Introduction

A New Model for Leasing Contract of Public Drinking Water Distribution Services

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Following the passage of the comprehensive decentralization law of March 2, 1982 (Articles 90 and 91; CGCT, Article L-1111-5 and following), Standard Contract are no longer obligatory. They now serve only as *"models"*, which local authorities may refer should they so wish. It is in this manner that local authorities (or their collective institutions) have continued to use the Standard Contracts for the distribution of drinking water, as approved by the executive order dated March 17, 1980.

Nonetheless, this document showed some signs that it was becoming out of date. In addition to the fact that it did not take into account the most recent legislative and regulatory developments (the *Sapin* law of January 29, 1993, the Water Act of January 3, 1992…), the document no longer entirely met the expectations of the responsible local authorities and users in the matter of quality control. Nor did it meet expectations concerning costs and benefits, or the concerns of the private operators themselves, who are concerned about retaining the necessary freedom to act to ensure an optimum operation of the service.

As a result of these concerns, a decision to draw up a new Standard Contract has been taken. The new Standard Contract will apply to public drinking water services. The Contract is only a model, but one that will attempt to remedy the failings previously noted as a result of taking note of those problems that have come to light over time.

The purpose of this introduction is to ensure the presentation of the new Standard Contract (II), though not without first calling to mind the essential elements of the leasing contract to which the Standard Contract refers and upon which it is dependent.

1. THE LEASING CONTRACT

In order to manage their public water distribution services, the territorial public authorities are free to have recourse to the procedures of their choice. The decision that they take in this respect is dependent upon the opportunities at hand, and is not subject to discussions before the

administrative judge[1]. In concrete terms, there are two possibilities open to the authorities: They may:

- They may opt for direct management of the service i.e., they may operate it directly using their own personnel and equipment;

- They may opt for indirect management, i.e. they may turn over operation of the service to a third party;

- In this latter case, the territorial public authorities have a new choice available. They may, in fact:

- Either reach an agreement with an operator to whom they pay a fee for his service, with no productivity bonus or profit share (known as "gérance")[2];

- Or have recourse to the delegation of the public service in which the co-contractor draws a substantial portion of his remuneration from the charges collected from the users of the service, or more broadly, from the results of the operation of this service. [3]

With the concession contract and the profit-sharing water authority with a private manager (known as "régie intéressée"), leasing is one of the main illustrations of this last type of management. In the water distribution sector, it even makes up the most frequently used type. Additionally, it was specifically noted in the old communal code, in Article R.371-6. It is to this code that the Standard Contract, the object of the present work, refers. This fact justifies our reviewing, at the very outset, the definition of the lease (A), and the main characteristics of the plan (B).

A. DEFINITION OF THE LEASE

The lease is not defined by any text. We must therefore refer to a well-developed body of case law "Jurisprudence" and core principles in order to single out the elements that make it possible for us to identify what it is. Leasing is presented in a classic manner as "an agreement by which a public authority that is responsible for a public service transfers responsibility to a third party, which then ensures the operation under its responsibility through the works that are entrusted to it. This third party is remunerated directly by the consumer and pays a portion of the amount

[1] In this respect, see EC, March 18, 1988, Loupias, CE records, tables on page 975; RDP, 1988.1460, observations by F. Llorens; EC, January 10, 1992, Peyreleau Association of Water Users, CE records, page 13, Administrative directive 1992, number 81, RFD administration 1992, page 346; and, for illustrations of this freedom outside of the field of drinking water, see, for example, EC. June, 28, 1989, Union of Personnel of the Electrical and Gas Industries, Centre of Grenoble, Adm. RDF 1989.929. Conclusions by E. Guillaume, note by J.F. Lachaume; EC, June 7, 1995, Mixed Committee of the Corporation of the Mixed Local Economy, Bordeaux Gas, EC records, pg. 226; CJEG 1995.371, conclusions by Mr..Denis Linton; Administrative directive 1995, number 492, observations by M. D-L

[2] EC, April 7, 1999, County of Guilherand-Grange, AJDA 1999.517, conclusions by C. Bergeal, RD imm 1999.396, observations by F. Llorens and P. Soler Couteaux BJCP; number 5/99, pg. 456, conclusions by C. Bergeal, Mon. TP, May 7, 1999, TO page 404 and July 9, 1999, page 48, observations by C. Cabanes, RFD Adm. 1999.1134study by J.C. Douence and page 1147, study by L. Vidal, concerning a management contract qualified as in the public market.

[3] Concerning this criterion of remuneration, see below (A), 1 (c), in this same part.

collected back to the contracting public authority to cover its own expenses and any services provided by it."[4]

On the basis of this definition– a definition that we may use as the basis of our work, and which we will refine over time- it becomes evident that leasing is very similar to concession contract and makes up a part of the broader category of the "delegation" of public services, the main characteristics of which it shares (1). It may only be distinguished from the broader category on the basis of a limited number of specific elements (2)

Items of Definition Common to the Contracting Out of Public Services

As was indicated above, leasing shares many essential elements with agreements governing the delegation contracts of public services, and even more so with concession, of which it is often presented as a simple variant.[5] More precisely, it has three characteristics in common with these agreements with respect to its nature (a), its purpose (b) and the manner in which co-contractors are remunerated (c).

