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## Government Contracts Under Argentine Law: A Comparative Law Overview

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Hector A. Mairal

## **Abstract**

This Article will summarize Argentine law on government contracts as it exists today, with special reference to the contracts of the Federal Government. Due to the French origin of the theory and to the fact that this Article is addressed to an American readership, a tentative comparison with the main legal rules on the subject of these two countries will be offered. A discussion of the practical consequences of the application of the administrative contract doctrine, and some possible solutions to the problems created thereby will be then put forward. But first, the basic issues that this doctrine gives rise to will be defined and the French origin of the concept of contract administratif and its reception in Argentina will be explained. The analysis offered will be limited to the general substantive legal regime of Government contracts leaving aside the issues arising from the contracting procedure, i.e., the rules on competitive bidding. To the extent that this substantive regime results from laws and regulations, only those directly applicable to Government contracts shall be considered. Thus, the analysis will only deal tangentially with the impact on these contracts of the exercise of public powers granted by statutes that may affect indirectly the performance of the private contractor. Since such statutes may reach all Government contracts and not only those defined as “administrative” (unless a tautological definition is used, i.e., one that characterizes as “administrative” only those Government contracts that can be reached by laws granting regulatory or police powers to the Government), it may be argued that the issues raised by those statutes lie outside the scope of the doctrine of the administrative contract. Therefore, the issue of the conflict between the legislative powers of the State and the principle of the sanctity of the contract shall not be treated.

# GOVERNMENT CONTRACTS UNDER ARGENTINE LAW: A COMPARATIVE LAW OVERVIEW

*Hector A. Mairal\**

## INTRODUCTION

The subject of Government contracts is not one that seems, to a foreign observer, to generate a great intellectual debate in the U.S. legal circles.<sup>1</sup> Apart from a few special rules that deviate from common law solutions, i.e., no apparent authority of Government agents, restricted admission of estoppel against the Government, absent a specific statute or regulation, the rules of general contract law apply.<sup>2</sup> While legal literature on the subject and specialized law journals exist, and courses on the subject are included in the curricula of many law schools, for an outside observer it would appear that much of the discussion dwells on the issues raised by the numerous laws and regulations governing public procurement, both during the competitive bidding and the contract performance stages, and on the construction of complex clauses included in every supply or works agreement with the Federal Government. Indeed, looking at the bulk of the federal procurement regulations, and the clauses that they require to be inserted in the agreements, a layman could well wonder how can any controversies arise with respect to contracts

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1. The present Article draws partially from a previous paper of the author, *De la peligrosidad o inutilidad de una teoría general del contrato administrativo*, 179 E.D. 655 (1998). This work started a controversy in Argentina on the theory of the administrative contract. For a reply, restating the traditional point of view, see Juan C. Cassagne, *Un intento doctrinario infructuoso: El rechazo de la figura del contrato administrativo*, 180 E.D. 773 (1999).

2. See JOHN CIBINIC, JR. & RALPH C. NASH, JR., FORMATION OF GOVERNMENT CONTRACTS 203 (3d ed. 1998) (citing *Priebe & Sons, Inc. v. United States*, 332 U.S. 407 (1947)); JOHN CIBINIC, JR. & RALPH C. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 30-33, 69-77 (3d ed. 1995) (citing *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947)); W. NOEL KEYES, GOVERNMENT CONTRACTS UNDER THE FEDERAL ACQUISITION REGULATION 27 (2d ed. 1996); EUGENE W. MASSENGALE, FUNDAMENTALS OF FEDERAL CONTRACT LAW 8-10, 45-49 (1991).

that seem to foresee, with meticulous detail, every possible contingency.<sup>3</sup>

A very different situation confronts those who wish to study Government contracts in Argentina. These contracts may include lengthy specifications, and the procurement procedure does give rise to many issues, but the main discussion is of a more general nature, namely: do some Government contracts, called by courts and legal scholars “administrative contracts,”<sup>4</sup> belong to a different species than agreements between private parties? If so, how can these administrative contracts be identified? And once identified, what rules apply to them that differ from those that would obtain under general contract law?

Common law lawyers have little patience with discussions of a very general nature. They tend to agree with the poet William Blake who thought that “[t]o particularize is the alone distinction of merit.” However, the matter is not devoid of practical importance: many foreign contractors have been surprised to discover, to their chagrin, that their agreements with the Argentine Government were significantly affected by underlying principles of administrative law not spelled out in the contractual documents and which, in their view, destroyed the very notion of a contract.

Although probably more acute in Argentina than elsewhere, the problem is not restricted to Argentine law. Because the theory behind this concept of special Government contracts originated in France, a country that has influenced greatly Latin American law and culture, many countries in the region have adopted it.<sup>5</sup> There is also a good deal of cross-fertilization in Latin American law; hence, it is not uncommon to find Argentine legal scholars citing Brazilian, Chilean and Uruguayan legal

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3. Federal Acquisition Regulation, 48 C.F.R. Sec. 1, *et seq.* [hereinafter F.A.R.].

4. Because of the differences between the French rules on *contrats administratifs* and the Argentine doctrine of the administrative contract, the French expression shall be used when discussing the French system, while the term “administrative contract” shall be used with respect to the Argentine regime.

5. This is the case with Brazil, Chile, Colombia, Uruguay and Venezuela. *See, e.g.*, LUCIA VALLE FIGUEIREDO, CURSO DE DIREITO ADMINISTRATIVO 310 (1994); ENRIQUE SILVA CIMMA, DERECHO ADMINISTRATIVO CHILEÑO Y COMPARADO: ACTOS, CONTRATOS Y BIENES 163 (1995); JAIME VIDAL PERDOMO, DERECHO ADMINISTRATIVO 314 (9th ed. 1987); ENRIQUE SAYAGUÉS LASO, 1 TRATADO DE DERECHO ADMINISTRATIVO 528-40 (3d ed. 1963); ALLAN R. BREWER-CARIAS, CONTRATOS ADMINISTRATIVOS (1992). These authors repeatedly cite French administrative law scholars.

authors and vice-versa.<sup>6</sup> Thus, legal doctrines imported or developed in one country are often taken into account by its neighbors.

The matter has already been noticed in the United States. American legal scholars have commented on the difficulty for developing countries that follow French administrative law theories, of adopting modern business law techniques necessary for project finance. International lending agencies that have been confronted with the problem have commissioned studies on the same issue, and have arrived at similar conclusions.<sup>7</sup>

This Article will summarize Argentine law on government contracts as it exists today, with special reference to the contracts of the Federal Government. Due to the French origin of the theory and to the fact that this Article is addressed to an American readership, a tentative comparison with the main legal rules on the subject of these two countries will be offered. A discussion of the practical consequences of the application of the administrative contract doctrine, and some possible solutions to the problems created thereby will be then put forward. But first, the basic issues that this doctrine gives rise to will be defined and the French origin of the concept of *contrat administratif* and its reception in Argentina will be explained.

The analysis offered will be limited to the general substantive legal regime of Government contracts leaving aside the issues arising from the contracting procedure, i.e., the rules on competitive bidding. To the extent that this substantive regime results from laws and regulations, only those directly applicable to Government contracts shall be considered. Thus, the analysis will only deal tangentially with the impact on these contracts of the exercise of public powers granted by statutes that may affect indirectly the performance of the private contractor. Since such statutes may reach all Government contracts and not only those defined as "administrative" (unless a tautological definition is used, i.e., one that characterizes as "administrative" only those

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6. For citations of Argentine administrative law writers found in all works, see *supra* n.5. See also AGUSTIN GORDILLO, *TRATADO DE DERECHO ADMINISTRATIVO* (4th ed. 1997).

7. See Alejandro P. Radzimirski, *Legal Obstacles and Incentives to Private Investment in Infrastructure Concessions*, in *CAN PRIVATIZATION DELIVER? INFRASTRUCTURE FOR LATIN AMERICA* 33-78 (Federico Basañes et al., eds., 1999). See also Nal Burman & Don Wallace Jr., *2000 and Beyond—The Private Law Side of International Economic Law: Taking Stock*, 29(3) *INT'L L. NEWS* 16 (2000).

Government contracts that can be reached by laws granting regulatory or police powers to the Government), it may be argued that the issues raised by those statutes lie outside the scope of the doctrine of the administrative contract. Therefore, the issue of the conflict between the legislative powers of the State and the principle of the sanctity of the contract shall not be treated.<sup>8</sup>

The economic crises that have afflicted the Argentine economy from the late 1980s to the present have led to the repeated enactment of legislation designed, generally, to mitigate the effects of the crises and, more specifically, to allow the Government to reduce its contractual commitments. Although this legislation has had a significant impact on Government contracts it will not be covered as it is, or should be, of a temporary nature and raises other issues of constitutional and international law as well.<sup>9</sup> For the same reason, the existence and consequences of

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8. J.D.B. MITCHELL, *THE CONTRACTS OF PUBLIC AUTHORITIES: A COMPARATIVE STUDY* (1954) (dealing with this subject). In France this issue is treated within the subject of the *contrat administratif* under the theory of the *fait du prince*.

9. When President Menem came into power in 1989, the Argentine Congress passed a law allowing the Executive to renegotiate all contracts entered into before a given cut-off date that coincided approximately with the beginning of the new administration. Law No. 23696, Aug. 18, 1989, [XLIX-C] A.D.L.A. 2444, 2451. Such renegotiation was to be guided by the principle of "shared sacrifice", i.e., a sharing of the burdens imposed by the economic crisis of the time (such as the increase of prices brought about by hyperinflation) between the two parties to the contract. If renegotiation failed, the Government was empowered to terminate the contract without compensating the contractor for loss of profits. A subsequent law consolidated the public debt and made claims against the Government arising prior to April 1, 1991 and resulting from judicial awards, payable in Government bonds with a maturity of sixteen years. Law No. 23982, Aug. 22, 1991, [LI-C] A.D.L.A. 2898, 2900.

A similar law allowing the Executive to renegotiate and terminate Government contracts was passed by the Argentine Congress in 2000, during the term of President de la Rúa. Law No. 25344, Nov. 11, 2000, [LX-E] A.D.L.A. 5547. In this case the cut-off date was exactly the day on which the new President was sworn in, although no economic crisis existed at the time. The same principle of "shared sacrifice" and the same rule of termination without compensating loss of profits were imposed by this law.

