according to ordinance (No. 2010-1307 of October 28, 2010). It provided that France's rail network (Réseau ferré de France, RFF) may compromise and enter into arbitration conventions.

In addition to the exceptions provided by Article 311-6 of the Administrative Justice Code in France, which applies to the field of partnership relationships, Article (L.) 1414-12 of the General Code which addresses territorial collective organs and the Ordinance of June 14, 2004 regarding public-private partnership contracts provide that public-private contracts necessarily have clauses concerning the methods and rules of litigation and the conditions under which contracts can be submitted to arbitration under French law.¹⁵⁷

In the field of construction contracts involving sports facilities, there also is a special law in the law of April 27, 2011 relevant to the organization of the European Championship of Football (l'UEFA) in 2016. It provided that, regardless of the provisions in the Administrative Justice Code determining the jurisdiction of first grand instance courts, in contracts entered into by judicial persons under the public law for the construction or renovation of sports facilities to host UEFA Euro in 2016 and for all equipment related to the operation of these sport activities as well as the organization and conduct of the same competition,

¹⁵⁷ Refer to Article 11 de l'Ordonnance n° 2004-559 du 14 juin 2004 regarding the public-private contracts, JO du 19 juin 2004.

contesting parties have the right to submit to arbitration under French law.

In brief, in France, the legislator plays the major role in determining arbitrability. Public judicial persons are permitted to participate in arbitration only pursuant to specific laws provided by legislators. In these situations, even when the arbitrators and arbitral tribunals are selected and appointed by the contesting parties, the origin of jurisdiction is still established by legislators. Public legal persons are permitted to submit to domestic arbitration to resolve their disputes only in these exceptional cases. Aside from these exceptional cases, public legal persons cannot establish the origin of jurisdiction.

II. SPECIFIC PUBLIC CONTRACTS

(1). PROCUREMENT CONTRACTS (*MARCHÉ PUBLIC*)

Many public law jurists do not agree that arbitration should be permitted in administrative disputes. François Brenet and Fabrice Melleray said that ‘all public affairs contracts involving international commerce, which by their nature should apply French public law, cannot escape the control of administrative judges only by the means that they contain a compromise clause’.¹⁵⁸

But this opinion has been criticized because it does not correspond with the ruling in the INSERM case by the TC, who stated that “the imperative rules in French public law...apply in the field of occupation of administrative properties (in French, “*droit du domaine public*”) or rules relative the public command and administrative works (in French, “*droit des travaux publics*”), public-private contract and delegation contracts of public service.’ In short, the contracts enumerated in the INSERM case by the Conflict Tribunal can be classed as ‘*public affairs contracts*’.

Regarding procurement contracts, Article 28 of the French Procurement Law of April 17 1996 (in French the ‘*Code des Marchés Publics*’, or **CMP**), derived from Article 69, permitted arbitration on disputes arising from the accounting of engineering projects. Thus, for procurement contracts for services, contracts of delegation of public services and concession contracts, the recognition of their arbitrability for international matters is a new solution.

¹⁵⁸ F.Brenet, F. Melleray, *La répartition des compétences à propos des recours formés contre une sentence arbitrale mettant en jeu les intérêts du commerce international*, DA 2010, comm.122.

(2).PUBLIC-PRIVATE PARTNERSHIP CONTRACTS (*CONTRATS*

PARTENAIRE)

Public tasks are not necessarily done by public entities. In practice, 'public tasks' are often entrusted to the private sector through contracts, legislative provisions or government decisions. This is called '**externalization**'. Externalization by contract is the most usual. Externalization has different names and forms. Generally, in common law, it is exemplified by old jurisprudence on the '**regulation of public entities**', and in civil law systems by the long-lasting existence of mechanisms such as concessions.¹⁵⁹ In France, there are '**delegations of public service**' and public-private partnerships (in French, '**Contrats Partenaire**', hereinafter referred to as "PPP"¹⁶⁰) in many areas introduced by the Act dated 17 June 2004 (hereinafter referred to as the PPP Act)¹⁶¹. In Great Britain, they are known as '**Private Finance Initiatives**' (PFI).

Consistent with French Directive No 2004/18/EC, the new form PPP in France allows public works contracts that cover the financing, design, construction, operation and maintenance of public infrastructure.¹⁶² PPP contracts also constitute a right to occupy administrative properties for public legal persons signing contracts.¹⁶³

Besides, the PPP Act authorizes administrative authorities to submit their disputes to arbitration, under Article 10.1 of the PPP Act and Article L.1414-12.1 of the French Collective Territorial General Code. At first the legality of this provision was challenged, since the legislation did not explicitly permit the government to be free from the prohibition principle. On 29 October 2004, the CE confirmed its validity.

¹⁵⁹ Jean-Bernard Auby, *Contracting Out and 'Public Values': A Theoretical and Comparative*

Approach, in Workshop on Comparative Administrative Law, in Yale Law School, May 7-9, 2009..

¹⁶⁰ But in France, the amount of PPP contract decreased, from 36 cases (Jan. to Oct. 2012) to 17 projects (Jan. to Oct. 2013). Refer to Support PPP contract Mission, <http://www.economie.gouv.fr/ppp/accueil>, last visited 7 Nov. 2013.

¹⁶¹ See Article 11 and 14 of the decree n° 2004-559 in 2004 June 17.

¹⁶² Organized from PIERRE HEITZMANN, *The contract de partenariat: a new form of french public private partnership allowing the use of arbitration to adjudicate disputes*, 23-1, International Construction Law Review, 21, 20-38 (2006), and Ph. Delelis, *Partenariats public-privé* : Fasc.602. paragraph no.43.

¹⁶³ Ph. Delelis, *Partenariats public-privé* : Fasc.602. paragraph no.85.

In addition, that disputes about competence, such as the execution of a PPP contract, are decided by administrative judges.¹⁶⁴ The arbitration tribunal should apply French public law.¹⁶⁵

However, in practice we can observe that public organizations do not exercise their right to submit to arbitration. In 2009, for example, only two partnership contracts contained an arbitration clause.¹⁶⁶

Several reasons can explain the reticence of public legal persons to submit disputes to arbitration.

First, the cost of private justice (it means arbitration system) is more expensive than the cost of public justice in France, especially because it is necessary for the parties to pay the arbitrators.

Second, public legal persons have more confidence in administrative justice and often hesitate before submitting to private justice.

Third, even though tasks are entrusted to the private sector, they remain under public supervision.

Finally, regarding the usual advantages of arbitration, for example their rapidity, private nature or confidentiality, these have less power in public law. More precisely, on the one hand administrative authorities are less sensitive or pay less attention than private enterprises to the time taken by a procedure. On the other hand, it is difficult for the private nature of an arbitral procedure to be compatible with the requirements of transparency imposed by the administrative law (for example, the law about the communication of administrative documents, or the publicity of the signing procedure).

Especially in the field of administrative works or delegation of public service, there is a penal responsibility. The person holding public authority or discharging a public service mission or holding a public elected mandate or serving as a representative, being a director or officer of the state, local authorities, public institutions...acting on behalf one of those listed above to procure or attempt to procure for others an unfair advantage by an act contrary to the laws or regulations designed to ensure freedom of access and equality of bidders in public procurement and public service delegations would be punished

¹⁶⁴ Ph. Delelis, *Partenariats public-privé* : Fasc.602. paragraph no.43.

¹⁶⁵ Ph. Delelis, *Partenariats public-privé* : Fasc.602. paragraph no.84.

¹⁶⁶ See N.Chahid-Nourai et R.Lazergues, *La résolution des litiges dans les contrats de partenariat*, AJDA, 2009, p.1925. quoted from Olivier Le Bot, *Les modes alternatifs de règlement des litiges en droit public de la construction*, *Revue de la recherche juridique. Droit prospectif*, Vol. 37, No. 142(2012), at page 880, note 17

penal responsibility.

Because of the growing complex rules on passion of administrative works and delegation of public service, these mentioned penal responsibilities appear more dangerous for local elected officers¹⁶⁷.

B. PROCEDURE LAW

I. CIVIL PROCEDURE LAW IN FRANCE

International commercial arbitration and domestic arbitration apply different regimes. Under Article 1504 and the following Articles of the French New Civil Procedure Code (which were Article 1492 and the following Articles before May 2011, but are hereinafter referred to as Article 1504) and “**European Convention on International Commercial Arbitration of 1961 Done at Geneva**” (also called the Geneva Convention¹⁶⁸), international arbitration enjoyed more liberty.

French doctrine and jurisprudence state that arising from Article 1504, “international arbitration” means arbitration ‘**involving an international commercial interest**’. This is based on the adoption of a ‘simple economic’ criterion to define ‘international’.¹⁶⁹

In a different way from domestic arbitration, under this definition the ‘international’ nature of a contract justifies its ‘arbitrability’.¹⁷⁰ In France, international arbitration applies the French New Civil Procedure Code, and the international arbitration is naturally subject to the ordinary jurisdiction, not to administrative jurisdiction even if one part is administrative agency. Questions on arbitrability and competent judges are independent of the ‘private’ or ‘administrative’ nature discussed in relation to domestic arbitration.

Under Labetoulle’s report ¹⁷¹, if an administrative contract has no

¹⁶⁷ JEAN-BERNARD AUBY, DROIT DES COLLECTIVITÉS LOCALES, 171 (5th ed.2009).

¹⁶⁸ European Convention on International Commercial Arbitration of 1961 Done at Geneva, April 21, 1961, U.N.T.S. vol. 484, p. 364 No. 7041 (1963-1964)

¹⁶⁹ Ernest Paris, *Arbitrage international et contrat administratif*, Volume 678, Revue Juridique De L'Economie Publique, p.40 (August 2010).

¹⁷⁰ François Bernet and Fabrice Melleray, *La répartition des compétences à propos des recours formés contre une sentence arbitrale mettant en jeu les intérêts du commerce international*, Volume 8, Droit Administratif, p.104 (August 2010).

¹⁷¹ Daniel Labetoulle, *L'arbitrage en droit public : Rapport Daniel Labetoulle*, 2007, n°3, Rev. arb. P.651.

international commercial character; both the arbitral procedure and the control of the arbitral award would be carried out under the administrative judges. In contrast, if there is an international commercial contract, then under Article 1504 and the Geneva Convention, an ordinary judge would be the '*juge d'appui*' when there is difficulty in the constitution of arbitral tribunal (we would talk it below in B. NOMINATION OF ARBITRATORS IN FRANCE) and would give the "*exequatur order*" to make arbitration award comes into the enforcement¹⁷².

However, it is worth noting that an 'international' aspect should not be the only reason for neutralizing the 'administrative' character of a contract. Nor does the 'international' nature automatically and inevitably delete the competence of the administrative judges to deal with administrative contracts. There will be further discussion of this in the third part of this dissertation (THIRD PART: JUDICIAL REVIEW AND EXECUTION OF ARBITRATION AWARD).

II.SIMILAR PROVISIONS IN COMPARATIVE PROCEDURAL LAW

There is also another legal system for the arbitration of administrative matters that can be compared to the French Civil Procedure Code. In Ethiopia, there are several provisions about the arbitrability of administrative matters. One is the Civil Code and the other is the Civil Procedure Code.

Article 315(2) of the Civil Procedure Code of Ethiopia (enacted more than 43 years ago and still in force) provides '*No arbitration may take place in relation to administrative contracts as defined in Article 3132 of the Civil Code or in any other case where it is prohibited by law.*'

Besides this, in Ethiopia Articles 3325-3346 of the Civil Code deal with arbitration in general. But Article 315(4) of the Civil Procedure Code says '*nothing in this chapter shall affect the provisions of Articles 3325 - 3346 of the Civil Code*'.

In Ethiopia, a public procurement contract is also an administrative contract and a dispute under such a contract cannot be submitted to arbitration.

2. IN JURISPRUDENCE

Even though the prohibition on arbitration is dominant, in French

¹⁷² Yves Strickler, *Arbitres Et Juges Internes*, in L'ARBITRAGE QUESTIONS CONTEMPORAINES, 81,57-84 (L'HARMATTAN ed.,2012)

jurisprudence, there were also some leading cases challenging this principle. The case “GALAKIS (1966)” was a good example.

Many French experts in arbitration law think that TC in France has finally enlarged the principle of arbitrability to public law contracts by allowing that administrative contracts could be part of the operation of international commerce.

In *Trésor Public v. Galakis*, (hereinafter referred to as *Galakis*) case, the CC held that ***‘the prohibition of French law against the state agreeing to arbitration did not apply to an international contract ... concluded for the needs of, and under conditions conforming to the usages of, maritime commerce’***.

Thus, according to this judgment, administrative agencies may not rely on their own laws to oppose the application of an agreement to arbitrate to which they otherwise consented.

The case also raised the question of whether the principle mentioned above concerned only the right of French public entities to refer their disputes to arbitration, or whether the principle also applies to foreign public entities. The jurist Loquin answered in the negative (opted for the first answer).¹⁷³

Furthermore, Loquin asserted that the jurisprudence has created a legal duality of rules in France. One set of rules is a prohibition in internal relations and the other set is valid for international relations.¹⁷⁴

However, as for international commercial field, before the *WALT DISNEY* (1986) case (hereinafter referred to as *Disney*), the question of whether the prohibition on arbitration was applicable to *‘international contracts’* had remained unsettled in French law for a long time.¹⁷⁵

The *Disney* case was about an administrative contract for the construction of the Eurodisneyland attraction. It was a leading case that allowed the Assemblée Générale du Conseil d’État (hereinafter the AGCE) to consider the principle of interdiction. The AGCE considered that the principle *‘resulted from general principles in French public law, according to first paragraph of Article 2060 of Civil Code that, under reservation of exceptions from express legislations or a*

¹⁷³ Eric Loquin, *Retour dépassionné sur l’arrêt inerm c/ fondation letten f. saugstad*. - (*Tribunal des Conflits*, 17 mai 2010), Volume 4, *Journal du droit international* (Clunet).p.841,(2011)

¹⁷⁴ Eric Loquin,*Id.*

¹⁷⁵ Regarding the vague situation in jurisprudence before *Disney*, refer to PIERRE HEITZMANN, *A welcome and surprising decision: french administrative supreme court acknowledges the adequacy of arbitration to adjudicate disputes arising out of a new kind of public private partnership*, Vol. 20, N° 10, *Mealey’s International Arbitration Report*, p.4

general principle in French public law and it(the principle) preexisted before civil procedure code.¹⁷⁶

In addition, AGCE pointed out that legal entities of public law could not ***“circumvent the rules determining the jurisdiction of the French administrative courts if the dispute touches upon rules of French administrative law that are considered as being of public policy.”***

AGCE reasoned that the contract envisaged with Walt Disney ***“resorted to the French domestic legal order”, and “not governed by principles applicable to international commerce.”*** Thus, this contract cannot contain a valid arbitration clause, which would be null and void as a matter of public policy.

Comparing the Disney (1986, CE) and the Galakis(1966,CC) decisions, the former was more restrictive. In fact, the contract in Disney could certainly be considered as international pursuant to Article 1492 of the French Civil Procedure Code¹⁷⁷, as it involved international trade.¹⁷⁸ We can say that, regarding the interpretation of ***“international commercial interest”***, the attitude of the CE is more restrictive than that of the CC.¹⁷⁹

To make the contract correspond with the above decision, a law was enacted on 19 April 1986 under which the state, territorial collectives and public establishments are authorized to include arbitration clauses in contracts that they conclude with foreign companies for the achievement of operations in the national interest¹⁸⁰.

But in the administrative law field, jurist Yves Gaudemet considered that since the mentioned law was enacted extremely for the Disney case, and so we can never imagine that its application could be enlarged.¹⁸¹

Recently, the landmark case of ‘INSERM’ was based on the conclusion in the ‘Galakis’ case that contracts involving an international commercial interest, even when they have the nature of administrative contracts, could be arbitrable. Even

¹⁷⁶ Regarding this decision, refer to CE, avis Eurodisneyland on 6 March 1986 and D. Labetoulle, GACE, 2e éd., Dalloz, 2002, n° 15, p. 175.

¹⁷⁷ Article 1492 of French Civil Procedure Code (before 2011) provided: “Where international commercial interests are involved, the arbitration shall be an international one. “.

¹⁷⁸ Alexis Mourre and Alexandre Vagenheim, the INSERM Decision OF the Tribunal Des Conflits: A Storm In A Teacup?, Kluwer Arbitration Blog,(June 7,2010), available in <http://kluwerarbitrationblog.com/blog/2010/06/07/the-inserm-decision-of-the-tribunal-des-conflits-a-storm-in-a-teacup/>

¹⁷⁹ YVES GAUDEMET, L’avenir De L’arbitrage En Droit Administratif Français, in JACQUES PETIT, LES COLLECTIVITÉS LOCALES, MÉLANGES EN L’HONNEUR DE JACQUES MOREAU, 171 (Economica, 2002).

¹⁸⁰ And it was called as “Walt Disney Code”.

¹⁸¹ YVES GAUDEMET, supra note 78.

in this case arbitrability is not a focus, but is on the enforcement of the arbitral award, the judgment is very important for the standard of the separation of competence, thus we would talk it in the third part of this dissertation (JUDICIAL REVIEW).

CHAPTER II: ARBITRATION IN ADMINISTRATIVE MATTERS IN CANADA

1.IN PRINCIPLE: ACCEPTABLE

Canada is a federal country and its legal framework is very complex. Each province has autonomy in many fields. In examining arbitration in administrative matters in Canada, it is necessary to divide the discussion into two major parts. The first part examines it from positive law perspective. It aims to determine whether under substantial law, administrative contracts and private contracts are subject to the same rules (A.SUBSTANTIVE LAW: SUBJECT TO THE SAME RULES). The second part examines it from a procedural law perspective. It aims to determine whether under procedural law, a special process has been established to deal exclusively with administrative matters (B. PROCEDURAL LAW: SUBJECT TO THE SAME JURISDICTION).

A.SUBSTANTIVE LAW: SUBJECT TO THE SAME RULES

From an objective point of view, it is important to examine whether independent ideas regarding “administrative contracts” or “public contracts” exist. This is important in determining whether disputes arising from administrative contracts and private contracts are subject to the same rules and principles. Canada has certain peculiarities regarding this question that stems from a variety of influences.

At this point, the discussion will be split into two segments. The first examines the Canadian legal system regarding positive law. Its main point of distinction is the coexistence of common law and civil law, which stems from Canada’s historical background (I. INFLUENCED BY HISTORY: COEXISTENCE OF COMMON LAW AND CIVIL LAW). The second section introduces the topic of the reception of law in Canada, particularly the international accord. Its primary focus is Canada’s open attitude toward arbitration as a result of the influence of

international law (II. INFLUENCE OF INTERNATIONAL LAW: RECEPTION OF LAW).

I. INFLUENCED BY HISTORY: COEXISTENCE OF COMMON LAW AND

CIVIL LAW

In considering the coexistence of common law and civil law¹⁸² in Canada, it is necessary to discuss the origins of Canadian law. By and large, it emerged from colonial influences ((1). ORIGINS OF CANADIAN LAW). Based on common law, the idea of an “administrative contract” springs from different origins. It primarily refers back to influences from the Anglo-Saxon legal system, and in particular, to the legal principles of the “legislative sovereignty of Parliament” and the “rule of law” ((2). TRADITIONS OF THE “LEGISLATIVE SOVEREIGNTY OF PARLIAMENT” AND THE “RULE OF LAW”)

(1). ORIGINS OF CANADIAN LAW

Historically, the Canadian legal system is derived from various European systems which were brought to Canada by explorers and colonists in the 17th and 18th centuries.

European immigrants (especially the English and French) were the largest group of original settlers in Canada. The English and French settlers each brought with them their own laws, legal systems, customs, and historical traditions. Therefore, two distinct legal systems and sets of legal ideas coexisted in Canada. However, they were very different. The French legal system was based on the civil law, while the English legal system was based on the common law, fairness and equity. Canada, with the exception of Quebec, is governed by laws founded upon the common law of England.¹⁸³

¹⁸² The legal term “civil law” often has different legal meanings in different situations. One meaning is used in contrast to the “common law” to refer to the legal system that is based on a civil code, such as the Justinian Code or the Civil Code of Quebec. The common law was developed in Great Britain following the Norman Conquest and is based on the decisions of judges which are often referred to as “precedent.” The second meaning of civil law refers to matters of private law as opposed to “public law.”

¹⁸³ F.P. Walton, *The Legal System of Canada*, Vol. V. January, 1913. No. 4, LAW LIBRARY

It is important to consider the historical evolution of Canadian law.¹⁸⁴ Three major eras are identifiable: New France ((I). NEW FRANCE (1608-1763)), British ((II). BRITISH (1764-1866)), and Federation ((III). FEDERATION (1867-PRESENT)).

(I). NEW FRANCE (1608-1763)

In Canada, in 1608, France was quickly able to establish a new colony along the St. Lawrence River that, at that time, was called “New France.”

At first, Samuel de Champlain, the explorer who established the first truly permanent French settlement in the area, did not govern many settlers. It was a small settlement - no more than 60 colonists lived there in 1620. The French settlement remained a small fur trading post for the first 50 years of its existence.¹⁸⁵ Because of its status as a small trading post, its legal system was not of great importance.

However, this situation changed in 1663. New France suddenly underwent a period of extensive expansion. Jean-Baptiste Colbert, a leading minister in France, strongly believed that compact settlements would better protect the colony against warring Native Americans and the British.

Nevertheless, the governing law in France was exceedingly complex. In the 17th century, France was still an autocratic and feudal state. Although the royalty was increasingly powerful at that time, separate local forces existed. Thus, there was no uniform legal system in France.

(II). BRITISH (1764-1866)

Following the Battle of Quebec in 1759, the country was governed almost exclusively under English law. British conquerors forced France to abandon the colony of New France in *The Treaty of Paris of 1760*. To introduce the British legal system, Governor Murray issued an order in September 1764 establishing civil courts; that order can be considered to represent the beginning of the British

JOURNAL,55,55-60(1913).

¹⁸⁴ For a discussion of the historical evolution of the civil law of Quebec, see ALINE GRENON & LOUISE BÉLANGER-HARDY, *ELEMENTS OF QUEBEC CIVIL LAW: A COMPARISON WITH THE COMMON LAW OF CANADA* 25 ff. (Thomson Carswell ed., 2008)

¹⁸⁵ Refer to the website: http://www.canadiana.ca/citm/themes/pioneers/pioneers3_e.html#newfrance, title: Pioneers and Immigrants, last visited 26 Feb.2013.

period. Judgments would be made in accordance with British law, but the courts could take French customs and laws into account insofar as the disputes related to the French inhabitants of the colony. Furthermore, on July 1, 1766, a new order called “*Paulus Æmilius Irving*” indicated that all civil actions between British-born subjects would be examined by juries composed of British-born subjects; civil actions among Canadians would be decided by juries composed of Canadians. In cases involving both British subjects and Canadians, the juries would be composed of equal numbers of each group.¹⁸⁶ Pursuant to the abovementioned order of 1766, the authority of French laws and customs was extended to all cases involving the inhabitants of Quebec colony.¹⁸⁷

To avoid public defiance, the British Parliament enacted the Quebec Act in 1774, providing that existing French law (*jus commune*) would continue to apply to matters about property and civil rights within the Quebec colony, and pursuant to which the English common law was to apply to matters of public and criminal law.¹⁸⁸

The British Parliament enacted the *Constitutional Act* in 1791, which created two provinces: Upper Canada (situated closer to the headwaters of the Saint Lawrence River and now known as Ontario) and Lower Canada (now known as Quebec province). In 1792, the first act introduced by the Legislature of Upper Canada adopted English common law in Upper Canada.¹⁸⁹ This distinctive legal system (civil law and common law) for Quebec was confirmed again in 1841, after the rebellions in Upper and Lower Canada, in the 1841 Act of Union of the two Canadas.

(III). FEDERATION (1867-PRESENT)

As mentioned above, the bijural legal system was established during the British period and it continued to develop. The bifurcation of laws was included in Canada’s constitution, the 1867 British North America Act¹⁹⁰ (now called the “*Constitution Act, 1867*,” hereinafter, “Canadian Constitution”). The preamble of

¹⁸⁶ C.LLOYD BROWN-JOHN and HOWARD PAWLEY, WHEN LEGAL SYSTEMS MEET: BIJURALISM IN THE CANADIAN FEDERAL SYSTEM, 7 (ICPS, 2004); and CLAUDE ROUTHIER, L’Histoire du QUÉBEC pour ne pas oublier NOTRE PASSÉ, 23 (FRANCOIS GOULET, 2012).

¹⁸⁷ C.LLOYD BROWN-JOHN and HOWARD PAWLEY, *supra* note 186, at. 7.

¹⁸⁸ C.LLOYD BROWN-JOHN and HOWARD PAWLEY, *supra* note 186, at. 7.

¹⁸⁹ BRAVERMAN, *infra* note 11, at. 8.

¹⁹⁰ CAN. CONST. (Constitution Act, 1867, 30-31 Victoria, c. 3 (U.K.) (Union)) (since 1982, Constitution Act, 1982, c. 11), available in JUSTICE LAWS WEBSITE, <http://laws-lois.justice.gc.ca/eng/const/FullText.html>, last modified 28 Oct. 2013.

the Canadian Constitution proclaims that Canada is to have a Constitution “similar in principle to that of the United Kingdom.”¹⁹¹ Because of the supremacy of constitutional law, much of Canadian constitutional and administrative law is derived from British sources. Legal scholars David Phillip Jones and Anne S. de Villars referred to this phenomenon as “the relevance of British Law.”¹⁹²

The legislative authority of the Canadian Parliament is addressed in Sections 91 and 92, which indicate that criminal law, public debt and property are within federal jurisdiction, while property and civil rights are assigned to provincial jurisdiction.¹⁹³

Thus, the Canadian legal system as a whole actually consists of two legal systems: Quebec preserved the civil law in the field of private law, while the criminal law, the public law in Quebec, other federal laws (mentioned Section 92) and the other nine provinces and three territories are governed by common law systems.¹⁹⁴

As a result of the bijuralism in the Canadian legal system, Canadian public law is based on common law, even in Quebec. Obviously, it includes many special features. The field of positive law includes the traditions described as the “legislative sovereignty of parliament” and the “rule of law.” In procedural law, it is subject to the same procedures and jurisdiction as civil disputes.

(2). TRADITIONS OF THE “LEGISLATIVE SOVEREIGNTY OF

PARLIAMENT” AND THE “RULE OF LAW”

As mentioned, the Canadian legal system, in the field of public law, is based on British public law. British conventions and judicial precedents are still used to interpret and execute the Canadian Constitution. Two important ideas governing Canadian public law are the “legislative sovereignty of parliament” and the “rule

¹⁹¹ DAVID PHILLIP JONES & ANNE S. DE VILLARS, *PRINCIPLES OF ADMINISTRATIVE LAW* 21 (Carswell ed., 4th ed. 2004)

¹⁹² *Id.*

¹⁹³ C.LLOYD BROWN-JOHN and HOWARD PAWLEY, *supra* note 186, at.8; And Department of Justice of Canada, <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/constitution/lawreg-loireg/p1t13.html>, last modified: 7 June, 2013.

¹⁹⁴ C.LLOYD BROWN-JOHN and HOWARD PAWLEY, *supra* note 186, at.8.

of law.”

“The sovereignty of parliament” or “sovereignty” was the term created by the jurist Dicey to describe the concept of “the power of law-making unrestricted by any legal limit.” Dicey described this legal principle as follows:

Parliament...has, under the English constitution, the right to make or unmake any law ... no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.¹⁹⁵

Observing this concept from a different angle, we can say that the concept of the “sovereignty of parliament” relates to the relationship between the parliament and the courts. That is, which one occupies a superior position?

Pursuant to Dicey’s definition, the concept includes three important elements. One of these elements is that parliament has the supreme power to make any law. Another is that it is impossible to create a law that a future parliament cannot change. The final element is that only parliament can change or reverse a law that it has passed.

Parliament is sometimes understood to include the king, the House of Lords, and the House of Commons; these three bodies may be aptly described as the “King in Parliament.” Prior to the 20th century, the king was the source of law and the maintainer of order.

“The rule of law”¹⁹⁶ is also referred to as the “supremacy of law.” The phrase “rule of law” has multiple meanings.¹⁹⁷ The first meaning is the absolute supremacy of the law. This meaning excludes the existence of arbitrariness. Everyone is ruled by law and by law alone. A man may be punished only for a breach of the law.

The second meaning is **equality before the law**. In this sense, administrative agencies and individuals should be subject to the same jurisdiction. According to this view, there is no place for “administrative law.”

The third meaning is that rules are not the source, but rather, are the consequence of individual rights as defined and enforced by the courts. The

¹⁹⁵ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION, 3(8TH ED, 1915)

¹⁹⁶ BERNARD SCHWARTZ, FRENCH ADMINISTRATIVE LAW AND THE COMMON-LAW WORD 307 (New York University Press,1954)

¹⁹⁷ For the details regarding the rule of law, see A.V. DICEY, *supra* note 195..

principles of private law have been so extended by the actions of the courts and the parliament as to determine the position of the Crown.

Under the principles of “parliamentary sovereignty” and the “rule of law,” the same rules were applied to administrative bodies and they were subject to the same rules and jurisdiction as citizens. Thus, in the common law judicial tradition, the notion of an “administrative contract” is nonexistent.¹⁹⁸ Even so, another special process to deal with administrative disputes developed in the common law system and we will provide additional details regarding this process later in the discussion regarding “quasi-judicial organizations.”(see below II. QUASI- JUDICIAL ORGANISATION: ADMINISTRATIVE TRIBUNALS)

II. INFLUENCE OF INTERNATIONAL LAW: RECEPTION OF LAW

In addition to historical factors, there also has been a reception of international law into the Canadian legal system. The reception of law originated mainly from international conventions, including the North American Free Trade Agreement (in French, “*Accord de libre-échange nord-américain*,” hereinafter NAFTA). The reception is demonstrated primarily by two particularities. One is Canada’s open attitude toward arbitration ((1). OPEN ATTITUDE TOWARD ARBITRATION) and the other is the arbitration system that has been imposed. ((2). IMPOSED ARBITRATION)

(1). OPEN ATTITUDE TOWARD ARBITRATION

In Canada, there is no rule that directly provides for arbitration in administrative matters. However, not only the federal government, but also the provinces and local authorities have adopted international arbitration rules and recourse to arbitration is generally authorized by them.¹⁹⁹

Pursuant to the Federal Commercial Arbitration Code, arbitration against the government is possible. Article 5(2) of the Federal Commercial Arbitration Code (FCAC) provides: “*The Code applies only in relation to matters where at least one of the parties to the arbitration is Her Majesty in right of Canada, a departmental corporation or a Crown corporation or in relation to maritime or*

¹⁹⁸ MATHIAS AUDIT, *Présentation générale : les contrats publics sont-ils solubles dans l’arbitrage international?*, CONTRATS PUBLICS ET ARBITRAGE INTERNATIONAL 1 (Bruylant, 2010.)

¹⁹⁹ Denis Lemieux, *Arbitrage International et Contrats Publics au Canada*, in MATHIAS AUDIT, CONTRATS PUBLICS ET ARBITRAGE INTERNATIONAL 142, 141-50 (Bruylant, 2011).

admiralty matters.”

In addition, Article 10 of the FCAC provides: *“This Act is binding on Her Majesty in right of Canada.”*

Generally, Her Majesty (in French, “Sa Majesté”) is considered to represent the Crown and the government. Thus, it is possible for the Crown or the government to be a party to an arbitration process.

Article 7 of the Manual for the Settlement of Conflicts of Canada, with regard to the legal definition of an “Arbitration agreement,” provides that: “...an agreement (concluded) by the parties so as to submit to arbitration **all or certain disputes** which...may arise between them **with reference to a defined legal, contractual or suggested relationship.**”

Pursuant to this disposition, there are no distinctions made regarding the subject of an arbitration process (“...by the parties”), and there are only specifically defined relationships (“...defined legal, contractual or suggested relationship”). Thus, there is no special rule regarding arbitration for public legal persons.

Aside from the field of international arbitration, in domestic arbitration, we also can find the possibility that the government may submit its disputes to arbitration.

Pursuant to Article 50 of the Arbitration Code of Alberta:²⁰⁰ *“This Act binds the Crown.”*

Furthermore, there are some national laws favoring arbitration as a modern method for the resolution of conflicts.

Pursuant to Article 35.11 of the Forest Act in Quebec: *“...(II) If the holders have not come to an agreement 45 days after the notification of the request, one of them may require that the dispute be submitted to arbitration.”*

In addition, pursuant to Article 106.11: *“...(III) Any disputes...shall be submitted to arbitration, on the application of an interested contractor...The decision of the arbitrator shall have the same effect as stipulations agreed upon between the contractors in respect of the subject of the dispute.*

In addition, pursuant to the third paragraph of Article 151.1 of the Mining Act: *“Any dispute concerning the determination of the amount of and the terms and conditions applicable to the compensation shall be submitted to arbitration.”* Thus, it is possible to submit disputes arising from contracts governing surface mineral substances to arbitration.

²⁰⁰ The number and context of the provision is also provided in Manitoba.

Pursuant to Article 37 of the legislation entitled An Act Respecting The Professional Status Of Artists In The Visual Arts, Arts And Crafts And Literature, And Their Contracts With Promoters: “(I) ... every dispute arising from the interpretation of the contract shall be submitted to an arbitrator at the request of one of the parties...”

Also, Article 21 of the Public Works Act of Quebec provides: “(I) The Government may, at any time, establish a board of arbitration and appoint ...competent persons..., not exceeding three, as arbitrators for Québec. (II) *Such arbitrators shall arbitrate on...any claim arising out of any contract...* (III) *Every arbitrator shall receive such remuneration as may be fixed by the Government.*”

Similarly, with regard to public supply contracts, a public body is authorized to adopt an amicable regime for settling disputes arising out of a contract by referring to the dispute resolution clauses in the contract. If the matter cannot be settled in an amicable manner, the public body may refer to a court of justice or to an arbitrator.²⁰¹ There is an identical provision regarding public service contracts.²⁰²

With regard to public construction, a public body is also authorized to settle disputes through a court of justice, an adjudicative body, or an arbitrator. However, in the case of arbitration, general or special authorization from the Minister of Justice is required for public bodies²⁰³ involved in governmental procurement or public construction in the educational and health network field.²⁰⁴

In conclusion, arbitration is generally acceptable in the public law field.

(2). IMPOSED ARBITRATION

Arbitration also is an important mechanism for Canada as a member of NAFTA as it aims to protect investors’ interests.

In NAFTA, the most relevant provisions concerning administrative law are those contained in chapters 10 and 11.

Chapter 10 of NAFTA addresses government procurement but not execution. The provisions in chapter 11 address imposed arbitration.

²⁰¹ Regulation Respecting Supply Contracts of Public Bodies §41 (Décret 531-2008, s. 41)

²⁰² Regulation Respecting Service Contracts of Public Bodies §54 (O.C. 533-2008, s. 54)

²⁰³ Regulation Respecting Construction Contracts of Public Bodies § 54 (O.C. 532-2008, s. 54)

²⁰⁴ Denis Lemieux, *supra* note 199, at 145.

Chapter 11 allows a disputing party to settle a claim through consultation or negotiation by delivering to the other disputing party a written notice of the intention to submit the dispute to arbitration at least 90 days before the claim is submitted (Art. 1118, 1119).

The enterprise can ask for payment of compensation arising from an administrative decision authorizing the expropriation of an investment by asserting the provisions in chapter 11 (Article 1110).

Further, Article 1121 addresses the conditions precedent to the submission of a claim to arbitration. It provides for a waiver of the right to initiate or continue domestic proceedings before an administrative court.

This “waiver clause” aims to prevent the disputing parties from presenting the same dispute in two different judicial systems. It prevents the duplication of proceedings and ensures the independence and the privileges of the NAFTA investment disputes arbitration mechanism. Although it means that international investment disputes occurring in NAFTA can be resolved only by arbitration, it also essentially reflects the rejection and exclusion of a party’s local remedies and court system.²⁰⁵

B. PROCEDURAL LAW: SUBJECT TO THE SAME JURISDICTION

As mentioned, unlike the court system in France and Taiwan, which includes both judicial courts and administrative courts, in Canada, **there is only “one” set of courts.** Administrative disputes and civil disputes are subject to the same jurisdiction. Thus, in the first paragraph, we will discuss the monism of the court system in Canada (I. JUDICIAL ORGANIZATION: MONISM OF COURT SYSTEM). Even so, special organs called “administrative tribunals” have been established to deal with administrative matters (II. QUASI- JUDICIAL ORGANISATION: ADMINISTRATIVE TRIBUNALS).

I. JUDICIAL ORGANIZATION: MONISM OF COURT SYSTEM

In Europe and in other countries in which the court system is based on the

²⁰⁵ About the discussion of chapter 11, see Denis Lemieux and Sabine Mekki, *La revision judiciaire des decisions en vertu du chapitre 11 de l’anena*, vol. 45, n° 4, Les Cahiers de droit, p. 791-820 (2004). Regarding the detail provisions of NAFTA, refer to The NAFTA Secretariat website: <https://www.nafta-sec-alena.org/>, last visited 31 Oct.2013.

French model, there is a dual court system²⁰⁶. Administrative courts and judicial courts deal with public disputes and private ones, respectively.

In contrast, the Canadian court system is not a dual court system. Administrative bodies and citizens are subject to the same jurisdiction.

Thus, we will first examine the Canadian legal system from the perspective of whether it's a federal or province court ((1).FEDERAL AND PROVINCIAL COURTS). Secondly, we will analyze the Canadian judicial system from the perspective of whether it's a superior or supreme" courts. ((2).SUPREME COURT AND SUPERIOR COURTS)

One significance of this distinction is that only the superior courts and the Federal Court of Canada are competent to deal with judicial review about decisions made by administrative tribunal on administrative matters.

(1).FEDERAL AND PROVINCIAL COURTS

As a result of historical factors, the Canadian legal system has been significantly influenced by the British system. The Canadian court system includes two divisions: the federal judicial system and the provincial judicial system.

Generally speaking, the federal judicial system includes the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court, the Canadian Taxation Court and the Court Martial Appeal Court.²⁰⁷

The provincial judicial system includes the criminal courts, the civil courts, and the Court of Appeal.

Both the federal and the provincial governments can establish courts in Canada. The federal government has established the Canadian Supreme Court and the Canadian Federal Court.

In brief, three main types of courts constitute the Canadian court system. They are the Canadian Supreme Court, the Canadian Federal Court (federal courts), and the courts within the provinces (provincial courts).

²⁰⁶ As for the Canadian court system, please refer to website:

http://www.cjc-ccm.gc.ca/english/resource_en.asp?selMenu=resource_courtsystem_en.asp, last visited 28 Feb.,2013.

²⁰⁷ Supreme Court of Canada HomePage, <http://www.scc-csc.gc.ca/>, last visited 28 Oct., 2013.

(I). FEDERAL COURTS

The Canadian Constitution allows the federal Parliament to create additional courts having general jurisdiction over federal statutes. Article 101 of the Constitution Act, 1867 is the legal source allowing the creation of federal courts as mentioned.

Unlike provincial superior courts, which exercise inherent jurisdiction, the jurisdiction of these federal courts is defined by statute and encompasses matters falling within the competence of the federal government.²⁰⁸

The Federal Court of Canada was established in 1971. The Canadian Federal Court can hear cases regarding disputes between provinces and the federal government as well as disputes among provinces.

The control of the legality of federal administrative action has been conferred almost exclusively to the Federal Court of Canada. It can also hear cases relating to claims against or by the federal government and other federal matters such as taxation, copyrights, trademarks, maritime disputes and patents.²⁰⁹ The Canadian Federal Court has two tribunals. One is the trial division and the other is the appeal division. The Federal Court- Appeal Division, also known as the Federal Court of Appeal, hears applications for judicial review from federal administrative tribunals such as the Canadian Radio-television and Telecommunications Commission as well as appeals from its own Trial Division.

Finally, the Federal Court of Appeal and the Federal Court of Canada are the closest thing in Canada to an administrative court since a substantial part of these courts' work concerns administrative and public law issues, while superior courts only occasionally determine such issues.

(II). PROVINCIAL COURTS

The legal authority for the establishment of courts within provinces is based on Article 92 of the British North America Act, 1867.

Based on this article, legislators in each province can make laws regarding the organization of provincial courts, including the courts of appeal, the superior courts of the province, and the provincial courts.

²⁰⁸ Supreme Court of Canada HomePage, *supra* note 207.

²⁰⁹ BRAVERMAN, *supra* note 11, at 17.

In Canada, the provinces do not have a uniform construction regarding courts. The names of their courts are also different, but the same types of courts usually have a similar jurisdiction. In each province, the court system is primarily constituted of provincial criminal courts, provincial civil courts, and provincial courts of appeal.

Each province has a court of appeal which is responsible for hearing appeals from the province's trial courts. Usually the panel consists of three or five judges. This panel hears the appeals and each appeal is determined according to the judgment of a majority of the judges.

With regard to the effect of the judgments, the judgment of a court of appeal in a particular province is binding on all other courts in the same province, but it only has a persuasive effect in the courts of other provinces. The judgment of a superior or supreme court in a particular province is binding on the lower levels of court within the same province, but it only provides persuasive authority for the other judges of superior or supreme courts in the same province.

Each province also has a superior court. It has jurisdiction over criminal and civil cases involving matters that are beyond the jurisdiction of the provincial courts.

The discussion above examines the distinctions between the "federal" or "provincial" courts. Now, we will discuss the Canadian legal system from another angle. As is the case in other countries around the world, the Canadian judicial system may be viewed as constituting a pyramid. Only some courts are competent to deal with administrative matters. Thus, we would like to analyze which courts in the Canadian judicial system are competent to deal with the judicial review of decisions made by administrative tribunal on administrative matters.

(2).SUPREME COURT AND SUPERIOR COURTS

Three levels of Canadian courts resemble the construction of a pyramid.²¹⁰

The first level, which is basic and broad, is formed by the provincial and territorial courts. The second level consists of provincial and territorial superior courts. Judgments from the superior courts may be appealed to the next level,

²¹⁰ There also is another view that there are "four" levels, but it only is another angle of observation.

which is made up of the provincial or territorial courts of appeal.²¹¹

In addition, also federal courts (the Federal Court of Appeal, the Federal Court, the Tax Court of Canada and the Court Martial Appeal Court) are also in second level. Finally, the Canadian Supreme Court is at the top of pyramid and it is Canada's final court of appeal.

Because the Canadian Supreme Court is the highest court, we will consider it first ((I). SUPREME COURT OF CANADA). Secondly, we will discuss the superior courts ((II). SUPERIOR COURTS OF CANADA).

(I).SUPREME COURT OF CANADA(SCOC)

As is the case in most countries, the Canadian Supreme Court is a court of appeal and exercises final appellate jurisdiction in Canada. It is entitled to review whether the court of appeal respected the procedural rules to which it is subject, as well as whether it correctly interpreted the law. It deals only with legal issues and does not conduct trials.

The Canadian Supreme Court hears appeals from the highest courts of last resort in the provinces and territories (the provincial, territorial courts of appeal), the Federal Court of Appeal and the Court Martial Appeal Court of Canada. It limits its review to appeals of particular importance and interprets the law in complex and confusing cases. In addition, it hears matters that are referred to it by the federal government, particularly constitutional questions. In brief, the Canadian Supreme Court has jurisdiction simultaneously over civil, commercial, criminal, **administrative** and even constitutional law matters. Its main function is to safeguard and assure the “uniformity,” “consistency” and “correctness” in the “articulation,” “development” and “interpretation” of legal principles in the Canadian judicial system.²¹²

The Canadian judicial system was established pursuant to the “British North America Act in 1867”. This act was modified in 1982 by the “Constitution Act, 1867”. The Canadian Supreme Court was created in 1875 by the Parliament as permitted by the Constitution of Canada. Currently, the jurisdiction of the Canadian Supreme Court is derived mainly from the “Supreme Court Act,” as well as from several other acts of Parliament, including the “Criminal Code.”²¹³

²¹¹ Supreme Court of Canada, *supra* 207.

²¹² Supreme Court of Canada, *supra* note 207.

²¹³ Supreme Court of Canada, *supra* note 207.

Detailed provisions regarding the Supreme Court of Canada are provided in the Supreme Court Act (R.S.C., 1985, c. S-26).²¹⁴

The Canadian Supreme Court has nine regular members. One is *the Chief Justice of Canada*²¹⁵ and the others²¹⁶ are "*Puisne Judges*." ²¹⁷ All members of the Canadian Supreme Court are appointed by the federal government as mentioned, but they are also representative of all parts of Canada, including its different regional interests. In addition, in order to provide balance and give attention to the traditions and specialties of Quebec province, three of the nine members of the Canadian Supreme Court have obtained civil-law training to take the spirit and provisions of the civil law tradition of Quebec province into consideration.

A panel of Supreme Court judges hears the arguments presented by lawyers and then gives a written or oral decision regarding the dispute. However, if the dispute is very important, the case is heard by all nine members of the Supreme Court.

With regard to the judgments of the Canadian Supreme Court, members of the panel who hear a particular case may not agree about whether an appeal should be dismissed or allowed, but eventually a final decision will be made by a simple majority. The concept of a majority is the concept used in making a judgment. This judgment becomes a precedent for all Canadian courts to follow in concept when they are confronted with cases involving similar facts.

There are three different procedures by which matters can come before the Canadian Supreme Court. First, in most cases, a party who wishes to appeal the decision of a lower court must obtain permission from a panel of three judges of the Supreme Court. Second, in some special cases, permission is not required and are referred to as appeals "as of right." These include certain criminal cases and appeals from opinions pronounced by courts of appeal on matters referred to them by a provincial government.²¹⁸ To be more precise, the Criminal Code gives

²¹⁴ Supreme Court of Canada, *supra* note 207.

²¹⁵ Justice Laws Website, <http://laws-lois.justice.gc.ca/eng/acts/S-26/page-2.html#docCont>, last visited Oct. 21, 2013, last modified Oct. 11, 2013.

²¹⁶ The term is used almost exclusively in common law jurisdictions to refer to a regular member of the court, as opposed to the head of court. Regarding the list of current judges on the Supreme Court of Canada, refer to the Supreme Court of Canada, *supra* note 207.

²¹⁷ Article 4 of the Supreme Court Act, R.S.C. 1985, c. S-26 provides that: "The Court shall consist of a chief justice to be called the Chief Justice of Canada, and eight puisne judges." See the website: <http://laws-lois.justice.gc.ca/eng/acts/S-26/page-2.html#docCont>, last viewed 2013/05/19.

²¹⁸ This is a legal term that describes a court action by which a party who wishes to appeal may take without permission of the court, as opposed to requiring leave of court.

a right of appeal where an acquittal has been set aside in the provincial court of appeal or where, in the provincial court of appeal, one judge dissents on a point of law.²¹⁹ Third, the Court sometimes provides advisory opinions on questions referred to it by the Governor-in-Council.

Regarding the third condition mentioned above, similar to the Conseil d'État in France, the Canadian Supreme Court also has a special "reference" jurisdiction. This "reference" jurisdiction is provided by s. 53 of the Supreme Court Act. The Governor-in-Council may refer important questions to the Court regarding the interpretation of the Constitution, the constitutionality or interpretation of any federal or provincial legislation, or the powers of Parliament or the provincial legislatures, their respective governments, or any other important question on any matter.

Consequently, in light of the broad scope of the Canadian Supreme Court's jurisdiction, the Canadian judicial system significantly differs from that of many other countries. The Canadian Supreme Court really stands at the apex of courts. Even in the United States, the U.S Supreme Court does not possess full appeal jurisdiction over judgments rendered by state (as opposed to federal) courts.²²⁰ Compared to its counterpart in the United States, the Canadian Supreme Court functions as a "national," and not merely a "federal," court of last resort. Furthermore, in continental Europe or in Taiwan, sometimes there are more than two "supreme" courts in the domestic court system. For example, in France, there is one Constitutional Court, one Conseil d'État (for administrative litigation), and one Cour de Cassation (for civil and criminal law affairs). In Taiwan, there is one Constitutional Court, one Supreme Administrative Court (for administrative litigation), and one Supreme Court (for civil and criminal law affairs). Thus, in many other countries, the supreme court is not so "unique," but rather, there are separate courts of last resort for constitutional law and administrative law cases in addition to a general court of appeal.²²¹

(II).SUPERIOR COURTS

In Canada, the legal term "superior court" has two different meanings. One is the general meaning, indicating the inherent jurisdiction of a court. The other is

²¹⁹ Supreme Court of Canada, *supra* note 207.

²²⁰ Supreme Court of Canada, *supra* note 207.

²²¹ Supreme Court of Canada, *supra* note 207.

the specific meaning, indicating a particular court. Capitalization is used to distinguish between these two different meanings.

The term “superior court” is used to designate the general sense. It indicates that a court has an inherent jurisdictional character.

Traditionally, in England, the “*English Court of King’s Bench*” executed the task of supervising public administration. The members of the Bench are descendants of the royal superior courts in England. Because of the aforementioned historical and colonial factors, Canadian superior courts inherited the Bench’s inherent powers and jurisdiction and assumed its task. The judgments of a superior court are not subject to review unless there is a specific statute providing for review or appeal. The term “superior court” is not limited to trial courts. The Federal Court of Appeal and the provincial and territorial courts of appeal are all superior courts.²²²

However, in the Canadian legal system, pursuant to the Canadian Constitution, the administration of justice falls under provincial jurisdiction. Provincial legislatures have the responsibility to provide for the organization and procedure of the courts.

In addition, the federal government is responsible for the appointment and payment of judges in both the federal courts and the superior-level courts of each province. The provincial and territorial governments are responsible for the appointment of judges for the lower provincial and territorial courts.²²³ Hence, although the superior courts in Canada are organized on the basis of provisions under provincial jurisdiction, the members of these superior courts are all appointed and paid by the federal government, not by the provincial government. The Canadian legal system has used this method to avoid intervention by the government. Consequently, these superior courts do not depend on a certain single level of judicial authority, and thus, the independence and dignity of the superior courts is safeguarded.²²⁴

In accordance with the other meaning of the term “superior court,” it is capitalized as follows: **the “Superior Court.” This term is used to refer to the superior trial court of original jurisdiction in a province.**

This mentioned introduction has addressed the monism of the Canadian legal system. The courts discussed above are judicial organizations in nature.

²²² Supreme Court of Canada, *supra* note 207.

²²³ *Id.*

²²⁴ *Id.*

Nevertheless, in Canada, there is another “quasi-judicial” organization that deals with disputes against the government. It is the “administrative tribunal.”

II. QUASI- JUDICIAL ORGANISATION: ADMINISTRATIVE TRIBUNALS

As mentioned, under the legal principles described as the “legislative sovereignty of parliament” and the “rule of law,” the notion of an “administrative contract” does not exist at common law. However, there are still specific rules governing contracts concluded by public legal persons.²²⁵

In examining “administrative tribunals” (hereinafter, “AT” is used to identify the administrative tribunals in Canada), we will first discuss their function ((1).THE FUNCTION OF ADMINISTRATIVE TRIBUNALS). Then, we will examine their relationship with the courts and administrative organisations. ((2).PARTICULAR POSITION BETWEEN PURE ADMINISTRATIVE BODY AND JURISDICTION ORGANIZATION)

(1).THE FUNCTION OF ADMINISTRATIVE TRIBUNALS

In Canada, many years ago, administrative law was rarely taught in law school and its development was incomplete. The real surge in the development of administrative law in Canada has occurred since World War II and particularly since the 1960’s. During that period, there has been a gradual proliferation of legislation at both the federal and provincial levels of government. This legislation has addressed the delegation of authority to inferior tribunals composed of individuals possessing expertise in a specific area that enables them to make policy and administrative decisions.

This delegation has substantially reduced the burden of the primary legislative bodies (Parliament). In addition, this development has theoretically created many expert bodies that are better qualified to resolve the progressively more complex administrative questions that are arising in certain fields. For example, the Canadian Radio-television and Telecommunications Commission (hereafter CRTC) includes several experts possessing technical backgrounds, and thus, it is better prepared than Parliament to deal with certain technical questions. These are the historical elements of administrative tribunals in

²²⁵ MATHIAS AUDIT, *Présentation générale :les contrats publics sont-ils solubles dans l’arbitrage international?*, in CONTRATS PUBLICS ET ARBITRAGE INTERNATIONAL 1 (Bruylant, 2010.)

Canada.²²⁶ That is, administrative tribunals are specialized governmental agencies established pursuant to federal or provincial legislation to implement legislative policy.

To provide a more precise understanding, an administrative tribunal is an organization decentralized from the administration that essentially specializes in exercising the judicial function,²²⁷ i.e., providing justice between citizens and the government as well as between different government agencies.

According to the legal scholars Pierre Issalys and Denis Lemieux, in Quebec, a recent evolution in the legal language describing administrative tribunals demonstrates that we should reserve the appellation of administrative tribunal solely for decentralized administrative authorities that exclusively, or at least principally, have a judicial function. Furthermore, this function should be reduced to public proceedings in which recourse is sought against an individual administrative decision²²⁸.

With regard to the contemporary numbers of AT in Canada, there are hundreds of different administrative tribunals.

Furthermore, the activities of AT have been considered to be those of “ministers” (that is, having the constitutional situation of ministers), of public officers of central administration having judicial power, or as administrative management organizations.

AT can settle all types of conflicts; there are a significant number of administrative tribunals that can settle conflicts between citizens. For example, the Landlord and Tenant Board of Ontario can settle conflicts between landlords and tenants. Some areas - for example, labour relations (both in the unionized and non-unionized sectors of the economy) and individual claims of discrimination in areas including employment, housing and access to services and facilities customarily available to the public - are dealt with almost exclusively by administrative tribunals.

Every administrative tribunal specializes in an area, for example: labour relations, alcohol permits, employment insurance, human rights and the

²²⁶ In the 1970s, there were four types of administrative tribunals in Canada: (1) the purely administrative tribunal, (2) the administrative tribunal, (3) the judicial or quasi-judicial tribunal, (4) the fully legislative tribunal. For a discussion of these four types of administrative tribunals in Canada, see NEIL BOYD, *CANADIAN LAW* 301 (Thomson Nelson, 4TH ed. 2007).

²²⁷ Regarding the administrative tribunal in Canada, please see the website : <http://www.ccat-ctac.org/en/>, last visited 28 February 2013.

²²⁸ PIERRE ISSALYS, DENIS LEMIEUX, *L'ACTION GOUVERNEMENTALE*, 359 (Précis de droit des institutions administratives, 2nd edition, edition TVON BLAIS, 2009).

Immigration and Refugee Board of Canada (which makes decisions about immigrants and refugees in Canada).

AT perform a wide range of legal functions, including legal research and recommendations (e.g., law reform commissions); rulemaking and policy development (e.g., the Canadian Radio-television and Telecommunications Commission and provincial securities commissions); grant allocation (e.g., the Canada Council and regional development agencies); **adjudication (e.g., labor relations boards, municipal boards and human rights tribunals)**; and standard setting (e.g., environmental assessment boards, workers' compensation boards and health and safety commissions).

The legislation entitled An Act Respecting Administrative Justice of 1996 and the Public Administrative Act of 2000 aimed to affirm the specific character of administrative justice and to resolve litigation by citizens against administrative authorities. The target of the code is to establish the rules of procedure applicable to individual administrative decisions.

Pursuant to Article 1 of the abovementioned Act, the nature of an individual administrative decision should be identified. If an individual administrative decision is within the exercise of the **judicial function**, it will be subject to certain rules of procedure. In contrast, if other individual administrative decisions in Quebec are considered to be the exercise of the **administrative function**, they will be subject to other procedural rules. These two types of procedural rules should not be considered comprehensive. The relationship between them is similar to the relationship between a general rule and a paramount rule. The objective is to provide for different domains of governmental action.

Pursuant to the law of Quebec, the standard for making a distinction between the categories of administrative tribunals is whether certain decentralized organizations are established specifically for the exercise of the judicial function, i.e., providing a hearing for citizens seeking recourse.

That is, similar to a judge in a judicial tribunal, members of the AT should judge the facts and apply of law with an impartial attitude and without considering extrajudicial elements, particularly politics.

The cases will be resolved by a decision following an argument, though not necessarily a verbal argument, presented by citizens against whom an administrative authority has previously made an unfavorable decision. In addition to the citizens directly affected by a concrete administrative decision,

other citizens who assert that they have right to participate in the argument may indeed have that right.

Why do we need to recognize the different functions of administrative tribunals in Canada? In Canada, it is very important to distinguish between administrative tribunals in terms of their different functions; **the judicial review of an administrative act and an application for the prerogative remedies of the courts on the basis of a lack of natural justice are limited to the category of administrative tribunals that exercise a judicial or quasi-judicial function**²²⁹, for instance the AT(Canadian International Trade Tribunal) to deal with the public procurement contract in Canada.(see below II.CANADIAN INTERNATIONAL TRADE TRIBUNAL (CITT))

The identification of all of the AT in Quebec might be accomplished more precisely using a list that the Counsel of Administrative Justice should revise and announce every year. This list should distinguish between different kinds of organizations. It should distinguish between the organizations that exercise only the juridical function, **which can be called administrative tribunals**, and organizations that exercise a plurality of functions, including the judicial function. The application code for AT that exercise a plurality of functions is found in Article 9 of An Act Respecting Administrative Justice.

Pursuant to Article 9 of An Act Respecting Administrative Justice: *"The procedures leading to a decision to be made by the Administrative Tribunal of Québec or by another body of the administrative branch charged with settling disputes between a citizen and an administrative authority or a decentralized authority must...be conducted in keeping with the duty to act impartially."* Thus, it applies to **the organizations** (an administrative tribunal of Quebec or another body of the administrative branch) **that exercise a jurisdictional function** (i.e., that settle disputes between a citizen and an administrative authority or a decentralized authority).

In Canada, the Administrative Tribunal of Quebec, the Commission of Professional Lesion, the Commissioner of the Industry of the Construction, and the Commission of Appeal to the Aboriginal of Quebec belong to first group, i.e., they are administrative tribunals.

In contrast, the Commission of the Access to Information is an independent central organization and the Municipal Commission of Quebec is an organization of administrative management. These two organizations are within the second

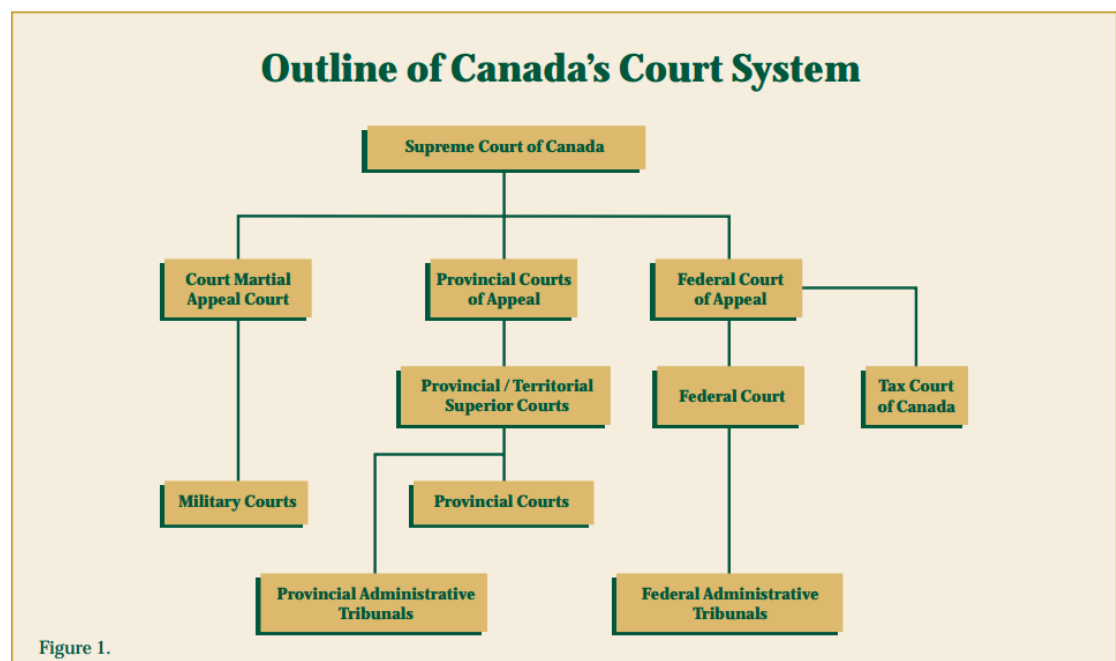
²²⁹ See GERALD GALL, THE CANADIAN LEGAL SYSTEM 355 (Toronto: Carswell, 3th ed. 1990).

group (organizations exercising a plurality of functions).

According to federal law, as a result of a deficiency in legislative intervention clarifying the meaning of the categories of administrative tribunals, the use of the term “administrative tribunal” is not fixed and precise. It should be decided on an objective basis.

Even so, the legal scholars Pierre Issalys and Denis Lemieux are of the view that although an administrative tribunal has performed some actions that include certain features of a judicial function, the exercise of the jurisdictional function is only a fraction of administrative justice. The majority of administrative justice is still found in administrative functions. Consequently, we should examine the “ensemble of individual action” for a full view the operation of administrative justice.

The following chart indicates how the Canadian court system works²³⁰:



²³⁰ Department of Justice HomePage, <http://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/>, last visited 30 Oct.2013.

(2).PARTICULAR POSITION BETWEEN PURE ADMINISTRATIVE

BODY AND JURISDICTION ORGANIZATION

In Canada, administrative bodies can divide into two types. One is the “pure” administrative bodies; the other is administrative bodies which exercise certain judicial function, named “administrative tribunal” (AT).

Even though ATs exercise certain judicial function, their competence does not extend to the entirety of a legal situation. Thus, in Canada, the limited nature of their competence illustrates that an AT is still an “**administrative device**” for the application of law. They still belong to one part of administrative bodies in government.

In addition, the intervention of an administrative tribunal to resolve a dispute arising from the application of a legal measure is one step of a decision-making process that includes several steps. According to legal scholars Pierre Issalys and Denis Lemieux, the role of an AT is like that of a “tribunal of recourse” (in French, “*une instance de recours*”) that provides an opportunity for a debate before a third party that offers a guaranty of more independence and impartiality and has a higher degree of technical and legal expertise.

Thus, traditionally, an AT is not considered to be a formal part of the Canadian judicial system. However, the AT is still an integral component of the system created by the Canadian government to resolve all disputes arising from administrative decisions.

To enable AT to function well, there is a trend for courts to have supervisory jurisdiction to ensure that AT do not exceed the jurisdiction provided to them by their enabling statutes. This also may be called the “superintending and reforming power” of the courts.

For example, the courts exercise a broader supervisory authority over AT that were established to deal with claims of discrimination that extends not only to ensuring that jurisdiction is not exceeded, but also to reviewing decisions regarding questions of law that arise within their jurisdiction.

However, as mentioned, **an AT’s function varies**. Depending on the basis on which the AT has acted (i.e., arising out of a legislative, executive or judicial branch of government), the court will have a different standard of review. This

differs greatly in various areas and cannot be explained in detail in the confines of this dissertation.²³¹

Judicial review of a decision made by an AT is possible when it makes certain errors. As mentioned above, **only the superior courts, the Federal Court of Canada and the Federal Court of Appeal of Canada have the competence to exercise judicial review.**²³²

Generally speaking, a decision made by an AT will be declared a nullity under the following situations:

1. Not competent:

This means that the decision-maker did not have the right to handle the case. The individual organizational code will provide the field in which an administrative tribunal is competent to act. Thus, if a decision-maker is handling a case outside of his competence, his decision is illegal in composition.

2. Violation of the rules of justice:

The second situation occurs when the decision-maker did not respect the basic rules of justice. For example, the parties were not allowed to present their evidence or they were not allowed to be heard by the tribunal. This situation is also possible when the decision-maker or a member of an AT is not independent enough from the government, resulting in a lack of impartiality and independence.

3. Misunderstanding:

The third situation occurs when the decision-maker did not understand the law or the events in the case. It involves a question regarding the identification of the facts of the dispute.

Regarding the range of judicial review of decisions rendered by an AT, in the judgment rendered in “*Dunsmuir v. New Brunswick*,”²³³ the Canadian Supreme Court held: “...*judicial review should include only two standards: correctness and reasonableness.*” Under these standards, the issue of whether an administrative tribunal was acting within its jurisdiction or ultra vires would be incorporated into the review process.

²³¹ Eric P. Polten, Dr. Sebastian Zander, and Michael Conle, *Canadian Administrative Law and German Verwaltungsrecht: Overview and Comparison*, available at <http://www.poltenassociates.com/Resource-Links/AdminLaw-English.pdf>, last visited: 27 Oct.2013.

²³² Refer to Council of Canadian Administrative Tribunals (CCAT) HomePage, <http://www.ccat-ctac.org/>, last visited Oct.28,2013.

²³³ *Dunsmuir v. New Brunswick*, 1 S.C.R. 190, 2008 SCC 9 (2008).

Thus, we consider it necessary to compare the court's judicial review of an arbitration award rendered by arbitrators and its review of decisions rendered by an AT. We will discuss it in the third part of this dissertation (THIRD PART: JUDICIAL REVIEW).

Finally, the Canadian jurist Mr. Justice Antonio Lamer, a former Chairman of the Canadian Law Reform Commission and Justice of the Supreme Court of Canada, has described the role and function of Canadian courts as a "conflict resolution service."²³⁴

2. EXCEPTION: LIMITATIONS

Arbitration is generally authorized as mentioned. However, there are some limitations regarding it. In Canada, those limitations are present in two areas. One is in positive law (A.IN LAW). The other is in practice (B.IN PRACTICE).

A.IN LAW

In Canadian law, the limitations primarily belong to two categories. One is described by the legal term "public order" (I. PUBLIC ORDER); the other is described by the term "authorization" (II. PRIOR AUTHORIZATION).

I. PUBLIC ORDER

The legislative limitation on arbitration for a state is found in Article 2639 of the Civil Code of Quebec, which provides:

*Disputes over the status and capacity of persons, family matters or **other matters of public order may not be submitted to arbitration.** An arbitration agreement may not be opposed on the ground that the rules applicable to settlement of the dispute are in the nature of rules of public order.*

This provision is similar to Article 2060 of the French Civil Code. In France, the doctrine and jurisprudence in the interpretation of the term "public order" are focused on arbitration in administrative matters. In Canada, however, this

²³⁴ NEIL BOYD, CANADIAN LAW: AN INTRODUCTION, 145 (Nelson College Indigenous, 5th edition, 2010)

provision generally does not apply exclusively to the arbitration of administrative matters.

For example, the famous and recent judgment “Investissement Charlevoix, Inc. c. Gestion Pierre Gingras, Inc.”²³⁵ involved a legal account; another one, “H.A. Gétry Inc. c. 9065-3627 Québec Inc.”²³⁶ involved the annulment of certain notarized actions.²³⁷

Thus, the term “public order” is often used during reviews of arbitration awards in all fields.²³⁸

II. PRIOR AUTHORIZATION

In addition to the “public order” limitation in Canada, the control or management of arbitration is often based on some general or special prior authorization.

First, as we mentioned above, for certain public contracts,²³⁹ arbitration must be authorized by the Minister of Justice. In practice, however, the minister does not submit disputes to arbitration pursuant to the abovementioned provisions. Instead, arbitration clauses are found in many public contracts, particularly in PPP contracts.²⁴⁰ It also involves the interpretation of arbitration clauses included in contracts of adhesion, which we will discuss later (I. ARBITRATION CANNOT REPLACE COURT JUSTICE).

Secondly, regarding the federal law, there is a directive entitled “Standard Acquisition Clauses and Conditions” (in French, “*clauses et conditions uniformisées d'achat* (CCUA)”) providing a listing of procurement clauses and general conditions as well as instructions on how these clauses and conditions are used²⁴¹. In Section 3 (General Conditions) regarding dispute resolution, this directive gives some examples of issues that are not arbitrable in nature (G.C 8.6

²³⁵ Investissement Charlevoix inc. c. Gestion Pierre Gingras inc., 2010 QCCA 1229 (2010) (CanLII), <http://canlii.ca/t/2bcbk>, last visited Oct.28,2013.

²³⁶ H.A. Grétry inc. c. 9065-3627 Québec inc., 2009 QCCA 2468(2009) (CanLII), <http://canlii.ca/t/2744q>, last visted Oct.28,2013.

²³⁷ Regarding the leading cases in arbitration in Canada, refer to McGill University Homepage at “CONSENSUAL ARBITRATION IN QUEBEC”(July 5,2013, 11:02AM), <http://www.mcgill.ca/arbitration/law>.

²³⁸ *Id.*

²³⁹ See this dissertation *supra* note 203.

²⁴⁰ Lemieux, *supra* note 199 at 145.

²⁴¹ See <https://achatsetventes.gc.ca/politiques-et-lignes-directrices/guide-des-clauses-et-conditions-uniformisees-d-achat>, last visted Oct.28,2013.

and 8.7), including the violation of conditions regarding fact questions or arbitrable legal issues. Jurist Denis Lemieux opined that all the examples are relative to the interpretation and application of public law, especially constitutional, administrative, penal or fiscal law.²⁴² In practice, the Treasury Board (in French, “*Le Conseil du Trésor*”, a Cabinet committee of the Queen's Privy Council of Canada, hereinafter “Trésor”), established in 1867 and given statutory powers in 1869, is responsible for accountability and ethics, financial, personnel and administrative management, comptrollership, approving regulations and most Orders-in-Council. The Treasury Board has an administrative arm, the Secretariat, which was part of the Department of Finance until it was proclaimed a department in 1966. The formal role of the President is to chair the Treasury Board and to carry out his responsibility for governmental management by translating policies and programs approved by the Cabinet into operational reality and by providing departments with resources and a suitable administrative environment for work.²⁴³ Presently, the Treasury Board is responsible to provide management that respects the directive.²⁴⁴

B.IN PRACTICE

The abovementioned codes do favor arbitration. In practice, however, arbitration's scope of development has been constricted. The main challenges stems from two areas. One is that there continue to be advantages to court justice that cannot be replaced (I. ARBITRATION CANNOT REPLACE COURT JUSTICE). The other is that the ADR systems have well developed in Canada and thus there are many better options than arbitration. Consequently, arbitration is not the most popular way to deal with administrative matters. (II. ADR SYSTEMS).

I. ARBITRATION CANNOT REPLACE COURT JUSTICE

In the field of public law or issues involving public politics, jurist Denis Lemieux considers that arbitration cannot replace the national courts since some

²⁴² *Id.*

²⁴³ Treat Board of Canada Secretariat HomePage, <http://www.tbs-sct.gc.ca/>, last visited oct.28,2013.

²⁴⁴ Contracting Policy(in French, “*Politique sur les marches*”), art,12.8.5 and 12.8.6(about arbitration), refer to Treasury Board of Canada Secretariat, available at :<http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=14494§ion=text>, last modified 9 Oct. 2013.

questions as follows can't be submitted to arbitration:²⁴⁵

1. Requirements regarding **transparency** and **public participation** by the relevant parties.
2. Character containing **an interpretation of important legal principles**.

In addition, Lemieux believes that the judiciary has greater sensitivity regarding the interpretation of public law.

At common law, under the doctrine of "*stare decisis*," common-law judges are obliged to adhere to precedents. However, each contract is typically individually interpreted and, in theory, it is rare to refer to the interpretation of other contracts in considering the subject-matter of a contract.

In Quebec, Article 46.1 of the Quebec Charter ensures the right to live in a healthful environment to the extent provided by law. The Quebec courts have frequently referred to Article 46.1 of the Quebec Charter to justify administrative decisions favorable to environmental protections. For example, *Bélanger c. Québec Ministry of Durable Development, Enviroment, and Parks*²⁴⁶(in French, "*Ministère du Développement durable, de l'Environnement et des Parcs*") and *St-Luc-de-Vincennes c. Com-postage Mauricie Inc*²⁴⁷ involve the interpretation of certain ambiguous provisions; the judges interpreted them by taking into consideration the municipality's responsibility to adequately protect the environment.

Thus, jurist Denis Lemieux believes that judges have more sensitivity regarding the interpretation of public law than arbiters.²⁴⁸

Denis Lemieux considered public works to be an example in which, if a dispute involves an essential legal question, arbitration would not be a substitute for recourse in the courts, though it is permissible.²⁴⁹

In addition, in Canada, the judicial fee depends on the amount of money represented by the dispute. The range is as follows:²⁵⁰

Amount of litigation (\$)	Physical	Legal
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²⁴⁵ Lemieux, *supra* note 199, at 145.

²⁴⁶ *Bélanger c. Québec (Ministère du Développement durable, de l'Environnement et des Parcs)* 2011 QCCS 102, 2011EXP-541, J.E. 2011-278, [2011] R.J.Q. 369, in para 120.

²⁴⁷ *St-Luc-de-Vincennes (Municipalité de) c. Com-postage Mauricie inc*, 2008 QCCA 235, (2008) (R.J.Q. 309) in para 46-47.

²⁴⁸ In addition, see Lemieux, *supra* note 199, at 145.

²⁴⁹ Issalys & Lemieux, *supra* note 228, at 1188.

²⁵⁰ As for this form, refer to <http://www.justice.gouv.qc.ca/francais/publications/generale/tarifs.htm#Anchor-Pou-10148>, last visited 7 May,2013.

	Person (\$)	Person (\$)
De 0.01 à 999.99	33,75	48.50
De 1,000 à 9,999.99	62,00	72.50
De 10,000 à 99,999.99	120,00	142.00
De 100,000 à 999,999.99	184,00	221.00
1,000,000 et plus	366,00	436.00

In Canada, however, arbitrators' fees range from \$250 to \$800 per hour. The fees are elastic and the applicable taxes depend on each arbitrator and arbitration location. Many arbitrators even have half and full-day rates. In practice, the parties should contact the ADR Chamber²⁵¹ to obtain detailed rates, and if the parties want to nominate a special arbitrator, they should contact the ADR Chamber to determine his availability and any special conditions to retain such a specific arbitrator.

In arbitration, the involved parties must pay the salary of the arbitrators or the arbitral tribunal. By contrast, in the litigation system, the salary of judges is paid by the state, not by the parties. Thus, on this point, the cost of arbitration is greater than that in the litigation system. Nevertheless, arbitration has no procedure for an appeal, but litigation does have a procedure for appeal. Thus, if the parties are not satisfied with a judge's decision, they may appeal, and consequently, would spend additional time and money to go forward with this appeal procedure. Thus, with regard to the cost of an appeal procedure, arbitration is less expensive for the parties.

Generally speaking, however, arbitration in Canada is more expensive than the litigation system.

Furthermore, in practice, arbitration clauses are often found in contracts of adhesion. The attitude of Canadian courts is different, however.

In Quebec, arbitration clauses are often interpreted broadly.²⁵²

In contrast to Quebec, in the well-known public construction project for Toronto Pearson Airport Terminals 1 and 2 in 1994, the arbitration clauses were

²⁵¹ See <http://adrchambers.com/ca/>, last visited 7 May, 2013.

²⁵² *Zodiak International c. Polish People's Republic*, 1 R.C.S. 529 (1983); and *Condominiums Mont Saint-Sauveur Inc. c. Constructions Serge Sauvé Ltée*, R.J.Q 2783 (1990) (C.A.) However, they both deal with private contracts.

narrowly interpreted by an Ontario court.²⁵³ This dispute was about the annulment of a contract concluded between Pearson Development Corporation (PDC, a completely Canadian enterprise) and a foreign private enterprise. The annulment of the contract would cost Trésor more than 300 million Canadian dollars (CAN) without including the investment damages that PDC had incurred (about 700 million CAN).²⁵⁴

The Superior Court of Ontario considered that the resolution of the disputes raised by pleadings would involve mixed questions of fact and law that were not within the scope of the arbitration clause.²⁵⁵

In the “Ontario 407 expressway” case,²⁵⁶ however, the Ontario Superior Court adopted **an open attitude toward an arbitration clause** that was included in a contract of adhesion. It was a concession contract for an expressway. The threshold issue in this case was **whether the concessionaire could impose a fee increase without the approval of the provincial government**, i.e., whether the government could abdicate its discretionary right to motorway route passing fees in favor of the concessionaire by contract.²⁵⁷ Both the arbitration tribunal and the Ontario Superior Court regarded the question as one of the interpretation of a simple clause in a commercial contract, and thus, considered that **the concessionaire can increase the fees without the Province’s consent**. Thus, the Ontario Superior Court dismissed the Province’s appeal of the arbitration award.

Recently, in the case “*Dell Computer Corp. v. Union des Consommateurs*,” the Canadian Supreme Court adopted a restrictive position by casting doubt on the true consent of a party to be bound by obligations contained in a contract of adhesion.²⁵⁸ Although this case did not involve a public contract, a restrictive interpretation regarding the validity of an arbitration clause in a contract of adhesion reveals the vigilant attitude of the Canadian Supreme Court.²⁵⁹

²⁵³ T1T2 Limited Partnership v. Canada, 1994 CanLII 7368 (1994) (ON SC), <http://canlii.ca/t/1vtnp>, last retrieved 1 Nov. 2013.

²⁵⁴ Lemieux, *supra* note 199 at 142.

²⁵⁵ Randy A. Pepper, *Why Arbitrate?: Ontario’s Recent Experience With Commercial Arbitration*, 36 Osgoode Hall Law Journal 805-807 (1998).

²⁵⁶ Ontario v. 407 ETR Concession Company Ltd., 2005 CanLII 362 (2005) (ON SC), <http://canlii.ca/t/1jkrh>, last retrieved 1 Nov. 2013.

²⁵⁷ Lemieux, *supra* note 199, at 146.

²⁵⁸ Dell Computer Corp. v. Union des consommateurs, 2 R.C.S. 801 (2007).

²⁵⁹ Lemieux, *supra* note 199, at 143.

II. ADR SYSTEMS

Alternative dispute resolution is generally authorized in Canada, regardless of the resolution method and regardless of the domain of law. The guide issued by the Council of Canadian Administrative Tribunals (CCAT)²⁶⁰ encourages people to settle their conflicts without a hearing, using ADR methods such as conciliation, mediation, etc.

Thus, the relationship between arbitration and other alternative dispute resolution methods has developed differently in Canada than in some other countries. In France, because the principle of interdiction is still a dominant principle in public law, administrative matters are submitted to another amicable regime. This is, more or less, one “indirect influence” of the principle of interdiction. In Canada, however, administrative agencies are authorized to submit to arbitration, but because other amicable regimes are well developed and offer more advantages to a public entity, administrative agencies have additional choices. Thus, the vigorous development of other amicable regimes is not the “result” but is a “reason” explaining why arbitration is not the most popular method for citizens.

Accordingly, we will introduce other alternative dispute resolution methods as follows.

(1).ADMINISTRATIVE APPEAL BEFORE A SUPERIOR AUTHORITY

Generally speaking, in Canada, the administrative agencies that have the authority to make decisions involving the conclusion and the realization of a contract or to handle administrative works have less authority and a less active role because they are often not made up of high level civil servants. Sometimes, the supervision of the execution of contracts is delegated to private professional sectors that have a limited tenure.

Thus, for these two reasons, in cases involving an unfavorable decision, the contract contractor may ask for a “revision” process before a superior administrative authority that is competent to handle the issue.

The hierarchical recourse is a general principle in Canadian administrative

²⁶⁰ Refer to Council of Canadian Administrative Tribunals (CCAT) HomePage, <http://www.ccat-ctac.org/>, last visited Oct.28,2013.

law. It is frequently provided in the case of contracts that are concluded by administrative agencies.

(2).MEDIATION

In Canada, a mediation system exists. Mediation is the intervention of an impartial person in a dispute who has no decision-making power, but whose role is to assist the parties in reaching a settlement.²⁶¹

All disputes must be mediated pursuant to the National Mediation Rules, amended on April 15, 2011 by the ADR Institute of Canada, Inc. The contesting parties often nominate an independent professional, such as a professor or an engineer, and submit their disputes to them as mediators. They hope that the mediators will consider the dispute as a neutral third person that has expertise and an impartial attitude.

The parties shall bear the cost equally and pay the mediator's fees and all expenses, including travel and the rental of a premise, as well as the costs and expenses for any experts or consultants engaged by the mediator. The mediator may require the parties to make an initial deposit as well as an additional deposit or deposits, including their proportionate shares of the costs of mediation. Each party must bear its own costs and expenses for participating in the mediation, unless otherwise agreed by the parties.²⁶²

In addition, according to the observations of legal scholars Pierre Issalys and Denis Lemieux, although administrative authorities at the federal level are permitted to submit to arbitration, they prefer to submit to negotiation and mediation.²⁶³

(3).AMIALE REGULATION PROCEDURE

Contesting parties can also choose other amiable regulation procedures (in French, "*La procédure de règlement amiable*") such as consultation procedures and bilateral negotiations at a superior level, for example, negotiations by the higher-ranking directors of the parties. This method can place the subject-matter

²⁶¹ See JOHN SWAIGEN, ADMINISTRATIVE LAW : PRINCIPLES AND ADVOCACY, 130 (Emond Montgomery Publications Limited Toronto, Canada, 2nd edition, 2010)

²⁶² See Article 18 of the National Mediation Rules.

²⁶³ Issalys & Lemieux, *supra* note 228.

of the dispute into a sphere in which more can be taken into consideration.²⁶⁴

(4).MIXED PERMANENT COMMISSION

Mixed permanent commissions are frequently organized in the case of PPP contracts to ensure that disputes do not affect their execution. It enables the contesting parties to deal with continual or periodic questions that arise during the execution of PPP contracts. The commission is authorized to adopt certain conservatory or temporary measures to permit the execution of the contract.

(5).INDEPENDENT EXPERT

Article 2112 of the Quebec Civil Code (in French, “*Code Civil du Québec*”) provides that: “*If the parties do not agree on the amount to be deducted and on the work to be completed, an assessment is made by an expert designated by the parties or, failing that, by the court.*” This is the conventional procedure involved in submitting to an independent expert.

The submission to an independent expert is not an arbitration procedure.²⁶⁵ Unlike arbitrators, independent experts can only deal with questions of fact.²⁶⁶

As a result of the availability of alternative dispute resolution in Canada, arbitration, although permitted, has become a residual and exceptional system to deal with administrative disputes.

Thus, because of the availability of many options for amicable dispute resolution, Denis Lemieux has described arbitration as a “residual” recourse that has been filtered by the abovementioned alternative dispute resolutions.²⁶⁷

CHAPTER III: ARBITRATION IN ADMINISTRATIVE MATTERS IN CHINA

China has also his speciality on arbitration in administrative matters.

In China, the primary methods of settling administrative disputes are through administrative reconsideration (like administrative recourse in other countries) and the administrative litigation system. The former is performed by a

²⁶⁴ Lemieux, *supra* note 199, at 147.