(a) The nature of the Lease: the Lease is a contract

Even though it seems obvious on the basis of the evidence, this statement deserves to be stressed for a number of reasons. First of all, delegations of public services may exist d on a unilateral basis. Due to the contractual nature of the leasing arrangement, there will therefore result a large number of important consequences, these consequences include:

- In the first place, like all other contracts, it can only be concluded on the basis of the reciprocal agreement of the parties;

- In the second place, the fact that the parties are bound by their agreements and are bound to respect them under penalty of seeing their responsibilities brought into question. In the event of litigation relative to the execution of the contract, the judge will look to the clauses in the contract for a solution to the problem under litigation.[6]

This reminder gives us an opportunity to insist upon the care that the contracting parties must bring to the drawing up of the contractual provisions. It also makes it possible to draw attention, if this were necessary, to the importance of the Standard Contract produced below, in so far as it contains the essential elements of the clauses intended to govern relations between the leasing public authority and the lease-holder.

(b) The Purpose of the Lease: The Lease is a Contract that Brings about the Devolution of Public Services

In order for there to be a lease, the public authority must turn over responsibility for the operation of the public service to its co-contractor.

[4] A de Laubadere – Treatise on Administrative Contracts, LGDJ 1983, Volume 1, number 260, page 317
[5] See, for example, O. Fouquet, Conclusions concerning the State Directorate, February 22, 1989. The Viandest Company, the Classifieds, July 19, 1989Number 86, page 7.
[6] See, for example, the Lyon CAA, June 8, 1993, the General Water works, Pal Gas 1994, Administrative Directive, page 147

This devolution can only be partial. It may involve only element of the service[7], or it may cover only a portion of the geographic field. However, it must necessarily result in the transfer of responsibility to the lease-holder's account, while at the same time serving as a recognition that the lease-holder is entitled to sufficient freedom to be allowed to manage the service.

From this characteristic of the lease, there once again follow several consequences.

- As it bears upon the operation of a public service, the lease is, in the first instance, an administrative contract, subject as such to the general theory of administrative contracts, and governed in law by the case law that governs administrative matters. An administrative contract, as defined by the 1982 decentralization laws, is a contract between a public and a private (or semi-public) entity for the delivery of public services.[8]

- As it constitutes a manner of managing a public service, it therefore brings about the submission of the contracting parties to the regulations that govern the public service(French public service law), and, in particular, to the principles of continuity, equality of users (non-discrimination) and continuing adaptation to circumstances (the latter following from the principle of continuity).

These principles apply in a general sort of way: to the leasing public authority and to the lease-holder equally; they govern the drawing up of the contract as well as the awarding of same; the principles govern relations between the parties, just as they govern those with the users of the service: in this latter instance they are of a very special importance.[9.]

Finally, the fact that the lease constitutes both a contract and a mode of management of a public service makes it a special kind of agreement, or, if we may borrow a time-honored expression, it is of mixed character. Beside the contractual clauses which exclusively concern relations between the lease-holder and the leasing public authority, it includes, in fact, an entire series of provisions that, because they have to do with the organization of a public service, take on the character of regulations, thus allowing a third party, by the use of the contract, to invoke them to its advantage; this is particularly the case with users of the service. Inversely, they may also contest them in the courts.[10.]

(c) <u>The manner in which the lease-holder is remunerated: the lease is a contract under which the co-contractor is substantially remunerated by the results of the operation of the service.</u>

Although not formulated in any text, this provision is essential. It is what distinguishes a lease from similar contracts and especially from a public market. It is what is involved in the category of the delegation of public services within the meaning of the *Sapin* law of January 29, 1993. If this provision is not fulfilled, the contract does not, in fact, constitute a lease. There are as many reasons to clarify the meaning that is involved in the manner of payment, as there are to invoke the principal consequences that result.[11]

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[7] For example, the delegation of public water services may not include the production of water.

[8] April 8, 1998, the Association for the Promotion and Influence of Orres, BJCP, number 1/98, page 63, conclusions by C. Bergeal.

[9] See the Standard Contract, reproduced below, the Notes to Article 39, Note 89.

[10] See below, Section II of this Introduction.

[11] See the question, F. Llorens and P. Soler-Couteaux, Code of Public Markets, Annotated, Litec, 1999, Observations to the first article, Section 9, page 46.

The criterion of substantial remuneration of the co-contractor through the results of the operation of the service was selected by the State Directorate in the henceforth celebrated case of *The Prefect of the Rhone Intakes v. the County of Lambesc.*[12] This criterion was selected in order to distinguish the delegations of public services from private markets.

It is justified on the basis of the notion that, in so far as the delegation of public services in general and of leasing in particular is concerned, the management of the service ought to be at the risk of the co-contractor.[13] It makes up the corollary to the devolution of the services to the latter, and of the recognition to the benefit of sufficient freedom of management.

