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MODIFICATION OF PUBLIC CONTRACTS AND ITS REGULATORY MODELS

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ABSTRACT. The amendment of public contracts during the execution phase is one of the most topical issues in the recent public procurement literature. This paper assesses in which ways different countries have dealt with contract modification. It claims that all these systems have taken a common approach putting the limitations on modification as the key regulatory tool. Following that approach, a general classification according to the intensity of those limits is proposed. The consequences of this "limitative" approach are then studied. In order to do that a comparative law research is carried out. It will be focused on the provisions that deal with limits on modifications in the following legal systems: European Union, United Kingdom (England), France, Spain and United States of America.

INTRODUCTION

The amendment of public contracts during the execution phase is one of the most topical issues in the recent public procurement literature. The special attention recently given to this issue should not lead to consider it merely as a new problem, for the contracts have traditionally been modified in a systematic manner (Flyvbjerg, Holm, & Buhl, 2002).

This lately increase on the attention paid to contract modifications as an academic topic could be explained because of the widespread rise of competitive award procedures in the last thirty years. The competition principle is enshrined as the mechanism by which the main goals of public procurement are achieved –even though each system has its own particular goals (Schooner, 2002).

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The whole procurement system centres around the idea of tendering. Thus, any change during the execution phase could inevitably impact, and even distort, the initial competition.

Even though the issue is now being faced by legal systems all over the world, this concern is not new for the Academia (Auricchio, 1998). In Spain, for instance, FERNÁNDEZ VELASCO in 1927 was already worried about the noxious impact of modifications on competition when considering that administrative contracts cannot be extended nor modified but on the cases authorized by law or a contract clause; otherwise the public interest guaranteed by the tendering procedure would be ignored (Fernández de Velasco, 1927).

Most of the public procurement regulatory models embraced the above point of view and started passing regulations in order to protect the public interest against abusive modifications.

This paper assesses in which ways different countries have dealt with contract modification. It claims that all these systems have taken a common approach putting the limitations on modification as the key regulatory tool. Following that approach, a general classification according to the intensity of those limits is proposed. The consequences of this "limitative" approach are then studied.

METHOD

The proposed classification is carried out on the basis of a comparative law research focused on the provisions that several legal systems adopted to regulate that matter. These legal systems are as follows: the European Union's classic Directive: Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, the United Kingdom (specifically England's Public Contracts Regulations 2015, SI 2015/102 (PCR hereinafter), France's Décret n°2006-975 du 1er août 2006 portant code des marchés publics ; now replaced by Ordonnance n° 2015-899 du 23 juillet 2015 relative aux marchés publics, Spain's Real Decreto Legislativo 3/2011, de 14 de noviembre, por el que se aprueba el texto refundido de la Ley de Contratos del Sector Público (TRLCSP, hereinafter), and the United States of America's Federal Acquisition Regulation (FAR hereinafter), which is the Tittle 48, Cap. 1 Code of Federal Regulations.

It is a micro-comparative analysis since it will be focused on the provisions that expressly regulate contract modifications. These provisions are called "central or principal elements", composed of the following elements: i)the provisions regarding the grounds for modifying the contract, ii) the limits on modifications and iii) the control mechanisms in which the remedies system plays a nuclear role. As stated above, the modern rules pay attention to the limitations and so will be done in this paper.

Other provisions that impact indirectly on modifications are set aside. These other provisions will be termed as "peripheral or secondary elements" within the proposed regulatory models. This category includes i) the preparatoy works carried out before the award; ii) the selection criteria –namely prohibitions and the treatment of past performance; iii) the award criteria and the way in which abnormally low tenders are assessed, v.g in Spain lowballing has always been associated to contract modification; iv) provisions on similar figures such as complementary or additional works.

