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LITIGATION ON PUBLIC CONTRACT PERFORMANCE

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**LITIGATION ON PUBLIC CONTRACT PERFORMANCE:
A COMPARATIVE STUDY OF THE TREATMENT OF ADDITIONAL
COSTS AND CONTRACT EQUILIBRIUM BY ADMINISTRATIVE JUDGES
IN THE UNITED STATES AND FRANCE**

Thierry Kirat¹ and Laurent Vidal²

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ABSTRACT

Comparative law applied to public contracts usually concentrates more on the tendering process than on performance issues. This article focuses on the latter: it deals with cases in which performance of public contracts in the United States and France leads to litigation. The article’s objectives are

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threefold: first, to synthesize the findings of an empirical analysis of the sources and nature of performance issues that lead to litigation before administrative courts (namely: the General Services Board of Contracts Appeals; and the Cours administratives d'Appel and the Conseil d'État); second, to provide an analysis of the way in which American administrative judges and French administrative judges tackle and decide contract cases; and third, to broaden the perspective in order to provide a more comprehensive comparative analysis of the legal context in which regulation, case law and the styles of administrative judges' reasoning affect the treatment of additional costs and contract equilibrium issues in both countries.

I. INTRODUCTION

Comparative public contract law usually concentrates more on the tendering process than on performance issues. This article focuses on the latter: it deals with cases in which alteration to the performance of public contracts in the United States and France leads to litigation. The article's objectives are threefold: first, to synthesize the findings of an empirical analysis of litigation before administrative courts in France and the United States; then, to analyze the way French and American judges make their decisions in contract cases; and finally, to broaden the perspective in order to provide a more comprehensive comparative analysis of the ways and means by which regulation, case law and the reasoning of administrative judges affect the treatment of additional costs and contract equilibrium³ issues in both countries. The analysis of the American contracts has been conducted from the French perspective. The orientation adopted here is that of comparative litigation,

³ We were curious about the way the judges of public contracts deal with unforeseen events. In this regard, the French case law has tailored a specific concept, namely "équilibre financier du contrat". As will be seen in the article, that concept of contract equilibrium is a standard through which the judge assesses how deeply the initial contract is affected, in the course of performance, by unforeseen events. That basic principle is that when concluded a public contract involves a balanced relation between the price (and, beyond, the expected profitability for the contractor) and the work or goods and services to be delivered.

which aims to analyze the solutions offered by the courts and study the relative weight of legal references and factual considerations in the courts' decisions in contract cases.⁴

This article's analysis does not stem from a socio-legal study, inasmuch as its goal is not to consider sociological or extralegal factors, such as cultural factors, attitudes or preferences, liable to affect the administrative judges' reasoning. Moreover, this research does not fall within the framework of *Law and Economics* in the narrow sense, in particular because we are not attempting either to determine whether judges consider the economic consequences of their decisions, or to pass judgment on the economic efficiency of administrative jurisdictions' solutions to contractual conflicts. However, the study will reach certain conclusions that, from the perspective of legal theory, may support insights from *Law and Economics* approaches to public contracts.

Borrowing certain methodological orientations from the empirical sociology of law,⁵ we consider the role of the courts in handling contractual litigation as a legal activity embedded in a legal-institutional context, which constitutes the frame of reference for judges' decision-making. Given that, and unlike judicial reasoning's formalistic approach, we will maintain that their decisions cannot *entirely* stem from this context—a context that does greatly affect them, however. In that respect, it is fashionable in legal theory, as in comparative law, to distinguish between forms of

⁴ The research on which the present article is based has been conducted thanks to a grant of the Economic Attractivity of Law Program sponsored by the French Ministry of Justice (« mission de recherche Droit et Justice »).

⁵ L. FRIEDMAN, *THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE* (New York, Russell Sage Foundation, 1975).

reasoning at work in the domain of law, particularly those implemented by the judges, even if the differences separating the worlds of *common law* and *civil law* may vary considerably .⁶

These analytical frameworks may be usefully couched in Max Weber's sociology of law terms as "material rationality" and "formal rationality." The former corresponds to the depiction of equity in the resolution of conflicts based not on formal rules of law, but on judges' sense of justice that Weber associates to a notion of material rationality of law, which stresses the fact that "concrete considerations predominate over the abstract axiom."⁷ The second form of rationality, i.e. formal rationality, is two-dimensional, within and outside of the legal order. From the "internal" perspective, legal formalism "characterizes a logical coherence of legal rules,"⁸ with formal legal rationality being expressed through general, abstract and systemizable rules. From the "external" perspective, legal formalism "expresses a certain degree of procedural regularity and calculability on an empirical level with regard to various spheres of activity, in particular economic spheres."⁹

⁶ Thus, Duncan Kennedy considers, with regard to European legal judicial discourse, that it is characterized by its profound attachment to the deduction and passive application of the law, while American legal justice can be found in a hybrid context, where deductive and formal logic mix with policy considerations. D. KENNEDY, *A CRITIQUE OF ADJUDICATION (END OF THE CENTURY)* (1997). Mitchell Lasser discusses the pertinence of this characterization of European judicial discourse and offers a "counterdescription." Mitchel de S.-O. l'É. LASSER, *Do Judges Deploy Policy?* CARDOZO L. REV., 2001. Also, see by the same author: *Anticipating Three Models of Judicial Control, Debate and Legitimacy: The European Court of Justice, the Cour de cassation and the United States Supreme Court*, JEAN MONNET WORKING PAPER 1/03, New York University School of Law, 2003.

⁷ MICHEL COUTU, *MAX WEBER ET LES RATIONALITES DU DROIT* (L.G.D.J. and Presses de l'Université de Laval, collection. Droit et Société 15, 1995, p. 51).

⁸ *Id.*, at p. 49.

⁹*Id.*, at p. 49.

It is important to specify from the outset that the economic issues involved in litigation in the administrative contract lead naturally to questioning the relative weight given by the judge to factual and economic considerations on the one side and legal considerations on the other side, when he decides cases. Ultimately, this is about the relationship between facts and the law. This problem leads to a theoretical one: is there a theoretical approach supporting a comparative empirical analysis of the way judges decide cases in different legal systems? We will here refer to two orientations that seem best suited to our question: that distinguishing legal systems according to their type of rationality, for example, Weberian theory of law; and that distinguishing between formalistic logic and pragmatism in legal practice.

According to Max Weber, in a context of formally rationalized law, judges fulfill their duties based on general, systematic and abstract rules, applicable to a particular case. The general and systematic nature of the rules is essential to assure the justifiability, calculability and predictability of court decisions, precisely because they are based on formal-rational rules. This is the characteristic trait of legal systems in the Romano-Germanic tradition. For their part, Anglo-American legal systems conserve a persistent trace, varying in strength according to the fields of law, of a form of predominantly material rationality that may lead to basing decision-making more on the particular facts of the case and on considerations of equity rather than on general, abstract and systematic rules.

Within the framework of the second orientation mentioned above, the comparative debate is posed in terms of the logic at work in courts decisional practices. Two principal types of logic thus present themselves: on one hand, that of

formalism,¹⁰ usually associated with deduction, with legal syllogism as well as “mechanical jurisprudence,” according to the term employed by Roscoe Pound; on the other hand, non-formalistic logic, qualified by the authors as “policy oriented” or “pragmatic.”¹¹ In this model, the general idea is that jurisdictional practice is not exempt from concerns about decisions’ economic and social consequences, but above all that references (wrongly characterized as extralegal) are considered in the judge’s reasoning. Thus, the legal decision is not the outcome of formal logical and deductive reasoning, but rather is concerned about either its probable, predictable consequences or the material issues at stake in the dispute.

A comparative study of litigation in administrative contracts in two very different legal traditions allows us to test both forms of legal rationality that Max Weber distinguished,¹² as well as the analysis in terms of formalism or pragmatism in jurisdictional decisions. This empirical study will allow us to clarify the nature of public contract litigation involving the American federal government, as well as that concerning French public authorities (II). Furthermore, this study will introduce a characterization of administrative judges’ decision-making styles in handling litigation (III). Finally, we offer a broader comparison of the way in which the French system and the American federal system deal with additional costs and the question of contract equilibrium (IV). The conclusion will come back to the question

¹⁰ For a presentation of different degrees of formalism and their contexts, see Duncan Kennedy, *Legal Formalism*, in the INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES, 8634-8638 (2001).

¹¹ See, respectively, the theses of Duncan Kennedy *op. cit.* (1997) and of Richard A. Posner: *So What Has Pragmatism to Offer Law?*, in: R.A. POSNER, *OVERCOMING LAW* (Harvard University Press, 1995, pp. 387-405).

¹² MAX WEBER, *SOCIOLOGIE DU DROIT* (Jacques Grosclaude trans., P.U.F., coll. Recherches politiques, 1986).

of formalism and pragmatism in the activity of American and French judges with respect to public contracts.

II. CONTRACT LITIGATION: A COMPARATIVE ANALYSIS

Analysis in administrative justice terms has generally focused on describing and commenting on principles and rules contained in authoritative decisions. That is not the case here. We will concentrate instead on data from a study of a series of decisions. These data concern what we will term “contract litigation,” the outlines of which are provided after classification of the cases involved with the help of a series of variables: type of contract (construction contract, services contract, supply contract, etc.), nature of the demand from a material point of view (compensation for unforeseen events, amount of damages in case of breach of contract, revision of contract price, etc.), nature of the public authority’s decision which is being contested before a judge (refusal to admit the existence of additional costs or to grant delays, contract termination, etc.), the public authority’s grievances against a co-contractor (inadequate work, performance delays, etc.), and types of decisions (acceptance, denial, consultation of experts prior to taking legal steps, etc.).