²⁶⁵ Regarding the distinction between arbitration and expertise, see *Sport Maska inc. c. Zittreer*, 1 R.C.S. 564 (1988).

²⁶⁶ Denis Lemieux, *Arbitrage International et Contrats Publics au Canada*, in MATHIAS AUDIT, *CONTRATS PUBLICS ET ARBITRAGE INTERNATIONAL*, 149, 141-50 (Bruylant 2011).

²⁶⁷ Lemieux, *supra* note 266, at 149.

higher administrative authority and it also provides a decision that is administrative in nature. Thus, only the administrative litigation system is jurisdictional in nature.

The substantive law set forth in the Chinese legal system falls, generally speaking, within the continental legal system and reflects a structural similarity to the legal systems of countries like Germany and France. China has statutory law; case law is not regarded as part of its laws or regulations.

There are administrative laws dealing with disputes between citizens and administrative agencies. They include the administrative license law, the administrative review law, the administrative penalty law, and the administrative litigation law.

In procedural law, the main law governing the administrative litigation system in China is the “*Administrative Litigation Law of the People's Republic of China*” (hereinafter “ALLPRC”), which was passed in April 1989 and implemented in October 1990.²⁶⁸

However, although the aforementioned ALLPRC deals with administrative litigation, there is no special system of courts to handle administrative litigation. Administrative litigation is submitted to the ordinary court system.

In China, the court system consists of a “four-tiered structure” and provides “two instances of trial.” In its constitution, there are courts at the national, provincial, prefectural, and county levels ²⁶⁹ (four-tiers). From another perspective, the Chinese court system can be divided into two main branches. One is the Supreme People’s Court. The other consists of the various people’s courts.

The Supreme People’s Court is the highest judicial organ (national level).

The various people’s courts also can be classified within many categories, including local people’s courts and special people’s courts.

Local people’s courts are composed of the basic people’s courts (county level), the intermediate people’s courts (prefectural level), and the high people’s courts (provincial level).

Special people’s courts include the military courts, the maritime courts, and the railway transportation courts.

In China, administrative matters should be submitted to the “administrative

²⁶⁸ Minxin Pei, *Citizens v. Mandarins: Administrative Litigation in China*, 152 THE CHINA QUARTERLY, 832-862 (1997).

²⁶⁹ Cheryl Long, *Chinese Courts in Transition: Evolution, Causes, and Effects*, in conference on 11 May 2011, Beijing.

chamber” (in French, “*chambre administrative*”) of the local people’s court.

Although Article 2 provides that a competent plaintiff is “*a citizen, a legal person or any other organization*,” when it is read in conjunction with Articles 1 and 11, which set forth the legislative goals of ALLPRC and the scope of cases that may be accepted pursuant to it, it is clear that administrative litigation in China aims to deal with disputes arising from administrative actions that infringe lawful rights and interests. Thus, the Chinese system considers administrative agencies, in most administrative litigation cases, to be competent defendants, but not plaintiffs.²⁷⁰

Under mentioned background, as for the arbitration in administrative matters, we need to examine it from two different perspectives. One perspective is in principle arbitration is interdicted in China. (1. IN PRINCIPLE:PROHIBITION). However, there are also some exceptions. Thus, the other perspective examines legislation exceptions in certain public contracts. (2. EXCEPTION:ACCEPTABLE IN CERTAIN PUBLIC CONTRACTS)

1. IN PRINCIPLE:PROHIBITION

In China, arbitration is primarily addressed by the Arbitration Law of the People's Republic of China (hereinafter “ALPRC”), which was adopted in 1994 and enacted on 1 September 1995. Pursuant to section 2 of Article 3 of ALPRC: “... ***administrative disputes falling within the jurisdiction of the relevant administrative organs according to law...shall not be submitted to arbitration.***” This article is generally considered to be the principle provision regarding the arbitrability of administrative matters in China.

We will discuss the principle of the prohibition of arbitration in two ways. One is to examine the principle of interdiction. (A.PRINCIPLE OF INTERDICTION OF ARBITRATION IN ADMINISTRATIVE MATTERS) The other is to examine how this principle of interdiction has an influence over administrative litigation system. Its characteristics reveal that parties refer to conciliation to resolve administrative litigations (B. INFLUENCE OF PRINCIPLE OF INTERDICTION: REFERRING CASES TO CONCILIATION TO RESOLVE LITIGATION)

²⁷⁰ Yang Jie-Jun (楊解君), *Evolution and Development of Chinese Mainland Administrative Law* (中國大陸行政法的變遷與發展), speech at the Central Police University, 8 February 2009, available from <http://smc.cpu.edu.tw/files/14-1095-13385.r177-1.php>, last visited 1 November 2013.

A. PRINCIPLE OF INTERDICTION OF ARBITRATION IN

ADMINISTRATIVE MATTERS

Mentioned Article 3 is similar to Article 2060 of the French Civil Code. But in France, the principle of prohibition for administrative matters is set forth in the Civil Code; in contrast, in Taiwan and China, it is contained in their respective arbitration laws.

However, diverse interpretations about this mentioned article occur.

In China, there is no legislation addressing how to distinguish between public contracts and private contracts. Thus, this issue is still a matter of dispute between jurists. If a certain contract is interpreted to be a private contract, it is arbitrable without doubt. In contrast, if it is interpreted to be a public contract, it would be governed by Article 3.

There is a divergence in China's administrative doctrine regarding the interpretation of Article 3 and the need for a special procedure to deal with administrative litigation that has arisen from administrative contracts. First, we will discuss the view that disputes arising from administrative contracts are encompassed within Article 3 (I. ENCOMPASSED WITHIN ARTICLE 3:). Secondly, we will discuss the view that they are not encompassed within Article 3 (II. NOT ENCOMPASSED WITHIN ARTICLE 3:).

I. ENCOMPASSED WITHIN ARTICLE 3:

One administrative doctrine asserts that disputes arising from administrative contracts are, by nature, administrative matters. The aforementioned prohibition only excludes international arbitration, in particular, procurement contracts, PPP contracts and concession contracts involving public property.²⁷¹

According to this view, no administrative disputes that arise from administrative contracts can be submitted to domestic arbitration; in contrast, the specific administrative contracts mentioned above can be submitted to

²⁷¹ JIANG MINGAN (姜明安), ADMINISTRATIVE LAW AND ADMINISTRATIVE CONTENTIONS (行政法與行政訴訟) (Beijing University ed. (北京大學出版社) 2004).

international arbitration. For the purpose of comparison with the other two doctrinal views discussed below, we will call this view “Doctrine A.”

II. NOT ENCOMPASSED WITHIN ARTICLE 3:

As mentioned above, there is another interpretation. Zhang Li asserted that the meaning of “administrative contentions” is not explicitly expressed by the aforementioned article. Article 11 of ALL provides that certain categories of administrative matters are subject to the administrative litigation code, but “disputes from administrative contracts” is not included within those categories. Thus, “disputes from administrative contracts” are not within the scope of the prohibition in Article 3. Thus, it is necessary to discuss it more extensively.

Under this hypothesis, there are two different interpretative directions. One is to consider the special character of administrative contracts ((1). CONSIDERING THE CHARACTER OF ADMINISTRATIVE CONTRACTS). The other is to identify administrative contracts as ordinary civil contracts ((2)NOT CONSIDERING THE CHARACTER OF ADMINISTRATIVE CONTRACTS).

(1).CONSIDERING THE CHARACTER OF ADMINISTRATIVE

CONTRACTS

Adherents of this view believe that even if disputes arising from administrative contracts are not included within the scope of Article 3, we should still consider the special character of administrative contracts and adopt a more expansive attitude toward the application of the administrative litigation code. Thus, international arbitration should be strictly excluded when administrative contracts are involved.²⁷² This view is often supported by Chinese public law jurists,²⁷³ but they have not gone on to provide an explicit standard. We describe this view as “Doctrine B.”

(2).NOT CONSIDERING THE CHARACTER OF ADMINISTRATIVE

²⁷² SHI JIANHUI (施建辉), *STUDY OF ADMINISTRATIVE CONTRACT*, (行政契约研究) (Renmin ed. 2008) quoted from Zhang Li, *Arbitrage International Et Contrats Publics En Chine*, in MATHIAS AUDIT, *CONTRATS PUBLICS ET ARBITRAGE INTERNATIONAL* 196, 195-213 (Bruylant 2011).

²⁷³ Zhang Li, *supra* note 272, at 199.

CONTRACTS

This view is often adopted by Chinese private law jurists.²⁷⁴ They believe that a special procedure is not necessary for disputes arising from administrative contracts. Thus, pursuant to this hypothesis, arbitration is a possible method of settling administrative disputes.

According to this view, disputes arising from administrative contracts are not “administrative contentions” within the scope of Article 3 and can be submitted to arbitration as is the case for all private contracts. We describe this view as “Doctrine C.”

In brief, under Doctrine A, arbitration in administrative matters is “interdicted without exception.” Pursuant to Doctrine C, arbitration is acceptable in administrative matters. Doctrine B asserts an intermediary position that is between those of A and C, but it provides no explicit standard.

However, despite the aforementioned doctrines, international arbitration is permitted for certain administrative contracts (see below: 2. EXCEPTION:ACCEPTABLE IN CERTAIN PUBLIC CONTRACTS). Jurists hold differing views regarding domestic arbitration because of their disparate interpretations of the meaning of the term “administrative contentions” in Article 3. In any case, it is worthwhile to note that there is no Chinese legislation establishing any exceptions to Article 3. Thus, a priori, Article 3 expresses a principle with no exceptions.

B. INFLUENCE OF PRINCIPLE OF INTERDICTION: REFERRING CASES

TO CONCILIATION TO RESOLVE LITIGATION

In this part, we want to observe the influence of principle of interdiction of arbitration in administrative matters.

Since arbitration is prohibited in China, the doctrinal discussion focuses on whether it is possible to utilize mediation or conciliation to deal with

²⁷⁴ Xu xiaofeng (徐曉風), *Arbitration as the New Mode of Regulation of Disputes Relative to Administrative Contracts* (仲裁作为行政契约新的解决方式), CHINA BUSINESS MONTHLY 2008, quoted from Zhang Li, *supra* note 272, at 199.

administrative matters.

First, regarding mediation, pursuant to Article 50 of the Administrative Litigation Law of the People's Republic of China (hereinafter "ALLPRC"), the **"...court shall not apply mediation in handling an administrative case..."** and pursuant to Section 3 of Article 67: "Mediation may be applied in handling a suit for damages." Accordingly, administrative disputes, with the exception of lawsuits seeking damages, are **generally prohibited from being submitted to mediation.**

Although there is no positive law explicitly prohibiting **conciliation in administrative matters**, pursuant to the administrative doctrine that has observed in practice, it **is also prohibited.**²⁷⁵ **In fact, contesting parties often achieve conciliation agreements outside of a tribunal and after a plaintiff withdraws his lawsuit.**

According to judicial statistics revealing the percentage of withdrawn lawsuits (see Form 1 as below), the percentage of withdrawal is very high. The highest percentage recorded was 57.3 % in 1997. The average percentage of withdrawn suits is close to 30%. In some provinces, like Zhè Jiāng, the average number is 40%.²⁷⁶ This indicates that, **in China, conciliation outside of the courtroom occurs and is very popular.**

Form 1:judicial statistic in China about administrative disputes²⁷⁷ (1987 – 2008)

	Numbers of cases accepted	Numbers of cases finished	Percentage of withdraw(%)	Withdraw by plaintiff (%)	Judgment favorable to defender(%)	Judgment favorable to plaintiff (%)	Other than reject lawsuit(%)	Reject lawsuit(%)
1987	5,240	4,677	21.3		59.2	14.0	5.5	
1988	8,573	8,029	27.0		48.9	16.7	7.4	
1989	9,934	9,742	30.4		42.4	20.0	7.2	
1990	13,006	12,040	36.1		36.0	20.0	7.9	

²⁷⁵ Fang Fang (方芳), *On The Construction Of Administrative Reconciliation* (论行政和解的构建), 16 (May 10, 2006)(unpublished Master thesis, Northeast Normal University)(on file with author).

²⁷⁶ Zhang Xiaohua(张晓华), *About Administrative Litigation Settlement System*(关于行政诉讼和解制度的思考), in ChinaCourt.org, <http://www.chinacourt.org>, last visited 10 Nov.2013.

²⁷⁷ Refer to LAW YEARBOOK OF CHINA(中国法律年鉴), available at [http://210.26.5.10/kns50/Navi/item.aspx?NavID=4&BaseID=YZGFL&NaviLink=%E6%B3%95%E5%BE%8B\(8\)-%2Fkns50%2FNavID%3D4%26Field%3D%25E6%2595%25B4%25E5%2588%258A%25E5%2588%2586%25E7%25B1%25BB%26Value%3D0103%253F%26GroupBy%3DBaseID%7C%E4%B8%AD%E5%9B%BD%E6%B3%95%E5%BE%8B%E5%B9%B4%E9%89%B4](http://210.26.5.10/kns50/Navi/item.aspx?NavID=4&BaseID=YZGFL&NaviLink=%E6%B3%95%E5%BE%8B(8)-%2Fkns50%2FNavID%3D4%26Field%3D%25E6%2595%25B4%25E5%2588%258A%25E5%2588%2586%25E7%25B1%25BB%26Value%3D0103%253F%26GroupBy%3DBaseID%7C%E4%B8%AD%E5%9B%BD%E6%B3%95%E5%BE%8B%E5%B9%B4%E9%89%B4), last visited 5 Nov.2013.

1991	25,667	25,202	37.0		31.6	21.2	10.2	
1992	27,125	27,116	37.8		28.1	22.0	12.1	
1993	27,911	27,958	41.3		23.6	23.8	11.3	
1994	35,083	34,567	44.3	62.4	20.6	21.3	13.8	
1995	52,596	51,370	50.6	57.7	17.3	17.6	14.5	
1996	79,966	79,537	54.0	51.7	14.5	18.3	13.2	8.7
1997	90,557	88,542	57.3	56.6	12.7	16.8	13.2	8.5
1998	98,463	98,390	49.8	60.7	13.6	17.0	19.6	11.0
1999	97,569	98,759	45.0	64.6	14.9	18.2	21.9	12.0
2000	83,533	84,112	37.8	69.0	16.0	19.7	26.5	13.3
2001	98,372	93,219	33.3	74.7	17.1	17.9	31.7	14.7
2002	80,728	84,943	30.7	76.5	24.7	16.1	28.5	15.2
2003	87,919	88,050	31.6	83.9	27.8	14.3	26.3	10.7
2004	92,613	92,192	30.6	84.4	25.8	15.9	27.7	11.0
2005	96,178	94,771	30.2	88.7	16.6	17.4	35.8	11.4
2006	95,617	94,215	33.8	91.2	17.8	14.2	34.3	12.3
2007	101,510	100,683	37.0	94.2	29.1	12.6	21.2	9.1
2008	108,398	109,085	35.9	92.9	28.7	17.9	23.5	8.3

Chinese doctrine does not recognize this phenomenon (the high percentage of withdrawn lawsuits). According to jurists, the reason for the high percentage is that judges do not want to render judgments for several reasons: because they are puzzled by the legal provisions (regarding the prohibition of arbitration and mediation), because of possible interference from administrative agencies inside or outside of their tribunals, or because of pressure arising from public opinion. Judges may believe that rendering judgments may lead to criticisms from public opinion, and thus, they may try to persuade the contesting parties to reach an agreement and to withdraw the lawsuit.²⁷⁸ If this is the case, conciliation would be outside of the control of judges and people's rights could be damaged if there is a lack of balance in the position of the parties.

²⁷⁸ Li Yan Tsai (李研材) *Feasibility Of Administrative Litigation System (行政诉讼和解制度可行性探析)*, on the ChinaCourt.Org home page, available at: <http://gxfy.chinacourt.org/public/detail.php?id=54162>, last visited 5 November 2013.

Thus, Chinese doctrine is more likely to be open to conciliation in administrative matters than to indulge in conciliation outside of tribunals to avoid judicial control.²⁷⁹

Supporters of conciliation also refer to German, Taiwanese,²⁸⁰ Japanese or American ADR²⁸¹ legislation as their theoretical base regarding its permissibility in the administrative litigation system.

Supporters also assert that since there is no explicit prohibition of conciliation in administrative matters, the conciliation used in civil proceedings may be borrowed for application to administrative matters. According to this view, no new legislation needs to be enacted to introduce conciliation into administrative matters.²⁸²

Another reason to support conciliation in administrative matters is that it is acceptable in the administrative reconsideration process.²⁸³ Furthermore, it is a particularly suitable method to settle disputes arising from administrative contracts.²⁸⁴

To address fears that administrative authorities will exert pressure during conciliation procedures, legislation establishing judicial review of the results of conciliation²⁸⁵ or a strengthened inquisitorial role for judges in the conciliation process²⁸⁶ is also recommended.

In any case, due to the fact that both arbitration and mediation are prohibited in administrative matters, the view that conciliation should be introduced or permitted in administrative litigation procedures has become a prominent subject of discussion in the field of administrative

²⁷⁹ *Id.*

²⁸⁰ Liu Weijia (刘维佳), *Inspiration From Foreign Conciliation System In Administrative Litigation System* (淺談域外行政訴訟和解制度對我國的啟示), 3 LEGAL SYSTEM AND SOCIETY (法制與社會) 2 (2010).

²⁸¹ Ji Weihua (季卫华), *Study Of Questions About Conciliation In Administrative Litigation System* (行政訴訟和解問題研究), 9 (2008) (unpublished Master thesis, Shanghai University)(on file with author).

²⁸² Zhang Jiansheng (章劍生), *Seek the Possibility of Reconciliation in Administrative Procedure in Legal Criterion——In Perspective of Legal Interpretation Method* (尋求行政訴訟和解在法律規範上的可能性—法律解釋方法之視角), 2, CONTEMPORARY LAW REVIEW, 2(2010).

²⁸³ See Article 40 of Regulation on the Implementation of the Administrative Reconsideration Law of the People's Republic of China.

²⁸⁴ An Yulei (安玉磊), *On the establishment of conciliation system in China Administrative litigation* (論我國行政訴訟中和解制度的構建), 37(May,8,2005)(unpublished Master thesis, Soochow University)(on file with author).

²⁸⁵ Fang, *supra* note note 275, at 23.

²⁸⁶ Ji Yanli (紀艷麗), *Study of Administrative Conciliation System* (行政和解制度之研究), 20(2011) (unpublished Master thesis, Heilongjiang University)(on file with author)

law.²⁸⁷ However, few jurists assert that arbitration should be used to resolve administrative matters.²⁸⁸

Aside from legal doctrine, conciliation also has become a “favored” method for the Chinese government to deal with administrative matters. In January 2007, the Supreme People's Court issued a notice to a local court named “*Notice of the Supreme People's Court on Issuing Some Opinions of the Supreme People's Court about Providing Judicial Protection for the Construction of Socialist Harmonious Society*” (hereinafter “Notice-Jan2007²⁸⁹”). The Supreme People's Court supported its ruling on the basis of “... constructing a socialist harmonious society...to better implement the strategic deployment of...[the] Central Committee, [to] fully bring the functions of [the] people's courts into play.” Notably, the phrase “*for the construction of [a] socialist harmonious society*” is repeated two times. In March 2007, the Supreme People's Court again issued a similar notice named “*Several Opinions of the Supreme People's Court on Further Displaying the Positive Roles of Litigation Mediation in the Building of a Socialist Harmonious Society*” (hereinafter Notice-Mars2007²⁹⁰) in which **the Court emphasized against the importance of conciliation and mediation.**

Thus, although we cannot access the judgment of China's Supreme People's Court on the internet, after examining the aforementioned notice, we can conclude that **Chinese jurisprudence has no wish to contravene the prohibition of arbitration, but instead has tried to extend the opportunities for conciliation or mediation by judges in dealing with disputes, regardless of whether they arise in administrative or civil matters.**

2. EXCEPTION:ACCEPTABLE IN CERTAIN PUBLIC CONTRACTS

Because the administrative litigation code is designed to enable citizens to assert claims against administrative agencies, in this part, we will examine

²⁸⁷ Tan Yixia(谭毅霞), *Review and Remodeling of conciliation in administrative litigation system*(行政诉讼和解制度之检讨与重塑),14(May,2011)(unpublished Master thesis, Xiangtan University)(on file with author)

²⁸⁸ Wang Guoyong(王国勇), *Thinking On Administrative Contract And Arbitration*(行政合同與仲裁救濟的契合與淺思), see GMW.CN HomePage, <http://court.gmw.cn/html/article/201205/03/89025.shtml>, last visited 13 Nov.2013.

²⁸⁹ Refer to Lawinfochina web, <http://www.lawinfochina.com/display.aspx?lib=law&id=5886&CGid=>, last visited 12 November 2013.

²⁹⁰ Refer to Lawinfochina web, <http://www.lawinfochina.com/display.aspx?lib=law&id=5930>, last visited 12 November 2013.

disputes arising from administrative contracts that have been asserted by administrative agencies against citizens. There are two primary elements to consider. One is the domestic arena, in which arbitration may be employed by administrative bodies (A.DOMESTIC FIELD: ACCEPTABLE FOR ADMINISTRATIVE CONTRACTS). The other is the international arena, in which arbitration also may be employed to resolve disputes involving international commercial contracts; its use helps to further the development of international commerce and the special enterprise named the “China Investment Corporation” (hereinafter CIC) in dealing with international contracts (B. INTERNATIONAL FIELD: ACCEPTABLE UNDER INTERNATIONAL CONVENTIONS).

A.DOMESTIC FIELD: ACCEPTABLE FOR ADMINISTRATIVE

CONTRACTS

We will examine two different points governed by domestic law. One is the procurement contract from which disputes have variety of legal natures. **Arbitration is permitted to resolve contractual disputes, but it is still prohibited when a dispute is about the signing of contract.** (I.PROCUREMENT CONTRACTS: ACCEPTABLE FOR CONTRACTUAL DISPUTES, PROHIBITED FOR DISPUTES ABOUT THE SINGING OF CONTRACT) The other point for discussion is the PPP contract. There has been legislative silence regarding the arbitrability of PPP contracts; **arbitration appears to be acceptable to resolve disputes arising from PPP contracts** (II. PPP CONTRACTS: ARBITRATION APPEARS TO BE ACCEPTABLE).

I.PROCUREMENT CONTRACTS: ACCEPTABLE FOR CONTRACTUAL

DISPUTES, PROHIBITED FOR DISPUTES ABOUT THE SINGING OF

CONTRACT

Over the last 20 years, the Chinese government has engaged in many

important public construction projects. China's massive stimulus spending in 2008 and 2009, its "Indigenous Innovation" policies and its ongoing negotiations towards China's accession to the World Trade Organization (WTO) Government Procurement Agreement (GPA) have brought China's public procurement policies into focus.

Pursuant to Article 43 of the China Public Procurement Law (hereinafter CPPL), procurement relationships are governed by the China Contract Code (hereinafter CCC) and the rights and obligations of the parties should be considered in light of the principles of equality and autonomy. Thus, most Chinese civil jurists consider relationships involving governmental procurement to be private contracts.

Furthermore, Article 128 of the CCC authorizes all contesting parties to resolve their disputes through settlements, including arbitration. Thus, jurist Zhang Li believes that disputes arising from governmental procurement contracts are arbitrable.

However, as is the case in many countries, including Taiwan and Germany, in governmental procurement contracts, all disputes occurring before the concluding of the procurement contract, such as choice of adversary of contract, competition order in tender procedure (in France, they are called as "*acte détachable*"), must be submitted to administrative judges. Chapter 6 of the CPPL includes many provisions regarding disputes during the phase before the concluding of the procurement contract.

In brief, in China, two distinct regimes exist regarding governmental procurement contracts to address different kinds of disputes: disputes arising from procurement contracts are governed by private law and are arbitrable; precontractual disputes are governed by judges in the administrative chamber and are not arbitrable.

II. PPP CONTRACTS: ARBITRATION APPEARS TO BE ACCEPTABLE

In China, the PPP contract is a newly developed type of contract. The construction in 1995 of an electrical plant in China by Chinese EDF and Alstom, a private enterprise, was the first project involving the acknowledgement of PPP contract. From that time onward, the development of PPP contracts has not ceased.

However, there is no uniform legislation addressing PPP contracts. In

practice, it has relied upon various administrative regulations or even those of local authorities. In China, **arbitration clauses often exist in PPP adherence contracts**, but whether the arbitration agreements in PPP contracts (in France, they means “*la clause compromissoire*”, the convention clauses by which the parties agree to submit their disputes to arbitration if any arise from the contract) are valid continues to present an important question.²⁹¹

In both the aforementioned case involving Chinese EDF and Alstom and another case, *Fu Zhou City v. Hongkongaise Enterprise*, the dispute regarding the arbitrability of a PPP contract became the threshold issue. However, the parties in those cases eventually achieved conciliation, and thus, we did not have the opportunity to learn the view of Chinese jurisprudence.

The aforementioned two categories of administrative contracts are the most important types in China. According to Zhang Li's observations, arbitrability in administrative matters in China is characterized by a variance and diversity of theoretical interpretations and practical applications.

In view of the issues mentioned above, reforms of the PPP code are being considered and are likely to acknowledge the arbitrability of PPP contracts.²⁹²

B. INTERNATIONAL FIELD: ACCEPTABLE UNDER INTERNATIONAL

CONVENTIONS

Pursuant to the economic and political reforms of 1978, China has moved toward openness in the international commercial and investment fields. Economic development has continued to take place in recent times in China. There will be increasing development of the infrastructure and international investment.

To handle international investment affairs effectively, a public enterprise, China Investment Corporation(CIC), was established on 29 September 2007 pursuant to the China Society Code.

Its capital was fully provided by the state, specifically, by the Chinese sovereignty funds. Despite the aforementioned source of its capital, the

²⁹¹ Kan Zhong Le (康宋乐) & Liu Shu Ran (刘书翰), *Analysis Regarding the Judicial Question of PPP Contracts* (PPP 契约司法问题分析), Faxue, 2007, recited from Zhang Li, *supra* note 272, at 201.

²⁹² Zhang Li, *supra* note 272 at 202.

management of CIC is like that of a private enterprise in China. Its group of directors is composed of an administrative counsel and a supervisory counsel, though its investment project was decided by a nine member committee.²⁹³

Regarding its relationship with third parties, CIC has no specific characteristics of a private investment fund. It can be a holder of rights and obligations. However, **a public enterprise does not constitute an administrative organization in China. In Chinese legislation, CIC is regarded as a private legal person.** Furthermore, China is a member state of the New York Convention and has a network of approximately 130 bilateral investment treaties. Thus, **there is no legislative obstacle to prevent CIC from submitting its disputes to arbitration. In practice, CIC frequently, and even systematically, demands that its contractor insert an arbitration clause in its contracts to avoid examination in a foreign jurisdiction.**

In the arbitration law field, arbitration can be divided into institutional arbitration and ad hoc arbitration. **In China, the arbitration law only permits institutional arbitration.** The main arbitration institution in China is the “China International Economic and Trade Arbitration Commission” (hereinafter CIETAC). Submission to CIETAC and the application of Chinese law is the most familiar to CIC. However, in practice, the contractor often demands that CIC submit to arbitration outside of China.

In conclusion, in China, **in the domestic public law field**, there currently is uncertainty regarding the distinct standards applied to public and private contacts and their arbitrability. In the future, there should be legislation that explicitly provides definitions or standards for administrative contracts and expressly defines the meaning of “administrative contentions” as set forth in Article 3.

In the international field, although CIC is a public enterprise and is fully funded by the government, the nature of its activities (commercial trade) and its objectives (seeking to maximize its commercial interests) continue to be the focus of jurists who analyze arbitrability in China.²⁹⁴ In the future exploration of these issues, serious consideration should be given to reconciling the goals of protecting the general interests and addressing the practical needs of foreign investors.

²⁹³ Zhang Li, *supra* note 272, at 142.

²⁹⁴ Zhang Li, *supra* note 272, at 208.

CHAPTER IV: ARBITRATION IN ADMINISTRATIVE MATTERS IN TAIWAN

In Taiwan, arbitration in administrative matters also has developed differently in legislation and in practice. In Taiwan's legislation, there are articles explicitly providing for arbitrability and the standards governing it. They reveal that in Taiwan, administrative matters are generally arbitrable under certain determined conditions (SECTION I. LEGISLATION: ARBITRABILITY UNDER CERTAIN CONDITIONS). In practice, there are different developments in administrative law and arbitration law fields. (SECTION II. IN PRACTICE: DIFFERENT EVOLUTIONS IN ADMINISTRATIVE LAW AND ARBITRATION LAW FIELDS).

SECTION I. LEGISLATION: ARBITRABILITY UNDER CERTAIN

CONDITIONS

As mentioned, the question of arbitrability in Taiwan is addressed in the "Arbitration Law;" there is no special law regarding the arbitrability of administrative contracts.

Pursuant to Article 1 of Taiwan's Arbitration Law: "(I) *Parties to a dispute arising at present or in the future may enter into an arbitration agreement designating a single arbitrator or an odd number of arbitrators to constitute an arbitral tribunal to determine the dispute. (II) The dispute referred to in the preceding paragraph is limited to those which **may be conciliated in accordance with the law.***"

Thus, **the parties may conclude an arbitration agreement that establishes an arbiter or arbitration tribunal to arbitrate current or future disputes. The arbitrable disputes are restricted to legally reconcilable disputes.**

Yet how do we define disputes as "reconcilable"? Jurists²⁹⁵ considered that we should refer to mentioned Section I of Article 219 of the Administrative

²⁹⁵ Ming-Chiang Lin(林明鏘) , *The Determination Of Nature On Delegation Exploitation Industrial Zone Contract And Its Arbitrability*(委託開發工業區契約之定性與仲裁容許性),Vol.33, The Taiwan Law Review(月旦法學雜誌), p114.

Litigation Law of Taiwan (ALLT): *“The object of litigation in which **the parties have the right of disposition**, subject to the precondition of **not violating public interest**, may be submitted to reconciliation, and the administrative court may try to reconcile at any time, regardless of debouchment of process.”*

Accordingly, whether an administrative contract is the object of litigation to which parties have a right of disposition and violate public interest becomes an important standard for arbitration.

Thus, the Taiwanese legal system has adopted the same standard to deal with arbitrability as that applicable to reconciliation. This is not a unique rule in the world. Article 203(4) of the United Arab Emirates’ (abbreviated as “UAE”) Civil Procedures Code also provides: *“Arbitration shall not be permissible in matters which are not capable of being reconciled.”*²⁹⁶ Thus, under this category of legislation, the concept of arbitrability closely coincides with that of “reconcilability.”

There are two important elements that distinguish the arbitrability of administrative disputes. One is that the parties should have the right to the disposition of the object of litigation (**1. PARTIES HAVE THE RIGHT TO DISPOSE THE OBJECT OF LITIGATION**). The other is that the reconciliation or arbitration should not violate the public interest (**2. ARBITRATION DOESN’T VIOLATE PUBLIC INTEREST**).

1. PARTIES HAVE THE RIGHT TO DISPOSE THE OBJECT OF LITIGATION

This standard can be seen as a “positive” element. Section I of Article 219 establishes the parties’ right to the disposition of the object of litigation.

However, we will distinguish between the ideas of an *“object of litigation”* and an *“object of conciliation.”* The former is not necessarily the same as the latter. In conciliation or arbitration procedures, the parties’ right of disposition should depend upon the object of “conciliation” or “arbitration,” rather than on the “litigation.” Specifically, the parties should have the right to disposition of the legal relationship regarding which they desire to achieve an agreement, rather

²⁹⁶ Gordon Blanke, Baker & McKenzie Habib Al Mulla, *The New UAE Competition Law: Is It Arbitrable or Is It Not Arbitrable? – That Is the Question*, http://kluwarbitrationblog.com/blog/2013/02/19/the-new-uae-competition-law-is-it-arbitrable-or-is-it-not-arbitrable-that-is-the-question/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+KluwerArbitrationBlogFull+%28Kluwer+Arbitration+Blog+-+Latest+Entries%29, last visited 22 February 2013. For a discussion of the other legislation throughout the world that was mentioned, refer to notes 36-59 of this dissertation.

than the whole legal relationship of disputes. The rest of the relationship can continue in litigation.

That is, perhaps there are many legal relationships involved in a dispute and the parties want to achieve an agreement of conciliation or arbitration regarding only one or certain determined legal relationships. It is sufficient for the parties to have a right of disposition of the ***expected conciliation or arbitration relationship***. Thus, although legislators used the term of “***object of litigation***,” as mentioned above, Taiwanese doctrine maintains that the wording of the article should be changed to “***object of reconciliation***” or “***object of arbitration***.”²⁹⁷

Furthermore, what is the definition of the “right of disposition regarding the object of reconciliation” in Taiwan? This is a legal idea that is easily understood in theory, but rarely and hardly realized in cases.

Firstly, the “right of disposition” is a legal idea found in Taiwan’s civil law. In Taiwan’s civil law, Article 765 provides: “*The owner of a thing has the right, within the limits of the Acts and regulations, to use it, to profit from it, and to dispose of it freely, and to exclude the interference from others.*” Gradually, this right has become generally accepted and has been introduced in procedural law. In procedural law, jurists believe that the right of disposition means the right to **abandon claims, admit claims, voluntarily dismiss the action, or settle the case.**²⁹⁸ Therefore, pursuant to the law governing administrative procedure, the right of disposition means that the parties, regardless of whether they are administrative organs or citizens, can abandon their claims, admit their claims, dismiss their actions voluntarily, or settle their cases.²⁹⁹

2. ARBITRATION DOESN'T VIOLATE PUBLIC INTEREST

In Taiwan, there are three major types of administrative litigation. They are paying litigation, confirming litigation and revocation litigation (as discussed below). To deal with disputes regarding the obligations of an administrative contract, the parties can bring a lawsuit for paying litigation pursuant to Section I of Article 8 of ALLT. In contrast to China, Taiwan’s paying litigation includes lawsuits brought by citizens against administrative agencies to seek remuneration and by administrative agencies against citizens to seek

²⁹⁷ WENG YUES-HENG(翁岳生), INTERPRETATION ON ADMINISTRATIVE LITIGATION LAW(行政訴訟法逐條釋義),605,(WUNAN,2004).

²⁹⁸ SHIE, TZAI-CHIUAN(謝在全),ON THE PROPERTY LAW IN CIVIL LAW(民法物權論), TOME I, 20, (2007).

²⁹⁹ QIU LIAN-GONG(邱聯恭), ON PROCEDURAL OPTION RIGHT(程序選擇權論),33(NTU edition,2000)

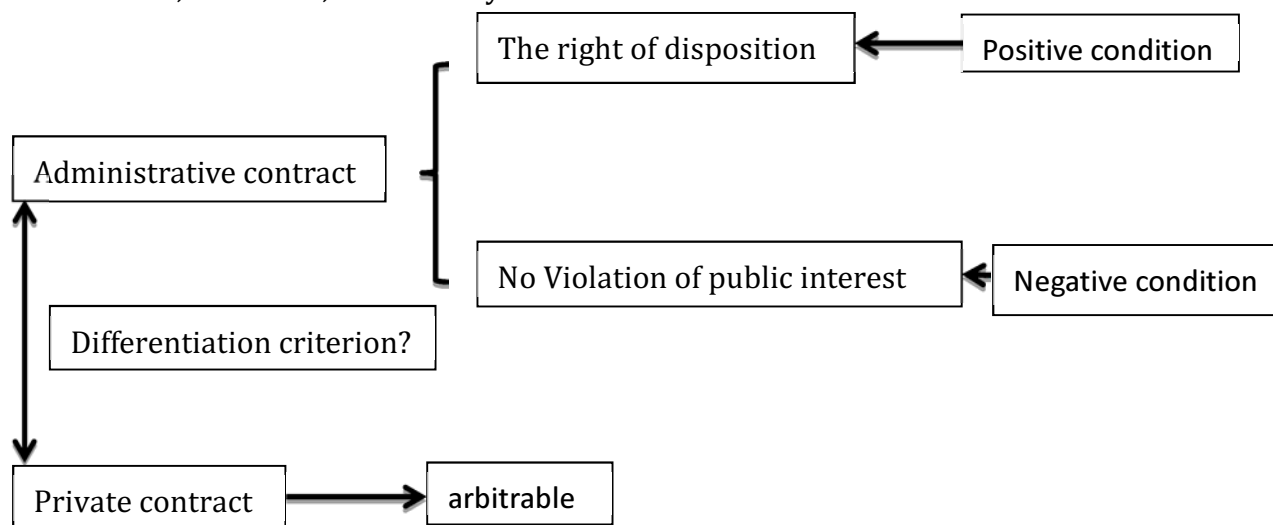
performance of an administrative contract (there are disputes about lawsuits brought by Taiwan administrative bodies and we would talk it below in 1.PREROGATIVES OF ADMINISTRATIONS IN CONTRACTS).

Conclusively, an examination of Articles 8I and 219 of ALLT reveals that, in Taiwan, the arbitrability of an administrative contract is determined by its conciliability, which is established by the following two conditions:

- 1. Parties have right of disposition regarding the object of litigation.**
- 2. The reconciliation or arbitration does not violate a public interest.**

In addition, since it addresses the arbitrability of administrative contracts, Taiwan's legal doctrine also assumes that an administrative contract is necessary.

Thus, in Taiwan, arbitrability on administrative contract is as follows:



SECTION II. IN PRACTICE: DIFFERENT EVOLUTIONS IN

ADMINISTRATIVE LAW AND ARBITRATION LAW FIELDS

Although Taiwanese legislation explicitly provides the conditions under which arbitration is permitted in administrative matters, in practice, the nature of the contract is still the crucial point to decide arbitrability, especially in disputes in the field of administrative law. If a certain contract is considered to be an administrative contract, in theory, it should fall within the abovementioned conditions; in contrast, a private contract will be considered to be arbitrable.

However, contemporary practice in Taiwan reveals that **in the field of administrative law, the nature of the contract** (administrative contract or private contract) **seems to be the only one standard to decide arbitrability. Precisely, if certain contract is defined as private contract, it would be arbitrable. Contrarily, if certain contract is defined as administrative contract, it seems inarbitrable.** Furthermore, we would discuss the two main reasons why arbitration is accepted in administrative law in Taiwan. One is the nature of contract. The other one is the extension of remedies in administrative litigation because it affects the acceptance of arbitration in administrative matters in Taiwan. (1.IN ADMINISTRATIVE LAW FIELD: TWO MAIN REASONS TO EXPLICATE WHY ARBITRATION IS ACCEPTED IN ADMINISTRATIVE LAW IN TAIWAN)

In contrast, in the field of arbitration law, there is an open attitude toward arbitration, regardless of the nature of the contract. Moreover, arbitration has been advanced in many public contract fields (2. IN ARBITRATION LAW FIELD: OPEN ATTITUDE).

1.IN ADMINISTRATIVE LAW FIELD: TWO MAIN REASONS TO EXPLICATE

WHY ARBITRATION IS ACCEPTED IN ADMINISTRATIVE LAW IN TAIWAN

In many countries, such as France and China, which have been previously discussed, there have been questions regarding how to define administrative

contracts. The distinction between administrative contracts and private contracts is not clear and has resulted in diversity in identification the nature of the contract, both in doctrine and in jurisprudence. This phenomenon is also present in Taiwan. Jurists describe it as the “**administrative contract in private law**.”³⁰⁰ To examine this issue, we must consider the dispute in Taiwanese doctrine regarding the nature of contracts since **previously many administrative contracts are regarded as private contracts**. (A.FIRST EASON: PREVIOUSLY, MANY ADMINISTRATIVE CONTRACTS WERE REGARDED AS PRIVATE CONTRACTS), and there are more remedies in contemporary administrative litigation (B. SECOND REASON:PREVIOUSLY, DISPUTES ARISING FROM ADMINISTRATIVE CONTRACT WERE NOT IN THE SCOPE OF ADMINISTRATIVE LITIGATION SYSTEM), and most importantly, the relationship between them.

A.FIRST EASON: PREVIOUSLY, MANY ADMINISTRATIVE CONTRACTS WERE REGARDED AS PRIVATE CONTRACTS

We can consider disputes regarding the nature of contracts in Taiwan from two perspectives. The first is from a doctrinal perspective (I.DOCTRINE STANDARDS OF ADMINISTRATIVE CONTRACTS). The other is from the jurisprudential perspective. (II. JURISPRUDENTIAL STANDARDS: THEY ARE ALSO ACCEPTED BY MOST DOCTRINE)

I.DOCTRINE STANDARDS OF ADMINISTRATIVE CONTRACTS

Like France, Taiwan judiciary is a typical dualistic one, in which there is a separate set of courts dealing with administrative litigations. All administrative litigations should be submitted to administrative courts.

In Taiwan, an administrative contract is almost a synonym for a public contract. These two terms are often used interchangeably by jurists. Strictly speaking, “public contract” in Taiwan doesn’t mean all contracts concluded by administrative bodies, but means all the contracts submitted to public law.

In Taiwanese legislation, the terms “**legal relations under public law**” or

³⁰⁰ Chen Chwen-Wen, *Contrat Public à Taiwan*, in ROZEN NOGUELLOU and ULRICH STELKENS, *COMPARATIVE LAW ON PUBLIC CONTRACTS*, 934, 931-51 (BRUYLANT, 2010)

“administrative contract” are used. The third chapter of the Administrative Procedure Act of Taiwan (APAT) is entitled *“Administrative Contracts.”* In addition, Article 135 of APAT states: *“Legal relations under public law may be created, altered or extinguished by contracts....”* In short, there are no official legal meanings for these two terms in Taiwanese law. As a result, there are debates among various jurists. And the following different opinions signified two successively historical steps.

(1). FIRST EPOCH: AN ADMINISTRATIVE CONTRACT MEANS THE

CONTRACT OF WHICH ONE PARTY IS AN ADMINISTRATIVE ORGAN

At first step, one theory holds that **if one party to a contract is an administrative organ, the contract is an administrative contract.** Under this theory, the contents of the contract are not examined.

However, this theory has changed and developed. The old theory, which judges a contract solely on the basis of one party, results in the problem that there is no opportunity for an administrative agency to conclude a private contract. **That is, all contracts concluded by an administration are administrative contracts. In Taiwan, it is well established that administrative agencies can conclude private contracts with citizens or private enterprises.**

One new theory maintains that if one party is an administrative organ, we should then determine whether the administrative organ is in a preponderant position over the other party. If so, the contract may be readily regarded as an administrative contract. If not, the contract may be regarded as a private contract.

The new theory admits that administrative agencies may conclude private contracts, but regardless of whether the old or the new theory is advanced, the object of the contract is not taken into consideration. Thus, in second step there are other legal doctrines asserting that the object of the contract should be considered.

(2).SECOND EPOCH: AN ADMINISTRATIVE CONTRACT MEANS THE

ONE AIMING TO CREATE, ALTER OR EXTINGUISH LEGAL

RELATIONSHIPS UNDER PUBLIC LAW

Supporters of another theory assert that **an administrative contract aims to create, alter or extinguish legal relationships under public law**. Thus, the object of an administrative contract should be examined to determine whether it is a public contract.

In Taiwan's legal doctrine, this theory has gained major endorsements.

Yet how do we determine the "object" of a contract? Under Taiwanese legal doctrine, if the facts surrounding a contract involve public law, the contract should be regarded as an administrative contract; otherwise, it should be considered a private contract. Taiwanese doctrine also asserts that the standards should be based on the effects or the relationships resulting from the contract.

In conclusion, in Taiwan, the specific legal situation of a contract determines whether or not the contract will be governed by public law. Generally, **Taiwanese contemporary doctrinal standards are as follows:**

1. If one party to a contract is an administrative agency, it is presumed to be a public contract.
2. If the object of a contract involves the public interest, it is a public contract.
3. If the target of the contract is to create a relationship under public law or to exercise a certain administrative mission, it is a public contract.
4. If the facts surrounding the contract involve public law, it is a public contract.

Generally, none of these criteria should occupy a dominant position; in practice, they are often mixed in their consideration.

Some comparative examples provided by French jurist Auby should be considered in Taiwanese doctrine to determine whether a legal situation will fall under public law:³⁰¹

Assets belonging to public institutions are subject to public law where they are open to the public, or especially adapted for being

³⁰¹ Jean-Bernard Auby, *supra* note 75, at 116, note 7.

used in a public service activity³⁰²; a contract in which a public entity is party is a public law contract if it is externalizing a public service, if it contains provisions which could not be found in an ordinary contract, and in any case where it is public procurement contract.

In Taiwanese doctrine, the means for the interpretation of whether a contract is public or private reveal that jurists would like to pull public contracts away from “private law” toward “public law.” For a long time, many contracts that are public in nature have been interpreted to be “private contracts” when a remedy is sought in court. The present dispute regarding the standards that should be used to distinguish between public and private contracts is not long-standing. Rather, it is new and is a major question in the field of Taiwanese administrative law. The substantial development of doctrine regarding the establishment of standards for public contracts reveals the efforts of administrative jurists to create an independent administrative contract law that is distinguishable from private contract law.

The same situation also has occurred in Taiwanese jurisprudence. In Taiwan, legal development began in private law; at first, the interpretation of public law often followed the principles applicable to private law. Thus, an examination of the jurisprudential standards applied to public contracts will enable us to recognize this phenomenon.

II. JURISPRUDENTIAL STANDARDS: THEY ARE ALSO ACCEPTED BY

MOST DOCTRINE

We will consider jurisprudence in Taiwan from two angles. The first is an examination of the establishment of standards. It reveals that many important public law theories have been established by the interpretations of the Constitutional Court and that they have influenced doctrine and jurisprudence in the administrative law field ((1).INTERPRETATION BY JUSTICES OF THE CONSTITUTIONAL COURT). The other is to examine important cases that have

³⁰² See Code of public properties, article L.2111-1.

occurred in practice, particularly ETC cases (*Electronic Toll Collection*) and delegation exploitation contracts. ((2).JURISPRUDENCE BY SUPREME ADMINISTRATIVE COURT).

(1).INTERPRETATION BY JUSTICES OF THE CONSTITUTIONAL

COURT

In Taiwan, many public law jurists teach administrative law and constitutional law in law schools. From a historical perspective, Taiwan's Constitutional Court (TCC) was established prior to the establishment of Taiwan's administrative courts. Thus, many important public law questions have been resolved by the TCC rather than by administrative courts. In practice, the TCC's interpretations have a dominant position in Taiwanese doctrine and jurisprudence.

Similarly, regarding the standards of public contracts, the TCC also has played an important role in providing direction to doctrine and jurisprudence.

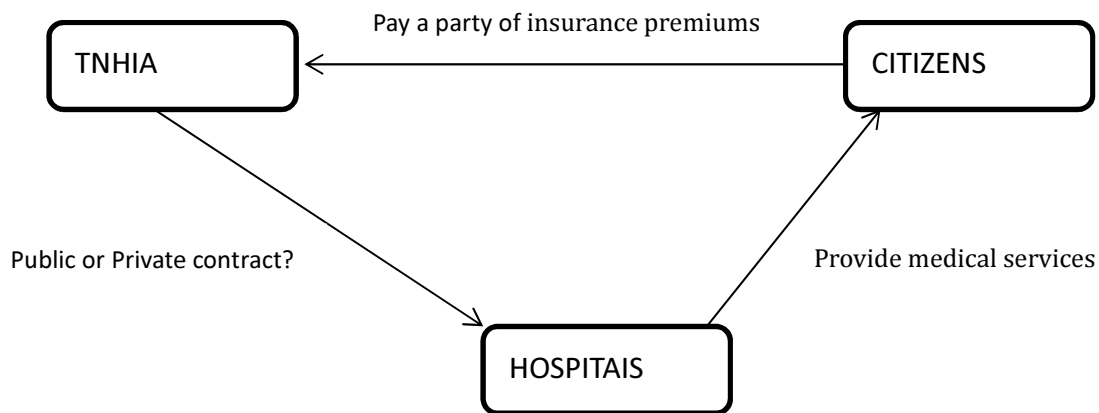
In case number 533, the TCC held that the social insurance system (imposed on every citizen) affects all citizens' well-being, and thus, falls within the "public law."

The TCC has used three different criteria to define the legal nature of contracts concluded between the Taiwan National Health Insurance Administration (the administrative agency responsible for the insurance system, "TNHIA") and hospitals³⁰³.

Firstly, the TCC adopted the "subjective" standard. One party to such a contract is the TNHIA, an administrative agency. If citizens are taken into consideration, third-party contracts are involved.

³⁰³ No.533, See http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=533, last visited 3 April 2014.

Legal relationships between three parties are as follows:



Secondly, the TCC adopted the “objective” standard. Pursuant to Article 1 of the contract, TNHIA’s payments are made to promote citizens’ health and public interests through the healthcare services provided by the hospitals.

Thirdly, to ensure the hospitals’ fulfillment of their contractual obligations to perform medical services, the said contract allows the TNHIA a right to set “unilateral” guidelines for hospitals. In addition, pursuant to the National Health Insurance Act of Taiwan (TNHA), which governs the Taiwanese social insurance system, the TNHIA is authorized to unilaterally discipline hospitals. Thus, the TNHIA’s prerogative means that the parties are not accorded equal status.

Briefly, the TCC used “subjective” and “objective” (including the “prerogative”) standards to define public contracts.

In the same case, one member of the TCC, public law justice (Wu Geng), set forth more precise criteria to define public contracts. They are often cited by jurists and in jurisprudence, and are as follows:

1. When a public organization is authorized by specific law to conclude a public contract or when details are already provided in a certain public law.
2. When certain contracts can and should be done in a unilateral form, but in fact have a contractual form, these contracts can be regarded as replacements for unilateral administrative acts.
3. When the obligations or liabilities arising from the contract can only be imposed on a public organization.
4. When some points in the contract assist or are favorable to an

administrative agency.

When one of these conditions occurs, certain contracts are considered to be public contracts.

This case was not directly concerned with the arbitration of administrative matters, but it was the first leading case regarding the definition of a public contract. From that time forward, standards regarding public contracts have been gradually established.

The abovementioned standards are similar to those established in French jurisprudence. In France, the standards regarding administrative contracts are established by two main criteria. One is the “organ” standard (by subject); the other is the “material” standard (by object). To provide a brief illustration, if a contract is concluded between two public persons, it would be presumed to be an administrative contract; however, if its effect is to bring about a private understanding (in French jurisprudence, “*rappports de droit privé*”) between parties, it would be considered a private contract. In contrast, if a contract is concluded between two private persons, it would be presumed to be a private contract; however, if one party represents the interest of a certain public legal person, it is considered to be a public contract. If a contract is concluded by a private person and public person, the material standard should be considered. That is, it should be determined whether the object of a contract involves the execution of a public service or the relationship between the parties appears to involve an exception of private law, i.e., one party has the right to dismiss the contract or can control the financial results of exploitation unilaterally.³⁰⁴

³⁰⁴ Jean Rivero, *supra* note 103, at 370.

(2).JURISPRUDENCE BY SUPREME ADMINISTRATIVE COURT

In Taiwanese public law jurisprudence, the most important contemporary question about arbitration is the definition of a public contract. We will introduce cases dealing with two aspects. The first concerns the ETC contract ((I). ETC). In the second section, we will introduce the delegation exploitation contract ((II). DELEGATION EXPLOITATION CONTRACT).

(I). ETC

Taiwan's public contract system is based on two main types of contract. One is the PPP contract. The other is the procurement contract.

Taiwan started Public-Private Partnerships (PPP) in 1994 under the "STATUTE FOR ENCOURAGING PRIVATE SECTOR PARTICIPATION IN TRANSPORTATION DEVELOPMENT" issued by the Ministry of Transportation and Communication (MOTC), and the "ACT FOR PROMOTING PRIVATE PARTICIPATION IN INFRASTRUCTURE PROJECTS", which was passed on February 9, 2000 and amended in 2001 (hereinafter called the "APPIP") in order to enlarge private investment in the public sector.³⁰⁵

After the laws mentioned above were promulgated, PPP contracts were widely used in infrastructure projects, with an increase in the number of projects.³⁰⁶

Taiwan's public procurement regime was established under the Government Procurement Act, passed on May 27, 1998 (hereinafter referred to as the GPAT).

Taiwan's Taipei High Administrative Court (hereinafter referred to as the THAC) rendered a judgment on the electronic toll system for Taiwan's national

³⁰⁵ Shih-Jung Hsu and Grace Li-Min Liao, *Privatization, Partnership Planning And The Exclusion Of Citizens — Role Of The Third Sector To Take In Taiwan*, 7th International Conference of the International Society for Third-Sector Research (ISTR), Bangkok, Thailand, July 9-12, 2006.

³⁰⁶ Refer to the report of Public Construction Commission in Taiwan in 2006, at <http://www.pcc.gov.tw/pccap2/TMPLfronted/ChtIndex.do?site=002>, last visited 14 December 2013. The Public Construction Commission is a facilitating public body under the Executive Yuan (the executive branch of the Taiwan government), in charge of the law making, examination and promotion of PPPs in different areas. See CHENG CHEN, *Institutional Barriers to Private Participation in Infrastructure: The Case of Electronic Toll Collection In Taiwan*, In: Boyd, D (Ed) 23rd Annual Association of Researchers in Construction Management Conference, September 3-5, 2007, Belfast, UK, 673-682.

highways.³⁰⁷ The project was named “*Electronic Toll Collection*” (ETC), and aimed to eliminate delays on toll roads by adapting military “identification of friend or foe” technology.

We want to introduce this case in two sections. The first is background (BACKGROUND). The other is analysis (ANALYSIS).

BACKGROUND

We divide this Background section into two parts. The first looks at the facts ((1). FACTS). The second considers procedure ((2). PROCEDURE).

(1). FACTS

In 2003, the Taiwan Area National Freeway Bureau (the administrative body responsible for national freeway security and maintenance, referred to from now on as the TANFB) invited tenders for a project on the installation and operation of ETC. After a pre-qualification phase, three applicants were competent to be considered for the award of the contract: Taiwan Yutong Consulting and Technology Co Ltd (hereinafter “Yutong”), Far East Electronic Toll Collection Co (FE) and Acer Incorporated (Acer).

On February 27, 2004, the TANFB published its qualification decision (hereinafter “TQD”), declaring that FE was the superior bidder for the ETC project while Yutong was designated the junior bidder³⁰⁸, meaning that if the negotiations between FE and the TANFB failed, Yutong would be substituted for FE. Two months later, the TANFB and FE signed a contract for ETC.

Yutong objected to the administrative decision about the award of the contract, and filed an administrative appeal before the TANFB (in French, a “*recours gracieux*”, an action by a citizen demanding that an administrative body review its administrative decision) on March 25, 2004, requesting a review of the TQD. Yutong complained that the tendering and bidding process was unfair.

Under Taiwan’s GPAT, the surveillance of procurement contracts is entrusted to two entities: the “responsible entity” and the “superior entity”. The

³⁰⁷ THAC, No.(Su-zhi) 752, Year 94 (臺灣高等行政法院 94 年度訴字第 752 號). (judgment date: February 24, 2006). Judicial judgments in Taiwan are cited from the year of establishment of the Republic of China, 1911. Thus, a case brought into court in 2005 is cited as judgment in Year “94” (2005 minus 1911 equals 94). “Su-zhi” is the Romanization of the Chinese word used to classify matters, and means “litigation” in Chinese.

³⁰⁸ Administrative Decision No. 0930005550, February 27, Year 2004.

responsible entity is always Taiwan's Public Construction Commission (PCC). The "superior entity" refers to a body at a higher level than the individual purchasing agency.³⁰⁹

The TANFB did not respond within the period required by statute (fifteen days from March 25³¹⁰), so on April 19, 2004 Yutong proceeded to file another claim before the responsible entity, the PCC, for a further judgment (in French this is a "*recours hiérarchique*", a request to a hierarchically higher administration to revoke a lower body's decision). The two actions mentioned are those imposed for tenders.

The PCC planned a review meeting for April 28, 2004, but the TANFB suddenly announced a rejection of Yutong's complaint (the "*recours gracieux*" of March 25) and signed final contract with FE on April 26, 2004, just two days before the planned meeting.³¹¹ (Since a contract is concluded on the basis of the TQD, for ease of reference we shall call the contract the TQDC from now on.)

In the meeting mentioned above, the PCC supported Yutong's complaint, on the basis that FE had failed to provide a notarized certification of its toll system³¹² (the Chinese version of its infra-red system). The qualification of the superior bidder was thus invalidated, and the TQD should have been quashed.³¹³

Although its complaint had been accepted by the PCC, Yutong was not satisfied with the result since it only "cancelled" the TQD but did not award the contract to Yutong. Instead, Yutong wanted a judgment compelling the TANFB to award the contract to Yutong. Thus Yutong filed a lawsuit before the THAC, arguing that, pursuant to the decision reached at the PCC meeting, Yutong should be substituted as awardee.

The problem became more complex when more actors became involved. The TANFB and FE formed an alliance by signing the contract, confronting the challenge from Yutong and PCC. Thus the TANFB was defendant and invited FE to join as a "participant"³¹⁴ in the administrative litigation process.

³⁰⁹ DANIEL J. MITTERHOFF, *The Failure Of Administrative Law To Provide Adequate Relief In Bid Challenge Litigation: A Note On Taiwan Yutong Consulting And Technology Co Ltd V Taiwan Area National Freeway Bureau And Far East Electronic Toll Collection Co*, 5 Public Procurement Law Review NA131 (2007).

³¹⁰ Under Article 75(2) GPAT, if the administrative agency that rendered the decision that is being questioned does not respond within fifteen days, a citizen can bring an action before the responsible entity.

³¹¹ CHENG CHEN, *supra* note 306.

³¹² Required by Arts 43 and 44(1) of the PPP Law.

³¹³ However, at that time, the ETC system had been installed by FE at 21 existing toll booths around Taiwan. See CHENG CHEN, *supra* note 306.

³¹⁴ Regarding participants in administrative litigation, see Taiwan's Administrative Litigation Law,

(2). PROCEDURE

Four different claims exist in this case, and the THAC divided its judgment into four separate judgments. Judgment No. 752³¹⁵ addressed the defects in the bidding process and revoked the TQD. Judgment No. 122³¹⁶ concerned Yutong's request to suspend the execution of the TQD. Judgment No. 3123³¹⁷ cancelled the decision of the PCC. Judgment No. 301³¹⁸ resolved any claims FE had against the PCC. These four judgments were rendered by the same adjudication tribunal.

Finally, the parties appealed to the Taiwan Supreme Administrative Court (TSAC, which is like the Conseil d'État in France), and the TSAC rejected the appeal.³¹⁹ **The final result is that the TQD was revoked, and this resulted in the invalidity of the TQDC.** The TSAC's opinion was generally in line with legal doctrine.³²⁰ (Disputes about the relationship between a TQD and a TQDC in doctrine involve the theory called "l'acte détachable" and will be discussed below: SECOND PART: Questions on the process of arbitration). Finally, the ETC system was opened to re-tendering in 2006, and FE was re-awarded the contract.

ANALYSIS

We will discuss the ETC case in Taiwan in two main sections. The first is the legal nature of the contract ((1). NATURE OF CONTRACT). The second is how a better resolution to BOT (Build-operate-transfer) disputes can be found in Taiwan, with many jurists advocating arbitration ((2). IS ARBITRATION A BETTER RESOLUTION?).

(1). NATURE OF CONTRACT

The ETC system was an important public transportation reform in Taiwan.

Article 42(1).

³¹⁵ *Supra* note 307.

³¹⁶ THAC, judgment No. (Ting-zhi) 122, Year 94(臺灣高等行政法院 94 年度停字第 122 號), February 24 (2005). "Ting-zhi" in Chinese means an urgent process to suspend the execution of an administrative decision.

³¹⁷ THAC, judgment No. (Su -zhi)3123(臺灣高等行政法院 94 年度訴字第 3123 號), Year 94, May 25 (2006).

³¹⁸ THAC, judgment No. (Su -zhi)301(臺灣高等行政法院 94 年度訴字第 301 號), Year 94, February 24 (2005)

³¹⁹ TSAC, judgment No. (pang-zhi) 1239(最高行政法院 95 年度判字第 1239 號), Year 95, August 3, (2006). "Pang-zhi" in Chinese means "judgments" and is exclusively used in the TSAC.

³²⁰ Ming-Chiang Lin(林明鏘), Analysis of legal nature about private participation in public construction(促進民間參與公共建設法事件法律性質之分析),5, Taiwan Law Journal(臺灣本土法學雜誌),2006, p.220-24.

In the face of this litigation, from 2003 to 2006, various different voices were heard. Some jurists started to think whether the BOT system is suitable for Taiwan given the nature of its contracts.

At first, the question of whether the ETC project had adopted BOT or was “in-house” was in dispute. In 1996, the head of the Ministry of Transportation and Communication (MOTC) proposed entering into contracts with the private sector, namely through “Build and Operate” contracts, which would include contracting out finance, operation and technology management.

In 1997, the head of the MOTC was replaced by a new head, who preferred the “in-house” method. The TANFB signed a contract with China Telecom, a state-owned enterprise, for the construction, operation and maintenance of the ETC system.

Nevertheless, China Telecom’s budget plan for this contract (for about 40 million euros) was rejected by the Taiwanese Legislative Yuan³²¹ (the Taiwan Parliament) in 2002. Thus, the contract with China Telecom was cancelled. Since the “in house” method had failed, the only possible alternative for the ETC project was to turn back to the BOT method.³²²

The target of adopting BOT is to introduce private finance, increase efficiency, and reduce the burden on government funds. But because this dispute lasted three years, the contract was finally announced to be invalid, the project had to be re-tendered, and as a result there were conflicts in political fields, certain jurists considered that BOT is perhaps not suitable for Taiwan.³²³

Another main discussion in the public law field is the nature of the TQDC. Besides the contracting parties who are mentioned, there is another party, the junior bidder (Yutong). Thus, the relationship is composed of at least three parties.

In jurisprudence, the THAC and TSAC ruled that the ETC contract has the characteristics of an administrative contract, and thus considered the ETC contract to be an administrative contract, not a private contract.

The ETC case was the first one in which a BOT contract was submitted to

³²¹ From Japanese Colonial Period in Taiwan (1895-1945), “Yuan” was used for the Romanization of a Chinese word that means “organization”.

³²² The choice of “BOT” or “in house” caused conflicts between legislators. In that epoch, the ruling party was the DPP (Democratic Progressive Party) but in Parliament the major party was KMT (Kuomintang, Chinese Nationalist Party). DPP preferred the “in-house” method but KMT preferred “BOT”.

³²³ LAN Jeng-Peng(藍正朋), Analysis on Effectiveness Of ETC (高速公路 ETC 決策成效的評析), in National Policy Foundation Homepage, <http://old.npf.org.tw/PUBLICATION/SD/095/SD-B-095-006.htm>, last visited 2 Decembre,2013.

and interpreted by the administrative law jurisprudence of Taiwan.

Certain jurists considered that the definition of public contract used by the TSAC is in conflict with the provisions of the APPPIP. Pursuant to Article 12 of the APPPIP, the rights and obligations of the authority in charge and the private institution (bidder) are to be governed by an agreement to which the Civil Code provisions shall apply, except for matters where it is specified otherwise. In the ETC case, there were no specified clauses and thus the ETC contract should be under the Civil Code.³²⁴ Thus, some administrative law jurists define the ETC contract as a private contract.³²⁵

Even so, the definition of public contract is supported by most public law jurists.³²⁶

If the ETC contract is a private contract, it is therefore arbitrable. In contrast, if it is a public contract, we doubt whether, in Taiwan's jurisprudence, it can be arbitrable. What is the "potential" standard of jurisprudence? To answer this question, we need to consider the position of BOT contracts under the public law doctrine ((2) IS ARBITRATION A BETTER METHOD OF RESOLUTION?), and the jurisprudence about the delegation exploitation zone contract ((II). DELEGATION EXPLOITATION CONTRACT).

(2) IS ARBITRATION A BETTER METHOD OF RESOLUTION?

Because the ETC case caused a storm in the Taiwan public law field, some jurists have tried to find an alternative dispute resolution method, and arbitration is their preference.

Their main reasons are based on the fact that Article 11 of the APPPIP gives competence to the parties to include arbitration clauses in a BOT contract.³²⁷

However, in the public law field, some jurists consider that Article 11 does not mean that all relationships in a BOT contract are arbitrable. Public interest should still be the crucial standard for deciding on arbitrability in a BOT contract. Under the APPPIP, a BOT contract has many characteristics that distinguish it

³²⁴ LUO, Hui-Wen(羅惠雯), *Theory and Practice of BOT Contract*(BOT 契約之理論與實務), Tome 47, ANNUAL REPORT OF ACADEMY FOR THE JUDICIARY IN MINISTRY OF JUSTICE(司法官學院學員報告), p347.

³²⁵ CHEN Ai-E(陳愛娥), *Forms of Administrative Action And Division Of Powers on APPIP*(促進民間參與公共建設事件中的行為形式與權力劃分), 134, *The Taiwan Law Review*, p37.

³²⁶ JIANG Jia-Chi(江嘉琪), *ON THE NATURE OF ETC CONTRACT*(ETC 契約的公私法爭議), 81, *Taiwan Law Journal*, p114. Ming-Chiang Lin(林明鏘), *ETC Case And Public Interest*(ETC 判決與公益原則), 134, *The Taiwan Law Review*(月旦法學雜誌), p19.

³²⁷ LUO, Hui-Wen(羅惠雯), *supra* note 324, at 350.

from a private contract: for example, the administrative body can unilaterally request the bidder to reduce its fees, while the bidder has no authority to decide on the fees, and the bidder cannot transfer or lease the rights it obtains under the BOT contract (APPIP 49, 50, 51). Thus, the public interest is much involved in a BOT contract, and the nature of a BOT contract means that it is not suitable for submission to conciliation and arbitration.³²⁸

Certain jurists consider that arbitrability in a BOT contract should depend on the type of dispute. If the dispute concerns certain matters (APPIP 49, 50, 51, which refer to prerogatives of the administrative body), then it should not be subject to arbitration; if not, the dispute is arbitrable.³²⁹

(II). DELEGATION EXPLOITATION CONTRACT

In Taiwan, public activity for the exploitation, constitution and management of industrial zones is often delegated to private enterprise by contract. In its nature this is like a PPP contract.

In 1988, the Taiwan Land Development Corporation (originally established with national public capital in 1964, and then changed to a private enterprise in 2008, hereinafter referred to as the "TLDC") and the Hualien city government (Hualien) concluded a contract delegating the TLDC to exploit the Guanghai industrial zone. In 2005, disputes about the exploitation fee arose. The TLDC preferred to submit these to arbitration, while Hualien contested arbitrability. Finally they submitted the disputes to the THAC.

At first, the THAC regarded this contract as a private contract and rejected the TLDC's lawsuit, reasoning that the dispute only concerned a contractual obligation and that when the contract was concluded (in 1988), public contract and administrative litigation was not widely acknowledged in Taiwan, and then presuming that the parties had a common understanding to define this contract as a private contract.

The TLDC appealed to the TSAC. The TSAC revoked the THAC's decision for two main reasons. The first was that the TLDC was an enterprise which was

³²⁸ Fu Ke-qiang(傅克強), *Study On Dispute Resolution of APPIP*(促參案件爭議處理機制之研究), 48, ANNUAL REPORT OF ACADEMY FOR THE JUDICIARY IN MINISTRY OF JUSTICE(司法官學院學員報告), p.465. WU Hsiao-Yen, HSU Teng-Ko, and HUNG Kuo-Chin(吳小燕、許登科、洪國欽), *Dispute And Arbitration Of APPIP*(促參案件之爭議與仲裁), 77, Arbitration, p.44 (2006).

³²⁹ Ching-Yi Hsu(許靜宜), *A Study on the Dispute Settlement Regime of the Private Participation in Infrastructure Projects in Taiwan*, 101, (Jan.2010) (unpublished Master's thesis, National Taiwan Ocean University) (on file with author)

wholly owned by the State when the contract was concluded. The other was that the object and target of the contract involved public activity to encourage private investment and promote national economic development. Thus, the TSAC considered the said contract to be a public contract.

This case also interested public law jurists for two reasons. One is the nature of the contract. The other is whether this dispute is arbitrable.

Regarding the nature of the contract, public law jurists agreed with the opinion of jurisprudence.³³⁰

Regarding arbitrability, public law jurists considered that this dispute concerned an exploitation fee, in respect of which, by its nature, the parties have the right of disposition. Regarding the public interest, conciliation by the parties would lead to an obligation on the administrative body to pay remuneration, which would involve spending from the government budget. This seems to violate the public interest. However, the jurist Ming-Chiang Lin formulated a question about whether money can be spent from the government budget without the prior permission of Parliament, and, moreover, whether this use of the budget would consequently violate the public interest³³¹.

Lin stated that, in principle, the government budget should be spent only with the prior permission of Parliament, but that there are exceptions. The administration can spend monies in urgent or special situations. Although a conciliation plan would add to the amount of remuneration, if this does not affect other public activities and perhaps even leads to the continuing execution of the original exploitation plan, the public interest would instead be satisfied by adding this amount under the conciliation plan. In this situation, conciliation would advance rather than violate the public interest. Thus, he is in favor of allowing conciliation in delegation exploitation contracts. Therefore, since it can be submitted to conciliation, it can be arbitrable pursuant to the contemporary legislation mentioned above on the conditions for arbitrability in Taiwan.

³³⁰ Ming-Chiang Lin(林明鏘), *Determination Of Nature On Delegation Exploitation Industrial Zone Contract And Its Arbitrability*(委託開發工業區契約之定性與仲裁容許性), 33, *The Taiwan Law Review*(月旦法學雜誌), p114.

³³¹ Ming-Chiang Lin(林明鏘), *supra* 330, at 115.

(III) CONCLUSION: IS ARBITRATION EXCLUSIVELY FOR PRIVATE DISPUTES?

After having considered the two leading cases in Taiwan, we want to look back to ask why the nature of the contract is so important to questions about arbitrability.

In the delegation exploitation contract mentioned above, the question of whether the existence of an arbitration clause would increase the possibility of the contract being identified as a “private contract” is interesting. The answer seems to be easy and obviously negative. But in Taiwanese jurisprudence there are two interesting phenomena. One is that **arbitration seems to be a system exclusively for private law rather than public law (phenomenon 1)**. The other is that **contracts containing arbitration clauses would be considered as private contracts (phenomenon 2)**.

Regarding phenomenon 1, in cases number 93 Tai-sun zhi 992³³² and 93 Tai-sun zhi 169, the Taiwan Supreme Court (like the “*Cours de Cassation*” in France, hereinafter “TSC”) considered that the arbitration system is based on the principles of “party autonomy” and “freedom of disposition to private rights”, according to which parties have the right to choose their preference for the ***resolution of private rights disputes***.

In the judgment in case number 591 of the TCC (like the “*Conseil Constitutionnel*” in France, hereinafter “TCC”), the TCC also defined arbitration as the “autonomous ***resolution of disputes arising from private causes***”.

Regarding phenomenon 2, in case number “97 su-zhi 722”, the THAC decided that a contract for dealing with incinerating garbage concluded by HsinChu County Government (local administrative body) with a private enterprise was a private contract, by reasoning that the clauses in the said contract referred to dispute resolution through arbitration and conciliation and

³³² “Tai-sun zhi” is the Romanization of the Chinese word to classify matters when decisions of the Taiwan High Courts are appealed. “Tai” means “Taiwan” and “sun” is the Romanization of the word for “appeal” in Chinese. “Tai-sun” is used exclusively for judgments of the Taiwan Supreme Court. “93” signifies the year in which the case was submitted to the Taiwan Supreme Court and means the year 2004.

thus signified the *parties' common agreement to submit to private contract law*.

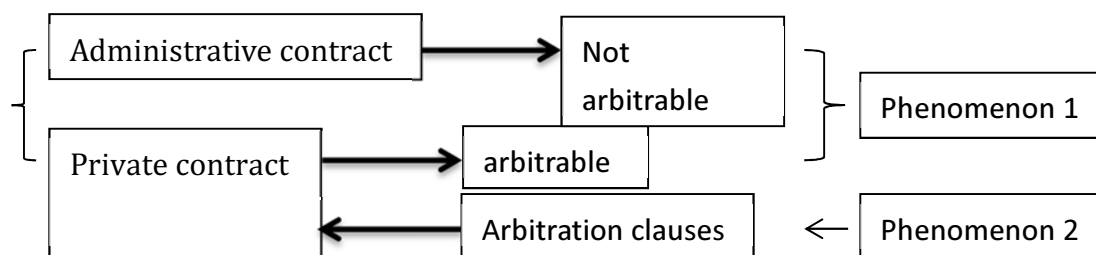
Taken together, these two phenomena lead in contrary directions. Under phenomenon 1, all disputes arising from administrative contracts seem to be excluded from arbitration. In contrast, under phenomenon 2, all administrative contracts containing arbitration clauses are likely to be deemed to be private contracts and are thus arbitrable.

Obviously phenomenon 2 shows confusion between arbitration clauses and arbitrability. Phenomenon 1 also ignored the contemporary legislation mentioned above on the conditions for arbitrability.

Even so, these two apparently contrasting phenomena perhaps present one “common” tacit understanding that, **in Taiwanese jurisprudence, arbitration was traditionally (or mistakenly) regarded as synonymous with the existence of a “private legal relationship”**. This explains the interesting results that “arbitration is exclusively for private law disputes” (phenomenon 1) and that “arbitration clauses signify an agreement to apply private law” (phenomenon 2).

Finally, looking at this from another angle, we can perhaps put forward an “audacious” hypothesis that the traditional Taiwanese jurisprudence mentioned above is not a “mistake” but a “silent resistance” or “conscious disregard”. In other words, even though the contemporary legislation allows that there are some conditions under which administrative disputes are arbitrable, the judges resist permitting arbitration for public legal relationship disputes.

Thus, perhaps the system on arbitrability in administrative matters in the mind of the judges is as follows:



Briefly, to echo the initial introduction, in contemporary administrative law field in Taiwan, and especially in its jurisprudence, arbitration on administrative matters continually focuses on the nature of the contract. **They habitually link "public contract" to "unarbitrable" and "private contract" to "arbitrable"**

B. SECOND REASON: PREVIOUSLY, DISPUTES ARISING FROM

ADMINISTRATIVE CONTRACT WERE NOT IN THE SCOPE OF

ADMINISTRATIVE LITIGATION SYSTEM

Public law in Taiwan is a new field in comparison to private law. Initially, public law developed by following private law. As many public law jurists became engaged in the study of public law, public law has gradually obtained its proper independence.

First we want to introduce the evolution of the Taiwanese legal system. The characteristics of this evolution are illustrated by the extension of remedies in administrative litigation. It's from one tier system, through two tier system, and to three tiers. And there are more remedies for administrative disputes. (I. ADMINISTRATIVE COURTS: FROM ONE TIER, THROUGH TWO TIERS AND TO THREE TIERS SYSTEM AND DIVERSIFICATION OF REMEDIES) Afterwards, we will quickly and briefly introduce the remedy for disputes arising from administrative contracts and reflect the question of arbitrability in administrative matters in Taiwan. The features of this reveal that arbitration is generally acceptable to Taiwanese legal jurists, even in public law. (II. THE

RELATIONSHIP BETWEEN “AVAILABLE REMEDIES FOR DISPUTES OF ADMINISTRATIVE CONTRACT” AND “ARBITRABILITY IN ADMINISTRATIVE MATTERS IN TAIWAN)

I. ADMINISTRATIVE COURTS: FROM ONE TIER, THROUGH TWO

TIERS AND TO THREE TIERS SYSTEM AND DIVERSIFICATION OF

REMEDIES

First, we will divide our study into two sections. The first concerns the reform of administrative courts from one tier, through two tiers and to three tiers system. Precisely, it's from the “one level, one instance” phase (the first phase), through the “two levels, two instances” phase (the second phase), to the “three levels, two instances” phase (the third phase) ((1). ADMINISTRATIVE COURTS: FROM ONE TIER, THROUGH TWO TIERS, AND TO THREE TIERS SYSTEM). Secondly, we will look at the diversification of remedies in administrative litigation. ((2).REMEDIES FOR DISPUTES ARISING FROM ADMINISTRATIVE CONTRACTS)

(1). ADMINISTRATIVE COURTS: FROM ONE TIER, THROUGH TWO

TIERS, AND TO THREE TIERS SYSTEM

In the history of administrative litigation in Taiwan, there are three different phases. **The first phase was from 1930 to 2000**; during this phase, Taiwan's administrative litigation procedure **consisted of a *single instance tier***.

Under this procedure, disputes were decided once judgments were given at the trial level. Citizens had no right of appeal, and their interests were not adequately protected.

Legal scholars considered that there should be additional tiers of review to protect citizens' rights.

The administration of the Taiwanese judicial system was divided into two.

From 1980, the management of all tribunals was directly under the Judicial Yuan, which exercised judicial authority, while procurator organizations came under the Ministry of Justice (a ministry of the Administration Yuan, which exercised administrative authority). The Judicial Yuan was responsible for the codification of all procedural laws, and the Ministry of Justice for all substantive laws.

Thus, in July 1981, the Judicial Yuan studied and amended the “ADMINISTRATIVE LITIGATION LAW” and finished the “DRAFT AMENDMENT TO ADMINISTRATIVE LITIGATION LAW” (“the Draft”), which converted the one single instance system into a “two tiers, two instances” system. The Draft was passed by the Legislative Yuan (Taiwan’s Parliament), promulgated on October 28, 1998, and executed on July 1, 2000.

This was an important reform to Taiwan’s legal system. From that time onwards, Taiwan’s administrative law has been in its second phase.

In this second phase, three High Administrative Courts (the Taipei, Taichung and Kaohsiung High Administrative Courts) come under the Taiwan Supreme Administrative Court.

To provide a better system of remedies, on September 6, 2012, the Taiwanese administrative litigation system entered **its third phase – the “three tiers, two instances” system**. Administrative litigation courts were established at all district courts, and deal with summary proceeding cases (in which the amount in dispute is less than 10,000 euros or a claim is made against a minor administrative act such as an immediate caution and execution, in French “*le référé d'urgence*”) and traffic violations.

At the present time, all administrative disputes arising from an administrative contract, can be submitted and appealed under the administrative jurisdiction.

In addition, the diversification of litigation categories provided for other resolutions for disputes arising from administrative contracts.

(2).REMEDIES FOR DISPUTES ARISING FROM ADMINISTRATIVE

CONTRACTS

The categories of administrative litigation instruments affect access to the courts. In Taiwan, they even influence the arbitrability of administrative matters.

We will initially describe the old system ((I) OLD SYSTEM: NO REMEDY FOR DISPUTES ARISING FROM ADMINISTRATIVE CONTRACTS), and after that the new system ((II) NEW SYSTEM: DIVERSE REMEDIES FOR DISPUTES ARISING FROM ADMINISTRATIVE CONTRACTS). The dividing line is the codification of the Taiwan Administrative Litigation Law in 2000 (hereinafter, **TALLO** means the old code, which applied before 2000, **TALLN** means the code applying after 2000, and **TALLNC** means the current code after September 6, 2012).

(I) OLD SYSTEM: NO REMEDY FOR DISPUTES

ARISING FROM ADMINISTRATIVE CONTRACTS

Under the TALLO, only illegal “*unilateral*” administrative decision can be examined and quashed by administrative judges. In nature this is like its counterpart in French administrative law – the “*recours pour excès de pouvoir*” (REP)- to quash an illegal unilateral administrative act.

The procedure was that, before initiating litigation, a person was required to file a request for administrative recourse against the author (the administrative body) or the administrative body above the author in the hierarchy.

In the substantive law, the plaintiff in administrative litigation had to prove **the infringement of his “right” or “legal interest”**. Administrative litigation was predominantly a type of “**subjective**” litigation³³³.

Thus, disputes arising from administrative contracts could not be submitted to the administrative litigation procedure because they arose from “*bilateral*” administrative acts.

Additionally, there should have been more litigation instruments to protect citizens’ individual rights in respect of unilateral and bilateral administrative acts. In the administrative contract field, it should have been possible to submit some claims, such as those requesting a declaration that a contract was illegal or null and void or affecting payments under certain administrative contracts, to the administrative jurisdiction.

Thus, the new system was required for reasons of both doctrine and

³³³ Regarding subjective litigation and objective litigation, refer to “SECTION I: ADMINISTRATIVE LITIGATION SYSTEM HAS BOTH AN OBJECTIVE AND A SUBJECTIVE FUNCTION” of this dissertation.

jurisprudence.

(II) NEW SYSTEM: DIVERSE REMEDIES FOR

DISPUTES ARISING FROM ADMINISTRATIVE CONTRACTS

Taiwan's legal system, including its administrative litigation instruments, has traditionally been received from Germany. Besides the existing rules allowing claims for the revocation of acts, new categories of requests (**claims for obligation, confirmation and payment**) were permitted to give solutions to individual disputes and even to traditional revocation claims.

1. CLAIMS FOR REVOCATION

Article 4 of the TALLN provided: "A person who seeks to revoke **an administrative act that restricts his freedoms or rights may bring an action for revocation**". Although the legislation contains no limitation of these rights to "**unilateral**" administrative acts, all public jurists consider this type of claim for revocation to be available for unilateral administrative acts.

In the field of Taiwanese administrative contracts, this right is often used, especially in procurement contracts, to revoke administrative decisions about contractual concluding decision (in French "*acte détachable*"; for details and comparisons, see below in SECTION II: RECOURSE FOR ULTRA VIRES).