OVERCOMING THE TRADITIONAL DISTINCTION BETWEEN MODELS OF PUBLIC CONTRACT MODIFICATION

Traditionally, when classifying the legal systems of public contracting, the criteria followed was to make a difference between two main groups depending on the kind of rules that were applied to this contracts. On the on hand, legal systems in which the Government contracts using the same set of rules that individuals, that is, the common Contract Law. On the other hand, legal systems in which public buy is ruled by public law provisions that provides with prerogatives in favour of the contracting authority given the fact that it was acting on behalf of the public interest (Auby, 2007).

This very same distinction was applied to the field of public contracts modification in which a *convenanted model* could be opposed to a *prerogative model*. Some systems do not foresee special provisions and, thus, modification has to be carried out following the same rules as in the *Contract Law*: the parties' agreement is required and there is little or no room for unilateral variations (Fischer, 2013). Contrarily, other systems consider that the contracting authority should have a unilateral power to modify the contract which is set forth directly in a special set of rules enacted to rule contracts signed by public bodies. Classic examples of this

opposed approaches are the UK (private law rules) and Spain (special or administrative law rules).

A first attempt to overcome this classification was a proporsal made according to the legal location of the rules giving special powers to public parties (Craig, 2010; Comba, 2013). This classification instead of being focused on the existence of exorbitant powers such as the unilateral modifications, it merely assumes that these powers are present in every single system. Thus, the difference is based on the legal location of these powers: law or the contract itself.

It has to be highlighted that there is no a "single appropriate model", or, at least, there is no solid evidence to support a preference for one of the models. The only piece of work indirectly related to it is the one authored by GUASCH for the World Bank in which he observed that the amount of contract modifications varied depending on the place in which the regulatory framework was embedded: in law (17%), in decree (28%), or in contract (40%) (Guasch, 2004, p.86). In any case, the traditional classification based either on the existence of powers to modify or on the legal location of the rules is out of date.

First of all, the prerogative model does not necessarily exclude within its provisions the possibility of modifying the contract by means of mutual agreement. It is the case, among others, of France in which the bilateral modification (*avenant*) plays an increasing role along with the unilateral one (Art. 20 CMP).

Secondly, even in the case of prerogative models with a tendency for unilateral variations, this kind of variations are rarely challenged by the contractor since it usually implies an increase of the activity. Only when the modification implies a reduction of the work is that the contractor files a protest.[1] This is the reason why the Consejo de Estado –the Supreme Advisory Body of Spanish Govnerment-, states that "the prerogative has been used after the initiative of the contractor and in its interest" (CONSEJO DE ESTADO, 2004, p.131). If it were the case, then the unilateral mechanism would be only a shell hiding a bilateral agreement.

[1] In this field the protests usually deal with the final amount to be paid but not with the modification *per se*. thus, they are filed when the contract is already executed.

Thirdly, the convenanted model has introduced the possibility of unilateral variations by means of contract clauses. These contract clauses turn out to have the same effects as the unilateral variations. The widespread use of templates has greneralised this kind of practices. An example of it is the model for contract of services published by *Transport for London*:

Contract Variation

Save where the Authority may require an amendment to the Services, the Contract may only be varied or amended with the written agreement of both Parties. The details of any variations or amendments shall be set out in such form as the Authority may dictate and which may be substantially in the form set out in Schedule 6 and shall not be binding upon the Parties unless completed in accordance with such form of variation.

Fourthly, the solution adopted by most of the legal systems is based on limits imposed on the possibility of modifying the contract regardless the formal mechanism used to adopt the modification, be either bilateral or unilateral. The new EU Directives illustrate this point since they are to be transposed by all Member States whatever the legal system is.

In view of all these circumstances, a new classification has to be adopted not focused on the legal regime, private or public. It has to go far beyond, acknowledging the complexity of this issue. In the next section some useful criteria are addressed.