It remains to determine the meaning. By results of the operation of this service, we must understand not only the charges collected by the lease-holder from the users of this service, but also the additional revenues resulting from the operation of the services.[14]

In order for the contract to have the nature of a delegation of public services- in this case the character of a lease- and not that of a market, it is necessary that this form of remuneration is of a substantial amount. By this we mean not of a majority or preponderant character, but simply of some consequence or significance. By way of example, the State Directorate has determined that 30% of the co-contractor's remuneration is a sufficient amount.

This criterion does not preclude considering as a lease any contract under which the lease-holder receives a fee from the leasing public authority, as soon as this fee is topped up by substantial resources, resources (within the meaning indicated above) that are drawn from the operation of the service. [15]

On the other hand, there is no lease if this latter condition is not fulfilled, especially if the remuneration of the lease-holder is made up essentially of a fee paid out by the public authority. The State Directorate has ruled, in this respect, that a contract under which the contracting corporation collects sums from the public authority corresponding to a fixed portion represented by the rental of meters along with a portion determined on the basis of the volume of water distributed does not constitute a delegation of the public service of water distribution. The High Court was of the opinion that this manner of remuneration did not lay the risks involved in the operation upon the co-contractor; and that, not being tied to the results of the operation of the service it constituted a fee and thus assumed the classification of a market, thereby excluding its being classified as a delegation of public service.[16]

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[12] EC, April 15, 1996. EC records, page 137, Administrative DRF, 1996.715, Conclusions by C. Chantepy, note by Ph. Terneyre; CJEG, 1996.267, conclusions and notes by R. Savignat; MP, number 7/95-96, page 39, conclusion, AJDA 1996.806, chronicle by D. Chauvaux and T.X. Giradot ; Imm RD 1996.369, observations by F. Llorens and Ph. Ternneyre. JCP, editions E, 1997number 929, Notes by Y. Delaire, Administrative Directive 1996, number 355, notes by J.B. Auby.

[13] Concerning the importance of this idea of management of risks and perils, see C. Bergeal, Conclusions of the EC, June 30, 1999, Mixed household waste treatment union, Seine Centre-West and Marnais, BJCP, number 7/99, page 607.

[14] See the solution of the case of Intercommunity Household Waste Treatment Union, Seine Centre-West and Marnais, the references to which are given in the following note.

[15] EC, June 30, 1999, Mixed Household Waste Treatment Union, Seine Centre-West and Marnais, EC records, page 229, BJCP, number 7/99, page 607, conclusions by C. Bergeal; AJDA, 1999, conclusions by C Bergeral, note by J.M. Peyrical, Mon TP, October 1, 1999, page 54, Study by M. Long; RD imm., 1999.634, observations by F. Llorens and P. Soler-Couteaux; the Classifieds, number 41, February 28, 2000, note by C. Boiteau; Administrative director, 1999, number 246.

[16] EC, April 7, 1999, County of Guilherand-Granges, previously cited.

** If it is appropriate to insist upon a criterion of remuneration, it is both:

- On the one hand, because it constitutes the concrete expression of this fundamental idea, already stated, according to which the lease is a contract under which the operating risk must bear, at least in a significant manner, upon the lease-holder;

- On the other hand, because it involves the submission of the lease to the rules of awarding and execution (directly as a result of the *Sapin* law), rules that govern delegations of public services, and also because it excludes, in the manner of a co-relation, the application of the public markets rule

It is important in consequence, to insist strongly on the necessity, on the part of public authorities, to make sure that the contracts that they intend to pass, contracts that involve the management of their public water services, respond well to this criterion, and deserve the classification as a lease. Otherwise, there would be, in effect, every chance that the situation is one of a public market, and the Market Code would apply.[17]

2. Defining Elements that are Specific to Leases

The defining elements previously examined showed how leases make up part of the category of the delegation of public services. What we will now examine will allow us to identify a lease within this category, by means of differentiating the lease from the other delegations of public services, in particular, concession agreements. They are generally presented as two in number, pertaining, respectively, to the turning over to the lease-holder of the service installations (a) and the payment of a "tax" by the lease-holder to the leasing public authority (b). We will see, none the less, that if the specificity of the first of these elements is certain, that of the second is already more so subject to caution.

(a) The Turning Over to the lease-holder of the Service Installations

* This criterion of identification of the lease is essential. Both the legal writings[18] and the case law[19] confer upon it a central place in the distinction to be drawn between a lease and a concession agreement. In the first of these contracts, the installations that were required for the operation of the service existed at the time of its devolution. They were turned over to the lease-

[17] Administrative Territory of Strasbourg, September 15, 2000. The Michel Ruas Enterprises Company v. The City of Colmar, Public Market Contracts, 2000, Commission number 7, note by F. Llorens.