The results presented here are drawn from an empirical analysis of 41 judgments by the General Services Board of Contract Appeals (GSBCA) in 2005¹³ and 51 judgments by French administrative judges in 2004 and 2005. The complete texts of GSBCA judgments are collected on its Internet site. In France, the complete

¹³ The GSBCA internet site included 83 decisions for 2005. We took into account the sole judgments deciding the cases; the decisions of dismissal of the appeal were not taken into account.

By virtue of Section 847 of the FY 2006 National Defense Authorization Act, Pub.L.No. 109-163, §847, 119 Stat. 3136, 3391-95 (2006), effective January 6, 2007, eight boards of contract appeals, including the GSBCA were consolidated into a new United States Civilian Board of Contract Appeals. On the Boards’ of Contracts Appeals consolidation, see: Frederick J. Lees, *Consolidation of Boards of Contracts Appeals: An Old Idea Whose Time Has Come?*, 33 PUBLIC CONTRACT L. J. (2004).

texts of the judgments collected are also available, through the data base LamylineReflex. This *corpus* included mainly Cours administrative d'appel judgments (85%), the remaining part (15%) being Conseil d'Etat judgments. In both French and American cases, the judgments selected involve litigation over contract performance.

While the litigious dimension of contracts varies according to their type (A -), both French and American administrative judges display a common severity (B -).

A. Differentiated contract “litigiousness”

We observe that construction contracts are much more involved in litigation in France than in the United States where services contracts are more litigious¹⁴ (Table 1). We also observe that the litigious nature of the contract according to its type is correlated with its complexity. Generally, we know that, indeed, construction contracts include sometimes complex operations and are more often than others confronted with unanticipated events. Similarly, services contracts are often more complex than supply contracts.

Table 1—Types of Disputed Contracts

	GSBCA	CE and CAA
Construction contracts	26.8%	60.8%
Services contracts	39%	21.5%
Supply contracts	12.2%	5.9%
Other (GSBCA auction bids)	22%	
Provision of public services contracts (France)		11.8%
Total	100%	100%

¹⁴ The small size of the sample analyzed must be kept in mind. The fact that construction contracts are less litigious than service contracts obviously deserves further enquiry.

As for French public service contracts, their litigious character is less pronounced than those of construction contracts and services contracts, but greater than that of supply contracts. The relatively small number of public service contracts, along with the greater sophistication of their clauses, explains why they represent only 11.8 % of litigious contracts.

In the case of the United States, we see that the proportion of services contracts in contract litigation is higher, and that the construction contracts constitute a bit more than a quarter of the whole.

As for the causes of litigation (Table 2), we may observe that each system has its own particular traits: additional work and the resulting services contracts are of concern in the United States, while in France, it is the construction contracts that prove most contentious. Furthermore, disregard for technical specifications appears to be the principal cause of contract litigation in the United States, while this plays a minimal role in France.

Table 2—Causes of Litigation

GSBCA	CE and CAA
1. Disregard for technical specifications <i>19.5% of the total</i> <i>75% of cases concern construction contracts</i>	1. Additional work or expenses <i>31.3% of the total</i> <i>75% concern construction contracts</i>
2. Additional work <i>9.7% of the total</i> <i>75% of cases concern services contracts</i>	2. Termination or consequences of termination of the contract <i>13.7% of the total</i> <i>Service contracts (43% of cases) and concessions (43% of cases)</i>
3. Unexpected occurrence of a social nature (strike, wages) <i>7% of the total</i>	3. Disregard for technical specifications <i>7.8% of the total</i>

With regard to the economic nature of litigation, considered with reference to the request in court, we may note that in the French case, there are three broad types: demands for compensation; demands for adjustment, for revision or determination of prices; and demands for damages and interest. These three main lines constitute 88.23% of the total. Demands for compensation alone represent 60.8% of total demands (Table 3).

Table 3—Economic Nature of Litigation

GSBCA	CE and CAA
1. Compensation for additional costs or adjustment of contract price <i>24.4% of the total</i> <i>70% of cases concern services contracts</i>	1. Demand for compensation for extra-contractual charges <i>60.7% of the total</i> <i>67% of cases concern construction contracts</i>
2. Equitable adjustment <i>17% of the total</i> <i>58% of cases concern construction contracts</i>	2. Adjustment, revision or payment of price <i>15.7% of the total</i> <i>62% of cases concern construction contracts</i>
3. Termination or consequences of termination <i>9.7% of the total</i> <i>75% of cases concern services contracts</i>	3. Demand for damages and interests <i>11.7% of the total</i> <i>66% of cases concern construction contracts</i>

Here again, for the three principal forms of claims, construction contracts prevail by a fairly substantial margin (67.7% in the case of demands for compensation, 62.5% in the case of demands for adjustment, revision or payment of price, and 66.6% for demands for damages and interest). The litigious dimension of construction contracts is confirmed once more.

In the case of American litigation, the “economic profiles” of demands addressed by co-contractors to the GSBCA vary depending on whether they relate to construction contracts, services contracts or supply contracts. Demands for equitable adjustment emanate exclusively from holders of construction contracts, while those with services contracts are mostly engaged in conflicts about price and costs. Services contracts are also concerned with default termination. Supply contracts are characterized by the predominance of conflicts over price, giving rise, for some, to demands for reimbursement after the public authority’s discovery of the existence of a defective pricing practice.

Moreover, it is possible to specify the nature of the decision of the contracting officer, contested by the co-contractor (Table 4). Here again, the two countries clearly differ. Indeed, a decision to terminate for default or convenience of the government is behind more than a third of cases before the GSBCA, while this is much rarer in France (less than 6% of the reasons for recourse). In cases of unforeseen events related to performance, the American judge seems to worry less about the continuity of the contractual relation than the French administrative judge.

Table 4—Decision of the Contracting Officer Contested

GSBCA	CE and CAA
1. Contract termination (for default or convenience of the government) <i>36.5% of the total</i> <i>33% are from services contracts</i>	1. Refusal to cover cost overruns <i>58.9% of the total</i> <i>76% of cases concern construction contracts</i>
2. Refusal to cover cost overruns <i>29.2% of the total</i> <i>66% of the cases are for services contracts</i>	2. Refusal to pay the price <i>7.8% of the total</i> <i>75% of cases are for construction contracts</i>
3. Refusal of the technical solution adopted <i>7.3% of the total</i> <i>Construction contracts exclusively</i>	3. Contract cancellation <i>5.8% of the total</i> <i>One case each observed for construction, supply, and concession</i>

In French contract performance litigation, two types of principal causes emerge: additional work or costs and disagreements on price, especially with respect to construction contracts. This is a major source of difference from the structure of contract litigation in the United States, where claims for additional work are found, above all, in services contracts, while the principal cause of litigation in construction contracts is disregard for technical specifications. In France disregard for technical specifications is only a minor cause for litigation brought before an administrative judge.

In order to develop a more systematic image of litigation profiles, Figures 1.a and 1.b (below) present the results of an analysis of the most significant correlations between variables. Variables are more strongly correlated as the arrows that represent them in Figure 1 are closer. They are more significant when the arrow is closer to the circumference represented in the graphs.

Figure 1.a. Correlations Between Variables (GSBCA)