A NEW CLASSIFICATION BASED ON LIMITS IMPOSED ON THE POSSIBILITY OF MODIFYING A CONTRACT

Given the fact that contract modifications are not an easy target to be dealt with, a comprehensive regulatory answer has to be sketched. The regulatory framework has to take a holistic approach to be able to reduce the negative impact of modifications on the contracting system. Both, central and peripheral elements have to be considered.

Most of the legal systems have drawn their attention to one particular central element: the limits on modifying. Thus, imposing limitations emerge as the regulatory answer to the problems derive from contract modifications. In this line of thought the Competition in

Contracting Act (1984) in the U.S or the new EU Directives (2014) were approved.

Moreover, the fact of limiting the possibility of modifying has a dogmatic consequence: it reduces considerably the parties' freedom of contract. This is not a novelty in public law systems in which this freedom was not enshrined. However, other legal cultures could accept it with a degree of reluctance. From now on the contracting authority is not fully empowered to agree or order an amendment since the concept of "public interest" is reshaped by law. Even if an amendment is positive from an economic point of view it could be against the public interest of having a fair competition during the award procedure.

It has to be borne in mind that there are reasons to support each of the models. A lenient regulatory regime could adapt the contract easily and be more flexible, while an stricter approach could achieve more realistic projects and bids, among others (Dekel, 2008). Thus, this paper will not pretend to tip the balance towards any of the models.

In the following sections the paper will address the ways in which the studied countries design these limitations.

The EU Framework

The clearest example of the new trend observed is the EU framework which has its origins in the CJEU case law and now it is envisaged in the 2014 Directives.

The EU public procurement system is based on a set of rules implemented to achieve several goals, mainly to open domestic markets to European trade. These rules are focused on the award procedure, shaped following certain principles that lead to achieve the abovementioned goals (Arrowsmith, 2013).

In protecting the award procedure, the CJEU considered that contract modifications could have a direct impact on the awarding procredure underlying principles. In *Succhi di Frutta*, the Commission considered both that the modification of a contract concerns only the internal relationship with the successful tenderer and that public procurement directives are no longer applicable after the award. On the contrary, the CJEU ruled that

> 120. If, when the contract was being performed, the contracting authority was authorised to amend at will the very conditions of the invitation to tender, where there was no express authorisation to that effect in the relevant provisions, the terms governing the award of the contract, as originally laid down, would be distorted.
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> 121. Furthermore, a practice of that kind would inevitably lead to infringement of the principles of transparency and equal treatment as between tenderers since the uniform application of the conditions of the invitation to tender and the objectivity of the procedure would no longer be guaranteed.

Since then, the CJEU has linked award procedure, underlying principles and contract modification acknowledging that during the execution phase the award procedure could be distorted – and thus started to regulate over the execution phase in which can be considered a "silent revolution" in the EU procurement system[2].

Elaborating on this triangular connection, the CJEU in Pressetext assumed the test of the Advocate General Julianne KOKOTT in order to assess when a modification could be considered as "material":

i) when it introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted (p. 35)
ii) when it extends the scope of the contract considerably to encompass services not initially covered (p. 36)
iii) when it changes the economic balance of the contract in favour of the contractor in a manner which was not provided for in the terms of the initial contract (p. 37)

This triple test has been codified in art. 72 of the 2014 EU Directive in order to asses when the modification is "substantial". Moreover, even if the modificaiton is substantial, it could be legally carried out insomuch as it can be included in one the following grounds – each of them with its own limits:

[2] The concept of "silent revolution" was coined by Katie Smith and Xavier Codina and it remains to be developed elsewhere.

i) modifications, irrespective of their monetary value, have been provided for in the initial procurement documents: they do not alter the overall nature of the contract (art. 72.1.a);
ii) modifications for additional works by the original contractor: each modification shall not exceed 50 % of the value of the original contract and consecutive modifications shall not be aimed at circumventing the Directive (art. 72.1.b);
iii) modifications to deal with unforeseen circumstance: the modification cannot alter the overall nature of the contract, each modification is not higher than 50 % of the value of the original contract and consecutive modifications shall not be aimed at circumventing the Directive (art. 72.1.c);
iv) modifications considered as *de minimis*: when the value of modification is below the Directive thresholds and 10-15% of the initial value (art. 72.2);

The English Framework

Traditionally, in England, contracts concluded by the Government were ruled by the same rules than the ones concluded between private parties. Thus, there was not a special set of rules aimed at regulating these kind of contracts. In fact, the provisions applied to the execution of this contracts are mainly contained in the very contract (Craig, 2010, p. 173).