[18] See, among others, A. de Laubadere, F. Moderne, and P. Delvolve, opus citat. Volume one, number 260 and following, page 317 and following, J. M. Auby, The Current Situation concerning Leasing in the Public Services, Pequignot Mixtures, Montpellier 1984, page 29; P. Subra de Bieusses. The specificity of the contract, AJDA 1996.608; F. Llorens, the Current Definition of the Lease in the Public Service in the face of community law, Sirey, 1992.

[19] EC, April 29, 1987, County of Elancourt, EC records, page 153; DFR Administration, 1987.525 and the important conclusion reached by Y. Robineau; CJEG, 1987.855, conclusions; AJDA 1987.543, note by X. Pretot; EC, April 19, 1989, Urban Transportation Company of Angers, EC records, Tables on page 780, RDP 1989.1794, observations by F. Llorens; CAA from Paris, September 21, 1922, The Enterprise Jerome Company, Administrative directive 1993, number 1, EC, November 3, 1995, The Lyonnaise des Eaux-Dumez Company, EC records, tables, page 901, DFR administration, 1997.927, note by S. Duroy.
This difference explains that, in the field of the distribution of drinking water, the delegation of the service most often is in the nature of a lease and not a concession agreement.

holder by the local authority, but the local authority assume the costs of the initial set-up. In the second contract, on the other hand, it was up to the private operator, not only to manage the service, but also to acquire or construct the necessary equipment or installations in order for the operations to proceed.

It also makes it possible to understand certain elements of the plan that are specific to the lease and which have to do with its duration; with the supervision of how the installations work, or, again, with the authority of the administrative judge with respect to the measures involved in canceling the contract by the delegating local authority.[20]

In spite of its importance, this criterion of the lease is none the less far from being of universal scope.

As said in the Treaty of Administrative Contracts,[21] there exists more a difference in degree between lease and concession, than a difference in nature. This is what Yves Robineau, the government commissioner, meant by the imagery that he used when he wrote as follows: *"between these two theoretical types, administrative practice reveals all of the nuances of the rainbow."*[22]

In fact, it may happen that, within the context of a concession agreement, the local authority may deliver part of the installations to the co-contractor, or it may contribute to some of the expenses involved. Inversely, in a symmetrical manner, it is common for the lease-holder to see himself become responsible for the realization of some of the works necessary to the service (by way of renewal and improvement of the installations, in particular), or to support, in part, the costs involved in investments and related matters.[23]

In such cases, the classification of the contract depends upon the proportion of the work or the financing that is undertaken by the local authority and by the co-contractor respectively.[24] If the portion of these costs falls more heavily upon the local authority, the contract will assume the character of a lease. In the opposite case, it should be classified as a concession contract.[25]

[20] Concerning these various questions, see below, section II.

[21] Opus cit. number 261, page 320.

[22] Conclusions cited above concerning the State Directorate, April 29, 1987, County of Elancourt.

[23] Such is moreover the case in theStandard Contract, proposed below, where in addition to the maintenance works (Article 34) and daily repairs, the lease-holder finds himself responsible for all or a portion of the replacement or major repair costs (Article 35), as well as for the works termed "Concessive" (Article 37).

[24] Concerning this method of *"proportioning"*, see Public Service Law, edited by Moniteur, Volume One, Section IV.200.4.8.

[25] Thus, in the case of *"Commerce d'Elancourt"*, cited previously, the State Directorate shows that, if the contracting company undertook to take charge of the annuities remaining to cover the loans taken out by the delegating local authority for the establishment of the network and an important program of works, *"the financing of the largest portion of these investments remained the responsibility of the intercommunal Union; therefore, since this time, the contract dated November 29, 1957 is a lease contract and not a concession agreement…"*

(b) The Payment of Taxes by the lease-holder

* Legal writings are very frequently of the opinion that the payment of a tax to the public authority constitutes a distinctive characteristic of a lease.[26.] This situation seems natural, none the less: as soon as the lease-holder benefits from the installations put at his disposal, it appears normal that he should contribute to their financing, or, in any event, that he pay a type of rent in return for the advantage that he is thereby granted by the public authority.

** In practice, and even within the strict meaning of the law, things are, however, less clear. We take note, right off the bat, that that the existence of a tax that is owing by the lease-holder hardly comes up in those cases which bear upon the nature of the classification of the lease.[27]

Subsequently, and most especially, it appears that in the majority of cases, the lease-holder's contribution to the financing of the installations does not take the form, properly speaking, of a tax paid by the farmer to the local authority, but rather that it is agreed upon to call (and doubtless improperly), a "*surtax",* collected by the lease-holder from the users of the service, and repaid to the local authority. However, this "*surtax"* is nothing more than a portion of the price of the water collected by the lease-holder from the users and pays back to the local authority to cover the local authority's management costs (Supervisory costs), but also costs tied to investments or the amortization of earlier investments borne by the local authority.[28]

The contract may certainly provide for the lease-holder to make, in addition to the surtax or "communal share", a financial contribution towards the financing of the installations and services. Such a provision may take the form of the recovery of annuities. However, any such clauses are optional in nature.[29]

Finally, we must state that, even when provided for, the tax paid by the lease-holder is far from taking on the character of any absolute type. It may, in fact, come about that within the context of the concession agreements the private operator also pays taxes to the local authority that has granted him the contract, although the classification of the contract will not, thereby, be called into question. In practice, in concession contract, some investment may be undertaken directly by the local authority in order to benefit from government subsidies or cheaper finance. As a result, the fee paid to the local authority by the concessionaire will allow for investment costs borne by the local authority.