2. CLAIMS FOR OBLIGATION

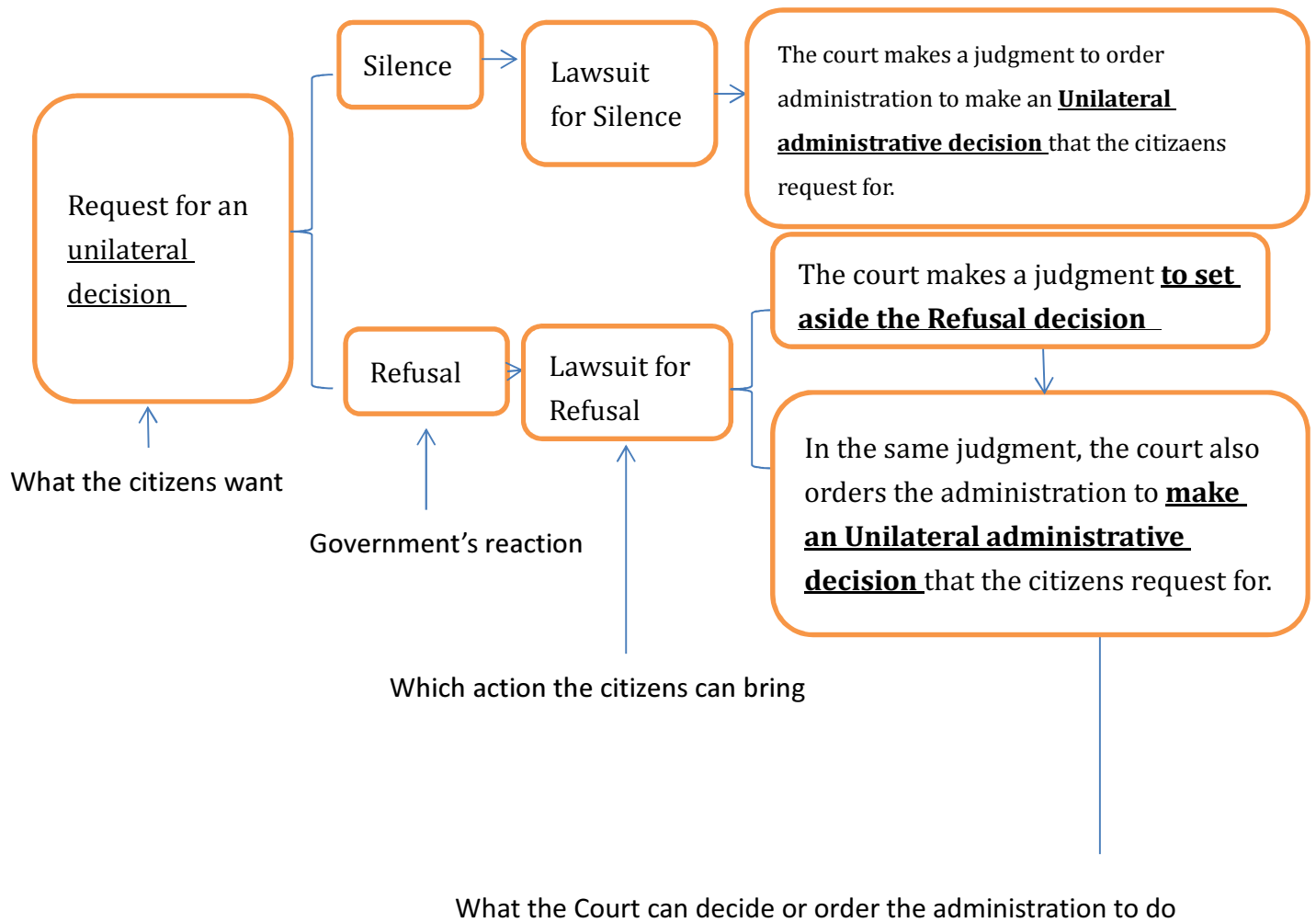
Obligation litigation instrument (Section 2 of Article 4 in TALLN) is designed only for unilateral administrative acts. A claimant may demand that the administrative judges give a concrete order to require an administrative body to render a "**unilateral administrative decision**". Thus, here the "unilateral administrative decision" is always "favorable" for citizens, and is a decision on such things as a construction permit or an allowance.

In Taiwan there are two subtypes of obligation claims. The first is used when the administrative body is "**silent**", and requires it to make a unilateral favorable administrative decision (subtype 1). The other is used when an administrative body has "**refused**" a citizen's request (subtype 2).

Regarding an obligation to take a “*bilateral administrative decision*” such as a decision under an administrative contract, another type of litigation instrument named “claims for payment” is used; this litigation instrument aims to deal with disputes under administrative contracts and is often discussed separately (see below under 3. Claims for Payment)

In subtype 1, the administrative judges’ judgment simply requires the administrative body to make a favorable unilateral decision. In subtype 2, the administrative judges’ judgment has a dual function, both revoking the administrative body’s “refusal” decision by declaring it to be illegal (which could also have been done under the old system) and requiring the administrative body to give a decision in accordance with the citizen’s request (this is the contribution of the new system).

Thus, obligation litigation instruments in Taiwan are as follows:



3. CLAIMS FOR PAYMENT

As mentioned above, litigation instrument of “claim for payment” is designed for, but is not only used for, disputes arising from administrative contracts.

Pursuant to Article 8 of the TALLN, two paying litigation instruments can be used, depending on the relevant public law “obligation”.

The first is “***pecuniary request litigation***”, which aims to deal with all pecuniary requests, such as requests for retirement benefits or allowances and claims in respect of receipts without any public law foundation (which are named “***UNJUST RECEIPTS IN PUBLIC LAW***” by Taiwanese administrative law doctrine).

In addition, in the administrative contract field, requests for the execution of an administrative contract, or requests for the return of money that has been paid or for the performance of quashed administrative contracts are made using the payment litigation instruments.

The second instrument is “***non-pecuniary request litigation***”, which aims to deal with all non-pecuniary requests, such as requests that an administrative body takes measures to prevent current or future possible damages.

Normally, an administrative body can take a unilateral decision to impose a public obligation on citizens, but whether an administrative body still has this authority when it decides to conclude an administrative contract remains a crucial question in Taiwan’s administrative contract field.

Pursuant to Article 148 of the Taiwan Administrative Procedure Code (TAPC), the parties can insert a “***voluntary enforcement clause***” that gives the obligee the authority to seek enforcement of the contract directly, taking the contract as his entitlement.

Most public law jurists consider that if an administrative body has concluded an administrative contract that does not contain a voluntary enforcement clause, the administrative body no longer has the authority to make a unilateral decision controlling the execution of the contract. To be precise, if there is a dispute about the performance of the contract, or about return of donated compensation following the termination of the contract, the administrative body should bring a lawsuit before an administrative judge to require the citizen to perform the contract, under Article 8 mentioned above. This principle is known as the “PRINCIPLE OF PROHIBITION OF MIXED USE OF

ADMINISTRATIVE ACTS”³³⁴ (hereinafter “PMUAA”).

By contrast, under French administrative law, the administrative body has the right to take measures and sanctions to control the execution of the contract.³³⁵

4. CLAIMS FOR CONFIRMATION

The fourth main administrative litigation instrument is “claim for confirmation”, in which an administrative judge is requested to declare the “existence” or the “non-existence” of a particular public legal relationship.

But which legal relationships can and should be the subject of such a “declaration”? Most public law jurists believe that a relationship which is basic of another relationship would be a target.

However, compared to the other types of administrative litigation mentioned above, confirmatory litigation should stand last in the line. Taken together, under the instrument for the revocation or declaration of an obligation, the approval or the refusal of a citizen’s request by an administrative judge also has the side-effect of “confirming” the existence or non-existence of the subject of the citizen’s request. The effect of “confirmation” is part of the nature of the revocation or obligation claim. Thus, most public law jurists consider that the confirmatory litigation instrument should be used exclusively when citizens have no other lawsuit to bring. They regard this as an “*adminicular*” or “*last resort*” function of the confirmatory litigation instrument.

In the Taiwanese administrative contract law field, the confirmatory litigation instrument is often discussed in the context of the termination of the contracts of public school teachers (including professors in public universities).

In Taiwan, the legal relationship between a teacher and a school depends on whether the school is a “public school” or a “private school”: in a private school, the contract is a private contract, and in a public school, the contract is an administrative contract. This is the almost universal opinion in the administrative law field, both in doctrine and jurisprudence.

If a certain teacher meets the conditions in Article 14 of Taiwan’s Teachers’ Law (TTC), meaning that there is corruption or malfeasance, he may be dismissed on the decision of the Teacher Evaluation Committee (TEC, members

³³⁴ WU GENG(吳庚), *THEORY AND PRACTICE OF ADMINISTRATIVE LAW(行政法之理論與實用)*, 45 (8 ed. 2003).

³³⁵ Regarding other prerogatives of the administrative body in France, refer to this dissertation in 1.PREROGATIVES OF ADMINISTRATIONS IN CONTRACTS.

are often composed of the president of school, parents of students, and teachers). This decision should be presented by the school to the Taiwan Ministry of Education (the central administration responsible for education, hereinafter “TME”), and issued officially by the TME.

For teachers in public schools, the crucial question is how to define the dismissal decision. The TSAC issued its legal opinion (in Chinese “最高行政法院 98 年度 7 月份第 1 次庭長法官聯席會議”) during the “Plenary Assembly” in July 2009.³³⁶ (The Plenary Assembly is like the counterpart “*assemblée plénière*” in the French “*Cour de Cassation*”. However, in France, it issues decisions in the form of concrete “judgments”; in Taiwan, the decisions are conference conclusions. In Taiwan, such a conclusion signifies the uniform opinion of the TSAC and the TSC. The members of the TSAC are the president judge, experienced judges and certain judges of the TSAC. The TSC has the same type of membership.) The TSAC reaffirmed that this contract is an administrative contract, and decided on three important points: a dismissal decision is a unilateral administrative decision (point 1), a dismissed teacher can bring a lawsuit when a dismissal decision is made by the TEC, and does not need to wait for a notice from the TME (point 2), and the proper party to defend the claim is the school, not the TEC or the TME (point 3).

This jurisprudence was of interest in relation to administrative law doctrine. Many jurists disagreed with point 1 and adopted the PMUAA principle mentioned above,³³⁷ reasoning that an administrative body has no authority to render a unilateral administrative decision in an administrative contract, as then all disputes arising from administrative contracts should be submitted to administrative judges, not by administrative body’s own unilateral administrative decision.

Regarding litigation instruments, following the TSAC’s logic in point 1, a dismissed teacher should use the revocation litigation instrument. But if the jurists’ opinion mentioned above is followed, the dismissed teacher should use the “confirmation litigation instrument” to confirm the continual “existence” of an administrative contract.

³³⁶ At

http://www.judicial.gov.tw/publish/paperd/9809/pdf/9809%E3%80%80_23_%20%E6%9C%80%E9%AB%98%E8%A1%8C%E6%94%BF%E6%B3%95%E9%99%A298%E5%B9%B4%E5%BA%A67%E6%9C%88%E4%BB%BD%E7%AC%AC1%E6%AC%A1%E5%BA%AD%E9%95%B7%E6%B3%95%E5%AE%98%E8%81%AF%E5%B8%AD%E6%9C%83%E8%AD%B0.pdf, last visited 14 December 2013.

³³⁷ Supra note 334 at this dissertation.

Certain administrative law jurists disagreed with point 3, and stated that the notice issued by the TME effects the dismissal and is a unilateral administrative decision.³³⁸ Thus, the proper defendant in the revocation litigation instrument should instead be the TME.

II. THE RELATIONSHIP BETWEEN “AVAILABLE REMEDIES FOR

DISPUTES OF ADMINISTRATIVE CONTRACT” AND “ARBITRABILITY

IN ADMINISTRATIVE MATTERS IN TAIWAN”

With the diversification of administrative litigation instruments, disputes arising from administrative contracts are subject to Taiwan’s contemporary administrative litigation system and should be resolved as follows:

- (1) Disputes about decisions made about concluding administrative contracts: REVOCATION LITIGATION (Type 1)
- (2) Existence or non-existence of a particular legal relationship under an administrative contract: CONFIRMATION LITIGATION (Type 2)
- (3) Performance of contract: PAYING LITIGATION (Type 3)
- (4) Request for return of given payments: PAYING LITIGATION (Type 4)

Under the old system, because it was not possible to bring claims of types 2, 3, or 4, disputes arising from administrative contracts, especially those concerning the performance of the contract, were often **“forced” to be defined as “private contract disputes” and submitted to ordinary judges**. This is one reason why arbitration, at least for most jurists whether in public law or in private law, is acceptable and popular in Taiwan. It was the traditional logic in Taiwan administrative law.

However, under the new system, with its diversification of remedies in administrative litigation, more and more disputes arising from administrative

³³⁸ Keh-Chang Gee(葛克昌), Contentions about dismissal of public school teachers –comments about resolution of TSAC in July 2009(公立教師解聘等爭訟之救濟途徑－最高行政法院九十八年七月份第一次聯席會議決議), 2(April, 2010), Court Case Times(月旦裁判時報), p34-39.

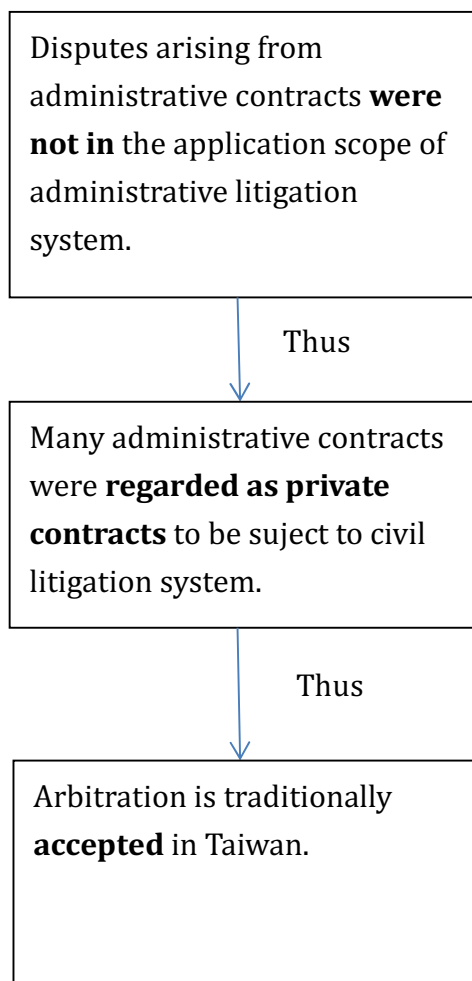
contracts can be resolved under public law.

Since public contract law has gradually developed, the temptation to consider an “administrative contract” as a “private contract” has faded. Thus, mentioned traditional logic in Taiwan administrative law should be reviewed.

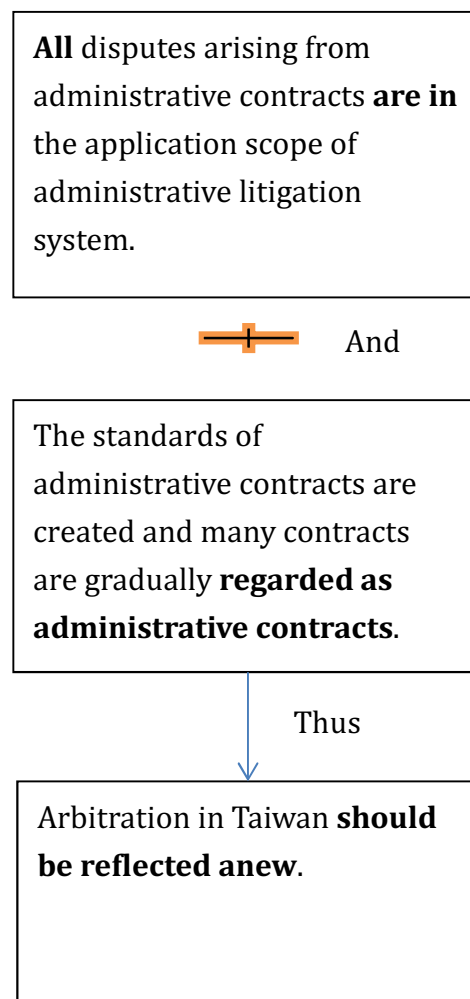
Consequently, arbitrability in administrative matters should be reflected, as we suggest, by observing the prerogative of administrative contracts (see below 1.PREROGATIVES OF ADMINISTRATIONS IN CONTRACTS).

Thus, we illustrate “the reasons why arbitration is traditionally accepted in Taiwan” and our reflection as follows:

The reasons why arbitration is accepted in Taiwan are as follows:



Our reflection is as follows:



2. IN ARBITRATION LAW FIELD: OPEN ATTITUDE

We will analyze administrative matters in the arbitration law field from two viewpoints. Firstly, we will introduce contemporary arbitration in Taiwan (A.CONTEMPORARY ARBITRATION IN TAIWAN: ACCEPTABLE AND POPULAR). **For many jurists, regardless of whether they specialize in public or private law, arbitration is acceptable and popular.**

Accordingly, pursuant to this open attitude, imposed arbitration is included in certain procurement contracts (B. ENLARGEMENT OF ARBITRATION IN CERTAIN ADMINISTRATIVE CONTRACTS: IMPOSED ARBITRATION IN PUBLIC CONSTRUCTION CONTRACTS).

A.CONTEMPORARY ARBITRATION IN TAIWAN: ACCEPTABLE AND

POPULAR

With regard to legislation, the “Taiwan Arbitration Law” (TAL), previously named the “Commercial Arbitration Code,”(TCAC) was enacted in 1961. Accordingly, after 50 years of experience, arbitration in Taiwan is well-established, and many domestic and international disputes have been successfully settled through arbitration. Currently, the Taiwan Arbitration Law is based on the 1985 UNCITRAL Model law (the ‘Model Law’), although Taiwan is not a party to the New York Convention.

In practice, in comparison with Taiwan’s litigation system, **regardless of whether a dispute is within administrative or ordinary jurisdiction, arbitration is generally considered to be more economical in time and cost, and is popular with many lawyers and jurists in Taiwan.**

Four main arbitration institutions, each focusing on different specialized domains, were established pursuant to the TAL, namely, the “Arbitration Association of the Republic of China,” also known as the “Chinese Arbitration Association, Taipei” (hereinafter CAAT), the “Taiwan Construction Arbitration Association,” the “Chinese Construction Industry Arbitration Association” and the “Chinese Labor Dispute Arbitration Association.”

For example, in the past decade, approximately 6.17 % of CAAT’s cases have

involved foreign parties.³³⁹

There are several reasons that explain this phenomenon.

Firstly, arbitration in Taiwan is **regarded as a lower cost system** of dispute resolution compared to litigation. Pursuant to the “RULES OF ARBITRATION INSTITUTION, MEDIATION PROCEDURES AND FEES” (an ordinance rendered jointly by “the Administrative Yuan³⁴⁰” and “the Judicial Yuan” to govern fees in arbitration and mediation procedures), arbitration fees are divided into two parts: the administration fee and the arbitrator(s) remuneration. They are calculated as a basic charge of 75 euros; any additional rates range from 0.5% to 4%, based on the value of the subject-matter (see the form below).

Thus, unlike many arbitrators in other arbitration associations, in Taiwan or in foreign jurisdictions, who may charge by “working hours,” users of Taiwan’s arbitration system can precisely calculate their fixed fees from the beginning, which allows the parties to adequately evaluate their potential exposure. Generally speaking, in Taiwan, the arbitration fee is much less than the total litigation fee.

Comparison of Arbitration, Mediation, and Litigation Fee³⁴¹ : (euros)

Amount of dispute.	Arbitration Fee	Mediation Fee	Litigation Fee			
			District Court	Appeal Court	Supreme Court	Total
25,000	915	125	272.50	408.75	408.75	1,090
50,000	1,465	250	520	780	780	2,080
75,000	1,890	375	767.50	1,151.25	1,151.25	3,070
100,000	2,265	500	1,015	1,522.50	1,522.50	4,060
125,000	2,615	625	1,262.50	1,893.75	1,893.75	5,050
150,000	2,865	750	1,510	2,265	2,265	6,040
175,000	3,115	875	1,757.50	2,636.25	2,636.25	7,030
200,000	3,365	1,000	2,005	3,007.50	3,007.50	7,570
225,000	3,615	1,125	2,252.50	3,378.75	3,378.75	9,010
250,000	3,815	1,250	2,500	3,750	3,750	10,000

³³⁹ Shu-Wei Li and Edward Liu, *Arbitration In Taiwan*, available at <http://www.chinalawandpractice.com/Article/2839217/Channel/7576/Arbitration-in-Taiwan.html>, last issued June 2011.

³⁴⁰ With regard to Administrative Yuan, see note 306 in this dissertation.

³⁴¹ Available in the site : <http://www.arbitration.org.tw/content/a3.htm>, but the amount is calculated in New Taiwan Dollars, and we change to euros by 1:40. Last visited 21 August 2013.

375,000	4,440	1,875	3,600	5,400	5,400	14,400
500,000	5,065	2,500	4,700	7,050	7,050	18,800
625,000	5,690	3,125	5,800	8,700	8,700	23,200
750,000	6,315	3,750	6,900	10,350	10,350	27,600
1,250,000	8,815	6,250	11,300	16,950	16,950	45,200
2,500,000	15,065	12,500	22,300	33,450	33,450	89,200
5,000,000	27,565	25,000	41,550	62,325	62,325	166,200
7,500,000	40,065	37,500	60,800	91,200	91,200	243,200
12,500,000	65,065	62,500	99,300	148,950	148,950	397,200
25,000,000	127,565	125,000	195,550	293,325	293,325	782,200

Secondly, **in Taiwan, arbitration is more rapid.** Under Article 21 of the TAL, the arbitral tribunal must render an arbitration award within six months from the beginning of the arbitration procedure, though it may be extended for an additional three months if necessary. Regarding the litigation system, the maximum period for all cases in the District Court and the Administrative Court of Appeal is sixteen months; in the TSAC (Taiwan Supreme Administrative Court), the maximum period is two years. Considering these factors, arbitration is undoubtedly a time-saving alternative for obtaining a final and enforceable decision.

Thirdly and perhaps most importantly, **“arbitration” is regarded as providing better odds for private enterprises to win their lawsuits.**

A relevant case is the famous dispute between the Taipei City Government (a public juridical person in Taiwan, “TCG”) and SA Matra Transport (a French private company, “Matra”) regarding the construction of the Mass Rapid Transit (Metro) in Taipei. In 1993, the arbitral tribunal rendered a final award requiring TCG to compensate Matra for its damages (NT\$1,025,000,000, equivalent to 25,625,000 euros). TCG refused to accept the arbitration award and appealed to the Taiwan Court of Appeal (“TCA;” in Taiwan, all judicial review of arbitration awards belongs to judicial judges) against the arbitration award. However, the TCA and the TSC (Taiwan Supreme Court) both rejected TCG’s appeal on May 25, 2005. Thus, the total amount of compensation was significantly increased

because of the interest that had accrued over the twelve years following the award.

Before the Matra case, arbitration was not a well-known form of dispute resolution. However, the final result was favorable to the plaintiff, it often referred to private enterprises and the amount was the largest at that time. Because the news was broadly reported in the media, arbitration gradually became more widely known.

In addition, the period prior to the rendering of the arbitration award was only nine months (January 1993 to October 6, 1993). This short period stimulated the public construction field.

Thus, many private enterprises that had concluded administrative contracts considered arbitration to be a method of dispute resolution that provided a greater potential for them to win a “favorable” result.

Fourthly, lawyers’ charges are also a consideration. Usually, in every instance, a lawyer charges a basic amount and possibly a bonus if the lawsuit is won. The faster the lawyer finishes the lawsuit, the better it is for lawyers’ ends. If a dispute takes a long time to settle, it is not good business for lawyers.

Furthermore, **Taiwan’s administrative litigation system is inquisitorially orientated** and all the schedules for cases in the administrative litigation system, such as the periods for the hearing or the adjournment, are decided by judges. It is not convenient for lawyers, particularly those engaged in both the litigation system and arbitration.

The number of Taiwanese lawyers has grown in recent decades. In Taiwan, 13,375 lawyers registered with the lawyers’ syndicate in 2013. More tension and competition is occurring in the lawyer field. Thus, **if administrative matters are arbitrable, they will be an important resource of revenue for lawyers**. Thus, lawyers are an important resource to encourage arbitration in Taiwan.

Finally, **many legal professors**, regardless of whether they teach public law or private law, **engage in arbitration**. There are 796 registered arbitrators in CAAT, among whom are 115 law school professors, 459 lawyers, 53 architects, 39 accountants, 27 commercial-related professionals, 14 real estate appraisers and 8 fire protection engineers. Thus, in Taiwan, lawyers and professors are the main arbitrators³⁴².

In addition, in Taiwan, many universities organize continuing education

³⁴² With regard to mentioned statistics, see CAAT’s Homepage, at <http://arbitrator.arbitration.org.tw/Default.aspx?u=2>, last visited 3 January, 2014.

programs in law schools that are designed for working professionals, including many of whom are leaders of private enterprises and public servants³⁴³. **Many legal professors**, regardless of whether they teach public law or private law, **have professor-student relationships with those leaders and public servants**. Thus, with respect to those relationships, if a certain administrative matter occurs, **their professors in the continuing education programs often become their arbitrators**.

Finally, because of a combination of the aforementioned reasons, the Taiwanese “arbitration field” incorporates many professionals in other fields, and with their encouragement, arbitration has become a very developed and accepted system in Taiwan. Consequently, in legislation dealing with procurement contracts, Taiwan has introduced the “imposed” arbitration system.

B. ENLARGEMENT OF ARBITRATION IN CERTAIN ADMINISTRATIVE

CONTRACTS: IMPOSED ARBITRATION IN PUBLIC CONSTRUCTION

CONTRACTS

Like Canada, as mentioned above,³⁴⁴ Taiwan similarly has imposed arbitration.

In Taiwan’s procurement contract system, there are three categories of procurement contracts. The main one is “PUBLIC CONSTRUCTION” (in French, “*marchés de travaux publics*”). The second is “PROPERTY PROCUREMENT,” meaning daily purchases or leases of public property (in French, “*marchés de fourniture*”). The third is “service procurement,” meaning the offer of services (in French, “*marchés de service*”).

Pursuant to Section 2 of Article 85-1 of GPAT (Government Procurement Act), which was passed in 2007, arbitration is imposed to deal with administrative matters arising out of “*public construction*.”

The background of this article is linked to the aforementioned Matra case. The favorable and extremely large amount in arbitration award interested many

³⁴³ Therefore, class time of this program is often at night or on weekends.

³⁴⁴ See this dissertation at note 204 to 205.

private enterprises, but worried many in the public sector. From that time forward, many in the public sector inserted clauses excluding arbitration in their public construction contracts. This phenomenon irritated many jurists that were engaged in arbitration and led to legislation requiring imposed arbitration.³⁴⁵

GPAT provided for a particular public organization named the “**Complaint Review Board for Government Procurement**” (CRBGP) to deal with all disputes arising from procurement contracts. CRBGP was constituted by the “**Public Construction Commission**” (an administrative body in the form of a commission established under the Administrative Yuan and responsible for all public procurement affairs, “PCC”) or by the local government if the procurement contract involves affairs under local autonomy.

According to the aforementioned article, **when certain disputes regarding the performance of public construction occur, the public sector or supplier can choose mediation (mediated through the CRBGP) or institutional arbitration as a means of dispute resolution.**

The public sector cannot refuse mediation if a supplier applies for it. Furthermore, **the public sector cannot deny arbitration if mediation is failing because the public sector disagrees with a mediation plan** suggested by the CRBGP during the mediation procedure; thus, suppliers also can assert arbitration.

In addition, if the article is read literally, mediation and institutional arbitration seem to be alternatives, but jurists consider mediation to be required initially. This is called **the principle of “FORMER MEDIATION, LATER ARBITRATION.”**³⁴⁶

This principle is applicable exclusively to matters involving **public construction**. Thus, an important and difficult question in practice is whether the “service of design” is considered to be “public construction” or “services procurement.”

In public construction practice, there are “turnkey contracts” and “design-bid-build contracts.” The former means that the contractor is responsible for both design and construction, and possibly, commission (in French “*contrat*

³⁴⁵ LiJia-Qing(李家慶), Study on “Former Mediation, Later Arbitration” of Article 85-1 (政府採購法第 85 條之 1 第 2 項增訂「先調後仲」機制), 4, Arbitration News(仲裁報), p6. (2007)

³⁴⁶ ZHANGJia-Zhen(張嘉真) and Wu Dian-Lun(吳典倫), *The Impact and Recommendations of Compulsory Arbitration as Provided under Paragraph 2, Article 85-1 of Government Procurement Act to Public Construction Contracts*(政府採購法第 85 條之 1 第 2 項修訂為「先調後仲」之強制仲裁對公共工程合約之影響分析及因應建議), 157, FT law review(萬國法律), p.40-48.

clé en main”). In the latter type of contract, design, tender and construction are separate. In the former, the amount allotted to construction typically accounts for a greater percentage than that allotted to design. Thus, turnkey contracts are often regarded as public construction contracts and disputes about design are subject to imposed arbitration.

To the contrary, in “design-bid-build” contracts, whether disputes that arise during the design phase are subject to imposed arbitration is open to question. It depends upon the particular contract clause.

Furthermore, mediation exclusively means mediation by CRBGP. It excludes other types of mediation, such as mediation in civil litigation procedures.

However, CRBGP has an administrative character, and then before the Parliament, a group of suppliers questioned CRBGP’s impartiality and the administrative body’s intentional disallowance of a mediation plan. The suppliers argued in favor of limiting the possibility for disallowance by the administrative body or requiring imposed arbitration after an unsuccessful mediation.³⁴⁷

Therefore, pursuant to Section II of Article 85-3, CRBGP’s mediation plan is required to be rendered in writing, and in an unsuccessful mediation, the administrative body must submit a report to explain the reasons for the disallowance of the mediation plan to its hierarchical superior administrative organ and to the CRBGP.

In practice, the CRBGP often sets a 15-day period for the parties to decide whether to accept a written mediation plan.

Another dispute is whether imposed arbitration violates an administrative body’s right of free choice. As mentioned above, if an unsuccessful mediation is due to an administrative body’s disallowance of a mediation plan, contractors or suppliers can assert arbitration and the administrative body cannot deny it. However, contrarily, does an administrative body have an equal right to assert arbitration when a contractor or supplier disagrees with the mediation plan? Or, **will a contractor or supplier lose the right to assert arbitration due to its disallowance of the mediation plan?** This is currently subject to dispute. This question has concrete meaning when no arbitration clause is inserted in a procurement contract. Generally speaking, there are several different

³⁴⁷ Regarding this concern in Parliament, see Legislative Yuan Agenda Related Documents (立法院議案關係文書), available at <http://www.ly.gov.tw/saveAs.action?comtcd=15&fileName=200911131609144.doc>, last visited 26 December 2013.

positions.³⁴⁸

POSITION1: CONTRACTORS STILL HAS THE RIGHT TO ASSERT IMPOSTED ARBITRATION

Supporters of this position consider arbitration to be a basic right of contractors. Thus, if a contractor would lose his right to assert arbitration due to his own former disallowance of a mediation plan, it would become a punishment for contractors. Rather, contractors also have the right to disallow certain unfavorable mediation plans. Thus, to create a balance between administrative bodies and contractors, even if a contractor has disallowed a mediation plan, the contractor should still have a right to assert arbitration, which the administrative cannot deny.

POSITION2:CONTRACTORS HAS NO RIGHT TO ASSERT IMPOSTED ARBITRATION

Supporters of this position have cited the legal proverb “Clearly express one, exclude the other” (*expressio unius est exclusio alterius*) to refuse arbitration that has been asserted by contractors. They regard imposed arbitration as exceptional, and because it is considered exceptional, it should be interpreted in a limited way.

Thus, since imposed arbitration is based on an administrative body’s disallowance, a contractor’s disallowance, in its nature, does not lead to imposed arbitration. Their disputes are arbitrable only under the aforementioned arbitrability provisions in Taiwan³⁴⁹.

POSITION3:DISTINGUISH THE REASONS OF DISALLOWANCE

Supporters of a middle position distinguish between disallowance by a contractor “unilaterally” or by the parties “bilaterally.” In the former situation, there is no “administrative body’s disallowance,” and thus, imposed arbitration should be refused.

Contrarily, in the latter situation, “bilateral disallowance” embodies an “administrative body’s disallowance.” Thus, imposed arbitration can be applied in

³⁴⁸ Chan Kwan-Hon(陳君漢), Questions on Article 85-1 in GPAT(採購法第 85-1 條適用疑義),301, (Feb.2008), Construction News Record(營建知訊),p32-36.

³⁴⁹ See this dissertation at SECTION I. LEGISLATION: ARBITRABILITY UNDER CERTAIN CONDITIONS.

a situation involving bilateral disallowance.³⁵⁰

However, in the latter situation, there are various doctrinal opinions in which bilateral disallowance is considered to be different from an administrative body's unilateral disallowance, and thus, imposed arbitration is considered to be inapplicable.³⁵¹

Finally, imposed arbitration means arbitration asserted by contractors, not by administrative bodies. Contractors can deny arbitration submitted by administrative bodies.

CHAPTER V: CONCLUSION OF THIS TITLE

The general conclusion of the first part is that arbitrability in administrative contracts has developed differently in France, Taiwan, Canada, and China.

In France, disputes of private contracts and administrative ones are adjudicated in different court systems. The former are adjudicated in front of ordinary judges; while the latter are adjudicated in front of administrative judges. Administrative contracts have many particularities. For example, public legal persons are prevented from submitting their disputes of administrative contracts to arbitration. Although there are more and more legislative exceptions, the principle of inarbitrability is, until now, a dominant principle in public law.

In Taiwan, the separation of jurisdiction is like the system in France. Due to historical elements about remedies in administrative litigation, in old system only "unilateral" administrative decisions can be examined and quashed by administrative jurisdiction. Thus, in that epoch, many administrative contracts in nature are "forced" to be interpreted as "private contracts" to seek remedy from ordinary judges. And it naturally led to the fact that arbitration was accepted and popular in Taiwan. But with the extension of remedies in administrative litigation, all disputes of administrative contracts can be covered and resolved by contemporary administrative litigation. Thus, I suggest that arbitrability in administrative matters in Taiwan should reflect and come back to public law consideration by obeying the specificities of administrative contracts and functions of administrative litigations. Besides, I observe that although in Taiwanese legislation, disputes of administrative contracts can be submitted to

³⁵⁰ Xu Ying-Zhen(許瑩珍) and Luo Zhong-Cheng(駱忠誠), *Study On "Former Mediation, Later Arbitration" In Public Construction*(公共工程履約爭議先調後仲之探討), 28-2, Government audit Journal(政府審計季刊), p31.

³⁵¹ Chan Kwan-Hon(陳君漢), *supra* note 348, at 33

arbitration under some conditions, such as the dispositive right of parties and no violation of public order; in practice, the development of jurisprudence seems to ignore the aforementioned conditions. In jurisprudence, arbitration seems to be connected with disputes of private contracts and if certain contract is defined as public contract, it cannot be arbitrable. But contrarily, in the field of arbitration law, arbitration extends its application field and, in some administrative contracts, is imposed on the parties regardless of their lack of consent.

In China, there is no special set of courts, but there is “administrative chamber” in people’s court to deal with disputes of administrative contracts. Generally arbitration is not allowed in administrative matters. But in some administrative contracts, to correspond with the requirement of economic development, some arbitration clauses are included in procurement contracts and public-private partnership contracts.

In Canada, in substantive law, due to the principles of the rule of law and the legislative sovereignty of Parliament, contracts concluded by the administration are subjected to the same rules as private contracts. In procedure law, there is also no special set of courts to handle disputes of administrative contracts. Nevertheless, there are some organizations, named “Administrative Tribunal” (AT), which are different from “pure” administrative bodies and “jurisdiction” bodies. ATs exercise some functions of jurisdiction to deal with matters occurred between the administration and citizens.

SECOND PART: PARTICULAR QUESTIONS OF ADMINISTRATIVE

MATTERS IN ARBITRATION PROCEDURE

In the second part, we will introduce possible specific questions regarding administrative matters in arbitration procedures. We want to introduce how to deal with administrative disputes in each legal system. In this part, we would observe different legal systems.

Besides, we will divide the discussion into two main perspectives. One is the procedural perspective and the other is the substantive perspective.

Questions regarding the former involve the constitution of courts and arbitral tribunals and they may involve the resolution of any disputes that occur regarding their constitution (TITLE I: PROCEDURAL PERSPECTIVE: CONSTITUTION AND RESOLUTION OF DIFFICULTIES IN CONSITUTION).

Questions regarding the latter involve how judgments are rendered by judges and how arbitration awards are rendered by arbiters (TITLE II: SUBSTANTIAL PERSPECTIVE: WHAT SHOULD ARBITRATORS TAKE INTO CONSIDERATION ?).

TITLE I: PROCEDURAL PERSPECTIVE: CONSTITUTION AND RESOLUTION OF DIFFICULTIES IN CONSITUTION

In this section, we will compare how judges and arbiters handle the constitution of courts and arbitral tribunals and the resolution of any disputes that arise in their constitution. Firstly, we will introduce the constitution of courts and arbitral tribunals (CHAPTER I: CONSTITUTION OF COURTS AND ARBITRAL TRIBUNALS).

Secondly, we will introduce possible specific questions about administrative matters in the arbitral process. (CHAPTER II:).

CHAPTER I: CONSTITUTION OF COURTS AND ARBITRAL TRIBUNALS

The possibility of selecting one's own arbitrators is a benefit of arbitration.

Thus, selecting an appropriate arbitrator who is well-versed in administrative disputes is important for the parties to a dispute.

In practice, administrative contracts usually are involved in the accomplishment of a public mission in a special domain, and sometimes, they involve a particular type of science. If they deal with public construction, they often involve architecture, civil engineering or geological surveys.

Firstly, it is necessary to define the nature of the dispute (such as administrative contracts or private contracts and what's the special domain), and then, the parties' legal advisors may identify and suggest appropriate arbitrators; for example, a retired judge may be appropriate for disputes involving knotty legal issues and an accountant may be appropriate for disputes involving accounting.

Secondly, in international arbitration proceedings, nationality, language and the different guidelines adopted by different arbitration institutions should be considered.

Thus, the parties should take into consideration the arbitrators' working experience, expertise and relevant qualifications with regard to arbitration, language, nationality, conflicts of interest, the number on an arbitral panel, etc.

With regard to the constitution of a court or arbitral panel, we will divide the discussion into two sections. The former addresses general principles about nomination of judges and arbitrators. (SECTION I: GENERAL PRINCIPLES ON NOMINATION OF JUDGES AND ARBITERS)

The latter addresses special professionals nominated as arbitrators. (SECTION II: JUDGES AND PUBLIC SERVANTS AS ARBITRATORS).

SECTION I: GENERAL PRINCIPLES ON NOMINATION OF JUDGES AND

ARBITERS

1.TAIWAN

A. NOMINATION OF JUDGES IN TAIWAN

In Taiwan, before 1980, judges and prosecutors were under the same administrative organization (Ministry of Judicial Administration). Changes in professional careers occurred often and easily between the two positions. Since 1980, although judges and prosecutors are under the purview of different governmental administrative bodies,³⁵² their examination and training are performed by the same training organization, namely, the “Judges and Prosecutors Training Institute (JPTI) of the Ministry of Justice,” which was reorganized as the “Academy for the Judiciary” in 2013.

The nomination of judges in Taiwan stems from two main sources. One, which is likely to be the future trend, is the public selection from lawyers, legal professors and other professionals, such as engineers or accountants.

The other source is the national examination, which is currently the major method of nominating judges. The national law examination includes two main exams. One is for those who desire to become lawyers. The other is for those who wish to become magistrates. Those who pass the examination for lawyers are required to have six months training, including one month in the Lawyer Training Institute and five months in a particular legal cabinet.

Those who pass the magistrate exam are required to have two years training, including the first six months in the JPTI, one year in the district tribunal to study practice under one judge and one prosecutor, three months in the administration to study administrative affairs, and in the final three months, candidates return to the JPTI to take their final examinations. Candidates select their preferred career as a judge or prosecutor based upon their grades in the JPTI. Generally

³⁵² See this dissertation at note 332.

speaking, becoming a judge is preferable to the majority; in Taiwan, judges are supervised by the Judicial Yuan having judicial authority, while prosecutors are supervised by the Ministry of Justice, under executive authority. With regard to material benefits and guarantees of independence, judges are in a better situation than prosecutors. Thus, every year the proportion of judges is often lower and judicial positions are obtained by those having higher grades. In practice, sitting prosecutors often apply to change their career to become judges.³⁵³

In the national legal examination, administrative law, civil law, penal law and other subjects (a total of 15) are required. Thus, every student must study both public law and private law and there is a balanced proportion between them.

Administrative judges in the THAC (Taiwan High Administrative Court) and the TSAC (Taiwan Supreme Administrative Court) are often experienced judges who have been promoted from their positions as tribunal judges in all districts and who have more than twelve years of working experience. In practice, all cases, regardless of whether they are within judicial or administrative jurisdiction, are determined by the drawing of lots to be subordinate to a certain collegial panel. However, the TCPC (Code of Civil Procedure of Taiwan) includes an exception pursuant to which the parties can select their preferred judges in matters involving civil procedure; to the contrary, in the administrative litigation instrument, the parties have no right to select their administrative judges.

In conclusion, the aforementioned discussion regarding the education, examination and nomination procedures applicable to **Taiwan's judges reveals that administrative judges and judicial judges have access to the same resources and are not subject to different methods of nomination.** Taiwan's judges are generally capable of effectuating both private laws and public laws and have sufficient experience to develop their familiarity with public law.

B. NOMINATION OF ARBITERS IN TAIWAN

In Taiwan, the constitution of an arbitral tribunal is governed by Articles 9 through 12 of the ALT (Arbitration Law of Taiwan).

Pursuant to Section 1 of Article 9 of the ALT, in the absence of an

³⁵³ In 2012, there were 44 sitting prosecutors and 94 sitting lawyers who applied to change their careers to become judges, see <http://www.judicial.gov.tw/work/work09-01.asp>, last visited 27 Dec. 2013.

appointment in the arbitration agreement, each party should appoint an arbitrator for itself. The appointed arbitrators jointly designate the third arbitrator as the chair. The arbitral tribunal will notify the parties of the final appointment in writing. Generally, it takes one to two months to set up a tribunal.³⁵⁴

With regard to difficulties in constituting the arbitral panel, pursuant to Section 2 of Article 9 of the ALT, if the arbitrators fail to agree on a chair within 30 days of their appointment, the final appointment will be made by a court upon any party's application.

If arbitration is to be conducted by a sole arbitrator and the parties fail to agree upon an arbitrator within 30 days of the receipt of a written request to appoint made by any party, pursuant to Section 3 of the aforementioned article, the appointment will be made by a court upon any party's application or upon the application of the arbitration institution if the parties have agreed that the arbitration will be administered by an institution.

Pursuant to Section 4 of the aforementioned article, when there are numerous people in any party and they are unable to agree upon the appointment of a certain arbitrator, the appointment will be made by the majority. In the event of a tie, the appointment will be made by the drawing of lots.

Taiwan's arbitrators have no practical training before becoming arbitrators. However, pursuant to Article 14 of the Arbitrator Training and Workshops Act (ATWA), registered arbitrators should complete on-the-job training at least two times during the course of every three years, and each time, the training should be at least three hours and at most twelve hours.

In conclusion, there are some administrative judges who specialize in public law, while not many arbitrators specialize in public law. It is possible for arbitrators to deal with administrative matters by typical private contract principles.

³⁵⁴ See the CAAT homepage, at <http://www.arbitration.org.tw/>, last visited 27 Dec.2013.

2. FRANCE

A. RECRUITMENT OF JUDGES IN FRANCE

In French documents, the word “recruit” is often used to describe the selection of judges instead of the word “nomination.” In addition, administrative judges in administrative courts are often called “Counsel” (in French, “*Conseil*”) instead of “Judges,”³⁵⁵ although they exercise the function of jurisdiction.

In France, judiciary judges are educated in the National School of Magistrates (in French, “*L’École Nationale de la Magistrature*,” “ENM”), while administrative judges are not.

In France, the contemporary administrative litigation system is based on “two levels of jurisdiction in trial and one supreme court,” under the Code of Administrative Justice (in French, “*le code de justice administrative*,” “CJA”), which was adopted by ordinance (in French, “*ordonnance*” refers to a statute passed by the Council of Ministers in an area of law normally reserved to statutory law passed by the Parliament of France) on May 4, 2000 and enacted on January 1, 2001.

There are 42 Administrative Tribunals (in French, “*Tribunaux Administratifs*”, “TA”, 31 in the motherland and 11 overseas), the courts of first instance for administrative disputes in common law. There are eight Administrative Courts of Appeal (“*Cours Administratives D’Appel*”, “CAA”) having second instance administrative jurisdiction. Also, there is one Counsel of State (“*Conseil d’État*”, CE). The TAs, CAAs and the CE constitute the French administrative jurisdictions. Their recruits can be introduced by either the main or principal source or by special rules.

There are two principal sources of judges having administrative jurisdiction. The first, which is the principal and major source of recruits, is the National Administration School (*Ecole Nationale d’Administration*, “ENA”). The other, more recent source is those who have been public servants and is called the “*tour extérieur*” (In French, this means “from out of jurisdiction,” hereinafter “TE”). Recruits from the ENA and the TE are incorporated in all levels of administrative jurisdiction in France.

³⁵⁵ ROGER PERROT, INSTITUTIONS JUDICIAIRES 220 (13th ed., Montchrestien 2008).

The ENA is the usual means of access to the public sector (in French, “*la fonction publique*”) and it provides the typical route to become a judge having administrative jurisdiction.

Every year, there are three categories of competition in the ENA. The first is called “external” (*externe*) and is reserved for young candidates, less than 28 years old, having a national diploma of higher education (in French, “*enseignement supérieur*,” also called the “*Grand École*,” is a special institution of higher education. There is a list of those institutions for the competition in the ENA.) The second is called “internal” (*interne*) and is reserved for older persons having at least five years of experience in public service. The third is called the “THIRD COMPETITION” (*troisième concours*) and is reserved for persons who are less than 40 years old on July 1 of the year of the competition and have eight years of professional activities.

The TE is very unique because there is no counterpart in ordinary jurisdiction. The basic thinking is that, to enlarge the moral authority of administrative judges’ judgments and to facilitate their execution, it is better to include public servants who are familiar with the difficulties that administrative bodies face among administrative judges. Otherwise, the judgments of administrative judges may possibly be difficult to be executed by the administration.

The special rules depend upon different administrative judges.

In the CE, there are six grades under the President of the CE (from low to high): second *auditeurs*, premier auditeurs (there is no term that is its counterpart in English; however, in fact, they exercise the function of jurisdiction and examine administrative disputes), the Master of Requests (“*maître des requêtes*” is a “Counsel” in the CE and often is a high-level judicial officer of administrative law, “MDR”), the Counselor of State (*conseiller d’État*), a higher judicial officer; CSE), the President of the Section(POS), and the Vice-President.

The Vice-President is suggested by the President of the Ministry of Justice, nominated by the CE, and selected from among the POS of the CSE. The POS is suggested and nominated in the same way mentioned above and is selected from among the CSE.

All “*auditeurs*” are recruited from the ENA, while the MDR and the CSE are recruited from the TE. Generally, MDR are selected from among the premier auditeurs.

Regarding the CSE, at least two-thirds of the CSE are reserved from among

MDR having at least twelve years of experience in the MDR and the other one-third is reserved by the government and designed for public servants who are more than 45 years old.³⁵⁶

Since their institution in 1987, the members of the TA and the CAA have formed a unit (in French doctrine, they use “*corps unique*” to describe their “uniform” management, including their recruitment and their careers, under the Vice President of the CE³⁵⁷). Generally, the members of this unit are recruited from among experienced students in the ENA.³⁵⁸ However, traditionally, under some exceptional conditions, certain public servants and judges in ordinary jurisdiction will be permitted to join this unit without having completed the ENA.³⁵⁹ In addition, there are other special recruits, including those from complementary recruitment (“*recrutement complémentaire*,” reserved for particular public servants and persons who have passed certain age limitations³⁶⁰), those who are seconded (“*détachement*,” such as judicial judges, jurists, legal professors), and those who are maintained in redundancy (“*maintien en surnombre*,” for senior members reaching retirement age and for not renewable for three years³⁶¹).

Consequently, unlike Taiwan, **French administrative judges have their own special nomination** that has an origin **different from that of ordinary jurisdiction**. They have thorough training in public law and are knowledgeable regarding the procedures for decision-making and the possible difficulties that

³⁵⁶ See the “Code de justice administrative” art. L133-3 at

<http://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006070933&idArticle=LEGIARTI000006449198&dateTexte=&categorieLien=cid>, last visited 27 Dec.2013.

³⁵⁷ See R.231-3 of Code de justice administrative “ of France, at

http://www.legifrance.gouv.fr/affichCodeArticle.do?jsessionid=8698CD02501EF757467AC47785F2CB71.tpdjo09v_1?idArticle=LEGIARTI000021865006&cidTexte=LEGITEXT000006070933&dateTexte=20131227 last visited 27 Dec.2013.

³⁵⁸ See L.233-2, of Code de justice administrative “ of France, at

http://www.legifrance.gouv.fr/affichCodeArticle.do?jsessionid=8698CD02501EF757467AC47785F2CB71.tpdjo09v_1?idArticle=LEGIARTI000006449274&cidTexte=LEGITEXT000006070933&dateTexte=20131227, last visited 27 Dec.2013.

³⁵⁹ See L233-3 and 233-4, of Code de justice administrative “ of France, at

http://www.legifrance.gouv.fr/affichCodeArticle.do?jsessionid=8698CD02501EF757467AC47785F2CB71.tpdjo09v_1?idArticle=LEGIARTI000006449276&cidTexte=LEGITEXT000006070933&dateTexte=20131227, last visited 27 Dec.2013.

³⁶⁰ See L 233-6, of Code de justice administrative “ of France, at

http://www.legifrance.gouv.fr/affichCode.do?jsessionid=9CED644BBF651B1B30A05509C29272A0.tpdjo09v_1?idSectionTA=LEGISCTA000025495600&cidTexte=LEGITEXT000006070933&dateTexte=20131227, last visited 3 January 2014.

³⁶¹ See L 233-7 and 8 of Code de justice administrative “ of France, at

<http://www.legifrance.gouv.fr/affichCode.do?idSectionTA=LEGISCTA000006165662&cidTexte=LEGITEXT000006070933&dateTexte=20131227>, last visited 3 January 2014.

administrative judges may face. **The administrative judges' judgments closely correspond to the requirements of public missions and practically resolve administrative matters.** However, this also provides a reason that explains why private enterprises distrust administrative jurisdiction when administrative matters occur. They question the impartiality of administrative jurisdiction.

B. NOMINATION OF ARBITRATORS IN FRANCE

The provisions governing arbitration in France are mainly found in Book IV of the Code of Civil Procedure (in French, "**Code de procédure civile**", CCPF, composed of Title I, regarding domestic arbitration and Title II, regarding international arbitration). These provisions entered into force on May 1, 2011, following the implementation of the January 13 Decree (n°2011-48)) in the Civil Code ("**Code civil**") and the Code of Judicial Organization ("**Code de l'organisation judiciaire**").

One or an odd number of arbitrators constitutes an arbitral tribunal pursuant to Article 1451 of the CCPF. The methods used for nomination and to handle difficulties are provided in 1452 to 1454, and similar to most countries' legislation around the world, they are applied by the "courts."

However, in France, as mentioned above, "courts" means "**juge d'appui**" (there is no counterpart in English; literally, it means "support judges," hereinafter "JDA"). A JDA has the authority to issue orders to resolve any hindrances or difficulties in the constitution and launching of the arbitral process.

JDA is a legal term borrowed from Swiss arbitration practice and used in French arbitration doctrine and jurisprudence; it finally appeared in the aforementioned decree.³⁶²

A JDA also is needed when the parties have no agreement regarding the nomination of arbiters. In practice, a JDA is important in "**ad hoc arbitrations**."³⁶³ In France, the contemporary official role of JDA is attributed to President of the Grande Instance Tribunal pursuant to Article 1459 of CCPF.

A JDA often rules upon the prima facie validity of the arbitration clause or

³⁶² Emmanuel Gaillard and Pierre de Lapasse, *Le nouveau droit français de l'arbitrage interne et international*, 2011, Recueil Dalloz, p. 175..

³⁶³ See note 293 of this dissertation.

upon challenges asserted against the arbitrators.

A JDA may issue orders relative to the arbitral process, but cannot make a decision regarding the outcome of the subject-matter of the arbitration.

Pursuant to Article 1460 of the CCPF, any contesting party, the arbitral tribunal or one of its members can demand a JDA.

Returning to disputes of administrative contracts, another crucial question in French doctrine is **which judges (ordinary or administrative) are competent to examine disputes regarding the constitution of arbitral tribunals that involve administrative matters.**

In the French arbitration law field, many jurists have asserted that ordinary judges should have the exclusive competence to examine **all** disputes involving the constitution of arbitral tribunals.

Clothilde Blanchon reasoned that, under this hypothesis, it is not necessary to ask if the particular contract that is the subject-matter of a dispute belongs to one of four categories of contracts indicated in the INSERM case (occupancy of French public property, public procurement contracts, public-private partnership agreements and contracts delegating the performance of public services. For details, see below: INSERM CASE IN FRANCE) at the constitutional phase; rather, this question can be postponed until the post-arbitral phase.³⁶⁴

In addition, jurist Eric Loquin³⁶⁵ considered that the main missions of the JDA, including the constitution of arbitral tribunals, the oversight of arbitral tribunals' independence, and the prolongation of the allotted time for arbitration procedures, have no characteristics that are specifically administrative and do not concern the "**imperative rules of French public law**" (one standard that was issued in the INSERM case). Thus, JDAs should be ordinary judges.

Jurist Mathias Audit asserted that, in French law, the creation of two jurisdictional competences for the JDA would be not useful and that Article 1444 of the CCPF has given this function to ordinary judges.³⁶⁶

Jurist Th. Clay argued that if it is necessary to preliminarily examine the facts of the matter to determine whether the President of the Grand Instance Tribunal or the President of Administrative Tribunal is competent, the result would be a "Kafkaesque" situation (Th. Clay used the French term, "kafkaïen"), especially for

³⁶⁴ Clothilde Blanchon, *le juge administratif et les sentences arbitrales internationales : entre autolimitation et expansion de sa compétence*, 47, JCP, 47, 2330 (18 Nov. 2013)

³⁶⁵ Eric Loquin, *Retour dépassionné sur l'arrêt INSERM c/ Fondation Letten F. Saugstad*. - (Tribunal des conflits, 17 mai 2010), 4, Journal du droit international (Clunet), Oct. 2011.

³⁶⁶ Mathias Audit, *Arbitrage International Et Contrats Publics En France*, in Mathias Audit, CONTRATS PUBLICS ET ARBITRAGE INTERNATIONAL 115, 126 (Bruylant, 2011)

foreign parties.³⁶⁷

Thus, those in the French arbitration law field consider that since Article 1505 of the FCPC defined the competence of JDA as that of ordinary judges and Article 1451 to 1460 address the JDA's powers, the aforementioned provisions would not vary even in disputes involving administrative contracts.³⁶⁸

However in the public law field, jurist Pierre Delvolvé believed that JDAs should be involved in the “**beginning, procedure and ending**” of arbitral procedures to make sure that the necessary measures are taken. Thus, if the matters in arbitration are private disputes, the JDA should be a judicial judge; contrarily, if public disputes are in arbitration, the JDA should be an administrative judge. In addition, Delvolvé believed that, in administrative disputes, the interpretation of the JDA is not involved in the separation of administrative and judicial jurisdiction. The most important consideration is the facilitation of the resolution of disputes subject to arbitration in which public legal persons are involved. Thus, in arbitration process of disputes involving administrative matters, administrative judges are competent not only to render the arbitration award, but also in the whole instance.³⁶⁹

Even so, it is not a very urgent question. As jurist Cassia said, the JDA does not oversee any facts regarding the arbitration award because the arbitration award is not rendered during the constitution phase of an arbitral tribunal.³⁷⁰ Thus, pursuant to Clothilde Blanchon's observations,³⁷¹ the importance of the dispute about JDAs is not so much than that about judges involved in judicial review or judges of exequatur, because they involve judicial review or the performance of the arbitration award (See below in THIRD PART: JUDICIAL REVIEW AND EXECUTION OF ARBITRATION AWARD).

³⁶⁷ Op. cit. JCP 2010, spéc. p. 1049. recited from Eric Loquin, *supra* 365, at note 44.

³⁶⁸ Eric Loquin, *supra* note 365.

³⁶⁹ Pierre Delvolvé, *Le contentieux des sentences arbitrales en matière administrative*, 2010, RFDA, p.971.

³⁷⁰ Paul Cassia, *Les sentences arbitrales internationales : une compétence de contrôle partagée entre les juridictions françaises*, 2010 RJDA, p.1573.

³⁷¹ Clothilde Blanchon, *supra* note 364, at 50.

3. CANADA

A. APPOINTMENT OF JUDGES IN CANADA

In Canada, generally, judges are “*appointed*,” not elected. Standards vary between provinces. However, **the basic requirements for obtaining a judicial appointment** are that one must be a Canadian citizen having **legal working experience**: typically, a practicing lawyer with **at least 10 years of experience**, sometimes “at the bar” but preferably, in the “courtroom.”

Candidates must submit a written application that will be reviewed by a committee. The committee is often composed of judges, lawyers, governmental officers, laypeople, members of the legal community, etc.³⁷² The committee will assess the candidates and forward its recommendations to an independent Judicial Board to ensure that the judge is not biased; for example, in Ontario, it is the Ontario Attorney General for that state’s provincial courts³⁷³ and it is “The Office of the Commissioner for Federal Judicial Affairs” (FJA) for federally appointed judges.³⁷⁴

Federal judges presiding over federal cases, including Supreme Court judges, should be nominated by the President and confirmed by the Senate. Federal judges have the benefit of life tenure and they can be impeached by the Senate only in extreme cases.³⁷⁵ After their appointment, judges have access to special training regarding all aspects of being a judge and all areas of the law.³⁷⁶

In an AT (Administrative Tribunal, see the aforementioned II. QUASI-JUDICIAL ORGANISATION: ADMINISTRATIVE TRIBUNALS), the person leading

³⁷² See The Canadian Superior Courts Judges Association (CSCJA) Homepage, at http://www.cscja-acjcs.ca/about_cscja-en.asp?l=1, last visited 4 January 2014.

³⁷³ See Ontario Ministry of the Attorney General, at <http://www.attorneygeneral.jus.gov.on.ca/english/>, last visited 4 January 2014. At this site, the background of appointed judges is available, for example: <http://news.ontario.ca/mag/en/2013/12/new-judges-appointed-to-the-ontario-court-of-justice-2.html>, last visited 4 January 2014.

³⁷⁴ At <http://www.fja-cmf.gc.ca/appointments-nominations/process-regime-eng.html>, last visited 4 January 2014.

³⁷⁵ Regarding judges in Canada, see Judges Act in Canada Justice Laws Website, at <http://laws-lois.justice.gc.ca/PDF/J-1.pdf>, last visited 4 January 2014.

³⁷⁶ See Canadian Judicial Council (CJC), at http://www.cjc-ccm.gc.ca/english/resource_en.asp?selMenu=resource_judges_en.asp, last visited 4 January 2014.

the hearing process in the tribunal is the **decision-maker**. Details about how to name and replace decision-makers and their training are provided under Canadian law; for example, in Nova Scotia, a two-day course provides introductory information to help the tribunal's decision-makers acquire a better understanding of their roles and responsibilities and it provides the basic knowledge they need to conduct fair hearings and to write clear, well-reasoned decisions.

Generally, the decision-maker is often a judge or lawyer,³⁷⁷ and is called "commissioner," "administrative judge," "arbitrator" or "member," depending upon the tribunal.³⁷⁸ They are often appointed based on their perceived knowledge in the field in question, especially with regard to the "*Canadian Human Rights Act*," the "*Employment Equity Act*," and the "*Canada Pension Plan*."

In its composition, it is common for each party to appoint one member, and subsequently, these two members mutually select the third member as the chair.³⁷⁹ Thus, the constitution of the decision-makers is like that of an arbitral tribunal.

In conclusion, **judges in Canada are required to have working experience as a lawyer** during which they became accustomed to submitting disputes to arbitration, regardless of whether the public sector involved. **In ATs, the method of constitution is similar to that of an arbitral tribunal**; it is the preferred method to arbitrate administrative matters. Taken together, **the appointment and composition of judges in both the courts and the AT is helpful to the development of arbitration and echoes the aforementioned open attitude in Canada toward arbitration in administrative matters.**

B. NOMINATION OF ARBITRATORS IN CANADA

The provisions governing the Canadian arbitration system are mainly found in Chapter II of the Code of Civil Procedure of Canada (CCPC). Pursuant to these provisions, three arbitrators should be nominated by the parties pendant within

³⁷⁷ See Guide in The Council of Canadian Administrative Tribunals (CCAT), at <http://www.ccat-ctac.org/en/>, last visited 4 January 2014

³⁷⁸ See ADMINISTRATIVE TRIBUNALS ACT, at http://www.bclaws.ca/Recon/document/ID/freeside/00_04045_01#section1, last visited 4 January 2014.

³⁷⁹ See Partnering for Benefit of Canadians Homepage, at <http://www.vsi-isbc.org/>, last visited 4 January 2014.

a maximum of 30 days, and if not, a judge shall make appointment upon the motion of one party.³⁸⁰ The aforementioned judicial decisions regarding the appointment of arbitrators are final and without appeal.³⁸¹

In practice, the main arbitration institution is the **ADR Institute of Canada** (ADRIC), which announces qualified arbitrators; they are often members that have, within the last 10 years, completed at least 40 hours of training courses³⁸² that include a written exam and that have pledged to abide by the ADRIc's Code of Ethics.³⁸³

Candidates should apply for designation on the form prescribed by the ADRIc. In practice, candidates must not only to satisfy the educational requirements and pass the written examination, but their applications also must be reviewed by the Regional Committee and the ADRIc. Following the aforementioned procedure, the ADRIc will award the designation of arbitrator.

This designation procedure must be renewed annually. Every three years, the designated arbitrators must acquire a set number of points prescribed by the ADRIc. Furthermore, arbitrators must maintain their professional liability insurance in an amount prescribed by the ADRIc.

The public can search for appropriate arbitrators on the "ADRWeb" site,³⁸⁴ which is available to search by provinces, the arbitrators' case experience in a determined field, language, years of ADR practice, and required ADR service. There are many qualified arbitrators who are adept at administrative cases. In particular, the site provides a preference to select only attorney-mediators or retired judges.³⁸⁵

Thus, although in Canada, there is no legislative distinction between private and public contracts, in arbitration practice, there are some professionals who are adept at administrative matters and perhaps may be expected to take public law ideas into consideration.

³⁸⁰ See Art. 941.1-941.2 of CCPC

³⁸¹ See Art. 941.3 of CCPC.

³⁸² For details about the courses, see:

http://www.adrcanada.ca/resources/documents/ArbitrationCoursesThatAreAcceptedAsFulfillingTheTrainingRequirementsForADRInstituteOfCan_000.pdf, last visited 5 January 2014.

³⁸³ See ADRIc, at <http://www.adrcanada.ca/rules/ethics.cfm>, last visited 5 January 2014

³⁸⁴ See ADRweb, at <http://www.adrweb.ca/quicksearch2.php>, last visited 5 January 2014.

³⁸⁵ See ADRweb, at http://www.adrweb.ca/index.php?list=search&method=create_form, last visited 5 January 2014.

4. CHINA

A. NOMINATION OF JUDGES IN CHINA

Provisions governing the nomination of judges in China are mainly found in the Judges Act of China (JAC). **Chinese judges are appointed from qualified candidates.** In 2010, the total number of judges in China was 190,000, of whom 500 judges and 200 assistant judges were in the Supreme People's Court, and the total strength of the judicial staff was 320,000.³⁸⁶

Public law, including administrative and constitutional law, is a required exam subject in the China National Judicial Examination.³⁸⁷

Pursuant to Article 9 of the JAC, apart from passing the examination mentioned above, **candidates who have a master's or doctoral degree are not required to have any work experience, while those with a bachelor's degree should have at least one year's work experience and those without a bachelor's degree at least two years' experience.**

An interesting phenomenon is that **Chinese judges are often not selected among lawyers; by contrast, a judge often resigns to become a lawyer.**³⁸⁸ This is **because in China judges' salaries are generally lower than those of lawyers,** and the relevant benefits and job guarantees for judges are not sufficient. In Jiang Su province, for example, from 2008 to June 2012 2,402 court staff left, and among these were 1,850 judges.³⁸⁹

As mentioned, there is no special set of tribunals dealing with administrative matters in the Chinese court system – such matters are only dealt with in the “administrative chamber” in a court. Thus, **the appointment and training of**

³⁸⁶ See “In China, one can become High Court judge at 23”, at <http://www.hindu.com/2010/12/27/stories/2010122762671300.htm>, last visited 7 January 2014.

³⁸⁷ DAI Shi-Ying (戴世瑛), introduction on China National Judicial Examination (中國大陸國家司法考試簡介), in LawTw, at http://www.lawtw.com/article.php?template=article_content&area=free_browse&parent_path=1.561.&job_id=112940&article_category_id=2056&article_id=51512, last visited 7 January 2014.

³⁸⁸ See “China Judge - Never Used To Be Lawyers” <http://www.chinalawblog.org/law-topics/litigation-lawyer/223-china-judge-never-used-to-be-lawyers>, last visited 7 January 2014.

³⁸⁹ See “Serious reduction of numbers of Chinese Judges: low income, high pressure, and no sense of honor “中国法官流失现象严重：压力大工资低荣誉感消退” <http://news.163.com/13/0925/01/99J3VE0T0001124J.html>, last visited 7 January 2014.

judges of the administrative chambers have no different characteristics from those of judges in normal chambers, such as civil, penal and commercial chambers.

B. NOMINATION OF ARBITRATORS IN CHINA

The main arbitration institution in China is the China International Economic and Trade Arbitration Commission (CIETAC).

Arbitrators registered by CIETAC are required to have at least eight years' experience as a lawyer or judge, pursuant to Article 2 of the Nomination Rules of Arbitrators (NRAC) of CIETAC.³⁹⁰ Candidates present their application to CIETAC and are selected by a CIETAC committee; their tenure as arbitrators for CIETAC is three years, pursuant to Article 5 of the NRAC.

On the official CIETAC website, citizens can search for appropriate arbitrators by name, skill, service city, nationality and language.³⁹¹ However, there are only nine arbitrators who are proficient in administrative law among the 998 registered arbitrators, and these nine often provide arbitration services in big cities such as Beijing, Shanghai, Tiān-jīn and Shenzhen.

5. CONCLUSION

The jurist Jean-Marie Auby described three elements of arbitration.³⁹² The second of these is that the process is launched by arbitrators or arbitral tribunals. Thus, the nomination of arbitrators is important for the arbitration process.

As mentioned in the comparison section, every country has its own special way of nominating judges and arbitrators. These different ways lead to different levels of confidence in the administrative litigation instruments, and they influence the development of arbitration.

We now need to analyze the question of the appointment of judges and public servants as arbitrators below.

³⁹⁰ See China International Economic And Trade Arbitration Commission HomePage (中國國際經濟貿易仲裁委員會, CIETAC) <http://cn.cietac.org/Arbitration/ArbitrationPrescribeEngage.shtml>, last visited 7 January 2014.

³⁹¹ See CIETAC Homepage, *supra* note 390.

³⁹² See note 6 of this dissertation

SECTION II: JUDGES AND PUBLIC SERVANTS AS ARBITRATORS

Although the report by Daniel Labetoulle's group considered that there was no "incompatibility" between arbitration and administrative contracts, and in practice there is indeed legislation in the world that enables administrative matters to be submitted to arbitration, we are interested in this section in particular professionals acting as arbitrators.

The main professionals we want to discuss are divided into two categories. One is public servants (1. PUBLIC SERVANTS), and the other one is sitting or retired judges (2. SITTING OR RETIRED JUDGES).

1. PUBLIC SERVANTS

The relationship between the arbitrators and the parties is established by the **designation** of the arbitrators. Therefore, the selection of an appropriate arbitrator by an administrative body is also important and difficult.

Usually, administrative contracts involve public order and the execution of a public service. In its decision-making procedure, the administrative body often asks for suggestions from professionals, such as lawyers, legal professors and public servants. Thus, when a dispute occurs under an administrative contract, those who provided suggestions are likely to be nominated as arbitrators because they are considered to be most appropriate for this contract.

However, when a public servant is designated as an arbitrator, the balance between the public interest and his public mission is often a difficult question. Thus, it is an interesting point whether sitting public servants can be designated and whether there are any limitations to this.

In Taiwan, sitting public servants generally cannot hold more than one position, unless they are allowed to do so by the organization for which they work, pursuant to a regulation issued by the Ministry of Justice in 2003³⁹³(法務部 92.1.16 法律決字第 910052108 號函) and to Article 14 of the Taiwan Civil Servant Law (TCSL).

In China,³⁹⁴ the principle for public servants is similar to that in

³⁹³ Number 910052108, issued by the Ministry of Justice, dated 16 January, 2003.

³⁹⁴ See China Public Servant Law(中國公務員法), at http://big5.gov.cn/gate/big5/www.gov.cn/banshi/2005-05/25/content_960.htm, last visited 8 January 2014.

Taiwan, and again exceptions necessarily require authorization by the administrative body.

In France, public servants are generally forbidden to hold other positions. This is called the principle of forbidding the overlap of private activity and public service (in French “*L’interdiction de cumul d’une activité privée et d’un emploi public*”) and is set out in Article 25 of the law of July 13, 1983³⁹⁵, a general provision applicable to all public servants in France.

Some exceptions to the principle mentioned above, such as the production of scientific, literary or artistic work, consultancy activities or activities using expertise, or teaching activities, are often permitted if the public servant obtains authorization from the president of the relevant administrative body pursuant to Article 2 of the decree (No 2007-658 of 2 May 2007³⁹⁶).

In France, plurality is controlled uniformly under a commission on ethics in public service (“*Commission de déontologie de la fonction publique*”, or “CDFP”). According to its annual report, there are more and more public servants applying to be permitted to perform other activities: in 2009, the CDFP received 2,552 requests, in 2010 the number was 3,386, and in 2011 it was 3,314.³⁹⁷

In Canada, it is the Public Service Commission (“*Commission De La Fonction Publique*”) that governs plurality for public servants. **Public servants are generally interdicted from accepting other employment inconsistent with their functions**, pursuant to Article 4 of the Public Service Employment Act.³⁹⁸

In brief, the interdiction of plurality for public servants is a general principle around the world. However, the question of whether public servants can be arbitrators has not been discussed in the four countries we have mentioned.

Perhaps we will analyze this question in three parts. First, an “arbitrator” is not the representative of one party, and thus it is impossible and interdicted to

³⁹⁵ N° 83-634 of July 13, 1983.

³⁹⁶ “Décret n°2007-658 du 2 mai 2007 relatif au cumul d’activités des fonctionnaires, des agents non titulaires de droit public et des ouvriers des établissements industriels de l’Etat”, see <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000649834>, last visited 8 January 2014.

³⁹⁷ For the annual report (“Commission de déontologie de la fonction publique--Accès des agents publics au secteur privé, Rapport au Premier ministre”), see <http://www.fonction-publique.gouv.fr/fonction-publique/carriere-et-parcours-professionnel-16>, last visited 8 January 2014.

³⁹⁸ The number of this law is : “S.C. 2003, c. 22, ss. 12, 13”, See <http://laws-lois.justice.gc.ca/eng/acts/P-33.01/FullText.html>, last visited 8 January 2014.

nominate a public servant who works for an administrative body as an arbitrator in a dispute involving that body.

Secondly, if a certain administrative body nominates a public servant from an administrative body that is “lower” in the administrative hierarchy as an arbitrator, that arbitrator would be considered to be unqualified. Public servants have a legal duty of obedience under the hierarchy structure, and usually a higher administrative body has practical control over the promotion and activity of the employees of the lower one. Thus, such practical influence would lead to worries about the impartiality and independence of the arbitrator.

Thirdly, and most importantly, there is the question of nominating a public servant from a “higher” body or an “independent” body. The hierarchy means that such a person would not be under the control of the lower body whose administrative matters are involved in the dispute.

Thus, public servants from a higher or independent administrative body should be suitable to be designated as arbitrators.

However, although this is appropriate in theory, worries about bias by public servants in arbitration processes exist. Thus, in practice, public servants are rarely designated as arbitrators in disputes arising from administrative contracts. Perhaps this is one reason why there has been no discussion about plurality for public servants acting as arbitrators.

2. SITTING OR RETIRED JUDGES

In this section, we want to discuss the issue of whether sitting or retired judges can be arbitrators. We will divide this into two parts. The first is sitting judges (A. SITTING JUDGES), and the other one is retired judges (B. RETIRED JUDGES).

A. SITTING JUDGES

Sitting judges are generally forbidden to be arbitrators (I.INTERDICTION), but it is not so in England. (see II. PERMISSION)

Taiwan, China and France are on the list of countries where the practice is interdicted, while Canada is on the list of countries where it is permitted but only under certain conditions.

I. INTERDICTION

In Taiwan, pursuant to Article 16 of the Judges Act in Taiwan, sitting judges cannot be members of the central or local administration, or be engaged in private enterprise, or take part in any other activity from which they are disqualified by their jurisdictional mission. Whether judges can be arbitrators has not been discussed in doctrine or jurisprudence, but in practice there is no case of a sitting judge designed to be an arbitrator.

In France, there has been no discussion about whether judges can have any other post. The possible reason for this phenomenon is that plurality of judges is often considered as a violation of their impartiality. Thus, interdiction should be the principle.

Besides, some countries have explicit provisions interdicting judges from being arbitrators, such as Article 578 of the Code of Civil Procedure of Austria:³⁹⁹ *“Judicial officers **may not accept appointment as arbitrators** during their tenure of judicial office”*. Article 699 of the Polish Code of Civil Procedure also provides for the same position.

In China, Article 15 of the Judges Act forbids a judge from being concurrently a member of the standing committee of a people's congress (one type of political organization in China), or holding a post in an administrative organ, procuratorial organ, enterprise or institution, or serving as a lawyer. Besides, the Chinese Supreme People's Court, on 13 July 2004, took the position in a guideline sent to all lower courts that sitting judges are not allowed to be arbitrators and harmful to the impartiality of judges, and it ordered a sitting judge who had been appointed as an arbitrator to resign from his position as arbitrator within one month.

II. PERMISSION

However, some countries permit judges also to hold office as arbitrators. Section 93 of the Arbitration Act of England of 1966, in the section headed “Appointment of Judges as Arbitrators”, provides that a judge of the “**Commercial**

³⁹⁹ The code has been modified by Federal Law of February 2, 1983, as for the context of the code, refer to the website:
<http://www.jus.uio.no/lm/austria.code.of.civil.procedure.fourth.chapter.as.modified.1983/doc.html#7>, last visited 9 May 2013

Court” (so not all judges) may accept an appointment as a “**sole arbitrator**” (so he cannot become simply a member of an arbitral tribunal, or the chairman of an arbitral tribunal).⁴⁰⁰

In Canada, sitting judges can be appointed as arbitrators under certain conditions. Article 55 of the Judges Act in 1985 sets out the principle of interdiction,⁴⁰¹ and Article 56 provides an explicit interdiction against judges being appointed as arbitrators. However, in Article 56, some exceptions are permitted, such as appointments pursuant to the legislative authority of Parliament or as authorized by the Governor in Council. And these are for extreme exception cases, for example, a judge can be appointed as an arbitrator to deal with questions about the boundary between two neighboring provinces.

Conclusively, administrative matters often involve special thinking about the principles of public law. It is impossible, or at least insufficient, to examine administrative matters simply by looking at concepts in private law. We consider administrative judges to be more appropriate than lawyers for nomination as arbitrators to deal with administrative matters. Thus, perhaps we can think about the possibility of permitting administrative judges to be arbitrators under certain conditions.

B. RETIRED JUDGES

In theory, everyone has the freedom to choose how to live his life after his retirement, and hence it is hard to prohibit retired judges from being appointed as arbitrators.

In the laws we have compared above, **there is no rule prohibiting retired judges from being arbitrators.**

However, in the current situation under the arbitration law of the four countries mentioned above, sitting or retired judges acting as arbitrators are rare and not popular. Whether or not retired judges can be arbitrators is not a legal question, but instead involves the parties’ opinions.

First, a retired judge is often thought to rely on his past judicial experience as the gateway to the arbitration procedure and the rendering of an arbitration award. However, a more formal judicial capacity may not correspond with the

⁴⁰⁰ BRUCE HARRIS, ROWAN PLANTEROSÉ AND JONATHAN TECKS, *THE ARBITRATION ACT 1996: A COMMENTARY*, 410 (4th edition, 2007)

⁴⁰¹ R.S., 1985, c. J-1, s. 55; 2002, c. 8, s. 102(E)

parties' needs.

Even so, we consider that a formal judicial capacity is helpful for parties because it should ensure the legality of the arbitration award and its successful performance.

Secondly, judges become accustomed to applying strict principles of proof in order to identify whether a conviction should be given. Thus, judges acting as arbitrators will need to adjust to many changes.

Conclusively, retired judges often create a more structured and formal arbitration process. This may not be the parties' preference. It may, perhaps, derive from procedural differences between administrative litigation and arbitration processes, as discussed below.

CHAPTER II: PROCEDURAL DIFFERENCES BETWEEN ADMINISTRATIVE

LITIGATION AND ARBITRATION PROCEDURE

The questions mentioned above about the nomination of judges as arbitrators lead us to think about whether different processes and judicial specificities in administrative litigation and arbitration would be obstacles for the arbitration of administrative matters.

We will discuss this in two sections. The first covers administrative litigation (SECTION I: ADMINISTRATIVE LITIGATION: A MIX OF INQUISITORIAL AND ADVERSARIAL APPROACHES AND THE PRINCIPLE OF STRICT PROOF), and the other one covers the arbitration process (SECTION II: ARBITRAL PROCEDURE: AN ADVERSARIAL PROCESS AND A RELATIVELY LIBERAL PRINCIPLE OF PROOF). The former reveals a mix of inquisitorial and adversarial approaches and the principle of strict proof. The latter reveals an adversarial process and a relatively liberal principle of proof.

SECTION I: ADMINISTRATIVE LITIGATION: A MIX OF INQUISITORIAL

AND ADVERSARIAL APPROACHES AND THE PRINCIPLE OF STRICT

PROOF

In an administrative litigation procedure, the inquisitorial and adversarial processes have different specific characteristics and this undoubtedly influences the findings of fact.

The core idea of this division is mainly found when looking at who initiates the litigation, conducts the process, and ends the litigation. In an adversarial procedure, it is the parties, while in an inquisitorial one, it is the judge.

This division is shown in the symptoms below:⁴⁰²

- In an adversarial system, the litigation is initiated by the parties; while in an inquisitorial one, judges can sometimes initiate some processes.
- Regarding the parties to the process, in an adversarial system the parties can determine who can participate in the process and, furthermore, can ask for the intervention of third parties; while in an inquisitorial process, judges can bring in third parties under certain conditions.
- Regarding the hearing, in an adversarial system the parties' role is regarded as leading, and thus oral hearings predominate; while in an inquisitorial one, the procedure is mainly written.
- The evidence rules in an adversarial system are often defined strictly by law; while in an inquisitorial system, judges have some leeway about the types of evidence and about whether evidence should be admitted.
- Regarding the investigation and the provision of evidence, the evidence under an adversarial system will be provided entirely by the parties, and judges do not, in principle, investigate by themselves; while in an inquisitorial process, judges are more active in making their own determination about the proof of the facts to be established, the documents to be produced, and the witnesses to be summoned.
- In an adversarial system, oral evidence will often be taken from

⁴⁰² JEAN-BERNARD AUBY, *supra* note 75, at.117.

witnesses, and then cross examination is frequent; while in an inquisitorial system cross examination is much less frequent.

The procedure followed under the French administrative jurisdiction is generally regarded as the archetype of the inquisitorial system,⁴⁰³ but some adversarial logic might be found behind the purely inquisitorial appearances. Thus, the **contemporary administrative litigation system in France is an intermediate system.**

Considering evidence and the burden of proof, French administrative judges can admit different types of evidence relatively liberally without being bound by formal rules. They can also adjust the burden of proof in some fields by reversing it to lie upon the defendant public authority if certain evidence is brought, held or decided by the administrative authorities. Besides, an administrative judge can help a private party (who will often be the plaintiff) to prove the facts that he or she should establish if parties can convict judges what they try to prove could be real.

Recently, there have been some changes (including administrative judges being given greater power to issue injunctions to administrative authorities⁴⁰⁴ and some urgent procedures being made available to allow citizens to ask judges to order administrative bodies to adopt certain measures), and these have made the administrative litigation procedure meet citizens' needs directly rather than only leading to the quashing of certain legal administrative decisions.

Thus, the diversification in the procedural tools will make the conduct of cases less entrusted to judges.

In Taiwan, the trend is a little contrary to that in France.

All litigation is initiated by the parties, not by the judges.

The procedure for Taiwanese administrative jurisdiction was adversarial before 1999, but the contemporary system is a mix of an inquisitorial and an adversarial system.

In the process, the parties can decide to suspend or withdraw the litigation.⁴⁰⁵ Reconciliation is also permitted under the Taiwan Administrative Litigation Law (TALL).⁴⁰⁶

Regarding the findings of fact and the principles for the burden of proof, the

⁴⁰³ JEAN-BERNARD AUBY, *supra* note 75, at 114.

⁴⁰⁴ Article 8 of the rules applying to the organization of jurisdiction ("Relative à l'organisation des juridictions") of February 1995.

⁴⁰⁵ Article 122 of the Taiwan Administrative Litigation Law.

⁴⁰⁶ Article 219-228 of the Taiwan Administrative Litigation Law.

amendment in 1999 had a profound change.

Before 1999, the burden of proof fell on the plaintiff, and the plaintiff had to establish the facts in order to prove his or her claims. The result was the frequent failure of citizens in administrative litigation.

In 1999, Article 125 of the TALL provided that administrative judges “shall” investigate the facts inquisitorially without being bound by the parties. Article 133 provided that, when revoking litigation and in other situations to defend the public interest, **administrative judges should investigate the facts inquisitorially.**

The amendments to these provisions gave rise to different opinions. Those who support them think that the introduction of the inquisitorial system is helpful for the protection of citizens’ rights.⁴⁰⁷ However, certain jurists consider that not all administrative litigation involves the public interest and, thus, in some cases, such as trademark and patent cases and cases relating to tax refunds and business licenses, an inquisitorial process should not be followed.⁴⁰⁸

The first instance hearing is held before the Taiwan High Administrative Court (THAC), and generally an oral hearing is required. The Taiwan Supreme Administrative Court (TSAC) is the court for “*revisio in jure*”, and the procedure often requires written submissions.⁴⁰⁹

In Canada, as mentioned above, there is no separate set of courts dealing with administrative litigation. But in the major common law systems, one can find some jurisdictions, especially in the “tribunals” field, that apply an inquisitorial system.⁴¹⁰

In Canada, in the Administrative Tribunal (AT) procedure, the decision-maker should read the file of the case before the hearing. All of the evidence is also in this file.

During the hearing, the decision-maker makes all the decisions, but usually does not ask the witnesses questions, unless one or both of the parties has no lawyer or representative.

When the parties have finished presenting their evidence, the decision-maker may take time to think about his or her decision or to check the

⁴⁰⁷ Wu Dong-Du (吳東都), *Study On Inquisitorial Processes In Administrative Litigation*(行政訴訟之職權調查主義兼論新行政訴訟法關於職權調查主義之規定), 15 TAIWAN LAW JOURNAL, 22-40 (2000).