At the beginning of 2002, a yet new Emergency Law was passed. Law No. 25561, Jan. 7, 2002, [LXII-A] A.D.L.A. 44. It eliminated the one-to-one correlation between the U.S. dollar and the Argentine peso that had existed since the Convertibility Law of 1991, Law No. 23928, Mar. 27, 1991, [LI-B] A. D. L. A. 1752, thus leading to a major devaluation of the local currency. However, the same Emergency Law provided that utility rates, that had until then been tied to the dollar, were to be converted into pesos at the one-to-one rate previously in force, and empowered the Executive to renegotiate the concession agreements. Major utilities that had borrowed abroad heavily to comply with their investment programs have thus found themselves with a frozen peso income to service huge debts in foreign currency. Several foreign investors in these utility companies have announced their intention to seek remedies under the different bilateral

the sovereign power to enact laws expropriating contractual rights of specific private parties will be omitted.<sup>10</sup>

### I. *THE MAIN ISSUES POSED BY THE ADMINISTRATIVE CONTRACT DOCTRINE*

That a State does not resign its sovereign powers by entering into a contract is a principle known in the common law world. J.D.B. Mitchell's classic book on Government contracts dealt at length with this issue.<sup>11</sup> The famous *Amphitrite*<sup>12</sup> case in England stated precisely that rule which has also been followed in the United States.<sup>13</sup> However, the theory of the administrative contract poses a different question, namely whether the Government, by the simple fact of having entered into a contract, and regardless of the existence of any laws that grant to it powers that, when exercised, may affect directly or indirectly the rights and obligations of the private contractor, has the power to adjust or terminate the contract for reasons of public convenience in the absence of any contractual clauses in the agreement itself or incorporated into it by reference to a regulation, granting it such powers, and even if the contract itself cannot be said to involve typical sovereign prerogatives.

Put in more general terms, the issue is whether an administrative agency possesses powers "within" the contract that it has executed with a private contractor so that it may conduct itself in its relations with such contractor as a sovereign person without any need of invoking statutes granting it public prerogatives. This means, in turn, that the contractor must treat all Government pronouncements made within the framework of the agreement as administrative decisions that must be obeyed unless and until set aside by a court of law, without prejudice to the contractor's right to additional compensation if such orders impose on him burdens in excess of those contemplated by the agreement.

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investment protection treaties signed by Argentina with the majority of the capital exporting countries.

10. Argentine law allows the expropriation of contractual rights. See JORGE L. MAIORANO, *LA EXPROPIACIÓN EN LA LEY 21499 45* (1978).

11. MITCHELL, *supra* n.8.

12. *Rederiaktiebolaget Amphitrite v. The King*, [1921] 3 K.B. 500.

13. *New York & N.E. R. Co. Rey. v. Bristol*, 151 U. S. 556, 567 (1894) ("A governmental power of self protection cannot be contracted away"); *Norman v. Baltimore & O. R. Co.* 294 U.S. 240, 307 (1935) ("Contracts, however express, cannot fetter the constitutional authority of the Congress").

A U.S. lawyer specializing in Government contracts may think he is treading familiar ground here. After all, contractual clauses that follow the Federal Acquisition Regulations ("FAR") do grant to the U.S. Government the right to direct the work of the contractor,<sup>14</sup> require the latter to abide by the change orders given by the contracting officer,<sup>15</sup> and set short time limits to the complaints that may be brought against such orders.<sup>16</sup> Stretching somewhat the comparison, if the relation between a regulated industry and the Government were to be construed as one based on a contract, i.e., as a concession granted by the latter to the former to build and operate a utility, then the power to regulate the industry could be depicted as the power to amend the initial conditions of the concession contract.<sup>17</sup> Such is, precisely, the solution under the administrative contract theory.

But what would surprise the U.S. lawyer is both the broad reach of the concept of "administrative contract" and the undetermined nature of its consequences. As will be seen below, many contracts that in the United States would not normally contain clauses granting special rights to the Government and that do not concern a regulated industry, are considered, nevertheless, to be administrative contracts in Argentina. The independence of these government prerogatives from the existence of contractual clauses that recognize them or of regulatory powers arising from statute, create a double type of uncertainty: first, which contracts are included in the concept of "administra-

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14. Inspection of Construction clause reads, in part: "All work shall be conducted under the general direction of the Contracting Officer and is subject to Government inspection and test at all places and at all reasonable times before acceptance to ensure strict compliance with the terms of the contract". 48 C.F.R. Sec. 52.246-12(b). See also Ralph C. Nash, Jr. & John Cibinic, Jr., *Administration of Government Contracts*, in KEYES, *supra* n.2, at 789-811 (2d ed. 1969).

15. Change orders are mandatory if the change falls "within the general scope of the contract" and it is included among the type of changes authorized by the contract. Failure to comply with a change order may lead to the contractor being default terminated. The contractor should comply and seek equitable adjustment of its compensation. *Id.* at 384, 407.

16. According to the FAR, the contractor must assert its right to an adjustment within thirty days from the receipt of the change order. However, this time limit has been construed liberally in favor of the contractor so as not to bar a late claim unless the Government has been prejudiced by the delay. 48 C.F.R. Sec. 52.243-1(c). See also NASH & CIBINIC, *supra* n.14, at 477-81.

17. See MITCHELL, *supra* n.8, at 120-29 (dealing with the effects of rate regulation on existing contracts with public agencies).

tive contract"; and second, what are the consequences of such inclusion.

## II. *THE FRENCH ORIGIN OF THE THEORY*

The constitutional principle of the separation of powers has been construed in France, since the 1789 Revolution, as a bar for the judiciary to intervene in any controversy involving the Government when acting as a public entity.<sup>18</sup> Since it was not conceivable to deprive those private persons who were affected by the exercise of public powers of all redress, it became necessary to create a system of administrative courts, separate from the judicial ones, to adjudicate the controversies that concern the Government and are ruled, thus, by administrative law. Thus, during the 19th century, the *Conseil d'Etat*, originally an advisory body within the Administration, evolved into a full fledged administrative court. In 1953, lower administrative courts with general jurisdiction were organized, and a 1987 law created the administrative courts of appeals.<sup>19</sup> Final decisions issued by the administrative courts may not be appealed to the judicial courts.<sup>20</sup>

The existence of a separate administrative jurisdiction has made it necessary, in turn, to distinguish which of the contracts entered into by the Administration fall under the jurisdiction of the administrative courts (*contrats administratifs*) and which are, instead, to be treated as ordinary contracts subject to the jurisdiction of the judicial courts.<sup>21</sup>

This distinction, recognized by French authors as one of the most complex issues of French administrative law, would require many pages to be explained fully. Initially, all controversies aris-

18. The law of August 16-24, 1790, provided: "Judicial functions are and will always remain distinct from administrative functions. Judges may not, under penalty of forfeiture of office, interfere in any manner with the workings of administrative bodies, nor summon administrators before them in connection (with the exercise) of their function". See BERNARD SCHWARTZ, *FRENCH ADMINISTRATIVE LAW AND THE COMMON-LAW WORLD* 6-8 (1954). On the current construction of this constitutional principle, and its limits, see YVES GAUDEMET, *TRAITÉ DE DROIT ADMINISTRATIF* 331-35 (16th ed. 2001).

19. On the system of administrative courts in France, see RENÉ CHAPUS, *DROIT DU CONTENTIEUX ADMINISTRATIF* 53-97 (9th ed. 2001); see also GAUDEMET, *supra* n.18, at 327-73.

20. GAUDEMET, *supra* n.18, at 346-47.

21. The main French text on the subject is ANDRÉ DE LAUBADÈRE ET AL., *TRAITÉ DES CONTRATS ADMINISTRATIFS* (2d ed. 1984). A more modern but shorter work is LAURENT RICHER, *DROIT DES CONTRATS ADMINISTRATIFS* (3d ed. 2002).

ing under government contracts were allocated to the judicial courts, unless a law declared them subject to the administrative jurisdiction, as happened for cases of public works and supply contracts.<sup>22</sup> When, at the end of the 19th century, the presence of a public service became the criterion to decide in favor of the administrative jurisdiction, the concept of *contrat administratif* was enlarged to include also those contracts involving the performance of a public service.<sup>23</sup> Soon thereafter, however, the *Conseil d'Etat* adopted an additional criterion: the administrative nature of the contract could result also from its terms and conditions, thus giving birth to the notion of the "exorbitant clause".<sup>24</sup>

A not too unfair summary of the current state of the distinction could thus be the following: in addition to those contracts expressly characterized as administrative by a statute, a *contrat administratif* is one which either (i) includes clauses that show that the Government wishes to exercise public law prerogatives with respect to the contractor (the so called "exorbitant clauses"); (ii) is subject to a special legal regime that grants to the Government certain regulatory or control powers (the "exorbitant regime"); or (iii) either entrusts to the private contractor the performance of a public service or is intricately linked with the performance of a public service, so that it can be said that the contract is a form of performance of the public service or that the contractor cooperates in the performance of a public service.<sup>25</sup>

Of course, these rules give rise to many queries. Which clauses are to be considered "exorbitant?" Those unusual in private law or those that would be illegal in private law?<sup>26</sup> When is a specific legal regime "exorbitant",<sup>27</sup> and when is a contract intri-

22. DE LAUBADÈRE, *supra* n.21, at 126.

23. Terrier, *Conseil d'Etat*, Feb. 6, 1903, Lebon 94; Théron, *Conseil d'Etat*, Mar. 4, 1910, Lebon 193. This criterion was revitalized in 1956 in the decisions *Epoux Bertin & Ministre de l'Agriculture c. Consorts Grimouard*, *Conseil d'Etat*, Apr. 20, 1956, Lebon 167, 168.

24. The first case so holding was *Société des Granits Porphyroïdes des Vosges*, *Conseil d'Etat*, Jul. 31, 1912, Lebon 909.

25. I DE LAUBADÈRE, *supra* n.21, at 125-240; RICHER, *supra* n.21, at 84-123.

26. The following clauses have been considered "exorbitant": a grant to the Government of the right to modify the contract unilaterally or to direct the performance of the contractor and the imposition on the contractor of obligations that benefit the public. The Government's right to terminate has not always been considered "exorbitant". See RICHER, *supra* n.21, at 88-90.