3. Elements with no Bearing on the Definition of Leasing

Contrary to what might be believed, or to what might be affirmed from time to time, neither the classification of the contract that is selected by the parties (a), nor the duration (b) enters into the definition of what constitutes a lease.

[26] See the authors cited above, Note 18, P. Subra de Bieusses, Case Law of the Territorial Local Authorities, Fasc. 765, Leasing of local public services, number 213.
[27] See, none the less, EC, April 29, 1987, County of Elancourt cited previously, which indicates in its motivation, that the co-contractor undertook to pay a tax to the public local authority against the re-instatement of the service's installation.
[28] See the Standard Contract presented below, Article 45.
[29] In this connection see Article 48.2 of the Standard Contract, presented below.

(a) The Classification of the Contract

Under the terms of a constant solution, which does not, however, pertain to the field of the lease, the classification given by the parties to their contracts is a matter of indifference. It does not bind the judge. The judge would not, therefore, admit the qualification of a contract as a lease, other than to the extent that this classification corresponds to the actual and real nature of the agreement submitted for adjudication. In the opposite case, he would not hesitate to reclassify the contract, and deal with it on the basis of this classification.[30]

(b) The Duration of the Contract

The duration of the contract is sometimes advanced as a distinguishing characteristic of the lease. It is said to be shorter than the time period involved in other contracts such as a concession contract agreement. This difference, which is sometimes raised by the judge,[31] is born out frequently enough in practice. It is easily explained by the fact that, since the lease-holder does not support the costs involved in the initial installation, he does not require a long-term contract in order to amortize his investment.

There is supporting evidence, none the less, in the provisions of Article L 1411-2 of the CGCT; under the terms of this Article, the duration of agreements involving the delegation of public services (and therefore involved in leasing) is determined by the local authority as a function of the services requested from the lease-holder. This duration is limited to the normal duration of the period of the amortization of the installations, in those cases in which these installations are the responsibility of the delegatee.[32]

Nevertheless, we may cast in doubt the idea that the duration of the contract constitutes a criterion that could serve as a distinguishing point between a lease and a concession agreement. It may turn out, in fact, that the contract confers upon the lease-holder the realization of certain tasks, and sometimes even including important tasks. Now, in such cases, the contract will naturally stipulate a relatively long duration, very similar to that involved in concession agreements bearing upon the same purpose.[33]

B. THE LEASING FRAMEWORK

The legal framework underlying the lease is derived from three sources:

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[30] For an example of the reclassification of a *"concession/agreement"* involving a lease, see EC, April 1987, the County of Elancourt, cited above.

[31] June 3, 1987. The Nimoise Bullfighting and Show Company, the Classifieds, number 72, June 15, 1988, page 22, note by B. Poujade.

[32] Concerning this question, see below, Section II, A.

[33] For a lease for water distribution service with a duration of greater than 20 years that was not considered as obviously excessive (Before the taking effect of the *Sapin* law of January 29, 1993), see EC July 23, 1993, General Waterworks, EC Records, page 225, DFR administration 1994.252, note by Ph. Terneyre; Administrative directive 1993, number 398, observations by F.S.
Apart from this, the duration of leasing agreements varies in a real way, based on the importance of the work that has become the responsibility of the delagatee. It would therefore be chancy, under these conditions, to consider the relatively brief duration of the contract as constituting a defining characteristic of the lease, while at the same time letting it serve as a criterion of distinction between the lease and a concession agreement.

- The first source consists of the contract itself, under which, and even by its own purpose, the Standard Contract reproduced below is called upon to play an essential role.

- The second is found in the rights under the relevant jurisprudence that applies to administrative contracts in general and to the delegations of public services in particular. In this manner, leases come under the purview of the broad theories formulated by the administrative judge (unforeseen circumstance, government actions, the theory of the financial balance of the contract, the power of unilateral modification and cancellation), as it is to those solutions of more limited scope uncovered by the judge himself.

- The third and final is found in the texts the importance of which has grown in recent years, especially since the adoption of the law of January 29, 1993, pertaining to the prevention of corruption and transparency of economic life, termed the *"Sapin"* law.[34]

From the point of view of its content, the leasing framework is characterized by the same traits as its definition, namely a very great similarity with that of the delegation of public services in general, and the concession contract in particular, (1) from which it goes it is distinguished in a number of points (2).

1. The Elements of the framework that are Common to Delegations of Public Services

It is not possible, within the context of an introduction, to undertake to explore – even were it to be only in an allusive manner- all of the aspects of the leasing contract. To deal with them would be practically to redo the entire general theory of the delegation of public services. And equally as well, these developments find their only aim in the evocation of the most innovative aspects of the leasing law – i.e., those that follow from the *"Sapin law"* and its contents, and which have to do with the awarding of a leasing contract (a); with its contents (b) as well as with its execution (c).