⁴⁰⁸ Zhang Wen-Yu(張文郁), *Study on Inquisitorial Processes In Taiwan Administrative Litigation Law* (行政訴訟法之職權調查主義), 160 TAIWAN LAW JOURNAL, 27-33 (2010).

⁴⁰⁹ Articles 109 and 121-132 of Taiwan Administrative Litigation Law.

⁴¹⁰ JEAN-BERNARD AUBY, *supra* note 75, at 118.

applicable law. This time is called the “advisement”. The decision-maker can also make his or her decision directly at the hearing; this is called making a decision “from the bench”. The decision can also be made in writing, or given orally at the hearing and then later in writing.

In China, the organization responsible for dealing with administrative litigation is the administrative chamber in a regional people’s court, and the procedure here is generally an adversarial one.

However, Article 32 of the Administrative Procedure Law of the People’s Republic of China (APLC) provides that the burden of proof is principally borne by the defendant public authority, which must provide evidence and the regulatory documents in accordance with which the act has been undertaken. Article 34 of the APLC provides that the people’s court can request an administrative body to provide evidence.

In France, the refusal of an administrative body to present documents in accordance with a judge’s demand would mean that the judge would consider the plaintiff’s allegation to be proved,⁴¹¹ following the decision of the CE in the “Barel” case in 1954. However, in China, there is no similar rule.

Taken together, we can draw a brief conclusion. There is no absolute inquisitorial or adversarial process in the four countries mentioned. Their styles have nuances.

In China and Taiwan, the process before the judge in an administrative matter is generally adversarial but is gradually becoming more inquisitorial. On the contrary, in France and Canada, the system is moving from being inquisitorial by the faint mixture of adversarial elements.

Alternatively, we can say that the elements that relate more to the legality of administrative acts and the protection of the public interest are entrusted to the judges (and so is inquisitorial in nature), while those relating more to the protection of individual rights are entrusted to the parties (and so is adversarial in nature).

⁴¹¹ CE, Ass., 28 mai 1954, Barel, Rec.308.

SECTION II: ARBITRAL PROCEDURE: AN ADVERSARIAL PROCESS AND A

RELATIVELY LIBERAL PRINCIPLE OF PROOF

The procedure before arbitrators is generally considered to be adversarial. But there are some jurists who consider that the power of the arbitrator in the arbitral process should be enlarged⁴¹². Thus, for administrative matters subject to an arbitration process, we will discuss two areas. One is whether the arbitral process should, exceptionally, be open (1. OPEN, AS AN EXCEPTION, FOR ADMINISTRATIVE MATTERS?), and the other one is whether the arbitral process should be inquisitorial for administrative matters. (2. INQUISITORIAL IN NATURE FOR ADMINISTRATIVE MATTERS?)

1. OPEN, AS AN EXCEPTION, FOR ADMINISTRATIVE MATTERS?

One of the particular characteristics of the arbitration process is its secrecy.

In China, arbitration is, in principle, secret unless the parties request it be made public, under Article 40 of the China Arbitration Law (CAL).

In Taiwan, arbitration is also secret unless the parties reach a special agreement under Article 23 of the Arbitration Law of Taiwan (ALT).

In France, there is no explicit provision about whether an arbitration process is secret or public, but Article 1460 of the Code of Civil Procedure of France (CCPF) authorizes arbitrators to settle an arbitration process without being bound by the rules governing the courts; the jurist Delvolvé considered that this includes both substantive and procedural rules.⁴¹³ Thus, the arbitration process in France (*l'audience de plaidoirie*) is generally considered not to be public.

In Canada, the ADR Institute of Canada (ADRIC, a national non-profit organization that provides alternative dispute resolution in Canada and

⁴¹² Wang Xiao-Jun(汪曉君), A comparative study of Arbitration System between Taiwan and China(兩岸仲裁制度之比較研究), Tome 47, ANNUAL REPORT OF ACADEMY FOR THE JUDICIARY IN MINISTRY OF JUSTICE(司法官學院學員報告), p.2692.

⁴¹³ JEAN-LOUIS DELVOLVÉ, GERALD H. POINTON & JEAN ROUCHE, FRENCH ARBITRATION LAW AND PRACTICE: A DYNAMIC CIVIL LAW APPROACH TO INTERNATIONAL ARBITRATION, 105-29, (2nd Edition, Kluwer Law International 2009)

internationally) also authorizes an arbitration tribunal to conduct the arbitration process in the manner it considers appropriate, including public or secret one.⁴¹⁴

Conclusively, around the world arbitration processes are generally secret. However, whether secrecy is in conflict with the specific relationship between administrative matters and the safeguarding of public interest is crucial.

Secrecy can lead to worries about corruption. In administrative litigation, the judge's salary is paid by the state, not by the parties, and judges are prohibited from having a relationship with the parties. Thus the impartiality and independence of judges is generally considered to be higher than that of arbitrators.

By contrast, in an arbitral tribunal, one arbitrator is designated by each party and then the presiding arbitrator usually plays the crucial role in the arbitration. Even worse, the attitude of the presiding arbitrator has the greatest influence on the result of the case.

Certainly, corruption can also occur in judges. It is a common question relating to both judges and arbitrators. However, bringing the process into public view would increase surveillance and reduce the possibility of corruption.

In practice, **Taiwan's experience may be a good reference point.** As mentioned, arbitration is acceptable and popular in the public construction field and, according to the statistics of Taiwan's Public Construction Commission, (the PCC, an administration under the Administrative Yuan that is responsible for public construction in Taiwan), all disputes about public construction have been settled within an average of 0.58 years if by mediation, 1.14 years if by arbitration, and 2.08 years if by litigation.⁴¹⁵ However, in Taiwan, a famous civilist was detained on suspicion of corruption, and this led to a debate in Taiwan.

To encourage arbitration and avoid corruption in public construction, in 2012 the PCC issued **six model contracts for public construction** into which they inserted clauses providing that the arbitration process relating to public construction disputes should be open and that any arbitration award should be published for consultation. Besides, in those model contracts mentioned, each party designates one arbitrator from ten arbitrators selected by his adversary –

⁴¹⁴ See ADRIIC homepage, at <http://www.adrcanada.ca/rules/arbitration.cfm>, last visited 17 January 2014.

⁴¹⁵ See PCC homepage, at http://www.pcc.gov.tw/pccap2/BIZSfront/NewsContent.do?site=002&bid=BIZS_C10205231, last visited 13 January 2014.

this is called “*cross-selection*”.

With the new clauses mentioned above, 30 disputes arising from public construction contracts were submitted to arbitration between January and 23 May 2013; this is more than in the corresponding period in 2012 when there were 22 disputes.⁴¹⁶

Conclusively, disputes arising from administrative contracts involve the public interest more than private interests. **In administrative matters, the secrecy of the arbitral process should be adjusted to correspond with the requirements of the public interest.**

2. INQUISITORIAL IN NATURE FOR ADMINISTRATIVE MATTERS?

As mentioned, administrative litigation is handled by an inquisitorial process in some systems, and an adversarial process in others including, in many cases, in common law countries.

Besides the cases mentioned above in SECTION I: ADMINISTRATIVE LITIGATION: A MIX OF INQUISITORIAL AND ADVERSARIAL APPROACHES AND THE PRINCIPLE OF STRICT PROOF, we are also interested in cases in common law countries that are decided in an inquisitorial manner.

Generally, social aid is one situation in which an inquisitorial procedure is used. Jurist Robert Thomas reasons, “the adjudication process is viewed as part of a wider decision-making process which is designed to ensure that claimants receive neither more nor less than the amount of social security benefit to which they are properly entitled⁴¹⁷”.

Cases about social security benefit or social welfare do not necessarily involve administrative contracts. But in Taiwan, certain social security benefits can arise from an administrative contract, such as a contract for the construction of a nursing home concluded between an administrative body and a welfare institution.⁴¹⁸ Another example is a national scholarship contract concluded between an administrative body and a student, under which the administrative body is obliged to give a scholarship, and the student to study for a diploma.⁴¹⁹

⁴¹⁶ See PCC homepage supra note 415.

⁴¹⁷ Recited from Jean-Bernard, Auby, supra note 75, at 118.

⁴¹⁸ TSAC., No. (Zai-zhi) 1531(最高行政法院 96 年度裁字第 1531 號裁定), Year 96, July 12 (2007). “Zai-zhi” is the Romanization of the Chinese word used to classify matters that are in a provisional process.

⁴¹⁹ See No. 348 of interpretation of Justice of the Constitutional Court in Taiwan, http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=348, last visited 30

In continental law countries, administrative litigation is not a matter of “the one who wins is the one who built her case better”, but a matter of “making sure legality is the winner”.⁴²⁰ **Administrative litigation mainly checks whether a certain administrative act abides by the rule of law. Thus, in nature, an administrative matter is an “objective” matter (or at least prefer to) rather than a simple “subjective” legal issue.** Consequently, even when disputes arising from administrative contracts are submitted to arbitration, this “objective” nature of the issue does not vary.

Thus, to correspond with this “objective” nature, we suggest that some measures are taken.

First, in some fields if what is contested was decided by an administrative authority, such as in cases about the unilateral termination of administrative contracts (see below, 1.PREROGATIVES OF ADMINISTRATIONS IN CONTRACTS), **the arbitrators should be required to move the burden of proof onto the public authority.**

Secondly, arbitrators should examine the possibility of a violation of the public interest if **the administration is seeking to abandon certain rights under the public law.**

Thirdly, arbitrators should **actively bring relevant third parties into the action** when disputes are more or less involved with the “public interest”.

In addition, all information collected by the arbitrators must be communicated to the parties to make sure the parties are put in a position in which they can discuss all the legal arguments on which the arbitrators will base their arbitration award.⁴²¹

Conclusively, even although an arbitration procedure is fundamentally adversarial, we suggest that in administrative matters there should be some adjustments that slightly transform the arbitration procedure, not necessarily into an inquisitorial procedure, but at least towards a procedure which would certainly be more “arbitrator driven”. It’s not the traditional arbitral procedure. But it would be a profitable evolution in arbitration on administrative matters.

January 2014.

⁴²⁰ JEAN-BERNARD AUBY, *supra* note 75, at 118.

⁴²¹ JEAN-BERNARD AUBY, *supra* note 75, at 121.

TITLE II: SUBSTANTIAL PERSPECTIVE: WHAT SHOULD ARBITRATORS TAKE INTO CONSIDERATION ?

In this title, we want to analyze what arbitrators or arbitral tribunal should take into consideration on disputes arising from administrative contracts. We will be based on the French system, and then compare that in the other three countries.

In French administrative contract law, contract claims are essentially divided into, but not all, three main categories of disputes.

The first dispute contains claims the validity of contracts or, in French, “*Le contentieux du contrat, LCDC*” (CHAPTER I: LITIGATION CONCERNING THE CONTRACT ITSELF).

The second category of contention is claims concerning “*recours de l'excès de pouvoir, REP*”.

Traditionally, disputes of administrative contract are in principle considered not receivable under REP, exception to some acts, in nature, can be regarded detachable from contract and thus can be receivable in REP. (CHAPTER II: “*RECOURS POUR L'EXCÈS DE POUVOIR*” ON DETACHABLE ACTS)

The third is disputes in urgent procedure named “*Le référé précontractuel*” (LRP) (CHAPTER III: URGENT PROCEDURE (“*RÉFÉRÉ*”)).

CHAPTER I: LITIGATION CONCERNING THE CONTRACT ITSELF

In a LCDC case, a demand is made to an administrative judge (in French doctrine, an administrative judge charged with declaring the validity or nullity of a contract is named “*le juge du contrat*”) to declare that a clause or the whole of a contract is null or valid. The counterpart of a CNPC case in Taiwan's administrative law system is called confirmation litigation.⁴²²

For disputes about administrative contracts, the doctrine considered that the arbitral procedure should be conducted in the same way as before the administrative courts.⁴²³

We want to discuss the disputes on validity of administrative contract into three main directions. The first one is the disputes concerning the making of an administrative contract. (SECTION I: DISPUTES CONCERNING THE MAKING OF

⁴²² See note 335 of this dissertation.

⁴²³ JEAN-LOUIS DELVOLVÉ, FRENCH ARBITRATION LAW AND PRACTICE: A DYNAMIC CIVIL LAW APPROACH TO INTERNATIONAL ARBITRATION, 44, (2nd edition, 2009)

CONTRACT). The second one is the disputes concerning the execution of an administrative contract (SECTION II: DISPUTES CONCERNING THE EXECUTION OF CONTRACT). The third one is the disputes concerning the content of an administrative contract.(SECTION III: DISPUTES CONCERNING THE CONTENT OF CONTRACT)

SECTION I: DISPUTES CONCERNING THE MAKING OF CONTRACT

Regarding the questions about the negotiation phase of an administrative contract, we will divide our study into two sections. In the first we will discuss the specificities in the selection of the contractor to an administrative contract (1. SELECTION OF THE CONTRACTOR IN ADMINISTRATIVE CONTRACT).

In the other we will discuss litigation about the selection of the contractor to an administrative contract, which mainly means actions that can be called “competitor-lawsuits” (2.CHALLENGE OF SELECTION OF THE CONTRACTOR IN ADMINISTRATIVE CONTRACT (COMPETITOR-LAWSUIT, *LE CONCURRENT ÉVINCE*))

1. SELECTION OF THE CONTRACTOR IN ADMINISTRATIVE CONTRACT

Under private law, a party has the freedom to choose his contractor, but in administrative contract law there are specificities relating to the conclusion of administrative contracts.⁴²⁴

The protection of competition is not the main function of private contract law. But in administrative contract law, the CE considers that competition is the guarantee of the most efficient use of resources and is an element involving the public interest.⁴²⁵

Thus, to ensure competition, there are some special methods around the world for selecting a contractor to an administrative contract.

First, we will introduce the system that is used in France, and then proceed to consider certain other countries.

⁴²⁴ TRUCHET DIDIER, DROIT ADMINISTRATIF, 276 (5th edition 2013).

⁴²⁵ Conseil d’État, RAPPORT PUBLIC 2002-Jurisprudence et avis de 2001, Collectivités publiques et concurrence, available at <http://www.conseil-etat.fr/media/document//rapportpublic2002.pdf>, last visited 20 January, 2014.

I.FRANCE

Regarding the selection of contractor of administrative contract in France, we want to discuss in two directions. One is the categories of selection procedure (I. THE CATEGORIES OF SELECTION PROCEDURE). The other one is the criteria of selection procedure (II. THE CRITERIONS OF SELECTION PROCEDURE) .

(1).THE CATEGORIES OF SELECTION PROCEDURE

Firstly, in procurement contract, there are two main requirements: the fair competition and publicity obligation.

The principle of competition is applicable to all administrative contracts, even for local administrations (*collectivités territoriales*).⁴²⁶

Publicity (*La publicité préalable*) is the basis for the tender process, pursuant to Article 280 of the Procurement Code (*Code des Marchés Publics, CMP*).

Afterward, there are certain special procedures for the selection of counterparties in administrative contracts in France.

Traditionally, the “tender” process (in French, “*adjudication*”) is a procedure in which the price or financial conditions plays the crucial role.⁴²⁷ Thus, the bidder offering the lowest price is “automatically” selected as the contractor. In French, this procedure is also called the “*moins-disant*” (which literally means the “lowest- saying”). But it doesn’t exist in contemporary system.

Contemporarily, the most used way to select the contractor of procurement contract can be divided into three main procedures: the formalized procedure, special formalized procedure and the adapted procedure.

(i) FORMALIZED PROCEDURE

The main formalized procedure is named “*L’appel d’offres*” (LDO⁴²⁸).

⁴²⁶ For local administration, this principle was established by CE in the *Communauté de communes du Piémont de Barr* case, see CE, Sect., 20 May 1998, AJDA, 1998, p.53., cited in JEAN-RIVERO and JEAN WALINE, *supra* note 103, at 376.

⁴²⁷ ANDRÉ DE LAUBADÈRE, *TRAITÉ DES CONTRATS ADMINISTRATIFS. 1, LA NOTION DE CONTRAT ADMINISTRATIF, LA FORMATION DES CONTRATS ADMINISTRATIFS, L’EXÉCUTION DES CONTRATS ADMINISTRATIFS (PRINCIPES GÉNÉRAUX)*, 593 (2nd edition, 1983).

⁴²⁸ See article 33 of CMP.

Since price is sometime not the only element, and thus LDO procedure is used. LDO is open to the public (when any entity can make an offer) or to a restricted group (when only certain selected and authorized candidates can make offers). In practice the LDO is obligatory for procurement contracts over a certain value. The LDO process often begins by a notice of appeal for competition ("**Avis d'appel public à la concurrence**", *AAPC*⁴²⁹), published in administrative official procurement bulletin ("**Bulletin officiel administrative des marchés publics**", *BOAMP*) and, for the most important procurement contracts, also in a European Union publication (*les publications de L'Union européen*).

In a process that is different from the tender process (*adjudication*), the price is only one of the elements affecting selection. Other elements, such as technical matters, financial capacity, execution period, environment and professional experience, are often important. Bidders' different offers and the conditions they put forward are examined together in a secret meeting often organized by a commission (*La Commission d'appel d'offres*); at this meeting the most economically advantageous offer (in French doctrine, "*l'offre économiquement la plus avantageuse*"⁴³⁰) will be selected, but not necessarily the offer of the lowest bidder. This is called "the best offers" principle ("*mieux-disant*").

(ii).THE SPECIAL FORMALIZED PROCEDURE

■LA PROCEDURE NÉGOCIÉE(LPN)

There is also a special process called the negotiation procedure (*La procédure négociée, LPN*).

Pursuant to Article 34 of the CMP, LPN is defined as the procedure by which a seller (an administrative body) negotiates procurement conditions with one or several economic operators.

Jurist Laurent Richer described LPN as an exceptional procedure (*un aspect dérogatoire*) since the principle of LDO prohibits the negotiation (Article 59).

Since an administration can negotiate with interested operators about the conditions of the contract, the conditions of contracts in "*les cahiers des charges*" (the contractual documents which determine the conditions under which the procurement would be executed and respected) are thus, in practice, less set in

⁴²⁹ LOMBARD MARTINE ,DUMONT GILLES, AND JEAN SIRINELLI, DROIT ADMINISTRATIF, 280(10th edition, 2013)

⁴³⁰ See article 53 of CMP.

concrete than those in *l'appel d'offres*.

■ LA PROCÉDURE "DIALOGUE COMPÉTITIF"

Since it is often difficult for the administration to determine the conditions of the procurement project in advance and on its own, the competitive dialogue process ("*Le dialogue compétitif*") provides the possibility for the administration to discuss the project with the candidates and, if possible, adapt the offer in the dialogue procedure (Article 36 and 67 of the CMP).

Under the European Directive of 2004 and the CMP (*annexé au décret du 7 Janvier 2004 CMP*), some administrative contracts, such as PPP or other contracts considered as "*complex procurement*", are required to be negotiated in a competitive dialogue process in which every candidate proposes his solution and offers to meet the administration's needs. This process must satisfy the requirements of prior publication and fair competition.

Furthermore, the Constitutional Court in France has decided that the competitive dialogue is applicable to procurement contracts for the conception, construction, arrangement, exploitation and maintenance of prison organizations, in its judgment of 22 March 2012.⁴³¹

(iii).THE ADAPTED PROCEDURE(LES PROCÉDURES ADAPTÉES)

There is a procedure named "*Marchés à procédure adaptée*" (MAPA) that refers to a procedure without previous formality.(*marchés sans formalités*)

This name was introduced by the code in 2004, and means the public legal person has the liberty and obligation to define by itself the stipulations of signing depending on different circumstances⁴³².

MAPA is applied to procurement contracts for more than a certain amount, such as contracts for public works costing between 15,000 and 130,000 euros, and public purchase and local government service contracts with a value between 15,000 and 200,000 euros.

In the MAPA procedure, the administrative body is also at liberty to select its contractor according to its needs and circumstances, the nature of procurement contract, and the number or location of the economic operators, but it should

⁴³¹ Conseil Constitutionnelle, 22 March 2012, n° 2012-651 DC, "Loi de programmation relative à l'exécution des peines".See <http://www.conseil-constitutionnel.fr/decision/2012/2012-651-dc/decision-n-2012-651-dc-du-22-mars-2012.105197.html>, last visited 11 February 2014.

⁴³² LAURENT RICHER, *supra* note 515, at 502.

obey the principles of free access to procurement contracts, equal treatment of candidates, and transparency in the purchase process.

(2).THE CRITERIONS OF SELECTION PROCEDURE

Recently, some procurement contracts should take into consideration the procedure involving public services in the environmental, ecological fields and social cohesion field.

(i).ENVIRONMENTAL CRITERIA

Pursuant to the Article 14 of the new Code of procurement⁴³³ in France (*le nouveau CMP*), a procurement contract should contribute to sustainable development (*développement durable*), consisting of economic development, social cohesion, and environmental effect. Environmental savoir-faire is one important standard to be considered for the granting of a procurement contract. In the Helsinki bus case decision⁴³⁴ of 17 September 2002 (a case about a bus purchase contract), the Court of the European Community ("*la Cour de Justice des Communautés européennes*", CJCE, which after December 1, 2009 has been known as the Court of Justice of the European Union) authorized the local government to insert an environmental standard as a condition of the LDO process because the local government had a goal of protecting the environment.

(ii).SOCIAL COHESION

Besides, the procurement contract should also serve social cohesion (*la cohésion sociale ou l'insertion sociale*). The conditions for the award of a contract can include clauses promoting the employment of persons having difficulties in social integration, such as the disabled, to help the fight against unemployment. In French doctrine, this is called a social criterion (*le critère mieux disant social*).

In the decision in the "*Commune de Gravelines*" case (Gravelines) of the CE on 25 July 2001⁴³⁵, the CE considered that social criteria would be illegal when they had no relationship with the goal or the conditions for the execution of the procurement contract.

⁴³³ JEAN-RIVERO and JEAN WALINE, *supra* note 103, at 377.

⁴³⁴ See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61999CJ0513:FR:PDF>, last visited 2 February 2014.

⁴³⁵ CE 25 July 2001 "commune de Gravelines", req. n° 229666.

Social criteria were introduced into the CMP in 2004. The CMP of 2004 and 2006 provided that the administration (in French procurement contracts, this is often called “*le pouvoir adjudicateur*”) may rely on many non-discrimination criteria linked with the goal of the procurement contract, such as technical, aesthetic, fundamental functional and performance criteria involving environmental protection and difficult professional insertion in public (*en matière d’insertion professionnelle des publics en difficulté*).

II. CHINA

In China, procurement contracts are handled according to the China Public Procurement Law (CPPL). Pursuant to the CPPL, government procurement must be carried out **using one of six methods**: public bidding, invitation for bid (like “*l’appel d’offres*” in France), competitive negotiations, **unitary source purchase**, inquiry, and other forms under the State Council (an administrative organization in charge of government procurement in China). Generally the definitions of these terms are the same as elsewhere around the world. Pursuant to Article 26 of the CPPL, **public bidding is the main form of government procurement in China**.

Exceptionally and interestingly, a unitary source purchase often takes place when goods or services can only be procured from a sole supplier (such as where there is a monopoly patent), or when it is impossible to procure them from other suppliers due to some unexpected situation (such as a natural disaster).

III. CANADA

In Canada, although the concept of “administrative contract” does not exist, in practice contracts concluded by administrative bodies for public procurement are handled according to a special guide. Public Works and Government Services Canada (PWGSC, the government body responsible for public procurement in Canada) announced that the supply manual would apply uniformly to Canadian public procurement contracts.⁴³⁶ In Chapter 4 of this supply manual, there are various methods of solicitation, such as, among others, a Request for Quotation (RFQ, for commercial goods or services valued below \$25,000, in which the

⁴³⁶ Supply Manual of Public Works and Government Services Canada, See <https://buyandsell.gc.ca/policy-and-guidelines/supply-manual>, last visited 10 February 2014.

contract may be awarded on the basis of the lowest-priced quotation. This is like the “*moins-disant*” in France), or a Request for Proposal (RFP, which is used when the bidder selection is based on best value rather than on price alone. This is like the “*mieux-disant*” in France).

IV.TAIWAN

In Taiwan, Article 18 of the Procurement Code provides for three main methods: **open**, **selective** and **limited tendering procedures**. The open tendering procedure is a procedure under which a public notice is given to invite all interested suppliers to submit their tenders. This is like the “*adjudication*” in France. The selective tendering procedure is a procedure under which a public notice is given to invite all interested suppliers to submit their qualification documents for a pre-qualification evaluation, after which qualified suppliers are invited to tender. This is like the “*l’appel d’offres*” in France. The limited tendering procedure is a procedure under which no public notice is given but one, two or more suppliers are invited directly to compete or tender. The open tendering procedure is the principal method, pursuant to Article 19.

V.CONCLUSION FOR SELECTION OF CONTRACTOR IN

ADMINISTRATIVE CONTRACTS

Administrative contracts (or procurement contracts) differ because of an administrative body’s different public service requirements. Thus, the way for selecting the contractor to an administrative contract is not limited to the methods mentioned above.

Briefly, for an administrative contract, the selection method involves the administration’s professional considerations (administrative discretion) and the goal of keeping competition fair. The principles of publicity (*publicité*) and free and equal access to contracts are the crucial principles dominating the selection of counterparties for administrative contracts. This is very different from private contracts, and arbitrators should take this into consideration when resolving administrative disputes.

However, in selecting a contractor, the administration’s discretionary leeway

should be respected. The administration's discretion is based on its professional considerations, and it has to balance the fulfillment of the public interest and any damage to the private interest. This respect for the administration's professional discretion is unchanged in the arbitration procedure on administrative matters. In particular, for cases of "*mieux-disant*" the administration should have greater room for discretion in the selection of the contractor. Thus, the arbitrator should examine and more or less respect the elements that administration considered to be the most advantageous.

Besides, how to avoid judicial review of administrative acts lead to **bureaucratic rigidity**. This is also a crucial question in administrative law, and we regard it as having the same importance in the arbitration procedure on administrative matters.

Conclusively, in the arbitration procedure for disputes on selecting a contractor in an administrative contract, the arbitrator should take into consideration the diverse questions mentioned above, which are very different from those that are relevant in civil arbitration.

We will now consider the violation of fair competition and disputes over this, which are called "competitor-lawsuits" between candidates.

2. CHALLENGE OF SELECTION OF THE CONTRACTOR IN

ADMINISTRATIVE CONTRACT (COMPETITOR-LAWSUIT, *LE*

***CONCURRENT ÉVINCÉ*)**

A. IN FRANCE

Disputes involving ETC (discussed at (I). ETC) are described by Taiwanese administrative law field jurists ⁴³⁷ as "**competitor-lawsuits**," which is terminology borrowed from German jurisprudence, while in France, the CE uses the term "***le concurrent évincé***" ("LCEV").

⁴³⁷ Cherng Ming-Shiou (程明修), *Application and category on administrative litigation* (行政訴訟類型之適用), 81 Taiwan L.J. 117 (2006).

Traditionally, a contention that an administrative contract is null is reserved exclusively to the contractual parties; however, this phenomenon has changed and is now accepted for third parties, such as in LCEV.

LCEV's particularities are revealed in disputes involving three parties to administrative contracts, in which two of the parties are competitors.

In France, there was a famous case that was similar to ETC in Taiwan.

In the 2007 case *Sté Tropic Travaux Signalisation* (hereinafter Tropic), the CE modified his older opinion and acknowledged a third person's right to contest a contract's validity and to demand the suspension of the execution of the contract.⁴³⁸

The CE authorized administrative judges in the Tropic judgment⁴³⁹ to be very open and it provided many opportunities for them to declare whole administrative contracts or certain divisible clauses null, to modify certain clauses, to continue or suspend the execution of administrative contracts under regularization and to order compensation.⁴⁴⁰

A "third person" who can bring this lawsuit was initially defined exclusively as one having a quality of competition (in French, "*la qualité de concurrent*").

In practice, those who have presented a candidate file, and further, those who have presented an offer that has not yet been accepted would be considered to have a quality of competition.

However, in the *Société Gouelle* (Gouelle) case in 2012, the CE defined the LCEV as the one who has an interest in concluding the contract, even if he has not yet presented an offer or candidacy. Obviously, the standard set forth in the Gouelle case is much broader than that established in the Tropic case.

LCEV can be brought during the two months following the publicity of a contractual negotiation; to the contrary, if the contract has been signed, it is impossible to bring an RPE (*recours pour excès de pouvoir*) to contest the detachable acts.⁴⁴¹ Briefly, before the contract is signed, it is subject to RPE, while after the contract is signed, it is subject to LCEV.

Generally speaking, this jurisprudence was interpreted to apply to all

⁴³⁸ Rozen Noguellou, *Les Recours Contre Les Marchés Publics*, 2009 R.D.I. 246.

⁴³⁹ CE Ass. 16 July 2007, "Société Tropic Travaux Signalisation", req. n° 291545, published in "Recueil Lebon", at <http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000018744539&fastReqId=889933829&fastPos=1>, last visited 18 January 2014.

⁴⁴⁰ Jean-Bernard Auby, *Ancien Régime et Révolution dans le contentieux contractuel*, Droit Administratif n° 5, Mai 2011, repère 5.

⁴⁴¹ Jean-Bernard Auby, *Contentieux contractuel et revirements de jurisprudence*, Droit Administratif n° 7, Juillet 2007, repère 7.

administrative contracts, especially to procurement contracts, contracts of delegations of public service and those in which an administrative body would conclude a contract with several competitive candidates.

Disputes in LCEV often involve whether a plaintiff has the quality of an “evicted competitor,” whether a lawsuit can be reviewable and whether an administrative body has fully executed its obligations with respect to a competitive order, for example, providing a sufficient time period and taking appropriate measures to provide publicity.

In the LCEV process, specificity in individual administrative contracts is important for administrative judges to demarcate the previously mentioned “**sufficient period**” and “**appropriate measures.**” If it is too long or complex, it will delay the conclusion and execution of administrative contracts and furthermore, it will affect the public mission; however, if it is too short, the goal of maintaining fair competition cannot be achieved. Thus, administrative judges should balance the goals of maintaining fair competition and implementing the public mission, and from another perspective, the goals of maintaining stable contractual relationships and reacting to urgent needs in the public interest.

In the Tropic case, the CE authorized judges not to pronounce the termination of contracts, but instead, to adopt appropriate measures, depending upon the gravity of the illegality and the damage to the public interest. This allowed the maintenance of illegal contracts in extreme situations in which the public interest is so urgent that the contract should be maintained. Obviously, the power of administrative judges is reinforced by the modulating effects of their judgments; this cannot be achieved by the REP (*excès de pouvoir*) process.

Another famous case is the Commune de Béziers case in 2009 (First Béziers) and 2011 (Second Béziers). In Second Béziers, the CE changed its long-standing jurisprudence by permitting judges to quash a “unilateral termination of contract” that had been issued by an administrative body. Thus, the contractor can demand that the court quash the termination, and furthermore, order the resumption of the contractual relationship (*la reprise des relations contractuelles*⁴⁴²).

The jurisprudence that has been mentioned establishes the power of administrative judges to recognize the importance of the public interest as well as the gravity and the consequences of irregularities in contracts. Only cases involving the particular gravity of illicit irregularities would lead to the annulment of administrative contracts with immediate or postponed effects, or in

⁴⁴² Jean-Bernard Auby, *supra* note 440.

cases of extreme gravity, the total or partial termination of the contract with retroactive measures; however, in cases involving only minor irregularities, administrative judges can decide to continue the execution of contract under regulative measures. Jurist Jean-Bernard Auby described the opinion in Tropic as an “innovation” that changed the CE’s long-standing jurisprudential direction (“*revirement de jurisprudence*”) ⁴⁴³ and seemed to be a movement to “subjectivization” or “contextualization” ⁴⁴⁴ of administrative contractual litigation.

B.IN TAIWAN

Interestingly, the ETC case in Taiwan was brought **after** the contract was signed; however, the plaintiff’s claims did not demand that the administrative judge declare the nullity of a contract (in the nature of LCEV), but sought to quash the unilateral administrative decision that determined the contractual award (in its nature a detachable act). This was different and seemed illogical.

C.IN CHINA

In China, there are four main methods of recourse against the decision of selection of contractor in an administrative contract available before either administrative bodies or judges.

Under the China Public Procurement Law (CPPL), the three available remedies are **consultation, an interrogation procedure** before the contractual administrative body (Articles 51 and 52), and **an appeal procedure** to a higher controlling administrative body (Article 56).

Of these remedies, the appeal procedure is more important than the other two. In the appeal procedure, the controlling administrative body is required to make its decision in writing within 30 days. In addition, the controlling administrative body must notify all related candidates of its decision.

After these three methods have been implemented, losing bidders also can initiate **administration litigation before the courts** (Article 58).

⁴⁴³ Jean-Bernard Auby, *supra* note 441.

⁴⁴⁴ Jean-Bernard Auby, *supra* note 440.

D. IN CANADA

In Canada, where the traditions of common law are followed in public law, there is no concept of an “administrative contract.” However, there is a special mechanism to deal with public procurement affairs. In Canada, the term “government contract” is often used to describe contracts concluded by the government.

In Canada, questions arising from disputes about the selection of the contractor mainly involve public procurement contracts.

The bidding/tendering procedure that is most often used for Canadian procurement contracts is the “Request for Proposal (RFP)” and, in practice, this is of the greatest importance.

Any bidder who has been disqualified from an RFP/tendering process has three possible remedies in Canada: to initiate a civil action in the courts, to complain to the Canadian International Trade Tribunal (CITT), or to complain to the Procurement Ombudsman.

I. ACTIONS IN COURTS

In Canada, (judicial) judges are competent to examine all contractual disputes, whether the dispute arises from a private or from an administrative contract.⁴⁴⁵

Under federal law, a contractor who has suffered damage can initiate litigation either before the Federal Court or before the competent Provincial Court, depending on the value of the contract.

Under Quebec law, the Superior Court is competent to hear all claims arising under administrative contracts that are for more than 70,000 Canadian dollars, while claims for less than this amount should be brought before the Court of Quebec pursuant to Article 34 of the Quebec Civil Procedure Code⁴⁴⁶.

In addition, it is possible for an interested third party to initiate litigation

⁴⁴⁵ Theoretically there is no such thing as an “administrative contract” in Canada. Canadians use the term “government contract” to describe a contract concluded by a public legal entity. However, to correspond with the terms used in this dissertation, we will still use “administrative contract” to mean a “government contract” in Canada.

⁴⁴⁶ Code of Civil Procedure in Quebec (Chapter C-25), see http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/C_25/C25_A.HTM, last visited 7 April 2014.

before the courts to demand that a contract be nullified.

However, looking at the case law, in the case of “*Saint-Placide (Munic.) v. Régie intermunic. Argenteuil Deux-Montagnes*” the Court of Appeal decided that a claim by a third party demanding that a contract be nullified should be initiated within a “reasonable period” of 30 days after the signature of the contract,⁴⁴⁷ even if the alleged illegality involved the provisions whose target is to protect the public interest (...*même si l’illégalité invoquée concerne une disposition visant la protection du public*....). The only exception to this reasonable period is if the party is arguing that there has been an infringement of the competence to sign a contract.⁴⁴⁸

II. CANADIAN INTERNATIONAL TRADE TRIBUNAL (CITT)

We will discuss the CITT in two sections. In the first we will address its application conditions and competences ((1). ACCESS TO CITT AND CITT’S POWER), and in the other we will address its relationship with administrative organizations and jurisdictional organizations ((2). CITT’S RELATIONSHIP WITH ADMINISTRATIVE ORGANIZATIONS AND JURISDICTIONAL ORGANIZATIONS).

(1). ACCESS TO CITT AND CITT’S POWER

The CITT is an independent authority established to review federal government contract awards.

We want to discuss in two main sections. One addresses CITT’s application conditions. (i. CITT’S APPLICATION CONDITIONS) The other one addresses what CITT can decide. (ii. WHAT CITT CAN DECIDE)

i. CITT’S APPLICATION CONDITIONS

The CITT’s jurisdiction is based on a complaint being initiated in good time by a qualified potential supplier. In other words, the CITT process is complaints-driven.

Generally, there are four situations regarded excluded the application of CITT. They are: (a) after the period to initiate, (b) when the contract has not yet

⁴⁴⁷ St-Placide (Municipalité de) c. Régie intermunicipale Argenteuil Deux-Montagnes, 2012 QCCA 1724 (CanLII), <<http://canlii.ca/t/fsznd>> last visited 7 April 2014.

⁴⁴⁸ Denis Lemieux and Pierre Giroux, *Une demande d’annulation d’un contrat public doit être instituée dans un délai raisonnable*, BULLETIN CCH, Dec. 11, 2012.

been awarded,(c) for disputes on execution of government contract and (d) non-Canadian suppliers.

a.APPLICATION LIMIT ONE: AFTER THE PERIOD TO INITIATE

A complaint must be made within 10 working days after the supplier knows or reasonably ought to have known the grounds for the complaint, under section 6(1) of the CITT Procurement Inquiry Regulations.⁴⁴⁹

Regarding the ten working days, there have been several developments in Canada.

In earlier years, the CITT was more flexible with the time limits in the CITT Act. In *“Re Earl C McDermid Ltd”*,⁴⁵⁰ for example, the CITT overlooked an infringement of the time limit because issues “significant to the procurement system had been raised”.

In subsequent years, the CITT has required strict compliance with the time limit, and no infringement of the time limit will now be allowed by the CITT.⁴⁵¹

Interestingly, there was a question about when the “ten days” begin to run.

In the *“TPG”* case,⁴⁵² the CITT rejected the complaint because the complainant had failed to meet the filing time limit. The complainant applied for judicial review to the Federal Court of Appeal (FCA).

The FCA disagreed with the CITT’s opinion, holding that the time had not started to run since the information came from rumors and was leaked by second-hand sources.

b.APPLICATION LIMIT TWO: FOR THE CONTRACT NOT YET BEEN AWARDED

Another question arises when the contract has not yet been awarded.

In *“Re Fine Tool & Die Inc.”*, the CITT refused a complaint, as the contract had not yet been awarded,⁴⁵³ holding that premature complaints cannot be heard.

c.APPLICATION LIMITATION THREE:FOR DISPUTES ON EXECUTION

⁴⁴⁹ Canadian International Trade Tribunal Procurement Inquiry Regulations (SOR/93-602), see <http://laws-lois.justice.gc.ca/eng/regulations/sor-93-602/FullText.html>, last visited 27 March 2014.

⁴⁵⁰ *Re, Earl C. McDermid Ltd.*, 1990 CanLII 3980 (CITT) at para.3.

⁴⁵¹ *CAE Inc. v. Department of Public Works and Government Services*, PR-2004-007 at para. 28.

⁴⁵² *TPG Technology Consulting Ltd. c. Canada*, 2011 FC 1054 (2011).

⁴⁵³ *Re Fine Tool & Die Inc.*, 1991 CanLII 4193 (CITT) at 2.

OF GOVERNMENT CONTRACT

Note that under Article 30.11(1), a potential supplier can only file a complaint about a dispute arising under the “procurement procedure”; this was defined by the CITT in its judgment in the “*Reicore Technologies*” case on 22 September 2009⁴⁵⁴ as being a procedure that “begins after an entity has decided on its procurement requirement ...and continues to the awarding of the contract.”⁴⁵⁵

Consequently, in practice, **the CITT generally refuses to examine any issues occurring after the award of the contract.**⁴⁵⁶ **Thus, disputes about the performance of government contracts do not fall within the CITT’s jurisdiction.**

Note that the CITT complaint procedure is primarily a paper procedure, but that the CITT has the power to convene an oral hearing. Besides, the CITT can conduct inquiries and provide recommendations.

d.APPLICATION LIMIT FOUR: NON-CANADIAN SUPPLIERS

Supreme Court Of Canada (SCOC) considered that non-Canadian suppliers do not have the standing to bring CITT complaints, in its judgment in “*Canada v Northrop Grumman Overseas Services Corp (NGOSC)*” on 5 November 2011.⁴⁵⁷

The plaintiff and appellant (NGOSC) was an American company with no office in Canada and thus was not a Canadian supplier, so, as a consequence, the SCOC stated that it lay within the jurisdiction of a government that did not negotiate access to the CITT for this type of contract and that its recourse is judicial review in the Federal Court.

ii. WHAT CITT CAN DECIDE

As for the question what CITT can decide, we want to discuss in two sections. The first one addresses CITT’s functions (a.CITT’S FUNCTIONS). The second one addresses CITT’s investigative power (b. CITT’S INVESTIGATIVE POWER)

⁴⁵⁴ Re Reicore Technologies Inc., PR-2009-047.

⁴⁵⁵ See https://www.citt-tcce.gc.ca/procure/determin/archive_pr2j047_e.asp, last visited 27 March 2014.

⁴⁵⁶ ANNE C. MCNEELY, CANADIAN LAW OF COMPETITIVE BIDDING AND PROCUREMENT, 55-56 (2010). Quoted on Gowlings homepage, <http://www.governmentcontracting.ca/>, last visited 27 March 2014.

⁴⁵⁷ Northrop Grumman Overseas Services Corp. v. Canada (Attorney General), 2009 SCC 50, [2009] 3 S.C.R. 309, see <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7826/index.do>, last visited 27 March 2014.

a. CITT'S FUNCTIONS

In “*TPG Technology Consulting Ltd. v. Canada PWGSC*”,⁴⁵⁸ the Court defined the CITT's function as being “to determine whether Canada (government) has breached obligations under specified international and domestic trade agreements”.

The CITT is established under federal legislation (the CITT Act), and its jurisdiction includes complaints by potential suppliers/vendors under what are called “designated contracts” who allege that the federal government procurement procedure was conducted in an unfair manner that infringed the provisions of the North American Free Trade Agreement (“NAFTA”), the WTO Agreement (“WTOA”) on Government Procurement (“AGP”) or the Agreement on Internal Trade (“AIT”).

The framework for complaints made to the CITT is primarily contained in sections 30.11 to 30.19 (in the chapter entitled COMPLAINTS BY POTENTIAL SUPPLIERS) of the CITT Act.⁴⁵⁹

The CITT is made up of members whose backgrounds display a mixture of government and private sector experience.

In practice, approximately eighty bid protests a year are filed with the CITT by suppliers and potential suppliers. Of these complaints, approximately 25% are held to be valid; this compares with a success rate of only about 5% before the similar organization in the US (the General Accounting Office).

Thus, it's a successful system in Canada.

b. CITT'S INVESTIGATIVE POWER

The CITT has broad investigative powers, including:

- Ordering a new tender process to be held.
- **Ordering a reevaluation of the bids.**
- **Ordering the termination of the contract.**
- **Ordering a delay in the award and performance of the contract** (until the CITT determines the validity of the complaint under section 30.13 of the CITT Act).
- **Awarding the contract to the complainant.**

⁴⁵⁸ *TPG Technology Consulting Ltd. v. Canada* (Minister of Public Works and Government Services), 2007 FCA 291, [2008] 1 F.C.R. D-5.

⁴⁵⁹ See Canada Justice Laws Website, <http://laws-lois.justice.gc.ca/eng/acts/c-18.3/page-26.html#docCont>, last visited 27 March 2014.

- Awarding compensation to the complainant.

Now, we want to analyze CITT's relationship with administrative organizations and jurisdictional organizations.

(2). CITT'S RELATIONSHIP WITH ADMINISTRATIVE

ORGANIZATIONS AND JURISDICTIONAL ORGANIZATIONS

We will discuss the CITT's relationship with other organizations under two headings. The first addresses its relationship with administrative organizations (i. CITT'S RELATIONSHIP WITH ADMINISTRATIVE ORGANIZATIONS), and the second, its relationship with jurisdictional organizations (ii. CITT'S RELATIONSHIP WITH JURISDICTIONAL ORGANIZATIONS).

i. CITT'S RELATIONSHIP WITH ADMINISTRATIVE ORGANIZATIONS

The CITT is an administrative tribunal (AT). We should remember that in Canada an AT is neither a judicial "tribunal", nor a government department populated with public servants, but rather **an independent quasi-judicial body**.

Note that the CITT has jurisdiction **only** to hear complaints against **federal government entities**, but not those made by other levels of government. The sole exception is when a provincial government has made a purchase for the federal government. In this situation, a complaint may be initiated before the CITT alleging that the federal government entity has not complied with its obligations under the trade agreements.

Regarding the CITT's competence, in "*Canada v. McNally Construction Inc.*",⁴⁶⁰ the Court concluded on 9 May 2002 that, since the incorporation of the NAFTA, WTOA and AGP into federal legislation, the CITT had become the competent body to deal with challenges to procurement contracts falling within these agreements.

Another interesting question is the relationship between the CITT and government evaluators.

⁴⁶⁰ Canada (Attorney General) v. McNally Construction Inc. (C.A.), 2002 FCA 184, [2002] 4 F.C. 633.

In the “*AmeriData Canada Ltd*” case⁴⁶¹, the CITT defined the relationship by reasoning that the CITT **cannot review the evaluators’ decisions**, but can determine whether the evaluation criteria specified in the RFP were actually used. Thus, in Canada, the CITT principally respects decisions made by the administration as long as the decisions use the evaluation criteria in the RFP.

This principle was reconfirmed by the CITT in its judgment in the “*FMD International Inc.*”⁴⁶² case on 22 August 2000. The CITT held that even though it disagreed with the points awarded to a bidder, it would not substitute its own judgment for that of the government officials unless their conduct was in breach of the trade agreements.

Later, the CITT listed some situations in which it would substitute its judgment for that of the evaluators in its judgment in the “*Northern Lights Aerobatic Team, Inc. v. Department of Public Works and Government Services*”⁴⁶³ case. These situations are when the evaluators:

- have not applied themselves in evaluating a bidder’s proposal;
- have ignored vital information provided in a bid;
- have wrongly interpreted the scope of a requirement;
- have based their evaluation on undisclosed criteria; or
- have not conducted the evaluation in accordance with a fair procedure.

In “*Siemens Westinghouse Inc. v. Canada*” (the “*Siemens Westinghouse*” case) on 24 July 2001, the Court gave examples of what the CITT should examine, holding that the CITT must interpret intricate contractual and legislative provisions and decide whether the tender documents properly identified the requirements and evaluation criteria in the RFP, and whether the procurement was conducted in a way that corresponded with them.⁴⁶⁴

ii. CITT’S RELATIONSHIP WITH JURISDICTIONAL ORGANIZATIONS

Finally, we want to discuss judicial reviews by the Federal Court of

⁴⁶¹ Re AmeriData Canada Ltd., PR-95-011, see http://www.citt-tcce.gc.ca/procure/Determin/archive_pr95011_e.asp, last visited 27 March 2014.

⁴⁶² Re FMD International Inc., PR-2000-007, See https://www.citt-tcce.gc.ca/procure/determin/archive_pr2a007_e.asp, last visited 27 March 2014.

⁴⁶³ Northern Lights Aerobatic Team, Inc. v. Department of Public Works and Government Services, PR-2005-004, see http://www.citt-tcce.gc.ca/procure/Determin/archive_pr2f004_e.asp, last visited 27 March 2014.

⁴⁶⁴ Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services), 2001 FCA 241 at paras. 21-24, 29 (CanLII).

judgments by the CITT.

We will discuss this question in two parts. The first addresses the judicial review standards((i).STANDARDS USED IN JUDICIAL REVIEW), and the second addresses whether the jurisdiction of the CITT overlaps with that of the Courts((ii)THE DUPLICATION BETWEEN THE CITT AND THE FEDERAL COURT).

(i) STANDARDS USED IN JUDICIAL REVIEW

Generally, the Federal Court has a role in federal bid challenges in two situations: the first is to carry out a judicial review of decisions by the CITT, under the provisions of the Federal Courts Act, R.S.C. 1985, c. F-7,⁴⁶⁵ and the second is to hear actions for damages brought under the common law causes of action in tort and contract. The former involves government contracts.

As for the standards used in judicial review, we want to discuss in two sections. One addresses the standards. (a. APPLICATION STANDARDS) The other one addresses the ample or narrow leeway for CITT's decision? (b.APPLICATION RESULT: AMPLE OR NARROW LEEWAY?)

a. APPLICATION STANDARDS

Regarding the standards used in judicial review cases, we need to distinguish the different situations in which different standards are applied in judicial review cases in Canada.

Traditionally, when a judicial review of an administrative decision was carried out, there were three standards used in the review (from lowest to highest): **correctness, (simple) unreasonableness, and patent unreasonableness.**

Besides, regarding the “patent unreasonableness” standard, in the *Siemens Westinghouse* case mentioned above, the Court held (of decisions by the CITT) that “unless they are clearly irrational, they must stand”.⁴⁶⁶

However, in its judgment of 7 March 2008 in “*Dunsmuir v. New Brunswick*”⁴⁶⁷ the SCOC removed the “patent unreasonableness” standard by combining “simple unreasonableness” and “patent unreasonableness” into a single “unreasonableness” standard.

Thus, since 2008 there have been two main standards: **correctness and**

⁴⁶⁵ Federal Courts Act (R.S.C., 1985, c. F-7), see <http://laws-lois.justice.gc.ca/eng/acts/f-7/>, last visited 27 March 2014.

⁴⁶⁶ 2001 FCA 241 at para. 23, see supra note 463.

⁴⁶⁷ *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190.

unreasonableness.

If the dispute is within the expertise of the CITT, it is principally the “reasonableness” standard that would be applied. By contrast, if the dispute is not related to the CITT’s expertise, the “correctness” standard should be applied.

This principle has been established in Canada’s jurisprudence.⁴⁶⁸

b. APPLICATION RESULT: AMPLE OR NARROW LEEWAY?

However, defining the scope of the CITT’s expertise is often difficult in practice.

First, the Court has stated that the CITT’s power to review a procurement procedure gives it a “wide latitude”, since the CITT is granted not only a supervisory role in the procurement procedure but also certain policy and advisory functions. Thus, the Court has held that this role in policy formation, given in the legislation, should be reflected in a wide scope for the CITT’s expertise. This was stated in the judgment in the *Siemens Westinghouse* case of 24 July 2001, a case that concerned a procurement concluded by the PWGSC for service support for Canadian frigates and destroyers.

Secondly, in the 2001 case of “*Profac Facilities Management Services Inc. v. FM One Alliance Corp.*”⁴⁶⁹ (the “*FM*” case), which concerned Canada Post’s property management services contracts, the Court held that the CITT’s judgment on procurement matters can only be reviewed according to the administrative law standard that gives most latitude to the CITT, namely, “patent unreasonableness”(since it was rendered in 2001 when there was still the standard “patent reasonableness”).

Besides, in the FM case the Court also held that the CITT performs exercises of considerable legal, factual and business complexity, and that its work includes the scrutiny and construction of contractual documents, for instance to decide on the applicability of the NAFTA procurement requirements (NAFTA Article 1002), and to determine whether tenders meet the participation conditions (NAFTA Article 1015). Thus, the CITT’s area of expertise is indicated by its broad statutory mandate to investigate complaints “concerning any aspect of the procurement process” (Article 30.11(1) of the CITT Act).

⁴⁶⁸ Canada (Attorney General) v. Envoy Relocation Services, 2007 FCA 16 at paras 15-18 (CanLII). M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd., [1999] 1 S.C.R. 619; Limited v. Zenix Engineering Ltd, 2008 FCA 109 at paras 19-20 (CanLII); Les Systemes Equinox Inc. v. Canada (Attorney General), 2012 FCA 51 at para 4 (CanLII).

⁴⁶⁹ Profac Facilities Management Services Inc. v. FM One Alliance Corp., 2001 FCA 352, [2002] 2 F.C. D-27.

This open point was considered in “*John Chandioux Experts Conseils Inc. v. Canada*”⁴⁷⁰ on 23 March 2004. This case concerned a contract on the automatic translation of weather reports for Environment Canada, and the court held that the CITT’s decisions should be treated with a high degree of deference.

The Canadian jurist Anne C. McNeely has observed that, in practice, disputes about whether an evaluation by a procuring body was performed in accordance with the evaluation criteria or whether a bidder was improperly rejected are often regarded as being within the CITT’s expertise and are given wide deference by the reviewing Court.⁴⁷¹

Conclusively, Canadian jurisprudence has granted ample leeway to the CITT in questions on the CITT’s expertise.

(ii) THE DUPLICATION BETWEEN THE CITT AND THE FEDERAL COURT

The existence of the CITT has given rise to the question of whether the CITT ousts the Federal Court’s jurisdiction to hear challenges arising from federal procurement contracts. Two cases are involved.

The judgment in “*Envoy Relocation Services Inc. v. Ministry of Attorney General of Canada*” was given on 5 May 2008; this case is about a procurement process for the provision of relocation services. Later, in “*TPG Technology Consulting Ltd. v. Her Majesty the Queen*”⁴⁷², in which the judgment was given on 7 September 2011, the plaintiff (also the respondent, TPG) initiated an action before the Federal Court alleging a contractual breach by the defendant (Her Majesty the Queen, the Crown).

In the two cases mentioned, the defendants (the Crown and the Ministry of the Attorney General of Canada) argued that the Federal Court lacked jurisdiction to hear the cases by reason of the existence of the CITT.

The Federal Court decided that the CITT Act does not provide relief that occupies the whole field in terms of the relief available, and that nor does it duplicate the relief that could be offered by a Court. The goal of the CITT Act is not to create a complete procedural code for addressing federal procurement complaints, and the Act was not sufficient to oust the jurisdiction of the Federal Court over procurement related matters.

⁴⁷⁰ *John Chandioux Experts Conseils Inc. v. Canada* (Department of Public Works and Government Services), 2004 FCA 118 at para. 23 (CanLII).

⁴⁷¹ ANNE C. MCNEELY, *supra* note 456, at 58-59.

⁴⁷² *TPG Technology Consulting Ltd. v. Her Majesty the Queen*, 2011 FC 1054.

(iii) CONCLUSION

Thus, the CITT is an independent quasi-judicial organization that deals with complaints about federal procurement contracts. We have discussed two types of relationship: those between the CITT and evaluators from the administration, and those between the CITT and the courts.

In respect of the former:

Under the legislation, the CITT has wide jurisdiction and powers under the CITT Act; in practice, the CITT often respects the decisions of evaluators from the administration.

In respect of the latter:

The jurisdiction of the Federal Court is not ousted by the existence of the CITT.

The Federal Court also still has a role to play in federal bid challenges, by carrying out judicial reviews of the CITT's decisions.

So far as review standards go, a policy of deference has been applied by the Federal Court when considering whether the CITT's decisions fall within its particular expertise.

III. PROCUREMENT OMBUDSMAN

A Canadian government contract is also under the control and management of **an independent organization**, namely, "The Office of the Procurement Ombudsman (OPO)", which is included within the purview of the Minister of Public Works and Government Services Canada (MPWGSC), but operates at an arm's length from that department.

This organization was created on 5 May 2008 by the federal government to review complaints about the award of contracts for goods valued at less than C\$25,000 and for services valued at less than C\$100,000 **which often do not fall within the jurisdiction of the CITT.**

The OPO's overall objective is to strengthen the fairness, openness and transparency of federal procurement. Also, it reviews complaints from suppliers in the procurement procedures and solves them quickly and efficiently, which possibly results in immediate relief to suppliers.

The OPO is different from the CITT because it has not been granted the jurisdiction to cancel or modify any contractual terms and conditions, but has the power to recommend compensation in certain circumstances.

On receiving a complaint, the OPO checks whether the complaint falls within OPO's regulatory parameters. If it does, the OPO launches an investigation procedure and makes a report, with findings and recommendations, which is available to the public on the OPO's website.

If the complaint does not fall within its parameters, the OPO advises the bidder of other appropriate avenues for resolution.

Generally, the period for filing a complaint before the OPO is 30 days from public notice of the contract award, and the period for the OPO to finish its report is 120 days from receipt of the complaint.⁴⁷³

Note that by its nature, the OPO is neither a judicial organization nor an AT. OPO can make recommendations, not decisions. The OPO's recommendation is the final stage in the OPO procedure. The Department of Public Works and Government Services Act or the Procurement Ombudsman Regulations **have no provision for an appeal process**. Therefore, the only mechanism available for suppliers **would be judicial review if they don't agree with the recommendation**.

A judicial review will generally focus on the way in which the ombudsman arrived at the decision, not on the individual facts and merits of the dispute itself. Thus, unless there are jurisdictional or other significant errors, a court is unlikely to interfere with an ombudsman's conclusions.⁴⁷⁴

In practice, an application for judicial review is rarely made because the OPO often offers and encourages bidders ADR services for contractual disputes regarding the interpretation or application of a contract's terms and conditions.⁴⁷⁵ For complex procurements, the government even engages "independent fairness monitors" (the name of the program) to provide assurance that the process is being conducted in a fair, open, transparent and compliant manner.⁴⁷⁶

⁴⁷³ For the procedure followed by the OPO, see <http://opo-boag.gc.ca/red-ard/quoiattendre-whatexpect-eng.html>, last visited 28 March 2014.

⁴⁷⁴ See Forum of Canada Ombudsman homepage, <http://www.ombudsmanforum.ca/en/?p=571>, last visited 29 March 2014.

⁴⁷⁵ See Office of the Procurement Ombudsman homepage, <http://opo-boag.gc.ca/red-ard/redfaq-adrfag-eng.html>, last visited 29 March 2014.

⁴⁷⁶ Fairness Monitoring (FM) Program, see <http://www.tpsgc-pwgsc.gc.ca/se-fm/index-eng.html>, last visited 19 March 2014.

SECTION II: DISPUTES CONCERNING THE EXECUTION OF CONTRACT

We will discuss the particularities in the execution of administrative contracts from two angles. One addresses the prerogatives of administrations in contracts. Their characteristics reveal that administrative bodies have some prerogatives that parties in private contracts do not have (1.PREROGATIVES OF ADMINISTRATIONS IN CONTRACTS).

Next, there is a discussion regarding the principle of financial balance in administrative contracts (2. THE PRINCIPLE OF FINANCIAL BALANCE OF A CONTRACT).

1.PREROGATIVES OF ADMINISTRATIONS IN CONTRACTS

Regarding the prerogatives of administrative contracts, in Canada, under the common law tradition, the same rules that are applied to private contracts are applied to administrative contracts.

In China, the administrative contract system is developing and is incorporating some aspects of foreign administrative contract law, especially that of France.⁴⁷⁷

An administrative contract system is a relatively new domain in Taiwan's administrative law field, compared to unilateral administrative decisions.

Taiwan's administrative contract system can be divided into two aspects. One addresses the definition of administrative contracts; the other addresses its effects.

Regarding the definition of administrative contracts, Taiwan has adopted the German system (from the fourth chapter: Article 54 to 62 in Germany's Administrative Procedure Law) in Article 135 of the Administrative Procedure Act of Taiwan (APAT). The definition and the standards used to distinguish administrative contracts and private ones are mentioned (In: SECTION II. IN PRACTICE: DIFFERENT EVOLUTIONS IN ADMINISTRATIVE LAW AND ARBITRATION LAW FIELDS).

However, regarding their effects and execution, Taiwan references the

⁴⁷⁷ Wang Yan (王燕), Administrative Contracts and Dispute Settlement Mechanism (行政合同及其争议的解决机制) (May 21, 2010) (unpublished Master's thesis, Shandong University)(on file with author).

French system.

In France, the four prerogatives of administration in contracts discussed below can be applied to all executions of administrative contracts, the last three categories of which were created by the CE: the right of direction and control (A.THE RIGHT OF DIRECTION AND CONTROL), sanctions (B.THE RIGHT TO SANCTION), unilateral modification (C.THE RIGHT OF UNILATERAL MODIFICATION) and termination (D.THE RIGHT OF UNILATERAL TERMINATION).

Our discussion will be based on the system in France and compare that in the other three countries.

A.THE RIGHT OF DIRECTION AND CONTROL

In this topic, we will divide the discussion into four sections, introducing the system in France (I.IN FRANCE), in China (II.IN CHINA), in Canada (III.IN CANADA) and in Taiwan (IV.IN TAIWAN).

I.IN FRANCE

In France, firstly administrative bodies **have the right to control contractual execution**, which authorizes administrative bodies to ascertain whether the administrative contract has been well executed. This prerogative is also important for contracts involving the “delegation of public services” (“*délégation de service public*,” DSP) because the delegate (“*délégataire*,” meaning the person who receives the delegation from an administrative body) of a local government is obliged to send a “report of activities” to the delegating entity (“*délégant*,” which refers to the administrative body that delegates) every year to account for its financial management and service quality. Thus, this prerogative is helpful to mandate that good public service is being provided.

II.IN CHINA

In China, the administration is given certainly prerogatives in contracts, not only in individual administrative contracts ((1). INDIVIDUAL ADMINISTRATIVE CONTRACTS) but also under general management rules ((2). GENERAL MANAGEMENT RULES).

(1). INDIVIDUAL ADMINISTRATIVE CONTRACTS

In an individual administrative contract, the administration's prerogative is justified by the goal and the particular nature of the administrative contract: the prerogative ensures that the performance of the administrative contract achieves what is in the public interest.

As the jurist Zhang Li (張莉) has stated, the contractor should still be subject to the administration's direction and control, even if the direction is over the contractual obligations, which are regarded as being less important than the administration's unilateral direction rights in the contract.⁴⁷⁸

(2). GENERAL MANAGEMENT RULES

The administration's prerogative can be found in general administrative management regulations in China.

An example is the administrative notice (in French "avis") issued by the Ministry of Agriculture on 12 September 1992 about the management of lease contracts of agricultural land,⁴⁷⁹ which indicates that the administration should manage the signing and performance of the contract. The contracting administration is also responsible for surveying and controlling all acts involving agriculture land, including the transfer, lease and mortgage of land.

III. IN CANADA

In Canada, the administration is also given certainly prerogatives in contracts, not only in individual administrative contracts ((1).INDIVIDUAL ADMINISTRATIVE CONTRACTS) but also under general management rules ((2). GENERAL MANAGEMENT RULES).

⁴⁷⁸ Zhang Li (張莉), *Arbitrage International et Contrats Publics en Chine*, in CONTRATS PUBLICS ET ARBITRAGE INTERNATIONAL 493, 509 (Mathias Audit ed., 2011).

⁴⁷⁹ See Ministry of Agriculture Homepage, http://www.moa.gov.cn/zwlrm/zcfg/flfg/200601/t20060120_539603.htm, last visited 2 April 2014.

(1).INDIVIDUAL ADMINISTRATIVE CONTRACTS

In Canada, the administration's prerogative in respect of the direction and control of the contract can be found in many contracts in which the administration can require the contractor to continue performance. This prerogative is also based on the principle of "continuity of public service".⁴⁸⁰

(2). GENERAL MANAGEMENT RULES

The power of the administration to direct and control includes, in practice, control over **sub-contracting** by the contractor, which can be done in accordance with certain exceptions provided by laws, administrative regulations, or even in the contract, and with the contracting administration's authorization⁴⁸¹ which has often been given previously in writing in some general bidding document or publicity.

IV.IN TAIWAN

In Taiwan, the administration is also given certainly prerogatives in contracts, not only in individual administrative contracts ((1). INDIVIDUAL ADMINISTRATIVE CONTRACTS) but also under general management rules ((2). GENERAL MANAGEMENT RULES).

(1). INDIVIDUAL ADMINISTRATIVE CONTRACTS

In Taiwan, the administration's prerogative in respect of the direction and control of a contract is provided in **Article 144 of the Administrative Procedure Act of Taiwan (APAT)**.

Note that this prerogative can only be applied in compliance with two important conditions.

The first condition requires that **one party should be a citizen** (which includes a private legal person) and, thus, the prerogative does not apply to an administrative contract concluded between two administrative authorities.

⁴⁸⁰ LEMIEUX, *supra* note 199, at 461.

⁴⁸¹ LEMIEUX, *supra* note 199, at 461.

The second condition requires that **the unilateral power to direct and control should be given in writing in the contract.**

Thus, Taiwan is different from France, Canada and China because in Taiwan the administration's prerogative in respect of the direction and control of a contract does not seem to be justified by the nature of the administrative contract **but rather by the agreement of the parties.**

(2). GENERAL MANAGEMENT RULES

Chapter 4 of the Taiwan procurement law (TPL) provides some prerogatives for the contracting administration in respect of the management of the performance of the contract, allowing the administration to control sub-contracting and giving it the power to establish an inspection procedure (Article 70).

Certes, under Article 144 of the APAT, most of these provisions of the TPL will previously have been included in writing in the bidding document or publicity.

B.THE RIGHT TO SANCTION

I.IN FRANCE

In France, the second is the right to sanction, which administrative bodies often execute after an interpellation if the contractor has not respected its contractual obligations.

This prerogative was established by the CE in “*Dame veuve Tromper Gravier*” on 5 May 1944⁴⁸².

The methods of imposing sanctions are diverse and depend upon the gravity of the situation: from the less grave, which results in pecuniary sanctions, to the most grave, which results in the termination of the contract.⁴⁸³

⁴⁸² CE, Sect., 5 May 1944, Dame Veuve Trompier-Gravier, Rec. Leb., p. 133, GAJA, 56.

⁴⁸³ JEAN WALINE, DROIT ADMINISTRATIF 472 (24th ed. 2012).

II. IN CHINA

In Chinese administrative law, the notion of the “administration’s right to sanction” is so wide that it includes the administration’s right to terminate the contract without any liability.⁴⁸⁴

This right to sanction does not exist in private contracts in China.

The jurist Zhang Li has argued that the execution of this right to sanction has a specifically Chinese nature (*une spécificité chinoise*).

For example, the fundamental basis for this right is not the parties’ mutual agreement but, rather, **legal provisions**. In practice the execution of this right is very efficient by reason of its severity and direct applicability.

Zhang Li emphasized that the right to sanction is necessary because a contractual penalty would be insufficient, and it provides an additional guarantee that the administrative contractual goal will be realized.

The concrete form of the right may be a written warning, a fine, the confiscation of the goods in question, or the manager’s personal administrative responsibility.

For example, under Articles 39 and Article 48 of the administrative regulations of 22 November 2007 on the management of the Economic Zone in Shenzhen (a city in Guangdong Province), the contracting administration has the right to confiscate or demolish illegal constructions on the land subject to the contract, and to impose personal responsibility on the manager.⁴⁸⁵

III. IN CANADA

The administration’s unilateral sanction rights **are habitually provided in contractual clauses** in Canadian administrative contracts. A judge would consider whether a penal clause was abusive, and may reduce its effect or quash it.

Under Article 1623 of the Civil Code of Quebec, the amount of the stipulated penalty may be reduced if the creditor has benefited from partial performance of the obligation or if the clause is abusive. The jurist Denis Lemieux stated that this

⁴⁸⁴ Zhang Li (張莉), *supra* note 478, at 511.

⁴⁸⁵ See

http://www.szft.gov.cn/bmxx/qxmhjdbsc/zwxgk/zcfg/csgl/201107/t20110715_274991.html, last visited 2 April 2014.

Article applies not only to adhesion contracts but also to all public procurement contracts.⁴⁸⁶

In addition, Chapter VII of the “Act respecting contracting by public bodies” (*“Loi sur les contrats des organismes publics”*, Chapter C-65.1⁴⁸⁷) grants a contracting administration many regulatory powers in the contract, including the power to **establish monitoring measures for contractors**, such as sanctions (Section 12 of Article 23).

IV. IN TAIWAN

In Taiwan, the contracting administration can execute a unilateral sanction, whether in the form of a pecuniary penalty, a coercive order, or the termination of the contract, to penalize the contractor for his default in the performance of a contract.

In practice, the most important case is **No. 533⁴⁸⁸ of the Constitutional Court**, which concerned a contract in the social insurance system, in which the contracting administration had **the power to discipline the contractor and to set guidelines for the performance of the contract**; these powers were regarded as a standard prerogative for an administration in an administrative contract.

Moreover, under Article 110 of the Taiwan procurement law, in some situations, for instance if a bidder has behaved in a seriously illegal way by, for example, committing a criminal act related to the contract, the contracting administration can give notice of the facts and insert a negative note in the bulletin published by the Government Procurement Gazette. Under Taiwanese law this is called the **“Debarred List”** and is part of the system to **“Announce The Bad Supplier”**.⁴⁸⁹

⁴⁸⁶ LEMIEUX, *supra* note 199, at 459.

⁴⁸⁷ See

http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/C_65_1/C65_1.html, last visited 3 April 2014.

⁴⁸⁸ See *supra* note 303.

⁴⁸⁹ Lee Shiu Ming (李旭銘), Study on Debarred List of The Government Procurement Act of Taiwan (政府採購法不良廠商爭議問題之研究), (2005) (Master's thesis, Fu Jen Catholic University in Taiwan) at 20.

C.THE RIGHT OF UNILATERAL MODIFICATION

I.IN FRANCE

In France, the third prerogative is the right of unilateral modification, according to which the administrative body **has the right to modify a contract to meet practical service needs**. This prerogative was established by the CE in the case “*Union des transports publics urbains*⁴⁹⁰” on 2 February 1983 and confirmed again by the CE in the “*Compagnie générale des eaux et commune d'Olivet*⁴⁹¹” case on 8 April 2009, and is primarily based on the principle of the mutability of public service.

Although the contractor does not have the right to modification, two fundamental guarantees exist. The first is that this right cannot endanger the financial balance. The scope of this right should be limited,⁴⁹² which means that an administrative body’s modification cannot touch the fundamental elements of the contract.

The second guarantee is in the conventions concluded with local government that involve the organization of public services. The contractor can demand that the “judge of contract” (“*le juge du contrat*,” administrative judges who are charged with declaring the nullity of contracts) annul an illegal modification.⁴⁹³

Under an administrative body’s unilateral modification, the contractor can exclusively demand damages and possibly supplementary interest if a certain modification is not based on a reason involving the public interest. Also, the contractor can demand the termination of the contract if the modification is very important to the contractual stipulations.

II.IN CHINA

In China, if the evolution of circumstances that are external to an administrative contract have continuously led its execution to be noncompliant

⁴⁹⁰ CE, 2 février 1983, *Union des transports publics et urbains*, Lebon p.33

⁴⁹¹ CE, 8 avril 2009, *Compagnie générale des eaux - Commune d'Olivet*, req.n° 271737.

⁴⁹² JEAN WALINE, *supra* note 483, at 473.

⁴⁹³ PIERRE-LAURENT FRIER & JACQUES PETIT, *DRIT ADMINISTRATIF* 415 (8th ed. 2013).

with, or even injurious to, the public interest, an administrative body has the right to unilaterally modify it.

We will discuss this issue in two sections. One section addresses this principle in China ((1)THE PRINCIPLE OF THE RIGHT OF UNILATERAL MODIFICATION). The other section addresses the limits of the right of unilateral modification ((2)THE LIMITS OF THE RIGHT OF UNILATERAL MODIFICATION).

(1)THE PRINCIPLE OF THE RIGHT OF UNILATERAL MODIFICATION

An administrative body's unilateral modification right is sometimes provided in **administrative regulations**, for instance, in Article 42 of the provisional administrative regulations regarding the concession and transfer of State-owned urban land that were issued by the General Office of the State Council (GOSC) on 19 May 1990 (in Chinese, “中华人民共和国城镇国有土地使用权出让和转让暂行条例”, hereinafter “CTSOL”).

Note that, as jurist Zhang Li (張莉) stated, in China, this mechanism is often in the form of a **procedure** pursuant to certain administrative regulations that allows **discussion antecedent** to the contract.

For example, Article 19 of the provisional administrative regulations regarding State industrial enterprise exploitation contracts (in Chinese “全民所有制工业企业承包经营责任制暂行条例”), which were issued by the GOSC on 27 February 1988, granted the parties the right to **negotiate a right** to modify or terminate an administrative contract. However, jurist Zhang Li described this as a “**consultation between parties**” (*une concertation des parties*) and observed that the article had provoked a great deal of criticism from administrative law jurists.⁴⁹⁴

However, Zhang Li noted that, in the practical discussion, in China, **socialism should not be completely ignored** because, in fact, Chinese administrative bodies are often **much more powerful** than their counterparties. Thus, although it is called “consultation,” in practice, it is very close to a **right to unilateral modification by the administrative bodies**.

(2)THE LIMITS OF THE RIGHT OF UNILATERAL MODIFICATION

Zhang Li held that, in China, an administrative body's unilateral modification

⁴⁹⁴ Zhang Li (張莉), *supra* note 478, at 510.

right should be executed **with two restrictions**.

The first restriction specifies that the right should be justified by **the necessity to preserve the public interest**. The modification should **be proportional to** the evolution of external circumstances; otherwise, it would constitute **an abuse of the administrative body's power**.

The second restriction specifies that the contractor should receive **reasonable financial compensation** pursuant to the principle of economic equilibrium that justifies the administrative body's prerogative in contracts.

For example, under Article 42 of the CTSOUL, the contractor can receive compensation based upon the period of use, the practical exploitation and the circumstances of the usage of land.

III. IN CANADA

An administrative body's unilateral modification right is acknowledged in Canada.

We will discuss the issue in two sections. One section addresses the principle in Canada ((1)THE PRINCIPLE OF THE RIGHT OF UNILATERAL MODIFICATION). The other section addresses the limits of the right of unilateral modification ((2)THE LIMITS OF THE RIGHT OF UNILATERAL MODIFICATION).

(1)THE PRINCIPLE OF THE RIGHT OF UNILATERAL MODIFICATION

Note that, as jurist Denis Lemieux stated⁴⁹⁵, an administrative body's unilateral modification right is often included in a contract. This is slightly different from the rule in France, in which an administrative body's unilateral modification right stems from the nature of an administrative contract.

(2)THE LIMITS OF THE RIGHT OF UNILATERAL MODIFICATION

There are two main limitations on an administrative body's unilateral modification right.

The first limitation specifies that the modification should **be minor in proportion**. It cannot influence the equality of the bidders ("*l'égalité des soumissionnaires*," which means that the procedure is fair and equitable for

⁴⁹⁵ Denis Lemieux, *supra* note 199, at 458.

bidders) and **does not modify the essential core of the contract.**

In the case, “*Adricon Ltée v. East Angus*,” of 20 December 1977,⁴⁹⁶ which concerned a public arena building contract in which one threshold was the validity of the administrative body’s (municipal council) unilateral modification, the Supreme Court of Canada (SCOC) defined the modification as **being minor in relation to the contract as a whole** and acknowledged its validity.

How should a “minor” modification be demarcated? The SCOC held that a modification that **entailed an increase in the price would not alter the fixed nature or any essential term of the contract.**

The second limitation addresses **the compensation** that is given to a contractor. In practice, a contractual administrative body often excludes its obligation to provide compensation by inserting a clause in the contract. If an administrative contract is an adhesion contract, the court will examine whether the clause that disclaims the administrative body’s obligation is abusive under Article 1379 of the Quebec Civil Code.

IV. IN TAIWAN

An administrative body’s unilateral modification right is also acknowledged in Taiwan. We will introduce this issue in two sections. One section addresses the legislative provision ((1)IN LEGISLATION). The other section addresses practical situations ((2)IN PRACTICE).

(1)IN LEGISLATION

An administrative body’s unilateral modification right is provided in Article 146 of the Administrative Procedure Act of Taiwan (APAT), which also provides the right to unilateral termination. Thus, these two unilateral prerogatives for administrative bodies with regard to their contracts **are subject to the same rules in Taiwan**; details regarding the conditions for their application will be introduced below in the discussion of the unilateral termination right.

However, if modification is still possible, an administrative body should modify, not terminate, a contract. Thus, **termination should only be a method of last resort.**

⁴⁹⁶ *Adricon Ltée v. East Angus* (Town of), 1977 CanLII 197 (SCC), [1978] 1 SCR 1107, <<http://canlii.ca/t/1z74j>> retrieved on 2014-04-12

(2) IN PRACTICE

We can observe two relevant aspects in practice.

One aspect is that, in practice, an administrative body **rarely uses its unilateral power**, although as jurist Chwen-Wen Chen stated⁴⁹⁷, this is the part in which **the influence of French administrative law on Taiwan's administrative law is most evident**.

The second aspect addresses a case that is important and has had a broad influence. This case also involves the legality or constitutionality of an administrative contract and will be introduced below (see SECTION III: DISPUTES CONCERNING THE CONTENT OF CONTRACT).

In Taiwan, all schools, including elementary schools, junior high schools, senior high schools and universities, can be divided into “private schools” or “public schools,” primarily depending on the source of their financial resources. The relationship between the State and a professor in a public school is traditionally defined **by an administrative contract**.

Most obligations and rights are included in this administrative contract, including the right of professors to save money in a certain specified bank that has a higher interest rate.

In practice, the concrete interest rate is often governed by certain laws executed by the national financial administrative body. Traditionally, it has been about 18% per year.

During the past two decades, interest rates throughout the world have been low because of the economic crisis. Thus, the traditional interest rate resulted in a burden on the national finances and an unequal atmosphere in Taiwan.

In 1996, an administrative body modified the laws that governed the interest rate that was applicable to all related administrative contracts.

Thus, many professors in public schools argued that the administrative body's unilateral modification (the reduction of the interest rate) of the contract injured the professors' rights, and thus, they contested its validity.

The Constitutional Court of Taiwan entered its judgment (No. 717) on 20 February 2104, which indicated that the administrative body's unilateral modification to reduce the interest rate had balanced the public interest (in addressing concerns related to national finances and in creating a situation that

⁴⁹⁷ Chwen-Wen Chen, *supra* note 300, at 941.

more fair to society) and the possible damages (decreased interest income for the professors). Consequently, the unilateral modification was held to be valid.

D.THE RIGHT OF UNILATERAL TERMINATION

I.IN FRANCE

In France, the fourth prerogative, the right to **terminate contracts for motives involving the public interest**, was confirmed by the CE in the case “*Distillerie de Magnac-Laval*⁴⁹⁸” on 2 May 1958 and reconfirmed in “*Société des téléphériques du Mont-Blanc*⁴⁹⁹” on 31 July 1996, a case involving a telepherique exploitation contract.

This right is one of the most essential prerogatives in administrative contracts and any contractual clause that excludes this right would be a nullity pursuant to the ruling of the CE in the “*Ass. Eurolat*⁵⁰⁰” case on 6 May 1985.

After an administrative body’s unilateral termination, the contractor can demand integral indemnity, which includes all damage that the contractor suffers, including paid expenses, surcharges, investment costs and importantly, foreseeable lost profits.⁵⁰¹

II.IN CHINA

In China, as in other countries, public law is regarded as a special branch of the law that is separate from common law (which includes private law).

Even so, in most situations, private law is still dominant in disputes arising from administrative contracts. For example, if the administration does not perform its contractual obligations, the contractor can refuse to perform its contractual obligations by invoking Article 67 of the Contract Law of China.

However, there is a special right, the right to terminate the contract unilaterally, that is not contained in private contracts in China.

The unilateral termination right should be executed **under the same conditions as those that apply to unilateral modification** and were discussed

⁴⁹⁸ CE, 2 May 1958, *Distillerie de Magnac-Laval*, Rec., p. 246.

⁴⁹⁹ CE, 31 July 1996, *Société des téléphériques du Mont-Blanc*, n° 126594.

⁵⁰⁰ CE, 6 May 1985, *Assoc. Eurolat*, Rec. 141.

⁵⁰¹ PIERRE-LAURENT FRIER, *supra* note 493, at 416.

above (the necessity to preserve the public interest and to give reasonable compensation).

Finally, in China, the administration's unilateral termination right, when accompanying the exemption of any indemnity by the administration, is also regarded as a unilateral sanction.⁵⁰²

III. IN CANADA

In Canada, a unilateral termination right is granted under certain common law or civil law rules. For example, under Article 2125 of the Quebec Civil Code (C.c.Q.), a party may unilaterally terminate the contract even though the work or the provision of the service is already in progress.⁵⁰³

As the jurist Denis Lemieux has stated ⁵⁰⁴, an indemnity should be available only in cases when **some part of the contract has been performed or is in process**.

The scope of the indemnity is, in principle, **limited to the damage suffered**, and **does not include the expected loss of income**; this loss is only covered by the indemnity in cases in which the administration's unilateral termination is executed maliciously (*de mauvaise foi*), under Article 2129 of the C.c.Q.

The definition of "maliciously" in Canadian jurisprudence was created in the case of "*Roch Lessard Inc. v. Immobilière S.H.Q.*"⁵⁰⁵ on 20 October 2003. The court indicated that "maliciously" means that the right was executed with the aim of injuring others or in an excessively unreasonable way (*exercé en vue de nuire à autrui ou d'une manière excessive et déraisonnable*⁵⁰⁶).

In addition, some special laws ⁵⁰⁷ expressly provide for contractual termination without compensation, but Canadian jurisprudence has adopted an attitude that is **favorable to the contractor** by indicating that it is disingenuous for the administration to assert that a legislative enactment constitutes a frustrating act beyond its control. Thus, in the case of "*Wells v. Newfoundland*"

⁵⁰² Zhang Li (張莉), *supra* note 478 at 513.

⁵⁰³ Civil Code of Québec, see <http://ccq.lexum.com/ccq/en/#!/fragment/sec2125>, last visited 12 April 2014.

⁵⁰⁴ Denis Lemieux, *supra* note 199 at 459.

⁵⁰⁵ Roch Lessard inc. c. Immobilière S.H.Q., [2003] J.Q. no.14425, 2003 CanLII 32361 (C.S.).

⁵⁰⁶ In the paragraph 28 of the judgment, see *supra* note 505.

⁵⁰⁷ For example, Cabinet Directive MC 0359-'90 directed that the respondent receive no compensation.

on 15 September 1999,⁵⁰⁸ a case regarding a public servant nomination contract, the SCOC limited the application of the law and compensated the respondent for his loss.

IV. IN TAIWAN

In Taiwan, under Article 146 of the APAT, the government can unilaterally terminate or modify an administrative contract to protect the public interest. This provision is an adoption of the previously mentioned French right.

However, Taiwan's administrative law jurists traditionally have been influenced by Germany. Thus, although the French right to unilateral modification by an administrative body was adopted in the APAT, there were some adjustments.

Firstly, Article 146 required the modification or termination right to be based on "**grave harm to the public interest**," which jurists consider to have been influenced German legislation.⁵⁰⁹ It is slightly different from the original French principles, which were based on continuity, adjustability and the unalienable nature of public service.

Taken together, in the legislative field, an administrative body's role in the unilateral termination or modification right in France is more "active" than its corresponding role in Taiwan.

In jurisprudence, because this unilateral termination or modification right is still new and unfamiliar in Taiwan, **there are not many cases** that enable the observation of trends in the jurisprudence. However, there was a case in which administrative judges enlarged the principles of Article 146 to include the negotiation phase.⁵¹⁰

It was a BOT administrative contract in which the plaintiff (a private enterprise) had been selected as the "superior bidder" (having received the award or quality to conclude an administrative contract among many competitive candidates, but which had not yet been concluded). The enterprise brought a lawsuit before THAC to order the administrative body to conclude the contract as

⁵⁰⁸ Wells v. Newfoundland, [1999] 3 S.C.R. 199.