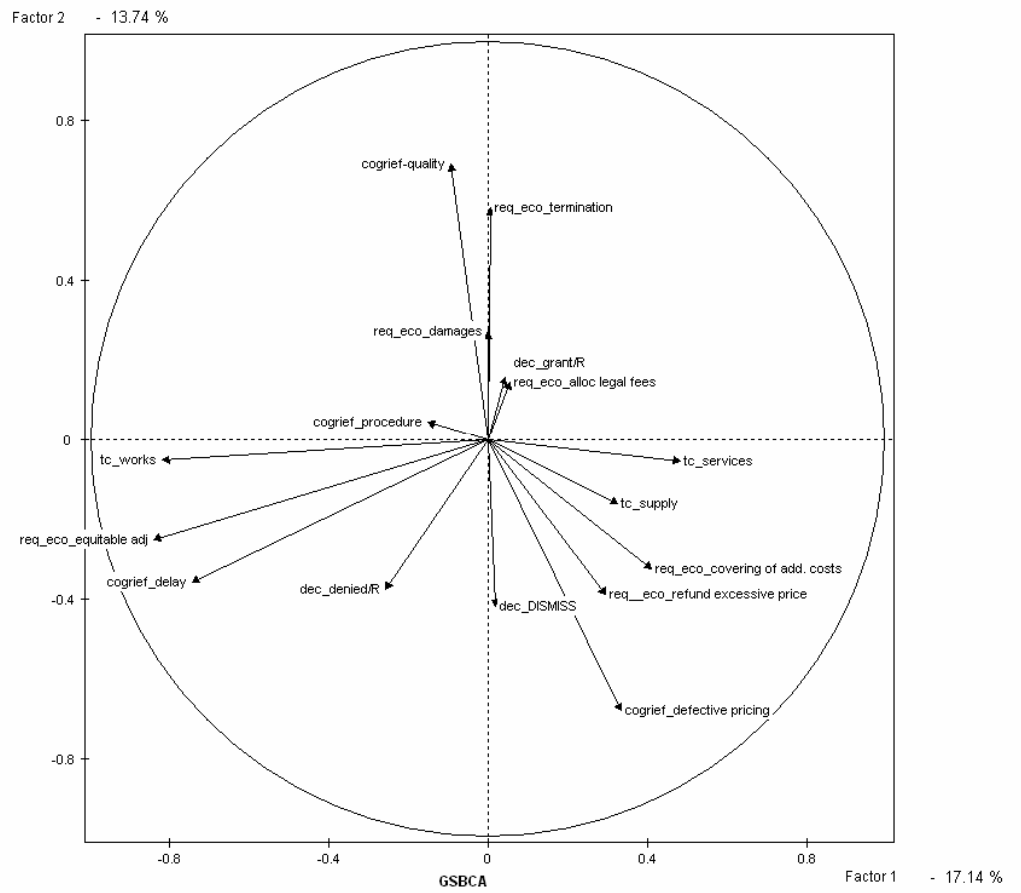
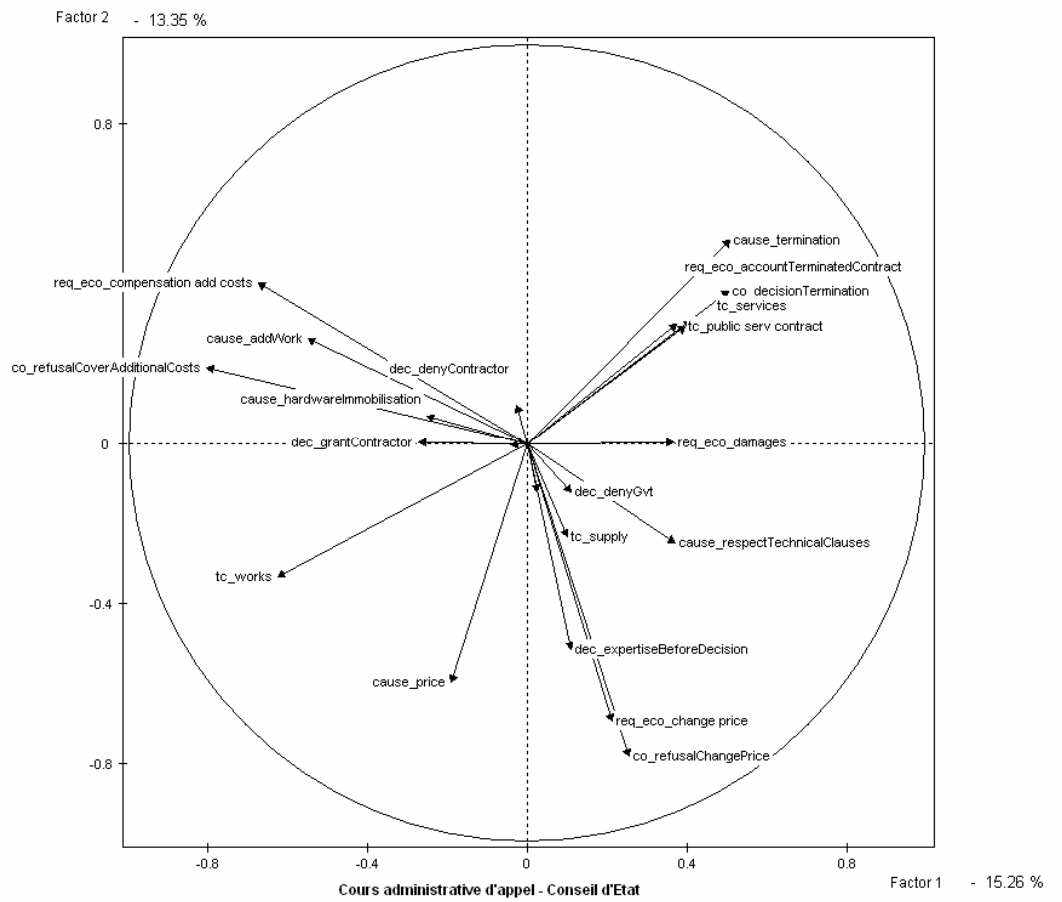


Figure 1.b. Correlations Between Variables (Cours administratives d'appel and Conseil d'Etat)



The Figure 1.a. reveals two strong correlations between variables that characterize the litigation before the GSBCA:

- a) The construction contracts (tc_works) are correlated to demands for equitable adjustment (req_eco_equitableadj), as well as a grievance from the public authority with regard to a contractor's performance delays (cogrief_delay) linked to exercising the power to unilaterally impose modifications¹⁵;
- b) We also observe satisfying correlations between supply contracts and demands to supplement remuneration by revising prices upwards (tc_supply and req_eco_coveringofadd.costs), more associated with demands to dismiss the case, while contract terminations are correlated to performance deficiencies in terms of quality.

Figure 1.b. illustrates correlations observed in the French case. The strong correlations are as follows:

- a) Terminations are linked to public services contracts and are somewhat correlated with demands for damages and interests;
- b) Additional work is correlated with demands for compensation for extra-contractual charges that the public authority refuses to grant.

¹⁵ For example, *Amec Construction Management, Inc.*, No. 16233, Nov 18, 2005 and *Turner Construction*, No. 15502, March 18, 2005 and Oct. 24, 2005).

B. *Litigation Outcomes: Administrative Judges' Common Severity*

Consideration of the issue of litigation procedures in the two countries leads to the conclusion that administrative judges display the same severity towards co-contractors of the government.

1) Concerning the results of the cases before the GSBCA, it appears that most end in denials of appeal (25 cases out of 41), and decisions to accept the request for appeal are relatively rare (6 cases out of 41). Almost all requests concerning respect for technical specifications and unforeseen occurrences touching employment conditions of personnel lead to a denial of appeal. The administrative judge very rarely overturns the contracting officers' decisions, particularly with respect to contract termination for default or for convenience of the government. As for demands for equitable adjustment, they result, in 5 cases out of 7, in a denial of appeal.

2) In the French case, analysis of the judgments has been completed with the study of conclusions by government commissioners (*commissaires du gouvernement*) assigned to the litigation resolution section (*section du contentieux*) of the Conseil d'État.

Concerning judgments rendered, denial of the co-contractor's appeal by the administration is most common (43%) in comparison to cases in which this request was partially accepted or denied (15.7 %) or accepted (3.9 %). In the latter case, the contrast is striking because the ratio of decisions to grant appeal compared to denial of appeal is 1 to 9. Furthermore, 59% of decisions to deny appeal concern demands for compensation, 22%

demands for adjustment, revision or payment of price and 13.6% demands for damages and interests.

The study of government commissioners' conclusions before the Conseil d'État from 1980 to 2004 reinforces the finding of judges' severity in contract performance litigation. We must note that conclusions are followed in 96% of cases and that no divergence of approach emerged between the formation of judgments and the government commissioners called upon to reach a conclusion on the matters at hand.

III. ADMINISTRATIVE JUDGES' DECISION-MAKING STYLE

What can we say at this point about the manner in which litigation is addressed by the judgments delivered? Here we propose to focus on the decision-making styles of American and French administrative judges¹⁶ through a study of the lexical structure of their judgments. The application of a lexical statistical analytical tool to decisions rendered in American and French jurisdictions (**A**) allows us to evaluate the typical lexical registers of judgments in that respect, beyond taking the measure of judgments' legal and procedural dimensions on one hand, and factual and material dimensions, on the other (**B**).

A. Differentiated Lexical Registers

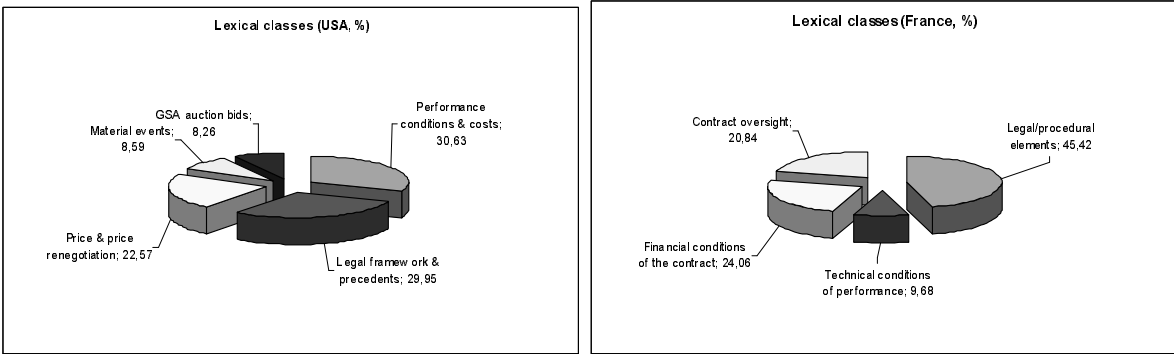
Each series of decisions (of the GSBCA on one hand, and the Cours administratives d'appel and the Conseil d'État, on the other) were subjected to computerized lexical analysis¹⁷

¹⁶ On the "style" of judgments, *see* A. Tunc and A. Touffait, *Pour une motivation plus explicite des décisions de justice notamment de celles de la Cour de cassation*, R.D.C. (1974).

¹⁷ With ALCESTE software Alceste is a software of analysis of textual data developed by the firm IMAGE. It proceeds to an automatic statistical analysis of textual data. It basically uses a downward and hierarchical classification method. In this method, the totality of the text is cut in textual units, these units representing pieces of text whose size is of order of the sentence. From these textual units, Alceste dissociates, while using the metrics of the khi2, two groups of units whose vocabularies are the most different possible. Alceste continues the process, of iterative manner, until the obtainment of a number of lexical classes.

permitting us to highlight lexical classes, that is, categories of words and phrases that are interlinked. A more in-depth analysis, in conjunction with the texts, allows us to relate these classes to particular decisions. The following graphs (Figure 2) represent the component lexical classes of the decisions and their overall weight.

Figure 2—Lexical Classes in Contract Litigation (United States—France)



In the French case, legal/procedural dimensions comprise nearly 45% of the body of decisions. This is an indicator of the legal motivation of decisions expressing the crucial place of legal formalism, while GSBCA judgments grant relatively more importance to material elements, notably to performance conditions and events of a technical nature affecting the contractual relationship. We may also observe that, in the case of the GSBCA, legal references are principally to judicial precedents and are only half as prevalent as in France.

However, we will eventually see that French and American federal public contract law reveal striking and substantial similarities: a legal system overriding conditions of private law, the public authority’s particular prerogatives (the power of unilateral modification, and the possibility of discretionary termination of contracts), and measures to balance and rebalance a contract, as well as specialized judges. Nonetheless, despite this basic similarity, to which we

will return later, their decision-making styles are radically different and prove to be specific to each case.