Apparently, until now, modification of public contracts was not an issue and a pragmatic approach was taken. In this sense, the qualitative research driven by Peter BRAUN on the practical application of the public procurement law to the PFI showed that in the UK changes to the project were a frequent occurrence and when substantial changes occurred re-advertising was not an option (Braun, 2003, p. 579). As a whole, it can be affirmed that in the UK practitioners adopted a "get the job done" approach.

The transposition of the EU procurement law, namely the recently approved 2014 Directives, has brought about the existence of a double regime. On the one hand, contracts covered by the EU law to which the transposed Directives by means of the PCR 2015 applied. On the other hand, contracts outside the scope of the EU law which are under an almost deregulated regime based on internal guidelines and Contract Law. The following clause of the Standing Orders on Procurement and Contracts of West Sussex will illustrate this point:

- 42. Variations permitted by law
- 42.1 Contracts which are subject to the PCR 2015 shall not be varied other than in accordance with the provisions of the PCR 2015. The Responsible Officer shall request advice from Legal Services in relation to any variation which is subject to the PCR 2015.
- 42.2 All other proposals to vary contracts not subject to the PCR 2015 shall be considered by the Executive Director on a case by case basis in accordance with the terms of the contract and the obligation to ensure Value for Money.

It has to be borne in mind that several templates and models are available in the Government sites. This not an insignificance mechanism of control. For instance, 95% of construction contracts in the UK -private and public contracts- built upon these models (Fischer, 2013, p. 217).

Regarding the contracts covered by the EU Law, the PCR 2015 have transposed art. 72 of the 2014/24 Directive almost literally[3]. Regarding every contract, it has to be consider that there are several statutory instruments and case law doctrines that could be applied to contract modifications as well as they are applied to contracts. By means of example, the Unfair Contract Terms Act of 1977 or the implied terms doctrine based on the Blackpool decision[4] which entails that the contracting authority is bound by the specifications set forth during the award procedure.

The French Framework

Traditionally in France there has been no limitations for modifying the contract. For instance, the Conseil d'État in its decision *Sieur Coste* of 22nd November 1907 considered that "no legal or statutory disposition impedes the clauses of a contract to be amended during its execution when the parties agree to do so"[5].

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[3] CROWN COMMERCIAL SERVICE, *The Public Contracts Regulations 2015: Guidance on Amendments to Contracts During Their Term*

[4] Blackpool and Fylde Aero Club Ltd. v Blackpool Borough Council [1990] EWCA Civ 13

[5] Arrêt num. 849 du Conseil d'État, du 22 Novembre 1907, (Sieur Coste).

It was only in the late eighties that the competitive tendering was widespread and started to be considered as a proper limit on contractual modifications (Auricchio, 1998,p. 118-119) (Hoepffner, 2011, p. 100). Nowadays, article 20 CMP set out a double regime depending whether the need for the modification is brought by unforeseen circumstances or not. The former has no limitation («*…peut intervenir quel que soit le montant de la modification en résultant*»). The latter case is subject to the prohibition i) « *bouleverser l'économie du marché* »; ii) « *ni en changer l'objet* ».