⁵⁰⁹ Hsu Tzong-Li (許宗力), *On Administrative Contract Law* (行政契約法概要), in REPORT ON ADMINISTRATIVE PROCEDURE 315 (1990).

⁵¹⁰ THAC, judgment No. (Su-zhi) 569, Year 99 (臺灣高等行政法院 99 年度訴字第 569 號) (Judgment date: April 14, 2011) and TSAC, judgment No. (Pan-zhi) 635, Year 98 (最高行政法院 98 年度判字第 635 號) (Judgment date: June 11, 2009).

soon as possible.

Since the time period of this contract was 35 years and involved a grave public interest, THAC and TSAC referred to the essence of Article 146 and considered that, since an administrative body has the right to termination or modification during the execution of the contract (**after the signing of the contract**), the administrative body also has the right to a “hesitating period” (a period given to the administrative body to hesitate or reflect about whether to conclude the contract or how to conclude it within the context of the contract) **before signing** an administrative contract.

E.CONCLUSION

In the execution phase, to promote the implementation of the public interest, administrative law grants an administrative body some prerogative rights. The most important is that the administrative body has the right to terminate or modify an administrative contract unilaterally, a right that does not exist with regard to private contracts.

In practice, how to examine the legality of an administrative body's performance of this unilateral right and to evaluate the “necessity for a public interest,” especially in cases lacking additional terms in administrative contracts, will become a crucial question for administrative judges.⁵¹¹ Particularly, it does not involve only the protection of individual personal rights, rather, it concerns the safeguarding of public interests.

Thus, questions occurring in the execution phase of administrative contracts regarding an administrative body's prerogatives are different from those in private contracts as a result of their nature. Even in the acceptable legislation discussed in first part of this dissertation, **arbitrators should integrate more public law thinking into arbitral procedures and arbitration awards.**

2. THE PRINCIPLE OF FINANCIAL BALANCE OF A CONTRACT

In administrative contracts, the contractor cannot suspend the contractual execution (even though the contracting administrative body fails to perform) because this suspension would endanger the continuity of public service

⁵¹¹ PIERRE-LAURENT FRIER & JACQUES PETIT, DROIT ADMINISTRATIF 414 (8th ed. 2013).

pursuant to the CE in the “*Ville d’Amiens*⁵¹²” case on 7 January 1976.

Thus, to continue the execution of administrative contracts to protect the public interest, the contractor has been granted some rights to contest. This is called **the principle of financial balance**. This principle is revealed mainly in two theories. One is the theory of the “act of prince” (“*fait de prince*”, *FDP*). The other one is the theory of the unforeseen (“*imprévision*”).

In addition, French doctrine has mentioned two other situations. One is the majeure force (“*La force majeure*”), a situation that frees both parties from their contractual obligations when an extraordinary circumstance outside of the parties’ control occurs that makes the execution of the contract impossible. Jurist Jean Waline considered majeure force to be the only reason that would permit the contractor to be excused from the contractual relationship.⁵¹³

The other one is the unforeseen obligation theory (“*sujétions imprévues*”), which is applicable exclusively to public works contracts, while the theory of unforeseen events is applicable to all administrative contracts.

Since these two latter theories are not an importance equal to that of the former two theories (because under majeure force, a contract can be terminated, and the unforeseen obligation theory applies exclusively to public works contracts), we will not discuss them independently, but will compare them in introducing the “*fait du prince*”(A.FAIT DU PRINCE(FDP)) and the theory of unforeseen events (B.THE THEORY OF THE UNFORESEEN EVENTS (“IMPRÉVISION”).).

A.FAIT DU PRINCE(FDP)

In Canada and China, there is no need for a special independent discussion about the “fait du prince” theory; this theory has, in fact, been integrated into the indemnity that is part of the administration’s unilateral modification right discussed earlier.

Thus, we will introduce the “fait du prince” theory in two sections: France (I.IN FRANCE) and Taiwan (II.IN TAIWAN).

⁵¹² CE, 7 January 1976, Ville d’Amiens.req.N° 92888.

⁵¹³ JEAN WALINE, *supra* note 483, at 471.

I. IN FRANCE

In France, the FDP is a principle under which an administrative body should indemnify the contractor if the contracting administrative body implements a measure that adds to the burden in the execution of an administrative contract. Its goal is to reestablish the contractual financial balance.

In contrast to the aforementioned unilateral modification, the FDP requires that the transformation of the conditions of the contractual execution is due to the “**contracting**” administrative body, which executes its power “**out of contract.**” Jurists have described this as the competence foreign to his quality as a contractual party (*compétence étrangère à sa qualité de partie au contrat*⁵¹⁴).

Jurist Laurent Richer described the FDP as an intervention by administrative authority but this intervention is not a cause of exoneration but constitutes a source of administrative liability “without fault”⁵¹⁵.

However, in practice, it is complex and depends upon the different subjects (**who executes?**) and the applicable form (**individual or general administrative act?**). If the contracting administrative body executes **individual acts**, they are always applicable since the damage is certain and direct⁵¹⁶, while **general acts** are applicable only in cases involving essential contractual elements and causing direct repercussions, for example, the creation of a tax that directly involves the contractual execution.⁵¹⁷

If a surcharge is not due to a contracting administrative body, for example, by the issuance of an administrative decree, State act (for a local government’s contractor) or the modification of a circulation plan by a city government, jurist Jean Waline believed that FDP is never applicable and that this situation would be similar to that required for the application of the theory of unforeseen events, which is discussed below.⁵¹⁸ However, jurist Jacqueline Morand-Deville considered it to be an indirect modification and believed that FDP could apply.⁵¹⁹

In jurisprudence, if the measures have not arisen from the contracting administrative body, the CE has refused to apply FDP, as is the case in “*Ville de*

⁵¹⁴ PIERRE-LAURENT FRIER & JACQUES PETIT, *supra* note 511, at 417.

⁵¹⁵ LAURENT RICHER, *DROIT DES CONTRATS ADMINISTRATIFS*, 313 (8th edition, LGDJ, 2012).

⁵¹⁶ LAURENT RICHER, *supra* note 515, at 315.

⁵¹⁷ JEAN WALINE, *supra* note 483, at 471.

⁵¹⁸ For the classification mentioned, see JEAN WALINE, *supra* note 483, at 475.

⁵¹⁹ JACQUELINE MORAND-DEVILLER, *DROIT ADMINISTRATIF* 412 (13th ed., 2013)

*Toulon*⁵²⁰ on 4 March 1949, "*Ville d'Elbeu*⁵²¹" on 15 July 1949 and "*Comp. du Chemin de fer de Bayonne*⁵²²" on 20 October 1971.

With regard to legislative acts, based on older jurisprudence, FDP was not applied in the "*Duchatellier*⁵²³" case on 11 January 1838, but contemporary jurisprudence has allowed FDP with respect to legislative acts in the "*Loi d'orientation pour l'aménagement du territoire*⁵²⁴" case, which was decided by the Constitutional Counsel on 26 January 1995, considering that the law can modify the context of an administrative contract.

However, jurist Laurent Richer reminded that the law can be justified by reason of sufficient public interest pursuant to the opinion of the Constitutional Court in his judgment of "*Société EDF*" case on 24 June 2011⁵²⁵.

Comparatively, if the measures only make contractual execution difficult, jurisprudence takes a conservative position; for example, in the cases "*Soc. du parking du square Boucicaut*⁵²⁶" of 18 March 1983 and "*Comp. marchande de navigation*⁵²⁷" of 20 May 1904, the CE held that certain administrative regulations (*acte réglementaire*) did not cause damage to essential contractual conditions and refused to apply FDP.⁵²⁸

Regarding the effects of FDP, the prevailing legal doctrine also has considered **indemnity to be integral**⁵²⁹, even though the power executed by contracting administrative authority is **correct and has no fault**⁵³⁰.

II. IN TAIWAN

In Taiwan, Article 145 of the APAT adopted FDP and the theory in Taiwan was named "The theory of Acts of King", although there are some differences.

In Taiwan, Article 145 applies to administrative acts made by "**another administrative body**" that is subject to the same **public legal person** to which

⁵²⁰ CE, 4 May 1949, Ville de Toulon, Recueil Lebon p. 197.

⁵²¹ CE, 15 July 1949, Ville d'Elbeuf, Rec. p. 358.

⁵²² CE, 20 October 1971, Comp. du Chemin de fer de Bayonne, Rec. 264.

⁵²³ CE, 11 January 1838, Duchâtellier, Lebon 7.

⁵²⁴ Cons. Const, 26 January 1995, déc. n° 94-358, Loi d'orientation pour l'aménagement et le développement du territoire.

⁵²⁵ LAURENT RICHER, *supra* note 515, at 316.

⁵²⁶ CE, 18 March 1983, Soc. du parking du square Boucicaut, RDP 1983.423.

⁵²⁷ CE, 20 May 1904, Comp. marchande de navigation, Rec. 425.

⁵²⁸ JACQUELINE MORAND-DEVILLER, *supra* note 519, at 412.

⁵²⁹ JEAN WALINE, *supra* note 483, at 475 and PIERRE-LAURENT FRIER & JACQUES PETIT, *supra* note 511, at 417.

⁵³⁰ LAURENT RICHER, *supra* note 515, at 315.

the contracting administrative body is subordinate” (see below). **Administrative acts performed by the contracting administrative body are not included.** This is quite different from the French provision.

In Taiwanese administrative law, a **“public legal person” is different from an “administrative body.”** “Public legal person” means a legal person established under public law. Contemporarily, there are only three categories of “public legal person” in Taiwan: the State (Republic of China), the political community and others (see below).

The State (Republic of China) is a public legal person, while the “Executive Yuan” and the “Judicial Yuan” are only “administrative bodies” under the same public legal person (the State).

In Taiwan, political community means a political organization that is established under the Local Government Act (TLGA). For example, Taipei is the capital city in Taiwan. **“Taipei city”** is a political community, and thus, is a public legal person. The **“Taipei city government”** is not a public legal person, but rather, an “administrative department,” while the **“Taipei city council”** is a “legislative department.” The “Taipei city government” and the “Taipei city council” are different “administrative bodies” subject to **the same public legal person: Taipei city.**

In Taiwanese administrative law doctrine, “public legal person” has the quality of being an “administrative subject” having the capacity to carry out legal rights and responsibilities.

In addition, an “administrative department” means the organization representing the aforementioned three categories of public legal persons and having an independent legal status in the declaration of its intentions and the carrying out of its public affairs.

Thus, in practice, all administrative acts are made on behalf of administrative departments. Consequently, in comparative law, the three terms (“administrative body,” “administrative authority” or “administration”) are equal to the aforementioned “administrative department” in Taiwan.

Thus, administrative law jurists in Taiwan often describe a **“public legal person” as a “person” while an “administrative body” is the “hands and legs” of the public legal person.**

Finally, there are only two other public legal persons in Taiwan that are recognized by the TCC and by the law. One type is the “Irrigation Associations” that are empowered by law to pursue water conservancy for the state and are

recognized by the TCC in No.518.⁵³¹ The other is the “National Chiang Kai-Shek Cultural Center,” which is empowered by law to pursue art and culture affairs.

Thus, the condition in Article 145 (“**measures by another administrative body**”) is similar to the theory of unforeseen events discussed below, for which a similar provision exists in Taiwan’s Civil Code.⁵³²

Consequently, in Taiwanese practice, **jurisprudence regarding the execution of administrative contracts has been used to adopt similar positions as those applied to private contracts**⁵³³ and administrative bodies often insert “**price modification clauses**” in administrative contracts. Thus, Article 145 is rarely used.

B.THE THEORY OF THE UNFORESEEN EVENTS (“*IMPRÉVISION*”).

I.IN FRANCE

The theory of the unforeseen events is applied when something unforeseen occurs (this often refers to economic hazards, “*l’aléa économique*”) and leads to economic upheaval that is out of the parties’ control and results in surcharge damage to the contractor. This theory is used to ensure the “**continuity of public service**”⁵³⁴ and to balance the economic risk between an administrative body and a contractor.

The theory was established by the CE in the “*Cie du gaz de bordeaux*”⁵³⁵ case on 30 March 1916, in which the war in 1914 caused an increase in coal prices, so that the **authorized dealer** (“*concessionnaire*”, the private enterprise providing public service by concluding a concession contract with administrative body) of gas was not able to execute its contract according to the fees that were initially foreseen without suffering much damage.

This theory is different from that of “*force majeure*.” The former is applied

⁵³¹ See http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=518, last visited 16 February, 2014.

⁵³² Article 227-2 of the Civil Code.

⁵³³ TSAC judgment No. (Pan-zhi) 1685, Year 92.(最高行政法院 92 年度判字第 1685 號) (Judgment year:2003); THAC judgment No.(Su-zhi) 652, Year 91.(臺灣高等行政法院 91 年度訴字第 652 號) (Judgment year:2002);THAC judgment No.(Su-zhi) 3546, Year 91.(臺灣高等行政法院 91 年度訴字第 3546 號) (Judgment year: 2002); THAC judgment No.(Su-zhi) 4271, Year 91.(臺灣高等法院 91 年度訴字第 4271 號) (Judgment year: 2002).

⁵³⁴ PIERRE-LAURENT FRIER, *supra* note 511, at 419.

⁵³⁵ CE, 30 March 1916,Compagnie générale d’éclairage de Bordeaux ,Rec. Lebon p. 125.

when the execution of a contract is **difficult, but still possible**, while the latter is applied when the execution of a contract is **impossible**.

This theory is also different from FDP. The former is based on circumstances that are **external to the parties**, while the latter is due to measures implemented **by the contractual administrative body**.

But jurist Laurent Richer considered when the modification resulted from the intervention by the contractual administrative body, the contractor can demand the indemnity by appealing to FDP or the foreseen theory⁵³⁶.

There are three conditions in the construction of this theory.

Firstly, both the parties to the administrative contract **cannot have reasonably foreseen the facts** that upset the contractual execution. These facts must be exceptional, such as a war or a grave economic crisis.⁵³⁷

In French jurisprudence, the conditions under which the theory of unforeseen events is applied are largely interpreted. They can include a political event, such as a war, an economic event, such as an economic crisis, or a natural event, such as a catastrophe. They also can include general measures implemented by an administrative authority other than the contractual administrative body, such as the devaluation of money or the blocking of prices. If they are not measures implemented by the contractual administrative body, FDP cannot be applied.

Secondly, these facts must be **independent from and beyond the parties' control**.

Thirdly, these facts must **cause an upheaval in the conditions of the contractual execution**. The disappearance of the contractor's benefits or the existence of a deficit is not sufficient to be construed as an "upheaval." The deficit must be grave, persistent and beyond what the contractor could reasonably have envisaged.

Besides, in French jurisprudence, the foreseen situation should be absolutely upset (*absolument bouleversée*) and if the supplement surcharge as only 3 % of the amount in public works cannot be seen as a upset of financial balance of administrative contract pursuant to the case "*Soc. Coignet*⁵³⁸" of CE on 30 November 1990⁵³⁹.

⁵³⁶ LAURENT RICHER, *DROIT DES CONTRATS ADMINISTRATIFS*, 295 (8th edition, LGDJ, 2012).

⁵³⁷ CE, 3 December 1920, *Fromassol* case, *Revue du droit public et de la science politique en France et à l'étranger*, 1921, p. 73; and CE, 8 November 1935, *Ville de Lagny* case, Rec.1026.

⁵³⁸ CE, 30 November 1990, *Soc. Coignet*, Rec.t.875.

⁵³⁹ LAURENT RICHER, *supra* note 536, at 296.

As jurist Laurent Richer said the indemnity of the foreseen theory has the namely “extra-contractual” characters⁵⁴⁰. Thus, under the aforementioned conditions, the contract will enter into the specified “**extra-contractual**” **period**⁵⁴¹ in which parties should negotiate indemnity. If the parties cannot achieve an agreement, an administrative judge must establish the applicable rules during this period.

However, jurist Jean Waline warned that the term “extra-contractual” is easily misunderstood. The theory of unforeseen events does not call for the termination of the contractual relationship; instead, the contractual relationship continues and the administrative contract should continue to be executed. The theory of unforeseen events aims only to require the administrative body to indemnify the contractor to the extent necessary to ensure financial balance and to achieve the continuity of the administrative contract.

In practice, the administrative judge must fix a “limit-price” (*prix-limites*), which means to fix the margin of a reasonably predictable increase that could be exceeded only in unforeseen circumstances.

In contrast to FDP, the indemnity required by the theory of unforeseen events is not integral (*intégralité du dommage*⁵⁴²). It is only an “**extra-contractual**” **surcharge** and is **not equivalent to the total damages**. Administrative judges should calculate the surcharge incurred during the extra-contractual period and determine each party’s share. Jurist Jean Waline believes that, in this situation, the overall financial balance should be seriously considered, particularly the benefits that the contractor previously may have obtained. Thus, Jean Waline believes that the indemnity, under the theory of unforeseen events, should be the share of the extra-contractual surcharge that the administrative body should shoulder.⁵⁴³ Jurist Laurent Richer considered the principle of distribution can be explained under the idea of “equity” or “distributive justice”⁵⁴⁴.

Jurist Pierre-Laurent considered that it is a **fixed indemnity** by agreement between the parties and that the administrative judges should distinguish between “ordinary risks,” which it is foreseeable that that contractor could incur, and “extraordinary risks.” The latter, which in practice accounts for only a small

⁵⁴⁰ LAURENT RICHER, *supra* note 536, at 297.

⁵⁴¹ JEAN WALINE, *DROIT ADMINISTRATIF* 477 (24th ed. 2012).

⁵⁴² LAURENT RICHER, *supra* note 536, at 297.

⁵⁴³ JEAN WALINE, *supra* note 541 at 477.

⁵⁴⁴ LAURENT RICHER, *supra* note 536, at 297

percentage (about 10%) of surcharges, are often considered according to the financial situation, the rapidity of their development and the costs the contractor must absorb to surmount the difficulties in the contractual execution, and finally, the importance of the lost benefits.⁵⁴⁵

Besides, jurist Laurent Richer considered that the indemnity of the foreseen theory can be demanded only in execution phase but not after the expiration of an administrative contract. However, it is not the practice in positive laws. In jurisprudence, the indemnity can be demanded after the expiration of administrative contract⁵⁴⁶ pursuant to the CE's judgment in case "**Département des Hautes-Pyrénées**⁵⁴⁷" on 12 March 1976.

In contrast to the foreseen theory, pursuant to the "**sujétions imprévues**," the contractor can demand the integral damages suffered and supplement the engaged fees as a result of unforeseen situations.⁵⁴⁸

Another question is whether the contractual administrative body can oppose another administrative body that implements the measures. The CE took a negative position in its judgment in the "**Ville d'Elbeuf**⁵⁴⁹" case on 15 July 1949.

In addition, jurist Jean Rivero considered that, in a concession contract, the contractor cannot be deprived of his right to apply the theory of unforeseen events simply because he distributed a dividend to his shareholders.⁵⁵⁰

Jurist Pierre-Laurent considered that, even if the contract stipulated that the execution would be continued in spite of any difficulties the contractor might meet, the theory of unforeseen events still can be applied.⁵⁵¹ Thus, the contract itself cannot exclude the application of the theory of unforeseen events.

In French jurisprudence⁵⁵², the CE held that the termination of a contract does not exclude the application of the theory of unforeseen events in its judgment in the "**Sté Prest'action**" case on 10 February 2010.⁵⁵³

In addition, pursuant to French jurisprudence, the unforeseen situation must be "temporary," and thus, if the difficulties persist and the ordinary

⁵⁴⁵ PIERRE-LAURENT FRIER, *supra* note 511, at 419.

⁵⁴⁶ LAURENT RICHER, *supra* note 536, at 296.

⁵⁴⁷ CE, 12 March 1976, Département des Hautes-Pyrénées, AJDA 528, concl. Labetoulle, p. 552.

⁵⁴⁸ PIERRE-LAURENT FRIER, *supra* note 511, at 417.

⁵⁴⁹ CE, 15 July 1949, Ville d'Elbeuf, Rec. p. 358.

⁵⁵⁰ JEAN WALINE, *supra* note 541, at 477.

⁵⁵¹ PIERRE-LAURENT FRIER, *supra* note 511, at 417.

⁵⁵² François BRENET, *Confirmation de la jurisprudence Société Prest'Action, application et précision de la jurisprudence Commune de Béziers et conciliation entre imprévision et résiliation*, Droit Administratif n° 4, Avril 2010, comm. 52.

⁵⁵³ CE, 10 February 2010, n° 301116, "Sté Prest'Action" : JurisData n° 2010-000427 ; Rec. CE 2010, tables.

situation cannot be reestablished, the “permanent unbalancing” is similar to that in “*force majeure*,” in that the parties must conclude a new contract or demand that the administrative judge pronounce the termination of the contract⁵⁵⁴, according to the judgment in the “*Cie des tramways de Cherbourg*⁵⁵⁵” case on 9 December 1932.

II. IN CHIAN

We will look at two aspects of “the theory of unforeseen events” in China.

The first is that, in Chinese administrative law doctrine, “the theory of unforeseen events” applies; under it, the administration can request the contractor to continue with the performance of the contract and should give an indemnity to the contractor.

The second is that, in practice, there is provision in administrative regulations for **a consultation procedure between the parties**. This is used in certain administrative contracts to deal with changes in external unforeseen circumstances. However, because of China’s special political background the jurist Zhang Li⁵⁵⁶ has defined the result of the consultation procedure to be the administration’s unilateral modification right, which we have already discussed.

III. IN CANADA

In Canada, as the jurist Denis Lemieux has observed⁵⁵⁷, whether under the common law or the civil law system, the theory of unforeseen events **cannot apply to administrative contracts**.

Usually, the increased obligations resulting from changes to the external unforeseen circumstances of the contract would be imposed on the contractor pursuant to certain contractual clauses, namely “**elevator clauses**”, which aim to deal with price fluctuations in long-term contracts.

⁵⁵⁴ PIERRE-LAURENT FRIER, *supra* note 511, at 419.

⁵⁵⁵ CE Ass. 9 December 1932, Compagnie de tramways de Cherbourg, req.n° 89655.

⁵⁵⁶ JIANG BI-XIN(江必新), *Chinese Administrative Contract Law System: System, Content And Construct* (中国行政合同法律制度：体系、内容及其构建), Peking University Law Journal(中外法学) Volume 6, 2012, available in http://article.chinalawinfo.com/Article_Detail.asp?ArticleId=78966, last visited 13 April 2014.

⁵⁵⁷ Denis Lemieux, *supra* note 199 at 458.

IV. IN TAIWAN

In Taiwan, the theory of unforeseen events has been adopted in Article 147 and has the same name “unforeseen theory”.

In French civil jurisprudence, the CC (Cour de Cassation) affirmed the principle of the “intangibility of the initial contract” (*l'intangibilité du contrat initial*), which means that, not only can the parties to the contract not modify the contract unilaterally, but also, a judge cannot intervene in the relationship between the parties⁵⁵⁸) by applying Article 1134 of the French Civil Code in its judgment in the “*F.Terré v. Y.Lequette*”⁵⁵⁹ case on 6 March 1876.

However, in contrast to French law, the theory of unforeseen events already exists in Taiwan’s civil code before the adoption of that in APAT. Thus, we will first introduce the differences in the theory of unforeseen events in Taiwan.

The conditions of the theory of unforeseen events in an administrative contract (Article 147 in APAT) and a private one (Article 227-2 in Taiwan’s Civil Code) **are the same**. The differences are revealed in their legal effect.

In civil law, both of the parties can make a **demand that the judge** (in Taiwan, ordinary judges) increase or reduce the payment, or modify the initial contractual obligation. However, in the APAT, the parties can make a **demand for another contractor to adjust the contract**, but the administrative body has the right to pay indemnity and to demand that the contractor continue its contractual execution; if they cannot come to an agreement regarding the amount of the indemnity, the contractor can bring a lawsuit before an administrative judge.

In situations involving difficulties in the contractual execution, the APAT requires the parties firstly to adjust the contract, which is different from the French theory of unforeseen events. This difference is regarded as a reference to and reception from the German administrative procedure code.⁵⁶⁰

However, in France, jurist François Brenet considered that, pursuant to the theory of unforeseen events, the parties have many possible courses of action, including adjustments, such as the modification of prices to surmount the

⁵⁵⁸ YVAINÉ BUFFELAN-LANORE & VIRGINIE LARRIBAU-TERNEYRE, DROIT CIVIL-LES OBLIGATION 396 (13th ed. 2012).

⁵⁵⁹ Cass. Civ., 6 March 1876, *F.Terré v. Y.Lequette*, DP 1876, 1, p. 163, note Giboulot.

⁵⁶⁰ Hsu Tzong-Li, *supra* note 509, at 315.

unforeseen situation.⁵⁶¹ The application of the APAT (which initially asks the parties to adjust) is similar.

Another question in Taiwan's jurisprudence is **whether Article 147 can apply to administrative contracts that were concluded prior to the enactment of the APAT**. This will depend upon whether the theory of unforeseen events is an "inherent" principle in administrative law. If the answer is positive, the theory of unforeseen events may be applicable to previously concluded administrative contracts.

Since the APAT was enacted in 2001, there was a powerful earthquake measuring 7.1, namely the **"921 earthquake"** (which occurred on 21 September 1999) that caused many difficulties in contractual execution, including the breakdown of structures that were under construction and increases in the prices of raw materials. Many counterparties demanded indemnity, citing Article 147. **The TSAC denied the application of Article 147 to contracts concluded before 2001.**⁵⁶²

However, we think that the theory of unforeseen events should be regarded as a principle that is inherent in administrative contract law because its goal is to achieve financial balance in administrative contracts. If this theory cannot be applied to contracts concluded before 2001, many administrative contracts may be suspended or, even worse, terminated. This would be gravely harmful to the public interest. Thus, although there were no provisions regarding the theory of unforeseen events at that time, the theory should also be applied to administrative contracts concluded before 2001.

Finally, according to jurist Ludivine Clouzot's observations, the theory of unforeseen events is rarely applied in France because of price adjustment clauses that are often included in administrative contracts. However, he regarded the theory of unforeseen events as an important particularity for administrative contracts and **its desuetude is improbable**.⁵⁶³ Jurist François Chénéde even considered the theory of unforeseen events to be a source of reflection and inspiration for private contract law.⁵⁶⁴ Civil law jurists considered that the theory of unforeseen events in administrative law should be applicable in private

⁵⁶¹ Pascale Gonod, Fabrice Melleray & Philippe Yolka, *supra* 124, at 254.

⁵⁶² TSAC, No. (Pan-zhi) 1137, Year 95. (最高行政法院 95 年度判字第 1137 號) (Judgment year: 2006).

⁵⁶³ Ludivine Clouzot, *La théorie de l'imprévision en droit des contrats administratifs: une improbable desuetude*, RFDA 2010 p.937.

⁵⁶⁴ François Chénéde, *Les emprunts du droit privé au droit public en matière contractuelle*, AJDA 2009 p.923.

contract, especially for the economic crisis of steel since 2003⁵⁶⁵.

C.CONCLUSION

The aforementioned theories reveal the particularities of administrative contracts that are not applied to private contracts.

In concrete disputes, administrative judges must take the public interest into consideration in their examination of the legality of administrative contracts, for example, in deciding whether a certain administrative act can be construed as a FDP (i.e., an administrative body blocks an increase in price to protect the public interest) or in deciding the amount of an “extra-contractual” surcharge.

Administrative contracts exist to provide public services: the higher the relative degree of public service, the stronger the degree of judicial control. Disputes involving administrative contracts that involve the legality of the administrative contract, as a result of their nature, should only be examined by an administrative judge and they should not be arbitrable.

Even for the arbitrable administrative contracts mentioned in the first chapter in this dissertation, arbitrators in administrative matters must realize their particularities, adopt dispositions and obey jurisprudence that differ from those in private contract disputes.

We now will discuss the disputes on validity of administrative contracts.

SECTION III: DISPUTES CONCERNING THE CONTENT OF CONTRACT

Disputes regarding administrative contractual content often occur in practice, but the reasons for the disputes are diverse. We will concentrate on the relationship between administrative contracts and constitutional law.

Generally, throughout the world, the constitutional judicial review system can be divided into three main types, depending on **which organization is competent to engage in a review**.⁵⁶⁶

The first type of review is by **a legislative organization**, and it has been adopted by England and China. The second type is by **an independent**

⁵⁶⁵ See Séverin Abbattu, Bertrand Sablier, and Vincent Sablier, *Crise de l'acier : le retour de l'imprévision dans les marchés de travaux*, AJDA 2004 p. 2192.

⁵⁶⁶ Han-Zhen Lai (賴漢臻), *The Research on the Establishment and Completion of the Unconstitutional Reviewing System of China (論我國違憲審查制度的建立和完善)* 148 (2012) (doctoral thesis, Macau University).

competent organization, and it has been adopted by many countries having the continental law system, for instance, France, Taiwan, and Germany. In this type, there is a nuance, however. In Taiwan and Germany, the organization has full judicial characteristics (**Constitutional Court** in Germany or **Council of Grand Justices** in Taiwan), while in France, it has judicial characteristics, but also those that are slightly political (**Constitutional Counsel** or in French, “*Conseil Constitutionnel*”).

The third mode is by **the courts** and it has been adopted by America and Canada (see below for details).

Let us return to a practical case. In Taiwan, an administrative contract was concluded under legislative provisions, but these provisions infringed the Constitutional Law. We will first introduce it (A.IN TAIWANA. IN TAIWAN), and then, we will compare how this question is dealt with in France (B.IN FRANCEB. IN FRANCE), in China (C.IN CHINAC. IN CHINA) and in Canada (D.IN CANADAD.IN CANADA).

A.IN TAIWAN

In Taiwan, the constitutional system can be divided into two aspects: the constitutionality **of laws** and **of administrative regulations**.

Regarding the former aspect, judges (regardless of whether they are judicial or administrative) **cannot refuse to apply the law**. Consequently, they should **suspend the adjudicative process** and demand that “the Justice of the Constitutional Court, Judicial Yuan, R.O.C” (in Taiwan, it’s named “大法官會議”, literally, “Council of Grand Justices”, with 15 members, charged with interpreting the Constitution. It’s the Constitutional Court in Taiwan, hereinafter “TCC”) interpret its constitutionality.

Regarding the latter aspect, judges **can refuse to apply administrative regulations** that they believe infringe constitutional law. However, judges **have no right to announce the nullity of regulations**. The nullity or unconstitutionality of administrative regulations **must be announced exclusively by the TCC**.

Briefly, in Taiwan, the constitutionality or nullity of laws and administrative regulations **belongs exclusively within the competence of the TCC**.

Regarding the constitutionality of administrative contracts, two cases in Taiwan can provide us with insight. The first involves the recruitment contract of

a military magistrate that was concluded between a citizen and the Ministry of the Military in Taiwan (MMT) regarding a military job (I.THE RECRUITMENT CONTRACT OF A MILITARY MAGISTRATE).

The second is the recruitment contracts of public servant agents (II.THE RECRUITMENT CONTRACTS OF PUBLIC SERVANT AGENTS).

I.THE RECRUITMENT CONTRACT OF A MILITARY MAGISTRATE

In Taiwan, the constitution of the army corps can be divided into two segments: obligatory and voluntary military service. The former is an obligation of every boy in Taiwan. The latter is based on an administrative recruitment contract and it provides a job in the army.

In Taiwan, there are certain military judges and prosecutors (hereinafter, military magistrates) in the army that deal with questions regarding discipline or criminality in the army.

To be a military magistrate, a student in a law school must pass the national military magistrate examination and then conclude a recruitment contract with the MMT.

The nature of a recruitment contract was defined as an administrative contract by the Taiwan Administrative Supreme Court (TASC) in 2007.⁵⁶⁷ The contract is concluded under the administrative regulations that are called the “Regulations of Military Service for Selecting Voluntary Personnel as Officers and Noncommissioned Officers of the Armed Forces” (RMSS), and pursuant to which the MMT can decide to renew or not to renew a recruitment contract.

Note that the RMSS applies to all military recruitment jobs under the MMT, not solely to military magistrates.

However, some special military jobs, such as military magistrates, are determined by a national examination. Consequently, the fact that the MMT can decide to renew or not to renew this administrative recruitment contract provokes the concern that military magistrates **are not able be independent because they are afraid that their recruitment contracts will not be renewed.**

Thus, military magistrates believe that they should benefit from the same

⁵⁶⁷ TSAC, judgment No. (Pan-zhi) 995, Year 96.(最高行政法院 96 年度判字第 995 號) (Judgment date: June 7, 2007). “Pan-zhi” is the romanization of the Chinese word used to classify matters and it means “litigation” in the Chinese used by the TSAC.

guarantees of independence that are provided to judges by Article 80 of Taiwan's Constitutional Law (the guarantees of independence are applicable to judicial and administrative judges).

The dispute is whether "military judges" are considered to be "judges," and thus, benefit from the same guarantee. This question was sent to the TCC.

In its interpretation No 704, the TCC held that military judges are not "judges" within Article 80 of the Constitution Law; however, the TCC also held that the RMSS should not apply to those military jobs that are determined by national examinations.

In conclusion, it is important to discuss whether the administrative regulations (RMSS) that apply to administrative recruitment contracts and that authorize the MMT to decide to renew or not to renew recruitment contracts conflict with the guarantee of independence that has been established by Constitutional Law.⁵⁶⁸ Obviously, it involves the constitutionality of administrative regulations.

II. THE RECRUITMENT CONTRACTS OF PUBLIC SERVANT AGENTS

The other case addresses the recruitment contracts of public servants who are nationals of Mainland China.

Regarding the recruitment of public servants in Taiwan, most public servants are nominated by a unilateral administrative decision; however, some persons are nominated by concluding an administrative contract with the government and exercising their public mission according to the determined mandate that is specified in the administrative contract.

Because of the special international relationship between Taiwan and China, the provisions of the "Act Governing Relations between People of the Taiwan Area and Mainland Area" (GRPTM) deal with all of the affairs that relate to Taiwan and Mainland China.

Under Article 21-1 of the GRPTM, every person who is a national of Mainland China must become a national of Taiwan for at least ten years to be qualified as a public servant in Taiwan.

A woman who was a national of Mainland China married a Taiwanese spouse and then became a national of Taiwan. Nine years later, she passed Taiwan's national public servant examination, but was declared to be ineligible to

⁵⁶⁸ Articles 80 and 81 of Constitutional Law in Taiwan.

become a public servant because she had been a national of Taiwan for only nine years, and thus, did not comply with the aforementioned provision.

However, this limitation (ten years) applies exclusively to persons who are nationals of Mainland China and does not apply to foreigners or to Taiwanese nationals. The woman argued that the limitation that was created in the GRPTM infringed **the principle of equality** that is included in Article 7 of the Constitutional Law.

In conclusion, this case involved an administrative contract that was subject to a national law (GRPTM); however, this law may conflict with the principle of equality that is included within in the Constitutional Law.

III.CONCLUSION

Thus, we are curious about whether disputes that involve legality, including the constitutionality of laws (recruitment of public servants) or of administrative regulations (recruitment of military magistrates) that are applicable to certain administrative contracts, are arbitrable.

In Taiwan, the nullity or constitutionality of laws or of administrative regulations is **exclusively within the competence of the TCC**. Thus, even administrative judges are not competent to examine the question. Therefore, how can an arbitrator or arbitral tribunal examine it? Accordingly, as a result of its nature, the question should not be arbitrable.

We will now analyze comparable situations in other countries.

First, the examination of constitutionality is diverse and complex throughout the world. We will not introduce it in detail. We will only discuss the questions that are related to our subject.

B.IN FRANCE

In France, the question is divided into two sections: laws and administrative regulations.

I.CONSTITUTIONALITY OF LAWS AND ADMINISTRATIVE

REGULATIONS

Regarding the constitutionality of national laws or administrative regulations, the Constitutional Court (*Cour Constitutionnelle, CCF*) is responsible for determining the constitutionality of laws and administrative regulations,⁵⁶⁹ which are described as “*Question prioritaire de constitutionnalité, QPC*”.

II.WHETHER REGULATIONS INFRINGE LAWS

Regarding the question of whether administrative regulations infringe national laws, under the French Constitution of 1958, there are two categories of administrative regulations. One category is regulations that are promulgated to execute the law. These regulations must be issued pursuant to legal authorization. The other category is described as “autonomous regulations” (*règlement autonomes*) and is based on Article 37 of the French Constitution, according to which the government can issue rules without the authorization of law. The autonomous rules are the most interesting.

In the “*Compagnie des chemins de fer de l'Est*⁵⁷⁰” case of 6 December 1907, the CE acknowledged that regulations issued by administrative bodies also should be subject to the legality controls of administrative judges. Thus, administrative judges can declare that certain administrative regulations are null.

The legality of administrative regulations should be examined by the “*recours pour excès de pouvoir, REP*”, because of its nature as an “objective dispute.”

In addition, under R 311-1 CJA, certain competencies, for instance, recourse against regulatory acts by a Ministry, are reserved to the CE.

III.CONCLUSION

Thus, it is conceivable that, in an administrative contract concluded under

⁵⁶⁹ JEAN RIVERO & JEAN WALINE, DROIT ADMINISTRATIF 270 (20th ed. 2004).

⁵⁷⁰ CE, 6 December 1907, *Chemins de fer de l'Est*, req.n° 4244, rec. p. 913.

regulations issued by a Ministry, disputes regarding the legality of these regulations should not be arbitrable because they are within the exclusive competence of the CE.

If the administrative contract is concluded under an autonomous regulation, disputes regarding the legality of the autonomous regulation should be contested by the REP and should not be arbitrable.

Finally, if an administrative contract is concluded under a national law, disputes about the constitutionality of national laws cannot be arbitrable, because they are exclusively within the competence of the CCF.

C.IN CHINA

We will discuss constitutionality in China into two sections: the legislative aspects (I. LEGISLATIVE ASPECTS) and the practical aspects (II. PRACTICAL ASPECTS).

I.LEGISLATIVE ASPECTS

Under Article 5 of the Constitutional Law of China (CLRPC), no laws, administrative regulations, or local regulations may contravene the Constitution. This reveals the supremacy of the CLRPC.

Under Articles 58 and 90 of the Legislation Law of China (LLRPC), the competence to review the constitutionality of a law belongs **exclusively to the Standing Committee of the National People's Congress (SCNPC)**.

After accepting a demand from an organization or from a citizen, the Office of Operation in the SCNPC must study it and distribute it to the relevant special committees for review.

If a special committee determines that administrative regulations or laws contravene the Constitutional Law, it may present a written review comment to the enacting body that presents its opinion regarding whether an amendment must be made, and then, it must report back to the Legislative Committee (one committee in the SCNPC).

In contrast, if the enacting body refuses to make any amendment, it may submit a written review comment to the Chairman's Committee (one committee in the SCNPC), and the Chairman's Committee must decide whether to bring it to the Standing Committee (one committee in the SCNPC) session for deliberations

regarding a decision to quash it (Article 91 in LLRPC).

II. PRACTICAL ASPECTS

Up to the present time, constitutionality in China has not been executed in practice.⁵⁷¹

However, in 2000, a man named “Sun Zhi-gang” (孫志剛) was in detention and was killed while in prison. This case resulted in many debates concerning the requirement to establish a real constitutional system in China⁵⁷² that would include, for instance, a constitutional court.⁵⁷³

III. CONCLUSION

Although constitutionality was not practiced in China, under the legislative aspect, **certain special committees** are responsible for constitutional review. Even judges are not competent to exercise this review. Thus, disputes regarding the constitutionality of an administrative contract should not be arbitrable.

D. IN CANADA

Canadian constitutional law is composed of written documents and of constitutional customs or conventions. Of the written documents,⁵⁷⁴ two are of particular importance. One is the British North America Act of 1867. The other is the Canadian Charter of Rights and Freedoms (Charter) of 1982. Article 52 of the Charter established Canadian Constitutional law as the supreme law in

⁵⁷¹ Dai Shi-Ying (戴世瑛), On Constitutionality Examination System in China (論中國大陸的違憲審查制度), available at

http://www.lawtw.com/article.php?template=article_content&area=free_browse&parent_path=1.561.&job_id=121134&article_category_id=2056&article_id=57903, last visited 31 March 2014.

⁵⁷² See “Conference on Sun-Zhi-Gang Case and Constitutionality” (孫志剛案與違憲審查), held on 30 June 2003 at Shanghai Jiaotong University organized by Université Jiao-tong de Shanghai (上海交通大學法學院) and East China University of Political Science and Law (華東政法大學), at <http://big5.qikan.com/gate/big5/m.qikan.com/ArticleContentNew.aspx?type=3&titleid=zgfx20030421>, last visited 26 April 2014.

⁵⁷³ Larry Catá Backer, *A Constitutional Court for China within the Chinese Communist Party: Scientific Development and a Reconsideration of the Institutional Role of the CCP*, 43 SUFFOLK U. L. REV. 593 (2010); Miguel Schor, *Foreword: Symposium on Constitutional Review in China*, 43 SUFFOLK U. L. REV. 589 (2010); Guobin Zhu, *Constitutional Review in China: An Unaccomplished Project or a Mirage?*, 43 SUFFOLK U. L. REV. 625 (2010).

⁵⁷⁴ Jennifer Smith, *The Origins of Judicial Review in Canada*, 16(1) CANADIAN JOURNAL OF POLITICAL SCIENCE 115 (Mar. 1983).

Canada⁵⁷⁵.

In Canada, **all of the courts** (including the provincial superior courts, Federal Courts and Supreme Court) **are competent to exercise constitutional judicial review**. According to jurist Cromwell's observations, the provincial superior courts are the backbone of constitutional judicial review, while other courts, including the Federal Court, engage in constitutional judicial review in certain rare situations.⁵⁷⁶

The centrality of the provincial superior courts was established in the Canadian Supreme Court's famous case "*Attorney General Canada v. Law Society of B.C.*,⁵⁷⁷" by holding that the provincial superior courts have always occupied a position of prime importance in the constitutional pattern of Canada and that the empowering statute of the Federal Court cannot be applied to deprive the provincial superior courts of the jurisdiction to determine the constitutionality or constitutional applicability of federal legislation.

As jurist Cromwell stated, the Canadian conception of constitutional judicial review is deeply committed to the supervisory role of the provincial superior courts.

E.CONCLUSION

Thus, throughout the world, judges (both administrative and judicial) often face questions regarding the legality of administrative regulations and the constitutionality of laws.

In Taiwan and France, the competence of constitutional judicial review belongs exclusively to independent organizations, while in China, it belongs to a legislative organization.

Thus, in the aforementioned three countries, even judges are not competent to conduct constitutional judicial review. Why should an arbitrator be able to do what administrative judges cannot do? Arbitrators should not deal with disputes that even administrative judges are not permitted to handle.

However, in Canada, because all of the courts are competent to examine these disputes, perhaps this is one reason to support the arbitration of them in

⁵⁷⁵ It's named "The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11", See <http://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html>, last visited 1 April 2014.

⁵⁷⁶ T.A. Cromwell, *Aspects of Constitutional Judicial Review in Canada*, 46 S. C. L. REV. 1027 (1994).

⁵⁷⁷ *A.G. Can. v. Law Society of B.C.*, [1982] 2 S.C.R. 307.

administrative matters.

SECTION IV: CONCLUSION OF THIS CHAPTER

In conclusion, **in the making phase of contract**, parties to private contracts have more liberty to choose their adversaries. However, when administrative contracts are at issue, the goal of maintaining fair competition is considered to be a legal mechanism that has been constructed to ensure the highest degree of efficacy in resource utilization and the prevention of corruption. Thus, there are some types of litigation, such as the competitor-lawsuit (*le concurrent évincé*) and “*recours de l'excès de pouvoir*” that do not exist for private contracts in France, or in Canada there are “Canadian International Trade Tribunal” and “Procurement Ombudsman”.

Generally speaking, administrative contracts should be under the control of national laws and certain administrative regulations; in France, they also should be subject to the European directives.

Regarding legal principles, administrative contracts should be dominated by principles promoting the **liberal access to public procurement, equality of candidates**, and **procedural transparency** (the official terms in the judgment are “*liberté d'accès à la commande publique, d'égalité de traitement des candidats et de transparence des procédures*”); these principles have been confirmed by the French Constitutional Court, in its judgment of 26 June 2003, to be principles arising from the Declaration of Human Rights, which has been annexed into French Constitutional Law, and thus, they have constitutional fundaments.⁵⁷⁸

In addition, in practice, administrative judges should maintain fair competition and take heed of illegal collusions such as “bid rigging” (a form of fraud in which there appears to be several competitive bidders, but in fact, they present the same bid).

In execution phase, accordingly, in the administrative contract field, judges should take into consideration the parties' interests, the interests of third persons and the public interest; they also should appreciate the loyalty involved in the contractual relationship. These elements are different from those

⁵⁷⁸ Décision n° 2003-473 DC du 26 juin 2003, see <http://www.conseil-constitutionnel.fr/decision/2003/2003-473-dc/decision-n-2003-473-dc-du-26-juin-2003.861.html>, last visited 19 February 2014.

applicable to private contracts, such as the good faith of parties ("*La bonne foi*").

In France, particularly in Tropic and Béziers (I, II), the CE gave administrative judges the right to reconstruct ("*recadrer*") a contractual relationship if an irregularity occurs in the contract (Tropic and Béziers I) or in cases in which a contract has been unilaterally terminated (Béziers II). As jurist Jean-Bernard Auby stated, this "contribution" ("*apport*") may be welcome or criticized.⁵⁷⁹ We are sure that this right will avoid ruptures in contractual relationships and is helpful for the continuity of public service.

The aforementioned considerations obviously involve the public order; they do not involve simply the protection of individual rights, but rather, the legality of administrative contracts. As a result of their nature, they should not be arbitrable.

The aforementioned enlargement of the rights of administrative judges by the CE also raises the question whether, if the disputes mentioned above were submitted to arbitration, arbitrators who are accustomed to applying the principles of private contract law would have the competence to perform this "right" or perhaps, to undertake this "burden."

Even for the arbitrable administrative contracts mentioned in the first chapter in this dissertation, arbitrators in administrative matters must realize their particularities and adopt dispositions that differ from those in private contract disputes.

Finally, as for the disputes **on the contest of an administrative contract**, in France, Taiwan and China, even (judicial or administrative) judges are not competent to conduct constitutional judicial review. We doubt whether an arbitrator is able to do what administrative judges cannot do. Arbitrators should not deal with disputes that even administrative judges are not permitted to handle.

Finally, with respect to the application of REP to disputes involving administrative contracts, we will discuss it below by comparing it with a similar system that is found in Taiwan (CHAPTER II: "*RECOURS POUR L'EXCÈS DE POUVOIR*" ON DETACHABLE ACTS).

CHAPTER II: "*RECOURS POUR L'EXCÈS DE POUVOIR*" ON DETACHABLE ACTS

The "*recours de l'excès de pouvoir (REP)*," a special litigation system in

⁵⁷⁹ Jean-Bernard Auby, *supra* note 440.

France, enables parties to demand that an administrative judge (namely, the “*juge de l’excès de pouvoir*” *JDE*, which refers to an administrative judge in an REP procedure) quash certain administrative acts on the basis of a violation of legality.

In France, REP is designed to ensure an administrative body’s subordination to the law (*la subordination effective de l’administration au droit*). **Thus, REP is an “objective” remedy in nature** (regarding “objective/subjective” remedy, we would introduce them below); this means that a citizen’s interest has been encroached upon by an administrative body’s unilateral decision and the citizen is asserting a demand for an administrative judge to examine the legality of the aforementioned encroaching decision, and furthermore, to quash it.

Briefly, REP’s goal is to correct legal administrative decisions, and thus, it is considered to be used exclusively for the preservation of the public interest.

Traditionally, disputes regarding contractual execution and validity are regarded as bilateral administrative acts and are not admitted in REP; detachable acts are an exception.

The term “*actes détachable*” mainly refers to the preparatory acts prior to the signing of a contract.⁵⁸⁰ They involve the decision to conclude or not to conclude a contract. In nature, they are unilateral administrative decisions, but they are regarded as detachable from an administrative contract. In practice, this decision is often made by a certain deliberative organization or commission in the administrative body.

As jurist Joseph Kamga has stated, a dispute regarding detachable acts is an “objective” litigation, i.e., a procedure aimed at an “act,” not at a “person” (*un process fait à un acte et non à une personne*⁵⁸¹).

REP is different from the aforementioned litigation of administrative contracts (*contentieux du contrat*). The latter refers to litigation in which administrative judges have the greatest power to act; they may declare the nullity of a contract, reform the contractual context and order an administrative body to perform certain measures, such as indemnification. However, *JDE* is available only to quash certain administrative acts.

Now, we will review the historical development of REP in France.

Principally, an administrative body’s unilateral act may be aimed at a specific citizen, for example, the issuance of a building permit; in addition, they may be

⁵⁸⁰ Joseph Kamga, *supra* note 70, at 73.

⁵⁸¹ Joseph Kamga, *supra* note 70, at 74.

aimed at uncertain citizens, for example, the issuance of administrative regulations.

In addition, clauses in administrative contracts are principally agreements between parties, and theoretically, a third person is not within the scope of its effects.

However, in French administrative law doctrine, “regulatory clauses” (“**les clauses réglementaires**”) refer to clauses in contracts that are formally conventional and materially regulatory. Their specificities reveal that they are conventions in a contract, but they have the effect of a regulation (**une convention à effets réglementaires**⁵⁸²) in that they have a legal effect on related third persons.

Jurist Laurent Richer has noted that, although literally, the term “regulation” (“**réglementaire**”) is used, this does not mean that they are unilateral administrative acts, but rather, its use signifies only a similarity to a “regulation,⁵⁸³” i.e., it has an effect on third persons. They are still clauses in a contract and they are bilateral administrative acts in nature.

Traditionally, REP has been allowed exclusively to quash illegal unilateral administrative acts; in jurisprudence, REP principally has not been allowed to contest bilateral administrative acts pursuant to the CE’s judgments in the “**Labit**⁵⁸⁴” case on 22 April 1988 and the “**Cie d’aménagement des coteaux de Gascogne**⁵⁸⁵” case on 14 Mars 1997.⁵⁸⁶

This has been a longstanding phenomenon, but it was changed in the CE’s famous judgment in the “**Cayzeele**⁵⁸⁷” case on 10 July 1996, which allowed REP to be used to contest regulatory clauses in contracts⁵⁸⁸ and for a demand to quash them.⁵⁸⁹

In Taiwan, there are certain mechanisms that are similar to detachable acts (See below: We will observe the development of doctrine and jurisprudence in Taiwan and compare it with that in France).

⁵⁸² ANDRÉ DE LAUBADÈRE, FRANCK MODERNE & PIERRE DELVOLVÉ, *TRAITÉ DES CONTRATS ADMINISTRATIFS* 108 (2nd ed. 1983)

⁵⁸³ LAURENT RICHER, *supra* note 515, at 250.

⁵⁸⁴ CE, 22 April 1988, Labit, RDP 1988,1457.

⁵⁸⁵ CE, 14 March 1997, Cie d’aménagement des coteaux de Gascogne, RFDA 1997,349, note Delvolvé.

⁵⁸⁶ LAURENT RICHER, *supra* note 515, at 186.

⁵⁸⁷ CE, Ass., 10 July 1996, Cayzeele, Rec, p.274.

⁵⁸⁸ JEAN RIVERO, *supra* 103, at 375.

⁵⁸⁹ Pierre Delvolvé, *Le recours pour excès de pouvoir contre les dispositions réglementaires d'un contrat*, RFDA 1997, p.89.

Thus, we will introduce it from three standpoints and address questions that are relative to Taiwan, Canada and China in comparison to French legal doctrine.

The first section addresses the conditions under which REP can be used to contest detachable acts (SECTION I: THE CONDITIONS OF RECEIVABILITY).

The second addresses the vices by which administrative judges can quash detachable acts (SECTION II: THE VICES SUSCEPTIVE TO BE CONTESTED).

The third addresses the consequences of quashing detachable acts (SECTION III: CONSEQUENCES OF THE DETACHABLE ACT'S QUASHING).

SECTION I: THE CONDITIONS OF RECEIVABILITY

In French doctrine, "*le recours contre l'acte détachable*" (RCAD) is one category of REP used particularly to contest detachable acts.

We will discuss it from two perspectives.

Firstly, we will introduce the system that has been adopted in France (1. IN FRANCE).

Secondly, we will compare it with the system in Taiwan (2. IN TAIWAN).

1. IN FRANCE

With regard to French doctrine, we will divide the discussion into two sections.

Firstly, we will discuss which acts can be contested using RCAD (A. WHICH ACTS CAN BE CONTESTED BY RCAD). Secondly, we will discuss who can bring RCAD (B. WHO HAS THE COMPETENCE TO BRING RCAD).

A. WHICH ACTS CAN BE CONTESTED BY RCAD

The detachable act theory was introduced into administrative contract disputes in the CE's judgment in the "*Commune de Gorre*⁵⁹⁰" case (hereafter "*Gorre*" case) on 11 December 1903; this case initially allowed illegal preparatory acts in a private law contractual dispute to be contested. Afterward, this opinion was applied to an administrative contractual dispute by the CE in the "*Martin*⁵⁹¹" case on 4 August 1905; this case allowed a remedy against a

⁵⁹⁰ CE, 11 December 1903, *Commune de Gorre*, Rec. p. 770, S. 1906, III, p. 49, note de M. Hauriou.

⁵⁹¹ CE, 4 August 1905, *MARTIN*, Rec. 749, concl. Romieu.

deliberative conclusion made by the “General Counsel” (“*le conseil général*”, a local administrative authority at the “department” level in France, who makes a decision with a deliberating assembly; after a change in the law on 17 May 2013, it will be renamed as the “*conseils départementaux*”).

In his judgment, the CE held in “*GIE Grouperubois*⁵⁹²” on 29 April 1994 that the RCAD is not available when the act has a private law character; in that case, the contested act involved only the execution of industrial and commercial service.

The CE, in his judgment in “*Président de l'Assemblée nationale*⁵⁹³” on 5 March 1999, granted the competence to an administrative judge to examine a decision involving the public works (audiovisual equipment) of the “Assemblée Nationale” (French Parliament, *AN*) that were issued by the president of the AN.⁵⁹⁴ Thus, as jurist Laurent Richer has discussed, in the abandonment of the principle of the “immunity of parliamentary acts,” a decision issued by the president of a parliamentary assembly can be contested by RCAD.⁵⁹⁵

In addition, RCAD is one category of REP in which the claim should contest a grievance decision (*faisant grief*). The CE, in his judgment of 10 May 1996 in the “*conseil régional de l'ordre des architectes PACA*” case, held that the notice or publicity of an appeal offer cannot be the object of RCAD.⁵⁹⁶

In contrast to a simple notice or publicity of an appeal offer, decisions made by the deliberative assembly or by an offer appeal commission can be contested by RCAD. The CE allowed the contest of decisions declaring certain appeal offers unsuccessful (*appel d'offres infructueux*) in the “*compagnie générale de construction téléphonique*⁵⁹⁷” case on 10 October 1984.

The decision to reject an offer also can be contested pursuant to the CE's judgment in “*Société Biro*⁵⁹⁸” on 27 July 1984.⁵⁹⁹

Laurent Richer believed that, although a prior authorization or refusal to sign a contract could be contested by RCAD, the detachability of decisions

⁵⁹² CE, 29 April 1994, *GIE Grouperubois*, Rec. 786.

⁵⁹³ CE, Ass., 5 March 1999, *Président de l'Assemblée nationale*, req.n°163328.

⁵⁹⁴ Catherine Bergeal, *Le contrôle de la passation des marchés des assemblées parlementaires*, RFDA 1999, p.333.

⁵⁹⁵ LAURENT RICHER, *supra* note 515, at 188.

⁵⁹⁶ CE, 7 /10 SSR, du 10 May 1996, 162856, mentionned at “tables du recueil Lebon”, See: <http://legimobile.fr/fr/jp/a/ce/ad/1996/5/10/162856/>, last visited 5 March 2014.

⁵⁹⁷ CE, 10 October 1984, *compagnie générale de construction téléphonique*, Rec., at 322.

⁵⁹⁸ CE, 27 July 1984, *Société Biro*, req.n° 44919, Lebon p. 303.

⁵⁹⁹ Emmanuel Rosenfeld, *Appel d'offres restreint*, La Semaine Juridique Entreprise et Affaires n° 23, 5 June 1986, 14737.

(meaning two administrative acts: the “decision to sign” and the “signing of a contract”) may be simply an “intellectual division,” since the claims contesting a “decision to sign,” in practice, are manifested by the same facts as the “signing of the contract.”⁶⁰⁰

Finally, an interesting question is whether an arbitrator can be competent to examine detachable acts.

Generally, only administrative judges are competent to examine disputes regarding detachable acts.

However, jurist Joseph Kamga asserted that arbitrators also can be competent under arbitration clauses.⁶⁰¹ He considered the decision to submit disputes regarding administrative matters to arbitration to be a unilateral administrative act in that, like other unilateral decisions before an arbitration procedure, it is subject to REP.⁶⁰²

However, we believe that the decision to submit disputes to arbitration is within the conventions established by the parties, and thus, in its nature, it should still be a bilateral decision and not subject to REP.

Next, we will discuss who has the competence to bring RCAD.

B.WHO HAS THE COMPETENCE TO BRING RCAD

Theoretically, the persons damaged by the detachable acts are competent to bring RCAD.

French jurisprudence has opened the possibility of REP to contractual parties (CE, 11 December 1903, Commune de Gorre) and has extended it to a third person (CE, 4 August 1905, Martin).

They can include the opposing candidates that contest the decision (to sign a contract with someone). Principally only the enterprises that have participated in a competitive procedure are competent to assert, exceptions to an illegal detachable act that has created an obstacle to their participation. However, the CE allowed an enterprise that had not yet submitted a bid to bring REP in his judgment “*département de l’Aveyron*” on 6 December 1995.⁶⁰³ Laurent Richer noted that, even in this situation, those only having only a “volition” or who are

⁶⁰⁰ LAURENT RICHER, *supra* note 515, at 189.

⁶⁰¹ JOSEPH KAMGA, *supra* note 70, at 73.

⁶⁰² JOSEPH KAMGA, *supra* note 70, at 73.

⁶⁰³ CE, sect., 6 déc. 1995, nos 148.964 et 149.03, Département de l’Aveyron, Sté Jean-Claude Decaux, Rec. CE 1995, p. 428, AJDA 1996, p. 159, chr. Stahl J.-H. et Chauvaux G., CJEG 1996, p. 225 et s., concl. Fratacci S.

“willing” to be candidates are still incompetent.⁶⁰⁴

Another interesting question is whether one of the members in a deliberative assembly that made the decision can bring RCAD?

Jurist Laurent Richer believes that the answer is positive.

Another question is whether the user of a public service can bring RCAD to contest the decisions from the conventions of a public service delegation?

Jurist Laurent Richer also acknowledged the competence of those users.⁶⁰⁵

In addition, even an earlier contractor can contest the refusal to renew a contract⁶⁰⁶ pursuant to the CE’s judgment in “**SA Alabel**”⁶⁰⁷ on 20 September 1999.

Laurent Richer noted that there is no period of limitations to bring RCAD because the decision to sign a contract typically is not published; this is because no period limitation would cause juridical insecurity in the contractual relationship.⁶⁰⁸

Next, we will compare the French law discussed above with that of Taiwan.

2. IN TAIWAN

In Taiwan, there is no legal idea of a “detachable act” in its doctrine and jurisprudence. However, Taiwan’s administrative law jurists, in fact, divide procurement contracts into two sequential phases; this division is called the “**two-stages theory**” (it is derived from German administrative law theory: “**Zweistufentheorie**”).

We will divide the discussion into two sections. One addresses the background and meaning of the “two-stages theory” (A.MEANING OF THE “TWO-STAGES” THEORY). The other addresses the modification of the “two-stages theory” (B.MODIFICATION OF THE “TWO-STAGES” THEORY).

A.MEANING OF THE “TWO-STAGES” THEORY

The first stage in the “two-stages” theory addresses the application or the bidding procedure, while the second stage addresses the procurement contract.

⁶⁰⁴ LAURENT RICHER, *supra* note 515, at 188.

⁶⁰⁵ LAURENT RICHER, *supra* note 515, at 189.

⁶⁰⁶ FRANÇOIS BRENET, *l’annulation des mesures d’exécution du contrat par le Juge de plein contentieux*, Droit Administratif n° 11, Novembre 2000, chron. 18.

⁶⁰⁷ CE, 7 / 10 SSR, 20 septembre 1999, SA Alabel, req.n° 179345.

⁶⁰⁸ LAURENT RICHER, *supra* note 515, at 189.

Taiwan's administrative law jurists believe that the **decision in a bidding procedure is**, in its nature, **a unilateral administrative act** and that a remedy should be sought **before an administrative judge**.

In the second phase, however, disputes regarding the **execution of a procurement contract** in Taiwan are regarded as being resolved pursuant to **civil procedure**.

A brief comparison with the system in France is as follows:

With regard to decisions made before the signing of a contract:

In France, namely "detachable acts" are "unilateral administrative acts" and in nature belong before an administrative judge.

In Taiwan, they are "unilateral administrative acts" and belong before an administrative judge.

Thus, in the phase before the signing of a contract, Taiwan's system is similar to that in France.

However, disputes regarding the execution of procurement contracts are different.

In France, they are "bilateral acts" and belong before an administrative judge; furthermore, the principle of the prohibition of arbitration (examples of legislative exceptions are discussed in the first chapter of this dissertation) applies in this situation. Thus, "detachable acts" belong before the JDE, while disputes regarding the contract belong before the JDC (*juge du contrat*); both of them are administrative judges.

In Taiwan, although they are "bilateral administrative acts" pursuant to procurement law, they are resolved according to civil procedure; they belong before "ordinary judges" and, importantly, they are arbitrable.

An exploration of the reasons reveals that they involve the derivation of Taiwan's administrative contract law. Although the prerogatives of the administrative contract in the French system have been adopted in Taiwan, Taiwan's administrative law also has been deeply influenced by the German system in that procurement contracts are often viewed as private law relationships.

In Taiwan, all the administrative acts made by the state are divided into "**public law administration**" (the state stands in the prerogative position, **PLA**) and "**private economy administration**" (**PEA**); PEA is based on the characteristics of particular laws,⁶⁰⁹ for example, those applicable to public

⁶⁰⁹ Werner Jann, *State, Administration And Governance In Germany: Competing Traditions And*

property purchase contracts (in French, “*marchés fournitures*”), the administration’s commercial acts (such as sales of alcohol or cigarettes by public enterprises), administrative private law acts (such as offering water or electricity, or the lease or sale of public housing), simple commercial trade (such as the sale or purchase of foreign currency, or open sales of the state’s stock in public enterprises to citizens).⁶¹⁰ The aforementioned distinction has an impact on the legal effects of these transactions.

In remedy procedures, the PLA is within the administrative litigation system, while the PEA is within the civil litigation system.

In the responsibility system, the PLA is governed by the state’s responsibility, while the PEA is governed the civil responsibility law.

The aforementioned classifications are also applied to Taiwan’s administrative contracts. The first distinction standard is the “**contractual position**,” pursuant to which Taiwan’s administrative contracts can be divided into two categories. The first category involves situations in which the administration is standing **in the prerogative position**. The second category involves situations in which the administration stands **in an equivalent position** to the contractor.

Another classification is based on the **contractual function** of an administrative contract. One type of contract is called a “conciliation contract;” its target is to deal with certain cases involving facts or legal relationships that are difficult to identify pursuant to Article 136 of APAT. For example, many tax laws grant tax authorities the ability to conclude a “conciliation contract” in which the administrative body and the citizens enter into a resolution regarding tax facts. Tax authorities can save calculation costs (otherwise, it must calculate the real income of citizens or tax-based facts in detail, which would involve a high cost for tax authorities) and citizens possibly can reduce their tax burden (because, in a conciliation contract, tax authorities often will reduce the amount of taxes due in order to seek an agreement). Similarly, many environmental laws grant the environmental administration the ability to conclude an “environmental protection agreement” in which the administrative body and citizens (often the victims of certain urban development plans) agree to an amount of damages or a calculation of the identification standards of pollution.

Dominant Narratives, Vol.81 PUBLIC ADMINISTRATION p.95 (March 2003).

⁶¹⁰ Chien-Ho Ko & Hong-Sheng Liao, *Reducing Ineligible Contractor Disputes in Government Procurement : A Lesson from Taiwan*, 18(2) KSCE JOURNAL OF CIVIL ENGINEERING 411 (2014).

Also, land expropriation laws allow the relevant administrative body to conclude a “land expropriation compensation agreement” in which landowners and the administrative body agree to the level of compensation.

The other type of contract is a “bilateral obligation contract,” in which the administrative body and the contractor both have contractual obligations (Article 137 of APAT).

In summary, regardless of the distinction between the standards (contractual position or contractual function), Taiwan’s administrative law field acknowledges that an administrative body can stand in an equivalent position (especially in the “**private economy administration**” field) or enter into a settlement with citizens to save administrative costs; thus, arbitration is easily accepted in those situations.

However, the “two-stages theory” has led to some criticism, as different jurisdictions (administrative and ordinary judges) could possibly make contradictory judgments. Thus, legal doctrine and jurisprudence have stepped in to amend the theory.

B.MODIFICATION OF THE “TWO-STAGES” THEORY

More and more of Taiwan’s administrative law jurists also have begun to reflect upon the “two-stages theory.”

Firstly, jurists have reviewed the theory’s background. This theory was introduced in 1951 by German jurist Hans P. Ipsen; initially, it was intended to deal with cases in which the government provided social financial aid to citizens.

After the Second World War, the German government provided a great deal of social aid to help citizens in their reconstruction efforts. At that time, the acts through which government provided social aid (often low-rate loans) were defined as private contracts.

In addition, in German administrative doctrine, administrative acts are divided into two sections. One includes acts that provide public services or welfare, i.e., “welfare administrative acts” (in German, “*leistende Verwaltung*,” briefly, they are favorable to citizens). The other includes acts that intervene or impose obligations upon citizens, i.e., “interference administrative acts” (in German, “*Eingriffsverwaltung*,” briefly, they lead to devaluation for citizens). Most jurists in Germany and Taiwan believe that, in welfare administrative acts, the administrative body has the liberty to choose the form of administrative acts;

the relevant theory is called “*Formenwahlfreiheit*” (literally, in German, this means “Freedom of choice of form”). This means that they have the freedom to utilize a unilateral or bilateral form, or an administrative contract or private contract. Consequently, administrative bodies are free to choose whether they want to fulfil their public tasks pursuant to public or private law (*Formenwahlfreiheit der Verwaltung*)⁶¹¹

In conclusion, pursuant to the aforementioned freedom, in welfare administrative acts, the field administration has the right to define the competent courts to decide legal disputes that arise from the administrative acts.

Thus, German jurists worry that administrative bodies will exceed the legal controls of administrative acts by concluding private contracts; the “two-stages theory” was introduced because of this concern. This theory tries to detach administrative decisions that occur before the signing of a contract from the contract itself and to define them as unilateral administrative acts that are subject to administrative judges, who can examine the legality of the decision to sign.

For example, if the administrative body decides to grant state aid to citizens in the form of loans, the decision to grant the loan is considered to be an administrative act under public law. Legal claims to the grant of state aids that have been rejected by an administrative body would have to be made before administrative judges pursuant to the first section of Article 40 of VwGO (“*Verwaltungsgerichtsordnung*,” the Code of Administrative Court Procedure).⁶¹² However, the modalities of the loans are decided according to the loan contract under the private law rules found in Article 488 of the BGB (German Civil Code).⁶¹³ Thus, disputes that arise from the modalities of loan contracts, for instance, the conditions regarding the repayment of a loan, must be submitted to ordinary judges.

In addition, the use of public services, for instance, the use of a local library, can similarly be divided into two stages: The decision regarding whether a certain citizen is granted access to the library is under public law.⁶¹⁴ Thus, the refusal to grant access to the library could ultimately be challenged before an administrative judge. In contrast, the modalities of its use, such as the applicable

⁶¹¹ NIGEL FOSTER & SATISH SULE, *GERMAN LEGAL SYSTEM AND LAWS* 286 (4th ed. 2010)

⁶¹² NIGEL FOSTER & SATISH SULE, *supra* note 611, at 285.

⁶¹³ For an English version of German civil code, see http://www.gesetze-im-internet.de/englisch_bgb/index.html, last visited 7 March 2014.

⁶¹⁴ NIGEL FOSTER & SATISH SULE, *supra* note 611, at 286.

fees and rules of behavior, are regulated pursuant to private law contracts in that disputes about those modalities must be brought before an ordinary judge.

In Taiwan, this theory was acknowledged by the TCC (Taiwan Constitutional Court) in its judgment No.540 regarding the open sale of public housing that had been constructed by the government. The TCC ruled that the government's acts, i.e., constructing the public housing and selling it to citizens, can be divided into two phases: The first phase involves the decision regarding who is qualified to purchase this public housing and disputes about this decision should be adjudicated by an administrative judge. In the second phase, which involves the conclusion of a purchase or loan contract in which the modalities of the purchase (such as the price and payment method) have been determined, disputes involving the contract belong before an ordinary judge.⁶¹⁵

However, this theory has led to many disputes in public works practice in Taiwan. In the beginning of the bidding procedure, bidders must deposit a "Bid Bond" (BB) to guarantee that they are bidding legally and can execute the contract properly.

In one case (in Taiwan, it's namely "The first meeting of the Plenary Assembly of the TSAC in May 2008, in Chinese "最高行政法院 97 年 5 月份第 1 次庭長法官聯席會議"), the administrative body found that the BBs deposited by different bidders (called A, B, and the awardee, C) came from the same bank account; the administrative body questioned whether these three bidders were, in fact, the same bidder and confiscated their BBs. Thus, bidder C demanded that the administrative judge quash the "confiscation" act and order the administrative body to pay back the confiscated BB (Case BB-1⁶¹⁶).

In a second case (The first meeting of the Plenary Assembly of the TSAC in February 2004, in Chinese namely "最高行政法院 93 年 2 月份庭長法官聯席會議"), one bidder (bidder D), having been awarded to conclude a contract, found that its bid price was too low. Thus, the awardee bidder D asked the administrative body to cancel the award as a result of his mistake in writing the price in the bid application formula. However, the administrative body refused and confiscated the BB as a result of the awardee bidder D's failure to sign the contract with administrative body within the fixed period. Thus, the bidder, D, demanded that the administrative judge quash the "confiscation" act and order

⁶¹⁵ See http://www.judicial.gov.tw/constitutionalcourt/p03_01.asp?expno=540, last visited 7 March 2014.

⁶¹⁶ The first meeting of the Plenary Assembly of the TSAC in May 2008.

the administrative body to pay back the confiscated BB (Case BB-2⁶¹⁷).

In a third case, one bidder (bidder E) concluded a public works construction contract with one administrative body. Then, the administrative body returned the BB that had been deposited by bidder E. Subsequently, during the execution phase, an irregularity was found based on corruption, in that bidder E, during the bidding procedure, had bribed the public servants in the administrative body that were responsible for this public purchase. The responsible administrative body demanded that bidder E return the BB that had been returned to it on the basis that the return of the BB was illegal; pursuant to Article 31 of Taiwan's procurement law (TPL), corruption constituted grounds for the confiscation of the BB. Thus, the administrative body demanded that the administrative judge order bidder E to pay back the BB that had been returned to it (Case BB-3⁶¹⁸).

The jurisprudence considered that cases BB-1 and BB-3 were under public law (in that they involved questions that arose during the bidding phase) and that BB-2 was under private law (in that it involved questions that arose during the execution phase).

Interestingly, in BB-2, the contract had not been concluded, but the TSAC considered the disputes to have occurred in the execution phase, rather than in the bidding phase.

Similarly, in BB-3, the contract had been entering into the execution phase, but the TSAC regarded this dispute as one that had occurred during the bidding phase because the irregularity, i.e., the corruption, occurred during the bidding phase, although it had been exposed during the execution phase.

Thus, jurist Jeffrey Chang believed that the TSAC's opinions were based upon the reasoning that the disputes during the bidding phase were concerned with the right of access to the bidding procedure, while the disputes in the execution phase concerned the rights and obligations of contracts.⁶¹⁹

Jurist Yao Chi-Sheng believed that the goals of a BB can be divided into three main aspects. One addresses the maintenance of fair competition, another ensures the binding obligation to sign the contract and the third ensures the performance of the contractual obligations. The first goal, in its nature, involves the public interest and belongs before an administrative judge. The latter two

⁶¹⁷ The first meeting of the Plenary Assembly of the TSAC in February 2004.

⁶¹⁸ TSAC, judgment No. (Pan-zhi) 1237, Year 100. (最高行政法院 100 年度判字第 1237 號) (Judgment date: July 21, 2011).

⁶¹⁹ Jeffrey Chang (張祥暉), *Resolution System About Disputes On Procurement Contract* (政府採購法爭議處理機制之問題探討), 56 THE TAIWAN L. REV. JANUARY, 2000 (月旦法學雜誌) 123.

involve an administrative body's contractual interests and, in their nature, belong before an ordinary judge.⁶²⁰

However, we believe that the aforementioned three goals can't be interpreted separately. If the administrative body confiscates the BB during the execution phase, this is similar in nature to a unilateral sanction issued by a contractual administrative body. The confiscation by the administrative body should be a measure that is necessary to implement the public mission and protect the general interest, so we should not regard it from a simple contractual perspective.

Thus, jurist Keh-Chang Gee (葛克昌) has criticized Taiwan's jurisprudence as often confusing obligations under public law with those under private law. Keh asserted that, regardless of the form (administrative contract or private contract) and the obligations that follow (under public law or private law), all administrative acts involving the execution of public power should be monitored pursuant to the principle of legality.⁶²¹

Finally, disputes regarding the confiscation of BBs reveal the difficulties of the "two-stages theory" in dealing with disputes involving Taiwanese procurement contracts. Thus, Taiwan's administrative law doctrine and jurisprudence have introduced another amendment: the "**amended two-stages theory**" or the "**one-stage theory**."

However, how has it been amended? Also, what is the "one-stage"?

As mentioned above, in the ETC case in Taiwan, the administrative judge defined the ETC contract as an administrative contract, which is a breakthrough in Taiwan's administrative contract law field.

According to the TSAC's opinion in ETC, a decision in a bidding procedure is a unilateral administrative act (this part of the decision follows traditional jurisprudence) and the ETC contract is an administrative contract (**this part changes the traditional opinion**). Both of the two stages are administrative acts and are subject to the same jurisdiction: that of an administrative judge.

Pursuant to this opinion, the difference in a dispute between a "bidding procedure" and the "ETC contract" is the claim by plaintiff. The plaintiff should contest decisions involving bidding procedures by bringing a "revoking claim" to

⁶²⁰ Yao Chi-Sheng (姚其聖), *Disputes About Execution Of Bid Bonds Confiscated Under Article 31 of TPL* (依政府採購法第三十一條第二項規定追繳投標廠商之押標金，得否移送行政執行分署辦理強制執行), TAIWAN B.J. (全國律師) 98 (August 2013).

⁶²¹ Keh-Chang Gee (葛克昌), *Introduction, In Application Of Taiwan Administrative Procedure Law In Tax Disputes* (行政程序法在稅務爭訟之運用) (August 2009).

demand that the administrative judge quash the illegal decision to sign or to refuse to sign, while, with regard to the ETC contract, the plaintiff should assert an “obligation claim” to demand the administrative body’s performance or a “confirmation claim” to demand a declaration of contractual nullity.

This opinion seemed to echo the aforementioned doctrinal critics and has been adopted by jurists⁶²²; it is called the “**amended two-stages theory**”⁶²³ (Theory A).

In Taiwan, jurist Ai-Er Chen (陳愛娥) asserted that the decision to sign or the refusal to sign should be defined as a “concept notice before contract” that is not an independent administrative act and has no legal effect. The ETC contract (or procurement contract) should be defined as a private contract. Thus, regardless of whether it is a bidding procedure or a ETC contract, there is only “one administrative act,” but it results in a legal effect under **private law**.⁶²⁴ According to this opinion, the “one-stage” is **one private contract** (Theory B).

Another jurist, Ming Chen (陳敏), believed that the decision to sign or the refusal to sign is a unilateral administrative act and the signing of the contract is merely an act in performance of the decision to sign. Thus, the “one-stage” is the **one unilateral administrative act**: the decision to sign or the refusal to sign a contract⁶²⁵ (Theory C).

Another jurist, Wu Geng (吳庚), agreed with the TSAC’s opinion in ETC, but considered that both acts (a bidding procedure and the signing of a contract) are defined as administrative acts in that it is not necessary to detach a decision to sign from an administrative contract. Thus, Wu believed that the decision to sign and the contract should be globally defined as a “complete administrative contract” and that they are not “detachable” (Theory D).

Besides, there is an interesting theory. French jurist Jean-Baptiste Zufferey said, we can consider “single contract” as “two stages”. He detached the “bidding contract” from the “governmental procurement contract” and described as : the contract (bidding contract) results from another contract (governmental procurement contract)⁶²⁶. This opinion seems to define detachable acts as

⁶²² Ming-Chiang Lin(林明鏘), *supra* note 320.

⁶²³ Tsai Tung-Li (蔡東利), *Study on “Two-Stages Theory” and Public Interest* (從 ETC 案件論雙階理論與公益原則之操作), Tome 47, ANNUAL REPORT OF ACADEMY FOR THE JUDICIARY IN MINISTRY OF JUSTICE (司法官學院學員報告) at 314.

⁶²⁴ Ai-Er Chen(陳愛娥), *supra* note 325.

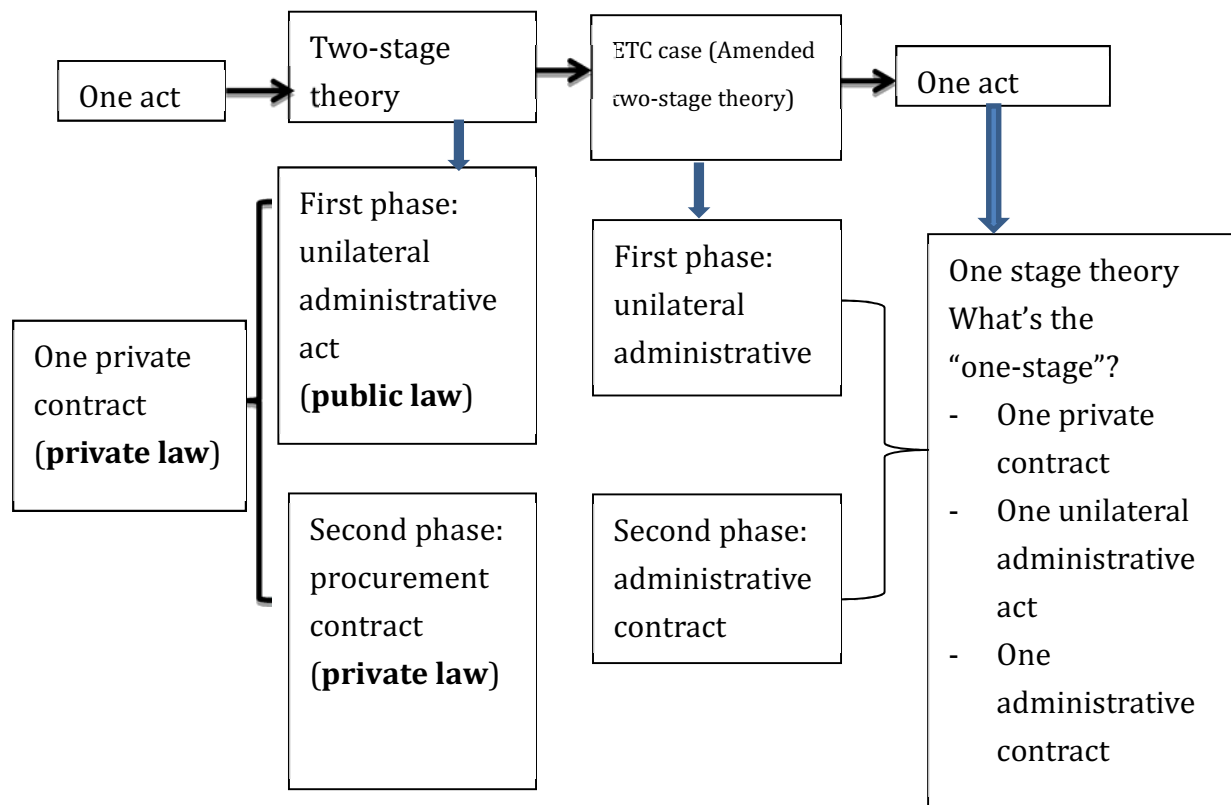
⁶²⁵ MING CHEN (陳敏), *GENERAL ADMINISTRATIVE LAW* (行政法總論) 662 (7th ed. 2011).

⁶²⁶ See <http://www.lawscape.ch/doc/admin/cours%20de%20droit%20administratif.pdf>, last visited 12 March 2014.

another independent administrative contract and similar to Taiwan's ETC case and Theory D.

In summary, under theories B, C, and D, there is no detachable act before the conclusion of a contract, while under theory A, a detachable act still exists in Taiwan's administrative law field.

Finally, in order to easily observe the development of "two-stages theory" in Taiwan, we can illustrate by following formula: we can call it as (one-two-two-one) style or (no detachable- detachable- detachable- no detachable) style on the next page.



3. IN CANADA

With respect to preparatory decisions prior to the signing of contracts, injured bidders can also initiate litigation before the External Commercial Tribunal of Canada regarding disputes arising from public procurement contracts that involve the agreement of WTO (World Trade Organization, or in French "*L'Organisation mondiale du commerce*", *OMC*); they must invoke chapter 10 of the North American Free Trade Agreement (NAFTA, or in French "*l'Accord de Libre-Échange Nord-Américain*", *ALENA*) or chapter 5 of the Accord on internal commerce, which is an accord regarding the free exchange that orders the federal states and all of the provinces in Canada.⁶²⁷

Although in practice, the losing bidder often initiates the remedy, as jurist Denis Lemieux stated⁶²⁸, with regard to disputes related to contractual signing, all of the ratepayers (*contribuable*) are considered to have a judicial interest in a claim that an administrative contract was signed in violation of laws or regulations.

This rule is obviously broader than those in Taiwan and France regarding qualified plaintiffs.

Moreover, bidders can use the bid challenge system in Canada, as has been mentioned previously.