Indeed, the previous graphs clearly demonstrate that the factual (conditions of contract performance) and material dimensions (financial aspects of the contract) only constitute about a third of the entire lexicon used by French judges in their decisions. Now, in the case of the GSBCA, examination of the conditions of contract performance (in terms of costs and unforeseen technical occurrences) and the conditions in which prices are negotiated or fixed constitute 60% of the entire lexicon of decision-making. Furthermore, reference to contract management by the public authority is present in a significant manner in French judgments, and does not appear in American judges' decisions.

This finding could be further explored through a study of the structure of litigation revealed through lexical classes by means of factorial analysis.

B. Differentiated Decision-making Styles

Technically, factorial analysis of relationships allows us to highlight the manner in which the lexical data of litigation is interrelated and, above all, reveals the lexical variables structuring the information contained in the decisions. The graphs that follow (Figures 3.a and 3.b) display the two first factorial axes and their contribution to explaining the information contained in the *corpus*.

Figure 3.a. Lexical Structure of Decisions (GSBCA)

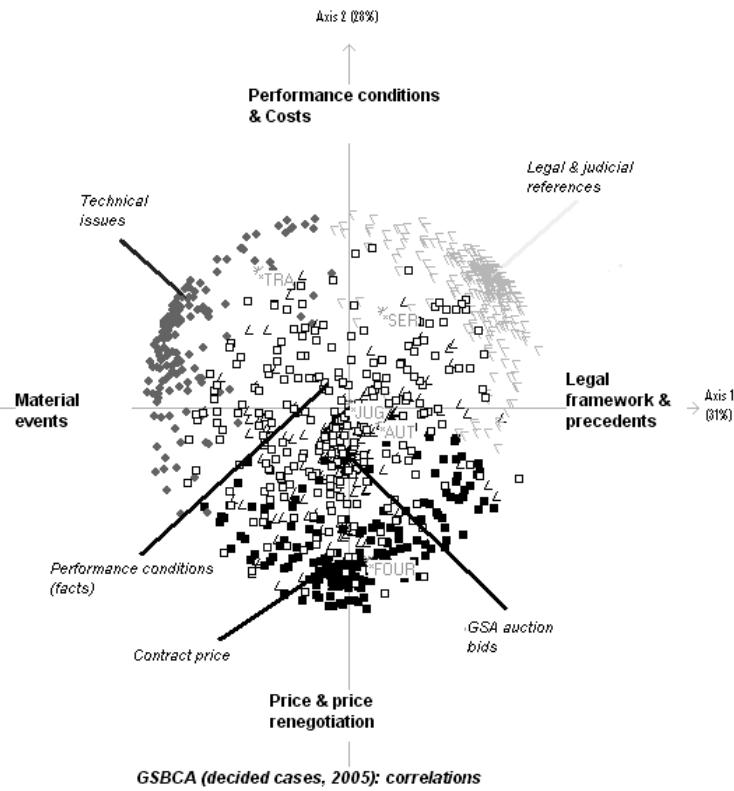
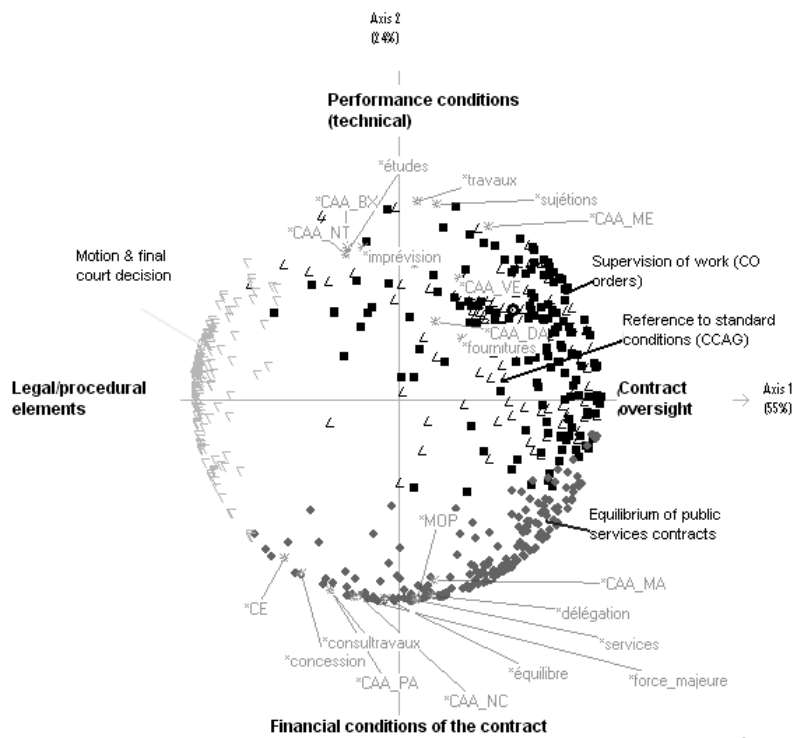


Figure 3.b. Lexical Structure of Decisions (Conseil d'Etat and Cours administratives d'appel)



Conseil d'Etat and Cours administratives d'appel (decided case, 2005): correlations

N.B. : on the graph, CAA means "Cour administrative d'appel"; "BX" = Bordeaux, "ME" = Melun, "NT" = Nantes, "PA" = Paris ; "VE" = Versailles ; CE means "Conseil d'Etat".

Contract litigation brought before the GSBCA (Figure 3.a) is structured by a double opposition. The first, represented by the horizontal axis, separates reference to the legal framework and judicial precedents on one hand, from the description of material or technical events characterizing the process of the contractual relation, on the other. The second opposition, represented by the vertical axis, concerns conditions of contract performance that have an impact on costs, as distinct from questions of negotiation and determination of the contract price.

For its part, French administrative contract litigation is characterized by a double opposition (Figure 3.b): a first axis is structured by opposition between, on one hand, legal/procedural notes present in all judgments ("given the motion"... "filed"... "docket") and, on the other hand, the evocation of contract management and oversight by the public authority; a second axis clearly separates technical conditions of contract performance from their financial conditions.

In the case of contract litigation before the GSBCA, we observe that construction and supply contracts are clearly differentiated from the perspective of the controversy's nature: that of construction contracts is primarily linked to cost conditions and performance of work, while that of supply contracts relates to "price determination." The intermediary position of services contracts indicates that they are situated midway between price and performance conditions, and, as such, do not present a specific profile, but may seem similar to construction or supply contracts, depending on the particular case. We may also observe that the lexical class of the legal and judicial framework is given the principal heading in the upper part of the graph, since reasoning, argumentation and precedents are closer to the types of construction contracts than to the others.

We may observe that the different types of contract litigation are unequally distributed in France: work concessions (*concessions de travaux*), public services contracts and project management contracts (*contrats de maîtrise d'ouvrage*) are closer to the lexicon of financial dimensions and contract equilibrium than those of construction contracts or studies, associated with the lexicon of performance conditions from a technical perspective. Indeed, judgments relative to construction or studies refer more to performance conditions provided for in the standards conditions (*Cahiers des Clauses Administratives Générales*) and the management of work by public authorities (via service orders): technical dimensions and management of work by the public authority touch on those of the contract's financial equilibrium, which is, on the other hand, at the heart of litigation about delegating public service.

At this stage, it is possible to conclude that French litigation is more closely associated with hierarchical and technical dimensions of construction contracts and studies, while for American litigation, there are more economic references, whether related to performance costs or the price of supplies. Furthermore, one may note that the lexicons used in American and French judgments are not only different, but that their positions in terms of correlations differ when it is a question of factual references and legal references. The relationship between material facts and legal references is visible in the previous graphs, allowing us to observe that the lexicon of performance conditions of the GSBCA is sufficiently dispersed in the graph, tending to suggest that these references are little different from the others: examination of performance conditions is not completely separate from the other components of administrative jurisdictional discourse, notably references to case law rulings and tools for calculating and evaluating costs and prices. We must caution that this is a particular trait of

construction contracts since we may observe that the other lexical classes are more concentrated in a precisely defined area. This could be interpreted as a sign of less diversity of problems and reasoning than in the case of construction contracts, which present greater complexity. To this lexical structure, that denotes a certain permeability amongst legal references, factual references and economic dimensions, may be easily contrasted with the lexical structure that French administrative litigation reveals: component words of each class are clearly correlated amongst themselves, and we may observe no significant dispersal in the space of the graph (except references to the general standard conditions (“*cahiers des clauses administratives générales*”). This means that the redactional structure of French decisions reflects a lack of interactions between the various dimensions of the cases.

IV. TREATMENT OF ADDITIONAL COSTS AND CONTRACT EQUILIBRIUM

The administrative judge’s position in terms of dealing with litigation is balanced between a formalistic posture, stemming from respect for regulation and existing case law, and a pragmatic posture, unavoidable with respect to the materiality of facts of each type and the need to conciliate the interests of the public authority and its co-contractor. The contract’s financial equilibrium constitutes the framework in which questions about costs and prices are handled by the judge.

Nevertheless, this mix of formalism and pragmatism is not the same in the two cases studied here. Clarification of the place occupied by accounting, financial and economic considerations will allow us to highlight particularities of each system. More precisely, we may discern a number of common points concerning the final results sought by the judge in the case of altered contract performance, notably compensation for additional costs imposed

through the power of unilateral modification or certain events beyond the control of the co-contractor, on the other hand. However, the means of reaching these points differ, whether it is a matter of raising legal and economic, accounting and financial considerations used to adjudicate co-contractors' demands, and the typology of situations, on one hand, or wide-ranging legal standards, on the other.

These differences assume a particular coloration with respect to financial equilibrium or treatment of costs. We will argue that the financial framework for termination or compensation for extra-contractual charges is quite similar in the two countries (see A below). In contrast, the handling of costs is quite distinctive (see B below).