27. A 1955 decree regulating mandatory purchases of electricity by the State elec-

cately linked with a public service? These are all issues which have given rise to many precedents of the *Conseil d'Etat* and exercised administrative law writers to the extent that an author declares that court decisions on the subject are sometimes unforeseeable or surprising.<sup>28</sup>

But the complexity of the subject grows when it is realized that a distinction that arose out of the mere need to allocate controversies arising from Government contracts among the two jurisdictional systems, ended up producing a substantive body of law that governs the *contrat administratif* and which, in many crucial aspects, deviates from the one applicable to purely private agreements. Two main ideas are at the base of this special body of law: the superior legal position of the Government vis-à-vis its private counter-party, and the impossibility for the Government of waiving its prerogatives.<sup>29</sup> Thus, for example, the Government has the power to direct the performance of the contractor and to unilaterally amend or terminate the contract for reasons of public convenience, even if these rights are not spelled out in the agreement.<sup>30</sup> On the other hand, the contractor has an implied right to claim relief in the face of unforeseen circumstances which destroy the economic balance of the contract under several doctrines, such as the theory of *imprévision*, a right that does not exist in private agreements when it is not expressly provided.<sup>31</sup>

Of course, those government powers are not untrammelled. The power to terminate, when not expressly contemplated in the agreement, requires the Government to grant full compensation to the contractor, including loss of profits.<sup>32</sup> It is therefore seldom used in the case of concessions of public service where it would be extremely costly.<sup>33</sup> The existence and scope of the

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tricity company from private generators, that granted the Minister jurisdiction to decide controversies arising thereunder, was deemed an "exorbitant regime." *Société d'exploitation électrique de la Rivière du Sant*, *Conseil d'Etat* Jan. 19, 1973, Lebon 48.

28. RICHER, *supra* n.21, at 88, 92.

29. *Id.* at 23; 2 DE LAUBADÈRE, *supra* n.21, 405, 734-35.

30. 2 DE LAUBADÈRE, *supra* n.21 at 383-408, 658-71; RICHER, *supra* n.21, at 219-25, 231-35.

31. 2 DE LAUBADÈRE, *supra* n.21 at 569-630; RICHER, *supra* n.21, at 246-50.

32. 2 DE LAUBADÈRE, *supra* n.21, at 668-71.

33. *Id.* at 737.

power to amend has been the subject of debate.<sup>34</sup> Does it exist at all? Does it include all *contrats administratifs*?<sup>35</sup> What clauses of the contract does it reach? The first two questions are now considered to have been settled in the affirmative by the decision of the *Conseil d'Etat* in *Union des transports*.<sup>36</sup> As to the last question, the majority opinion is that the Government's power is limited to amending the performance obligations of the contractor so that it complies at all times with the changing needs of public service. It does not reach, therefore, the financial aspects of the contract, without prejudice to the contractor's right to demand additional compensation if the amended performance entails costs in excess of those required by the performance originally contemplated by the agreement.<sup>37</sup> There is general accord as well, that the power to amend the contract does not reach a change of its nature, nor can it lead to a substantial alteration of the economic rights of the parties (*bouleversement du contrat*).<sup>38</sup>

While the existence of special rules for Government contracts is common to many countries, the scope and depth of the *contrat administratif* doctrine render the French legal system, as well as those other systems that follow this doctrine, exceptional.<sup>39</sup> Nevertheless, some French authors consider the distinction between the *contrat administratif* and the private law contract artificial,<sup>40</sup> or believe that the differences between them have been exaggerated.<sup>41</sup> Others see a gradual approximation of the two legal regimes, partly due to the impact of the Euro-

34. J. L'Huillier (*Les contrats administratifs tiennent-ils lieu de loi à l'administration?* Dalloz 1953, *Chroniques* 87) rejected the existence of this power.

35. Gastón Jêze had argued that this power existed only in certain contracts (*Le régime juridique du contrat administratif*, 1945 *Révue du Droit Public* 251, at 257).

36. *Union des transports publics urbains et régionaux*, Conseil d'Etat, Feb. 2, 1983, Lebon 33. See discussion in DE LAUBADÈRE, *supra* n.21, at 394-402; see also the note of J.M. Auby in *RÉVUE DE DROIT PUBLIC* 212 (1984).

37. 2 DE LAUBADÈRE, *supra* n.21, at 406-07. See also GEORGE DUPUIS ET AL., *DROIT ADMINISTRATIF* 407 (6th ed. 1999).

38. 2 DE LAUBADÈRE, *supra* n.21, at 407.

39. In addition to Latin America, these include Belgium, Spain and French-speaking African Nations. See RICHER, *supra* n.21, at 28-32; see also UWE LÜTHJE, *LA TECHNIQUE JURIDIQUE DU CONTRAT ADMINISTRATIF EN DROIT COMPARÉ* (1963); Georges Langrod, *Administrative Contracts*, 4 *Am. J. Comp. L.* 325 (1955); and the chapter on Public Contracts written by Colin C. Turpin in *VII INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW*.

40. CHARLES DEBBASCH, *DROIT ADMINISTRATIF* 531 (6th ed. 2002).

41. Thus, for the public works contract, FRANÇOIS LLORENS, *CONTRAT D'ENTREPRISE ET MARCHÉ DES TRAVAUX PUBLICS* 651-68 (1981).

pean Community legislation which does not recognize the distinction between *contrats administratifs* and Government contracts subject to private law.<sup>42</sup> Another attack on the specificity of the *contrat administratif* may yet come from the adoption in France of mechanisms to provide private finance structures for public projects, since the traditional rules of the *contrat administratif* might hamper their implementation according to some views.<sup>43</sup> Finally, a foreign observer may ask whether the correlation between the jurisdictional and the substantive aspects of the doctrine will be affected by a recent French statute declaring that controversies arising under certain contracts with the Government, including some that had always been considered private law agreements, such as insurance contracts, will be hereinafter subject to the administrative jurisdiction.<sup>44</sup>

### III. *THE RECEPTION OF THE CONTRAT ADMINISTRATIF IN ARGENTINA*

Argentina is a federal country and has a Constitution that follows the U.S. model of separation of powers.<sup>45</sup> Its judicial branch, like its U.S. counterpart, possesses the power to interpret the constitutionality of the laws and the constitutionality and legality of the Government's conduct.<sup>46</sup> Administrative courts have therefore been considered incompatible with this system to the extent that their decisions are not themselves subject to judicial review.<sup>47</sup> Thus, while the decisions of the French *Conseil d'Etat* and other administrative tribunals are not subject to review by any French judicial court, those of the few administrative courts that exist in Argentina, such as the federal Tax and Admiralty Courts, as well as all other administrative decisions,

42. RICHER, *supra* n.21, at 32-34.

43. Such were the conclusions of some, but not all of the speakers at a recent SMI seminar on "PPP and Concessions in France" held in Paris on February 24-25, 2003.

44. Law No. 2002-1168 of Dec. 11, 2001, J.O. Dec. 12, 2001, 19703. It declared all "*marchés*," or contracts for the supply of goods, services, or works, executed under the *Code des Marchés Publics* to have the nature of *contrats administratifs*. See RICHER, *supra* n.21, at 108.

45. The federal Constitution was adopted in 1853 and amended in 1860, 1866, 1898, 1957 and 1994. The current text is published in [LIV-C] A.D.L.A. 2731.

46. "Ríos, Gómez y Ríos," CSJN, [1863] 1 Fallos 32; "Tomkinson," CSJN [1864] 1 Fallos 62.

47. See JORGE T. BOSCH, *TRIBUNALES JUDICIALES O TRIBUNALES ADMINISTRATIVOS PARA JUZGAR A LA ADMINISTRACION PUBLICA* (1951) (attacking the constitutionality of administrative courts in Argentina).

can be appealed to the judicial courts.<sup>48</sup>

Apart from constitutional law, other branches of law in Argentina have been influenced by French law, especially the Civil Code enacted in 1869 and based to a great extent on the Napoleonic Code. This happened also with administrative law, in spite of its close relation to constitutional law, because until the middle of the 20th century, U.S. administrative law was not fully developed while, in this field, French law was deemed to be the most advanced in the world. Therefore, the incompatibilities of many of the doctrines of French administrative law with the rules of a Constitution based on the U.S. model, were glossed over or minimized. The existence of a separate system of administrative courts was mimicked by the creation in 1947 of a separate branch of the federal judiciary, entrusted with matters involving administrative law,<sup>49</sup> albeit subject to the paramount position of the Argentine Supreme Court with jurisdiction over all federal courts.

In Argentina, therefore, the constitutional reasons present in France for distinguishing between Government controversies subject to public or to private law for purposes of allocating them to the appropriate jurisdiction do not exist. Nevertheless, even before the creation of the administrative law branch of the federal courts, the doctrine of the *contrat administratif* was followed by administrative law writers. French authors on the subject were widely quoted. Thus, Gaston Jéze's work on the general theory of the Government contracts<sup>50</sup> was the basis for a set of rules governing the concession of public service proposed by

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48. "Fernández Arias c. Poggio," CSJN, [1960] 247 Fallos 646 (holding that judicial review of administrative courts' decisions is constitutionally required). Tax Court decisions are reviewable by the Federal Court of Appeals pursuant to of Law No. 11683, as amended, July 13, 1998, [LVIII-C] A.D.L.A. 2969, Secs. 86, 192; those of the Admiralty Court are reviewable pursuant to Law No. 18870, Dec. 17, 1970, [XXXI-A] A.D.L.A. 9, Secs. 86 and 90.

49. Law No. 12967, Apr. 12, 1947, [VII] A.D.L.A. 248; Law No. 13278, Oct. 1, 1948, [VIII] A.D.L.A. 187. These courts are now called "*tribunales en lo contencioso-administrativo federal*." Their competence is regulated by Law No. 13998, Oct. 11, 1950, [X-A] A.D.L.A. 221, Sec. 45; Decree-law No. 1285/1958, Feb. 4, 1958, [XVIII-A] A.D.L.A. 587, Sec. 42; Law No. 21628, Aug. 26, 1977, [XXXVII-D] A.D.L.A. 3671, Sec. 4.

50. THÉORIE GÉNÉRALE DES CONTRATS DE L'ADMINISTRATION (1934-1936). A Spanish translation of the six-volume treatise of which the aforementioned work formed the three last volumes, was published in Buenos Aires in 1948-1950.

a national convention of lawyers held in 1936.<sup>51</sup> An influential book especially dedicated to the subject of the administrative contracts was published in 1952.<sup>52</sup> The matter has been dealt with in most administrative law treatises, the most authoritative one being that of Miguel S. Marienhoff.<sup>53</sup> It has, in turn, given rise to many law journal articles and court precedents.<sup>54</sup>

With the zeal of disciples, both the original scope of the doctrine of the *contrat administratif* and its consequences, have been expanded by the Argentine commentators. One reason for this expansion has been the efforts of the federal Supreme Court to reduce its original jurisdiction in contractual controversies involving the different provinces (or states) of Argentina. From a comparative law point of view, this is an interesting development, arising from the interplay of a rule taken from the original text of the U.S. Constitution with a French legal doctrine.