4. IN CHINA

In China, administrative law doctrine also has acknowledged detachable acts in administrative contracts. As detachable acts in China are regarded as unilateral administrative acts, Administrative Litigation Law of the People's Republic of China (ALLPRC) can be applicable.

However, the detachable acts in China are not limited to acts prior to the signing of a contract, but also include the unilateral administrative acts that are issued during the execution of administrative contracts, for instance the

⁶²⁷ Loi sur le Tribunal canadien du commerce extérieur, L.R.C. 1985, ch. 47 (4e suppl.); Règlement sur les enquêtes du Tribunal canadien du commerce extérieur sur les marchés publics, DORS/93-602.

⁶²⁸ Denis Lemieux, *supra* note 199, at 462.

unilateral sanctions.⁶²⁹

3. CONCLUSION:

The idea of “detachable acts” exists in administrative contract law in the world, especially there are many practical cases in Taiwan and France.

The difficulty of REP in an arbitration procedure mainly concerns the third person in a contractual relationship. In particular, in litigation regarding the validity of administrative contracts that are contested by a third person, they are often regarded as having “no litigation interest”; thus, jurist Joseph Kamga believed that third persons have an interest in increasing the possibility of a remedy in REP.⁶³⁰

In arbitration procedures, jurist Joseph Kamga asserted that, in contrast to arbitration pursuant to private law, a third person has an interest in arguing that the contested disputes involving administrative contracts are not arbitrable (*le litige ne soit pas justiciable de l'arbitre*).⁶³¹

However, we believe that questions regarding the arbitrability of administrative contractual disputes should be considered as disputes regarding whether the conventions agreed upon by the parties to submit to arbitration are valid. In their nature, disputes regarding the validity of such conventions are not within the scope of REP.

Finally, Laurent Richer believed that RCAD cannot deprive parties of the right to “référé contractuel” (an urgent procedure) that was adopted in 2009, since the latter is only aimed at certain contracts, applicants and the contesting of certain illegalities.⁶³²

SECTION II: THE VICES SUSCEPTIVE TO BE CONTESTED

RCAD is one category of REP, and thus, it should also be based on the illegality of an administrative act. However, the illegality can exist within a detachable act itself or as a result of an administration contract. Thus, we will discuss it in two sections. One section addresses illegality in detachable acts (1.

⁶²⁹ Zhang Li (張莉), *Arbitrage International et Contrats Publics en Chine*, in MATHIAS AUDIT, *CONTRATS PUBLICS ET ARBITRAGE INTERNATIONAL* 493,513 (Bruylant 2011).

⁶³⁰ Joseph Kamga, *supra* note 70, at 73.

⁶³¹ Joseph Kamga, *supra* note 70, at 73.

⁶³² LAURENT RICHER, *supra* note 515, at 189.

ILLEGALITY IN THE DETACHABLE ACT ITSELF).

The other section addresses illegality in administrative contracts (2. ILLEGALITY IN THE CONTRACT).

1. ILLEGALITY IN THE DETACHABLE ACT ITSELF

Illegality in detachable acts, according to Laurent Richer's observations, can result from a vice involving "**external legality**" (vice that violates regulations) and that involving "**internal legality**" (vice existing in an act itself).⁶³³

Pursuant to the CE's judgment on 18 November 1991 in the "*Le Chaton*"⁶³⁴ case, a decision to sign a contract is illegal because of the illegal competence of an authority or its composition; that case dealt with the illegal composition of an appeal offer commission (*la commission d'appel d'offres*, CAO).

Jurist Willy Zimmer considered that an irregularity in the composition of the CAO would result in the illegality of the deliberative procedure, and consequently, the decision to award the contract.⁶³⁵

In addition, the decision may be illegal because the deliberative assembly received faulty information, as in the CE's "*Avrillier*"⁶³⁶ case of 1 October 1997. In that case, the real motivation was dissimulated, and thus, the deliberative decision that permitted the signing of a concession contract was quashed.

The vice also may exist in the decision itself. For example, a decision to sign in violation of urban regulations was quashed pursuant to the CE's judgment on 1 October 1993 in the "*Soc.Le Yacht-club international de Bormes-les-Mimosas*"⁶³⁷ case.

Also, a decision to sign that injures acquired rights can be quashed pursuant to the "Cour administrative d'appel de Nantes"s judgment in the "*Commune de Mauves-sur-Loire*"⁶³⁸ case of 7 May 1991.

The controls upon the selection of a contractor have varied for a lengthy period of time. In a case involving a public purchase contract, administrative judges executed a restricted control upon the decision of a CAO, referring exclusively to manifest errors pursuant to the CE's judgment on 14 September

⁶³³ LAURENT RICHER, *supra* note 515, at 190.

⁶³⁴ CE 18 November 1991 Le Châton, Rec.t.1040.

⁶³⁵ Willy Zimmer, L'irrégularité de la composition de la CAO entraîne la nullité du contrat de marché, Contrats et Marchés publics n° 7, Juillet 2004, comm. 135.

⁶³⁶ CE, 1er October 1997, Avrillier, req. n°133849.

⁶³⁷ CE, 1 October 1993, Soc.Le Yacht-club international de Bormes-les-Mimosas, req.n°54660.

⁶³⁸ CAA Nantes, 1e chambre, 7 May 1991, Commune de Mauves-sur-Loire :89NT00418.

1979 in the “*Commune d’Agde*” case.⁶³⁹ The CE’s opinion was described by jurist Laurent Richer as providing for “minimum control.”⁶⁴⁰

Traditionally, no control has been executed regarding the selection of a concession contract according to the CE’s jurisprudence in the “*Syndicat de l’Armagnac et des vins du Gers*”⁶⁴¹ case of 17 December 1986 and the “*M. Loupias et autres c. commune de Montreuil-Bellay*” case of 18 March 1988.⁶⁴² Note that the period of a concession contract is still under the control of administrative judges pursuant to the CE’s judgment on 23 July 1993 in the “*Compagnie générale des eaux*” case.⁶⁴³

In a contract that involved the delegation of public service (DSP), the CE’s leading judgment in the “*Département de la Vendée*”⁶⁴⁴ case not only specified the distinction between DSP and procurement contracts, but also strengthened the control of administrative judges over the selection of delegates. The Sapin Law (law No 93-122 of 29 January 1993, known as the ‘Sapin Law’) instituted the requirement for a competitive procedure, and thus, the traditional method in France, which is based on the “*intuitu personae*” (in which the specification of a person representing one of the contracting parties is an essential term of the contract), can no longer be used. Thus, the CE ruled that the selection of DSP should also be controlled. Jurist Laurent Richer described this as having the DSP in the line of a procurement contract.⁶⁴⁵

2. ILLEGALITY IN THE CONTRACT

Vice in administrative contracts may cause detachable acts to be quashed by administrative judges.

First, the illegal contract may result from vice in the parties’ consensus. In the CE’s judgment on 23 March 1992 in the “*Martin*”⁶⁴⁶ case, the CE considered that the contractual stipulations were overshadowed by vice (to fix the modalities of the capitals), which led to a lack of accord between the parties in

⁶³⁹ CE, 14 September 1979, *Commune d’Agde* : Lebon, at 356.

⁶⁴⁰ LAURENT RICHER, *supra* note 515, at 190.

⁶⁴¹ CE, 17 December 1986, *Syndicat de l’armagnac et des vins du Gers*, RFDA 1987, at 25.

⁶⁴² CE, 18 March 1988, ‘*M. Loupias et autres c. commune de Montreuil-Bellay*. Rec. Tables, 668.

⁶⁴³ CE, 23 July 1993, *Compagnie Générale des Eaux*, Recueil Lebon, p. 225.

⁶⁴⁴ CE, 7 November 2008, *Département de la Vendée*, req. n° 291794.

⁶⁴⁵ LAURENT RICHER, *supra* note 515, at 191.

⁶⁴⁶ CE, 23 mars 1992, *Martin et autres*, rec. p. 1028, AJDA 1992 at 375.

the essential elements, and thus, resulted in contractual nullity.⁶⁴⁷

A decision made by a minister to sign contracts in a domain that is reserved to certain legislatively determined public authorities would be quashed as an illegal contract. For example, it is within the police's power to frame a polluting enterprise's obligations and the State cannot establish them by contract. In his judgment on 8 March 1985 in the "**Association Les Amis de la Terre**⁶⁴⁸" case, the CE considered this to be a limitation on the parties' freedom.⁶⁴⁹

Thus, the execution of certain public missions is within a public power's prerogative, and in their nature, they cannot be the subject of delegation. The judges in REP should still examine the legality of an administration contract regarding the subject of delegation.⁶⁵⁰

The most frequent reason that an act is quashed is the violation of procedural rules, such as rules regarding publicity and fair competition, which administrative judges should examine by applying European directives and French national laws.

Another interesting question is whether the provisions in European directives can be used against regulatory acts or concrete decisions to award contracts.

First, the European directive 89/1140 was not transposed into France until its decree of 31 March 1992, which was already 20 months later than the deadline for transposition of 20 July 1990 that had been imposed by the European Communities.

Initially, in 1974, the CJCE (*la Cour de Justice des Communautés Européennes*), in its judgment on 4 December 1974 in the "**Yvonne van Duyn contre Home Office**⁶⁵¹" case, held that a Community directive has a "directive effect" over the national juridical order of member states. Thus, following the CJCE's logic, the provisions in a directive can be contested in a recourse.

However, the CE did not follow the aforementioned logic. In 1978, in his famous judgment on 22 December 1978 in the "**Cohn-Bendit**⁶⁵²" case, the CE

⁶⁴⁷ CE, 23 March 1992, Martin et autres, rec. p. 1028, AJDA 1992 at 375.

⁶⁴⁸ CE, 8 March 1985, Association Les Amis de la Terre, Recueil, p.73.

⁶⁴⁹ CE, 6 / 2 SSR, 8 March 1985, 24557, Association Les Amis de la Terre, published at "recueil Lebon", AJDA 1985, 382 and RFDA 1985, 363.

⁶⁵⁰ See

<http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEX T000007680516&fastReqId=413598670&fastPos=1>, last visited 8 March 2014.

⁶⁵¹ CJCE, 4 December 1974., Yvonne van Duyn contre Home Office, aff.41/74, Recueil, 1974, p. 1337.

⁶⁵² CE, 22 December 1978, ministre de l'intérieur c/ Cohn-Bendit, Rec. Lebon p. 524.

ruled that a Community directive had no direct effect and could not be invoked directly in an REP procedure to contest an individual administrative act.

In 1993, in his judgment in the “*Compagnie générale des eaux*”⁶⁵³ case on 23 July 1993, the CE reconfirmed that the provisions of a Community directive could not be used in a recourse against administrative acts that are not regulatory (“*acte administratif non réglementaire*”). Both administrative contracts and detachable acts are within the scope of the aforementioned opinion.

Thus, at that time, the provisions in a Community directive could be used exclusively in a recourse against regulatory acts, particularly when they violated the directive.

In 1998, the CE confirmed the priority of Community directives over national laws in his judgment on 6 February 1998 in the “*Tête*”⁶⁵⁴ case. Jurist Laurent Richer considered that this case cannot be characterized as the abandonment of the aforementioned jurisprudence (that a directive cannot be used in a recourse against administrative acts that are not regulatory). However, the CE quashed the contested deliberative decision that corresponded with national regulations, but that violated the subject of directives in 1989 because it lacked provisions that imposed the measures for publicity that were required by the Community directive of 18 July 1989.

The opinion in *Tête* was reconfirmed by the CE in his judgment on 27 July 2001 in the “*Compagnie Generale Des Eaux*”⁶⁵⁵ case, which dealt with a procurement contract.

In 2007, the CE acknowledged that the transposition of a Community directive is a **constitutional obligation** in his judgment on 8 February 2007 in the “*Société Arcelor*”⁶⁵⁶ case.

The judgment in “*Société Arcelor*” seemed to be the beginning of a dawn. Thus, in his judgment on 30 October 2009 in the “*Perreux*”⁶⁵⁷ case, the CE abandoned the older jurisprudence that had been established in the “*Cohn-Bendit*” case and acknowledged that a plaintiff can appeal to provisions in Community directives to contest administrative acts that are “not regulatory” (including RCDA). Thus, jurist Laurent Richer considered that plaintiffs can

⁶⁵³ CE, 23 July 1993, *Compagnie Générale des Eaux*, Recueil Lebon, p. 225.

⁶⁵⁴ CE, Ass., 6 February 1998, *Tête*, recueil p.30.

⁶⁵⁵ CE, 27 July 2001, *Compagnie Generale Des Eaux*, req. n°229566.

⁶⁵⁶ CE, 8 February 2007, *Société Arcelor*, req. n°287110.

⁶⁵⁷ CE, Ass., 30 October 2009, *Mme Perreux*, req. n°298348.

invoke Community directives to contest regulatory acts or concrete decisions that allow the signing of a contract if the acts or decisions violate a Community directive.⁶⁵⁸

Administrative judges may quash irregular detachable acts partially or entirely, depending on the gravity of the irregularity and whether the irregular situation is detachable.

As illegal detachable acts can be linked exclusively to certain illegal contractual clauses that are divisible from the other clauses, the illegality can be regarded as partial, and thus, detachable acts can be quashed partially⁶⁵⁹ pursuant to the CE's judgment on 17 December 1993 in the "**Groupement national des établissements de gérontologie**⁶⁶⁰" case. In a similar opinion, pursuant to the TA of Lyon in his judgment in the "**Paul CHOMAT et autres contre la ville de SAINT-ETIENNE**⁶⁶¹" case on 14 December 1993, a deliberative decision by the Municipal Counsel can be quashed only for an increase in water fees.

However, the stipulations in the contract constituted an indivisible totality, and thus, the detachable acts should be regarded as an illegal ensemble and quashed completely, pursuant to the CE's judgment in the "**SNETAP**⁶⁶²" case on 20 January 1978.

In practice, there is a principle called the "presumption of indivisibility" that is applicable to some categories of contracts, which was applied in the CE's judgment in the "**Confédération des syndicats médicaux français et autres**⁶⁶³" case on 2 December 1983; however, jurist Laurent Richer noted that this presumption is not irrefragable.⁶⁶⁴

The CE also held that the aforementioned presumption principle is not irrefragable in his judgment on 14 April 1999 in the "**Syndicat des médecins libéraux et autres**⁶⁶⁵" case.

⁶⁵⁸ LAURENT RICHER, *supra* note 515, at 191.

⁶⁵⁹ Gilles Le Chatelier, *Les avenants à une convention passée entre les caisses d'assurance maladie et les infirmiers ne doivent pas concerner les principes fondamentaux de la sécurité sociale*, AJDA 1994, at 61.

⁶⁶⁰ CE, Ass., 17 December 1993, *Groupement national des établissements de gérontologie*, req.n°137262.

⁶⁶¹ TA Lyon, 14 December 1993, *Paul CHOMAT et autres contre la ville de SAINT-ETIENNE*, req. n° CETATEXT000008210010.

⁶⁶² CE, Set. 20 January 1978, *SNETAP*, Rec.22.

⁶⁶³ CE, Ass., 2 December 1983, *Confédération des syndicats médicaux français et autres*, Rec., at 469.

⁶⁶⁴ LAURENT RICHER, *supra* note 515, at 192.

⁶⁶⁵ CE, Sec. 14 avril 1994, *Syndicat des médecins libéraux et autres*, RFDA 1999 p. 1190.

After recognizing the possible vices that may occur in detachable acts and contracts, we will discuss how the illegality of vices should be observed.

Jurist Christine Maugüé considered that the JDE should adopt an “essentially objective” analysis (dealing with the gravity of the illegality) in examining detachable acts, while the JDP should analyze whether the contested clauses are determinant ones for the parties to the contract. He emphasized that the two aforementioned analyses by the JDE and JDP are often combined in practice.⁶⁶⁶

Jurist Labetoulle also considered that the intentions of both parties and the objective economic situation related to the contract should be examined to decide the place of contested clauses in administrative contracts.⁶⁶⁷

Taken together, in RCAD, administrative judges should utilize an “objective analysis” (to decide whether to quash partially or totally after considering the gravity of the illegality and whether the economic situation would be upset if detachable acts were cancelled) and a “subjective analysis” (to ascertain the parties’ intentions and whether the contested contract clauses were determinant in the contract).

Interestingly, jurist Christine Maugüé considered that the aforementioned objective analysis should occur prior to the subjective one. Thus, he considered that “internal coherence” (which refers to the relationship between the cancellation of contested clauses and the equitable structure of the whole contract) is of primary importance. Thus, he reasoned that a subjective analysis alone would not be sufficient to decide the divisibility of contested clauses. Thus, he regarded a “subjective analysis” as playing a “subsidiary, secondary” role (*rôle subsidiaire*).

Christine Maugüé also considered that if contested clauses are determinant in a contract, the parties can negotiate and reestablish new contractual clauses, or they can demand that the JDP declare the nullity of the contract or even denounce it. Thus, vice that affects determinant clauses can be easily repaired by the parties, while “internal coherence” cannot.⁶⁶⁸

We agree with Christine Maugüé’s aforementioned opinion because we can imagine a case in which the parties assert that the vice clauses are determinant and in which both the administrative contract and the detachable acts should be a nullity, but the administrative judge can (after engaging in the objective

⁶⁶⁶ Christine Maugüé, *L'illégalité partielle d'une convention et ses conséquences sur l'arrêté qui l'approuve*, RFDA 1999, p.1190.

⁶⁶⁷ CE, Ass., 2 déc. 1983, Confédération des syndicats médicaux français et autres, Rec., at 469.

⁶⁶⁸ Christine Maugüé, *supra* note 666.

analysis to determine whether continued execution would be good for the public interest or the annulation of the contract would be very harmful to public interest) regard the contested clauses as “divisible” and quash only the detachable acts that are linked to the clauses affected by vice or require the parties to renegotiate new clauses.

Note that jurist François Brenet considered that regulatory clauses (***clause réglementaire***), in their nature, are divisible in contracts. Thus, vice affecting regulatory clauses would not influence the other clauses in a contract.

Further, who is competent to declare the “divisibility” of contractual clauses? Jurist François Brenet noted that it is not the JED, but rather, the JDP (*juge du contrat*).⁶⁶⁹

SECTION III: CONSEQUENCES OF THE DETACHABLE ACT’S QUASHING

We will discuss the consequences of quashing in two sections. One section addresses the effect of quashing detachable acts to a contract (1.THE EFFECTS OF A QUASHING DETACHABLE ACT ON THE CONTRACT). If there is a link between them, we will discuss the procedure that should be used to quash the administrative contracts (2.PROCEDURE FOR SUCCESSIVE CHALLENGING OF THE CONTRACT ITSELF).

1.THE EFFECTS OF A QUASHING DETACHABLE ACT ON THE CONTRACT

We will divide the discussion into two sections. One section addresses the system in France (A.IN FRANCE). The second section addresses the system in Taiwan (B.IN TAIWAN).

A.IN FRANCE

When a detachable act is quashed, it is regarded as never having existed. An administrative contract is a separate administrative act, and consequently, the effect of the annulation of detachable acts does not necessarily reach the contract. Jurist Laurent Richer described this as the administrative contract that “lives under the shelter of the examination of the JED” (*“à l’abri de la censure du juge*

⁶⁶⁹ François Brenet, *Le recours pour excès de pouvoir et le contrat*, La Semaine Juridique Administrations et Collectivités territoriales n° 38, 24 Septembre 2012, 2313.

de l'excès de pouvoir”, since the JED cannot quash a contract).

If there is a necessary relationship between the annulment of detachable acts and the contract, the stability of the effects of administrative contracts would face challenges that would result in uncertainty in the contractual relationship.

The study report of the CE on 25 January 1989 mentioned that the annulment of detachable acts by the JDE **has no direct effect** on contracts; this is still the law between the parties, and principally, the interest in contractual execution can be unremitting. Thus, an administrative body can exclusively demand that the JDP pronounce the nullity of a contract or terminate it.⁶⁷⁰

However, jurist Laurent Richer considered that the aforementioned opinion (that an administrative body can only make a demand before the JDP) is not obligatory if the circumstances, for instance, are urgent or have financial consequences and justify the continuance of contract or, if the irregularity does not influence the selection of a contractor, the contract can continue.⁶⁷¹

The opinion discussed above was adopted in jurisprudence. In his judgment on 24 May 2001 in the “*Avrillier*”⁶⁷² case, the CE held that, after an annulment of detachable acts, an administrative body can take into consideration the circumstances of the disputes that are under the judges’ control to decide the consequences of the annulment.⁶⁷³

Subsequently, the CE reconfirmed that the annulment of detachable acts does not necessarily imply the nullity of a contract, especially when the nullity of the contract would cause the risk of excessive damage to the public interest.⁶⁷⁴ Laurent Richer considered that “all automaticity is excluded.”⁶⁷⁵

Thus, the term “not necessarily” leads us to discuss and define the effects of the annulment of detachable acts.

First, jurist Marcel Pochard (*Commissaire du Gouvernement*) considered that two elements, the target of an act and the nature of an illegal detachable act, should be taken into consideration.⁶⁷⁶

⁶⁷⁰ EDCE 1989, n° 41, at 127; CJEG 1991, at 115, comm. B. Pacteau. Recited from LAURENT RICHER, *supra* note 515, at 193.

⁶⁷¹ LAURENT RICHER, *supra* note 515, at 193.

⁶⁷² CE, 14 May 2001, M. Avrillier, req n° 194410.

⁶⁷³ ACCP, sept. 2001, n°3.

⁶⁷⁴ Jean-David Dreyfus, *Le juge de l'exécution et les considérations d'intérêt général imposant le maintien du lien Contractuel*, AJDA 2004, at 394.

⁶⁷⁵ Laurent Richer, *Conséquences de l'annulation d'un acte détachable sur le contrat*, AJDA 1998, at 169.

⁶⁷⁶ Marcel Pochard, *Conséquences de l'annulation d'un acte détachable du contrat*, AJDA 1993, at 810.

These elements were adopted by the CE in his judgment in the “*Sté Le Yacht-club international de Bormes-les-Mimosas*”⁶⁷⁷ case on 1 October 1993, the “*Institut de recherche pour le développement*” case on 10 December 2003 (called *jurisprudence IRD*⁶⁷⁸), and were reconfirmed in his judgment in the “*société OPHRYS*” case on 21 February 2011.⁶⁷⁹

Logically, Marcel Pochard considered that the reason for the annulation of detachable acts provides the principal standard.

For example, if a certain detachable act is quashed because of the illegality of the contractual stipulations, this annulation of a detachable act should necessarily influence the contract. Thus, the annulation of a certain deliberative decision in which the price clauses are approved necessarily influences the price clauses in a contract.

If a certain detachable act is quashed because of its own vice, Marcel Pochard suggested that the relationship between this vice and the contract should be observed, namely, the target of the act or the influence of the act on the signing of the contract.

Marcel Pochard explained that if a quashed detachable act prompted the decision to sign a contract, the consequence of the annulation necessarily would be the nullity of the contract since the decision to sign is an essential element of the contract.

In contrast, if a detachable act only has an indirect relationship with the contract, as Laurent Richer explained, through an act of approbation by the tutelage of the administrative authority, the annulation would be regarded as an element that does not endanger the validity of the contract.⁶⁸⁰

In a review of Marcel Pochard’s aforementioned logic, the most interesting element is whether the annulation of a “deliberative decision granting permission to sign” would necessarily result in the nullity of a contract.

In his study report of 3 December 1997, the CE held that the annulation of a deliberative decision granting permission to sign a contract does not necessarily result in contractual nullity.⁶⁸¹

Subsequently, the CE confirmed the aforementioned report opinion in the “*Avrillier*” case, acknowledging that the validity of a termination convention by

⁶⁷⁷ CE, 1 October 1993, Soc.Le Yacht-club international de Bormes-les-Mimosas, req.n°54660.

⁶⁷⁸ CE, 10 December 2003, “Institut de recherche pour le développement”, n° 248950, AJDA 2004, at 394, obs. J.-D. Dreyfus.

⁶⁷⁹ CE, 21 février 2011, société OPHRYS, req.n° 337349.

⁶⁸⁰ LAURENT RICHER, *supra* note 515, at 194.

⁶⁸¹ Recited from Laurent Richer, *supra* note 675.

the parties after the annulation of a deliberative decision that had granted permission to sign a concession contract.⁶⁸²

The Cour d'Appel Administratif de Marseille followed this opinion in his judgment on 12 September 2002 in the “**Association Gap Club**”⁶⁸³ case, in which he considered that the annulation of the deliberative decision authorizing the signing of a public service delegation contract, because of the failure to transmit certain documents to candidates, does not imply that the department (an French organization under local autonomy) should terminate the contract or demand that the contract be declared a nullity.

We agree with Laurent Richer’s opinion.

First, the execution of an administrative contract involves the public interest, and thus, the nullity of an administrative contract should be classified in the ultimate position in dealing with contractual disputes. That is, if a contractual illegality can be remedied, we should maintain its effect to the extent it is possible to do so.

Second, the procedures of RCDA would take time and if the annulation of a decision to sign would automatically disable a contract, the execution of contracts would be placed in an uncertain situation.

Thus, as Laurent Richer stated, the reason for an annulation seems to be more important than the position of an act in the contractual signing procedures.⁶⁸⁴

Jurist Marie-Caroline Vincent-Legoux also considered that, when a contract is not affected by the illegality of a detachable act, the contractual execution should continue, but an administrative body should establish methods to remedy it, such as the creation of new measures as substitutes for the quashed detachable acts.⁶⁸⁵

Jurist Romieu even regarded an administrative body’s remedial measures as the best reaction to quashed detachable acts.⁶⁸⁶

Now, we will introduce and compare similar questions in Taiwan’s law.

⁶⁸² See *supra* note 673.

⁶⁸³ CAA Marseille, 12 September 2002, *Association Gap-Club*, AJDA 2003 pp. 1615-1619.

⁶⁸⁴ LAURENT RICHER, *supra* note 515, at 195.

⁶⁸⁵ M.-C. Vincent-Legoux, *Quand l'annulation de l'acte détachable demeure platonique*, AJDA 2003, at 1615.

⁶⁸⁶ M.-C. Vincent-Legoux, *supra* note 685.

B.IN TAIWAN

The effect of the annulment of detachable acts on contracts was discussed in the aforementioned ETC case.

In ETC,⁶⁸⁷ the THAC and the TSAC considered that contractual signing is only a behavior in execution of a “**unilateral**” decision to sign a contract. Thus, the annulment of a decision to award would cause the administrative contract to lose its foundation, and consequently, the administrative contract would be a nullity.

Regarding a signed contract, Article 7 of the Administrative Litigation Code of Taiwan (TALC) allows the plaintiff to simultaneously present several claims in one litigation procedure. Thus, in practice, a losing bidder often brings a revoke-claim litigation as its principal claim (naming both the contractual parties as the defendants and demanding that the administrative judges quash the illegal decision to sign) and simultaneously asserts “declaration claims” to demand a declaration of the nullity of the signed contract or “obligatory claims” to demand indemnity, and most importantly, “urgent suspension claims” to demand the suspension of the contractual signing (if contract has not been signed) or contractual execution (if contract has been signed).

This opinion seems to have been adopted in Taiwan’s administrative law doctrine.

Administrative law jurist Ming-Chiang Lin (林明鏘) considered that the APPPIP (the law governing ETC), in its nature, is the imperative law whose violation would lead to the nullity of the contract pursuant to Article 71 of the Civil Code.⁶⁸⁸ In addition, he considered that the decision to award was the “legal fundament” of the ETC administrative contract, and thus, the annulment of the decision to award necessarily caused the nullity of the contract.⁶⁸⁹

To explicate the aforementioned opinion in Taiwan, we should recall the aforementioned “**two-stages theory**” under which contracts in the second phase are often regarded as private contracts. In addition, pursuant to Article 141 of the APAT, an administrative contract maybe null if it violates provisions in the Civil

⁶⁸⁷ *Supra* note 305.

⁶⁸⁸ Ming-Chiang Lin (林明鏘), *supra* note 320, at 223.

⁶⁸⁹ Fu Ke-qiang (傅克強), *Study on Resolution Mechanisms in APPPIP* (促參案件爭議處理機制之研究), in Tome 48, ANNUAL REPORT OF ACADEMY FOR THE JUDICIARY IN MINISTRY OF JUSTICE (司法官學院學員報告), at 459.

Code.

In conclusion, the annulment of a decision to award, in Taiwan, necessarily results in the nullity of the contract.

In Taiwan, a question that has been frequently discussed is whether the decision to award would persist after the ETC contract was signed. This leads to another question: After the signing of the ETC contract, could a third person (particularly, the losing bidder in a bidding procedure) contest the decision to sign?

In the ETC case, the THAC considered that the two acts (the decision to sign and the ETC contract) are sequential, and thus, when the ETC contract was signed, the decision to sign persisted and became the basis of the ETC contract.⁶⁹⁰

Another reason that has been adopted in most of Taiwan's doctrine is that, to protect the losing bidder's remedial rights, after the signing of the ETC contract, we should regard the decision to sign as persisting, and thus, the losing bidder can contest the decision to sign.⁶⁹¹

Next, we will discuss the procedure to declare the nullity of a contract after the annulment of detachable acts.

2.PROCEDURE FOR SUCCESSIVE CHALLENGING OF THE CONTRACT

ITSELF

In French jurisprudence, because the annulment of detachable acts does not systematically cause the nullity of a contract, there should be another procedure to declare the nullity of a contract.

This question is complex because it concerns the separation of functions among "administrative judges," and particularity, between each administrative litigation procedure.

In France, administrative litigation can be divided by different standards. We will introduce the two main standards that are relevant to this dissertation. One is the traditional standard. The other is a relatively new standard.

⁶⁹⁰ *Supra* 307.

⁶⁹¹ Ming-li Guo (郭明麗), *A Study of Private Participation in Public Construction System* (民間參與公共建設制度之研究), 142 (Master's thesis in Sun Yat-sen University in Taiwan, 2009).

The traditional standard was presented by jurist Edouard Laferrière and depends on the nature of the administrative judges' scope of power:

- Disputes of full jurisdiction (***contentieux de pleine juridiction, CPJ***): judges have the most expansive power, pursuant to which they can quash, modify, reform or order the administrative body to provide compensation.
- Disputes of annulation (***contentieux de l'annulation, CDA***): judges exclusively have the right to quash.
- Disputes of declaration (***contentieux de la déclaration***): judges interpret and appreciate the validity of administrative acts and the result of their appreciation often can be fundamental in another dispute.
- Disputes of punishment (***contentieux de la répression***): judges render condemnation or sanctions.

Among these four categories, the most relevant to contractual disputes are the CPJ and the CDA; both the REP and RCDA belong to the CDA.

Another classification was presented by jurists Marcel Waline and Léon Duguit, who established a classification that was dependent upon the nature of the disputes before judges:

- Subjective remedy: involves the protection of a subjective right.
- Objective remedy: involves a question regarding an objective right and refers to the legality of administrative acts.

Theoretically, REP is an objective remedy aimed at demanding that administrative judges (JDE) examine the "legality" of an "administrative act." Thus, the JDE can only quash illegal acts.⁶⁹²

Now, let us return to our primary subject.

In practice, RCAD is often brought by a third person or a losing bidder who is not one of the contractual parties, and thus, will not be allowed in a CPJ procedure to contest the validity of a contract. In French positive law, since the 2007 Tropic case, only the contractual parties or a competitor (***les concurrents evinces***) can bring a CPJ procedure.

Thus, the third person should demand that the contractual administrative body initiate a CPJ procedure before the judges (***juges du contrat, JDC***). The JDE and the JDC are, in practice, probably the same judge, though not necessarily.⁶⁹³

⁶⁹² Alice Minet, *la distinction entre Recours pour Excès de Pouvoir (REP) et Recours de Pleine Jurisdiction(RPJ)* Séminaire de Droit ADMINISTRATIF, Association M2DPA Université Panthéon-Assas Paris II (May 2008).

⁶⁹³ François Lichère and Frédéric Marty, *Les recours en matière de marchés publics en France et*

If the contractual administrative body refuses, the third person can demand that the CE condemn the contractual administrative body pursuant to Article 2 of the law of 16 July 1980. The CE executed his aforementioned competence in his judgment in the “**Lopez**⁶⁹⁴” case of 7 October 1994, which dealt with claims after the annulment of a certain detachable act of a contract that involved the community’s (“**commune**,” a local government organization in France) occupation of private property.⁶⁹⁵

In addition to the article mentioned above, French positive law (Article L911-1 CJA) also gives administrative judges another more “active” power, namely, “injunctive power” (“**pouvoir d’injonction**”), when the annulment of detachable acts implies a determined measure in execution. Under this article, the plaintiff in REP can simultaneously demand that the JDE order that the contractual administrative body take the necessary measures to terminate contracts, either to bring CPJ to demand that the JDC declare the nullity of a contract or that the parties cancel the contract by themselves.

Jurist Laure Marcus described the JDE’s injunctive power as the power by which he can execute his decision to quash a detachable act.⁶⁹⁶

In practice, administrative judges in the Nantes Administrative Tribunal executed their injunctive power by ordering the contractual administrative body (**département de la Vendée**, French local government) to terminate a signed public service delegation contract in their judgment in the “**Compagnie des transports de l’Atlantique**” case on 11 April 1996.⁶⁹⁷

In addition, the CE, in his judgment on 26 March 1999 in the “**Hertz**⁶⁹⁸” case, also quashed a detachable act because of its incompetence to decide and ordered the contractual administrative body (**Aéroports de Paris**) to find a new resolution, either to achieve an agreement with the contractor or to initiate CPJ.

In the aforementioned “**Hertz**” case, jurist Dominique Pouyaud considered that, since the “**Lopez**” case in 1993, the annulment of detachable acts was

aux EtatsUnis: une analyse juridique et économique, in Weaver R.L. et Lichère F., (eds.), *Recours et analyse économique / Remedies and Economics*, Presses Universitaires d’Aix-Marseille, Aix en Provence, January 2011, pp.12-75..

⁶⁹⁴ CE, Sect., 7 October 1994, Lopez, Rec.p.430, concl. Schwartz.

⁶⁹⁵ Rémy Schwartz, RFDA 1994, 1090.

⁶⁹⁶ Laure MARCUS and Alix PERRIN, *Annulation de l’acte détachable du contrat et distinction des contentieux*, Droit Administratif n° 1, Janvier 2006, étude 1.

⁶⁹⁷ Jean-Frédéric Millet, *Délégation de service public : le contrôle des offres*, RFDA 1996,722; TA Nantes, 11 April 1996, Compagnie des transports de l’Atlantique ,AJDA 1996,562, obs. Millet.

⁶⁹⁸ CE Sect. 26 March,1999, Soc. Hertz France, AJDA 1999, 427, concl. Stahl, note Bazex ; RFDA 1999, note Pouyaud.

regarded as having only a “theoretical” basis, which Pouyaud described as even having “platonic” characteristics. Thus, Pouyaud considered that the “*Hertz*” case gave the annulment of detachable acts a practical effect.⁶⁹⁹

However, in REP, we are curious about whether judges (JED) would execute the aforementioned power.

Jurist Laurent Richer held that the JDE could possibly reject the plaintiff’s demand for the execution of his injunctive power.⁷⁰⁰ In the jurisprudence, the IRD expressed three possible options for execution for judges (*juges de l’exécution, JEX*):

- To continue the contractual execution: if it is possible or if remedial measures can be taken by a public person or by the parties’ conventions.
- To terminate the contract with the retroactive effect: after verifying that its judgment would not cause excessive damage to public interest.
- To make a proposal to the parties before the JDC or to cancel the contract: if the illegality is particularly grave, the JEX can invite the parties to cancel the contract under their conventions or to go before the JDC to evaluate whether the cancellation of the contract is the appropriate solution.

In addition, in 2009, in the famous case “*Béziers I*”⁷⁰¹, which has been previously mentioned, the CE enlarged the power of administrative judges to reconstruct the contractual relationship⁷⁰², and thus, the judges (*juge du contrat, JDC*) should take all the illegal situations affecting the contract into consideration before declaring it to be a nullity.

Thus, how can the JED’s injunctive power in the REP procedure, the role of the JEX under the jurisprudence of the IRD, and the JDC’s reconstruction of contractual power under the jurisprudence of “*Béziers*” be conciliated?

Jurist Laurent Richer considered that one of the similarities between the “*Béziers*” and “*Tropic*” cases was the reinforcement of contractual security, which is an innovation that arose from the notion of contractual “loyalty.”⁷⁰³

Thus, Laurent Richer considered that the jurisprudence of “*Béziers*” would

⁶⁹⁹ Dominique Pouyaud, *L'injonction de résoudre un contrat*, RFDA 1999, at 977.

⁷⁰⁰ LAURENT RICHER, *supra* 515, at 196.

⁷⁰¹ CE, 28 December 2009, Commune de Béziers, req.n° 304802.

⁷⁰² Jean-Bernard Auby, *supra* 441.

⁷⁰³ LAURENT RICHER, *supra* 515, at 216.

not render the jurisprudence of the IRD useless since the JDC could pronounce results other than “annulation,” which could be declared by the JEX.

Pursuant to Laurent Richer’s opinion, we can classify the essential power of the JEX and the JDC as the following: The JDC aims to modify the sanction, while the JEX aims to declare the nullity of a contract.

Next, we will discuss whether a third person can directly demand that a contractual administrative body itself ascertain the nullity of a contract, without appealing to the aforementioned judges to intervene.

First, the CE acknowledged that the contractual administrative body can ascertain the nullity of a contract by itself in a case involving the contractual recruitment of public agents (“*agent public non titulaire*”, hereafter “public agent”) in his judgment in the “*Brillé*” case of 23 February 1996.⁷⁰⁴

Note that the recruitment of public servants in France and Taiwan is different from that in the Anglo-Saxon system. In the Anglo-Saxon system, all public servants are enlisted by contract, while in France and Taiwan, the majority of public servants pass a national exam and are nominated by a unilateral governmental appointment decision and a minority are recruited by contracts, namely, they are “*agent public non titulaire*.”

In France, since the recruitment of public agents is collective, it is impossible for an administrative body to negotiate each contract individually. In its nature, French doctrine analogizes it as the nomination of public servants (unilateral administrative acts) and considers that the administrative body can ascertain the nullity of a contract.

However, as Laurent Richer stated, the contracts of public agents are a particular case, and thus, they cannot be generalized. Unless certain contracts are similar to unilateral acts, we cannot allow an administrative body to withdraw from an administrative contract because of illegality.

This opinion was confirmed by the CE in his judgment in the “*Tlatli*”⁷⁰⁵ case of 2 April 1971, which held that neither of the contractual parties has the right to unilaterally declare the nullity of an administrative contract, nor do they have the right to withdraw from the contract.

However, in the jurisprudence, the local contractual governmental body can particularly remediate its detachable act with retroactive effect if the vice has no

⁷⁰⁴ CE 23 février 1966, *Brillé*, Rec. 142

⁷⁰⁵ CE, 2 April 1971, *Tlatli*, Rec.t. 923.

relationship to the contract and would not cause excessive damages.⁷⁰⁶

In contrast, the CE has traditionally accepted that the parties themselves can ascertain the nullity of their contract “bilaterally,” instead of appealing to judges.⁷⁰⁷

Furthermore, how to deal with a situation in which an administrative body cannot obtain a common agreement to ascertain the nullity of a contract is of interest.

In the “**Hertz**” case, which involves a contract for the occupation of public property, the CE held, after viewing the particular circumstances, the nature of the contract, and the vice involved, that the annulation of the decision to sign necessarily implied a convention to terminate the contract, and thus, there should be a conclusion to order the administrative body (Aéroports de Paris) to appeal to the JDC to declare the nullity of the contract within two months from the notification of the CE’s decision if the administrative body is unable to obtain a common convention between the parties to terminate the contract.⁷⁰⁸

In his judgment in the “**Commune de Divonne**”⁷⁰⁹ case on 8 June 2011, the CE also acknowledged that if the illegality is slight, such as vice in the form or procedure (which the CE called “external legal vice”), or if remediation is still possible, detachable acts can be the subject of retroactive remediation. Thus, the parties can take new steps in recognition of the contract that have retroactive effect as a substitute for the quashed detachable act.

Regarding remediation by the parties, the CE acknowledged that if a contractual agent is illegally recruited to a job that cannot be occupied by public servants, the contractual administrative body can suggest that the recruited contractual public agent be transferred to another job. If the transfer is impossible or refused, the contractual public agent would be fired or indemnified pursuant to the CE’s judgment on 31 December 2008 in the “**Cavallo**”⁷¹⁰ case.

⁷⁰⁶ Gilles PELLISSIER, *Contrats. Régularisation d'un acte détachable annulé*, Collectivités territoriales Intercommunalité n° 11, Novembre 2004, comm. 222.

⁷⁰⁷ Assemblée, 16 avril 1986, Roujansky, p. 113, RDP 1986.847 conclusions O. Dutheillet de Lamothe, AJDA 1986.284 chronique M. Azibert et M. de Boisdeffre, RFDA 1987.2 note P. Delvolvé et F. Moderne, D. 1987.97 note F. Llorens.

⁷⁰⁸ CE Sect. 26 March, 1999, Soc. Hertz France, AJDA 1999, 427, concl. Stahl, note Bazex ; RFDA 1999, note Pouyaud.

⁷⁰⁹ CE, 8 June 2011, Commune de Divonne-les-Bains, BJDGP 2011, n° 78, concl. Dacosta.

⁷¹⁰ CE, Sect. 31 December 2008, Cavallo, Rec. P.481, concl. Glaser.

SECTION IV: CONCLUSION

In France, as jurist Laurent Richer stated, the complexity of detachable acts explicates why certain doctrine is favorable towards allowing REP to resolve contractual disputes.

The main supporting opinion is asserted by the conclusions of the jurist (*commissaire du gouvernement*) Stahl, who proposed that the CE reflect the disallowance of REP in contractual disputes. Stahl considered that this principle (that REP is not allowed in contractual disputes) had no imperative reason in its juridical nature, but that it resulted only from great consideration regarding jurisprudential policy.⁷¹¹

Furthermore, traditionally in French doctrine, **the distinction between objective/subjective remedies is the fundament of another separation between the JDE (objective remedy) and the JDP (subjective remedy)**. However, the possibility of the use of REP in contests involving contractual disputes would blur the classical distinction. Jurist Wilfried Kloepfer considered that REP has a dual character: one addresses disputes regarding unilateral administrative acts, while the other addresses contractual disputes, and thus, REP can no longer be regarded as an action that is “simply objective.”⁷¹²

Jurist François Brenet believed that this principle (that REP cannot be allowed in contractual disputes) did not explicate his reason. With the progressive acknowledgement that contractual disputes should be applicable in REP, François Brenet considered that the aforementioned principle seemed to be abandoned gradually.⁷¹³

However, it is not contemporary French jurisprudence⁷¹⁴ that exclusively acknowledged the aforementioned exceptions: detachable acts, regulatory clauses, and public agent recruitment contracts.

However, under contemporary French jurisprudence, we cannot deny that the annulation of detachable acts would still indirectly (since in jurisprudence, it is “not necessarily” used⁷¹⁵) affect administrative contracts that contain

⁷¹¹ Jacques-Henri Stahl, *La recevabilité du recours pour excès de pouvoir contre les contrats administratifs : une nouvelle avancée*, RFDA 1999, at 128.

⁷¹² Wilfried Kloepfer, *Réflexions sur l'admission du recours pour excès de pouvoir en matière contractuelle*, AJDA 2003, at 585.

⁷¹³ François Brenet, *supra* 669.

⁷¹⁴ TC 14 février 2000, Commune de Baie-Mahaut, at 747; DA 2000, n°54 et 80, obs. Schwartz.

⁷¹⁵ JEAN RIVERO, *supra* note 103, at 375.

compromise clauses.

In Taiwan, the annulation of detachable acts would principally necessarily imply the nullity of administrative contract. Thus, the complexity is less than that in France.

However, some interesting questions still arise.

First, can disputes about detachable contractual acts be submitted to arbitration? Also, can only contractual disputes be arbitrable? If an administrative contract contains a compromise clause, when a third person brings REP, what is the relationship between REP and litigation regarding contractual disputes?

Faced with such questions, jurist Yves Gaudemet considered that disputes about legality are beyond the skills of the parties and belong within the competence of administrative judges.⁷¹⁶

We agree with Yves Gaudemet's aforementioned opinion holding that disputes about contractual detachable acts involve not only contractual parties, but also relevant third persons, and that RCAD, in its nature, is an objective remedy that aims to examine the legality of administrative acts. In addition, a detachable act is a unilateral administrative act, and thus, only administrative judges are competent⁷¹⁷ and it should not be arbitrable.

Even for contracts that are the subjects of the legislative exceptions discussed in the first part of this dissertation, in arbitration procedure, it is important for arbitrators to execute the aforementioned "objective analysis"⁷¹⁸ to decide the divisibility of any contested clauses. This is different from private contracts. In private law, the parties' subjective intentions are often determinant in deciding the divisibility of contractual clauses. If arbitrators dismiss the objective analysis, they would misread the objectives of administrative contracts, which involve not only the protection of individual rights, but also, the legality of administrative acts.

Second, in France, there are three categories of judges for contractual disputes, the JDE, the JDC and the JEX, who play different roles and have diverse functions. If disputes regarding administrative contracts are submitted to arbitration, we doubt how an arbitrator or arbitral tribunal "simultaneously" carries out his or their roles.

⁷¹⁶ See Yves Gaudement, *supra* note 78.

⁷¹⁷ Joseph Kamga, *supra* note 70, at 73.

⁷¹⁸ See *supra* note 666.

In Taiwan, since we defined detachable acts as the fundament of administrative contract and have no similar distinction in France (JDE, JDC, and JEX), and consequently an arbitrator or arbitral tribunal may simultaneously carry out his or their roles in one procedure.

Third, if arbitration clauses are inserted in administrative contracts, in France we are curious about whether contractual parties can refuse the JED's execution of his injunctive power to order the contractual administrative body to go before the JDC. Alternatively, should the JED be bound by arbitration clauses? If the contractual administrative body obeys the JED's injunctive power and contests before the JDC, can the contractor contest it because of an arbitration clause?

Fourth, in France despite the relationship between the JEX and the JDC, and regardless of the jurisprudence of IRD or "Béziers I," both the JEX and the JDC's decisions should take into consideration the degree of illegality, the gravity of the vice, and even whether an annulation decision would cause excessive damage to the public interest. The aforementioned considerations are much different from those in private contracts.

Fifth, in France, although the annulation of detachable acts does not necessarily cause the nullity of the contract, we still can reasonably expect that the JDC or the JEX would be on the same side as the JED, or at least, not in contradiction to it. However, we are curious about whether the arbitrators or the arbitral tribunal should be bound by the annulation of detachable acts. If not, how can we conciliate an arbitration award that may conflict with the annulation of detachable acts?

Sixth, under the jurisprudence of "Tropic" in France or "ETC" in Taiwan which allowed a third person to contest the nullity of a contract before the JDC in France or administrative judges in Taiwan, we are curious about whether the contractual parties' convention to submit to arbitration should be agreed upon by the third person. Also, during an arbitration procedure regarding contractual disputes, if a third person brings a litigation pursuant to the jurisprudence in "Tropic" in France or "ETC" in Taiwan what is the relationship between an arbitration procedure initiated by the contractual parties and a litigation procedure initiated by a third person?

In France, under the complexities among the JEX, the JDC and the JED, and the procedures of REP and RPC, the questions mentioned above will become more complex because of participation in arbitration procedures. Thus,

arbitration in administrative matters, for us, cannot be interpreted only on the basis of the parties' autonomy and common conventions.

In any case, regardless of whether they are in Taiwan or in France, the contractual parties or third persons often bring their claims seeking an urgent procedure to avoid the enlargement of their damages. Thus, we will discuss those urgent procedures.

CHAPER III:URGENT PROCEDURE(“RÉFÉRÉ”)

Regarding disputes in urgent procedure, the four countries reveal their particularity in legislation and in jurisprudence. We will discuss them separately: in Canada (SECTION I: IN CANADA), in China (SECTION II: IN CHINA), in Taiwan (SECTION III: IN TAIWAN) and in France (SECTION IV: IN FRANCE). Finally, we will conclude comparatively and discuss possible questions about arbitration in cases brought pursuant to an urgent procedure that involve disputes arising from administrative contracts (SECTION V: CONCLUSION OF THIS CHAPTER).

SECTION I: IN CANADA

In Canada, there is no special urgent procedure.

However, in Canada, there are two similar procedures. They are the procedure to demand an “interlocutory injunction” (1.INTERLOCUTORY INJUNCTION PROCEDURE) and the preservation procedure (2.THE PRESERVATION PROCEDURE)

1.INTERLOCUTORY INJUNCTION PROCEDURE

In Canada, a party can assert a demand and judges would agree to take preventive measures to stop an illegally concluded government contract from being executed before a final judgment regarding the dispute; for instance, the court may grant an “**interlocutory injunction**,” which is an order by the Superior Court that imposes an obligation on one party to perform, not perform or cancel a particular action⁷¹⁹ pursuant to Article 373 of the Federal Courts

⁷¹⁹ A.I.E.S.T., local de scène n° 56 c. Société de la Place des Arts de Montréal, [2004] 1 R.C.S. 43, 2004 CSC 2 at para. 14.

Rules.⁷²⁰

In addition, interlocutory injunctions are also frequently used in Quebec under Article 752 and the articles that follow it in the Civil Procedure Code of Quebec (CPC).⁷²¹

Specifically, in Quebec, there are three consecutive categories of injunctions and they are in order. The first is a facultative procedure, namely, the “**provisional interlocutory injunction**,” for which the hearing procedure is rapid, but it is effective for a maximum of only 10 days. The second is the “**interlocutory injunction**,” which is valid until a final judgment. The third is an “injunction” or a “**permanent injunction**,” which is issued after a final judgment is rendered.

To demand an interlocutory injunction, a party must prove the appearance of a right, a potentially irreparable injury and the urgency of the situation. Further, pursuant to jurisprudence, the party who is asserting the demand must also prove that it has the preponderance of the inconvenience between the two parties.⁷²² That is, the inconvenience that is being caused to the party who is asserting the demand is much graver than borne by the adversary.

2.THE PRESERVATION PROCEDURE

In addition, there is also a similar procedure called “**une ordonnance de sauvegarde**,” which refers to the procedure to safeguard against the possible **disappearance of evidence** pursuant to sporadic dispositions in CPC (art. 46, 754.2, 813.3 and 835.4).

SECTION II: IN CHINA

In China, the procurement contract system is governed by China’s Public Procurement Law (CPPL, from 2003 ⁷²³) and the “Regulation on the

⁷²⁰ Federal Courts Rules (SOR/98-106), see <http://laws-lois.justice.gc.ca/eng/regulations/sor-98-106/index.html>, last visited 22 March 2014.

⁷²¹ Code de procédure civile in Quebec (chapitre C-25), see http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/C_25/C25.HTM, last visited 22 March 2014.

⁷²² *Fraternité des policiers et policières de Montréal c. Trudeau* (2012 QCCS 4056).

⁷²³ Code of Public Procurement in China (中华人民共和国政府采购法), see <http://www.people.com.cn/GB/jinji/20020629/764316.html> last visited 19 March 2014.

Implementation of the Bidding Law” (RIBL⁷²⁴, administrative order No. 613, issued on 20 December 2011 by the General Office of the State Council, the highest central administration in China). Thus, we want discuss in three sections. The first one addresses who is competent to initiate the remedy (1.WHO IS COMPETENT TO INITIATE THE REMEDY). The second one addresses what should the person who initiates the remedy should prove (2.WHAT SHOULD BE PROVED). The third one addresses suspension effect in China public procurement contract (3.THE SUSPENSION EFFECT IN CHINA PUBLIC PROCUREMENT CONTRACT).

In each topic, we want to discuss in two sections. One addresses the CPPL law. The other one addresses the administrative order by the General Office of the State Council.

1.WHO IS COMPETENT TO INITIATE THE REMEDY

Under the CPPL, four categories of remedies are available: consultation, **interrogation, appeal** (the preceding three remedies are **before the administrative body**) and **administrative litigation (before judges)**. However, all of remedies are available **only for suppliers** and are **not available to other candidates or potential candidates** (Article 51).

The RIBL enlarged the application that is subject to the bidder and other interested persons, including potential candidates.⁷²⁵

2.WHAT SHOULD BE PROVED

Furthermore, under Article 52 of the CPPL, the plaintiff must prove its damage and the administrative body’s violation, while under Article 60 of the RIBL, it is only necessary to prove the administrative body’s violation.

Briefly, the RIBL enlarges the possibility for a remedy, **not only regarding the applicable subjects, but also regarding the application conditions.**

3.THE SUSPENSION EFFECT IN CHINA PUBLIC PROCUREMENT

⁷²⁴ Regulation on the Implementation of the Bidding Law (中华人民共和国招标投标法实施条例), see http://www.gov.cn/zwggk/2011-12/29/content_2033184.htm, last visited 19 March 2014.

⁷²⁵ Chen Tian-Hao (陈天昊), *Study On Remedy Mechanism in RIBL* (从《招标投标法实施条例》的颁布看政府采购救济制度的完善), *Western L. Rev.* (西部法学评论) 72-82 (6th ed. 2012).

CONTRACT

Under the CPPL, there is neither suspension effect on signing contract nor on the performance of contract, regardless of the remedy (even before a judge), but in an appeal procedure before an administrative body, **the administrative body has the liberty** to decide in favor of a suspension for a maximum of 30 days (Article 57). Under the interrogation and appeal remedial procedure contained in the RIBL, procurement would be **automatically suspended** before an administrative body's response (Article 22, 54).

Briefly, there is no urgent procedure in China and the suspension effect is available exclusively in certain particular remedial situations.

SECTION III: IN TAIWAN

In Taiwan, there is no special urgent procedure in administrative law, but there are two similar procedures: the suspension procedure (1.THE SUSPENSION PROCEDURE) and the preservation procedure (2.THE PRESERVATION PROCEDURE).

1.THE SUSPENSION PROCEDURE

The suspension procedure enables parties to demand that the administrative judges suspend the execution of administrative acts that may cause further damage, including unilateral or bilateral acts. It is similar in nature to the French suspension procedure (*référé suspension*). We will introduce the application conditions (A.APPLICATION CONDITIONS) and application effect (B.APPLICATION EFFECT).

A.APPLICATION CONDITIONS

Taiwan's suspension procedure is based on **irreparable injury** and **an urgent situation**.

In practice, the most interesting question is how "irreparable injury" should be defined. More specifically, if a certain injury **can be compensated monetarily, is it "reparable"**? We can image that if the execution of an administrative

contract necessitates the demolition of a building, would the “demolition of a building” be regarded as “irreparable”?

In the jurisprudence, one case involved the execution of a unilateral administrative act to demolish a building, not a contract to do so. In his judgment No: 972 TSI-ZHI 99, the TSAC considered that the demolition of a building **could be compensated monetarily, and thus, it was reparable.**⁷²⁶

This point caused a great deal of criticism in legal doctrine. Most legal doctrine⁷²⁷ has asserted that the fact that an injury can be compensated monetarily is one, but not the “absolute,” standard that should be used to define the “irreparable” criterion. For example, if the sum of money that is necessary for due compensation is so large that it causes a significant burden on national finances, we should regard it as “irreparable.” Moreover, if the plaintiff’s claim is highly likely to be established, the execution of the administrative act would become undesirable. In conclusion, we agree with the opinion that was reached in the aforementioned doctrine.

B.APPLICATION EFFECT

As for the application effect, the administrative judges can grant (I.GRANT THE SUSPENSION) or refuse (II.REFUSE THE SUSPENSION) the suspension.

I.GRANT THE SUSPENSION

Of course, administrative judges can agree the demand for suspension.

Note that, during an administrative litigation procedure, administrative judges, after taking into consideration **the gravity of the urgent situation and the possible injury to the public interest** that may result from the execution of an administrative contract, can pronounce the suspension of the contract **even if the parties have not demanded suspension**, pursuant to sections 2 and 3 in Article 116 of the TLAC.

⁷²⁶ “Tsi-Zhi” is the Romanization of the Chinese word used to classify matters, means “litigation” in Chinese used in TSAC but often about disputes in procedure.

⁷²⁷ Xiao Vincent (蕭文生), On suspension of administrative acts (行政處分之停止執行), Vol. 6, Court Case Times (月旦裁判時報), 26-33. (1 December 2010).

II. REFUSE THE SUSPENSION

However, judges can reject it if the suspension would cause excessive damage to the public interest or if the plaintiff's demand is obviously unreasonable pursuant to Article 116 of the TLAC.

2. THE PRESERVATION PROCEDURE

The preservation procedure is aimed at urgently preventing the possible disappearance of evidence. It is similar in nature to the aforementioned "*ordonnance de sauvegarde*" in Canada.

3. CONCLUSION AND IN PRACTICE IN TAIWAN

In Taiwan, the plaintiff often initiates a main claim along with a suspension or preservation procedure. Thus, in Taiwan's administrative law, both suspension and preservation procedures are often regarded as auxiliary procedures, meaning that they cannot be asserted independently.

For example, in the aforementioned ETC case, the plaintiff initiated a litigation containing four claims,⁷²⁸ including the suspension procedure; in practice, they will be examined by the same administrative tribunal (one administrative court is composed of several administrative tribunals, each of which is composed of three administrative judges).

SECTION IV: IN FRANCE

Unlike that in Taiwan, in France, the urgent procedure is independent from the administrative litigation procedure. It can be **initiated separately**.

The original provisions in Article 22 and 23 of the Code of Administrative Tribunal and Administrative Appeal Courts became L551-1 and 551-5 of the CJA and their common origin is Community law.

The French urgent procedure for contractual disputes (*Le référé en matière de passation de contrats et marchés*, hereafter Référé system or RS) was initiated pursuant to the European Directive of 21 December 1989 (**DIRECTIVE**

⁷²⁸ See *supra* note 316 to 319.

89/665/CEE DU CONSEIL du 21 décembre 1989, hereinafter Directive 1989, it addresses the general rules of public procurement contracts) and 25 February 1992 (**DIRECTIVE 92/13/CEE DU CONSEIL du 25 février 1992**, hereinafter Directive 1992, it addresses the special rules concerning for instance, energy, water and transportation).⁷²⁹

Directive 1989 was transposed to French national law by the law (number: 92-10) of 4 January 1992 and Directive 1992 was transposed by the law (number: 93-1416) of 29 December 1993. Both of the aforementioned laws (92-10 and 93-1416) were amended by directive on 11 December 2007 (**Directive 2007/66/CE du Parlement européen et du Conseil du 11 décembre 2007**, hereinafter Directive 2007) and they were transferred into France by an order on 7 May 2009 (**Ordonnance n°2009-515 du 7 mai 2009 relative aux procédures de recours applicables aux contrats de la commande publique**, see below for the transposition details).

In France, RS is composed of two main systems: pre-contractual (**le référé précontractuel, LRPC**, 1.PRECONTRACTUAL URGENT PROCEDURE) and contractual urgent procedures (**le référé contractuel, LRC**, 2.URGENT CONTRACTUAL PROCEDURE).

1.PRECONTRACTUAL URGENT PROCEDURE

There are many considerations that are addressed simultaneously in the RS system.

First, the announcement of a public procurement contract necessitates a substantial increase in the guarantees of transparency and non-discrimination. Thus, to ensure that the aforementioned requirements are met in cases involving procurement contracts, if there are infringements of Community law, remedies must be available.

However, since the litigation procedure is incompressible, the remedies that are available through the administrative litigation system are time consuming. Thus, even if the administrative judges have quashed an illegal decision to sign, the illegal signed contract may have been executed.

Further, because the law (number: 2000-597) of 30 June 2000 and the generalization of the notion of “detachable acts” permit REP to come within the scope of contracts, as jurist Jérôme Momas stated, REP can “indirectly” influence

⁷²⁹ Laurent Richer, *supra* note 515, at 204.

the contracts.⁷³⁰ Thus, candidates who are involved in the procurement procedure seem to have methods by which they can obtain a remedy. For example, RADC often is combined with a suspension procedure (*référé-suspension*).

However, a suspension procedure is, at first glance, an efficient procedure to deal with pre-contractual disputes, however it is under a restrictive application by administrative judges (the plaintiff has the difficulty of proving an urgent situation⁷³¹); also, the quashing of detachable acts and orders of suspension have no direct systematical influence upon the quashing of a contract⁷³² as mentioned in the jurisprudence regarding IRD.⁷³³ Thus, the role of the suspension procedure is decreasing.

Taken together, administrative litigation and the suspension procedure seem unsatisfactory. Thus, it is expected that, to be an effective remedy, the remedy procedure should be preventive and the judges' intervention should be rapid.

Aside from the aforementioned directive 1989, the CJCE confirmed, in his judgment in the "**Factortame**"⁷³⁴, case on 19 June 1990 that there is a requirement for an effective remedy to ensure that Community laws are respected; in that case, the CJCE emphasized that we should "*grant interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law.*"⁷³⁵

Pursuant to this requirement, a pre-contractual urgent procedure was introduced into France and another judgeship, called the "**juge du référé**" (**JDR**), was created to handle urgent procedures.

Thus, we will introduce this topic in two sections. One addresses the conditions of LRPC (A. CONDITIONS OF PRECONTRACTUAL URGENT PROCEDURES). The other addresses the judges' powers in pre-contractual urgent procedures (B. JUDGES' POWER IN URGENT PRECONTRACTUAL PROCEDURES).

⁷³⁰ Jérôme Momas, *Référé-suspension et contentieux précontractuel*, AJDA 2004, at 1116.

⁷³¹ Laurent Richer, *supra* note 515, at 190.

⁷³² David Ruzié, *Droit administratif et droit international*, RFDA 2004, at 357.

⁷³³ CE, 10 December 2003, n° 248950, Institut de recherche pour le développement, RFDA, 2004, at 185.

⁷³⁴ CJCE, 19 June 1990, Factortame e.a, aff. C-213/89, Rec. p. I-2433, point 18.

⁷³⁵ See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61989J0213:EN:HTML>, last visited 16 March 2014.

A. CONDITIONS OF PRECONTRACTUAL URGENT PROCEDURES

I. WHICH CONTRACTS?

First, we will discuss the scope of application for urgent procedures. That is, which contracts are subject to the application of LRPC?

In the initial provisions, in the laws of 4 January 1992 and 29 December 1993, LRPC's scope of application was larger than that specified in Community law. At that time, all the procurement contracts and public service delegation contracts were subject to its application, while Community law instituted some limitations, such as a minimum amount.

However, at that time, there was an important disparity between the French procurement code and Community law. The notion of a "procurement contract" in the former is narrower than that in latter. Thus, there were some contracts that were within the scope of Community law, but that were not within the scope of the French procurement code.

To reduce the conceptual differences, Article L551-1 after 2009 (we should distinguish L551-1 as before the order on 7 May 2009 or after it; hereinafter, we will indicate "before" or "after" 2009 to refer to the different provisions) provided that LRPC applied to administrative contracts whose goal was the execution of public work, the delivery of supplies and the provision of services, that were concluded with an economic contractor and that addressed price, exploitation rights or a public service delegation.

It is important to note that not only public procurement contracts, but also private procurement contracts, are within the scope of Community law. However, the distinction between administrative contracts and private contracts is the fundamental distinction in France. Thus, as Laurent Richer stated, the aforementioned general notion (L551-1 after 2009) globalized them, but other contracts (concluded by private persons, but within the public field) were still within the scope of Community law, but were subject to the code of civil procedure, not the French procurement code.⁷³⁶

⁷³⁶ LAURENT RICHER, *supra* note 515, at 177.

II.WHO HAS THE STANDING?

The conditions to **be a qualified plaintiff** in LRPC are provided in Article L551-10 of the Code de Justice Administrative (CJA), pursuant to which there are three categories of “qualified plaintiffs.”

The first category is persons having an interest in concluding contracts or those who are subject to damage by infringements (involving transparency, fair competition and antidiscrimination); this is the same provision that was included in the Directive 1989. Jurist Laurent Richer’s means excluded candidates or competitors (*candidats évincés*).⁷³⁷

Second, in contracts that are concluded by local governments or public local institutions, the representatives of the State in local governments (often “*Le préfet*,” i.e., the public servant designated by State to exercise a defined delegation of power), can initiate this remedy.

Third, if the infringement of the requirements for publicity and fair competition is so grave that the European Commission notifies the State, the State is competent to initiate this remedy.

Furthermore, if the aforementioned suspension procedure (“*référé-suspension*”⁷³⁸) was initiated by “le préfet,” the suspension would automatically be for one month pursuant to Article L554-1 of the CJA.

Now, we are curious about whether a potential candidate or the awardee bidder (in French, an “*attributaire*,” which means a bidder who received an award, but for whom the notification has not yet been executed) can initiate LRPC.

In his judgment in the “*Collectivité territoriale de CORSE*”⁷³⁹ case on 24 October 2001, the CE granted a potential candidate⁷⁴⁰ who was deterred from the bidding procedure by an infringement of the requirements regarding publicity and fair competition the right to initiate LRPC.

In addition, the CE also granted the right to initiate LRPC to an awardee in his judgment in the “*Communauté d'agglomération de Saint Etienne*

⁷³⁷ LAURENT RICHER, *supra* note 515, at 179.

⁷³⁸ LAURENT RICHER, *supra* note 515, at 189.

⁷³⁹ CE, 24 October 2001, *Collectivité territoriale de CORSE* req. n°236293.

⁷⁴⁰ Damien.guillou, *L'attributaire d'un marché public et le référé précontractuel*, at <http://avocats.fr/space/damien-guillou/content/l-attributaire-d-un-marche-public-et-le-refeLRPCcontractuel> 841497CC-CA27-451A-B740-33E687DD2BFE, last visited 16 March 2014.

Métropole,⁷⁴¹ case on 19 September 2007.

In the “**Saint-Etienne Métropole**” case, the CE held that each enterprise has an interest in signing a procurement contract in a regular procedure. After a negotiation procedure, even if a certain enterprise was only one possible awardee, but the negotiation procedure infringed the foregoing publicity and competitive measures, the enterprise still has the right to initiate LRPC.

This opinion was presented by jurist Nicolas BOULOUIS, who considered that every bidder has the right to refuse a procurement contract that was concluded pursuant to an illegal procedure because an enterprise should not be required to assume the risk that the contract will held null or to incur the financial consequences that may result from that nullity.

Comparatively, BOULOUIS’s opinion would make contractual relationships more uncertain. Thus, his opinion was criticized by jurists Catherine Bergealand Frédéric Lenica after the CE’s famous judgment in the “Béziers” case on 28 December 2009.⁷⁴²

After the jurisprudence “Béziers,” the CE reconfirmed the principle of the “loyalty” of the contractual relationship in his judgment in the “**Manoukian**”⁷⁴³ case on 12 January 2011 and the “**Guyane**”⁷⁴⁴ case on 23 May 2011.

Thus, in his judgment in the “**Département de la Guadeloupe**”⁷⁴⁵ (*jurisprudence Guadeloupe*) case on 23 December 2011, the CE adopted the notion of the “loyalty” of the contractual relationship⁷⁴⁶ and abandoned the older jurisprudence of the “**Saint-Etienne Métropole**” case, holding that the awardee cannot be damaged by an infringement of the requirements of publicity and fair competition. Jurists generally agreed with the “**Guadeloupe**” ruling, but jurist Paul Cassia⁷⁴⁷ held that the CE’s judgment was not quite convicted.

Furthermore, the CE traditionally considered that neither professional organizations nor ratepayers are allowed to initiate LRPC pursuant to his

⁷⁴¹ CE, 19 September 2007, Communauté d’agglomération de Saint Etienne Métropole, req.n° 296192

⁷⁴² Catherine Bergeal et Frédéric Lenica, *Contentieux des marchés publics*, éditions Le Moniteur, recited from Damien Guillou, at <http://avocats.fr/space/damien-guillou/content/l-attributaire-d-un-marche-public-et-le-refere-precontractuel> 841497CC-CA27-451A-B740-33E687DD2BFF, last visited 16 March 2014.

⁷⁴³ CE, 12 Janvier 2011, Manoukian, req.n°338551.

⁷⁴⁴ CE, 23 May 2011, Département de la Guyane, req.n° 314715

⁷⁴⁵ CE, 23 December 2011, Département de la Guadeloupe, req.n° 350231.

⁷⁴⁶ Paul Cassia, *Irrecevabilité du référé précontractuel de l’entreprise attributaire d’un marché*, AJDA 2012, at 442.

⁷⁴⁷ Paul Cassia, *supra* note 746..

judgment in the “*Martinique*”⁷⁴⁸ case on 16 December 1996.

Thus, jurist Damien Guillou opined that, under contemporary jurisprudence, for bidders (in the French procurement code, they are called “economic operators”), if a certain illegality occurs in the negotiation procedure that may result in the nullity of the contract, their only recourse is to withdraw their offer before the decision to award.⁷⁴⁹

III. THE PERIOD TO INITIATE

In the traditional jurisprudence that was established in the “*la Chambre de commerce et d’industrie de Tarbes et des Hautes-Pyrénées*”⁷⁵⁰ case of 3 November 1995, the CE considered that LRPC should be receivable before the signing of the contract.⁷⁵¹

This principle has been restated by the CE in many judgments: the “*Région Centre*”⁷⁵² case on 27 November 2002, the “*Société GRANDJOUAN-SACO*”⁷⁵³ case on 7 March 2005 and the “*Société Physical Networks Software*”⁷⁵⁴ case on 17 October 2007, in which the CE held that a contract that was concluded by a public legal person in violation of Article 80 of the procurement code or before the expiration of the ten days suspension days (standstill period) was illegally signed in nature, but regardless of the illegality, the violation was insufficient to nullify the contract.

Under the aforementioned jurisprudence, jurist Laurent Richer considered that the signing of the contract would be an obstacle to LRPC and the suspension claim that is ordered pursuant to Article L521-1 of the CJA.⁷⁵⁵

Thus, as Laurent Richer stated, in practice, there is a risk that a competition

⁷⁴⁸ CE, 16 December 1996, Conseil régional de l’ordre des architectes de la Martinique, req.n° 158234.

⁷⁴⁹ Damien Guillou, *supra* note 742.

⁷⁵⁰ CE, 3 November 1995, Chambre de commerce et d’industrie de Tarbes et des Hautes-Pyrénées, req.n° 157304.

⁷⁵¹ CE, Section, du 3 novembre 1995, la Chambre de commerce et d’industrie de Tarbes et des Hautes-Pyrénées, 157304, publié au recueil Lebon, see <http://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000007879995&dateTexte>, last visite 16 March 2014.

⁷⁵² CE, 27 November 2002, Région Centre, n° 248050, see: <http://www.rajf.org/spip.php?article1415>, last visited 5 March 2014.

⁷⁵³ CE, 7 March 2005, Société GRANDJOUAN-SACO, req.n° 270778.

⁷⁵⁴ CE, 17 October 2007, n° 300419, Société Physical Networks Software, see <http://www.marche-public.fr/Marches-publics/Textes/Jurisprudence/CE-300419-Physical-Networks-Software.htm>, last visited 16 March 2014.

⁷⁵⁵ LAURENT RICHER, *supra* note 515, at 190.

to sign (meaning that the administrative body would sign the contract as quickly as possible to avoid LRPC) would occur.⁷⁵⁶

IV. THE REASONS TO INITIATE

The motivations for LRPC are set forth in Article L551-1 and include a failure to comply with or breach of the requirements for publicity and fair competition. Thus, literally, the plaintiff can obtain a remedy exclusively by reason of such breach.

However, French jurisprudence has **enlarged** the scope of the motivations for LRPC; for example, if many extremely restrictive technical requirements (*spécifications exagérément restrictives*) are demanded by the government in its technical specification formulas (*devis technique*, documents or conditions regarding the minimum requirements of the government in a procurement contract), the contractor can bring LRPC.⁷⁵⁷

Before the jurisprudence in “*SMIRGEOMES*” (see below), the CE, in his judgment in the “*Société Stereau*”⁷⁵⁸ case on 16 October 2000, acknowledged that a candidate enterprise is subject to damage by all violations of the requirements for publicity or fair competition. Furthermore, the CE acknowledged that a candidate enterprise can invoke the aforementioned violations even though it has not yet been damaged in his judgments in the “*Société Alstom Transport SA*”⁷⁵⁹ case on 19 October 2001 and the “*Syndicat des eaux de Charente-Maritime*”⁷⁶⁰ case on 20 October 2006.

Thus, at that time, according to the observations of jurist Bergeal, the most widely accepted interpretation of the scope of application of Article 22 of the CTACAA (“Code des tribunaux administratifs et des cours administratives d'appel”) was that most provisions regarding the signing of public service delegation contracts or procurement contracts were regarded as being aimed at protecting the requirements for publicity and fair competition.⁷⁶¹

Pursuant to the open attitude contained in the applicable jurisprudence, as

⁷⁵⁶ LAURENT RICHER, *supra* note 515, at 180.

⁷⁵⁷ CE Section, 3 November 1995, District de l'agglomération nancéienne, requête numéro 152484, rec. p. 391.

⁷⁵⁸ CE, 16 October 2000, Société Stereau, req. n° 213958.

⁷⁵⁹ CE, 19 October 2001, Société Alstom Transport SA, req. n° 233173.

⁷⁶⁰ CE, 20 October 2006, Syndicat des eaux de Charente-Maritime, req. n° 278601.

⁷⁶¹ Catherine Bergeal, *La candidature d'une personne publique à un contrat public- Conclusions sur Conseil d'Etat, 16 octobre 2000, Compagnie méditerranéenne d'exploitation des services d'eau*, RFDA 2001, p106.

Laurent Richer stated, the CE adopted an **almost “objective” conception** regarding legality although the article provided that the remedy should be initiated by persons who are **“subject to being damaged.”**⁷⁶² Thus, jurist Laurent Richer believed that this open jurisprudence would encourage malevolence in plaintiffs.

Regarding this point, Laurent Richer considered that the remedy that was adopted by the Community arose from the notion of **“qui tam”** (a writ whereby a private individual who assists a prosecution can receive all or part of any penalty that is imposed. According to Laurent Richer’s book, this means that the interest will be divided equally between the plaintiff and the State), pursuant to which we can expect that the plaintiff will defend the general interest in competition by defending his individual economic interest. Thus, one advantage of “qui tam” is the delegation to the plaintiff of the public mission of supervision. Because the plaintiff will guard his individual economic interest, we can also simultaneously benefit from the protection of the general interest (in fair competition).

However, one disadvantage is the facilitation of abuse, namely, “remedy blackmail” (***chantage au recours***).⁷⁶³

Philippe Delelis even believed that this open attitude would make winning in LRPC as easy as a child’s game (***un jeu d'enfant***).⁷⁶⁴

The aforementioned concern prompted the CE to change his previous open attitude.

In his judgment in the **“SMIRGEOMES((Syndicat Mixte Intercommunal de Réalisation et de Gestion pour l’Elimination des Ordures Ménagères du secteur Est de la Sarthe), hereinafter” SMIRGEOMES”**)⁷⁶⁵ case on 3 October 2008, the CE changed his previous jurisprudence and considered that administrative judges should verify whether the plaintiff has been or is at risk of being damaged by considering the effect of the infringement and the stage of the procedure in which it happens; further, they should consider whether the infringement indirectly caused another candidate’s superiority in bidding.

The jurisprudence in “SMIRGEOMES” leads us back to the legislative text. Because Article L551-10 of the CJA requires a plaintiff who “ha[s] the interest to conclude a contract and who is subject to be damaged,” this language prompt us

⁷⁶² LAURENT RICHER, *supra* note 515, at 181.

⁷⁶³ LAURENT RICHER, *supra* note 515, at 182.

⁷⁶⁴ Philippe Delelis, *Les insuffisances des procédures de référé*, AJDA 2011, at 320.

⁷⁶⁵ CE, 3 October 2008, SMIRGEOMES (Syndicat Mixte Intercommunal de Réalisation et de Gestion pour l’Elimination des Ordures Ménagères du secteur Est de la Sarthe), req.n° 305420

to reflect upon the idea of a “litigation interest” in LRPC. Laurent Richer described it as “the criterion of remedy utility” (*un critère d'utilité*). That is, we should evaluate this criterion according the phase in which the signing procedure is involved and the degree of the influence of the reason that is invoked.⁷⁶⁶

We will make observations regarding the development of the jurisprudence with respect to these two new standards.

First, since 2008, the important observation is that there should be an evaluation of the utility of the plaintiff's litigation by the phase in which his demand is involved; further, it is easy and concrete evaluation.

For example, if the plaintiff was admitted into the offer procedure, he cannot principally contest a decision based upon issues that occurred in the candidate procedure; in contrast, if he was only involved in the candidate procedure, he cannot invoke issues that were involved in the offer procedure.

However, it is more difficult to concretely define the second standard, i.e., the influence of the scope of the violation.

In his judgment in the “*Garde des sceaux, Ministre de la justice et des libertes*”⁷⁶⁷ case on 29 April 2011, the CE acknowledged that a relationship between the damage and the violation does not necessarily need to be established as a “certitude,” but rather, that it is “likely.”⁷⁶⁸

However, jurist Laurent Richer noted that certain illegalities would not cause damage to anyone.

Laurent Richer highlighted that, in “SMIRGEOMES,” there was no mention of a submission to an OMC accord in a procurement contract. Such a mention is regarded as obligatory under model stipulations, but it is only for statistical goals.

Thus, Laurent Richer noted that certain illegalities may not result in any consequences to the plaintiff because his situation was not affected, but despite this, the plaintiff should still prove it.⁷⁶⁹

For example, in his judgment in the “*Communaute D'agglomeration Du Bassin De Thau*”⁷⁷⁰ case on 4 February 2009, the CE held that the failure to verify compliance with legislation for the recruitment of handicapped workers should still be proven by the plaintiff.

⁷⁶⁶ LAURENT RICHER, *supra* note 515, at 183.

⁷⁶⁷ CE, 7ème et 2ème sous-sections réunies, Garde Des Sceaux, Ministre De La Justice Et Des Libertés 29 April 2011, req.N°344617, recueil Lebon.

⁷⁶⁸ BJC 2011, n° 77, at 268.

⁷⁶⁹ LAURENT RICHER, *supra* note 515, at 184.

⁷⁷⁰ CE, 4 February 2009, Communauté d'agglomération du Bassin de Thau, req.n° 311949

Briefly, the question is whether the plaintiff can assert LRPC when an administrative body has violated the requirements for publicity and fair competition, but the violation did not cause any damage to the plaintiff.

Before “SMIRGEOMES,” jurisprudence adopted an open attitude. Laurent Richer described the old jurisprudence as concentrating on the relationship of the administrative body’s act with “legality”; however, **after “SMIRGEOMES,” the jurisprudence concentrated on the relationship between the breach and the plaintiff’s situation.**

However, jurist Laurent Richer believed that the condition (the link with “plaintiff’s situation”) was not satisfied because it would cause an unfair situation that was initiated by the administrative body, but not by the candidate. Laurent Richer discussed a case in which a discriminatory standard about the candidates’ localization was, in fact, introduced in a contract, but the administrative body emphasized that the local candidate’s offer was the best and only touched lightly on the local candidate’s localization. Although the losing bidder contested the administrative body’s breach in LRPC (because the administrative body had, in fact, violated the requirement of fair competition by including this discriminatory standard regarding localization), the losing bidder’s claim was still rejected because his offer was not the best.

Thus, jurist Laurent Richer believed that we should verify the relationship between “the invoked rules” and “the plaintiff’s situation” and that, not only must “the invoked rules” be violated, but also, the rules that are invoked must be aimed at protecting the plaintiff’s situation. Consequently, illegality in the candidate procedure cannot be invoked in the offer procedure since the rules in the candidate procedure are aimed at protecting candidates, not bidders. Moreover, an illegality regarding the failure to mention the written language can be invoked exclusively by an enterprise that is not French. Laurent Richer believed that this solution was more likely to be anticipated.

Note that Laurent Richer’s aforementioned opinion is based on a basic hypothesis. He regarded the nature of disputes in LRPC as disputes regarding “rights.” As he said, LRPC is subject to full jurisdiction (*plein contentieux*) and thus, the plaintiff must assert his “right.” He described this right by citing jurist Roger Bonnard’s opinion that it must be a “subjective public law right” (*droit public subjectif*), which means the plaintiff has the prerogative to ask an administrative body to comply with the requirements regarding publicity and fair competition. Jurist Bonnard believed that the obligations regarding publicity and

fair competition must be established on an “individualized particular interest” and that the plaintiff must have a “personal interest” in the execution of the aforementioned obligation.

After introducing the conditions, we will now discuss the power of judges in urgent pre-contractual cases.

B. JUDGES' POWER IN URGENT PRECONTRACTUAL PROCEDURES

The JDR, the judge in LRPC, is the president of the Administrative Tribunal or its delegate pursuant to Article L551-3 after 2009.

The CE held that administrative judges are responsible for pronouncing an administrative body's duty to comply with the requirements for publicity and fair competition. Thus, administrative judges should verify the motivation for excluding a certain candidate in a bidding procedure. The CE described the role of administrative judges as executing a control having full jurisdiction (“*un contrôle de pleine juridiction*”) in his judgment in the “*Commune de Chateaudun*”⁷⁷¹ case on 3 March 2004.

The JDR's power is broad and he can order an administrative body to comply with those obligations, as well as suspend or quash the execution of all decisions that are related to the contractual signing; the JDR also can cancel clauses or stipulations that were destined to appear in contract.

However, for contracts that were concluded by two administrative bodies, the JDR has less power, i.e., it has injunctive power, as well as the power to suspend and sanction.⁷⁷²

Administrative judges can suspend the contractual signing procedure if an administrative body has violated Article 76 of the procurement code, which requires the administrative body to publish its motivation for rejecting a candidate pursuant to the CE's judgment in the “*Société Aquitaine Démolition*”⁷⁷³ case of 21 January 2004.

In contrast, administrative judges cannot examine claims regarding the competence of a public legal person pursuant to the CE's judgment in the “*Commune de Bandol*”⁷⁷⁴ case of 30 December 2002, nor can it evaluate the

⁷⁷¹ CE, 3 March 2004, Commune de Chateaudun, req.n° 258602.

⁷⁷² Article L 551-6 CJA.

⁷⁷³ CE, 21 janvier 2004, Société Aquitaine de démolition, n°253509.

⁷⁷⁴ CE, 7 / 5 SSR, 30 December 2002, la Commune De Bandol, n°247668; Ctts et MP, March 2003, com. 56.

proper quality of a candidate pursuant to the CE's judgment in the "*Synd. Mixte des transports en commun de l'agglomération clermontoise*"⁷⁷⁵ case of 29 July 1998.