(a) The Awarding of the Leasing Contract

Until more recent times, the awarding of the leasing contract was under the discretionary power of the local authority. This authority was free to choose as it saw fit, without becoming involved in any publicity procedures or calls for competition. And the administrative judge refused himself the authority to exercise any control over the motives behind his decision.[35]

This situation came to an end under the joint effect of the *Sapin* law (*), and to a lesser extent, of European Community (EC) rights (**), and rights of competition. (***).

* The *Sapin* Law

- Under the provisions of this law (henceforth codified in Articles L1411-1 and following of the CGCT), the public service delegations attributed by moral persons of public law are submitted

[34] Article 38 and following codified in Articles L1411-1 to L1411-18 of the CGCT.

[35] See, for example, the EC Assembly, April 16, 1986, the Luxemburg Television Company, EC records, page 97, AJDA 1986.284, Chronicles by Mr. Azibert and Mr. Fornacciare; D 1987.97, note by F. Llorens, RDP 1986.847, Conclusions by O Dutheilet, 2 Lamothe; RFDA 1987.11, Note by F. Moderne, EC Assembly, March 3, 1990, Association of the Saint Germain Forest AJDA 1993.387; CJEG 1993.A160, Conclusions by Mr. Samson; EC October 10, 1994, City of Toulose, EC records, Tables, page 746.

"to a publicity procedure that makes possible the presentation of several competing offers."[36] The mechanisms of this publicity are defined in executive order number 93-471 of March 24, 1993.

The procedure itself is detailed in the Articles of the CGCT cited above. In particular, it includes: deliberation on the part of the assembly of the local authority concerning the basic principle of delegation;[37] the publication of a notice of appeal for competitors under the conditions set by the above-cited executive order; the selection of candidates in view of their professional and financial guarantees, as well as on the basis of their aptitude to ensure the continuity of the public service and the equality of users;[38] as well as the examination by a special commission of the offers submitted by those firms.[39] In the view of the notice filed by the commission, the executive authority thus undertakes negotiations with one or more of the firms, and then transmits its choice to the local/municipal council (or the deliberating assembly in case of multiple municipalities),[40] which rules, in the last resort, upon the choice of the delegatee and the contract of delegation.[41] As is the case with any delegation of a public service, the leasing of water services falls within this procedure.[42] The local authority must act most scrupulously in accordance with it, as the provisions that govern it are obligatory in their nature. The local authority must also respect the principle of equality between the candidates to the process of delegating,[43] a1ong with the regulations (both basic and procedural), regulations that it set up itself (a delay in the presentation of candidates for the delegating process and offers; conditions that all and sundry must respect…).[44] Should it fail to do so, the local authority exposes itself to sanctions both:

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[36] Concerning the economy of these provisions, see J.B. Auby and Ch. Maugne, who have authored a particularly rich bibliography. Contracts involving the delegation of public services, JCP 1994, number 3743; D. Laurent and O. Rousset, Agreement concerning the Delegation of Public Services and the Sapin law, the Classifieds, March 11, 1994, numbers 18 and 19; F. Llorens and Ph. Terneyre, Comments on the law of January 29, 1993, in RD. imm. 1993.207; J.B. Auby and Ch Maugue, the idea and the plan for the delegation of public services. A few clarifications from the State Directorate, JCP., 1996; Ch. Mague and Ph. Terneyre, Delegation of public services in questions, CJEG 1997.131; J.F. Auby and P. Ligneres, The Law and the Delegation of Public Service. A few proposals for improvements, Administrative Law, 1999, Chronicle number 15; addendum The Delegation of Public Services, Documentation from France, 1999. Public Markets and the Delegation of Public Services with respect to Community Law, The Classifieds, February, 2000, Number 23.

[37] Article L-1411-4.

[38] Article 1411-1.

[39] Article 1411-5.

[40] Ibid.

[41] Article 1411-7. Direct negotiation with a chosen enterprise is not allowed except in the event that the procedure does not bear fruit (Article 1411-8). The agreement concerning the delegation of public services must, in any case, be forwarded to the States's representative(The Préfet is the district level representative of the national government) under the conditions defined in Article L2131-2. (Article L1411-9), which Article provides for the examination by the regional Chamber of accounts (French decentralized branches of the General Accounting Office) (Article L1411-18).

[42] The Law does not provide for any exceptions to the submitting to competition except in those limiting hypotheses enumerated in Article L1411-12 of the CGCT and which concern mainly those cases in which the public service is delegated to a public establishment having as its statutory purpose the management of the service, or the delegation of public services of small scope, financially.

[43] See, for example, the Administrative Territor of Paris, Edict , November 2, 1994, the Eiffrage Group and others, EC records, Tables, page 710; AJDA 1995.147, note by Ch. Brechon-Moulenes; Administrative Territory of Grenoble, August 16, 1995, Labadie and others, EC records, Tables page 896; December 5, 1995, Remillat, EC records, Tables page 897.