The initial text of the U.S. Constitution allocated controversies between a state and a citizen of another state, to the original jurisdiction of the Supreme Court.<sup>55</sup> According to the first laws on federal jurisdiction, this rule applied only to "civil" cases,<sup>56</sup> a term later used by the Supreme Court to distinguish such cases from penal ones.<sup>57</sup> However, when in 1794 the Supreme Court decided against the state of Georgia in a case brought under this rule, Georgia, in response, passed a statute punishing with hanging "without benefit of clergy" anyone who attempted to enforce that Supreme Court decision.<sup>58</sup> Soon after, the Constitution was amended and the rule was changed.<sup>59</sup>

51. See the proposal of the 4th National Convention of Lawyers in 61 J.A.-Doctrina-90 (1938).

52. MIGUEL A. BERCAITZ, *TEORIA GENERAL DE LOS CONTRATOS ADMINISTRATIVOS* (2d ed. 1980).

53. 3-A *TRATADO DE DERECHO ADMINISTRATIVO* (3d ed. 1982-1983). See also RAFAEL BIELSA, 2 *DERECHO ADMINISTRATIVO* 142-53 (5th ed. 1955); MANUEL M. DIEZ, 2 *DERECHO ADMINISTRATIVO* 435-59 (1965).

54. A review of the Supreme Court decision on the subject can be found in Pedro J. J. Coviello, *El Criterio de Contrato Administrativo en la Jurisprudencia de la Corte Suprema de Justicia de la Nación*, 111 E.D. 845 (1985).

55. U.S. CONST. art. III, Sec. 2, cls. 1, 2.

56. The Judiciary Act of 1789, Sec. 13, 1 Stat. 73, 80-81.

57. See CHARLES A. WRIGHT, *FEDERAL COURTS* 766 (4th ed. 1983) (citing *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265 (1888)).

58. *Chisholm v. Georgia*, 2 U.S. 419 (1794). See ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 330 (1989).

59. U.S. CONST. amend. XI.

The Argentine Constitution of 1853 copied in this respect the original text of the U.S. Constitution.<sup>60</sup> Although the 1853 Constitution was subject to several amendments, this jurisdictional rule remains today as originally drafted. The early laws that organized the Argentine federal court system also copied the U.S. statutes on the subject, restricting the original jurisdiction of the Supreme Court in controversies involving a province of Argentina with citizens of another province to “civil” cases.<sup>61</sup> As these controversies multiplied during the 20th century, there was a danger that the Supreme Court would become swamped with the contractual litigation of the provinces tried by it under its original jurisdiction. The Court then began interpreting “civil” not in opposition to penal, as was the construction given in the United States, but in opposition to “administrative.”<sup>62</sup> Therefore, by labeling a provincial contract as “administrative”, the Argentine Supreme Court has been able, effectively, to refuse to hear many of the contractual controversies involving a province and citizens of a different province. Given the inappropriateness of said constitutional rule in today’s litigious world, the construction can be defended as protecting the Supreme Court from an overcharged docket. However, an indirect result has been the expansion of the concept of the “administrative contract,” as the Court has adopted a very broad definition of it — one, which, as will be seen, can encompass almost any contract executed by a governmental agency. Traditional legal reasoning in Argentina would refuse to accept a jurisdictional concept for the administrative contract and a different concept for substantive law purposes. Thus, the understandable effort of the Supreme Court to manage its docket rationally has had the indirect consequence of expanding greatly the scope of the administrative contract doctrine without providing much guidance as to its substantive regime, as reported cases dealing with jurisdictional issues do not always require a decision on the merits.<sup>63</sup>

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60. CONST. ARG. art. 117.

61. Law Decree-Law No. 1285/1958, Feb. 4, 1958, [XVIII-A] A.D.L.A. 587, Sec. 24.

62. “Provincia de Buenos Aires c. S.A. Frigorífico Anglo,” CSJN [1947] 209 Fallos 514; “Provincia de Corrientes c. S.R.L. Capri,” CSJN [1975] 293 Fallos 412; “S.A. Las Petaquitas A.C.e I. v. Provincia de Buenos Aires,” CSJN [1976] 296 Fallos 34; “Contípel Catamarca,” CSJN [1988] 311 Fallos 2065.

63. See, e.g., “Lindoro I.C.S.A.,” CSJN [1984] 306 Fallos 328; “Inforex,” CSJN [1984] 306 Fallos 762.

#### IV. *THE CURRENT STATUS OF THE ADMINISTRATIVE CONTRACT DOCTRINE IN ARGENTINA*

##### A. *The Definition of the Administrative Contract*

A contract executed by a governmental agency is to be considered administrative, pursuant to the definition adopted by the Supreme Court, when the performance of the private contractor fulfills a "public purpose," such as rendering services used for the carrying out of the telecommunications public service.<sup>64</sup> Definitions offered by administrative law scholars are equally broad: the satisfaction of a public need, a direct and immediate relation with "specific" State functions (i.e., those considered of a truly public nature), the involvement of an administrative function, the presence of a public interest, are all factors that have been considered sufficient to impart an administrative nature to a Government contract.<sup>65</sup>

In addition to this definition of the administrative contract by reason of its object, Argentine law has also adopted the French concepts of the exorbitant clause<sup>66</sup> and the exorbitant regime.<sup>67</sup> Thus, a clause allowing the State railway company to require the withdrawal of advertisements on billboards placed within its premises when they violate ethical, aesthetic, or safety reasons, has been considered "exorbitant" and sufficient to determine the administrative nature of the contract.<sup>68</sup> An exorbitant regime has been found in a rental of space in an airport, as it was subject to laws granting the Government special eviction rights.<sup>69</sup> Pursuant to an opinion of the federal Attorney General, even a legal regime enacted after the execution of the contract may be sufficient to characterize a contract as "administra-

64. "Cinplast," CSJN, [1993] 316 Fallos 212. See also "Organización Coordinadora Argentina," CSJN [1996-E] L.L. 76.

65. See BERCAITZ, *supra* n.52, at 246-247; 2 BIELSA, *supra* n.53, at 142-53; 3-A MARIENHOFF, *supra* n.53, at 56-57; Juan Carlos Cassagne, *La sustantividad del Contrato Administrativo y sus principales consecuencias jurídicas*, 15-16 REVISTA DE DERECHO ADMINISTRATIVO 143 (1994); HÉCTOR ESCOLA, 1 TRATADO INTEGRAL DE LOS CONTRATOS ADMINISTRATIVOS 127-31 (1977).

66. See Lindoro; *Inforex*, *supra* n.63.

67. "Lopez," CSJN [1984] 306 Fallos 731; "Fernando Horacio Serra," CSJN [1993] 316 Fallos 2454 (1993); "Yacimientos Petrolíferos Fiscales S.A. c. Construcciones Sademi S.A.," CSJN [1993] 316 Fallos 2771.

68. "Clan SACIFI," CSJN [1989] 312 Fallos 696, 700.

69. *López*, *supra* n.67.

tive” for jurisdictional purposes.<sup>70</sup> Thus, a contract born as a private agreement could see its nature change midstream into an administrative one by fiat of the Government.

As an observer can readily see, it is difficult to imagine a Government contract that, directly or indirectly, does not fulfill a public purpose, be it merely the replenishing of the Treasury’s coffers in a sale of Government property contracted under private law rules. The definitions are also subjective in nature, as they depend on the narrow or broad role of the State preferred by the interpreter: what is a truly public function when for several decades during the 20th century the Argentine Government operated most of the utilities, the railroads and the main local airline? The concepts of exorbitant clause and exorbitant regime are not any clearer in Argentina than in France, as the discussion is punctuated with citations of French authors.<sup>71</sup> The net result is that it is difficult to affirm that any given Government contract is not of an administrative character. As a comparative law scholar says, “[S]uch fictitious splitting of the nature of administrative activity is considered a mere myth, as it does not cover the fact that this activity always seeks the public welfare.”<sup>72</sup>

The problem is not so serious with respect to those contracts that have been traditionally considered “administrative” by reason of their object or purpose. These include the construction of public works, the supply of goods or services to the Government, the contract of public employment, the concession to operate a public service, the concession to use public lands and the concession to build and exploit a public work (for example, a toll road). Private contractors or persons entering into these agreements know beforehand that they will be subject to administrative law, and either a specific law, such as the Public Works Law,<sup>73</sup> government regulations,<sup>74</sup> or, normally, the contractual documents themselves, set out in some detail the powers of the

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70. *Contipel Catamarca*, *supra* n.62.

71. See, e.g., 3-A MARIENHOFF, *supra* n.53, at 74-80.

72. LANGROD, *supra* n.39, at 328.

73. Law No. 13064, Oct. 13, 1947, [VII] A.D.L.A. 404, as amended.

74. Decree No. 436, June 5, 2000, [LX-C] A.D.L.A. 2869 (governing contracts for the supply of goods to the federal Government); Law No. 25164, June 10, 1999, [LIX-E] A.D.L.A. 5252 (governing public employment with the federal Government).

Government and the countervailing rights of the private contractor.

The problem is more serious, instead, with those other contracts that are defined as "administrative" by the government lawyers or by a court only after they have been executed, to the surprise of the private counter-party. That such surprises may arise can be seen from a list of the agreements that have been classified as "administrative contracts" by the courts or by different authorities. They include a deposit in a provincial State bank,<sup>75</sup> the distribution of Government mail by a private courier,<sup>76</sup> a contract for the exploitation of billboard space for commercial advertising,<sup>77</sup> the sale by the Government of low-cost housing,<sup>78</sup> Government loans,<sup>79</sup> the production of programs for a State TV channel,<sup>80</sup> oil concessions,<sup>81</sup> and leases of private real estate to house State agencies.<sup>82</sup>

A recent regulation, issued by the federal Executive under powers delegated by Congress, has expanded the concept of the administrative contract by providing that all Government contracts are presumed to be administrative unless it is otherwise stipulated or it results otherwise from the dossier.<sup>83</sup> The concept of administrative contract, therefore, tends more and more to equate that of the Government contract, a position that has been argued by certain Argentine scholars: all Government contracts would thus be administrative contracts.<sup>84</sup> Some recent Supreme Court decisions could be construed as adopting this position.<sup>85</sup>

75. "Virginia Clara Aquino," CSJN [1991] 314 Fallos 810.

76. *Organización Coordinadora Argentina*, *supra* n.64.

77. *Clan SACIFI*, *supra* n.68.

78. "Acosta," CNFed [1989-B] L.L. 295.

79. *Contipel Catamarca*, *supra* n.62.

80. "Radiodifusora Buenos Aires," CSJN [1993] 316 Fallos 225, 233 (Cavagna, Martínez and Barra, JJ., dissenting).