Furthermore, pursuant to the CE's judgment in the "*Région Guadeloupe*"⁷⁷⁶ case on 10 July 2006, the JDR cannot suspend a decision "not to renew a contract" when the original contract has expired.⁷⁷⁷

Laurent Richer emphasized that, because it is difficult to prove the urgency of a situation, it thus would be very difficult to prevent the signing of a contract using the urgent procedure.⁷⁷⁸

However, the JDR's power cannot be executed prior the expiration of certain minimum periods.

The first period is within 16 days following the date when the information (usually the bidding result or the notice of rejection) is delivered to the losing bidders (if it is delivered through electronic means, the time period is reduced to 11 days) and another period is within 11 days following the publication of the notice of an administrative body's intention to conclude a contract.

The aforementioned period is aimed at requiring all of the related candidates to initiate proceedings in LRPC at one time.

The JDR must render his judgment within 20 days following his acceptance, although in practice, the JDR's delay beyond the 20 day period will not result in the illegality of the judgment.

Thus, the JDR must execute a rapid investigative procedure and the record in the procedure must be abridged. The audience procedure generally is public and the parties present their oral opinions and reasoning.

To enhance the rapidity of the procedure, the JDR's judgment can be appealed (within 15 days of the notification of the JDR's judgment) and can be annulled exclusively by the CE.

⁷⁷⁵ CE, 29 July 1998, *Synd. Mixte des transports en commun de l'agglomération clermontoise*, Dr. adm.1998,p.302.

⁷⁷⁶ Conseil d'Etat, 10ème et 9ème sous-sections réunies, du 10 juillet 2006, 290017, mentionné aux tables du recueil Lebon.

⁷⁷⁷ See:

<http://www.revuegeneraledudroit.eu/blog/decisions/conseil-detat-ssr-10-juillet-2006-region-guadeloupe-requete-numero-290017-mentionne-aux-tables/#.UxdK2m-YZhg>, last visited 5 March 2014.

⁷⁷⁸ LAURENT RICHER, *supra* note 515, at 190.

2.URGENT CONTRACTUAL PROCEDURE

Similar to the discussion of LRPC, we will discuss the urgent contractual procedure (LRC) in two sections. One section addresses the conditions for LRC (A.CONDITIONS FOR URGENT CONTRACTUAL PROCEDURES). The other addresses the power of judges in LRC (B. POWER OF JUDGES IN URGENT CONTRACTUAL PROCEDURES).

A.CONDITIONS FOR URGENT CONTRACTUAL PROCEDURES

As mentioned, the directives of 1989 and 1992 and their transposition into French national laws (number: 92-10 and 93-1416⁷⁷⁹) provided only the minimum requirements, for example, the directive 1989 did not define which contractual decisions can be contested; the CJCE, in his judgment in the “*Alcatel Austria*”⁷⁸⁰ case on 28 October 1999, interpreted the directive by referring to the its goal and held that contractual award decisions can be contested.

In addition to the aforementioned jurisprudence, the directive also provided that State members can establish their own remedial procedures (Article 2 and 6).

However, at that time, a survey in 2004 revealed that many infringements of the provisions of the directive continued to persist.

Furthermore, the CJCE, in his judgment in the “*Commission c/ Allemagne*”⁷⁸¹ (CJCE Allemagne) case on 18 July 2007, held that, in certain grave violations of the directive, the State member should take measures to prevent the contract from taking effect.

Against this background, directive 2007/66 (hereinafter directive 2007) adopted two important mechanisms:

- The creation for a procurement contract of a suspension period (10 or 15 days) between the award decision and the contractual signing.
- The creation of an obligation to institute a procedure to prevent illegal contracts from taking effect.

To echo the CJCE’s opinion in the “*Commission c/ Allemagne*” case, article

⁷⁷⁹ See page in *supra* note 729.

⁷⁸⁰ CJCE, 28 October 1999 Alcatel Austria AG e.a, aff. C-81/98, Rec. 7671, concl. Mischo.

⁷⁸¹ CJCE, 18 July 2007, aff. C-503/04, Commission contre République fédérale d’Allemagne , RFDA 2007, at 958, concl. Trstenjak, note Delvolvé.

2-5 of the directive 2007 defined the applicable rules that prevent a contract from taking effect after an illegal signing.

In directive 2007, two situations are regarded as sufficiently grave that they should prevent a contract from taking effect⁷⁸² pursuant to articles 2 and 3:

- The award of a contract without previous publication of a contractual notice in the Official Journal of the European Union (JOUE).
- The violation of the aforementioned standstill period by ignoring its suspensive effects.

The third case in which a contract should be prevented from taking effect is when a Member State has invoked a derogation of the standstill period for contracts based on a framework agreement or a dynamic purchasing system (DPS, a way for a contracting authority to purchase certain goods, works or services) pursuant to article 2d(c) of the directive.

Finally, article 51 of the law (number: 2008-735) of 28 July 2008 regarding PPP contracts allowed France to proceed with the transposition of directive 2007 by order. Subsequently, it was transposed by the order (number: 2009-515) of 7 May 2009, whose main contribution was to create a new remedy, LRC, and to modify the LRPC.

The aforementioned order of 2009 was completed by a decree on 27 November 2009 and the dispositions on administrative contracts were also codified in Article L.551-13 and R.551-7 CJA.

Thus, we will introduce the scope of the application of LRC.

I. WHICH CONTRACT?

First, LRC is not required by the directives (89/665 and 91/16), which were only aimed at LRPC.

Theoretically, LRC should be applicable to all contracts within the scope of the European Community. However, as mentioned, the scope of application in the French procurement code is narrower than that in the directive (2004/18).

Thus, to reduce this disparity, the order of 2009 established new definitions regarding contracts in LRPC and LRC in Article L.55-1 and L551-13 (see the introduction to LRPC). The contracts that are not within the scope of the French procurement code, but that are within the scope of the directive would be required to apply LRC pursuant to the provisions in Chapter II of the order.

⁷⁸² LAURENT RICHER, *supra* note 515, at 205.

Similar to the development of LRPC since 1993, LRC was applicable not only to procurement contracts (even the amount of the contract is less than Community's requirement), but also to public service delegation contracts.⁷⁸³

The scope of its application is excluded in three situations pursuant to L551-15:

- The contractual signing is not subject to the previous publication obligation under the conditions that require the intention notice to be published (the model was proclaimed by rule 1150/2009 on 10 November 2009) before signing of the contract and in compliance with the period of 11 days after the aforementioned publication.
- For contracts which are subject to the previously mentioned publication obligation, but are not subject to the obligation to provide notice of the award decision to losing candidates, under the same conditions as those in the preceding part.
- For contracts that are concluded on the basis of a framework agreement or DPS, under the condition that the award decision was delivered to holders (*titulaire*).

II.WHO HAS THE STANDING?

Generally, the qualified plaintiffs in LRC are the same as those in LRPC. In section 2 of L551-14, the legislation provides for two exceptions. One addresses the person that has used LRPC (legislative exception A). The other addresses a situation in which an administrative body has complied with the standstill period (legislative exception B).

Exception A, in doctrine, is called the principle of “non-plurality between LRPC and LRC”: Someone who has initiated LRPC cannot initiate LRC.

However, in practice, there is a question regarding how to define “has initiated,” particularly when the plaintiff initiated LRPC after the contractual signing.

The CE held that LRC can still be allowed because the notification (about the rejection of certain candidates or certain offers) was not combined with the indication regarding the applicable standstill period and this absence of information would bar candidate enterprises from presenting their offers in a way that is sufficiently precise. Thus, the CE allowed LRC in his judgment in the

⁷⁸³ LAURENT RICHER, *supra* note 515, at 207.

“OPH Interdépartemental de l'Essonne, du Val d'Oise et des Yvelines⁷⁸⁴
(“OPIEVOY”)” case on 24 June 2011.⁷⁸⁵

In a second case, in his judgment in the ***“Clean Garden⁷⁸⁶”*** case on 2 August 2011, the CE held that if the administrative body has complied with its publicity obligation and with the standstill period before signing the contract, a plaintiff who initiated LRPC after the contract was signed cannot be allowed in LRC.

In a third case ***“Etablissement public national des produits de l'agriculture et de la mer – France Agrimer⁷⁸⁷”*** on 10 November 2010, a losing bidder (FIT company) initiated LRPC after the contract had been signed, and thus, the LRPC was rejected. However, in that case, FIT was not informed that its offer had been rejected. Thus, the CE ruled that the administrative body (France Agrimer, a public administrative institution) had violated the notification obligation provided under article 80 of CMP, and thus, it allowed FIT to initiate LRC.

Taken together, this jurisprudence dealt with the same situation: The plaintiffs initiated LRPC **after the contract had been signed**, and thus, LRPC was rejected. However, the reasons to allow it were different. In ***“OPIEVOY”*** and ***“France Agrimer,”*** because the reasons that the plaintiffs initiated LRPC after the contract had been signed were imputable either to the administrative body's illegal notification (OPIEVOY) or to its failure to inform the plaintiff (France Agrimer), those reasons were not imputed to plaintiff, but rather, to the administrative bodies.

In contrast, in the ***“Clean Garden”*** case, the administrative body had complied with the provisions requiring the notification and the standstill period, and thus, the late initiation of LRPC should be imputed to the plaintiff.

Briefly, the CE considered whether the reason for the refusal of LRPC or the failure to initiate LRPC should be imputed to the plaintiff.

Regarding legislative exception B, the CE also created an “exception to exception” B.

In one case, the administrative body did not comply with the standstill

⁷⁸⁴ CE, 24 June 2011, OPH Interdépartemental de l'Essonne, du Val d'Oise et des Yvelines, req. n°346665.

⁷⁸⁵ François BRENET, *Obligation pour le pouvoir adjudicateur d'informer le candidat évincé du délai de suspension qu'il entend respecter avant la signature du marché*, Droit Administratif n° 10, Octobre 2011, comm. 86..

⁷⁸⁶ CE, 2 August 2011, Société Clean Garden, req. n° 347526, Contrats et march. publ. 10/2011, n° 303, obs. J.P. Pietri ; AJDA 2011, p. 1598.

⁷⁸⁷ CE 10 November 2010 Etablissement public national des produits de l'agriculture et de la mer – France Agrimer, req. n° 340944 ,mentioned at “tables du recueil Lebon”.

period, and thus, theoretically, under Article L5551-14 CJA, the plaintiff may initiate LRPC. However, in his judgment in the “*Commune de Maizières-lès-Metz*”⁷⁸⁸, case on 30 September 2011 the CE held that the plaintiff had not satisfied his notification obligation (to provide notice to the administrative body that he was initiating LRPC), and thus, the CE ruled that LRPC should be disallowed.⁷⁸⁹

Briefly, in addition to the legislative exceptions in L551-14, the CE also created certain jurisprudential exceptions. We analyzed these jurisprudential exceptions and believe that they are based upon the same principle: The imputed party is not the administrative body, but rather, is the plaintiff.

III.THE REASONS TO INITIATE

Theoretically, LRC is designed to sanction grave irregularities. Generally, the reasons for LRC are the same as those for LRPC and are provided under article L551-18:

- In the contractual signing procedure, no obligatory publicity measures are taken or the obligatory publication in JOUE is infringed.
- The provisions to ensure fair competition in the signing procedures of contracts that are based on the system of a framework agreement or DPS are violated.
- The contract was signed during the standstill period.

IV.THE PERIOD TO INITIATE

There are two periods that are applicable to LRC:

- 31 days: from the publication of a contractual award notification in JOUE, or for contracts that are based on a system of a framework agreement or DPS, from the notification of the contractual signing.
- 6 months: from the next day following the contractual signing if no notice of award is published or if no notification of the contractual signing is executed.

We will now discuss the power of judges in LRC.

⁷⁸⁸ CE, 30 September 2011, n° 350148, Commune de Maizieres-les-Metz, published at “recueil Lebon”.

⁷⁸⁹ Rémi Grand, *Les passerelles entre référés précontractuel et contractuel*, AJDA 2012 p. 108.

B. POWER OF JUDGES IN URGENT CONTRACTUAL PROCEDURES

As for the power of judges in urgent contractual procedures, we want to discuss into two directions. One addresses the frame of the execution of this power (I. THE FRAME OF THE EXECUTION OF THIS POWER). The other addresses the relationship between LRC and the jurisprudence of Tropic and Departement De Tarn-Et-Garonne (II. THE RELATIONSHIP BETWEEN URGENT CONTRACTUAL PROCEDURE AND THE JURISPRUDENCE OF “TROPIC” AND “DEPARTEMENT DE TARN-ET-GARONNE”)

I. THE FRAME OF THE EXECUTION OF THIS POWER

Judges in LRC have many important powers. However, the use of this power is strictly framed by laws.

Judges in LRC should principally order the contract to be nullified reactively. However, the directive and the CJA grant judges discretion, depending on the degree of illegality.

If the violation of the standstill period **has deprived** candidates from executing their rights in LPRC, or if the requirements for publicity and fair competition have been violated in a way that affects a plaintiff’s opportunity to conclude a contract, the judges should pronounce the nullity of the contract. Thus, judges should examine the modalities of the contractual award.

In contrast, if the violation of the standstill period **did not deprive** a plaintiff of its rights or affect a candidate’s chances, the judges have more discretion, for instance, they may quash or terminate the contract, or they may reduce the period of the contract or impose a financial penalty; the directive called these measures “substitution punishment[s].”⁷⁹⁰

Note that the CE considered that in LRC, the judges’ ability to quash contracts is limited to the situations enumerated in three sections of Article L551-18. In public service delegation contract (CDS), the CE considered if the CDS does not comply with the obligation provided in section 3 (that an administrative body should notify the economic operator that presented an offer of the award decision) or if procurement contracts are based on framework agreement or DSP, as provided in section 2, then the CDS exclusively involves the

⁷⁹⁰ LAURENT RICHER, *supra* note 515, at 210.

first section of L551-18, which addresses the failure to comply with the publicity obligations required in the contractual signing procedure or with the requirement for publication in JOUE. Consequently, the candidates for the award of a CDS contract can exclusively invoke the delegating authority's violation as provided in the first section pursuant to the CE's judgment in the "*Commune La Seyne-sur-Mer*⁷⁹¹" case on 25 October 2013.

Finally, as in LRPC, judges should adhere to the principle of oral hearings. Their judgments can exclusively be appealed to the CE within 15 days of the notification of his judgment.

Afterward, we want to analyze the relationship between urgent contractual procedure and the jurisprudence "Tropic".

II. THE RELATIONSHIP BETWEEN URGENT CONTRACTUAL

PROCEDURE AND THE JURISPRUDENCE OF "TROPIC" AND

"DEPARTEMENT DE TARN-ET-GARONNE"

With regard to a judge's pronouncement regarding the nullity of a contract, jurist Laurent Richer reminded us to reflect upon the relationship between LRC and the jurisprudence of Tropic.

We want to discuss in two sections. One addresses the "annulation" is "principal sanctions" or "ultimate solution".((1).THE "ANNULATION" IS "PRINCIPAL SANCTIONS" OR "ULTIMATE SOLUTION?") The other addresses whether the jurisprudence conflicts with the provisions in the CJA or in the directive. That's the applicable situation of jurisprudence in "Tropic" and recent judgment "Departement De Tarn-Et-Garonne "((2).THE APPLICABLE SITUATION OF JURISPRUDENCE IN "TROPIC")

⁷⁹¹ CE, 25 October 2013, Commune de La Seyne-sur-Mer c. SARL MIRAMAR, req. n° 370393.

(1).THE “ANNULATION” IS “PRINCIPAL SANCTIONS” OR “ULTIMATE

SOLUTION?

Since L551-18 of the CJA used the wording that the judges may “pronounce the nullity of contract” in first section, but states that the “annulation is pronounced” in second section, we are curious about whether they have the same significance.

Jurist Laurent Richer believed that, in L551-18, they are the same. Because the verb is “pronounce” and not “declare,” this means that the judge can exercise a certain degree of latitude.⁷⁹²

Another reason to support jurist Laurent Richer is that the directive and the CJA have acknowledged the possibility for administrative judges to maintain the contractual execution of an illegal contract, for instance, in L551-19 CJA.

However, as Laurent Richer stated, the conditions should be restrictively limited. L551-19 CJA provided that the pronouncement of contractual nullity may result in urgent issues affecting the general interest, which cannot be constituted by a simple economic interest.

The pronouncement of nullity must cause disproportionate consequences and the damaged economic interest cannot be directly linked to the contract. Thus, jurist Laurent Richer considered that neither the surcharge that results from a new procedure for the signing of contract nor indemnity to victims constitute “urgent reasons.”

In addition, the amount of the financial penalty should be proportionally based on the dissuasive goal and cannot exceed 20% of the out-faxed contractual amount.

Returning to the relationship with the “Tropic” and “DEPARTEMENT DE TARN-ET-GARONNE” case, Tropic created a remedy for a third person to contest contractual validity before the JDC. The result of Tropic, according to jurist Didier Casas, corresponded with the requirements of directive 2007/66 and even surpassed them.

Recently in the case “*Département de Tarn-et-Garonne*” on 4 April 2014⁷⁹³,

⁷⁹² LAURENT RICHER, *supra* note 515, at 210.

⁷⁹³ CE, 4 April 2014, Département du Tarn et Garonne, req. N° 358994, see

CE granted a “third person in an administrative contract subject to be injured” (*tout tiers à un contrat administratif susceptible d’être lésé*) the possibility to bring a remedy to contest the nullity of an administrative contract.

Meanwhile, CE also established the application conditions. The third person who brings the remedy should justify that his interest is subject to be injured by a sufficiently direct and certain way (*de manière suffisamment directe et certaine*).

On this basis, the third person who brings the remedy can claim only for the vices in contract which are in direct relationship to his injured interest (*des vices du contrat en rapport direct avec l’intérêt lésé*) or for grave vices.

Thus, as jurist Laurent Richer stated, the difference is that the Tropic case did not require “the annulation” to become the “principal sanction,” which means that the JDC should try to preserve the validity of the contract. Under “*Tropic*” and “*Département de Tarn-et-Garonne*”, annulation is only the ultimate solution. In LRC, however, annulation is the principal solution, since the aforementioned substitution punishments are restrictively limited⁷⁹⁴.

(2).THE APPLICABLE SITUATION OF JURISPRUDENCE IN “TROPIC”

If we compare the conditions for maintaining a contractual execution, in Tropic, the condition is if “annulation would cause excessive damage to the general interest,” while in LRC, it is “urgent reasons affecting the general interest.” The condition in Tropic is obviously more “flexible” than that in LRC.

The manifest difference is in the injury that is caused to contractor. If the damage is to an interest that economic in nature, in LRC, it cannot be allowed, but in Tropic, it is acceptable.⁷⁹⁵

However, does this signify that the jurisprudence in Tropic conflicts with the provisions in the CJA or in the directive?

Jurist Laurent Richer believed that the divergence between Tropic and LRC should not be interpreted in this way. The jurisprudence in Tropic is applicable to disputes that are not within the scope of Article L551-1.

For example, in a public-area occupation contract, if there are many

http://www.lemoniteur.fr/media/FICHER/2014/04/04/FICHER_20140404_24053343.pdf, last visited 6 April 2014.

⁷⁹⁴ ÉLISE LANGELIR, L’OFFICE DU JUGE ADMINISTRATIF ET LE CONTRAT ADMINISTRATIF, 188 (L.G.D.J, 2012)

⁷⁹⁵ LAURENT RICHER, *supra* note 515, at 211.

candidates, there are three levels to be discussed.

The first level addresses whether the obligation of fair competition must be met in public-area occupation contracts.

The second level addresses whether the jurisprudence in Tropic is applicable to public-area occupation contracts.

The third level involves how to define the “losing competitor” (*concurrence évincée*) that is addressed in the jurisprudence in Tropic in a public-area occupation contract.

Regarding the first level, the decision to authorize someone to occupy a certain public area can be made in the form of unilateral or bilateral administrative act, and thus, an administrative contract is one option.

In addition, in his judgment in the “*Dame DeJean*” case on 26 April 1944, the CE held that the management of a public area is part of the administrative police power and that the protection of integrity in a public area is a component of the public interest.⁷⁹⁶

Further, jurist Nathalie Escaut also considered that the decision on public areas constituted the use of the public power prerogative in his report on the “*Association Jean-Bouin*” case.⁷⁹⁷

In conclusion, in the first level, jurist Céline Van Muylder concluded that public-area occupation contracts and the decision to select future occupants must comply with the obligation of fair competition.

Regarding the second level, jurist Muylder considered that the context of jurisprudence in Tropic did not exclude public-area occupation contracts since it addressed “all losing bidders in contractual signing...” (“*tout concurrent évincé de la conclusion d'un contrat...*”).

Jurist Frédéric Lenica⁷⁹⁸ also agreed by holding that there is no restriction on the subjects to which the jurisprudence of Tropic is applicable.

In conclusion, in the second level, the jurisprudence of Tropic is applicable to public-area occupation contracts.

Regarding the third level, because there is no bidding procedure or competition (“concours”), how the losing competitors should be defined is an interesting question.

⁷⁹⁶ Lebon, at 386.

⁷⁹⁷ Céline Van Muylder, *Recevabilité du recours Tropic contre une convention d'occupation domaniale-Jugement rendu par Tribunal administratif de Rouen*, AJDA 2012, at 493.

⁷⁹⁸ Frédéric Lenica, *Recours des tiers contre les contrats et modulation dans le temps des effets des changements de jurisprudence: Never say never*, AJDA, 2007, p. 1577.

In practice, an administrative body often provides public notification about a public area occupation by notice or by internet. Thus, jurist Muylder considered that all candidates that answered an occupation appeal can be defined as “*concurrence évincée*”.

In conclusion, **the jurisprudence of Tropic is applicable to public-area occupation contracts** pursuant to TA Rouen’s judgment in the “Berry” case on 6 October 2011.⁷⁹⁹

3.CONCLUSION OF THIS SECTION

In considering LPRC and LRC together, the questions related to urgent procedures involve the conciliation between two important legal bases: legality and security.

To address the diversity among the different European states, the European directive has a larger scope of application.

In France, in observing the development of jurisprudence from older cases than SMIRGEOMES, the CE tried to balance the requirements of adhering to the directive and to the domestic particularities in France. From broad to narrow, the CE gradually revealed his positions regarding the urgent procedures.

SECTION V: CONCLUSION OF THIS CHAPTER

We want to conclude the urgent procedure in two sections. One addresses the urgent procedure in Taiwan, Canada and China (1.IN TAIWAN, CANADA AND CHINA) and that in France (2.IN FRANCE).

1.IN TAIWAN, CANADA AND CHINA

In Taiwan, Canada and China, there is no special urgent procedure. However, they have similar mechanisms, i.e. the suspension procedures or preservation procedures, or to the interlocutory injunction procedure in Canada.

In Taiwan, if the parties have arbitration clauses and one party initiates a preservation procedure before an ordinary judge pursuant to Article 39 of TAL, the judges should order the party who initiated the preservation procedure to initiate either arbitration or a litigation procedure. Thus, in Taiwan, major

⁷⁹⁹ Céline Van Muylder, *surpa* note 797.

disputes regarding preservation or suspension procedures are often examined before ordinary judges, not arbitrators.

2.IN FRANCE

Indeed, an urgent procedure, regardless of whether it is LPRC or LRC, can also be initiated by a third person who has no contractual relationship with the defender, often the administrative body.

This also involves the function of urgent procedures. As mentioned, the trend of development in the jurisprudence reveals a broad to narrow scope of application, and eventually, it required the plaintiff to prove the relationship between a violation and his “injury.” It reveals the movement of the urgent procedure’s function **from “objective-oriented” to “subjective-oriented.”**

Even though jurisprudence regarding urgent procedures has been “subjective-oriented,” this development has not excluded the necessity of examining the legality of administrative acts; for instance, in Article L551-19, judges should still examine the gravity of the violation and the urgent reasons that affect the general interest to decide whether a substitution punishment should be applied.

Under Article L551-19, in addition to the legislative exceptions, jurisprudence also has created certain exceptions based on facts that are imputable to the candidates.

The effectiveness of an urgent procedure relies on one mechanism: the standstill period when all of the relevant candidates can initiate their claims together and the judges can evaluate them collectively.

Finally, regarding the diverse “administrative judges” in France, jurist Jean-François Lafaix considered that we should establish a “super” JDC (“***super juge du contrat***”) who can execute his mission in contractual disputes and in urgent procedures.⁸⁰⁰ We are curious about whether an arbitrator would be a competent “super judge.”

⁸⁰⁰ Jean-François Lafaix, *Le juge du contrat face à la diversité des contentieux contractuels*, RFDA 2010, p.1089.

THIRD PART: JUDICIAL REVIEW AND EXECUTION OF

ARBITRATION AWARD

After an arbitration award has been rendered, it must be enforced. In this phase, there are two related procedures.

To enforce an arbitration award, the prevailing party must demand and obtain an execution order issued by a judge (who is called by a different name in the four different countries, see below). This procedure is called the execution of the arbitration award (in French “*une procédure d'exequatur*”).

To prevent the enforcement of an arbitration award, the losing party may initiate a procedure to set it aside by contesting its legality. This procedure is called the judicial review of the arbitration award (in French, “*le recours en annulation*”)

Thus, in the third part of this dissertation, we will discuss questions about the annulment and execution of arbitration awards made in disputes arising from administrative contracts.

There are four principle questions surrounding the two procedures.

The first concerns what the court can decide. In other words, is the court able to set aside the arbitration award?

The second question concerns the possibility of challenging the award.

The third question concerns the court before which the challenge against the arbitration award should be brought. This question is about the definition of the competent court.

The fourth question addresses the arguments or reasons for the review.

There are some global points relating to the first question that we will discuss here.

All administrative actions should be controlled by judicial review. Arbitration cannot work without the support of the courts. It depends on the support of the court so that the arbitration process is protected against any attempt by a party to destroy it. Thus, whether in a judicial review procedure or in an execution procedure, the judge can set aside an arbitration award by

reference to its legality.

Conclusively, in all the four countries, the judges can not only refuse to enforce an arbitration award but can also set it aside.

As for the other three questions, and the comparative points in the fourth question, these are comparative and thus we will discuss them for each country separately.

Afterward, we will discuss this in two main sections. The first looks at judicial reviews of arbitration awards (TITLE I: JUDICIAL REVIEW OF ARBITRATION AWARDS). The other considers the issuance of the execution order of an arbitration award and the recourse against it. (TITLE II: THE ISSUANCE OF EXECUTION ORDER AND THE RECOURSE AGAINST IT).

TITLE I: JUDICIAL REVIEW OF ARBITRATION AWARDS

CHAPTER I: DOMESTIC ARBITRATION

SECTION I: CANADA

1. POSSIBILITY OF CHALLENGING: NO APPEAL PROCEDURE, ONLY THE

ANNULMENT OF AN AWARD

In Canada, arbitration is gradually being used more often used to resolve disputes arising from government contracts. Arbitration clauses are, for example, habitually inserted into PPP contracts and contracts for social services.

In addition, during the litigation of disputes arising from government contracts, we often see the parties agreeing to submit to arbitration even if there is no arbitration clause in the government contract.

There is no special provision governing the arbitration procedure for disputes under government contracts. As the jurist Lemieux has stated, even in the arbitration of a dispute under a government contract, the arbitrators possess all the powers given to them by the Civil Code in the section on arbitration

contracts.⁸⁰¹ Certes, the parties can reduce the arbitrators' power by agreement in the arbitration clause.

In Canada, **there is no appeal procedure but any arbitration award can be set aside.**

2.BEFORE WHICH COURT

Since Canada does not have a dual jurisdiction system (civil-administrative jurisdiction), all appeals against an arbitration award are brought before the **Federal Court** under Article 18.1 of the Federal Court Act (R.S.C., 1985, c. F-7).

3.ARGUMENTS OF REVIEW

Any arbitral award rendered in Canada may be challenged on the grounds set out in Article 35 and Article 36 of the Commercial Arbitration Act (the Model Law that has been implemented across Canada) or Article 947.2 of Quebec's Code of Civil Procedure (CCP).

The main reasons for challenging a domestic arbitration award are classified as follows:

- The incapacity of the parties or the invalidity of the arbitration agreement;
- Improper notice having been given to a party, or a party having been unable to present its case;
- The dispute not being contemplated by or being outside the scope of the submission to arbitration;
- The composition of the arbitration tribunal, or the procedure followed by the tribunal, not having been in accordance with the parties' agreement, unless this agreement was in conflict with the laws of Canada;
- The dispute not being arbitrable under the laws of Canada; and
- The award being contrary to public order in Canada.

4.WHAT THE COURT CAN DECIDE

The recourse to set aside should be initiated within three months of the date

⁸⁰¹ LEMIEUX, *supra* note 199, at 462.

of receipt of the arbitration award, pursuant to paragraph 3 of Article 34 of the Federal Court Act (R.S.C., 1985, c. F-7).

However, keep in mind that **the court** will strive to respect the intent of Parliament, as expressed in the Act and the Code, to preclude recourse against an award other than as expressly provided and **may therefore be reluctant to intervene**.⁸⁰²

SECTION II: CHINA

1.POSSIBILITY OF CHALLENGING: THREE POSSIBILITIES

In domestic law, Article 58 to Article 61 in Chapter 5 of ALPRC contains the relevant principles. They are the review action (A.REVIEW ACTION) and the recourse for annulment (B.THE ANNULMENT OF AN AWARD). Besides, in special laws, there are some particular arbitration commissions to deal with arbitrations on disputes arising from particular administrative contracts (C.SPECIAL ARBITRATION COMMISSION).

A.REVIEW ACTION

Under Article 61 of the ALPRC, in the procedure for the annulment of an award, if the court considers that the contested arbitration award should be revised, the court can stay its own procedure and give the arbitration tribunal notice to revise the award.

Thus, in China, it is possible to revise an arbitration award but, according to the legislation, this decision seems to lie within the discretion of the court, and is not a right for the parties⁸⁰³.

⁸⁰² See Department of Justice in Canada Official Homepage, <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/res/drrg-mrrc/06.html>, last visited 7 April 2014.

⁸⁰³ Du Huan-Fang (杜煥芳), On the Procedure, Effectiveness and Remedies of Cancellation of Awards in International Commercial Arbitration (論國際商事仲裁裁決的撤銷程式、效力與救濟), in site <http://www.china-arbitration.com/2.asp>, presented in 2003, last visited 8 April 2014.

B.THE ANNULMENT OF AN AWARD

Besides, in domestic law, Chapter 5 of ALPRC contains the relevant principles.

Any arbitral award rendered in China may be challenged on the grounds set out in Article 58 of the Arbitration Law of the People's Republic of China (ALPRC)

C.SPECIAL ARBITRATION COMMISSION

In China, administrative contracts have been in existence for three decades. However, there is no uniform principle that governs disputes arising from administrative contracts. Thus, there is still uncertainty about disputes arising from administrative contracts.⁸⁰⁴

According to the jurist Zhang Li's observation, disputes arising from administrative contracts in China can be resolved in two ways: judicially or non-judicially.

The judicial way means the dispute is referred to litigation.

Traditionally, disputes arising from administrative contracts were examined in the civil or commercial chamber in the local people's court. This was the case until 2000 when commercial chambers were abolished and transformed into civil chambers.

However, disputes about detachable acts can be examined by administrative judges in administrative chambers in local people's courts; these disputes include, for instance, the fine imposed in the execution of an administrative contract.⁸⁰⁵

The non-judicial way means that the ADR procedure is followed.

ADR is encouraged by China's Supreme Court, which issued an administrative notice to all the lower courts on 14 April 1986 stating that organizations responsible for the lease contracts for agriculture land should try to make it possible to resolve questions by mediation.⁸⁰⁶

Arbitration is gradually being used more often to resolve disputes arising from administrative contracts in certain categories, as mentioned in the first

⁸⁰⁴ Zhang Li(張莉), *Arbitrage International et Contrats Publics en Chine*, in CONTRATS PUBLICS ET ARBITRAGE INTERNATIONAL 493, 512 (Mathias Audit, ed., 2011).

⁸⁰⁵ ZHANG LI, *supra* note 804, at 513.

⁸⁰⁶ ZHANG LI, *supra* note 804, at 514.

chapter of this dissertation.

Before 1995, various commissions were set up in administrative organizations to deal with possible disputes arising from administrative contracts. But since 1995, most of these commissions have been abolished and transformed into external arbitration commissions.

However, if a dispute occurs in a particular domains, such as administrative contracts concluded between professors at a public university (in China, a university can be classified as either a public university or a private university), the dispute should still be submitted to the arbitration commission under the Ministry of Human Resources and Social Security.

Besides, because of the special land policy in China that means that all territory is government owned, disputes arising under certain contracts, such as lease contracts for agriculture land, as mentioned above, must be submitted to special arbitration commissions that are set up in the local municipalities, for which at least 50% of the tribunal must be farmers' representatives.

2.BEFORE WHICH COURT

In China, all recourses against arbitration awards are submitted to the **intermediate people's court** in the place where the arbitration commission is located, under Article 58 of the ALPRC.

3.ARGUMENTS OF REVIEW

Under the Article 58 of the ALPRC, the main reasons for challenging a domestic arbitration award are classified as follows:

- The incapacity of the parties or the invalidity of the arbitration agreement (subsection 1 of Article 58);
- The dispute not being contemplated by or being outside the scope of the submission to arbitration (subsection 2 of Section 1 of Article 58);
- The composition of the arbitration tribunal, or its procedure, not having been in accordance with the parties' agreement (subsection 3 of Section 1 of Article 58);
- The award being contrary to public order in China (section 3 of Article 58); and
- The facts or evidence to which the arbitration award refers having been

proved false, or corruption having occurred (subsections 4, 5 and 6 of Section 1 of Article 58).

A recourse should be initiated within six months of the date of receipt of the arbitration award, under Article 59 of the ALPRC.

4.WHAT THE COURT CAN DECIDE

The court can make three types of decision. The first of these is to give notice to the arbitration tribunal to revise its contested arbitration award, under Article 61.

The other two are to set aside the award or, within two months after receipt of the application for annulment of the award, to reject the application, under Article 60.

Note that in China, the national court can examine the arbitration award not only for procedural questions but also for factual questions.

SECTION III: TAIWAN

There is no legislative definition of domestic arbitration. However, under Article 30 of the TCAC (“Commercial Arbitration Code”, enacted in 1961 and abolished in 1998), an “international arbitration award” referred to an award rendered outside the territory of the ROC. This law therefore adopted a “geographical” standard.

The contemporary provision, under Article 1 of the ALT (“Arbitration Law of Taiwan”), refers to an award “**rendered outside ROC’s territory**” or “**rendered within ROC’s territory but applying foreign laws**”. It has therefore adopted “geographical” and “applicable law” standards.

Thus, in Taiwan, the definition of domestic arbitration award now contains two conditions. It requires that the arbitration award has not only been “**rendered in ROC’s territory**” but also that it “**applied ROC’s laws**”. Both the “geographical” and the “applicable law” requirements are taken together.

1.POSSIBILITY OF CHALLENGING : NO APPEAL PROCEDURE, ONLY THE

ANNULMENT OF AN AWARD

In Taiwan's positive law, there is neither an appeal procedure, nor a procedure through which a party can bring a review action. The only mechanism available to the parties would be to apply for the arbitration award to be set aside (Article 40 of the ALT) if they do not agree with it.

2.BEFORE WHICH COURT

Even though Taiwan has an administrative jurisdiction and its administrative judges are competent to examine disputes arising from administrative contracts, in practice and doctrine (even the administrative law doctrine) all recourses against arbitration awards made in disputes arising from administrative contracts are still heard by the judges of the Grand Instance Court where the arbitration award was rendered.

3.ARGUMENTS OF REVIEW

Any arbitral award rendered in Taiwan may be challenged on the grounds set out in Section I of Article 40 and Article 38 of the ALT.

The main reasons for challenging a domestic arbitration award are classified as follows:

- The incapacity of the parties or the invalidity of the arbitration agreement (subsection 2 of Section 1 of Article 40);
- Improper notice having been given to a party, or a party having been unable to present its case (subsections 3 and 5 of Section 1 of Article 40);
- The dispute not being contemplated by or being beyond the scope of the submission to arbitration (subsection 1 of Section 1 of Article 38);
- The composition of the arbitration tribunal or its procedure not having been in accordance with parties' agreement, unless that agreement was in conflict with laws of Taiwan (subsection 4 of Section 1 of Article 40);
- The dispute not being arbitrable under the laws of Taiwan (subsection 3

of Section 1 of Article 38);

- The award being contrary to public order in Taiwan or imposing an obligation that is interdicted by the law (subsection 3 of Section 1 of Article 38);
- The arbitration award lacking sufficient reasons (subsection 2 of Section 1 in Article 38); and
- The facts or evidence to which the arbitration award refers having been proved false (subsections 8 and 9 of Section 1 of Article 40).

4.WHAT THE COURT CAN DECIDE

A recourse should be initiated within 30 days of the date of the receipt of the arbitration award, pursuant to Section 2 of Article 41 of the ALT.

In practice, the TSC⁸⁰⁷ traditionally considers that a recourse against an arbitration award cannot re-examine the dispute that was the subject of the arbitration, but can review it if there are manifest errors in fact or law in the arbitration award. Thus, traditionally, an arbitration award is rarely quashed by the courts.

During the procedure to set aside an arbitration award, the court can stay the execution of the award under Article 42 of the ALT.

SECTION IV: FRANCE

1.POSSIBILITY OF CHALLENGING

Under decree number 2011-48 of 13 January 2011, arbitration law in France, both for domestic and for international arbitration, was seriously modified.

Our study of the remedies against domestic arbitration awards can be divided into two sections. In the first we address the ordinary remedies (A. ORDINARY REMEDIES), and in the other we addresses extraordinary remedies (B. EXTRAORDINARY REMEDIES). “Extraordinary” means that the recourse is only available in exceptional cases set out in the law.⁸⁰⁸

⁸⁰⁷ TSC, judgment No. (TaiSun-zhi) 1326, Year 90.(最高法院 90 年度台上字第 1326 號) (Judgment year: 2001).“TaiSun-zhi” is the Roman spelling of the Chinese word used for TSC’s judgments; “Tai” means “Taiwan” and “Sun” means “appeal”.

⁸⁰⁸ SERGE GUINCHARD, FRÉDÉRIQUE FERRAND & CÉCILE CHAINAIS, PROCÉDURE CIVILE, 603(Dalloz, 2013).

A. ORDINARY REMEDIES

Ordinary remedies can be divided into two sections: appeals (I. APPEALS) and claims for annulment (II. ANNULMENT).

I. APPEALS

In principle, an arbitral award cannot be appealed, unless otherwise agreed by the parties under Article 1489 of the Code of Civil Procedure of France (CCPF).

Note that Article 1485 allows the arbitration tribunal to interpret the award, to rectify clerical errors, or to make an additional award where it failed to rule on a claim. This is not an appeal procedure but rather is the completion of the arbitration award.

An appeal is an ordinary right of recourse and thus can suspend the execution of a contested judgment (Article 539) or an arbitration award (Article 1496), except where there is an urgent provisional execution order issued in the judgment or arbitration award.

II. ANNULMENT

In principle, a request can be made under Article 1491 of the CCPF for an arbitration award to be annulled, except where the parties agreed that the award may be appealed.

Note that the second section of Article 1491 provides that any provision to the contrary shall be deemed to have no effect.

Thus, we can conclude that these two possible lines of recourse are alternatives and are mutually exclusive.

B. EXTRAORDINARY REMEDIES

There are two types of extraordinary remedy, “*La tierce opposition*” (LTO) (I. LA “TIERCE OPPOSITION” (LTO)), and review action (II. REVIEW ACTION (LE RECOURS EN RÉVISION)). These are set out in the Fifth part of the CCPF under the heading “OTHER RECOURSES”.

I. LA "TIERCE OPPOSITION" (LTO)

LTO is different from the two ordinary remedies mentioned above. This right of recourse is executed by **a third person**, not by the parties to the arbitration award. There is only one Article in the CCPF governing this right of recourse (Article 1501).

II. REVIEW ACTION (LE RECOURS EN RÉVISION)

Article 1502 maintains the possibility of a remedy by means of a revision to the arbitration award.

Besides, under the old Article 1491 of CCPF, a review action is available against an arbitral award in the same circumstances and under the same conditions that such an action can be brought against a judgment. Thus, under the old system, the applicable circumstances and conditions for awards and judgments were the same.

However, the new CCPF does not have similar provisions, and Article 1502 only applies to Articles 594, 595, 596 and 597. Besides, Article 593 states that a review action is brought against a civil action that is *res judicata* (the Latin term for "a matter already judged").

Consequently, taking these provisions together, the jurist Hazoug considers⁸⁰⁹ that in the contemporary French arbitration system, a review action would be identified as an action against an arbitration award that is not yet *res judicata*.

C. CONCLUSION

Thus, after arbitration award has been rendered in France, there are four possible ways to challenge its validity. **The main remedy is to apply for an annulment.** Now we will analyze the court before which each of these four applications for recourse should be initiated.

⁸⁰⁹ Sâmî Hazoug, *Les voies de recours en droit de l'arbitrage*, in YVES STRICKLER, *L'ARBITRAGE QUESTIONS CONTEMPORAINES*, 100,91-109 (L'HARMATTAN ed.,2012).

2. THE COMPETENT COURT

As mentioned above, we will follow the preceding system by looking first at claims for ordinary remedies (A. ORDINARY REMEDIES) and then at claims for extraordinary remedies (B.EXTRAORDINARY REMEDIES).

A. ORDINARY REMEDIES

We will follow the same order as above, first considering appeals (I. APPEALS) and then looking at claims for annulment (II. ANNULMENT).

I. APPEALS

An appeal to set aside an arbitration award should be brought before the **Court of Appeal** in the place where the award was made, under Article 1494 of the CCPF.

If an arbitration award is made in respect of a dispute arising from an administrative contract, this definition of “Court of Appeal” should apply to the standards laid down in the “*l’Institut national de la santé et de la recherche médicale (INSERM)*” and “*Le Syndicat mixte des aéroports de Charente (le SMAC) v. La société Ryanair*” on 19 April 2013 (SMAC case) considered below.

II. ANNULMENT

In France, judicial review of arbitration awards made on disputes arising from administrative contracts involves two main questions. The first is the question of who is competent to examine or quash the arbitration award ((1).CIVIL JUDGES OR ADMINISTRATIVE JUDGES?), and the second is the question of who, within the administrative jurisdiction, is the competent judge. This question involves the competence of the administrative appeal court ((2).“COUR ADMINISTRATIVE D’APPEL” OR “CONSEIL D’ÉTAT”?).

(1).CIVIL JUDGES OR ADMINISTRATIVE JUDGES?

Regarding the question of which type of judge is competent to examine or

quash an arbitration award on a dispute arising from an administrative contract, there is an important leading case: SMAC case (which we introduce in detail below). Thus, we want to split this section into two subsections. The first addresses the situation before the SMAC case ((I).BEFORE THE SMAC CASE), and the second addresses the situation after the SMAC case ((II).AFTER THE SMAC CASE).

(I).BEFORE THE SMAC CASE

As mentioned, France has a “dual” jurisdiction system in which a special set of courts is in charge of administrative litigation (or at least most of this⁸¹⁰).

To decide whether a particular case fell within the jurisdiction of the CE, and not within that of the ordinary court, one had to refer, in particular, to the features of the dispute.

In doctrine and jurisprudence, there were many discussions about the standards used to distinguish the features of disputes. Among the French domestic judicial institutions, there is also a special court named “Tribunal de Conflit” (literally, “Court of Conflict”) to deal with conflicts between the CE and the ordinary courts about jurisdiction, whether they were positive conflicts (two jurisdictions assert their competences) or negative conflicts (two jurisdiction deny their competences).

Before the SMAC case, there were **two different arguments** about the competence of judges to examine the recourse against an arbitration award made on a dispute arising out of an administrative contract.

The first argument, as the jurist Foussard has stated, is that whatever the dispute involved public law or private law, arbitration is private justice that walks under the shield of private law⁸¹¹(“*sous l’égide du droit privé*”); this can be viewed as the principle of the “unity of arbitration law”.

Following this logic, judicial judges are the competent judges to examine the recourse against an arbitration award, no matter it is made on a dispute arising from a private contract or one arising from an administrative contract.

The second argument is adopted by most public law jurists.

As the jurist Henrion de Pansey has stated, “*Juger l’administration, c’est encore administrer*” (literally, “to judge an administration, this is still

⁸¹⁰ AUBY, *supra* note 75, at 115.

⁸¹¹ D. Foussard, *L’arbitrage en droit administratif*, REV. ARB., 3, 1990.

administration”).) Following this logic, all acts made by an administration, whatever they are unilateral or bilateral, are still attributed to the administrative jurisdiction.

Besides, the jurist Laurent Richer considers that in domestic arbitration, the competent judges to examine a challenge against the arbitration award are those who are competent to examine contractual disputes⁸¹².

Thus, following this logic, administrative judges, by their nature, are the competent judges to examine a challenge against an arbitration award that relates to administrative acts, such as administrative contracts.⁸¹³

However, following the cases of “*L’Institut national de la santé et de la recherche médicale v. Norwegian Foundation Letten F. Saugstad*”⁸¹⁴ (hereinafter “INERM”) on 17 May 2010 and SMAC, this situation has become interesting.

(II).AFTER THE SMAC CASE

First, one particular consequence of the SMAC case is that **it enlarges the scope of application of the jurisprudence built on the INERM case to domestic arbitration**. The INERM case mainly involves disputes in international arbitration, and thus we introduce it in detail below. Thus, we want to refer briefly to the conclusions of the INERM and SMAC cases.

According to the INERM case, the judges who are competent to examine a challenge against an international arbitration award are, principally, judicial judges. However, the TC allowed certain exceptions. These are arbitrations arising from the family of administrative contracts that are attributed to the public interest and public order regime (“*un bloc de contrats administratifs relevant d’un régime d’ordre public*”).⁸¹⁵ In the SMAC case, this standard was introduced into domestic arbitration.

Thus, following the SMAC case, administrative contracts relating to the

⁸¹² LAURENT RICHER, *supra* note 515, at 349.

⁸¹³ V. not. J.-M. Auby and R. Drago, *Traité de contentieux administratif*, op. cit., p. 204 ; A. De Laubadère, F. Moderne and P. Delvolvé, *Traité des contrats administratifs*, op. cit., T. 2, 2nd ed., no 1740 ; RENÉ CHAPUS, *DROIT DU CONTENTIEUX ADMINISTRATIF*, 9th ed., 2001, op. cit., no 304 ; G. Mattei-Dawance, *L’arbitrage en droit public*, *Gazette du Palais*, 1987, p. 471. Quoted by ANTOINE Julien, *L’arbitrage en droit administratif*, *Petites Affiches*, *Le Quotidien Juridique*—édition n° 156, Aug. 6, 2003, p.4. at note 89.

⁸¹⁴ TC 17 May 2010, *Institut national de la santé et de la recherche c/. Fondation Letten F. Saugstad*, req. n° C3754; *Rev. arb.* 2010, p.275, concl. M. Guyomar.

⁸¹⁵ LAURENT RICHER, *supra* note 515, at 348.

public order regime come under the jurisdiction of the administrative judges.

As the jurist Brenet has stated,⁸¹⁶ the CE linked “judicial competence” with “applicable laws”. Since disputes about the administrative regime for public order are within the competence of the administrative judges, we can ensure that an arbitration award respects the public order that is controlled on a daily basis by an administrative judge.

Another reason to support this view, according to the jurist Brenet, is that it would be contradictory if the CE were to be competent to examine “distant contracts” (disputes arising from international contracts) but not competent to look at “near contracts” (disputes arising from domestic contracts).

However, this point from the SMAC case would be challenged by arbitration law jurists, who would consider that it would destroy the principle of “unity of arbitration law” mentioned above.⁸¹⁷

Finally, regarding the reasons why an arbitration award could be overturned, under the INSERM and SMAC cases this could be done on the grounds that the award must conform to the legality of public order.

(2).“COUR ADMINISTRATIVE D’APPEL” OR “CONSEIL D’ÉTAT”?

The French administrative court system consists of non-specialized courts and has three layers. These courts are in charge of all cases falling under the jurisdiction of the administrative courts that are not to be decided by a specialized administrative court. In the hierarchy, at the top is one CE only. In the middle, there are eight administrative courts of appeal (in French, “*courts administrative d’appel*”), and at the bottom, there are 38 administrative courts⁸¹⁸ (in French, these are the “*tribunaux administratifs*”, but, to avoid confusion with the “*tribunaux administratifs*” in Canada, we use the term “administrative courts” to describe the tribunals of the bottom layer in France).

For those cases to which the INSERM and SMAC decisions apply, the next question concerns which court, within the administrative jurisdiction, is competent to examine the challenge against the arbitration award; this might be the administrative court of appeal (Cour Administratif d’appel) or the State Council (Conseil d’État) in France.

⁸¹⁶ François Brenet, *Arbitrage et contrat administratif: l’incompétence toute relative du juge Administratif*, Vol.7, DROIT ADMINISTRATIF, 2013, 49.

⁸¹⁷ François Brenet, *supra* note 816.

⁸¹⁸ AUBY, *supra* note 75, at 115.

We will discuss this in two sections. In the first we will address the question of whether a party can renounce his right to appeal ((I).IS IT POSSIBLE TO RENOUNCE CHALLENGING THE AWARD?), and in the second we will address the question of the competent court ((II).THE STANDARD FOR DECIDING WHETHER “COUR ADMINISTRATIVE D’APPEL” OR “CONSEIL D’ÉTAT”HAS JURISDICTION).

(I).IS IT POSSIBLE TO RENOUNCE CHALLENGING THE

AWARD?

By their nature, unless there is a special provision to the contrary, all administrative disputes, whether or not they are arbitrable, should be subject to appeal. If a dispute is arbitrable, the contesting parties can also appeal to another arbitral tribunal or to the administrative jurisdiction.

Besides, the traditional jurisprudence considers an arbitration award to be appealable.⁸¹⁹

However, Article 1482 of the CCPF (Code of Civil Procedure in France) granted contesting parties the absolute right to renounce their right of appeal, and thus we are curious about whether the parties do have the right to renounce their right to appeal.

This renunciation was forbidden by the CE⁸²⁰ in its advisory report (“*avis*”) of 6 March 1986, which states that an appeal against an arbitration award is possible and can only be avoided by explicit legislative provisions.⁸²¹ The jurist Laurent Richer also agreed with this.⁸²²

Thus, even if the contesting parties have reached an agreement to renounce their rights of appeal, their consensus cannot turn the award into a “non-appealable” award. Thus, their agreement should be regarded as a nullity and the arbitration award can still be appealed.

Conclusively, both the doctrine and the jurisprudence agree that the

⁸¹⁹ CE, 4 Jan.1957, Lamborot, AJDA 1957, II, 108; C.E.Sect., 3 March 1989, Société AREA, Rec.69.

⁸²⁰ CE, 3 March 1945, Schneider, Rec. Leb., p. 66; CE, Ass., 4 Jan. 1957, Lamborot, A.J.D.A. 1957. II, p. 109, concl. J. Chardeau. Quoted by ANTOINE Julien, “L’arbitrage en droit administratif”, Petites Affiches, Le Quotidien Juridique—édition n° 156, Aug. 6, 2003, p.4. at note 93.

⁸²¹ A. PATRIKIOS, *supra* note 91, at 283.

⁸²² LAURENT RICHER, *supra* note 515, at 349.

contesting parties cannot renounce their right of appeal. In practice, the parties may comply with their agreement and, in fact, may not initiate an appeal procedure. In this situation, in France we should rely on JEX (*juges de l'exécution*) to control the legality of the arbitration award.

(II).THE STANDARD FOR DECIDING WHETHER "COUR ADMINISTRATIVE D'APPEL" OR "CONSEIL D'ÉTAT" HAS JURISDICTION

Regarding the competent court, two possibilities exist: the administrative court of appeal or the CE.

First, generally speaking, for appeal cases the administrative court of appeal is usually the competent court. We can understand this court to be the court of appeal hearing all judgments, including arbitration awards. This solution is consonant with the recourse spirit in the civil procedure code. Of course, judgments given at first instance by the administrative court of appeal are subject to appeal to the Conseil d'État.

However, Article 1 of the law of 31 December 1987 provides that "...administrative courts of appeal are competent to decide on appeals against the decisions of the **administrative courts**, except for those relating to legality, and disputes relating to municipal and cantonal elections".⁸²³

If we read this Article word by word, it provides expressly that the competence of administrative court of appeal is only in respect of decisions rendered by the "administrative courts", and thus, since arbitration awards are rendered by "arbitral tribunals" rather than administrative courts, the administrative courts of appeal are not the competent courts regarding appeals against arbitration awards. The only competent court is the Conseil d'État.

The jurist Laurent Richer is also of the view that, even though the administrative court of appeal is the competent court for appeals in common law

⁸²³ But this provision has been abolished – see http://www.legifrance.gouv.fr/affichTexteArticle.do;jsessionid=F59B9404AC17442B6DEA025E7AFBD709.tpdjo16v_3?idArticle=LEGIARTI000006528467&cidTexte=LEGITEXT000006068986&dateTexte=20090401, dated Aug. 23, 2013.

(here, “common law” is the term used in contrast to “special law”, and means the normal administrative litigation procedure), its competence should be limited to appeals from “administrative courts”, and thus the competent court is the CE. This point is also adopted by other commentators in France.⁸²⁴

B.EXTRAORDINARY REMEDIES

I.LA TIERCE OPPOSITION(LTO)

Under Article 1501, a petition for LTO should be made to **the court** that would have had jurisdiction had there been no arbitration. If the arbitration award is made on a dispute arising from an administrative contract, the standard to decide on which judges are competent to hear the dispute should be that created in the INSERM and SMAC cases.

The period during which a petition for LTO can be initiated is not provided. The jurist Hazoug considers that the period should be interpreted, by reference to Article 586 of the CCPF, as two months from the date the arbitration award was notified to the third person and indicated the precise period.⁸²⁵

II. REVIEW ACTION (LE RECOURS EN RÉVISION)

Under Article 1502 of the CCPF, a review action should be initiated before the **arbitral tribunal**, but under the old Article 1491 the action was brought before the appeal court.

However, the second section of Article 1502 provides that if the arbitral tribunal cannot be reconvened, the application shall be made to **the Court of Appeal** that would have had jurisdiction to hear claims for other forms of recourse against the award.

Thus, for an arbitration on an administrative matter, the standards for deciding on which judges are competent should be those of the INSERM and SMAC cases.

⁸²⁴ RENÉ CHAPUS, *supra* note 813 at 204; A. PATRIKIOS, *supra* note 91 at 290.

⁸²⁵ Sâmî Hazoug, *Les voies de recours en droit de l'arbitrage*, in *L'ARBITRAGE QUESTIONS CONTEMPORAINES*, 99,91-109 (YVES STRICKLER ed., 2012).

3. ARGUMENTS OF REVIEW

Regarding the arguments of review, we will follow the preceding system, looking first at ordinary remedies (A. ORDINARY REMEDIES) and then at extraordinary remedies (B. EXTRAORDINARY REMEDIES).

A. ORDINARY REMEDIES

We follow the same system, with first appeals (I. APPEALS) and then annulments (II. ANNULMENT).

I. APPEALS

Under Article 1490 of the CCPF, the purpose of an appeal is to obtain either the reversal or the setting-aside of an award. Thus, all arguments concerning procedure or substantial vice can, theoretically, be brought.

However, as mentioned above, an appeal against an award and an application for it to be annulled are alternatives. Thus, the arguments of review for them should be the same.

II. ANNULMENT

Article 1492 of the CCPF lays out six reasons⁸²⁶ for a “domestic arbitration award” to be set aside. These are similar to those in the old Article 1484 of the CCPF.

Of the six reasons, the first and second are about the competence of the arbitral tribunal and whether it was legally constituted. The sixth is about infringements in the legal form of the arbitration award. The third and fourth are about the legality of the arbitration award. The fifth is about the arbitration award being contrary to the public order (or public policy). And thus, the question of public order is relevant not only to arbitrability but also in the judicial review phase.⁸²⁷

⁸²⁶ Mauro Rubino-Sammartano, *La preuve dans l'arbitrage et en particulier dans le Règlement de la Cour Européenne d'Arbitrage*, in, *L'ARBITRAGE QUESTIONS CONTEMPORAINES*, 13, 13 (YVES STRICKLER ed., 2012).

⁸²⁷ Mathias Audit, *Veille de droit administratif transnational – Chronique 2009*, 12, *DROIT*

In considering the sixth reason, we should take into consideration Articles 1483 and 1485, which provide that when errors in the form of the award can be corrected, the award should be regularized.

B. EXTRAORDINARY REMEDIES

I. LA TIERCE OPPOSITION (LTO)

Under Article 585 of the CCPF, all judgments can be the object of an application for LTO. However, this Article does not state the arguments that can be brought to obtain this remedy.

In principle, the traditional goal of LTO is to protect a third party if the plaintiff and defendant in the litigation procedure have injured that third party's rights or interests. Traditionally, the admissible situations also involve certain litigations about the status of persons (*état des personnes*), such as matters of divorce or nationality. Thus, in nature, LTO is similar to "objective-oriented" administrative litigation.

Thus, the arguments that a third party can invoke to contest the nullity of a contract before a JDC in administrative litigation can also be invoked in the procedure for LTO.

II. REVIEW ACTION

There is no particular provision governing the arguments in an application for a review of an arbitration award. Under Article 1502, Article 595 of the CCPF should apply.

Article 595 of the CCPF sets out four conditions:

- The judgment was made as a result of fraud by the party in whose favor it was rendered;
- After the judgment was handed down, decisive evidence that had been withheld by a party is produced;
- The judgment was based on documents that have since been proven to be false;
- The judgment was based on affidavits or testimonies that have been held

ADMINISTRATIF, 15 (2009).

by a court to be false.

In addition, in all four cases, an application for revision is admissible only where the applicant was not able, through no fault of his or her own, to raise the objection before the judgment became *res judicata*.

C. CONCLUSION

In conclusion, most arguments or reasons for remedies in respect of arbitration awards are provided in legislation.

In respect of disputes from administrative contracts, we consider that administrative judges can not only apply the arguments already mentioned but can also admit more reasons with the aim of protecting public order.

4. WHAT CAN THE COURT DECIDE?

We will divide the question of what the judges can do into two sections.

First, we follow the preceding system, looking first at ordinary remedies (A. ORDINARY REMEDIES) and then at extraordinary remedies (B. EXTRAORDINARY REMEDIES).

Second, within each section, we will have two subsections. In the first we will consider whether the court can suspend the execution of the contested arbitration award ((1) SUSPEND EXECUTION OF CONTESTED ARBITRATION AWARD), and in the second we will consider the period the appellate court will consider. In doctrine, this second subsection is called "*l'effet dévolutif*" ((2) PERIOD THE APPELLATE COURT WILL CONSIDER).

A. ORDINARY REMEDIES

We will follow the same system as above: (I. APPEALS) and (II. ANNULMENT).

I. APPEALS

(1) SUSPEND EXECUTION OF CONTESTED ARBITRATION AWARD

The right to appeal is an ordinary right of recourse, and thus the execution of the contested judgment (Article 539) or arbitration award (Article 1496) is suspended, except where there has been an urgent provisional execution order issued as part of the judgment or arbitration award.

(2) PERIOD THE APPELLATE COURT WILL CONSIDER

For a civil judgment, Article 561 of the CCPF states that the appeal has the full “*l’effet dévolutif*”, which means that the competent judges (appellate court) can examine anew all the questions of fact and law and consider all the evolutions.

However, in the field of arbitration awards, the accepted doctrine is that an appeal against an arbitration award is limited. As the jurist Jarrosson has stated, the debate before the court must be contained within the limits of the argument that was presented to the arbitrators.⁸²⁸

Thus, the jurist Jarrosson considers that it is impossible to apply “*the appeal theory for a judgment*” (“the appeal theory for a judgment “means that the judges can take into consideration the evolution of the litigation and new facts, including how litigation generally has evolved since the judgement was handed down, and how a particular case evolved during the trial) to an arbitration award.

However, as mentioned, the mission of administrative judges is to protect the legality of administrative contracts and, thus, we consider that the examination by the administrative judges of an arbitration award can include the evolution of the litigation and new facts.

Besides, regarding the object upon which the court can decide, after comparing Article 1491 and the old Article 1484, one interesting difference is

⁸²⁸ Charles Jarrosson and Jacques Pellerin, *Le droit français de l'arbitrage après le décret du 13 janvier 2011*, Volume 2011 Issue 1, Revue de l'Arbitrage, (Comité Français de l'Arbitrage 2011) pp. 5 – 86.

that under Article 1491 the words used are “the award” (*la sentence*), while the old Article 1484 used “the document qualified as an arbitration award” (*l’acte qualifié sentence arbitrale*).

Regarding this amendment to the words, arbitration law jurists have different views. The jurist Sâmi Hazoug considered the amendment to be insignificant,⁸²⁹ while the jurist Jarrosson considered it to be meaningful⁸³⁰.

Thus, now only the arbitration award can be the contested object.

Under Article 1495 of the CCPF, regarding the appeal procedure, the competent court must respect the rules in Articles 900 to 930-1.

Article 1493 states that when the court sets aside an arbitral award, the judge’s mission is to rule on the merits, within the limits of the arbitrators’ mandate. The jurist Hazoug considers that Article 1493 can also apply to the appeal procedure.⁸³¹

Note that under section II of Article 1490, the court must rule under the law or as “*amiable compositeur*”; this allows arbitrators or the court to render an award under the law and legal principles, but also to modify the effect of certain non-mandatory legal provisions.⁸³²

II. ANNULMENT

(1) SUSPEND EXECUTION OF CONTESTED ARBITRATION AWARD

Under Article 1496 of the CCPF, the enforcement of an arbitration award would be stayed during the procedure requesting an annulment.

(2) PERIOD THE APPELLATE COURT WILL CONSIDER

Under Article 1495 of the CCPF, in the procedure requesting an annulment, the court should respect the rules in Articles 900 to 930-1.

As mentioned, under Article 1494 of the CCPF, the competent court to examine a request for appeal or annulment is the same: **the Court of Appeal** of

⁸²⁹ Sâmi Hazoug, *supra* note 809, at 97.

⁸³⁰ Charles Jarrosson and Jacques Pellerin, *supra* note 828, at 48.

⁸³¹ Sâmi Hazoug, *supra* note 809, at 98.

⁸³² Jana Herbočzková, *Amiable Composition In The International Commercial Arbitration*, presented at the COFOLA conference (2008), see <https://www.law.muni.cz/sborniky/cofola2008/files/mezinaro.html>, last visited 5 April 2014.

the place where the award was made.

Thus, for the competent judges, the main difference is that in appeal proceedings they can set aside and reverse the arbitration award, while in annulment proceedings, they can only set it aside.

Note that, whether as a result of an appeal or of a claim for annulment, when the arbitration award is set aside, the court should rule on the merits within the limits of the arbitrators' mandate (Article 1490 and 1493). If the administrative judges are competent under the conditions created by the INSERM and SMAC cases, it is inevitable that the administrative judges will apply the principles of administrative law to rule on the merits of the case.

However, looking at Articles 1490 and 1493, we can observe that if there is an appeal, the court can make a judgment as "*amiable compositeur*", while for an annulment claim there is no similar provision. Thus, for disputes on administrative matters, there are two questions. The first is whether, by their nature, administrative judges can act as an "*amiable compositeur*" in appeal procedure. The other is whether the administrative judges can pass judgment as an "*amiable compositeur*" in an annulment claim.

Regarding the first question, we consider that the main function of administrative judges is to control the legality of administrative acts. Consequently, the principle that arbitrators are an "*amiable compositeur*" in nature does not match with the administrative judges' function. Thus, in the application of Article 1490 to claims against arbitration awards in disputes arising from administrative contracts, the principle of "*amiable compositeur*" should be amended and excluded.

In the second question, we argue that the point is the same and thus that administrative judges cannot act as an "*amiable compositeur*".

We consider that the appeal and annulment remedies for arbitration awards in disputes arising from administrative contracts should be united into one ordinary recourse procedure. Moreover, administrative judges should not be bound by the parties' claims; in other words, administrative judges, after taking into consideration all the circumstances (including, for instance, the gravity of the vice in the arbitration award and the related effect of a judgment of annulment on the public interest) should be able to modify, partially or totally, the content of the arbitration award rather than declare it to be null.

In this way, the requirements of the effect of an arbitration award and the public interest can be balanced by administrative judges in the judicial review

procedure.

B. EXTRAORDINARY REMEDIES

I. LA TIERCE OPPOSITION (LTO)

The CCPF has no provision governing what the court can decide. We therefore need to refer to LTO for civil judgments.

(1) SUSPEND EXECUTION OF CONTESTED ARBITRATION AWARD

Since LTO is an extraordinary recourse, under Article 579 it does not have the effect of suspending the execution of the contested judgment.

However, a specific provision (Article 590 of the CCPF) grants the judges the power to suspend the execution of the contested judgment.

However, in practice, jurisprudence has established a criterion for a judge to exercise his power of suspension, by allowing that it may be exercised if continuing the execution of the judgment would cause excessive and irreparable damage to the interests of the third party.⁸³³

This jurisprudence is similar to that in the CE about the leeway for administrative judges over the nullity of an administrative contract.

Certes, what the court can do with an arbitration award and what it can do with an administrative contract is similar in certain aspects.

Conclusively, we consider that if the continuing execution of an arbitration award would cause excessive and irreparable damage to the public interest, an administrative judge can exercise his power to suspend the execution of the award.

(2) PERIOD THE APPELLATE COURT WILL CONSIDER

In principle, the judges can examine not only the facts but also the law in the dispute. However, the doctrine and jurisprudence suggest that only a limited range of matters may be examined in an LTO case, and that the judge can only examine the point criticized by the plaintiff in LTO. Consequently, new demands

⁸³³ CA Douai, 19 déc. 1904; DP 1905, 5, p. 30.

are not admissible.⁸³⁴

In an arbitration award made in respect of a dispute arising from an administrative contract, we consider that the limited range of matters that can be examined should be slightly amended. We can imagine that if some grave circumstances occur after the arbitration award has been rendered that may cause excessive damage to the public interest, the administrative judges should be able to modify the arbitration award, even though this is a new demand and is not a point on which the award has been criticized by the parties.

II. REVIEW ACTION

(1) SUSPEND EXECUTION OF CONTESTED ARBITRATION AWARD

No provision governs whether an application for the review of an arbitration award has the effect of suspending the execution of the award.

The jurist Ferrand⁸³⁵ considers that an action for the review of a civil judgment does not have the effect of suspending execution of the judgment. Thus, it will be the same as in arbitration award.

(2) PERIOD THE APPELLATE COURT WILL CONSIDER

The jurist Ferrand considers that, under Article 593, in a case for the review of a judgment the court can examine the full range of matters⁸³⁶. Thus, administrative judges can take into consideration the evolution of the litigation and new facts.

C. CONCLUSION

What the court can decide in respect of an arbitration award made on a dispute arising from an administrative contract is a complex question in France since the arbitration law system is complicated.

Principally, jurists often refer to the related provisions in the CCPF on civil

⁸³⁴ NATALIE FRICERO, *PROCÉDURE CIVILE*, 473 (4 ed., 2011) and Cour de cassation, civile, Chambre civile 2, 9 octobre 2008, Robert et Jean-Paul, 07-12.409, Publié au bulletin.

⁸³⁵ FRÉDÉRIQUE FERRAND, *supra* note 808, at 609.

⁸³⁶ FRÉDÉRIQUE FERRAND, *supra* note 808, at 610.

judgments or arbitration awards. Generally, claims for ordinary remedies have the effect of suspension and a wider period to consider than claims for extraordinary remedies.

Regarding disputes arising from administrative contracts, we consider that the main question is about the period the appellate court will consider. We consider that in a judicial review, administrative judges should be able to take into consideration the evolution of litigation and new facts and to take appropriate measures, by either setting aside or modifying the arbitration award. This is the way to balance the goal of the arbitration procedure and the legality of administrative acts.

CHAPTER II: INTERNATIONAL ARBITRATION

We will discuss international arbitration in four sections, introducing the systems in Canada (SECTION I: IN CANADA), in China (SECTION II: IN CHINA), in Taiwan (SECTION III: IN TAIWAN) and in France (SECTION IV: IN FRANCE)

In each country, we will discuss in five sections, introducing whether international arbitration applies to the same rules as domestic arbitration. (1. WHETHER INTERNATIONAL ARBITRATION APPLY TO THE SAME RULES AS DOMESTIC ARBITRATION), the possibility of challenging (2. POSSIBILITY OF CHALLENGING: ONLY THE ANNULMENT OF AN AWARD), before which court (3. BEFORE WHICH COURT), the arguments of review (4. ARGUMENTS OF REVIEW) and what the court can decide (5. WHAT CAN THE COURT DECIDE?)

SECTION I: IN CANADA

We want to discuss international arbitration in Canada in two main sections. One addresses in Canada, majority international arbitration applies the different system than domestic arbitration (1. WHETHER INTERNATIONAL ARBITRATION APPLY TO THE SAME RULES AS DOMESTIC ARBITRATION). The other one addresses the possibility of challenging. (2. POSSIBILITY OF CHALLENGING)

1. WHETHER INTERNATIONAL ARBITRATION APPLY TO THE SAME

RULES AS DOMESTIC ARBITRATION

In international convention, the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006(hereafter “**the Model Law**”) provides the framework for international arbitration legislation in Canada.

In the international arbitration field, Canada became a party to the New York Convention in 1986.

In addition, the procedure for settling international investment disputes has changed for Canadians. With the coming into force of the Settlement of International Investment Disputes Act on November 1, 2013, Canada has ratified the ICSID.

Thus, many government contracts involving international investment may be subject to the conventions mentioned above.

The Washington Convention provides an important means for Canadian investors to reduce their risk of investing abroad, because the ICSID system enables Canadian legal persons, whether they are public or private legal persons, to access the binding arbitration system provided for by the ICSID.

Conclusively, international arbitration in Canada is mainly governed by **the UNCITRAL Model Law, the New York Convention**, and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (**the Washington Convention or ICSID**).

In domestic laws, Canada’s federal structure divides the legislative powers between the federal, the provincial and the territorial governments. The provinces and territories have primary legislative authority with respect to arbitration. The only exception is for arbitrations within certain federal spheres of jurisdiction where at least one party to the arbitration is Her Majesty in right of Canada, a government department or a Crown corporation, or the dispute is about maritime or admiralty matters (for which arbitrations are governed by the federal Commercial Arbitration Act, the main schedule to which is the Commercial Arbitration Code, which is also based on the Model Law).⁸³⁷

Thus, each province and territory has enacted legislation governing international arbitration, generally by incorporating the Model Law as a schedule

⁸³⁷ John E.C. Brierly, *Canadian Acceptance of International Commercial Arbitration*, 40 ME. L. REV., 287, 289 (1988).

to the relevant Act, by appending a version of the Model Law, or by reproducing the text of the Model Law directly in the body of the legislation.

In Quebec, the principal elements of the Model Law have been incorporated into the Quebec Civil Code (QCC) and the Quebec Civil Procedure Code (QCCP), with the express stipulation that the Model Law itself is to be taken into consideration in arbitrations involving interprovincial and international matters.⁸³⁸

Unlike the situation in many other Model Law countries, the domestic and international arbitration statutes applicable in Canada have not been amalgamated into a single legislative scheme.

All provinces and territories, other than Quebec (a single law, see below), have enacted two arbitration statutes: one for domestic arbitrations and the other for international commercial arbitrations.

Even though in Quebec, a single law (Book VII of the QCCP) applies to both domestic and international arbitration with the proviso that where an arbitration involves interprovincial or international matters, the interpretation of the relevant provisions of the QCCP must take into consideration the Model Law and UNCITRAL's travaux préparatoires (preparatory works) (Art. 940.6 CCP).

The domestic arbitration legislation varies significantly between the provinces and territories. Principally, compared to international arbitration, the domestic legislation applies to all domestic disputes (not only commercial disputes but also disputes between citizens and the government), and expressly addresses the arbitrator's powers and the court's supervisory powers over the arbitration.

Regarding disputes on certain matters having a federal character, that is, those falling within the federal parliament's constitutionally defined legislative jurisdiction, there is no distinction between international and domestic disputes, as the federal Commercial Arbitration Act governs both.

2.POSSIBILITY OF CHALLENGING

As for the possibility of challenging, we want to discuss in two sections. One addresses the possibility of appeal against international arbitration award. (A.NO APPEAL AGAINST INTERNATIONAL ARBITRATION AWARD) The other one

⁸³⁸ See International Bar Association Homepage, <http://www.ibanet.org/>, last visited 1 April 2014.

addresses the possibility to set aside an international arbitration award (B.TO SET ASIDE INTERNATIONAL ARBITRATION AWARD)

A.NO APPEAL AGAINST INTERNATIONAL ARBITRATION AWARD

As mentioned, in Quebec, there are three main categories of government contracts that are subject to arbitration (public procurement contracts, public supply contracts and public construction contracts), but **in the special laws governing this type of arbitration⁸³⁹ there is no rule about appeals from an international arbitration award⁸⁴⁰**.

Under the Q.c.c.P, when the seat of arbitration is located in Québec, the only recourse against an international arbitration award is an application for an annulment before a court of law.

B.TO SET ASIDE INTERNATIONAL ARBITRATION AWARD

Under the Washington Convention, the arbitration is presided over by tribunals chosen from panels of qualified arbitrators. Contracting States may each designate four representatives to sit on these arbitration panels. Awards rendered by the tribunals are binding for Contracting States, and are not subject to appeal or other remedies (Articles 7 and 53 of the Washington Convention), except in the special circumstances provided by the Convention, such as supplementation and rectification (Art. 49(2)), interpretation (Art. 50), revision (Art. 51) and annulment (Art. 52). Of these, annulment has turned out to be by far the most important. An ICSID award is not subject to any other appeal or remedy (Art. 53(1)). **In particular, there can be no resort to the domestic courts in respect of an ICSID award.**

Certain privileges and immunities are granted. Arbitrators have immunity from legal process and immigration restrictions in the course of their duties.

Thus, under the international conventions mentioned above, claims for recourse against international arbitration awards are rarely brought before the Canadian national judges but, instead, they are made under the particular resolution mechanisms of the individual international conventions.

⁸³⁹ See *supra* notes 201 to 203.

⁸⁴⁰ See Arbitration in Canada Norton Rose Group Homepage, www.nortonrosefulbright.com/, last visited 7 April 2014.

3. BEFORE WHICH COURT

The competent court to hear an action seeking the recourse of setting aside an international arbitration award pursuant to the first section of Article 34 of the Model Law is the **Federal Court**, as set forth in Article 18.1 of the Federal Court Act (R.S.C., 1985, c. F-7).

4. ARGUMENTS FOR REVIEW

The essential provisions that govern applications to set aside all international arbitration awards that are seated in Canada are the UNCITRAL Model Law, the ISCID (from 1 November 2013) and the New York Convention.

The ISCID Act provides Canada's provincial superior courts with jurisdiction to recognize and enforce arbitration awards, and it prohibits them from awarding other remedies and from entering interim orders.

Under the ISCID, if the enforcement of an award is stayed under the Convention, upon application, the court shall stay the enforcement of the award (Article 8 ISCID).

Under Article 34 of the Commercial Arbitration Act (the Model Law that has been implemented in Canada) and Article 947.2 of Quebec's Code of Civil Procedure (CCP), the arguments and reasons that may be asserted to set aside international arbitration awards are the same as those that are applicable to domestic arbitration awards.⁸⁴¹

In Québec, a party may oppose the recognition and enforcement of an arbitration award that is rendered outside of Québec; the grounds for such opposition are provided in the New York Convention.

5. WHAT CAN THE COURT DECIDE?

In addressing an application to set aside an arbitral award, the court may not inquire into the merits of the dispute.

Articles 5 and 34 of the Model Law use privative clauses. Thus, there is a

⁸⁴¹ Dispute Resolution Reference Guide issued by Department of Justice in Canada, See <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/res/drrg-mrrc/06.html>, last visited 7 April 2014.

question regarding whether the restrictive language of these articles would limit judicial review to the grounds identified.

We believe that this language should not preclude the Federal Court from exercising its supervisory jurisdiction under s.18.1 of the Federal Court Act.

Thus, if an arbitral decision contains a material error of fact or law that is not supported by the evidence, an application for judicial review can be made and the court can find that intervention under s. 18.1 is warranted.⁸⁴²

SECTION II: IN CHINA

1.WHEHTER INTERNATIONAL ARBITRATION APPLY TO THE SAME

RULES AS DOMESTIC ARBITRATION

In China, claims for recourse against international awards will be considered in two parts. In the first we will address international arbitration awards rendered by Taiwan (A. ARBITRATION AWARDS FROM TAIWAN), and in the other we will address awards made by other countries (B. ARBITRATION AWARD FROM COUNTRIES OTHER THAN TAIWAN).

A. ARBITRATION AWARDS FROM TAIWAN

We will discuss the subject of arbitration awards rendered in Taiwan in two sections.

The first considers whether a dispute between a Taiwanese enterprise and a Chinese public legal person that has occurred in China can, assuming that it is arbitrable, be submitted to arbitration in Taiwan (I.TAIWAN AS THE ARBITRATION LOCATION).

The other considers how an arbitration award rendered in Taiwan can be recognized (II.RECOGNITION OF ARBITRATION AWARDS RENDERED IN TAIWAN).

⁸⁴² See Department of Justice in Canada Official Homepage, *available at* <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/res/drrg-mrrc/06.html>, last visited 7 April 2014.

I.TAIWAN AS THE ARBITRATION LOCATION

Under Article 20 of an administrative regulation issued by the General Office of the State Council (GOSC) on 3 July 1988⁸⁴³ that aimed to encourage investment from Taiwan into China (in Chinese “国务院鼓励台湾同胞投资的规定”), disputes arising from contracts (including certain arbitrable administrative contracts) can be submitted to arbitration institutions in **“Mainland China” or “Hong Kong”**. Under this provision, it is impossible for the parties to submit a dispute to an arbitration institution in Taiwan.

Later, under Article 29 of another administrative regulation issued by the GOSC on 5 December 1999 that concerned investment protection for Taiwanese people⁸⁴⁴ (in Chinese “中華人民共和國台灣同胞投資保護法實施細則”), the legislative text was changed to refer to arbitration institutions in **“China”**, and this was interpreted by political hint to include Mainland China, Hong Kong, Macao and Taiwan.

From that date on, it has been possible for administrative contractual disputes that have occurred in China between a Taiwanese enterprise and a Chinese public legal person to be submitted to arbitration institutions in Taiwan.

II.RECOGNITION OF ARBITRATION AWARDS RENDERED IN TAIWAN

The administrative notice⁸⁴⁵ issued on 15 January 1998 by China’s Supreme People’s Court to all lower people’s courts about the recognition of civil judgments rendered in Taiwan (in Chinese “最高人民法院关于人民法院认可台湾地区有关法院民事判决的规定”) is applicable to international arbitration awards rendered in Taiwan.

However, in practice, there has only been one case in which the parties have decided to submit to arbitration in Taiwan; but this was a private commercial case in 2004. Thus, no other case, whether a dispute arising from a private contract or one arising from a public contract (between a private Taiwanese enterprise and the government of China), has been submitted to an

⁸⁴³ See <http://www.people.com.cn/zixun/flfgk/item/dwjf/falv/2/2-1-15.html>, last visited 7 April 2014.

⁸⁴⁴ See <http://tw.people.com.cn/BIG5/135848/135914/8406841.html>, last visited 7 April 2014.

⁸⁴⁵ See <http://www.people.com.cn/zixun/flfgk/item/dwjf/falv/9/9-1-7-3.html>, last visited 7 April 2014.

arbitration institution in Taiwan.

B. ARBITRATION AWARD FROM COUNTRIES OTHER THAN TAIWAN

The provisions governing the recognition and execution of international arbitration awards have two main origins: one is the Arbitration Law of the People's Republic of China ("ALPRC"), while the other is the administrative notice issued on 10 April 1987⁸⁴⁶ by the Supreme People's Court to all lower people's courts about the recognition and execution of international arbitration awards (in Chinese "最高人民法院关于执行我国加入的《承认及执行外国仲裁裁决公约》的通知, hereinafter "the "1987-SPC-notice").

Additionally, from 2 December 1986 onwards, China decided to participate in the 1958 New York Convention.

Under the 1987-SPC-notice, China only recognizes international arbitration awards rendered **within the territory of another contracting party** to the 1958 Convention. Thus, an international arbitration award rendered in a third state that is not a contracting party to the 1958 Convention cannot be recognized in China.

First, disputes about foreign economic, trade, transportation or maritime matters all fall under the ALPRC, pursuant to Article 65 of that Act.

Foreign arbitration rules may be formulated by the Chinese International Chamber of Commerce in accordance with the ALPRC and the relevant provisions of the Civil Procedure Law (CCPPRC).

2.POSSIBILITY OF CHALLENGING

In domestic law, Article 65 to Article 73 in Chapter 7 of ALPRC contains the relevant principles.

The remedies against an international arbitration award involve jurisdictional power and the role of the state in a judicial review action in the international arbitration system. Worldwide, there are two main mechanisms. The first addresses grave vice in an arbitration procedure or award, and legislation often grants national judges the power to set the award aside. The other one addresses minor vice and the revision or re-arbitration system is used.

⁸⁴⁶ See <http://www.people.com.cn/zixun/flfgk/item/dwjf/falv/9/9-1-7-1.html>, last visited 25 March 2014.

Regarding the right of recourse against an international arbitration award in China, the positive disposition **only** admits the mechanism of **setting aside the award**.

3.BEFORE WHICH COURT

Note that under **the “1987-SPC-notice”**, the recourse for annulment of an international arbitration award must be initiated before an **intermediate people’s court** within one year after the arbitration award becomes effective and in the place where the Chinese contractual party is located.

4.ARGUMENTS OF REVIEW

International arbitration awards are usually recognized, except in certain situations (Article 261 in Civil Procedure Code of China):

- The arbitration award does not have affirmative legal effect (for instance one party initiates the recourse against the arbitration award);
- There were certain problems in the notice given to the parties, or the parties were not able to present their opinions during the arbitration procedure;
- The dispute comes under a specialized jurisdiction in China;
- The dispute has been already resolved or recognized by a judgment made in China; or
- The arbitration infringed the public interest or a national fundamental principle of China.

5.WHAT CAN THE COURT DECIDE?

Comparatively, the arguments to set aside an international arbitration award are much narrower than those applicable to domestic awards. Thus, jurists believe that the ability of the courts to set aside an international award should be limited in compliance with international arbitration trends in an effort to encourage the development of international arbitration.⁸⁴⁷

⁸⁴⁷ Gu Weixia (顧維遐), *Comparison of Judicial Review of Cross-border Arbitration Awards* (跨境仲裁裁決司法審查之比較), in *LEGAL DEVELOPMENT AND INTERACTION IN FOUR PLACES OF TWO COAST IN CHINA* (兩岸四地法律發展與互動) 259 (1st ed. 2009).