French courts heterogeneously interpret these undefined concepts using two main criteria: a qualitative one (alter the nature of the contract) and a quantitative one (the value of the modification). Regarding the former, it is consider that a new contract has been concluded when, for instance, i) the area on which the works have to be executed is altered; ii) the kind of work is changed; iii) the contract is extended; iv) the price is increased. Regarding the quantitative criteria, the case law has not a firm position on that regard. On average, a modification up to 20% could be considered not substantial, although there are decisions keeping a stricter approach than others (Hoepffner, 2009, p. 203).

The Spanish Framework

Spain has a long tradition of rules on contract modifications – the origin of the legal framework can be traced back to several provisions approved in the nineteenth century. However, this regulatory framework did not impede the abuse of the modification mechanism by contracting parties. Thus, it is said that in Spain contract changes are not exceptional but a usual aspect of every contract (Martín Rebollo, 2004, p. 576). During the twentieth century, the text regulating procurement, both the 1963 and the 1995 laws, laid down no limitations so contracting authorities were vested with a wide discretion to modify. In fact, they had an unbounded power to modify the contract (Codina García-Andrade, 2015).

It was not until the eighties when a minor number of decisions of the Supreme Court began considering the award procedure as a proper limit to contract modification[6]. However, neither the 1995 nor

[6] STS,Sala Tercera,28/02/1989 (Ar.1461; MP:Benito S. Martínez Sanjuán); or the Dictamen del Consejo de Estado, 79/1993, de 1 de abril de 1993

the 2007 law complied with the emerging European doctrine on contract modifications. The Commission started an infringement proceeding against Spain in 2006 regarding the contract modification regime. It has been said that the variations introduced in the Gijon's Port were the last straw for the Commission since it was a 580 million euros project funded partially by Cohesion Funds. Soon after the award the contractor asked for an increase in the stone price given that the nearby quarries could not be exploited [7] - OLAF even recommended starting a devolution procedure against Spain given the irregularities, and also asked the Public Prosecutor to investigate what had really happened.[8] In any case, after an unsuccessful answer of Spanish authorities, the Commission decided to refer Spain to the CJEU over a series of provisions of the LCSP, considering that:

> "regime of modifications of contracts after award, as governed in LCSP, is not in line with the principles of equal treatment, non-discrimination and transparency as derived from article 2 of Directive 2008/14/EC (on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts) and from Articles 12, 43 and 49 of the EC Treaty. The LCSP gave contracting authorities a wide power to modify essential terms of public contracts after award, without the conditions of modification having been provided for in the contract documents in a clear, precise and unequivocal manner."[9]

The Spanish legislator reacted by amending the LCSP law. In 2011 a new regime was adopted. By means of Law 2/2011 of 4 March, on Sustainable Economy (LES hereinafter)[10], the most strict regulation that ever came into force in Spain. These provisions will be now analysed – be aware that LCSP and LES have been consolidated within the Royal Decree Law 3/2011 of 14 November, which

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[7] Domínguez Olivera (n 2).

[8] http://ec.europa.eu/anti_fraud/documents/reports-olaf/2014/olaf_report_2014_en.pdf (last visited June 2015)

[9] European Commission Press Release, November 20, 2009 (IP/09/1752).

[10] Ley 2/2011, de 4 de marzo, *de Economía Sostenible.*

approves the consolidated text of Public Sector Contracts Act (TRLCSP hereinafter).[11]

This new legislation drove the Commission to close the infringement proceedings against Spain, considering that "the new regime established by the LES is a welcome step in that it limits the power of the contracting authorities to modify public contracts after award in a way that alleviates the concerns that had triggered the infringement procedure".[12]

The LES has been considered a strict regulation – some authors consider that perhaps it has gone too far[13]. It is a fact that if applied rigidly it is stricter than the Directives regime[14]. The main reason to consider it as a strict regulation is precisely the limitations imposed on contract modifications.

Article 107.2 lays down these limits to be observed by every contract concluded by a public body. Regardless the ground used for modifying, the following two limits are to be applied: i) the modifications can only introduce the strictly necessary changes; ii) the modification cannot alter the essential conditions of the award procedure. Note here that it refers to the award and not to the contract –which seems to be the option adopted by the EU Directives ("overall nature of the contract).