81. H. Daniel Casal, *Marco jurídico de los contratos petroleros según el plan Houston*, [1989-D] L.L. 1237, 1240.

82. 3-A MARIENHOFF, *supra* n.53, at 120-21.

83. Decree No. 1023, Aug. 16, 2001, [LXI-D] A.D.L.A. 4144, Sec. 1.

84. RODOLFO BARRA, 1 CONTRATO DE OBRA PÚBLICA 37-47 (1984).

85. "Ingeniería Omega," CSJN [2000] 323 Fallos 3924. The Supreme Court stated that the validity of administrative contracts depends on the fulfillment of formal and procedural requirements provided by applicable law, a statement which is true of all Government contracts, whether administrative or not, since the rules on competitive bidding do not distinguish between the two kinds of contracts.

B. *The Jurisdictional Rules Applicable to Administrative Contracts*

Controversies arising with respect to an administrative contract entered into with the federal Government fall under the jurisdiction of the federal courts with competence in administrative matters.<sup>86</sup> When such a contract has been entered into with a provincial State agency, provincial laws either require that the case be brought before the provincial Supreme Court (the traditional rule)<sup>87</sup> or before a special branch of the judicial courts with competence in administrative matters (the new rule enacted in some of the major provinces given the increase of this type of litigation).<sup>88</sup> In all cases, therefore, the judicial courts have competence to decide contract cases involving the Government and other public agencies. At the federal level (but not in some provinces according to their constitutions),<sup>89</sup> the existence of a separate branch of courts to rule on administrative law matters is not a constitutional requirement, as it in France, so a law could unify all the contractual litigation of the Government and thus, do away with the jurisdictional basis of the distinction.

In cases of doubt, pragmatism induces the private party to bring the lawsuit before the courts with administrative competence (or the relevant provincial court, if applicable), unless the favorable decision of the case would depend on the contract not being defined as "administrative". Practice has shown that Government lawyers seldom oppose the jurisdiction of the courts with administrative competence, while they generally challenge that of the ordinary courts, except in the clearest of cases. Such a challenge entails not only a delay until resolved (and as the matter may go up to the federal Supreme Court in cases involving the federal Government, this delay can be long), but may also force the private party losing the competence issue to pay

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86. *Lindoro*, *supra* n.63; "Jorge Papadopulos," CSJN [1984] 306 Fallos 333; *López*, *supra* n.67; *Inforex*, *supra* n.63; "Talleres Carmona," CSJN [1984] 306 Fallos 856; "E.N.Tel c. Cía. de Seguros del Interior," CSJN [1986] 308 Fallos 229.

87. The province of Mendoza employs such a traditional rule. *See* Prov. Law No. 3918, Aug. 9, 1973, [XXXIII-D] A.D.L.A. 4361, Sec. 1.

88. The province of Córdoba employs the new rule. *See* Prov. Law No. 7182, Nov. 21, 1984, [XLIV-D] A.D.L.A. 4405, *amended by* Prov. Law 7818, Dec. 11, 1989 [L-A] A.D.L.A. 749, Sec. 5. For the province of Santa Fe, *see* Prov. Law No. 11330, Dec. 26, 1995 [LVI-B] A.D.L.A. 3253, Sec. 2.

89. Sec. 166 of the 1994 Constitution of the province of Buenos Aires requires the existence of a special division of courts with competence in administrative matters. Aug. 22, 1994 [LIV-D] A.D.L.A. 5120.

legal costs to the Government lawyers. Thus, the practical advantages of choosing the courts with administrative competence are clear. This attitude strengthens, in the long run, the trend towards the expansion of the concept of "administrative contract," as more and more Government contract cases are tried by the federal courts with administrative competence and indexed in the law reports under that title.

*C. The Substantive Regime of the Administrative Contract:  
the Government Powers*

Defining a Government contract as administrative implies that it is subject to administrative law and thus, that the rights of the private contractor are in a "relation of subordination" vis-à-vis those of the Administration, whose prerogatives are considered "powers" and not mere "rights" since they cannot be waived by it.<sup>90</sup> It follows, therefore, that private law rules (the Civil and the Commercial Codes) will not necessarily apply to the contract which means, essentially, that the Civil Code rule according to which a contract binds the parties thereto as a law,<sup>91</sup> generally does not apply against the Government.<sup>92</sup> However, this does not result, in many cases, in the contract being subject to a clear and precise body of law. There is no general law on Government contracts with specific rules for each type of contract. Public works contracts have a special law that sets a limit to the Government's right to amend the contract unilaterally, and provides for the consequences of most cases of termination.<sup>93</sup> Supply agreements are governed by administrative regulations which provide similar rules.<sup>94</sup> Consulting agreements with the Government are

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90. "Meridiano," CSJN [1979] 301 Fallos 292, 303. See also 3-A MARIENHOFF, *supra* n.53, at 398.

91. Cód. Civ. Sec. 1197.

92. Several decisions, however, declare this rule applicable to the private contractor. See "Intecar," CSJN [1979] 301 Fallos 525; "José Antonio Montes," CSJN [1992] Fallos 315-1760; "Sideco," SCNFed. [1996-D] L.L. 122. Cf. "Marocco y Cía," CSJN [1989] 312 Fallos 84 (1989) (declaring it applicable to the Governmental party).

93. Law No. 13064, Sec. 53 allows the contractor to terminate if the amendment exceeds twenty percent of the total value of the contract. Secs. 51 and 54, respectively, regulate the consequences of termination by the Administration and by the contractor. Public works concessions are governed by Law No. 17520, Nov. 13, 1967, [XXVII-C] A.D.L.A. 2813.

94. Decree No. 436, *supra* n.74, Annex, Sec. 99 allows increases of up to twenty percent, and reductions of up to ten percent of the original amount of the contract.

also subject to a special law.<sup>95</sup> Concessions to operate public utilities have no general law governing them,<sup>96</sup> but the relevant agreements normally spell out the powers of the Government to amend the obligations of the concessionaire and to terminate the contract. Other Government contracts, however, that lack such ground rules would still be subject, under the administrative contract doctrine, to the powers of the governmental party to amend or terminate the contract unilaterally for reasons of public convenience, even when the agreement does not include them. These powers are considered derived from the administrative nature of the contract and are thus deemed incorporated as implied exorbitant clauses, even when not spelled out in the contractual documents.<sup>97</sup> In such "other" Government contracts, the extent of the power of amendment is vague, as the authors can only say that it should be applied taking into account the circumstances of each contract.<sup>98</sup> The Supreme Court has held that the Government cannot waive these prerogatives by contract.<sup>99</sup>

The net result of imprecision in both the definition of the "administrative contract", and in the substantive regime to which it is subject, is that except to a certain extent in the aforementioned contracts traditionally considered as "administrative", the private party to a Government contract cannot know with precision which are its rights and obligations, and whether it will be required to obey the changes introduced by the Government and to suffer the termination of its agreement if so decided by the Government by reasons of public interest.

An additional problem that results from the characterization of a given Government contract as "administrative," is that all, or at least the most significant, of the Government's decisions taken along the life of the contract, are considered "administrative acts."<sup>100</sup> As such, pursuant to the federal Administrative

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95. Law No. 22460, Mar. 27, 1981, [XLI-B] A.D.L.A. 1688, Sec. 18 allows the Government to introduce amendments up to twenty percent of the value of the contract.

96. A draft of a law on concessions and licenses was prepared by a Commission appointed by the Ministry of Justice in 1998, but was never enacted. See 246 *Revista Argentina del Régimen de la Administración Pública* 133 (1999).

97. 3-A MARIENHOFF, *supra* n.53, at 395, 403.

98. *Id.* at 398.

99. *Meridiano*, *supra* n.90.

100. Pedro J.J. Coviello, *La teoría general del contrato administrativo a través de la juris-*

Procedure Law (“APL”),<sup>101</sup> they enjoy a presumption of validity, demand immediate compliance, and become firm and not subject to judicial review if unchallenged within a short time (normally fifteen business days) by means of an administrative appeal.<sup>102</sup> Furthermore, if this challenge is rejected by the Administration, the rejection must itself be submitted for judicial review within ninety business days, or the same legal consequence would follow.<sup>103</sup> According to case law, lack of a timely challenge to a Government decision also defeats the contractor’s claim for damages caused by such decision.<sup>104</sup>

Such a regime affects the right of the contractor to obtain judicial review of the Government’s decisions in several ways. First, the contractor may have assumed mistakenly that the contract was not “administrative,” and therefore, it may have not pursued its administrative and judicial remedies in the short periods described above, treating its controversy with the Government as a private contractual matter, subject to the normal statute of limitations periods. In this case, the claim of the contractor will be met with the arguments of Government’s counsel to the effect that the conduct of the Government under the agreement must be considered valid for lack of timely challenge, so that no damages or other additional compensation should be awarded to the contractor. Second, even if the private party assumed from the start the administrative nature of the contract, not many contractors wish to antagonize their governmental counter-party by bringing against it several lawsuits during the life of the agreement, or to incur the substantial cost involved in such litigation, preferring instead to attempt a negotiated solu-

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*prudencia de la Corte Suprema de Justicia de la Nación, in 130 AÑOS DE LA PROCURACIÓN DEL TESORO DE LA NACIÓN 1863-1993 98, 120-25 (1994).*

101. Decree-law No. 19549, Apr. 3, 1972, [XXXII-B] A.D.L.A. 1752, as amended [hereinafter APL]. The restated text of its implementing regulation was approved by Decree No. 1883, Sept. 17, 1991, [LI-D] A.D.L.A. 3946 [hereinafter Implementing Regulation].

102. APL, *supra* n.101, Secs. 12, 23; Implementing Regulation, *supra* n.101, Sec. 90. In France, the rule that recognizes exceptions is that the validity of administrative decisions issued during the life of a contract cannot be challenged by the contractor, but may open a claim for an indemnity. 2 DE LAUBADÈRE 1001, 1003-07, 1056-61.

103. APL, *supra* n.101, Sec. 25. The application of this rule to administrative decisions taken in the course of a contract’s performance was first rejected by the Supreme Court in “Mevopal,” CSJN [1985] 307 Fallos 2216, but was subsequently admitted in “Gypobras,” CSJN [1995] 318 Fallos 441.