SECTION III: IN TAIWAN

1.WHEHTER INTERNATIONAL ARBITRATION APPLY TO THE SAME

RULES AS DOMESTIC ARBITRATION

Since Taiwan is not a member state of the ICSID, Taiwanese people cannot submit international disputes, including civil or administrative contractual disputes, to the ICSID commission.

Taiwan is not party to the 1958 New York Convention, and thus neither Taiwan nor its contractor to an international arbitration award can invoke the Articles of this Convention.

Besides, appeals against arbitration awards also involve the conflict of laws. If the parties agree to apply Taiwanese law, the main provision governing the recognition and execution of the international arbitration award is Article 47 and Article 49 of the ALT.

2.POSSIBILITY OF CHALLENGING:ONLY THE ANNULMENT OF AN

AWARD

In Taiwan, there is no statutory right of appeal against international arbitration awards – **the parties are not entitled to appeal against such awards.**

However, a Taiwanese court can set aside an international arbitration award that was rendered abroad (Article 51 of the Arbitration Law of Taiwan (ALT)).

In conclusion, there are only **two possible challenges** against an arbitration award in Taiwan, whether it is a domestic or an international award. The first is an application for **the annulment of the award**. The other is a request to the court to **refuse to enforce** the award (Articles 49 and 50 of the ALT; see below in the section on the execution of arbitration awards).

3.BEFORE WHICH COURT

Like domestic arbitration, all recourses against arbitration awards made in disputes arising from administrative contracts are still heard by the **judicial judges** of the Grand Instance Court where the arbitration award was rendered pursuant to Article 41 of the Arbitration Law of Taiwan.

4.ARGUMENTS OF REVIEW

Regarding the annulment of an international arbitration award that was rendered abroad, legal doctrine considers that this is a question of private international law that involves the selection of an applicable law.⁸⁴⁸

If the parties choose Taiwanese law as the applicable law, the reasons for the annulment of an international arbitration award are set out in Article 40 of the Arbitration Law of Taiwan (ALT), and the case is heard before judicial judges.

5.WHAT CAN THE COURT DECIDE?

The question of what the court can decide is divided into two sections: we will look at the suspension effect of contested an arbitration award (A. SUSPENSION OF THE AWARD) and the period the appellate court will consider (B. PERIOD THE APPELLATE COURT WILL CONSIDER).

A. SUSPENSION OF THE AWARD

In Taiwan, the procedure to set aside an arbitration award does not necessarily have the effect of suspending the enforcement of the award.

However, under Article 42 of the ALT, the court may stay the enforcement of the arbitration award once the applicant has applied for the annulment and paid certain security as part of the annulment.

⁸⁴⁸ Lai Lai-Kun (賴來焜), *Remedy for Arbitration Award* (仲裁判斷之救濟程序), 78, ARBITRATION REVIEW (仲裁), p.23.

B. PERIOD THE APPELLATE COURT WILL CONSIDER

In Taiwan, the annulment of an arbitration award is neither a “review action” nor an “appeal procedure”, and thus traditionally it was thought that the court can exclusively examine whether the facts comply with Article 40 of the ALT, but cannot consider the merits or substance of the award.⁸⁴⁹

SECTION IV:IN FRANCE

1.WHEHTER INTERNATIONAL ARBITRATION APPLY TO THE SAME

RULES AS DOMESTIC ARBITRATION

At the present time, under the decree 2011, different mechanisms apply to domestic and international arbitration, especially for recourse in respect of an arbitration award.

2. POSSIBILITY OF CHALLENGING

In France, there are two possible ways to challenge an international arbitration award: review action (A. REVIEW ACTION) and a claim for the annulment of the award (B. ANNULMENT).

A. REVIEW ACTION

Regarding review actions, Article 1502 applies to international arbitration, under section 4 of Article 1506. Thus, the parties may initiate a review action against an international arbitration award.

⁸⁴⁹ TSC, judgment No. (Tai-son-zhi) 1534, Year 101.(最高法院 101 年度台上字第 1534 號) (Judgment date: September 27, 2012). “Tai” means “Taiwan”, and “son-zhi” is the Romanization of the Chinese word used to classify matters, and means “appeal” in Chinese when used in the TSC.

B. ANNULMENT

Under Article 1518, the only means of recourse against an international arbitration award made in France is to claim for it to be set aside.

This therefore excludes the possibilities of bringing an appeal and of an opposition claim by a third party.

3.BEFORE WHICH COURT

In France, the question of who is the competent judge to examine actions seeking recourse against international arbitration awards is crucial.

We will discuss the question in two sections. One section addresses the conditions set forth in positive laws. It principally addresses the famous INSERM case (A.IN POSITIVE LAW). The other section addresses the doctrinal discussion (B.DISCUSSIONS IN DOCTRINE).

A.IN POSITIVE LAW

In positive law, the leading case is the INSERM case. We will discuss it from two perspectives. One section addresses its background (I.BACKGROUND). The other one addresses the opinions set forth in the judgment (II.JUDGMENT CONTENT).

I.BACKGROUND

In the domestic legal system, a dispute regarding the competence of a certain jurisdiction is determined by the laws applicable to the facts of the dispute. However, it is possible that there may be conflicts regarding competence; as mentioned above, in France, these conflicts are resolved by the Tribunal of Conflicts (TC).

In the INSERM case, the TC was asked to decide which court (the civil court or the administrative court) has jurisdiction over judicial review of an action seeking recourse against an international arbitral award between a French public legal person and a foreign investor.

INSERM, a French public entity, had concluded a contract with a foreign

private enterprise (LETTEN) for the construction of a neurological research center in southern France. Afterwards, a dispute arose when LETTEN notified INSERM of the termination of their contractual relationship.

First, faced with the termination, INSERM initiated a litigation procedure before the French domestic high court. However, the court rejected it because there was an arbitration clause. Thus, the dispute was submitted to arbitration.

The arbitration award, which was rendered in France, rejected the plaintiff's (INSERM) claims. INSERM then simultaneously initiated actions before French civil and administrative courts to set aside the arbitration award.

II. JUDGMENT CONTENT

In the civil court, INSERM filed an action (asking for the annulment of the arbitration award) before the Paris Court of Appeal (it is a civil court, PCA) in which INSERM argued that the administrative contract was null because it infringed Article 2060 of the Civil Code of France.

In the administrative court, INSERM's request was first filed before the Marseille Administrative Court of Appeal, but it was remanded to the CE.

In the civil court procedure, INSERM requested a stay of the procedure pending the CE's decision.

However, the PCA rejected INSERM's request in its judgment on 13 November 2008.

In the procedural dispute, the PCA found that it had jurisdiction to hear a challenge of an award related to international trade under Article 1505 of the CCPF, and thus, it refused to stay the procedure.

With respect to the nullity of an administrative contract, the PCA held that the prohibition of arbitration for a public legal person is not part of international public policy and that it was exclusively limited to domestic administrative contracts. The PCA defined this contract as an international contract, reasoning that it was concluded between INSERM and a foreign foundation (LETTEN) and that it involved a cross-border transfer of funds. Accordingly, the PCA acknowledged the validity of the arbitration clauses.

Before the CE, INSERM argued that the administrative contract was governed by French administrative law, and thus, that administrative courts had the exclusive jurisdiction to hear its claim against the arbitration award.

In its judgment on 31 July 2009, the CE stayed the procedure and referred it

to the TC, finding that there was a conflict of competence.

The TC delivered its judgment on 17 May 2010, which led to a great deal of turmoil between doctrines.

The threshold issue is which court is competent to set aside an international arbitral award **rendered in France** in a dispute regarding the performance or termination of a contract **within the French territory** that was concluded between a **French public legal person** and a foreign enterprise.

The TC held that, principally, the competent court is the civil court, even if the dispute involves an administrative contract under French law.

However, the TC created certain exceptions. The administrative court shall retain jurisdiction over challenges to the award that relate to contracts that are governed by and imply **the control of conformity to French imperative administrative rules that relate to the occupancy of publicly-owned land or public procurement contracts, PPP contracts and public service delegation contracts** (hereinafter, “four kinds of contracts in INSERM”).

B.DISCUSSIONS IN DOCTRINE

INSERM provoked many disputes in doctrine.⁸⁵⁰ We will discuss them in two sections. One section addresses the arbitration law field (I.ARBITRATION LAW JURISTS). The other addresses the administrative law field (II.ADMINISTRATIVE LAW JURISTSII).

I.ARBITRATION LAW JURISTS

The importance of the INSERM case, as jurist Bernard Audit stated, is that it is classified as an influential judgment in the international arbitration law field because of the significance of its impact.⁸⁵¹

Generally, arbitration jurists believe that the INSERM case was not simply a dispute in the international arbitration law field.⁸⁵²

⁸⁵⁰ Loïc Cadiet, *L'Arbitrage Et L'Évolution Contemporaine Des Modes De Règlement Des Conflits*, in YVES STRICKLER, *L'ARBITRAGE QUESTIONS CONTEMPORAINES* 35, 29-46 (L'Harmattan ed. 2012).

⁸⁵¹ Bernard Audit, *Le nouveau régime de l'arbitrage des contrats administratifs internationaux (à la suite de l'arrêt rendu par le Tribunal des conflits dans l'affaire INSERM)*, *Revue de l'Arbitrage*, (Comité Français de l'Arbitrage 2010, Volume 2010 Issue 2) pp. 253 – 273.

⁸⁵² JULIEN CAZALA, ALEXIS MARIE & LAURENT TRIGEAUD, *JURISPRUDENCE FRANÇAISE RELATIVE AU DROIT INTERNATIONAL* (Année 2010), at 746 (*Annuaire Français de Droit International* LVII--CNRS éd., Paris, 2011).

Briefly, critics from the arbitration law field concentrate on the exceptions (four kinds of contracts) that were created by the TC, which was criticized with respect to the discharge of its major duty: the resolution of conflicts of competence.⁸⁵³

In the international law field, to ensure that international arbitration will develop appropriately, there are often suggestions regarding the establishment of principles favorable to the enforcement and autonomy of the dispute resolution system for international administrative contractual disputes.⁸⁵⁴

To echo the efforts, as jurist Cassia stated, a challenge against an international arbitration award should belong exclusively to one jurisdiction: that of ordinary judges.⁸⁵⁵

One of the main factors that supports the position of arbitration law jurists is their invocation of the provisions of Article 1505 and Article 1492 of the Code of Civil Procedure of France.

Article 1505 addresses the qualifications of “*juge d’appui*” (JDA) in international arbitration procedures, while Article 1492 sets forth six reasons⁸⁵⁶ that a “domestic arbitration award” can be set aside.

Of these six reasons, the first and the second address the competence and the legality of the constitution of the arbitral tribunal. The sixth addresses the infringement of the legal form of an arbitration award. The third and fourth address the legality of an arbitration award. The fifth addresses an arbitration award that is adverse to the public order. Thus, an examination with respect to the public order can occur, not only in the arbitrability phase, but also in the judicial review phase.⁸⁵⁷

Therefore, because civil courts are competent to set aside domestic arbitration awards that involve the “public order” pursuant to Article 1492, for arbitration law jurists, the “public order” does not prevent the civil courts from having the competence to hear disputes involving international arbitration awards.

⁸⁵³ Thomas Clay, Les contorsions byzantines du Tribunal des conflits en matière d'arbitrage, La Semaine Juridique Edition Générale n° 21, 24 May 2010, 552.

⁸⁵⁴ J. Kamga, *supra* note 70, at 82.

⁸⁵⁵ Paul Cassia, *Pour un bloc de compétence judiciaire dans le contrôle des sentences internationales*, AJDA, 2010, n° 42, p.2337.

⁸⁵⁶ Mauro Rubino-Sammartano, *La preuve dans l'arbitrage et en particulier dans le Règlement de la Cour Européenne d'Arbitrage*, in YVES STRICKLER, L'ARBITRAGE QUESTIONS CONTEMPORAINES, 13, 13-28 (L'Harmattan ed. 2012).

⁸⁵⁷ Mathias Audit, *veille de droit administratif transnational-Chronique 2009*, 12, Droit Administratif, 15 (2009).

However, there are different positions among arbitration law jurists regarding the scope of application of the exception.

Some arbitration law jurists believe that the exception regarding “**imperative administrative rules**” should be limited to the four categories enumerated in the TC’s judgment and that other exceptions cannot be established.

For example, jurist Jean-Christophe Honlet stated that the exceptions created by the TC in the INSERM case are applicable to **only a small fraction of the awards** made in France. The great majority of challenges against awards involving international trade, even in cases similar to INSERM (in which one party is a public legal person in France), will continue to be heard by civil courts.⁸⁵⁸

In addition, Jean-Christophe Honlet also believes that those four exceptions are strictly limited to international arbitration matters that involve contracts concluded by French legal persons. Consequently, in contractual disputes in which no French legal person is involved, the administrative courts do not intervene at all.

However, there is also a different position.

Jurist Alexandre Meyniel opined that the enumerated public contracts are unlikely to be strictly limited.⁸⁵⁹ Thus, he believed that the TC “cast a shadow of uncertainty” because a party cannot know if its contract is one of the public contracts that falls within the French mandatory public law rules.

Because of the exception regarding “**imperative administrative rules**”, jurist Thomas Clay was concerned that the uncertainty caused by the TC would weaken Paris’s contemporary status as an influential place in the field of international arbitration.

Thomas Clay believed that the TC’s judgment did not cause a big earthquake, but that it had, at least, shaken the fundament of international arbitration and that, in practice, it would result in harmful consequences.⁸⁶⁰ He described it as the “**vengeance of public justice (administrative courts) upon private justice (arbitration).**”

Further, jurist Yves Gaudemet emphasized the necessity of enforcing the

⁸⁵⁸ Jean-Christophe Honlet, *International arbitration and French public entities: the INSERM decision of the Tribunal des Conflits*, 16(1) ARBITRATION & ADR 77 (IBA Committee D Newsletter, Mar. 2011) (co-author G. Vannieuwenhuyse).

⁸⁵⁹ Alexandre Meyniel, *Case Note: France Tribunal Des Conflits 17 Mai 2010*, 1(2) INTERNATIONAL COMMERCIAL ARBITRATION BRIEF 3 (Washington College of Law).

⁸⁶⁰ Thomas Clay, *supra* note 853.

control of judicial judges to ensure the security of the development of international arbitration with regard to public legal persons. He held that civil judges are able to master and apply administrative laws in international arbitration procedures that involve administrative contracts. Consequently, the essential principles of public law can be respected by judicial judges, and thus, there is no fundamental incompatibility between the respect for the essential principles of administrative law and the competence of judicial judges.⁸⁶¹

Finally, some arbitration law jurists criticized the INSERM judgment on the basis of international conventions.

From the adoption of the 1958 New York Convention, the international arbitration law field has made efforts to conciliate the disparities between the continental law and common law systems.⁸⁶² Indeed, as jurist Thomas Clay stated, the question in INSERM would exclusively occur in the dual jurisdiction system, which cannot be envisaged in the common law system.

In addition, jurist Sophie Lemaire held that the enlargement of the competence of administrative judges under the INSERM and SMAC judgments conflicts with the 1958 New York Convention,⁸⁶³ as under Article V.1(e) of the Convention, the procedure of annulation can be conducted exclusively before the competent authority of the country in which the award was made.

However, with regard to the 1958 New York Convention, we hold that, in its text, **“the competent authority” does not necessarily mean “judicial judges,”** especially for countries having a system of dual jurisdiction; thus, this cannot be asserted as a reason to criticize the INESRM judgment.

Next, we will examine different viewpoints in the administrative law field.

II. ADMINISTRATIVE LAW JURISTS

The TC established a “shared competence” (*une compétence partagée*) between the administrative and judicial jurisdictions. This opinion generally is accepted by administrative law jurists.

Jurist Serge DEYGAS described this judgment as **an “equitable” and**

⁸⁶¹ Yves Gaudemet, *Les personnes publiques et l'arbitrage international*, Recueil Dalloz 2011, at 2552.

⁸⁶² Clothilde Blanchon, *Le juge administratif et les sentences arbitrales internationales : entre autolimitation et expansion de sa compétence*, n° 47, La Semaine Juridique Administrations et Collectivités territoriales (18 November 2013).

⁸⁶³ Sophie Lemaire, *Sentences arbitrales rendues à l'étranger : le Conseil d'État innove mais ne convainc pas*, JCPG 2013, 748.

“measured” judgment, as the TC runs the risk of being harshly criticized.⁸⁶⁴

Serge Deygas’ interpretation of the INSERM judgment is different from that of jurists in the arbitration law field. He held that the competence of judicial review over international arbitration that involves a public legal person is principally preserved for administrative judges under the exceptions for those contracts that have no administrative regime of public order (***régime administratif d’ordre public***).

Thus, Serge Deygas believed that the scope of application of the INSERM judgment is very broad, as these four categories of administrative contracts include major administrative contracts.

Public law jurist Mattias Guyomar⁸⁶⁵ considered that, in the INSERM case, the TC presented the definition of **“imperative dispositions”** by referring to the rules addressing the four kinds of contracts and that this definition echoed the inherent constitutional requirement of **equal opportunity with respect to public procurement**, as well as **the protection and appropriate use of public property** that were cited in the judgment of the Constitutional Counsel (number: 2003-473) on 26 June 2003.⁸⁶⁶

Jurist Mattias Guyomar considered that the CE would verify arbitration clauses and quash arbitration awards based on illegal arbitration clauses.

Thus, Guyomar believed that the ruling in INSERM has preserved the specificities of international arbitration and the core principles of public law that legal public persons should obey.

Jurist Mathieu RAUX⁸⁶⁷ stated that, although the INSERM judgment would arouse virulent critics from the arbitration law field, the INSERM judgment marked great progress. Mathieu RAUX considered that the INSERM judgment granted a greater degree of competence to judicial judges than had existed before, which automatically resulted from the simple nature of administrative or private contracts.

However, Mathieu RAUX held that the analysis in the INSERM judgment provided no concrete measures to deal with the intelligibility and predictability

⁸⁶⁴ Serge Deygas, *Recours contre une sentence arbitrale en matière de contrats de droit public à caractère international : quelle compétence?*, Procédures n° 7, Juillet 2010, comm. 299.

⁸⁶⁵ Guyomar, *Institut national de la santé et de la recherche médicale (INSERM) v. Fondation Letten F. Saugstad, tribunal des conflits, Not Indicated*, 17 May 2010, Rev. arb. 2010. 275.

⁸⁶⁶ Cons. Const. 26 juin 2003, déc. n° 2003-473 DC, Loi habilitant le Gouvernement à simplifier le droit, rec. p. 382, Conformité.; AJDA 2003. 1391, note J.-E. Schoettl, et 1404, note E. Fatôme.

⁸⁶⁷ Mathieu Raux, *L’arbitrage intéressant les personnes morales de droit public après l’arrêt Inserm*, n° 38, Les Petites Affiches, 23 February 2011, at 13-16.

of the rules that address judicial review of international arbitration awards. Thus, Mathieu RAUX was concerned that international operators may alter the location of their arbitration procedures to escape “French particularism” (*afin d’éviter un particularisme français*).

C.CONCLUSION

The INSERM case reflected conflicts of legal interests that, in their nature, dealt with “**internationality**” and the “**legal control of public laws**.”

The INSERM judgment tried to balance the conflicts. It provoked disparate opinions in the arbitration and administrative law fields. We can observe that the main battlefield concentrated on the exceptions that were created by the TC.

In the arbitration law field, the perspectives of most commentators are unfavorable to the INSERM judgment and hold that INSERM created uncertainty that may impede the development of international arbitration.

In the administrative law field, most commentators have adopted perspectives that are favorable to it.

We believe that, in the dual jurisdiction system, it is an unavoidable question. The INSERM judgment did not deprive judicial judges of control over international arbitration awards; rather, it granted a greater degree of competence to judicial judges for those contracts that do not belong within the administrative regime of public order.

Furthermore, the situations that are to be addressed by administrative judges can be controlled by administrative judges to ensure that international arbitration awards respect the rules of French public law.

Thus, we hold that, at the present time, there is no better way to balance the aforementioned conflicts of interest between the arbitration and administrative law fields.

4.ARGUMENTS OF REVIEW

The arguments for review are provided under Article 1520, which lists five possibilities; the first four of these are the same as provided in Article 1492 for domestic arbitration (that the tribunal was not competent, that the tribunal was irregularly constituted, that the tribunal ignored its mandate, and that due process was not followed). The most important is the fifth argument. This is that

the recognition or execution of the arbitration award would be contrary to international public order.

5.WHAT CAN THE COURT DECIDE?

A. SUSPENSION OF THE AWARD

The main questions concern whether the procedure to set aside, or a review action, has the effect of suspending enforcement of the contested international arbitration award.

Under Article 1526, an action to set aside cannot suspend the enforcement of an award.

There is no provision in the decree 2011 stating that a review action has the effect of suspending the enforcement of the award.

A review action, whether it is brought against a civil judgment or a domestic or international arbitration award, is defined by doctrine to be an extraordinary remedy, and, in theory, an extraordinary remedy does not have a suspension effect.⁸⁶⁸

B. PERIOD THE APPELLATE COURT WILL CONSIDER

In the procedure to set aside an award, following the precedent set by the INSERM and SMAC cases, the administrative judges should verify whether there were errors in fact or law in the arbitration award, and whether it complies with the administrative regime of public order.

In a review action, the arbitration tribunal can review all questions of fact and law anew.

TITLE II: THE ISSUANCE OF EXECUTION ORDER AND THE RECOURSE AGAINST IT

Arbitration cannot escape judicial control. Besides the possibility of a reference to a *“juge d’appui”* in the constitution phase and of judicial review over the arbitration award, when the arbitration award comes into the enforcement phase, the parties need a legal document issued by a sovereign

⁸⁶⁸ SERGE GUINCHARD, *supra* note 808 at 609.

authority allowing their rights to be enforced in the domain of competence of that authority. This is common throughout the world, but in France it has a particular name: “exequatur” or “an exequatur order”.

The exequatur is indispensable because even though the arbitrators have the competence to declare the right (jurisdictio), they have no power to command its execution (imperium). Thus, in every country, there should be another procedure for the enforcement of arbitration awards.

We will discuss the execution of an arbitration award in four sections, by introducing the different rules in Canada (CHAPTER I: IN CANADA), in China (CHAPTER II: IN CHINA), in Taiwan (CHAPTER III: IN TAIWAN) and in France (CHAPTER IV: IN FRANCE).

CHAPTER I: IN CANADA

In comparing the four countries, we will follow a similar structure. First, we will consider the granting of the execution order (SECTION I: THE EXECUTION ORDER ISSUANCE). Secondly, we will consider the possibility of challenging the granting or refusal of an execution order (SECTION II: THE POSSIBILITY OF CHALLENGING THE GRANTING OR REFUSAL OF AN EXECUTION ORDER). Thirdly, we will discuss the arguments or reasons for making a challenge (SECTION III: ARGUMENTS OR REASONS FOR CHALLENGE). Finally, we will introduce the question of what the court can decide (SECTION IV: WHAT THE COURT CAN DECIDE).

SECTION I: THE EXECUTION ORDER ISSUANCE

We will divide section I into two parts, analyzing who is the competent judge to issue the execution order (1. WHICH COURT IS COMPETENT TO ISSUE THE EXECUTION ORDER?) and the situations in which the court would refuse to allow the enforcement of the arbitration award (2. SITUATIONS IN WHICH ENFORCEMENT WOULD BE DISALLOWED). This structure will be similar in the sections on the other three countries.

1. WHICH COURT IS COMPETENT TO ISSUE THE EXECUTION ORDER?

In Canada, an application for recognition or enforcement is initiated either

before the Federal Court of Canada, or before any Superior, County or District Court, depending on the location of the assets of the debtor.

For example, in British Columbia, an application can be made either to the Supreme Court of British Columbia or to the Federal Court of Canada.

On an application to the Federal Court, the Federal Court Rules will govern the application procedure.

2.SITUATIONS IN WHICH ENFORCEMENT WOULD BE DISALLOWED

Regarding this question, Canadian national laws generally refer to the position in international conventions. Thus, **there is no great difference between international and domestic arbitration.**

The enforcement of arbitration awards in Canada is governed by the Commercial Arbitration Act of Canada (CAAC) and the Model Law, especially Articles 35 and 36 of the Model Law and the CAAC (the Article numbers are the same). Under these Articles, the grounds for refusing to recognise an award are the same as the grounds for refusing to enforce it.

SECTION II: THE POSSIBILITY OF CHALLENGING THE GRANTING OR

REFUSAL OF AN EXECUTION ORDER

We will discuss possible challenges in two sections: challenges to decisions to issue an execution order (1.CHALLENGE THE GRANTING OF AN EXECUTION ORDER:APPEAL) and challenges to refusals to issue an execution order (2.CHALLENGE THE REFUSAL OF AN EXECUTION ORDER:NO PROVISION)

1.CHALLENGE THE GRANTING OF AN EXECUTION ORDER:APPEAL

Under Article 36 of the Model Law and the CAAC, challenges can be made to the recognition or enforcement of an award.

However, the challenge is a complicated and expensive legal procedure, under which the debtor has the heavy burden of convincing the court that the recognition or enforcement demand should be refused.⁸⁶⁹

⁸⁶⁹ Peter Swanson, *The Enforcement of Arbitration Awards in Canada*, available at

2. CHALLENGE THE REFUSAL OF AN EXECUTION ORDER: NO PROVISION

Under the CAAC and the Model Law in Canada, there is no provision for any remedy for the refusal to issue an execution order.

However, Canadian courts are generally reluctant to refuse to enforce an international arbitration award,⁸⁷⁰ which simplifies the question of making a challenge.

In Canada, an appeal against the granting or opposing of enforcement is initiated either before the Federal Court of Canada, or before any Superior Court, depending on the location of the competent court which issues the granting or refusal of execution order.

SECTION III: ARGUMENTS OR REASONS FOR CHALLENGE

A party may resist enforcement of an award in Canada on the same grounds as those on which the award itself may be challenged, as described above.

The reasons for challenging the agreement to enforce an award are provided in Article 36 of the Model Law and the CAAC, and are the same as the reasons for requesting that the court refuse recognition or enforcement.

SECTION IV: WHAT THE COURT CAN DECIDE

The grounds for challenging the enforcement of an award generally do not, in practice, relate to the merits of the award, but rather concentrate on whether the arbitration procedure was properly conducted and completed.

The only possible exception is that the court can consider the merits or substance of an award if the award has been rendered in a dispute that cannot be submitted to arbitration in Canada, or if enforcement would be contrary to or injure the public policy of Canada.

<http://www.bernardllp.ca/wp-content/uploads/2011/11/Enforcement-of-Arbitration-Awards-in-Canada.pdf>, last visited 13 April 2014.

⁸⁷⁰ Peter Swanson, *supra* note 869.

CHAPTER II:IN CHINA

SECTION I:THE EXECUTION ORDER ISSUANCE

Regarding the execution order issuance, we want to discuss in two sections. One addresses who is competent to issue the order (1.WHICH COURT IS COMPETENT TO ISSUE THE EXECUTION ORDER?). The other addresses in which situation the arbitration award would be disallowed to enforcement.(2.SITUATIONS IN WHICH ENFORCEMENT WOULD BE DISALLOWED)

1.WHICH COURT IS COMPETENT TO ISSUE THE EXECUTION ORDER?

We will discuss the competent judges in two sections. One section addresses domestic arbitration awards (A.DOMESTIC ARBITRATION AWARD). The other one addresses international arbitration awards (B.INTERNATIONAL ARBITRATION AWARD).

A.DOMESTIC ARBITRATION AWARD

In China, although there is “Administrative Enforcement Law,” it addresses only **unilateral administrative acts**⁸⁷¹ and **none of the disputes** that arise from administrative contracts are within the scope of its application.

Under Article 217 of Code of Civil Procedure of People’s Republic of China (CCPPRC), a domestic award would be recognized and executed by the **local people’s court** that has jurisdiction over the case.

B.INTERNATIONAL ARBITRATION AWARD

Under the 1987-SPC-notice⁸⁷² and Article 259 of the CCPPRC, an international award would be recognized and executed by the **intermediate**

⁸⁷¹ Shi Qing-huo (施清火), *Study On The Chinese Mainland Administrative Enforcement* (中國大陸行政強制法制之研究), 98, LEGAL RESEARCH SELECTIONS (法務研究選輯), 118.

⁸⁷² See *supra* note 846.

people's court in the place where the Chinese contractual party or the goods in question are located.

However, an administrative notice issued by the China Supreme People's Court (CSPC) on 28 August 1995 (in Chinese “最高人民法院于人民法院处理与涉外仲裁及外国仲裁事项有关问题的通知”) regarding related questions that dealt with an international arbitration award indicates that if the competent court wants to refuse the enforcement of an international arbitration award, the court should renvoi the case to CSPC and it cannot enter a refusal judgment before it obtains the CSPC's agreement to the refusal⁸⁷³.

2.SITUATIONS IN WHICH ENFORCEMENT WOULD BE DISALLOWED

We will discuss the situations in China in which the national judges can disallow the enforcement of an arbitration award in two sections. One section addresses domestic arbitration awards (A.DOMESTIC ARBITRATION AWARDS). The other one addresses international arbitration awards (B. INTERNATIONAL ARBITRATION AWARDS).

A.DOMESTIC ARBITRATION AWARDS

The reasons that the enforcement of a domestic arbitration award may be rejected are provided under Article 63 of the Arbitration Law and Article 213 of the CCPPRC. They are:

- (1).The parties have no arbitration clause in their contract and they have not subsequently reached a written agreement regarding arbitration;
- (2).The matters dealt with by the award fall outside of the scope of the arbitration agreement or the arbitral organ has no power to arbitrate the matter;
- (3).The composition of the arbitration tribunal or the procedure contradicts the law.
- (4).The main evidence to ascertain the facts is insufficient;
- (5).Definite error in the application of the law;
- (6).The arbitrators have committed embezzlement, accepted bribes or committed malpractice for personal benefit.
- (7).The execution of the arbitral award is against the public interest of

⁸⁷³ See <http://www.people.com.cn/zixun/flfgk/item/dwjf/falv/9/9-2-1-05.html>, last visited 16 April 2014.

China.

B. INTERNATIONAL ARBITRATION AWARDS

The reasons that the enforcement of an international arbitration award may be rejected are provided under Article 71 of the Arbitration Law and Article 258 of CCPPRC, which were influenced by the 1958 New York Convention. They are:

(1).The parties have no arbitration clause in their contract and they have not subsequently reached a written arbitration agreement.

(2).One party was not given appropriate notice or was unable to present his opinion in an arbitration procedure.

(3).The composition of the arbitration tribunal or the procedure does not conform with the law.

(4).The matters dealt with by the award fall outside of the scope of the arbitration agreement or the arbitral organ was not empowered to arbitrate.

(5).The enforcement of the award is against China's public interest.

SECTION II: THE POSSIBILITY OF CHALLENGING THE GRANTING OR

REFUSAL OF AN EXECUTION ORDER

1.CHALLENGE THE GRANTING OF AN EXECUTION ORDER

A.THE GRANTING OF AN EXECUTION ORDER: APPEALABLE

In China, there is no independent "Execution Law" that governs the execution of civil judgments and arbitration awards.⁸⁷⁴ However, there is no provision prohibiting an appeal procedure against the granting of an execution order. Thus, it should be appealable.

⁸⁷⁴ Kuo Chung-Wen (郭中文), Study on the System of Enforcement Between Taiwan and China-Fows on Remedial Procedure (兩岸強制執行制度之研究 —以強制執行之救濟為中心) (2006) (Master's thesis, Chinese Culture University in Taiwan).

B.THE CONCRETE MEASURES IN THE EXECUTION

PROCEDURE:OBJECTION

The provisions that govern concrete execution measures are provided in the third part, which is entitled “Procedure of execution” in CCPPRC. Of these provisions, Article 202 allows the parties to an arbitration award or a judgment, and Article 208 allows third persons, to raise an objection against execution measures.

Jurists believe that this very unfair and that an independent law that deals with all of the questions in an execution procedure should be enacted.⁸⁷⁵

2.THE REFUSAL OF AN EXECUTION ORDER

We will discuss this issue in three sections: introducing the appeal procedure (A.NO APPEAL PROCEDURE), the review action (B.NO REVIEW ACTION) and resubmission to arbitration or initiation of an action before the national judges (C.RESUBMISSION TO ARBITRATION OR INITIATION OF AN ACTION BEFORE THE JUDGES).

A.NO APPEAL PROCEDURE

Under section 9 of Article 140 of the CCPPRC, an appeal against the refusal of an execution order is prohibited.

This principle was reconfirmed by the CSPC in its administrative notice, which was issued to all lower courts on 23 April 1997⁸⁷⁶ (in Chinese “最高人民法院于人民法院裁定撤销仲裁裁决或驳回当事人申请后当事人能否上诉问题的批复”) regarding the question of “whether judgments to set aside or to deny the enforcement of arbitration awards are appealable” and which indicated that **neither of those judgments is appealable.**

⁸⁷⁵ Zeng Sian-Wun (曾献文), *Enact "Civil Enforcement Act" to Crack Execution Difficulties* (制定民事强制执行法破解执行难处), CHINESE PROCEDURE LAW NET, available at http://www.procedurallaw.cn/msss/zxdt/200903/t20090306_189023.html, last visited 8 April 2014.

⁸⁷⁶ See http://china.findlaw.cn/fagui/p_1/136492.html, last visited 11 April 2014.

B.NO REVIEW ACTION

Under an administrative notice that was issued by China's Supreme People's Court (CSPC) on 26 June 1996 regarding responses to the recourse against the refusal of an execution order (in Chinese “最高人民法院于当事人因对不予执行仲裁裁决的裁定不服而申请再审人民法院不予受理的批复”),⁸⁷⁷ the CSPC ruled that, in China, there is no provision that governs the action, and thus, an action seeking the recourse of revision is prohibited.

C.RESUBMISSION TO ARBITRATION OR INITIATION OF AN ACTION

BEFORE THE JUDGES

Under the CSPC's logic, **there is no appeal procedure, nor is there a review action against the refusal of an execution order.** The parties can only reapply for arbitration or bring an action before the people's court under Article 217.

Thus, jurists⁸⁷⁸ believe that this is unfair because the granting of an execution order is appealable, but there is no possible remedy for a refusal. Thus, in China, the arbitration system has become a real “one-instance” system (which means that there is no possibility for an appeal).

SECTION III: ARGUMENTS OR REASONS TO CHALLENGE

As there is no remedy against the refusal of an execution order, the arguments to challenge an execution order exclusively exist in situations in which they are granted.

We will discuss this issue in two sections. One section addresses the arguments to challenge the granting of an execution order (1.THE GRANTING OF AN EXECUTION ORDER). The other one addresses the concrete execution measures (2.THE CONCRETE MEASURES IN THE EXECUTION PROCEDURE).

⁸⁷⁷ See http://china.findlaw.cn/fagui/p_1/134362.html, last visited 8 April 2014.

⁸⁷⁸ See “To Improve Judicial Review System of Arbitration Award”, Kan Qiao Law Film Homepage, available at <http://www.kqlawyer.com/index.php?c=content&a=show&id=882>, last visited 11 April 2014.

1.THE GRANTING OF AN EXECUTION ORDER

The main arguments to challenge the granting of an execution order involve the same reasons to refuse the enforcement of an arbitration award.

2.THE CONCRETE MEASURES IN THE EXECUTION PROCEDURE

Under Article 5 in an administrative notice⁸⁷⁹ to all lower people's courts that was issued by the CSPC on 3 November 2008 regarding the interpretation of the application to the CCPPRC (in Chinese “最高人民法院《适用中华人民共和国民事诉讼法执行程序若干问题的解释》”, “hereinafter “2008-SPC-notice”), the CSPC allowed the parties to assert their objections, which were based upon the infringement of the law by the execution judges, utilizing the procedure specified in Article 202 of the CCPPRC. Thus, the reasons would be those that involve the infringement of laws by the execution judges.

SECTION IV: WHAT THE COURT CAN DECIDE

The execution demand should be initiated within one year under Article 219 of the Civil Procedure Code, pursuant to the 1987-SPC-notice; however, if both of the parties are legal persons, it should be initiated within six months.

In addition, Article 5 of the 2008-SPC-notice required the people's courts to make a judgment regarding the disputes in an execution procedure within 15 days from the date of the receipt of the objection letter.

Under Article 10 of the 2008-SPC-notice, the objection procedure has no suspensive effect on execution procedure.

Under the 1958 New York Convention, a national court cannot review the substantive content of an arbitration award, which weakens judicial intervention and control over an arbitration award.

In contrast, the national court can substantively review the content or the reasons to refuse the enforcement of an arbitration award, and in the appeal procedure against the granting of an execution order, the national court can strictly examine the reasons for an appeal, which increases judicial intervention

⁸⁷⁹ See <http://www.people.com.cn/zixun/flfgk/item/dwjf/falv/9/9-1-1-08.html>, last visited 8 April 2014.

and control over the refusal to enforce an arbitration award.⁸⁸⁰

SECTION V: CONCLUSION

The most interesting point in the enforcement of an arbitration award in China is that there is neither possibility to appeal, nor to review the refusal to enforce an arbitration award. Thus, there should be related provisions to provide a sufficient remedy for the parties.

CHAPTER III: IN TAIWAN

Regarding the enforcement of an arbitration award in Taiwan, whether arbitration awards rendered in China can be recognized and executed in Taiwan has once been questioned.

Under the Commercial Arbitration Rules (between 1961 and 1998), an arbitration award rendered in China could not be recognized by a Taiwanese court.

In addition, the recourse against an arbitration award rendered abroad had to be made before the court in which the contested arbitration award was rendered, and the laws applying there had to be applied, pursuant to Article 34 of the TCAC.

Thus, during that period, it seems that there was no remedy against or way to recognize an arbitration award rendered in China.

Later, in 1992, the “Act Governing Relations between the People of the Taiwan Area and the Mainland Area” (RBTM) was enacted; this allows an arbitration award rendered in China to be recognized and executed as long as it does not violate public order in Taiwan (Article 74).

Arbitration awards rendered in Hong Kong and Macao can be recognized and executed under Article 42 of the “Act Governing Relations between the People of the Taiwan Area and the Hong Kong and Macao Area” (RBTHM) that was enacted in 1997.

Thus, arbitration award from China, Macao, and Hong Kong can be recognized and executed in Taiwan at present.

⁸⁸⁰ Li Xun (李迅), *Research on China Refusal Recognition and Enforcement of Foreign Arbitral Award* (中國拒絕承認與執行外國仲裁裁決實務研究), 1 ARBITRATION STUDY (仲裁研究) (2011), available at <http://www.cnki.com.cn/Article/CJFDTOTAL-ZCYJ201101013.htm>, last visited 11 April 2014.

Conclusively, all arbitration awards, regardless of where they were rendered, can be recognized and executed in Taiwan.

SECTION I: THE EXECUTION ORDER ISSUANCE

A discussion of the enforcement of a judgment regarding disputes arising from an administrative contract or an arbitration award (if submitted arbitration) in Taiwan can be divided into two sections. One addresses the execution of an arbitration award (1. WHICH COURT IS COMPETENT TO ISSUE THE EXECUTION ORDER?). The other addresses particular questions in Taiwan with respect to the enforcement of judgments made by administrative judges regarding administrative contracts (2. PARTICULAR QUESTIONS WITH RESPECT TO THE ENFORCEMENT OF JUDGMENTS MADE BY JUDGES REGARDING ADMINISTRATIVE CONTRACTS).

1. WHICH COURT IS COMPETENT TO ISSUE THE EXECUTION ORDER?

Although Taiwan has dual jurisdiction, the enforcement of an arbitration award, regardless of the nature of the dispute, should be under the Compulsory Enforcement Act (CEAT), which is executed by **judicial judges in the Grand Instance**.

Generally, in the procedure to issue an enforcement order, oral argument is not required. If the parties prepare sufficient documentation, usually the enforcement order will be issued in about two weeks.

However, as was mentioned previously, the national court shall reject an application for enforcement as provided in Article 38 and 40 of the Arbitration Law. The enforcement procedure can be stayed during the arbitration revocation process (Article 42 of ALT).

However, the Taiwanese court can refuse to recognize or execute an award for some reasons: it infringes Taiwanese public order, or the dispute is not arbitrable in Taiwan (Article 49) and situations in Article 50.

Besides, under the “equal and mutually-beneficial” principle, a court in Taiwan may refuse to recognize a foreign arbitration award pursuant to Article 49 of the ALT if the country in which the arbitration award was made or whose laws govern the arbitration award does not recognize arbitration awards made in Taiwan.

Since the recognition or refusal enforcement of arbitration awards is governed by the ALT, in practice it is thus the **judicial judges** who are competent to hear such claims.

2. PARTICULAR QUESTIONS WITH RESPECT TO THE ENFORCEMENT OF

JUDGMENTS MADE BY JUDGES REGARDING ADMINISTRATIVE

CONTRACTS

We will discuss particular questions regarding the enforcement of administrative contracts. These questions are discussed in order to compare the aforementioned enforcement procedures for arbitration awards.

We will discuss them in two sections. One section addresses their enforcement before the enactment of Taiwan Administrative Litigation Law (TALL). (A.BEFORE THE ENACTMENT OF TAIWAN ADMINISTRATIVE LITIGATION LAW). The other addresses them after the enactment of TALL (B.AFTER THE ENACTMENT OF TAIWAN ADMINISTRATIVE LITIGATION LAW).

A.BEFORE THE ENACTMENT OF TAIWAN ADMINISTRATIVE

LITIGATION LAW

Before 2000, when TALL was enacted, all of the disputes arising from administrative contracts were submitted to judicial judges. Thus, at that time, the enforcement of judgments made by judges was necessarily under CEAT and they were executed by **judicial judges** in the Grand Instance.

B.AFTER THE ENACTMENT OF TAIWAN ADMINISTRATIVE

LITIGATION LAW

After 2000, disputes arising from administrative contracts were submitted to administrative judges. Thus, the enforcement of judgments made by administrative judges were not submitted pursuant to CEAT, but rather, were governed by the Administrative Execution Law (AELT).

AELT governed all of the enforcement related to administrative acts, **including unilateral administrative acts or judgments made by administrative judges** (see below).

Note that enforcement related to **unilateral administrative acts** in Taiwan is executed principally by the administrative body that performed them, with the exception of pecuniary obligations under public law, which should be submitted to the **Ministry of Justice's branch of the Administrative Enforcement Agency (an administrative department under the Ministry of Justice, MJAEA)** (Article 4 in AELT).

The MJAEA is composed of many public servants, namely, "Enforcement Officers," that deal with the enforcement of administrative acts.

Disputes related to the performance of **administrative contracts** generally should be submitted to administrative judges who made judgments pursuant to which the parties can assert a demand for the MJAEA to enforce the judgment.

In conclusion, in Taiwan, the MJAEA is responsible for the enforcement of administrative acts, including administrative contracts, which is similar to the JDE in France.

Remember that the enforcement of the prerogatives of administrative bodies in contracts caused many disputes in Taiwan, which we have introduced as mentioned above (3. CLAIMS FOR PAYMENT).

SECTION II: THE POSSIBILITY OF CHALLENGING THE GRANTING OR

REFUSAL OF AN EXECUTION ORDER

We should distinguish THE GRANTING OR REFUSAL of an execution order in two sections. One section addresses the recourse against the “accord” or “refusal” of an execution order. **An appeal procedure is possible, while a review action is not** (1.CHALLENGE THE GRANTING OR REFUSAL OF AN EXECUTION ORDER: ONLY APPEAL, NO REVIEW ACTION). The other addresses the concrete measures in the execution procedure (2.THE CONCRETE MEASURES IN THE EXECUTION PROCEDURE: OBJECTION).

1.CHALLENGE THE GRANTING OR REFUSAL OF AN EXECUTION ORDER:

ONLY APPEAL, NO REVIEW ACTION

A.APPEAL

Under Article 52 of ALT, the provisions of the Taiwan Civil Procedure Code (TCPC) shall apply to arbitration awards in situations not addressed in ALT.

Regardless of whether there is an accord or a refusal to enforce an arbitration award, it is **a judgment** made by a judicial judge. Consequently, the parties can initiate an appeal under 482 of the TCPC.

B.REVIEW ACTION

In jurisprudence, the Taiwan Supreme Court has rejected an action for recourse that was initiated by one party who sought the revision of an accord of the execution order. Thus, in Taiwan, the parties may not bring an action for recourse against an accord of an execution order that seeks its revision.⁸⁸¹

⁸⁸¹ TSC, judgment No.(Tai-sen-zhi) 545, Year 81.(最高法院 81 年度台上字第 545 號) (Judgment year: 1992).“Tai” means “Taiwan” and “sen” is the Romanization of the Chinese word that is used

2.THE CONCRETE MEASURES IN THE EXECUTION PROCEDURE:

OBJECTION

Regarding the concrete execution measures, the parties can **initiate an objection** against an execution, namely, an “**Action of debtor**” under Article 14 of the Enforcement Law of Taiwan (ELT). In this respect, there is no difference, regardless of whether disputes have arisen from administrative or private contracts.

SECTION III: ARGUMENTS OR REASONS TO CHALLENGE

1.THE GRANTING OR REFUSAL OF THE EXECUTION ORDER

The main arguments against the accord or the refusal of an execution order all involve factual and procedure errors in the accord or the refusal. In practice, the arguments that the parties present are often similar to those in an action for recourse that seeks the annulment of an arbitration award.

2.THE CONCRETE MEASURES IN THE EXECUTION PROCEDURE

Under Article 14 of the ELT, the arguments against execution measures in enforcement procedures mainly involve the infringement of laws by execution judges, for instance, the infringement of sealing up.

SECTION IV: WHAT THE COURT CAN DECIDE

1.THE GRANTING OR REFUSAL OF THE EXECUTION ORDER

In a procedure that examines an appeal against an accord or a refusal of an execution order, the judges can evaluate whether there has been a grave error in

to classify matters and means “application” in the Chinese used by the TSC.

fact or procedure in making a determination with respect to the accord or the refusal. The judges may accept or reject the appeal. There is no procedure to “re-appeal” this judgment by the judges.

2.THE EXECUTION MEASURES IN ENFORCEMENT PROCEDURES

In a procedure in which objections against concrete execution measures are examined, the judges cannot verify the factual context of arbitration award, but principally can only verify whether there has been grave vice in an execution procedure.

CHAPTER IV:IN FRANCE

SECTION I:THE EXECUTION ORDER ISSUANCE

We will discuss the execution order issuance in two sections. One section addresses who is competent to issue such an order (1.WHICH COURT IS COMPETENT TO ISSUE THE EXECUTION ORDER?). The other addresses the situations in which enforcement of an arbitration award will be disallowed (2.THE SITUATIONS TO DISALLOW ENFORCEMENT).

1.WHICH COURT IS COMPETENT TO ISSUE THE EXECUTION ORDER?

In France, the parties must obtain an order issued by “*exequatur*” to enforce an arbitration award. Regarding arbitration awards in disputes arising from administrative contracts, the question of the judge who is competent to be an “exequatur” is crucial.

Before SMAC, jurist Mathieu RAUX held that the INSERM judgment was silent regarding the competence of an exequatur, but he believed that the same pattern should be applied.⁸⁸²

However, the CE presented its points in the SMAC case, and we will introduce them in two sections.

One section addresses the situation in positive law. It principally involves the famous SMAC case (A.IN POSITIVE LAW). The other section addresses the

⁸⁸² Mathieu Raux, *supra* note 867.

discussion in doctrine (B.THE DISCUSSION IN DOCTRINE).

A.IN POSITIVE LAW

In positive law, the leading case is the SMAC case. We will discuss it in two sections. One section addresses its background (I.BACKGROUND). The other section addresses the opinions in the judgment (II.JUDGMENT CONTENT).

I.BACKGROUND

The SMAC case involved a dispute that arose from two related contracts that were concluded by the mixed syndicate of the airports of Charente (*le syndicat mixte des aéroport de Charente*, hereafter SMAC) with the Ryanair Limited society and its branch of 100% stocks; French law was applied. The target of these two contracts was the development of a regular airport transport system between London-Stansted and Angoulême in 2008.

In contrast to the INSERM case, both of the contracts contained a stipulation that required the parties to submit to international arbitration in London. Thus, the arbitration procedure occurred in London, not in France.

SMAC initiated an action to set aside the arbitration award on the basis that it could not be recognized or executed in France.

II.JUDGMENT CONTENT

As the arbitration award was granted in London, not in France, the first question is whether a French judge, specifically, an administrative judge in France, has the competence to examine the recourse against an arbitration award that was rendered abroad.

With respect to this question, the CE followed the INSERM judgment and gave a negative response.

The CE ruled that, regardless of where the arbitration award was rendered, the administrative judge is always competent to examine an enforcement demand for an arbitration award. Thus, after his examination, the judge may refuse such a demand if an arbitration award is contrary to the public order. In addition, the CE defined the competence of administrative judges as the first instance of the administrative tribunal and applied to Article L311-1 of the CJA.

Thus, both the demand and control of exequatur over arbitration awards that involve disputes arising from contracts having characteristics of the administrative regime of public order (*régime administratif d'ordre public*) are within the competence of administrative judges.

Briefly, the CE broadened two aspects of French jurisprudence. First, the CE broadened the jurisprudence of INSERM to include domestic arbitration, which was introduced previously in the discussion of judicial review in France (introduced above in domestic arbitration). The other aspect relates to jurisdiction over the execution of arbitration awards in administrative litigation.

The provisions that govern the enforcement procedure for arbitration awards are included in the Code of Civil Procedure. An order of exequatur can be issued only by the president of the Grand Instance Tribunal in the trial level in which the arbitration award is rendered, or for an arbitration award rendered in a foreign jurisdiction, by the president of the Paris Grand Instance Tribunal.⁸⁸³

Jurists have held that the SMAC opinion was predictable, because in INSERM, the TC granted administrative judges the competence to examine arbitration awards in disputes arising from contracts that involve the administrative regime of public order, and thus, an exequatur is expected to have the same application.⁸⁸⁴

In SMAC, the CE maintained the duplication of competence that was created in INSERM. Jurist Laurent JAEGER opined that this duplication was the result of two factors. One factor is that the CE wants to retain control of all circumstances that involve the imperative rules that are contained in French public law. The other is that the control that is executed over arbitration awards by judicial judges is regarded as insufficient and as detracting from the effectiveness of public law rules.⁸⁸⁵

⁸⁸³ Regarding domestic arbitration, refer to CPC, art 1487; as for international arbitration, refer to article 1516.

⁸⁸⁴ Laurent Jaeger and Noël Chahid Noural, *Le Conseil d'État étend les principes de l'arrêt INSERM aux sentences étrangères*, Cahiers de l'arbitrage, 1 October 2013, n° 4, P. 1083.

⁸⁸⁵ Laurent Jaeger, *supra* note 884.

Considering INSERM and SMAC together, we can illustrate the system as follows:

JJ: Judicial Judges

AC: contract relative to an administrative regime of public order.

AJ: Administrative judges

Recourse against the arbitration award:

Rendered in foreign: JJ ← SMAC

Rendered in France: no relative to AC : JJ←INSERM

Relative to AC: internal arbitration : AJ← SMAC

International arbitration : AJ ←INSERM

No relative to AC : JJ← SMAC

Demand for execution

Relative to AC: AJ (in France or overseas)← SMAC

B.THE DISCUSSION IN DOCTRINE

We will discuss the doctrinal disputes that have been provoked by SMAC in two sections. One section addresses the disputes in the arbitration law field (I.ARBITRATION LAW JURISTS). The other section addresses those in the administrative law field (II.ADMINISTRATIVE LAW JURISTS).

I.ARBITRATION LAW JURISTS

The particularity of the SMAC case is that it involved an arbitration award that was **granted overseas** and that **addressed an international matter**.

Jurist Apostolos Patrikios considered that the SMAC case would lead to the annihilation of arbitration, because the intervention of administrative judges in economic relationships or investment matters that require the flexibility and rapidity that only arbitration proceedings can achieve is unacceptable.

Furthermore, he considered that, even if the possibility of intervention by administrative judges is acknowledged, their intervention in international matters has the same character as that of ordinary judges. He asserted an

analogy and inspiration from the civil procedure code.⁸⁸⁶

Briefly, pursuant to his standard, actions seeking recourse against arbitration awards that have been rendered overseas and that involve international matters belong within the jurisdiction of ordinary courts, contrary to the jurisprudence of SMAC.

II. ADMINISTRATIVE LAW JURISTS

There is no specific provision that establishes the conditions under which an order of exequatur can be issued by administrative judges.

Jurist Labetoulle, in his report in 2007, also refused to propose provisions that would give an executive character to arbitration awards with no intervention by a national jurisdiction (which refers to the president of an administrative tribunal).

However, the main reason to support the competence of administrative judges is that the **contractual legal relationship would be submitted to administrative law.**

In jurisprudence, the Administrative Court of Appeal in Lyon applied this solution in 2007,⁸⁸⁷ holding that, under the principles inspired by Article 1477 of the Code of Civil Procedure, it is administrative judges who can pronounce an order of exequatur.

This solution was envisaged by Mattias Guyomar in his conclusions regarding the famous decision in INSERM and it was finally officially adopted in the SMAC decision.

On these grounds, the administrative tribunal will play a role as the premier trial level to ensure that, regardless of whether they are rendered in France or in a foreign jurisdiction, no arbitration awards will violate the administrative regime of public order; further, it will grant them executive effect in their national territory.

Another less obvious meaning of the SMAC case is that the competence of administrative judges as “exequaturs” does not reach all contracts concluded by public legal persons; rather, their competence extends only to contracts that involve the administrative regime of public order.

⁸⁸⁶ Apostolos Patrikios, *supra* note 91, at 291.

⁸⁸⁷ CAA Lyon, 27 déc. 2007, SA Lagarde and Meregnani : Rec. CE 2007, p. 582 ; BJCP 2008, p.128, concl. M. Besle.

The reason for this, as jurist Mattias Guyomar stated, is that the principle that linked competence with the facts (competence is determined by the legal nature of disputes, i.e., whether it involves an administrative or private contract) is not sufficient or absolute.⁸⁸⁸ That is, certain disputes regarding the execution of certain administrative contracts are submitted to judicial judges, for instance, disputes regarding the execution of rent contracts in some markets.⁸⁸⁹

In conclusion, although SMAC provoked many doctrinal disputes, the CE at least drew a line in defining an “*exequatur*” order.

2.THE SITUATIONS TO DISALLOW ENFORCEMENT

A.DOMESTIC ARBITRATION AWARD

Under 1488, no enforcement order may be granted where an award is manifestly contrary to public policy.

However, we believe that the reasons for an annulment of a domestic arbitration award that are provided in Article 1492 will also apply to deny the enforcement of a domestic award.

B.INTERNATIONAL ARBITRATION AWARD

Under paragraph 4 of Article 1525, the court may only deny the recognition or the enforcement of an arbitral award on the grounds listed in Article 1520, which are the same as the reasons for the annulment of an international arbitration award.

SECTION II: THE POSSIBILITY OF CHALLENGING THE GRANTING OR

REFUSAL OF AN EXECUTION ORDER

In France, the recourse of revision is applicable only to an “arbitration

⁸⁸⁸ Table ronde organisée par C. Broyelle et M. Collet, “Arbitrage et contrats internationaux de l'administration – À propos de la décision Inserm du Tribunal des conflits du 17 mai 2010,” *Semaine Juridique Administration et Collectivités territoriales*, no 5, 30 janvier 2011.2040.

⁸⁸⁹ CE 19 January 2011, Consorts Auguste, n° 337870.

award,” but not to an execution order (Article 1502). Thus, we will discuss the possibility of an “appeal procedure” to contest the granting of an execution order (1.APPEAL AGAINST THE GRANTING OF EXECUTION ORDER) and to contest the refusal of an execution order (2.APPEAL AGAINST THE REFUSAL OF EXECUTION ORDER).

1.APPEAL AGAINST THE GRANTING OF EXECUTION ORDER

A.DOMESTIC ARBITRATION AWARD: NO APPEAL

Under section 1 of Article 1499, Article 1499, no recourse may be had against an order granting enforcement of an award.

However, under section 2 of Article 1499, an appeal or an action to set aside an award, in nature, shall be deemed to constitute recourse against the order of the judge having ruled on enforcement.

B.INTERNATIONAL ARBITRATION AWARD

I. RENDERED IN FRANCE: PRINCIPALLY NOT APPEALABLE

No recourse may be had against an order granting enforcement of an award rendered in France (Article 1524), except as provided in Article 1522, paragraph 2.

II.RENDERED ABROAD:APPEALABLE

Under Article 1525, an order granting recognition or enforcement of an arbitral award made abroad may be appealed.

2.APPEAL AGAINST THE REFUSAL OF EXECUTION ORDER

A.DOMESTIC ARBITRATION AWARD: APPEALABLE

Under Article 1500, an order denying enforcement may be appealed within one month following receipt of execution order.

B.INTERNATIONAL ARBITRATION AWARD: APPEALABLE

Any order that denies the recognition or enforcement of an international arbitral award may be appealed, regardless of whether the award was rendered in France (Article 1523) or abroad (Article 1525).

All appeal applications should be initiated before **the Court of Appeal** (Articles 1500, 1523, 1525). However, cases that comply with the jurisprudence of INSERM and SMAC should be initiated before the “*Cour d'Appel Administratif*.”

SECTION III:ARGUMENTS OR REASONS TO CHALLENGE

1.APPEAL AGAINST THE REFUSAL OF AN EXECUTION ORDER

The arguments for an appeal against the refusal of an arbitration award (domestic awards and international awards rendered in France) are not provided in the Arbitration Law of France.

2.APPEAL AGAINST THE GRANTING OF AN EXECUTION ORDER

The arguments that may be asserted in an appeal against the granting of an arbitration award (for an international award rendered in France) are provided in Article 1522, paragraph 2; however, arguments that may be asserted against international awards that have been rendered abroad are not provided.

However, under Article 1488, no enforcement order may be granted when an award is manifestly contrary to public policy.

Thus, the existence of facts that are contrary to public policy is also an argument that can be asserted to challenge the granting of an execution order.

SECTION IV: WHAT THE COURT CAN DECIDE

1.NO SUSPENSION OF EXECUTION ORDER

Under Article 1526, the appeal against an enforcement order shall not suspend enforcement of an award.

However, the first president ruling in urgent procedures (*référé*) or, once the matter is referred to him or her, the judge assigned to the matter (*conseiller de la mise en état*), may stay or set conditions for enforcement of an award where enforcement could severely prejudice the rights of one of the parties (Section 2 of Article 1526).

2.PERIOD THE APPELLATE COURT WILL CONSIDER

To echo the goal of the Arbitration Law, i.e., to encourage the development of the arbitration system, there is only an opportunity for an appeal procedure against the granting of the execution of an award that was rendered abroad and the refusal of an execution order; thus, we will only discuss what the court can decide in that procedure.

Interestingly, under section II of Article 1500, If it is appealed and under one party's request, the Court of Appeal shall rule on an appeal or application to set aside the award, provided that the time limit for such appeal or application has not expired.

However, since the "exequatur" procedure does not include oral arguments, it is difficult to decide who is the defendant in an appeal procedure against the refusal of an execution order. We believe that the other party to an arbitration award should be the defendant, as jurist Hazoug stated.⁸⁹⁰

Because it is an appeal procedure, in theory, the judge can examine all of the errors in fact and in the application of the law. However, in practice, judges execute this power with a preservative attitude.

⁸⁹⁰ Sâmî Hazoug, *supra* note 809, at 103.

CONCLUSIONS

While arbitration has traditionally been considered as a means to resolve private disputes, its role in disputes involving administrative contracts is a crucial question in administrative law.

We will conclude this dissertation into two main sections. One addresses its summary (TITLE I: SUMMARY OF DISSERTATION). The other addresses possible future developments (TITLE II: POSSIBLE FUTURE DEVELOPMENTS).

TITLE I: SUMMARY OF DISSERTATION

To resume this dissertation, we will divide the discussion into four sections, introducing the system in France (CHAPTER I: IN FRANCE), in Canada (CHAPTER II: IN CANADA), in China (CHAPTER III: IN CHINA) and in Taiwan (CHAPTER IV: IN TAIWAN).

CHAPTER I: IN FRANCE

Regarding arbitrability, the French system principally prohibits public legal persons from submitting disputes involving administrative contracts to arbitration. However, there are exceptions that have gradually been created by legislation and jurisprudence. Even so, up until the present time, the principle of the prohibition of arbitration in administrative matters is still a dominant principle in administrative law.

Regarding arbitration procedures that involve disputes resulting from administrative contracts, judges can intervene in difficulties regarding the constitution of arbitration tribunals, although the judge who is competent to address these issues is still an open question in legal doctrine.

With respect to substantive disputes, French administrative contracts include many particularities that have been created by jurisprudence. Their main foundation is ensuring the continuity of public service, which is much different from that of private contracts. Thus, we consider that, in arbitration procedures, arbitrators should take this into consideration.

In the administrative litigation of disputes involving administrative

contracts, French jurisprudence has created many principles in public law that also must be observed in arbitration procedures.

Finally, with respect to the judicial review of arbitration awards, in French practice, the most crucial question is a determination of the competent judge to examine actions seeking recourse against and the execution of arbitration awards. Although French jurisprudence has produced the INESRM and SMAC cases, the debates appear to be endless.

CHAPTER II: IN CANADA

Regarding arbitrability, the Canadian system principally allows public legal persons to submit disputes involving administrative contracts to arbitration. However, there are some legislative limitations. In practice, because other ADR regimes are well developed and offer administrative bodies more and better choices, arbitration is less popular than other ADR methods.

In substantive disputes, Canadian administrative contracts apply the same rules as those applicable to private contracts.

In the litigation system, disputes arising from administrative contracts are within the same jurisdiction as those arising from private contracts.

Distinctively, in the Canadian system, there is a special quasi-judicial organization called the “*Tribunal Administratif*” that deals with disputes between the government and the citizens. Its function and its relationship between administrative and jurisdictional organizations is interesting, both in doctrine and in jurisprudence.

Finally, with regard to judicial review of arbitration awards, the Canadian system has no many special rules that must be applied to administrative contracts, but it has been significantly influenced by international conventions.

CHAPTER III: IN CHINA

Regarding arbitrability, in China, arbitration is principally interdicted for administrative contracts, but there are many legislative exceptions for particular administrative contracts.

Disputes involving administrative contracts principally are not within the scope of application of the Chinese administrative litigation system, which is applicable exclusively to claims initiated by citizens against administrative bodies.

Most disputes involving administrative contracts should be submitted to administrative judges in the administrative chamber of the local people's courts. Arbitration and other ADR measures gradually are being accepted in jurisprudence.

Finally, with respect to judicial review of arbitration awards, China's system has no many special rules that are applicable to arbitration awards in disputes arising from administrative contracts.

CHAPTER IV: IN TAIWAN

Regarding arbitrability, Taiwan's system principally allows public legal persons to submit their disputes regarding administrative contracts to arbitration under certain legislatively established conditions. However, in practice, we believe that Taiwan's jurisprudence concentrates exclusively on the nature of the contract, i.e., whether it is an administrative or private contract, to determine its arbitrability. Thus, the legislative conditions seem to be inexistent in the jurisprudence.

In substantive disputes involving administrative contracts, French administrative contract law has been introduced into Taiwan's administrative contract system, with some amendments. In Taiwan's jurisprudence, some leading cases are similar to those in France, but Taiwan's jurisprudence has worked out its own special route, i.e., one that has a mixed administrative contract law system that combines French and German law with Taiwan's own particularities.

In Taiwan, administrative litigation of disputes arising from administrative contracts should be submitted to administrative judges. Taiwan's doctrine and jurisprudence in administrative law gradually has created certain principles in public law that also should be observed in arbitration procedures.

Finally, with respect to judicial review of arbitration awards, in Taiwanese practice, actions seeking recourse are often brought before judicial judges.

After the resumption of this dissertation in the contemporary situation, we can say that arbitration in cases involving administrative contracts is not a static question, but rather, a dynamic and variable question. Thus, we will make observations regarding possible future developments.

TITLE II: POSSIBLE FUTURE DEVELOPMENTS

The purpose of this paper is to show and to compare the feasibility and justifiability of applying arbitration to cases involving administrative law. Generally speaking, national laws define the scope of application of arbitration based upon considerations that take political, social, economic and other policies into account. Thus, the different locations of the arbitration of administrative contracts present different conceptions. Additionally, the aim of this thesis is also to determine the legal position of administrative authorities as parties to administrative contracts and arbitration procedures and the legal position of (administrative) judges in the litigation system.

Much attention has been devoted to the analysis of international arbitration and arbitration in public law. Their effects have been investigated by a number of authors. Several researchers have indicated that arbitration is helpful to improve the achievement of dispute resolution, as well as its efficiency. However, there are also a few studies that have been conducted that have adopted a negative attitude towards the effect of arbitration in cases involving administration law.

After having seen the divergence between the four countries discussed above and the foregoing considerations, we will analyze the possible development, though not comprehensively, of this topic in two main sections. One addresses the development of the conception of administrative contracts (CHAPTER I: DEVELOPMENT OF ADMINISTRATIVE CONTRACT CONCEPTS). The other addresses the development of the function of administrative litigation (CHAPTER II: EVOLUTION OF THE FUNCTION OF ADMINISTRATIVE LITIGATION).

CHAPTER I: DEVELOPMENT OF ADMINISTRATIVE CONTRACT CONCEPTS

In private law, contracts are often regarded as the law between the parties. In administrative law, what is an “administrative contract”? What is its conception and orientation?

As the French public reporter, Dacosta, in his conclusion of the report on the case, “*Département du Tarn-et-Garonne*” (Tarn-et-Garonne), in the CE on 31 March 2014, he considered that administrative contracts are not only the law between the parties, but they also involve the expression of public policy, as their contractual consequences are important for public finances and for their

implications for equality.⁸⁹¹

Thus, in Dacosta's report, he suggested that, in France, the jurisprudence of Martin should be overthrown and that the possibility of a third person contesting the nullity of contracts should be opened.

In contrast, in many countries, especially those that have adopted a common law system, administrative contracts are subject to the same rules as private contracts. Under this logic, arbitration should be more easily accepted.

Taken together, the development of administrative contracts (similar to or different from private contracts; as only the law of the parties or as concentrating on legality and the public order) will lead to different prospects for arbitration to deal with disputes arising from administrative contracts.

Further, we can observe different policies that have affected the development of the conception of administrative contracts.

First, there are different litigation cultures.

In a society that expects ADR to deal with disputes, to reduce administrative costs or to seek harmony, arbitration clauses are more likely to be included in administrative contracts.

For example, as mentioned above, in Taiwan, one category of administrative contract is the "conciliation contract," which is aimed at reducing administrative costs.

In addition, in China, as jurist Zhang Li (張莉) has stated, the fact that parties to administrative contracts prefer to submit to ADR measures partially reflects the mentality of the Chinese (*la mentalité des Chinois*), i.e., a proclivity to seek harmony.

The above litigation cultures are likely to lead to higher degrees of arbitrability for administrative contracts.

Second, it is also affected by economic policies.

As mentioned above, the famous "Disney" case in France is the result of economic policy considerations.

As mentioned, in the legislative exceptions that are applicable to certain administrative contracts in the four countries, the main reason for the acceptance of arbitration clauses is compliance with international commercial trends.

⁸⁹¹ Giacomo Roma, ' + *Tropic – Martin / SMIRGEOMES X Beziers I, Compte rendu des conclusions du rapporteur public Bertrand Dacosta dans l'affaire Département du Tarn-et-Garonne, audience de l'Assemblée du 21 mars 2014 (Conseil d'Etat, Assemblée, Département du Tarn-et-Garonne, requête numéro 358994)* ' : *Revue générale du droit* on line, 2014, numéro 15535 (www.revuegeneraledudroit.eu/?p=15535).

Third, it is affected by political policies.

In a country in which the control of the central government over administrative contracts is more powerful, the likelihood that arbitration will be prohibited is higher.

For example, in China and France, the principle of prohibiting arbitration is more likely to be dominant.

In addition, in China, because of the government-owned land policy, in disputes involving lease contracts for agricultural land, even if they are arbitrable, they must be submitted to special arbitration commissions; this means that the will of the parties is inferior to government policy and that the parties do not have the liberty to choose arbitration.

In conclusion, based on the aforementioned diversity, we can conclude that the development of the conception of administrative contracts involves many aspects, including legal, economic, political and even cultural aspects. Sometimes, it involves a political choice. As Jarrosson stated, the real justification of the principle of the prohibition of arbitration is based on the appreciation of opportunity and on a political choice which does not refer to a consideration established in law, but to an execution of power.⁸⁹² This statement perhaps can provide us with some inspiration.

Thus, we believe that an administrative contract, at least in its function and conception, is gradually becoming different from a private contract. Innovation with respect to administrative contracts will also reflect the concentration and function of the administrative litigation systems in each country.

CHAPTER II: EVOLUTION OF THE FUNCTION OF ADMINISTRATIVE

LITIGATION

As has been mentioned, the “objective” or “subjective” function of administrative litigation will also affect the degree of arbitrability, as well as arbitration procedures.

In France, the objective function has traditionally been regarded as the

⁸⁹² Ch. Jarrosson, *L'arbitrage en droit public*, A.J.D.A. 1997, at 16. Recited from Antoine Julien, “L'arbitrage en droit administratif,” *Petites Affiches*, Le Quotidien Juridique—édition n° 156, 06.août 2003, at 4, at note 41.

most important function in the administrative litigation system.

Taiwan, following traditional German legal principles, accepted that an administrative body stands in an equal position to sign an administrative contract. Further, in the administrative litigation system, **the subjective function has long been regarded as the principal function of Taiwan's administrative litigation system.**

In China, disputes arising from administrative contracts have long been excluded from the administrative litigation system; rather, they are subject to the legal principles of private law, which is subjectively oriented.

In Canada, following the traditions of common law, administrative contracts apply the same rules and jurisdiction that are applicable to private contracts. However, gradually, the term "government contract" is more commonly being used to differentiate contracts that have been concluded by the government and to try to apply different legal principles. Thus, in Canada, government contracts are gradually developing their particularities.

Thus, the development of the function of administrative litigation, as "subjectively oriented" or "objectively oriented," will affect the acceptance of arbitration in administrative matters. It is interesting for us to continue to track its development.

For example, in France, with respect to the famous jurisprudence in "*Tropic*," "*Brézier*" and "*Tarn-et-Garonne*," in addition to their innovation regarding the conception of administrative contracts, we are curious about whether it will also affect the function of administrative litigation, and if so, toward which orientation?

In Taiwan, with respect to the jurisprudence in "ETC" and the legislative enlargement of the admissibility of remedies for administrative contracts, is it possible for Taiwan's administrative litigation to be guided towards being "objectively oriented"?

In China, with the pressure of economic development, administrative contracts will also be affected by international trends. Will China's administrative litigation be guided towards being "objectively oriented" or "subjectively oriented"?

In Canada, will the common law tradition continue to have influence over the litigation system? Is it possible to develop a particular regime to deal with administrative disputes? What is the subsequent relationship between the AT and the juridical or administrative organization? Will the AT's functions be

“enlarged” or “reduced”? Will the enlargement or reduction of the AT’s functions crowd out the functions of the courts? Or, more interestingly, is it possible for the AT and the courts to carry out their respective functions? For example, the AT is responsible for (or, at least, concentrates more on) the protection of a person’s individual rights, while the courts are responsible for (or, at least, concentrate more on) the legality of administrative contracts: Is this subject to possible development?

Taken together, **arbitration will be more acceptable in systems whose function is more “subjectively oriented” than in those whose function is “objectively oriented.”**

Finally, “the arbitration of administrative matters” traditionally has been an important question in administrative and arbitration law. In the future, we will continue to see it shine in the doctrine and jurisprudence of both the administrative and arbitration law fields.

Table of abbreviations in this dissertation

<u>Abbreviation</u>	<u>Full name</u>	<u>Chinese</u>
ADRIC	ADR Institute of Canada	加拿大 ADR 機構
AELT	Administrative Execution Law in Taiwan	台灣行政執行法
ALLPRC	Administrative Litigation Law of the People's Republic of China	中國行政訴訟法
ALPRC	Arbitration Law of the People's Republic of China	中國仲裁法
ALT	Arbitration Law of Taiwan	台灣仲裁法
ANT	agents non titulaires	公務員
APAT	Administrative Procedure Act of Taiwan	台灣行政程序法
APLC	Administrative Procedure Law Of The People's Republic Of China	中國行政程序法
APPPIP	ACT FOR PROMOTING PRIVATE PARTICIPATION IN INFRASTRUCTURE PROJECTS	促參法
AT	Administrative Tribunals	加拿大仲裁法庭
ATWA	Arbitrator Training and Workshops Act	仲裁人訓練規則
BB	“Bid Bond”	投標金
CAA	Cours Administratives D'Appel	上訴行政法院
CAAC	Commercial Arbitration Act of Canada	加拿大商業仲裁法
CAAT	Chinese Arbitration Association, Taipei	台灣仲裁協會
CAL	China Arbitration Law	中國仲裁法
CAO	la commission d'appel d'offres	招標委員會
CC	Cour de Cassation	法國最高法院
CCC	China Contract Code	中國契約法
CCF	Constitutional Court of France	法國憲法委員會
CCP	China Community Party	中國共產黨

CCPC	Code Of Civil Procedure of Canada	加拿大民事訴訟法
CCPF	Code de procédure civile of France	法國民事訴訟法
CCPPRC	Code Of Civil Procedure of People's Republic of China	中國民事訴訟法
CCRA	des comités consultatifs de règlement amiable	和諧諮詢委員會
CCT	Civil Code of Taiwan	台灣民法
CDA	contentieux de l'annulation	撤銷之訴
CDFP	Commission de déontologie de la fonction publique	公務員道德規範準則
CDR	le consortium de realization	實現團體
CDSF	Commission on the Disciplinary Sanctions of Functionaries	公務人員懲戒委員會
CEAT	Compulsory Enforcement Act	台灣強制執行法
CGJ	Council of Grand Justices	大法官會議
CI	Constitutional Interpretation of Justice of Constitutional Court	台灣司法院大法官會議
CIC	China Investment Corporation	中國投資公司
CIETAC	China International Economic and Trade Arbitration Commission"	中國國際經濟及貿易委員會
CJA	Code de Justice Administrative	法國行政訴訟法
CJC	Canadian Judicial Council	加拿大
CLRPC	Constitutional Law of China	中國憲法
CMP	Code des marchés publics	法國政府採購法
CNPC	Le contentieux de la nullité: plein contentieux	契約無效之訴：完全之訴
CPA	Le contentieux des pratiques anticoncurrentielles	反競爭訴訟
CPJ	contentieux de pleine jurisdiction	完全之訴
CPPL	China Public Procurement Law	中國政府採購法
CRBGP	Complaint Review Board for Government Procurement	政府採購審議委員會
CRC	Constitution of Republic of China	中國憲法
CSE	Counselor of State	國務院
CSPC	China Supreme People's Court	中國最高人民法院
CTACAA	Code des tribunaux administratifs	法國地方及高等行政法

	et des cours administratives d'appel	院組織法
DAT	detachable act theory	可分離行為理論
DPC	Le déferé préfectoral et les contrats	契約先緊急訴訟
DPS	dynamic purchasing system	動力購買系統
DSP	delegation of public service	公共服務委託
ELT	Enforcement Law of Taiwan	台灣強制執行法
EPA	l'établissement public administratif national	國家行政公機構
EPFR	l'établissement public de financement et de restructuration	財經及重整公機構
EPIC	les établissements publics industriels et commerciaux	企業及商業公機構
ETC	Electronic toll collection	電子收費系統
FCA	Federal Court of Appeal	聯邦上訴法院
FCC	French Civil Code	法國民法
FDP	fait de prince	王之行為理論
FE	Far East Electronic Toll Collection Co	遠東電子收費公司
FJA	The Office of the Commissioner for Federal Judicial Affairs	聯邦司法部
GOSC	General Office of the State Council	中國國務院
GPAT	Government Procurement Act of Taiwan	台灣政府採購法
GRPTM	Act Governing Relations between People of the Taiwan Area and Mainland Area"	兩岸人民關係條例
HACT	The High Administrative Court of Taiwan	台灣高等行政法院
JAC	Judges Act of China	中國法官法
JDA	Juge d'appui	支持法官
JDC	juges du contrat	契約之訴法官
JDE	juge de l'excès de pouvoir	越權之訴法官
JDP	juge du plein contentieux	契約之訴法官
JDR	juge du référé	緊急程序法官

JEX	juges de l'exécution	執行法官
JPTI	Judges and Prosecutors Training Institute	司法人員訓練所
LCE	la conciliation extrajudiciaire	法律外和解
LCEV	le concurrent évincé	競爭者訴訟
LDO	L'appel d'offres	招標報價
LLRPC	Legislation Law of China	中國立法法
LPN	La procedure négociée	協商程序
LRPC	pre-contractual urgent procedure, Le référé précontractuel	先契約緊急程序
MAPA	"Marchés à procedure adaptée"	調整程序
MDR	Master of Requests	加拿大政府採購請求部
MJAEA	Ministry of Justice's branch of Administrative Enforcement Agency	行政執行署
MMT	Ministry of Military in Taiwan	台灣國防部
NIU	National Ilan University	國立宜蘭大學
NRAC	Nomination Rules of Arbitrators of CIETAC	中國經濟及貿易仲裁委員會仲裁人任命規則
OFCCP	old French Code of Civil Procedure	法國舊民事訴訟法
PCA	Paris Court of Appeal	巴黎上訴法院
PCC	Taiwan's Public Construction Commission	公共工程委員會
PEA	"private economy administration"	私經濟行政
PFDA	Public Functionaries Discipline Act"	公務人員懲戒法
PFI	"Private Finance Initiative"	民間融資提案制度
PLA	"public law administration"	公權力高權行政
PMUAA	PRINCIPLE OF PROHIBITION OF MIXED USE OF ADMINISTRATIVE ACTS	行政行為併用禁止原則
POS	President of Section	部門主管
PPP	Public-Private Partnerships "Contrat Partenaire"	公私力協力契約
PPP Law	Act Promoting Private Participation in Public Construction	促進私人參與公共建設條例

QCC	Quebec Civil Code	魁北克民法
QCCP	Quebec Civil Procedure Code	魁北克民事訴訟法
RBTHM	“Act Governing Relations between the People of the Taiwan Area and the Hong Kong and Macao Area”	香港澳門關係條例
RBTM	Act Governing Relations between the People of the Taiwan Area and the Mainland Area	兩岸人民關係條例
REP	recours pour excès de pouvoir	越權之訴
RFF	Réseau ferré de France	法國國鐵
RPCV	les recours de plein contentieux contestant la validité du contrat	契約效力爭議之訴
RS	le référé-suspension	停止效力
SCNPC	the Standing Committee of National People’s Congress	中國人民代表大會
SCOC	SUPREME COURT OF CANADA	加拿大最高法院
STTS	Sté Tropic Travaux Signalisation	Tropic 建設裝置公司
TAL	Taiwan Arbitration Law	台灣仲裁法
TALC	Administrative litigation code of Taiwan	台灣行政訴訟法
TALL	Taiwan Administrative Litigation Law.	台灣行政訴訟法
TANFB	Taiwan Area National Freeway Bureau	高工局
TAPC	Taiwan Administrative Procedure Code	台灣行政程序法
TCA	Taiwan Court of Appeal	台灣高等法院
TCAA	Taiwan Construction Arbitration Association	台灣營建仲裁協會
TCAC	Commercial Arbitration Code	台灣商務仲裁條例
TCC	Taiwan Constitutional Court	台灣大法官會議
TCG	Taipei City Government	台北市政府
TCPC	Taiwan Civil Procedure Code	台灣民事訴訟法
TCSL	Taiwan Civil Servant Law	台灣公務員法
TE	Tour Extérieur	外部任用
TEC	Teacher Evaluation Committee	教師評鑑委員會

THAC	Taipei High Administrative Court	台北高等行政法院
TLGA	Taiwan Local Government Act	台灣地方制度法
TME	Taiwan Ministry of Education	台灣教育部
TNHA	National Health Insurance Act of Taiwan	台灣全民健保法
TNHIA	Taiwan National Health Insurance Administration	台灣國立健康保險局
TPL	Taiwan procurement law	台灣政府採購法
TQD	TANFB's qualification decision	最優評選人
TSAC	Taiwan Supreme Administrative Court	台灣最高行政法院
TSC	Taiwan Supreme Court	台灣最高法院

Table of abbreviations in footnote

ACCP	Actualité de la commande et des contrats publics
AJDA	Actualité juridique, Droit administratif
BJDCP	Bulletin juridique des contrats publics
CAA	Cour administrative d'appel
CC	Conseil constitutionnel
CE	Conseil d'État
chron.	chronique
CJA	Code de justice administrative
CJCE	Cour de justice des communautés européennes
CJEG	Cahiers juridiques électricité-gaz
concl.	Conclsions
Ctts et MP	Contrats et marchés publics
D.	Recueil Dalloz
Dr. soc.	Droit social
Dr. adm	Droit Administratif (bulletin mensuel)
DS	Recueil Dalloz-Sirey
EDCE	Études et documents du Conseil d'État
GACE	Grand Avis du Conseil d'État
GAJA	Les grands arrêts de la jurisprudence administrative
Gaz. Pal.	Gazette du Palais
JCP	Juris-classeur périodique
RDP	Revue du droit public et de la science politique
Rec. or "Rec. Leb"	Recueil des arrêts du conseil d'État (Lebon)
req.	requête
Rev.	Revue
Rev. arb.	Revue de l'Arbitrage
RFDA	Revue française de droit administratif
S.	Recueil Sirey
t.	Table
TA	Tribunal administratif
TC	Tribunal des conflits
V.	Voir

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JUSTICE OF THE CONSTITUTIONAL COURT

Justice of the Constitutional Court in Taiwan, No. 348.

Justice of the Constitutional Court in Taiwan, No. 518.

Justice of the Constitutional Court in Taiwan, No. 533.

Justice of the Constitutional Court in Taiwan, No. 540.

Justice of the Constitutional Court in Taiwan, No. 704.

PLENARY ASSEMBLY OF THE TAIWAN SUPREME ADMINISTRATIVE COURT

The first meeting of the Plenary Assembly of the TSAC in February 2004, in
Chinese namely“最高行政法院 93 年 2 月份庭長法官聯席會議”

The first meeting of the Plenary Assembly of the TSAC in May 2008, in Chinese ”
最高行政法院 97 年 5 月份第 1 次庭長法官聯席會議.

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