In order to interpret what "alter the essential conditions" means, the very same article provides for a set of provisions that build upon the criteria previously laid down by the ECJ[15]. Thus, modification shall be considered to alter essential conditions where one or more of the following conditions is met:

a) "Where the modification varies the function or characteristics of the initial contract considerably". To a certain extent this could be compared to the prohibition to "alter the overall nature of

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[11] Real Decreto Legislativo 3/2011, de 14 de noviembre, por el que se aprueba el *texto refundido de la Ley de Contratos del Sector Público*

[12] European Commission Press Release, April 6, 2011 (IP/11/430).

[13] (Estévez, 2013)

[14] (Vázquez Matilla, 2013), p. 558;

[15] Mainly the provisions of Judgment of 19.06.2008, in case C-454/06 Pressetext Nachrichtenagentur GmbH v Republik Österreich and others [2008], ECLI:EU:C:2008:351

the contract" that is envisaged in the 2014 Directives. Also to the prohibition to extend the scope of the contract considerably (art. 72.4.c Directive 2014/24).

b) "Where the modification changes the economic balance of the contract in a manner which was not provided for in the initial contract".
c) "Where the modification introduced requires for a new professional classification or a higher economic and financial standing".
d) "Where the value of the modification is below or equal to 10 % of the award contract value, be it either an increase or a decrease of the value; where several successive modifications are made, the value shall be assessed on the basis of the net cumulative value of the successive modifications".
e) "Where the modification introduces conditions which, had they been part of the initial procurement procedure, would have attracted additional participants in the procurement procedure, or the tenderers would have made a bid substantially different than those initially presented".

The US Framework

In the US regulatory framework there are two kinds of limits: the ones included in the contract ("change clauses"); and the ones that stemmed from the regulatory efforts to protect the competitive tendering. This paper will draw its attention to the latter limit which has its origins in the *Competition in Contracting Act* of 1984 (CICA hereinafter).

Even before the enactment of the CICA, the modification was compared to the initial contract in order to assess whether it can be considered substantially different[16]. The "cardinal change" doctrine has served to that purpose (Powell, 1994). The following excerpt embodies the concept:

> Under established case law, a cardinal change is a breach. It occurs when the government effects an alteration in the work so drastic that it effectively requires the contractor to perform duties materially different from those originally bargained for. By definition, then, cardinal change is so profound that it is not

[16] GAO decision, Emergent BioSolutions Inc., B-402576, June 8, 2010

redressable under the contract, and thus renders the government in breach[17].

Thus, originally the cardinal doctrine is not a limit but a measure by which a contractor could challenge a decision of the contracting authority. However, at the same time "The "cardinal change" doctrine prevents government agencies from circumventing the competitive procurement process by adopting drastic modifications beyond the original scope of a contract. The basic standard is whether the modified contract calls for essentially the same performance as that required by the contract when originally awarded so that the modification does not materially change the field of competition"[18]. Briefly, the cardinal change doctrine will consider a modification as substantial when:

i) The nature of the works is altered[19] or the kind of work to be done[20].
ii) There are changes in the execution time[21].
iii) There are changes in the costs[22].
iv) The modification could have distort the competition[23].

There are decisions in which the additional works are not considered a susbtantial modification insofar as they are the same kind of work, same deadline and same cost[24]. That is why introducing hundreds of changes may not necessarily be a substantial