104. “Petracca,” CNFed. [1986-D] L.L. 10.

tion. And finally, the need to comply with all the orders imparted by the Government during the life of the contract, until set aside in a lengthy judicial review process, can well put the contractor into bankruptcy, except in the rare cases where a court injunction suspending the implementation of the order is obtained at the outset.<sup>105</sup>

Refusal to apply Civil Code rules results also in the limited scope recognized in the *exceptio non adimpleti contractus* in administrative contracts. This defense, originating in Roman law and now based on Section 1201 of the Civil Code, prevents a party in default from demanding performance by the other party to the contract. The mere existence of this defense in favor of the private contractor is disputed in administrative contracts and even if admitted, according to the prevailing view, the defense cannot be invoked unless the Government's default makes it impossible for the contractor to comply with its own obligations.<sup>106</sup> This is a strict but also imprecise test for the private contractor to meet. An incorrect pleading of the defense would make the contractor who suspends performance in the meantime, liable to be adjudged in default. In these times of generalized default of its obligations by the Argentine Government, it is not surprising that many Government contracts end before completion with reciprocal allegations of default, which the courts have then to sort out.

All these problems have been aggravated by the recent regulation cited above, that has significantly strengthened the Government powers in its contracts.<sup>107</sup> Thus, the power to amend exists now in all administrative contracts and with respect to all clauses, provided it is exercised "reasonably," with the only quantitative limit that if it affects the amount of the contractor's performance, it cannot exceed twenty percent of the originally agreed amount.<sup>108</sup> The power of unilateral termination by the Government for reasons of public convenience is also recognized in all administrative contracts, while loss of profits is ex-

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105. For an exceptional case where such suspension was allowed, see "Tienda León," CNFed., [1996-D] L.L. 127.

106. See 3-A MARIENHOFF, *supra* n.53, at 376-85; see also *Cinplast*, *supra* n.64, at 217. In France, in a *contrat administratif*, the private party cannot oppose this defense.

107. Decree No. 1023, *supra* n.83, Sec. 12.

108. *Id.*

pressly denied to the contractor in such cases.<sup>109</sup> Finally, the rules of the APL on administrative acts, which empower the Administration to revoke or amend administrative acts unilaterally for reasons of public convenience, albeit with the right of compensation in favor of the private party, have been made directly applicable to Government contracts.<sup>110</sup> If any doubts still remained as to the extent of the Government's powers, they have now been definitively quashed in favor of the Government.

D. *The Substantive Regime of the Administrative Contract:  
the Countervailing Rights of the Contractor*

The above description would be unfair if an important right of the contractor that, in effect, countervails the Government's prerogatives, is not mentioned. This is the right to maintain what is known as the "economic equation" of the contract, i.e., a balance between the cost of the performance required from the contractor, and the benefits it receives from the agreement.<sup>111</sup>

This balance can be altered by several causes, all of which give rise to this right of the contractor, although under different theories mostly taken from French law. The first cause comprises the changes in the specific contract introduced by the exercise of the Government's right to amend the agreement unilaterally: the compensation due to the contractor simply protects what in loose terms may be called the "mutuality of the agreement."<sup>112</sup> The second, is the effect on the contract of general Government measures that have a significant and prejudicial effect on the economy of the contract: the *fait du prince* of French administrative law.<sup>113</sup> Another cause is the impact on the contract of unforeseeable economic changes that disrupt the contract and subject the private party to a significant loss, such as a sudden major devaluation. We are here in the field of the *théorie de la imprévision*.<sup>114</sup> Finally, the contractor may face unforeseen

109. *Id.*

110. *Id.* Sec. 36; see APL, *supra* n.101, Sec. 18, on the Government's power to amend or revoke an administrative act for reasons of convenience.

111. See 3-A MARIENHOFF, *supra* n.53, at 469-73.

112. *Id.* at 475-76.

113. *Id.* at 476-500. For the discussion of French law, see 2 DE LAUBADÈRE, *supra* n.21, at 515-58. No comparison is offered in this paper with the U.S. sovereign acts doctrine. For discussion of this particular topic, see NASH & CIBINIC, *supra* n.2, at 365-73.

114. 3-A MARIENHOFF, *supra* n.53, at 500-48. For the discussion of French law, see 2 DE LAUBADÈRE, *supra* n.21, at 559-630. Since a 1968 amendment of Sec. 1198 of the

obstacles in its performance, such as unexpected sub-soil conditions. These are the "unforeseen physical difficulties" (*sujétions imprévues* in French law) that also entitle the contractor to an increase in compensation, when they exceed a certain threshold.<sup>115</sup> The precise conditions for the application of these theories, as well as the consequences of their successful pleadings, have produced abundant literature and precedents in France as well as in Argentina, which exceed the scope of this Article.

## V. A COMPARISON WITH OTHER SYSTEMS

Given the French origin of the doctrine, it may be relevant to inquire how far Argentine law could be said to have deviated from it. Additionally, some tentative comparisons with the U.S. legal regime for federal Government contracts will be offered.

### A. *Administrative Contract and Contrat Administratif*

The Argentine regime of the administrative contract can be said to go far beyond its French source, not only in the breadth of the doctrine, but also in the substantive rules derived from it.

The concept of administrative contract that results from the definitions applied by the Argentine courts or proposed by its authors is broader than the French notion of the *contrat administratif*. Given the imprecision inherent both in the concept of public service<sup>116</sup> and in the link that it must exhibit with the contract to characterize the latter as *administratif*, it is sterile to argue whether the formulas used in Argentine law for such purpose are more or less precise than the French parameters. However, these formulas do allow an expansion of the concept beyond the scope of the French doctrine, as can be seen in the example of a lease of a private property to house a State agency, which in France is the typical case of a Government contract subject to the French Civil Code, while in Argentina would be considered an administrative contract by the leading author on the sub-

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Civil Code, parties to private contracts in Argentina can also invoke a similar theory, thus eliminating, or at least attenuating significantly, the difference between the legal regimes of administrative and private contracts, that in France remains noticeable.

115. 3 BARRA, CONTRATO DE OBRA PÚBLICA 1178-82 (1988). For the discussion of French law, see 2 DE LAUBADÈRE, *supra* n.21, at 499-513.

116. The *service public* is, simultaneously, one of the most important and one of the most controversial concepts of French administrative law. DUPUIS *et al.*, *supra* n.37, at 477.

ject.<sup>117</sup> The presumption of a Government contract being administrative contained in the recent Argentine regulation on Government contracts<sup>118</sup> is opposite to the one that would apply in France, according to some authors.<sup>119</sup>

The Argentine doctrine on the power of unilateral amendment is also broader than the French rules on the *contrat administratif*. This is true with respect to the scope of this power, given that the Argentine courts have admitted that it could reach any clause of the contract,<sup>120</sup> a rule that is now expressly provided by the recent regulation on Government contracts.<sup>121</sup> Meanwhile in France, the changes that the Government may introduce in the agreement can only affect the performance of the contractor and only to the extent necessary to cater to the new needs of the public service.<sup>122</sup> It may be queried whether the same conclusion is not true as well with respect to the foundation of this power. This is because the leading French treatise on the subject includes language stating that the power to amend the contract must be based on norms, whether constitutional, statutory or regulatory, empowering the Administration to act in order to protect the public interest. Contrary to what is held in Argentina, de Laubadère argues that the mere fact that the Administration has executed a contract, is not sufficient to create such power.<sup>123</sup> One may thus wonder whether in France the contract is administrative because the Government has the power to amend it unilaterally (the "exorbitant regime"), while in Argentina the Government has the power of unilateral amendment because the contract is considered to be an administrative one. Given the already mentioned vague definitions of this concept, the legal uncertainty resulting from the Argentine doctrine is significant.

Finally, as indicated above, in France, unilateral termination for reasons of public interest entitles the private contractor to be

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117. Compare 3-A MARIENHOFF, *supra* n.53, at 120-21, with 1 DE LAUBADÈRE, *supra* n.21, at 341-42; see also RICHER, *supra* n.21, at 87.

118. Decree 1023, *supra* n.83, Sec. 1.

119. GEORGES VEDEL & PIERRE DELVOLLE, *DROIT ADMINISTRATIF* 392-93 (12th ed. 1992).

120. *Mevopal*, *supra* n.103.

121. Decree 1023, *supra* n.83, Sec. 12.

122. See *supra* n.37 and accompanying text.

123. Compare 2 DE LAUBADÈRE, *supra* n.21, at 390-92, with 3-A MARIENHOFF, *supra* n.53, at 395-403.

compensated also for loss of profits, when that power had not been expressly provided in the agreement.<sup>124</sup> This rule is expressly rejected by the recent Argentine regulation.<sup>125</sup>

### B. *Administrative Contracts and U.S. Government Contracts*

In spite of the apparent similarities mentioned above,<sup>126</sup> the differences between the doctrine of the administrative contract and the U.S. legal regime for Government contracts appear to be stark. There is, first, a very different general emphasis. Instead of language on the contractor being subordinated to the Government, an Argentine observer is surprised to find in U.S. Government's contract law repeated statements on the general applicability of the same basic principles that govern contracts executed among private parties: "When the United States becomes a party to a commercial transaction, it incurs all the responsibilities of a private person under the same circumstances . . . The Government's contractual liability must be decided in the same manner as that of a private party in the same circumstances".<sup>127</sup> Even allowing for the special rules already mentioned, as the U.S. Supreme Court has said: "the United States does business on business terms".<sup>128</sup>

The second main difference is the restricted scope of any governmental implied rights, given that for a Government right to exist, the inclusion of the appropriate clause provided by the FAR is needed. Even with respect to those clauses considered by the courts to express a fundamental or significant procurement policy and thus read into the contract when not clearly and legally excluded,<sup>129</sup> the text is the one that was written in the regulations as they existed when the contract was executed, regard-

124. See 2 DE LAUBADÈRE, *supra* n.21, at 667-71.

125. See Decree 1023, *supra* n.83, Sec. 12.

126. See *supra* n.14-17 and accompanying text.

127. MASSENGALE, *supra* n.2, at 8 (*citing* *Cooke v. United States*, 91 U.S. 389 (1875) and *Krupp v. Federal Housing Administration*, 285 F. 2d 833 (1st Cir. 1961)). See also MITCHELL, *supra* n.8, at 144-45 (*citing* *Lynch v. U.S.*, 292 U.S. 571, 579 (1934) ("When the United States enters into contractual relations its rights and duties therein are governed generally by law applicable to contracts between private individuals")).

128. *United States v. National Exchange Bank*, 270 U.S. 527, 534 (1926).

129. See NASH & CIBINIC, *supra* n.2, at 77-79. See also *G.L. Christian & Assoc. v. U.S.*, 160 Ct. Cl. 1, 312 F.2d 412, *motion for rehearing and reargument denied* 375 U.S. 954 (1963), *rehearing denied* 376 U.S. 929 (1964), *motion for leave to file second petition for rehearing denied* 377 U.S. 1010 (1964), 170 Ct. Cl. 902 (1965), *cert. denied* 382 U.S. 821 (1965).

less of any subsequent changes to its text.<sup>130</sup> Therefore, the contractor is, or may be, on notice of the precise rules that will govern the agreement at the time of execution.