A. The Contract's Financial Equilibrium: Attempt To Compare Case Law Concepts

In France and in the United States, regulation of public contracts and administrative case law converge at a certain point: one finds there regulatory and judicial mechanisms tending to permit the administration's co-contractors to request the maintenance of their contracts' financial equilibrium.

We will discuss the principal concepts at play in American case law, whether judicial concepts per se or judicial interpretations of regulatory concepts. We will attempt to define their relationships with concepts in use in French *jurisprudence*.

1. General Impression

Generally, we may distinguish two cases, that of unforeseen external occurrences and that of the power of unilateral modification, giving rise under certain conditions to an equitable adjustment.

With respect to unforeseen external events, American law takes into account a number of situations liable to justify a "default" by "refusal" or "failure" or a delay in contract performance ("*excusable delays*"): ¹⁸

- "*Acts of God*" or "*Acts of the public enemy*",
- "*Acts of another Contractor in the performance of a contract with the Government*",
- "*Fires*",
- "*Floods*",
- "*Epidemics*",
- "*Quarantine restrictions*",
- "*Strikes*",
- "*Freight embargoes*",
- "*Unusually severe weather*", or
- "*Delays of subcontractors or suppliers at any tier arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and the subcontractors or suppliers*".

Table 6—External Occurrences Unforeseen in the Contract

<i>France</i>	<i>United States</i>
Situations of <i>force majeure</i> including: 1) natural events 2) human-made occurrences: - third-party actions, - strikes, and - war-related events.	1) " <i>Acts of God</i> " or " <i>Acts of the public enemy</i> " 2) " <i>Fires</i> " 3) " <i>Floods</i> " 4) " <i>Epidemics</i> " 5) " <i>Quarantine restrictions</i> " 6) " <i>Strikes</i> " 7) " <i>Freight embargoes</i> " 8) " <i>Unusually severe weather</i> " and 9) " <i>Delays of subcontractors or suppliers at any tier arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and the subcontractors or suppliers.</i> "

¹⁸ In this regard, we note that, amongst the types of litigation considered by the GSBCA in 2005, we have found no cases of "*Excusable delays*" or "*Acts of God*." This finding leads naturally to two hypotheses that research could eventually verify: either the *Contracting Officers* display considerable tolerance towards these types of situations; or the administrative judges' interpretation is restrictive, thus discouraging co-contractors from having recourse to these motions.

Unforeseen events	<p>No equivalent (a single reference in section 50 of FAR: Extraordinary Contractual Actions → subsection 50.3: Contract Adjustments → paragraph 50.304 (e): Formalizing informal commitments → (6) <i>"A statement and evidence of the impracticability of providing, in an appropriate contractual instrument, for the work performed."</i></p> <p>English equivalent in the theory of "frustration" and situations of "impracticability" very rarely employed by the American judge and whose specifications remain very vague. In addition, there is no clear evidence of their invocation and application in hypotheses of contracts concluded with the government.</p>
Unforeseen conditions	"Differing Site Condition Clause"
<p>Unpredicted increase (1) or decrease in benefits (2): (1) new work, additional work, or a greater amount of work (2) less work</p> <p>Changes in the importance of various aspects of the work</p>	
Third-party actions	<i>"Acts of another Contractor in the performance of a contract with the Government,"</i>

When it is a question of modifications to contract performance, American law grants the power of unilateral contract modification through the Changes clause. It is interesting to note that American public contract law envisages the hypothesis of "Acts of the Government in either its sovereign or contractual capacity," which corresponds to the distinction in French law between the power to unilaterally modify the contract and discretionary acts of the government.

Table 7—Modifications to contract performance

<i>France</i>	<i>United States</i>
<p>Increase (1) or decrease (2) of benefits: (1) new work, additional work, or a greater amount of work (2) less work</p> <p>Changes in the importance of various aspects of the work</p>	<p>"Changes clause:" "within the general scope of the contract" including:</p> <ul style="list-style-type: none"> - "formal changes," - "constructive changes:" "contract interpretations, government interferences with work, defective specifications, nondisclosure of vital information, and speeding up the work."
<p>Limits of the power of unilateral modification: financial clauses are beyond this range and modifications prescribed must not be so innovative as to lead to the conclusion that a new contract should have been drawn up.</p>	<p>"Cardinal changes:" "beyond the general scope of the contract" → "if the contracting officer orders cardinal changes, the government has breached the contract and the contractor is entitled to cancel the contract and obtain a generous measure of damages."</p>
<p>Power of unilateral modification: the contracting administration, acting as a party to the contract modifies contract performance conditions</p> <p>Arbitrary governmental act:</p> <ul style="list-style-type: none"> - another public authority not party to the contract takes measures that serve to aggravate the contract's performance conditions - the co-contractor's situation is aggravated due to a measure taken by the public authority, but acting outside of their role as party to the contract. 	<p>"Acts of the Government in either its sovereign or contractual capacity"</p>

However, the American concept closest to that in French law is that of equitable adjustment.

2. Equitable Adjustments

(a) Definition

The Court of Claims, the predecessor of the U.S. Court of Appeals for the Federal Circuit which decisions are binding for both the boards of contract appeals and the Court of Federal Claims, first defined "equitable adjustments" in the 1960s: "equitable adjustments (...) are simply corrective measures utilized to keep a contractor whole when the government modifies a contract. Since the purpose underlying such adjustments is to safeguard the contractor against increased costs engendered by the modification, it appears patent that the

measure of damages cannot be the value received by the government, but must be more closely related and contingent upon the altered position in which the contractor finds himself by reason of the modification.”¹⁹ the concept of equitable adjustment allows for compensation for additional costs and the perception of profit for the part of the work that was done but excludes compensation for "unearned profits." This is a significant legal difference in public contracts compared to private contract law since the *common law* permits the integration of unearned profits amongst compensatable damages.²⁰

(b) "*Equitable Adjustments*" and "*Change orders*"

The notion of equitable adjustment seems closest to the issue of financial equilibrium in France. Now equitable adjustment is linked to the exercise of the power of modification (*change order*) of the contract by the public authority.²¹

The power of unilateral modification is, as in France, delineated in the contract equilibrium: a modification that constitutes a "cardinal change" frees the co-contractor from any obligations. In that respect, it is important to specify that the notion of "cardinal change" of the contract is absent from the *Federal Acquisition Regulation*: it is a jurisprudential

¹⁹ *Bruce Construction Corp. v. United States*, 163, Ct. Cl. 97, Nov. 15, 1963, 9 CCF 72, 325. This apparently clear definition may be misleading, however. Study of the jurisprudence since that date shows that the terms of the definition need adjustment. Thus, we needed to wait until 1974 to obtain clarifications on this showing what the *Court of Claims* meant by *keeping a contractor whole*. "It is well established that the equitable adjustment may not properly be used as an occasion for reducing or increasing the contractor's profit or loss or for converting a loss to a profit or vice-versa, for reasons unrelated to a change. A contractor who has understated his bid or encountered unanticipated expense or inefficiencies may not properly use a change order as an excuse to reform the contract or to shift its own risk or losses to the Government." *Pacific Architects and Engineers Inc v. United States*, 203 Ct. Cl. No. 298-72, Jan. 23, 1974, 19 CCF 82, 415.

²⁰ C. TIEFER, W. A. SHOOK, *GOVERNMENT CONTRACT LAW* (Carolina Academic Press, 2nd Ed., 2004, p. 330).

²¹ More precisely the change could be *unilateral* (similar to the French notion of unilateral modification of the contract) or *bilateral* (in this case it translates into an additional clause in the contract: "A bilateral modification (supplemental agreement) is a contract modification that is signed by the contractor and the contracting officer." (FAR – 43.103 (a)).

creation whose nature is specified in the caselaw²². Therefore, a cardinal change is the source of a material rupture that frees the co-contractor from any contractual obligations, including those provided for by the Contract Disputes Act²³. For the judge, determining whether a cardinal change has taken place is a question of fact; this supposes that each case will be analyzed individually in light of all the circumstances²⁴.

(c) "Equitable Adjustments" and "Constructive changes"

The order given by the public authority to accomplish work not foreseen in the contract arises from the doctrine of "constructive change:" "A constructive change generally arises where the Government, without more, expressly or impliedly orders the contractor to perform work that is not specified in the contract documents"²⁵.

The rule of "constructive change" is to offer the right to compensation for additional charges as a counterbalance to the pursuit of contract performance.

(d) Equitable Adjustments and Termination of contracts

As for compensated charges in case of contract cancellation by a public authority, French and American regulation is almost identical. In both cases "reliance interests" are favored, rather

²² *Allied Materials & Equipment Co. v. United States*, 569 F.2d 562, 563-64 (Ct. Cl. 1978).

²³ See *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1276 (Fed. Cir. 1999), *General Dynamics Corp. v U.S.*, 585 F.2d 457, 452(Ct. Cl. 1978).

²⁴ *Allied Materials & Equipment*, 569 F.2d at 565.

²⁵ *Lathan*, 20 Cl. Ct. at 128; *SIPCO Services & Marine*, Fed. Cl., 17/04/98.

than "expectation interests."²⁶ In American public contract law, the spirit governing the working out of charges for termination in the framework of termination for government convenience is described in article 49.201 (a) ("Termination of Contract") of the *Federal Acquisition Regulation*: "A settlement should compensate the contractor fairly for the work done and the preparations made for the terminated portions of the contract, including a reasonable allowance for profit." The payment for termination puts at the disposal of the affected party payment for the part of the work that was completed, including profit, but excluding compensation for anticipated profit not obtained and other prejudices subsequent to the cancellation (49.202 (a)).