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[17] *Allied Materials and Equipment Company v United States* 569 F.2d 562.
[18] *Webcraft Packaging, Division of Beatrice Foods Co.,* B-194086, 79-2 CPD ¶ 120 (Aug. 14, 1979). *Air-A-Plane Corp. v. United States,* 408 F.2d 1030, 1033 (Ct.Cl. 1969); *Cray Research inc. V Department of Navy Suppl*. 201 (1982) United States District Court, District of Columbia, 6 de octubre de 1982.
[19] *Air-A-Plane Corp. v United States* 408 F.2d Ct. Cl. 1030 (1969) o *Airprep Technology v United States*, 30 Fed. Cl. 488 (1994).
[20] *American Air Filter Co., Comp Gen*. 567 B-188408, 78-1 CPD.
[21] From three to six years of execution time *CPT Corp* Comp. Gen. B-211464 7 junio 1984.
[22] *Overseas Lease Group, Inc.,* B-402111, Jan. 19, 2010, p. 34
[23] *Sallie Mae, Inc*., B-400486, November 21, 2008 ; *Chapman Law Firm Co*., v. U. S., No. 08-39C, April 2, 2008
[24] *Caltech Service Corp* Comp. Gen. B-240726.6 de 22 enero 1992

modification[25]. Only when these hundreds of changes produce a susbstantial modification it triggers the cardinal change doctrine (Jones, 2001). On the other hand, there are decisions considering as substantial a change even when it is the same kind of work: for instance when ordering ten buildings instead of the original eight building project[26].

CLOSING REMARKS

First, the traditional classificatory system has been overcome by another that acknowledges the complexity of this issue. Until now the public contract modification models were classified following the very same classification used for the procurement system themselves. Thus, it hinged upon the nature of the rules either public administrative law or private common law. It was everything based on the existence of unilateral powers or, on the contrary, the need for bilateral agreements. However, the recent trends of the public procurement legal framework advises to consider other prevailing classifications that takes into account the complexity of the issue. This new classification stem from a holistic approach to the issue, firstly identifying the different elements of the regulatory framework and, then, selecting which one is shaping the models.

Second, limits imposed on contract modifications are the key element used for sketch out a new classification. Within the several elements in which the regulatory framework could be broken down, the most important one is the "limitations" or limits imposed on the possibility for modifying a contract. In fact, this limits are the mechanism by means which legal systems have tried to cope with the issue. The consequences of this phenomenon are already being observed. The contracting entities now enjoy less freedom contract during the execution of the contract not only because they are not allowed to modify the contract unless under certain circumstances, but also because they cannot identify whether the public interest is for modifying. The new undefined concepts allowing contract modifications are now enacted by the Legislator (national or even supranational) and interpreted by Courts (again, national or

[25] *Wunderlich Contracting v United States* 351 .2d 956 Ct Cl 1965; *Seger v United States* 469 F.2d 292 Ct Cl 1972.
[26] *GAO Tilden-Coil Constructors* B-211189.3 de 23 de Agosto de 1983

supranational such as CJEU), therefore the discretion of contracting authority is diminished.

Third, three regulatory models have been identified. This comparative research piece shows that there are three different models of contracto modification regulation.

First, an unlimited model featured by the non-existence of limits beyond the ones applied in contract law. The freedom of contract is enough to carry out any kind of modification even distorting the award procedures. The contracting authority freely identifies the predominant public interest.

Secondly, the closed limits model featured by an active role of the legal framework. The framework (law or guidance) not only lays down the terms beyond which the contract cannot be modified but also it does it in a clear and rigid manner.

Thirdly, the open limits model featured by a passive role of the legal framework. The terms of the provision regulating the limits are written in an open texture manner that allows the contracting authority certain possibility of legal interpretation, that is, certain margin of discretion. This system demands adequate control to be applied.

Final Reflection for Further Study

The gloablization phenomenon has a huge impact on the legal field. Legal frameworks tend to mirror one each other. The regulation of public contract modifications serves as an example to illustrate that point. In fact, the difference between systems are disappearing since all of them want to protect the award procedure as the mechanism to achieve the procurement policy goals. It is paradoxical to observe that while international models are closing the gap between them, internally the effect is the opposite: execution of both public and private contracts begin to diverge, because of the limits to the freedom of contract when modifying.

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