The third main difference is the imprecision of the Argentine notion of the administrative contract, which creates an important area of doubt on the type of contracts subject to the Government's exorbitant contractual powers, as it allows the Government to include within it almost any of its contractual relationships with which it wishes to tamper after the contract has been executed. While in the United States, there have been some controversies on the exact reach of the FAR, the area of doubt seems, to a foreign observer, much smaller in comparison with the types of contracts which have led to controversies in Argentina.<sup>131</sup>

From these main differences others have followed. Such is the case of the undefined coverage of the amendments that the Argentine Government can introduce in the different contracts, as the rule is a vague one (amendments should be "reasonable")<sup>132</sup> and no greater precision is generally found in the contract clauses themselves. This contrasts with the "changes clauses" of the FAR, which relate mainly to the performance of the contractor.<sup>133</sup> Still another difference is whether the Government can waive, in the agreement, its contractual powers or rights. The Argentine Supreme Court has held in the negative,<sup>134</sup> while such a waiver is expressly admitted by the FAR albeit subject to certain procedural safeguards.<sup>135</sup>

Differences can also be found with reference to the Government's power of termination for reasons of public convenience. In the United States, when the right is not contemplated in the agreement, termination by the Government for such reasons would constitute a breach entitling the contractor to be compen-

130. See KEYES, *supra* n.2, at 41-42.

131. NASH & CIBINIC, *supra* n.2, at 3-13. See also text accompanying nn.75-82.

132. Decree 1023, *supra* n.83, Sec. 12.

133. See F.A.R., *supra* n.3, Sec. 52.243-1 (fixed price supply contracts); *Id.* Sec. 52.243-4 for fixed price construction contracts. See NASH & CIBINIC, *supra* n.2, at 381-485 (observing that contractors normally do not contest change orders due to extra compensation that they entail).

134. See *supra* n.90. The same rule has been advanced in France. See 2 DE LAUBADÈRE, *supra* n.21, at 405, 734.

135. Deviations from the F.A.R. are allowed. F.A.R., *supra* n.3, Sec. 1.402. See also KEYES, *supra* n.2, para. 1.8.

sated also for loss of profits,<sup>136</sup> while in Argentina compensation for loss of profits was doubtful even before the recent regulation excluded it expressly.<sup>137</sup> It is true that the FAR requires the inclusion of a clause granting such right to the Government and excluding compensation for loss of profits, and that this is one of the rules considered so fundamental in Government contracts practice, that it was held to apply even if not expressly provided in the agreement. However, it appears that a waiver of this right through a properly authorized deviation is possible.<sup>138</sup>

In Argentina, instead, such a right cannot be waived by the Government,<sup>139</sup> although the consequences of its exercise can be defined in the contract and such a definition would probably be upheld. In practice, however, even before the recent regulation excluded compensation for loss of profits, it was very difficult to include such a clause, as Government lawyers were usually very reluctant to admit such legal consequences. Moreover, the broad and imprecise definition of the administrative contract would allow the Government to claim this power in contracts, such as roads financed with a toll system or oil concessions, where long term investments are made by the private contractor and thus termination of the contract followed by protracted litigation can lead to the bankruptcy of the contractor. Finally, as will be seen below, the economic and political environments in which this power is applied are very different in Argentina and the United States.

#### VI. THE PRACTICAL IMPACT OF THE ADMINISTRATIVE CONTRACT DOCTRINE

The summary of the Argentine doctrine of the administrative contract offered above, would lead an observer to conclude that this doctrine allows the oppression of Government contractors. Indeed, it could be asked why any private company would wish to enter into such type of legal relationship. The real situation is, however, more nuanced.

This is because the courts, provided the contractor has

136. See NASH & CIBINIC, *supra* n.2, at 1073-74.

137. The Supreme Court had recognized this right in "Eduardo Sánchez Granel Obras de Ingeniería," CSJN [1984] 306 Fallos 1409, but then restricted it somewhat in "J.C. Ruiz Orrico," CSJN [1993] 316 Fallos 1025.

138. NASH & CIBINIC, *supra* n.2. See also Christian, *supra* n.129.

139. Meridiano, *supra* n.90, at 303.

respected the applicable time limits in filing its appeals, generally apply the doctrine equitably, recognizing the prerogatives of the Government, but also insisting on the respect of the contractor's economic rights affected thereby. It may be even queried whether a generous application of the countervailing theories described in the previous section (coupled, sometimes, with a weak legal defense by Government's counsel for the reasons explained below) leads, in effect, to an unfair shifting of the risks of the agreement on to the Government. Reviewing some precedents, an observer is apt to react as a U.S. specialist on contract law did with respect to court decisions on Government contracts: "Government contractors have had unusual success in recouping unexpected costs of performance".<sup>140</sup>

In some cases, however, although this is not clearly spelled out, the courts appear to use the doctrine of the administrative contract to curb a perceived drain on the public Treasury caused by improvident or incorrect Government officers. In these cases, the courts have resorted to the theory of the administrative contract to escape the solution that would result from the application of private law rules, when they consider such solution inappropriate. Thus, in *Meridiano*,<sup>141</sup> where a private party had been granted a concession to use public land for three years with the right to extend it for seven successive annual periods, and where the Government had terminated the contract for reasons of public convenience during the first annual extension, the Supreme Court ruled that, being the contractual relation of an administrative nature, parallel to the concessionaire's right to extend the agreement, there was the right of the Government to terminate it. The Court thus avoided awarding to the concessionaire loss of profits for six years, which the concessionaire claimed as being the whole term of extensions still not exercised, and limited such right to the profits of the annual period then running. As can be readily seen, a right to extend a contract is tantamount to an obligation of the other party to suffer such extension. By characterizing the contract as "administrative," the Supreme Court was thus able to destroy the contractual right of the concessionaire and protect the Treasury from paying a substantial award of damages.

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140. KEYES, *supra* n.2, at 719 (citing Professor Farnsworth).

141. *Meridiano*, *supra* n.90.

As only a small percentage of contracts generate controversies that reach the courts, the impact of the doctrine should also be considered in the field of out-of-court relations. It is here that one can observe the detrimental effects of the doctrine with more clarity.

Because of the presence of the doctrine of the administrative contract, Government agreements tend to be short, as the parties rely on legal doctrine and case law to supplement the brief and generally worded clauses of the contract. If one considers all the rules to which a contractual relationship with the Government is subject, the contract itself appears to be only the tip of the iceberg. A great part of the applicable legal regime will not be spelled out therein but will be found in administrative law treatises, law reports and administrative precedents. A contractor who works routinely with the Government may predict with greater certainty than a newcomer, how its contractual rights and obligations will fare during the life of the agreement. While to a certain degree this is true in all countries, the more detailed and specific the contract is, the lesser the advantage that traditional contractors have over new entrants in the field. Moreover, no matter how specific the contract is, if the Government has an overriding power to amend it, the uncertainty is not significantly diminished by meticulous drafting. As uncertainty is reflected in the price bid, the system operates strongly against newcomers.

Furthermore, a system that allows continuous unilateral amendments of the contract by the Government, even if granting a right of compensation to the contractor for such amendments, implies, effectively, a relationship that is subject to continuous renegotiation. While the competitive bidding process is generally conducted under severe public scrutiny, subsequent renegotiations are not always subject to similar publicity. It may come as no surprise to learn that in such renegotiations, contractors with political power or savvy fare better than those who lack such tools. This power need not necessarily imply the existence of improper dealings, as it may result simply from the importance of the contract from a political point of view. Thus, the British companies that were involved in the construction of the tunnel under the English Channel were, at first, dismissive of the *contrat administratif* concept, as a dangerous outgrowth of the always suspect *droit administratif*, but finally embraced it enthusias-

tically when they realized the advantages they could derive from it.<sup>142</sup>

However, in Argentina, favors received, or perceived to have been received under one Administration, may subject the contractor to stricter control under the next Administration, especially when the contract requires Government decisions of public repercussion, such as the renegotiation of utility rates. Even in front of a neutral Administration, in long term agreements, once the contractor has made the required investments, it may have little leverage to negotiate with the Government.

The efficiency of judicial remedies is therefore an important factor in the risk analysis by the contractor. If review of the Government's decisions by the courts can entail, as it does in the Argentine federal court system, a five to seven year process, during which such decisions must be applied by the contractor until set aside by the court, the existence of a body of case law protecting the rights of the contractor may be of limited practical importance when evaluating whether to participate in a tender called by the Government.

An obvious consequence of this analysis is that contractors who lack political connections are often disinclined to bid for contracts subject to such rules. This is mainly true of foreign private contractors since they may consider that their lack of knowledge of the local scene and lack of local contacts may act to their detriment.<sup>143</sup> From the point of view of both the lack of legal certainty and the importance of political connections, the doctrine can thus be said to create a non-tariff barrier to the entry of foreign contractors.

The doctrine is especially prejudicial in the field of project finance for public works. When the Government pays for its works and supplies as these are constructed or provided, it is understandable that it will try to reserve for itself special powers and that the contractor will accept such powers, all the more readily if it can obtain additional compensation when they are

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142. Statement made by the Chairman of the company that built the tunnel, in his speech at the opening ceremony of the International Bar Association meeting in Paris, 1995.

143. This is not necessarily so in the case of foreign State-owned contractors, who can always rely on the diplomatic pressures brought to bear by their own Governments in the event of serious discrepancies with the local authorities arising during the life of the agreement.

exercised. It can be posited, of course, that the generous grant of such prerogatives, be it by express contractual agreement or by a general legal principle, increases the overall cost of Government contracting, especially in countries with legal systems which are not fully developed or trustworthy. This is, however, a subject pertaining more to the science of administration than to administrative law.

But when the contract is to be financed by private institutions who are repaid with the exploitation of the facility, Government prerogatives that can have the effect of increasing the total cost to be financed and of delaying the commissioning of the works, may be unacceptable. Both results, unless capped in the agreement, can be incompatible with the setting up of bankable structures. Thus, in a concession of public works which is financed through tolls paid by users, the exercise by the Government of its right of unilateral termination for reasons of public convenience, effectively converts a market risk into a sovereign risk, a conversion which may not be acceptable when the Government's finances are in strait circumstances.<sup>144</sup> Also, the launching of private projects that require the construction of facilities within Government properties, for instance in an area within a public port, the use of which is granted to the project company under a concession agreement, may be hampered if the Government is to recognize the right of unilateral termination of such agreement for reasons of public convenience. Thus, the effect of the doctrine of the administrative contract may well be to prevent the use of project finance in many Government, as well as private, initiatives.