A brief comparison of French and American measures relative to unilateral contract cancellation by the administration reveals that Section 43 ("Contract Modification") of FAR seems to echo:

- article 35.1 of the C.C.A.G. Marchés industriels (Industrial markets) (décret n° 80-809 of October 14, 1980 modified): "The public authority may, at any moment, whether or not the contractor was at fault, end the contract before total completion through a decision to terminate the contract, with notification according to number 4 of article 2;" and

- article 46.1 of the C.C.A.G. Marchés publics de travaux (décret n° 76-87 of January 21, 1976 modified): "Execution of work ... may be halted before completion by a decision of contract termination which determines the date this takes effect."

²⁶ R.A. Posner & M. Rubinfeld, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 JOURNAL OF LEGAL STUDIES (1977).

American measures applicable to detailed accounts of contracts terminated for convenience of the government are not that different from their French equivalents. For example, measures that are provided for in the section on general administrative clauses related to industrial contracts. Article 36 of the C.C.A.G. *Marchés industriels* specifies the terms of payment in case of termination of the contract by the public authority. The public authority has agreed to credit the contract holder with “the contractual value of benefits provided to the public authority, and expenses incurred by the contract holder to provide the agreed benefits to the public authority, to the extent that either these expenses were not previously amortized or they could not be earlier,” and “personnel’s expenses, including that of the contract holder, are demonstrably and necessarily a direct result of the contract cancellation.”

These points common to French and American legal systems of unilateral cancellation underscore their specific character with respect to private contract law. The question that then needs to be asked is whether this exorbitance could be legitimized through recourse to economic analysis.

To varying degrees, as we see, public contract regulation and administrative jurisprudence in the two countries have traits in common. On the other hand, and this seems related to a certain conception of contractual justice, it is in the handling of costs that France and the United States are most distinctive.

B. Bringing The Typology And Standards Used To Characterize Unforeseen Events Closer Versus Differences In The Handling Of Additional Costs

1. Conceptual Characterization of Altered Contract Performance

In France, venerable *jurisprudence administrative* classifies types of categories according to the contexts of modified performance: unforeseen conditions, unpredictable obstacles, force majeure, ability to unilaterally modify the contract, etc. These situations, when external to the parties, are determined from certain concepts belonging to analytical standards: predictability, unpredictability, irresistibility, etc. This typology, subject to jurisprudential evolution, constitutes a central element of the administrative judge methods of deciding cases. The judge will particularly insist on proof of the unpredictable, exceptional, irresistible, etc. character of the event responsible for changing the contract. Very obviously, the question of quantification and proof of prejudice is not absent, but it is less central than the qualification of situations by means of these analytical standards.

American law grants the administration the power to unilaterally modify the contract. However, the judge seems to put more emphasis on the consequences of changed contract performance. Rather than a typology of sources of risk (external or not to the contract) and their characteristics (predictability, and irresistibility), American regulation and administrative courts' rulings are based on a different logic of evaluating change and imbalance in the contract: determination of costs attributable to the contract (FAR, section 31- *Contract Costs Principles and Procedures*), the procedure to follow to demand an adjustment in the contract (justifying the reasons, and calculating the costs, subsection 50.3— *Contract adjustment*, notably 50.303); and the consequences of exercising the "changes clause." Thus, one could say that the American judge resorts to more comprehensive standards: the modification of the contract falls under the heading of the "scope of contract" or that of "cardinal change," the concept of "reasonable costs," "reasonable profit," etc.

This difference clearly appears in the treatment of costs when the government's co-contractor asks for an equitable adjustment.

2. Right to Equitable Adjustment and Assessment of Costs

More precisely, the judge's handling of the demands for equitable adjustment is conceived in a manner concomitant with a legal problem (for compensation) and fact (in the operations of "computation" and "proof" calculated from the costs). Indeed, to establish a right to compensation via an equitable adjustment, the one making the request is required to establish proof of responsibility (*liability*), of causality (*causation*) and of damage (*resultant injury*), in other words, supplementary costs (*SIPCO*, Fed. Cl., 1998, citing *Ralph L. Jones, Electronic & Missile Facilities v. U.S.*, 189 Ct. Cl. 1969; *Wunderlich Contracting v. U.S.*, 173 Ct. Cl. 1965).

American judicial and administrative tribunals have developed processes to evaluate the precise costs of handling equitable adjustment.²⁷ Upon examination of the processes, it certainly seems that the American federal system of contract regulation, from the perspective of substance and procedure, is denser than that in place in France. The Federal Acquisition Regulation structures a network of rules bearing on all aspects of the contract, notably economic and accounting features. Unlike the French practice, ministerial departments, like other agencies whose contract is governed by federal regulation, place at the disposal of their purchasers numerous rulebooks on contractualization. The content of the latter is less oriented towards respect for the formal regularity of the tendering of contracts than towards

²⁷ C. TIEFER & W. A. SHOOK, *GOVERNMENT CONTRACT LAW* (Carolina Academic Press, 2nd Ed., 2004). See section 2 of chapter 6: *Computation and Proof of Equitable Adjustments*, pp. 345 on.

the achievement of contractual choices adapted to the needs of the administration from an economic and accounting point of view. The implementation of the principles and standards stemming from common law through administrative jurisdictions and the *Court of Federal Claims* (such as the reasonable character of the claims or the supplementary costs for which they are seeking coverage) gives the jurisdictional system the image of a system largely open to the facts, whether these are “material facts” or “behavioral facts.” Thus, demands for equitable adjustment are investigated in consideration of the contract’s legal and accounting dimensions, simultaneously. In other words, all things being equal, the American judge does not proceed in a sequential manner as the French administrative judge has a tendency to do when ruling on the right to compensation of a co-contractor of the administration and determining the amount. The American judge proceeds in a synchronous manner, judgment of the eventual right to compensation being not considered independently of an attentive screening the allowability, allocability and reasonability of costs the co-contractor claims to have incurred.

The contracting officer, like the judge of the board of contract appeals, demonstrates some rigor, if not actual strictness. Yet, beyond a simple mechanical calculation, it is a certain conception of contractual justice that seems to us to be conveyed by the American method.

(a) Cost Pricing Methods: Principles

What is initially striking about the American process is that the accounting framework of cost evaluation constitutes an important aspect of the procedure of the judge called upon to rule on eventual compensation for additional costs.

(i) Characteristics of Compensable Costs

In handling demands for an equitable adjustment, a major question is that of the judge's application of the standard of "reasonable costs," as defined in FAR 31.201-3.²⁸ All things considered, the obligation of the appellant to demonstrate that the costs incurred are at the same time reasonable, allowable and allocable, explains in part numerous jurisprudential subtleties, since, whatever the nature of the modification decided by the public authority, once the total cost is broken down, the appellant must furnish proof that the costs for which reimbursement is being requested meet these three characteristics.

In addition and depending on the case, the calculation of costs incurred which is the basis of the compensation granted, will be done according to the *effective costs* or the *retroactive/actual cost pricing*²⁹ approach or according to the *prospective cost pricing*³⁰ approach.

The former case will be favored when the work necessitated by the contract modification was already partially executed or when the entrepreneur is unable to sufficiently precisely evaluate the potential costs linked to this change.

²⁸ Thus FAR indicates that a cost is reasonable "(a) (...) if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business. Reasonableness of specific costs must be examined with particular care in connection with firms or their separate divisions that may not be subject to effective competitive restraints. No presumption of reasonableness shall be attached to the incurrence of costs by a contractor. If an initial review of the facts results in a challenge of a specific cost by the contracting officer or the contracting officer's representative, the burden of proof shall be upon the contractor to establish that such cost is reasonable. (b) What is reasonable depends upon a variety of considerations and circumstances, including— (1) Whether it is the type of cost generally recognized as ordinary and necessary for the conduct of the contractor's business or the contract performance; (2) Generally accepted sound business practices, arm's length bargaining, and Federal and State laws and regulations; (3) The contractor's responsibilities to the Government, other customers, the owners of the business, employees, and the public at large; and (4) Any significant deviations from the contractor's established practices."

²⁹ According to FAR, "Actual costs" means (except for Subpart 31.6) amounts determined on the basis of costs incurred, as distinguished from forecasted costs. Actual costs include standard costs properly adjusted for applicable variances (FAR 31.001)."

³⁰ Prospective Pricing: "A pricing decision made in advance of performance, based on analysis of comparative prices, cost estimates, past costs, or combinations of such considerations."

In the second case, preferred by the government, the appellant is in a position to precisely evaluate the costs to be incurred.³¹

However, these two approaches (*prospective* for potential costs and *effective* for real costs) do not exhaust the question of the methodological framework of costs assessment. In addition, there are a number of methods to calculate the compensation requested by the co-contractor of the public authority.