[44] See for example, the Administrative Territory of Nantes, April 11, 1996, the Atlantic Transport Company, EC records, page 634; DFR Administration 1996.728, Conclusions by F. Millet; ACC of Paris,

- On the one hand from the administrative judge, seizure either by the Prefect or by a third party within the context of a pre-contractual provisional order to Article L22 of the Code of the Administrative Territories – CAA or within the context of recourse for excess of power;[45]

- As well as on the part of the penal judge for offences of favoritism.[46]

**** <u>European Community Law</u>**

In theory, the subjecting of the lease to competition only takes place in the internal level, under the conditions that have just been indicated. The public market community directives do not explicitly provide, in fact, for anything other than public works contracts, and only refer these contracts for competition in the basic sectors. It follows, therefore, that concession contracts, or more generally, the delegation of public services (therefore including leases) that have been passed in those sectors termed "special", a sector that includes water services, are not subject to community processes that would open them up to competition.[47] None the less, a recent Bulletin that was handed down by the Commission was of the opinion that concessions contracts passed in these sectors had to respect, at the very minimum, the principles of equality of treatment, of transparency, of proportionality, of mutual recognition and of the protection of the rights of the individual parties involved, as proposed by the European Union, or as secured by the case law of the Court of Justice of the European Communities.[48]

***** <u>The Right to Competition</u>**

We will add, in closing, that the devolution of the public water distribution service should be carried out in an attitude of respect for the principle of competition, as is provided for under the Order issued on December 1, 1986 and pertaining to the freedom of prices and does not involve any agreement, nor any abuse of a dominant position of such a nature as to stymie or derail the free play of competition.[49]

July 2, 1996, Sarfati, DFR Administration 1996.1113, conclusion by P. Couzinet; EC December 13, 1996, Intercommunal Union for the Re-evaluation of Trash of the Cannes-Grasse Sector, EC records, page 488.

[45] Has become Article L 551-1 of the Code of Administrative Justice (Law number 2000- 597, dated June 30, 2000).

[46] Article 432-14 of the Penal Code.

[47] Concerning this point, see F. Llorens and P. Soler-Couteaux, Summary of Dalloz Community Law, Fifth Public Markets, number 78 and following; Mr. Long, Concessionary System and Community Law in the field of water, Administrative Review number 318, 2000, page 576.

[48] Interpretive Bulletin handed down by the European Communities Commission on February 8, 2000 and concerning concessions in community law, Journal of the EC, April 24, 2000; BJCP number 11/2000, page 286, observations by C. Mangue, R. Schwartz and Ph., Teneyre, DR imm. 2000, number 4, observations by F. Llorens and P. Soler-Couteaux; Journal of Law of the European Union, number 2/2000, page 253, Study by A. Mattera, RDF Administration 2000.1015, Study by J. Arnould; Mon TP, May 19, 2000, observations by X. Bezancon; also see, within the same meaning, CJCE, dated December 7, 2000, Telaustria Publishing Ltd. Telefonaddress Ltd., and Telekom Austria AG, aff. C-324/98, Public Market contracts 2/201, communication number 50, note by F. Llorens: Case indicating that the obligation for transparency to which the awarding of service contracts are subjected implies an adequate degree of publicity and control over the impartiality of the adjudication procedures.

[49] Based on the principle by which this respect for the 1986 Order constitutes henceforth a condition for the legality of the delegation that the administrative judge undertook to sanction, see EC, Section, November 3, 1997. Intermarbres Company and Million and Marais Company, EC Records, page 393 and 406, conclusions by J.H. Stahl; AJDA 1997.945, T.X. Giradot and F. Raymond chronicle; RDP 1998.256, note by Y. Gaudemet. For an illustration of this solution in the matter of leasing in the public water services, see

(b) The Contents of the Leasing Contract

In order to ensure the effectiveness of the operation of the principle of competition, and in order to *"moralize"* the awarding of the delegations of public services, the legislator took care to frame the contents of the contract by three main measures that concern, respectively, the duration (*), the financial contributions of the lease-holder, and his rights of entry (**), and, finally, the clauses that govern the applicable tariffs (***).

*** The Duration of the Contract**[50]

Article L1411-2 of the CGCT imposes a limitation on the duration of the delegation of a public service. The duration must be determined not only on the basis of the contract, but also must be calculated as a function of the services required of the lease-holder as well as their duration, on the basis of the amount of the investments to be carried out by the lease-holder when he finds himself responsible for the realization of the installations required for the service.

In any case, the duration of the lease will not be permitted to exceed twenty years in the water sector, except in the event of a special justification submitted for prior examination by the Treasury Payor General, and forwarded to the local/municipal council or the deliberating assembly before the beginning of any deliberation pertaining to the delegation in question.