Moreover, in political regimes or jurisdictions that are not subject to effective judicial control, the power of the Government's contracting officer to terminate practically at will any contract, alleging reasons of public convenience (which the courts will rarely scrutinize), without compensating loss of prof-

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144. This was perceived by the Government when in 2000 it tried to set up a legal regime for the financing of infrastructure projects ("the Infrastructure Regime"). It became clear in the negotiations with the private banks and construction companies that the former were not willing to finance contracts that could be amended or terminated at will by the Government. The resulting legal regime effectively allowed the Government contracting officers to waive these rights. *See* Decree No. 1299, Dec. 29, 2000, Sec. 19, [LXI-A] A.D.L.A. 222. Due to the ensuing economic crisis this regime was never implemented.

its, gives the contracting officer an enormous power over the contractor. Frequent changes of economic policy in successive Administrations may provoke, or at least mask, the abusive exercise of such right. The problem is compounded when compensation even for termination costs may require lengthy litigation and a lengthier payment schedule, thus permitting a given Administration to enjoy the often positive political effects of recovering an asset or activity for the Government, and imposing on a future and different Administration the cost of such recovery. Lack of transparency and accountability are thus the price of recognizing this Government prerogative so broadly.

### VII. *POSSIBLE SOLUTIONS*

The main difference between the doctrine of the administrative contract and the rules that apply to Government contracts in legal regimes that do not recognize this doctrine may be stated as follows: in the former the rights and obligations of the parties are found mainly in the case law and in the writings of legal authors, while in the latter they are spelled out with greater precision in the contract itself. Therefore, it could be argued, this difference could be substantially reduced, and the problems caused by the administrative contract doctrine greatly attenuated, if Argentine Government contracts were to include more detailed stipulations.

The solution, however, is not so simple. In practice, the Government seldom includes in the contract clauses that grant full and precise protection to the rights of the contractor. Government contracts are drafted by public officers who can be politically vulnerable if the terms of the contract put forward by the Government appear too favorable to the contractor. The contentions that some bidders may be dissuaded from participating and that the resulting price of the contract is higher than what could have been obtained with more reasonable terms, are neither easily proven nor politically suspect. The FAR cautions that "[t]he cost to the taxpayer of attempting to eliminate all risk is prohibitive."<sup>145</sup> No similar directive is found in Argentine regulations on Government contracts. Thus, often the contract is generous in recognizing the Government prerogatives, draconian in imposing fines on the contractor in case of its default,

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145. F.A.R., *supra* n.3, Sec. 1.102-2(c)(2).

and skimpy in the description of the latter's rights. The contractor is thus left to invoke the general countervailing rights described above and hope that their application by the Administration or by the courts will be fair.

Additionally, the general scope of the Government's power to amend the terms of the contract defeats a solution based on more precise drafting. No matter how carefully the contract is drafted, and no matter what limits are included therein for the exercise of the public prerogatives, the carefully drafted protective clauses of the agreement will be of no avail if the Government is to have an overriding amendment power. One may well question the point of drafting the contract meticulously if the Government will anyway have the power to change any aspect of it "reasonably." Should every clause of the agreement be prefaced by the words "it is of the essence of this agreement that . . ." so as to make it less subject to unilateral change?

The doctrine of the administrative contract thus sacrifices a precise determination of the rights and obligations of the parties to the need to maintain the power of the Government to introduce changes or terminate the agreement for reasons of public convenience. Practice shows that Government lawyers consider this power of the utmost importance.

A doctrine that maximizes the discretion of the Government and forces the contractor to comply with its decisions, subject to whatever additional compensation the contractor may negotiate with the Government or obtain from a judicial award, places great emphasis on the following factors: the quality of the civil service, the speed and cost of the judicial process, the independence of both the civil service and the judiciary from political pressures, and the solvency of the Government.

In Argentina, conditions that would moderate the effects of the doctrine of the administrative contract do not always exist. There is no civil service career that attracts well trained and highly qualified professionals as happens in France. Such professionals, when they work for the Government, are generally political appointees who change with every Administration. Obtaining judicial recognition of a right of compensation against the federal Government may take more than five years, as the case must go through a stage of administrative review and three levels of courts. Litigation can also be very costly due to the im-

pact of the court tax and the legal regime on counsel fees.<sup>146</sup>

Collection entails a separate administrative procedure, which can last two more years.<sup>147</sup> Furthermore, in recent years, Congress has enacted two laws consolidating the debts of the Government vis-à-vis different creditors, including contractors, whose claims had been recognized by the courts, paying them with dollar-denominated Government bonds with a maturity of sixteen years.<sup>148</sup>

Apart from redressing of Argentine public finances, two other conditions should be fulfilled to reduce the problems caused by the administrative contract doctrine in Argentina. The first is the enactment of a new federal statute on Government contracts. An essential rule of that statute should be the validity of any contractual clause limiting or waiving Government prerogatives.<sup>149</sup> Procedural safeguards, such as requiring specific approval by a high ranking public officer, could be required for such limitation or waiver.<sup>150</sup> But the contractor should be able to rely on the respect by the Government of the agreed terms and conditions. A clear rule providing the appropriate time the contractor can suspend performance in case of Government's default would also be important. Such a regulation could fix a standard delay in Government's payments after which the suspension would be valid, allowing the contracting officer to set in the contract's specifications a different term when so required by the characteristics of the case.

Given that the problem is common to other Latin American countries, and that it may be difficult for Government officers to generate political support for such an initiative, query whether

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146. To file an action in the federal courts, a court tax equal to three percent of the amount of the claim must be paid by plaintiff at the beginning of the lawsuit, although it is recoverable from defendant if the action succeeds (Law No. 23898, Oct. 23, 1990, [L-D] A.D.L.A. 3751. As a rule, the loser pays the legal fees of the winner. COD. PROC. CIV. Y COM., Sec. 68. Legal fees are calculated as a percentage of the amount of the claim and can well reach thirty percent thereof if the case is taken up to the appellate level. Law No. 21839, Jul. 14, 1978, [XXXVIII-C] A.D.L.A. 2412, Secs. 6, 7. Pursuant to Sec. 505 of the Cód. Civ., legal fees cannot exceed twenty-five percent of the amount of the controversy for all work done at the lower court level.

147. This follows from the regime provided in Sec. 68 of the Permanent Budget Law, text restated in 1999. Decree No. 689, June 30, 1999, [LIX-C] A.D.L.A. 2765, 2775.

148. Law No. 23982 and Law No. 25344, *supra* n.9.

149. *See supra* n.144.

150. *Id.*

the drafting of a model law of Government contracts by international or regional lending agencies could accelerate the process.<sup>151</sup>

The second condition is the creation of a mechanism to resolve quickly and economically the controversies that arise from the performance of Government contracts. This mechanism could be either a special administrative court allowing for subsequent judicial review, or preferably, an arbitral tribunal set up for each contract. Under either alternative, the possibility of granting interim relief while the validity of the Government's order challenged by the contractor is determined, should be provided.<sup>152</sup>

Such a mechanism would benefit not only the private contractor. For the Government, greater and more immediate respect of the contractor's rights should increase the number of firms willing to participate in public procurement procedures; in turn, it could lead to lower price bids, especially in long term contracts. Also, a quicker resolution of the controversies would have a double advantage for the Government. It would reduce the risk of arbitrary decisions by the contracting officers taken for political reasons, since the consequences of such decisions would normally be known while the same officer remains in his post and, not, as it now happens, impact a future Administration. The controversy would be tried while the contracting officer remains involved in the contract, or at least is still in office, thus facilitating the presentation of the Government's case and the production of its evidence. At present, instead, when the matter reaches the evidentiary stage at the courts, several years have elapsed since the contract was terminated or the controversy arose, making it often difficult for the Government lawyers to obtain guidance from their client on the facts of the case, or even to contact the officers who were in charge at the time of controversy.

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151. Work towards the adoption of uniform rules on private finance for Government infrastructure projects has been carried out by the United Nations Commission on International Trade Law ("UNCITRAL").

152. The Infrastructure Regime mentioned above also provided for arbitration. See Decree No. 1299, *supra* n.144, Sec. 30.

*CONCLUSION*

The existence of special contractual prerogatives for the Government is a feature of many legal regimes, whether they result from laws, regulations, case law, or contractual terms. Given the public interests protected by the Government, such prerogatives are not, in themselves, questionable. What is open to criticism, however, is the prerogatives' sudden intrusion, by a mere decision of the contracting agency, in contracts that do not provide for them; they are not subject to laws that so provide; and they lack precision in those contracts to which they apply. In certain cases, the mere existence of Government prerogatives may make the contract unviable. The wish to protect fully the public interest becomes, in the end, self-defeating. Furthermore, public interest is not univocal. Apart from the interest in keeping the performance of the contract attuned at all times to the public needs, there is the interest of the Treasury not to pay high prices for the goods and services it acquires.<sup>153</sup> This aspect is seldom considered in Argentina, as the field of Government contracts appears to be studied more by lawyers than by economists or experts in public administration.

The author has argued that the main defect of the Argentine doctrine of the administrative contract is the undue generalization of rules that can be justified mainly in public works or supply agreements, or in those subject to the Government's regulatory powers, such as a concession to operate a public utility.<sup>154</sup> Legal writing on the subject often starts from a description of the legal regime of these contracts and then passes imperceptibly into a prescription of that regime for all contracts that can be characterized as administrative. The impossibility of extending such a regime to the very different types of contracts encompassed by the imprecise definition of the "administrative contract," coupled with the preference of the courts, specialized au-

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153. The existence of differing public interests became very clear during the discussions that led to the enactment of the Infrastructure Regime. Four sectors were represented: the Treasury, the Ministry of Public Works, private banks and private construction companies. The main divide was not public vs. private interests, as could have been predicted, but between those who paid (the Treasury and the banks, who insisted on firm price contracts) and those who spent or collected the money (the Ministry of Public Works and the construction companies, who coincided in their wish to retain the Government's power to amend the contract).

154. Mairal, *supra* n.1, at 659.

thors, and Government lawyers to apply the doctrine broadly, at present throw a shadow of uncertainty over many contractual relations entered into by the Argentine Government. To believe that the market does not recognize this as a risk, and thus as a cost factor, is unrealistic. Of the many circumstances that influence a country's cost for raising capital, and the prices it pays for the public procurement of goods and services, the circumstance of legal certainty is one that lies entirely in its own hands and can be solved, or attenuated, relatively quickly. It is just a question of recognizing the problem and dealing with it.