(ii) Methods to Determine the Amount of Compensation Demanded by the Co-Contractor: Pricing Methods

Judges, in evaluating the compensation demanded by the co-contractor, will have recourse to four methods of calculation, the choice of which depends partly on the possibility of reasoning in terms of the prospective or effective approach. The preferred method of “proof” of equitable adjustment is to rely on actual cost relating data in pricing the change and then add an element for profit. The three other methods (“total cost”, “modified total cost”, and “jury verdict”) are used when for justifiable causes the actual cost method cannot be used. The total cost method “compares the total cost of the work performed, minus the original

³¹ *SAB Constr. Inc. v. United States*, Ct. Cl. No 02-1952C, Jun. 10, (2005): ‘In this case, the plaintiff does not dispute that it has not purchased an additional insurance policy or set aside a self-insurance fund and thus it has not incurred any insurance costs. The plaintiff argues, however, that the cost of self-insuring has been incurred because the plaintiff faces a potential liability even if it has not incurred any additional costs of performing. In this case, the plaintiff now seeks the funds to create a self-insurance account to cover “liabilities” that have been “incurred” although it has not incurred any “damages”. The problem with the plaintiff’s theory is that because the measure of an equitable adjustment is the actual costs incurred in performing the contract, this court cannot measure the equitable adjustment without incurred costs. Contrary to the plaintiff’s assertions, an “incurred” potential liability is not an “incurred cost.” The equitable adjustment is intended to cover the costs the contractor incurred in connection with the additional work associated with the change. The estimated cost of creating a self-insurance program is not an incurred cost. Accordingly, the estimated cost of self-insurance is not recoverable as an equitable adjustment.’

estimate of the work”³². The “modified total cost method” is a variant of the latter, because “it excludes from the total cost comparison amounts attributable to underbidding, contractor inefficiency, and unrelated contractor costs”³³. The last method, called the ‘Jury verdict method’, is employed when judges cannot decide between two parties’ claims with respect to the elements of proof they provide. Co-contractors must demonstrate that it is impossible to determine a well-grounded amount for compensation.³⁴

Once eligible costs have been determined and methods to calculate the costs established in their entirety, there remains one last stage: that of the enumeration of various changes to the contract. In each case, the eligibility of costs for compensation will be examined through the prism of the three criteria identified above. As for the method selected to determine the amount of compensation, it will depend on the type of change imposed on the entrepreneur, the three methods discussed earlier not being interchangeable in all cases. Amongst the possible changes to the contract, *additive changes, deductive changes, constructive changes*,³⁵ *substituted work, acceleration, disruptions, defective specifications*,³⁶ *differing site conditions*,³⁷ etc., we will select one: *delay-related costs*.

³² C. TIEFER, W. A. SHOOK, GOVERNMENT CONTRACT LAW, at p. 345.

³³ C. TIEFER, W. A. SHOOK, GOVERNMENT CONTRACT LAW at p. 345.

³⁴ *Joseph Pickard's Sons Co. v. United States*, 532 F.2d 739, Ct. Cl., (1976); *Lea County Constr. Co.*, ASBCA No. 13964, 72-1 BCA (C.C.H.) ¶ 9298.

³⁵ For an example of a refusal, see, *Conner Brothers Constr. Co. Inc.*, Ct. Cl. No 99-735C, Jun. 10, (2005). “A constructive change generally arises where the Government, without more, expressly or impliedly orders the contractor to perform work that is not specified in the contract documents.”, *Lathan Co. v. United States*, 20 Cl. Ct. 122, 128 (1990) and Chris Berg, 455 F.2d at 1050; also see *Aydin Corp. v. Widnall*, 61 F.3d 1571, 1577 (Fed. Cir. 1995). In addition, see *Tecom Inc. v. United States*, Ct. Cl. No 00-475C, Jun. 27, (2005) and *Ervin and Associates v. United States*, Ct. Cl. No 01-153C, Jan. 20, (2004).

³⁶ See *Riley Constr. Co. v. United States*, Ct. Cl. No 02-593, Apr. 28, (2005) and *Conner Brothers Constr. Co. Inc.*, Ct. Cl. No 99-735C, Jun. 10, (2005), “defective drawings.”

³⁷ See *Conner Brothers Constr. Co. Inc.*, Ct. Cl. No 99-735C, Jun. 10, (2005).

Also, when American judges have ruled on a claim for recovery of general fixed overhead, in most cases they do not hesitate to refer to the formula from the *Eichleay Corp.*'s decision³⁸. And doubtless, it is possible to contend that what was understood and accompanied the evolution of formulae for cost calculation in the United States towards greater rationalization was a search for greater objectivity in compensation granted. But is such a finding satisfactory?

(b) Cost Pricing Methods and the conception of the contractual relation

We may wonder whether, indeed, this refinement in methods for calculating compensation granted to the public authority's partner is not misguided in nature, in terms of responding to the larger concerns raised by the necessarily sovereign role of the contracting administration. On the contrary, is it possible to see in a simple mechanical calculation, however refined, the objective expression of the search for a certain justice or equity in contractual relationships?

(i) The Status of Sovereign Contractor in the United States and in France

In reality, at the core of this rationalization, and beyond the often technical aspect, resides the American system's response to the question on the nature of sovereign authority and the resulting consequences, when the latter agrees to be bound by a contract.

³⁸ *Eichleay Corp.*, ASBCA No 5183, July 20, 1960. The "Eichleay formula" provides a method for calculation of overhead allocable to the contract as a function of time. One must notice that the Eichleay method as been adjusted. Thus, the Defence Contracts Audit Agency recommended that certain non deductible costs, such as bad debts, advertising, contributions and entertainment, be excluded from the general fixed expenditures used in the calculation of the daily rate of fixed expenditures incurred by the Government' cocontractor (Audit Guidance – Delay and Disruption Claims, DCAA PAMPHLET 7641.45, Aug. 1988).

Longstanding in the United States,³⁹ the difficulties raised by this question have not yet been resolved, witness, the difficult management by Congress during the 1980s and 1990s of the so-called *savings and loans* crisis.⁴⁰ Thus, its resolution gave rise to an important decision of the Supreme Court,⁴¹ the developments of which bear witness to the existence of mechanisms very similar to solutions administered by the French administrative judge on an issue of arbitrary government decision.

In that respect and in order to better resolve this tension⁴² arising from the double nature of the public contracting authority, the search for objectivity in the calculating forms of compensation granted to the administration's partner has finally appeared in the only and conclusive response of an American judge to this difficult question.⁴³ This response

³⁹ For the Supreme Court, "When a government enters into a contract with an individual, it deposes, as to the matter of the contract, its constitutional authority, and exchanges the character of legislator for that of moral agent with the same rights and obligations as an individual." But the Court immediately adds: "it is in theory impossible to reconcile the idea of a promise which obliges with a power to make a law which can vary the effect of it," *Hamilton Gas Light & Coke Co. v. Hamilton City*, 146 U.S. 258 (1892).

⁴⁰ After having authorized recourse to a favourable accounting measure designed to encourage savings institutions in sound financial health to resume the activity of those then hit by bankruptcy, public authorities abrogated this accounting measure, provoking the ruin of certain of those who took over these institutions.

⁴¹ Supreme Court, *United States v. Winstar Corporation & al.*, n° 95-685, July 1, 1996, 518, pp. 839-937.

⁴² "Historically, the Government has behaved differently from private enterprise, and the courts reinforced the distinction between private and Government contracts. This distinction exposes a fundamental tension that underlies the ongoing evolution of federal Government contract law, policy, and case law. Compelling arguments favour both the distinctions and the similarities between Government and private purchasing. As [observed], the US embraces both the traditions of 'exceptionalism' and 'congruence.' The exceptionalist view of Government contracting emphasises the unique status, attributes, and needs of the federal Government. The congruent view seeks to assimilate the government's contractual rights and duties to those of private entities. The effort to buy more commercial items and incorporate commercial practices signals a resurgence of congruent-type policy-making. Yet the exceptionalist constraints, which impede the implementation of a truly commercial government purchasing regime, cannot be ignored.", S. L. Schooner, *Commercial Purchasing: The Chasm between the United States' Government's Evolving Policy and Practice* in PUBLIC PROCUREMENT: THE CONTINUING REVOLUTION (S. Arrowsmith & M. Trybus, Ed., Kluwer Law International, 2003, pp. 137 on and especially, p. 158). Also see by the same author, *Impossibility of Performance in Public Contracts: An Economic Analysis*, 16 PUBLIC CONTRACT L.J. (1986, pp. 229 on and especially, pp. 262-263), as well as J. Schwartz, *Liability for Sovereign Acts: Congruence and Exceptionalism in Government Contracts Law*, 64 GEORGE WASHINGTON L. R. (1996, pp. 633 on.).

⁴³ See, in particular J. E. MURPHY, GUIDE TO CONTRACT PRICING: COST AND PRICE ANALYSIS FOR CONTRACTORS, SUBCONTRACTORS, AND GOVERNMENT AGENCIES (4th edition, CPA, CPCM, Editor, Management Concepts, 2004), as well as J. CIBINIC, JR. & RALPH C. NASH, JR., COST REIMBURSEMENT CONTRACTING (3rd ed., The George Washington University, 1995). For the case of defense contracts, see, T. KIRAT, D. BAYON & H. BLANC, MAITRISER LES COURTS DES PROGRAMMES D'ARMEMENT. UNE ANALYSE COMPARATIVE DE LA REGLEMENTATION DES MARCHES

necessarily presupposes that the latter has made the choice, like legislative and regulatory bodies elsewhere, to maintain the sovereignty of a contracting administration, thus preventing it being reduced to an ordinary contractor.

Still, is this system of compensation so different from the French system? In addition, is it so useful as to be a source of inspiration? Are we certain that extreme rationalization of the rules for financial compensation constitute the best remedy for the consequences of the public authority's possession and use of the power of unilateral modification?

In France, in raising the trilogy of the existence, possession and usage by the contracting administration of a power of unilateral modification as a general rule applicable to all administrative contracts, the Conseil d'État in 1983 ended⁴⁴ a controversy born, to simplify the matter, from a dispute between L'Huillier and Benoît⁴⁵ about the commonly held interpretation of the judgment of March 11th, 1910.⁴⁶

Nonetheless, we may suggest that the February 2nd, 1983 decision may not be interesting exclusively because of this promotion, since as well, and beyond the affirmation of the existence of the administration's unilateral power of modification, attempts to assign a precise and incontestable basis to the recognition of such a prerogative continue, as in the United States, to encounter numerous difficulties. This means that the public authority's

INDUSTRIELS D'ARMEMENT EN FRANCE, AU ROYAUME-UNI ET AUX ETATS-UNIS (Rapport de l'Observatoire Économique de la Défense, La documentation Française, Paris, 2003).

⁴⁴ Conseil d'Etat, Feb. 2, 1983, *Union des transports publics urbains et régionaux*, req. n° 34.027, Rec. Lebon, p. 33 ; R.D.P., 1984, p. 212, note J.-M. Auby ; R.F.D.A., 1984, n° 0, p. 45, note F. Llorens.

⁴⁵ J. L'Huillier, *Les contrats administratifs tiennent-ils lieu de loi à l'administration ?*, D., 1953.chro.87 ; F.-P. Benoît, *De l'inexistence d'un pouvoir de modification unilatérale dans les contrats administratifs*, J.C.P., 1963.I.1775 and LE DROIT ADMINISTRATIF FRANÇAIS, Dalloz, 1968, pp. 655 on.

⁴⁶ Conseil d'Etat, March 11th, 1910, *Compagnie générale française des tramways*, Rec. Lebon, p. 216, concl. L. BLUM; D., 1912.3.49, concl. L. Blum ; S., 1911.3.1, concl. L. Blum, note M. Hauriou ; M. LONG, P. WEIL, G. BRAIBANT, P. DELVOLVE AND B. GENEVOIS, *LES GRANDS ARRÊTS DE LA JURISPRUDENCE ADMINISTRATIVE*, 9th edition, Dalloz, 1990, p. 136 on.

possession of the power of unilateral modification is today certain; what is less certain is what constitutes its basis. For example, and from the outset, the general interest thesis, habitually an explanatory factor for the specific powers that the administration is recognized to have in a public contract,⁴⁷ inevitably resulting in an unequal relationship between the parties, cannot withstand in-depth scrutiny. At a minimum, the public interest does not fully explain these powers.

In particular, while pursuit of the general interest allows us to explain the administration's possession of exorbitant prerogatives, it does not permit an explanation for why the contractor of the administration, seeking its own interest—of a private nature—would agree to a contract with a partner with such singular means of unilateral action. The common explanation of serving the general interest merely gives rise to a truncated view. The justification given for the parties' inequality only works for the public authority's position. Thus, taking account of the partners' motivations requires adjusting this finding of the inequality of contracting parties and then, the inequality proves to be merely superficial and confined to certain prerogatives. On the other hand, there is an equality in mutual recognition of the respective rights of each. As a result, to even suppose that the administrative contract constitutes the basis of relations between unequal partners, we could only envisage this relationship of subordination independent of a coordination device. These two types of relationship are the expression of a single logical requirement and take each other for granted. In other words, the unequal or subordinate relationship only endures because it is based on reciprocal recognition. Therefore, it is only to the extent that the administration's co-

⁴⁷ Thus, and according to the Conseil d'État, the "unequal relationship between the contracting parties [...] constitutes one of the specificities of the administrative contract in comparison to private law contract. It is in the name of the general interest that the contracting administration has certain unilateral measures of action at its disposal, including the power to modify the contract and increase the charges incurred by its partner, including financial charges, or even the power unilaterally to cancel the contract in the interest of service," Rapport public pour 1999, L'INTÉRÊT GÉNÉRAL, ÉTUDES & DOCUMENTS DU CONSEIL D'ÉTAT, n° 50, La documentation Française, 1999, Paris, p. 279.

contractor recognizes in the latter these prerogatives to intervene in the contract that it is possible to use the expression inequality of the parties. This logical requirement allows us to discern the existence of a certain justice, even in hypotheses where the equilibrium between requirement and obligation is greatly unbalanced to the detriment of one of the parties. Also, and beyond the single finding of the validity of their consent, the administrative contract places essentially equal parties in a relationship. These parties are linked through reciprocity, which is made possible by the duality, at the heart of the commitment, of an active and passive aspect within a single act. The general interest is then unable to take account, in itself, of the unilateral means available to the administration when these convey the existence of an *unequal* relationship between contracting parties. The effects and the cause should not be confused.

This is why, and without necessarily imputing a particular intention to the Conseil d'État, we could suggest that the 1983 decision constituted the last stage in a problematic attempt at conciliation within the contract of two *bodies* of the administration, party to the exchange, thus prolonging the spirit of an already venerable *jurisprudence*.⁴⁸ Now, this tension between the administration's position, as a simple contractor, and its role as a public authority, admits of only two solutions: either the public authority agrees to divest itself of its prerogatives, acting as a simple co-contractor, unable to modify the contract; or it remains endowed with an irreducible portion of sovereignty that authorizes it, as the protector of the public interest, to modify the terms of the contract being executed. In upholding the power of unilateral modification as a general rule applicable to administrative contracts, the Conseil d'État has unambiguously opted for the second solution. In so doing, it has agreed with the

⁴⁸ see Conseil d'État, Aug. 4, 1905, *Compagnie des chemins de fer de Bône-Guelma et prolongements*, Rec. Lebon, p. 770; Conseil d'État, Dec. 29, 1905, *Bardy c/ Ville de Bergerac*, Rec. Lebon, p. 1014, concl. ROMIEU.

European Court of Human Rights,⁴⁹ as well as that of numerous national legal systems. In particular, it is in accord with the American system already referred to and of which one may say that, with regard to public authorities' previous contracts, it is closer to the French system than the latter is to the systems of Germanic inspiration—Austrian or German.⁵⁰ And this, “not for philosophical reasons, but to meet purely practical requirements, the concept of contract is being shaped to facilitate administration in improving performance of its difficult tasks and to provide a means of more concrete and prompt solutions in situations presenting a variety of complications. In addition, multilateral arrangements promote better collaboration between individuals and the administration wherever it seems indispensable, and at the same time establish a certain equilibrium between the public welfare, on the one hand, and the legitimate rights and interests of individual contractors, on the other.”⁵¹

Nonetheless, beyond this similarity in principle in terms of recognizing the public authority's power of unilateral modification stemming from the prerogatives of sovereignty, the two systems are distinguished by their modalities of determining the compensation accorded the co-contractor. To the rationalization of the American system, France responds with mechanisms of fairly generous financial adaptation, developed in response to the prerogatives of the public authority. And if part of constant judicial rulings is that, ultimately, the administration's partner has the right to require compensation for both *damnum emergens* (emerging damages) and *lucrum cessans* (disappearing gains), this overall jurisprudence is not based on any method of objective, preexisting calculation, but rather obeys the casuistical

⁴⁹ CEDH, Dec. 9, 1994, Aff. *Raffineries grecques Stran c/ Grèce*, Rec., vol. 301, p. 65, D.A., April 1995, n° 200.

⁵⁰ G. Langrod, *Administrative Contracts. A Comparative Study*, AM. J. OF COMPARATIVE LAW, Summer 1955, Vol. 4, Number 3, pp. 325 on.

⁵¹ *Eod. loc.*, p. 362.

rule despite some strong lines of force.⁵² Now this difference reveals a certain divergence in terms of taking into account the fairness of the judge's office.⁵³

(ii) Rationalization of cost pricing methods and the promotion of a double equity

More precisely, we believe that in attempting to achieve maximum objectivity in the compensation mechanism, the American system, at least in the field of equitable adjustments damages, promotes a double equity: on one side, the equity attached to the *principle* of compensability of unilaterally imposed modifications of the contract in the course of performance ; on the other side, the equity attached to the *most exacting measure* of amount of compensation and of costs incurred by the entrepreneur. That statement illustrates the fact that equity, in practices, resides as much in the affirmation of the principles as in the ways and means of their application.

Furthermore, it is remarkable that in the American system one finds side-by-side, beyond the quarrel between advocates of natural law and those of positivism, consideration of an objectified rationality according to costs, reduced to its most basic economic expression, and the search for solutions based expressly on equity, that is a judicialized form of equity. Explicit recourse to equity can be found, for the rest, in a number of instances of jurisprudence relative to contracts passed by the federal government, whether questions of, for example, *equitable termination* or *equitable estoppel*.⁵⁴ In doing so, the American system also had the effect of assuring at the same time the ethical requirement that is at the heart of

⁵² see A. DE LAUBADÈRE, F. MODERNE & P. DELVOLVÉ, TRAITÉ DES CONTRATS ADMINISTRATIFS (L.G.D.J., Paris, 1984, tome 2, n°s 1326 on., pp. 555 on).

⁵³ We here allow ourselves to return to developments in Laurent Vidal's thesis devoted to equity. see L'ÉQUILIBRE FINANCIER DU CONTRAT DANS LA JURISPRUDENCE ADMINISTRATIVE, Bruylant, 2005, pp. 860 on.

⁵⁴ see recently *Commer Brothers Constr. Co. Inc.*, Ct. Cl. No 99-735C, Jun. 10, (2005), as well as *Roxco, Ltd. v. United States*, Ct. Cl., No 02-176C, Mar. 29, (2004).

all contractual justice, the linking of this same ethical requirement to a logic that precedes it, and finally the resolution of difficulties born of this implementation.

V. CONCLUSION

American and French regulatory systems and resolution of differences by administrative jurisdictions, specialized in the case of the Boards of Contract Appeals, generalists in the case of French administrative jurisdictions, are usually more similar than different, though one cannot deny the distinctive features of each. This leads to the finding that the two countries' adherence to their legal traditions, however distinct, does not prevent American federal law and French regulation from converging to a remarkable degree on certain fundamental points: public law, power to orient and unilaterally modify the contract, compensatable character of the extra-contractual charges, even the obligation to pursue contract performance in the face of unforeseen occurrences.

Moreover, American judges seem still more open than their French counterparts to material facts and dimensions (accounting, economic and financial issues). Is this saying that they are closer to a material rationality than a formal rationality? In reality, it seems difficult to argue such a viewpoint since American law is also formally rationalized.

Could we then suggest that the French judge is more formalistic than the American judge, who is more pragmatic? This thesis could be defended in terms of the formal presentation of decisions. However, the judges' support for contracts and practices through techniques of cost evaluation allows us a glimpse of a hybridized form between formalism

and pragmatism. In a way, this is in tune with the formalized pragmatism evoked by Duncan Kennedy with respect to private law. From the outset, and this is in some ways the paradox of the situation, the French judge benefits from a greater degree of discretion than the American judge. In other words, the judge is freer within a framework of pragmatic formalism than in a framework of formalized pragmatism.