In order to guarantee the efficiency of these regulations, the law forbids any further extension of the delegation by means of an extension to the contract. The law only permits it in two very precise circumstances, circumstances that that have to do, on the one hand, with the existence of a reason of general interest justifying an extension, an extension that may not exceed one year, and on the other, on the basis of investments which may be imposed upon the lease-holder by the local authority for the proper execution of the service or the extension of its geographic field and which could not be amortized over the duration of the contract that remains, without an obviously excessive increase in the price.[51]

**** The Financial Contributions of the Lease-holder and the Rights of Entry**

In the second place, the legislation in effect prohibits the introduction of elements foreign to the service into the contract. In a more specific manner, it prohibits the taking in charge by the lease-holder of services or payments that are foreign to the delegation (as, for example, the realization of work that might have no relation to the purpose of the service).

In the same frame category of idea, it also prohibits the payment by the lease-holder of rights of entry into the water sector.[52]

Cass. com, May 3, 2000, BOCCRF, number 7, June 22, 2000, public market contracts number 2/2000. Community number 20, note by P. Soler Couteaux.

[50] F. Linditch, Research on the place of amortization in administrative law, AJDA, 1996.100; L. Richer, The End of the Delegation Agreement, AJDA 1996.648

[51] See Article L1411-2 (a) and (b) of the CGCT and the Circular dated May 10, 1995 concerning the application of Article 75 of the Law number 95-101, dated February 2, 1995 and pertaining to the reinforcement of the protection of the environment (duration of the delegation of public services in the water, sewage treatment and trash collection fields), Journal, May 12, 1995, completed by the Circular dated November 20, 1996, Journal dated January 25, 1997). The case law solutions handed down in the application of these provisions are detailed in note 8, under Article 4 of the Standard Contract.

[52] Article 1411-2 of the CGCT and, for a commentary about these provisions, see Note number 111 to the model Book of Project Specifications, under Article 48, as well as the cited bibliography.

***** Tariff Clauses**

Finally, the law requires that "the agreement stipulate tariffs that are charged to the users and that it specifies the effects on these tariffs of the parameters or indices that determine their evolution" (Article L1411-2 of the CGCT, second to last line).

(c) The Execution of the Leasing Contract

The desire to frame the leasing contract in its own specific terms extends as far as the field of its execution, in the first place through a limitation of the possibility of recourse to amendment, and in the second place by a reinforcement of the control over the management of the delegated service. (**).

*** Amendment**

Both legislation and case law place palpable limits, at the very outset, upon the right of the parties to modify the contract through the mechanism of an amendment.[53]

As we have seen, amendment that increase the duration of a contract are only permitted under very restrictive conditions.[54]

As far as the rest is concerned, amendment are possible, but strictly subject to the reservation that they have no effect that might upset the economy of the contract; nor are they permitted to change its purpose.

In addition, proposed amendment that bring about an increase of more than 5% to the overall amount of the delegation are submitted to a special awarding procedure that implies the consultation of the delegating commission, as well as the transmission of its notice to the local/municipal council or the deliberating assembly.[55]

Finally, the conclusion of any amendment must be preceded by an adequate subjection to open competition of the contract to be delegated, in cases that are demonstrably public projects. It would be the same if they entrust the lease-holder with additional tasks in exchange for a fee paid by the delegating authorities.[56]

**** Supervision of the lease-holder**

Finally the provisions in effect submit the execution of the contract to a reinforced process of supervision on the part of the public authority. This process is carried out, in particular by:

- The obligation imposed on the lease-holder to produce a report containing, in particular, accounts that retrace all of the operations that pertain to the execution of the delegated service as well as an analysis of the quality of the service. This report, which must be filed no later than June 1st each year, must also include an appendix that makes it possible for the delegating authority to assess the conditions of execution of the contract.[57]

[53] For an explanation of this limitation, see the Standard Contract, Note 20, under Article 37.
[54] See Above, (b) of this development.
[55] Article L1411-6 of the CGCT.
[56] In this respect, see Notes 79 and 80 of the Standard Contract, under Article 37. The State Directorate shows itself, on the other hand, as more liberal when it comes to riders that bear upon the transfer of the contract. In this respect, see Article 5 of the Standard Contract, as well as its notes.
[57] Article L1411-3 of the CGCT; see also Articles 52 and following of the Standard Contract.

- By the obligation to the executive of the local authority to present, to the local/municipal council or the deliberating assembly, an annual report concerning the cost and the quality of the public drinking water service, intended, in particular, for the information of users.[58]

- Finally, by means of making available all documents pertaining to the operation of the service to the public in those towns with 3,500 inhabitants or more.[59]

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As we stated at the beginning of these developments, the elements evoked – elements which are common to all of the delegations of public services- do not make up more than a limited part of legal framework surrounding leasing. If they have nevertheless been selected, it is both for their relative novelty and also to draw the attention of the public authorities to those obligations that they are required to fulfill as a result of these elements, as well as to draw attention to the risks that public authorities are running should they fail to respect these requirements.

2. The Elements of the Plan that are Specific to Leasing

By way of comparison, the elements of the plan that are proper to the lease (or which, in any case, are invested with a more specific character), turn out to be relatively few. Essentially, they concern: work that is confined to the lease-holder (a); the service goods and prerogatives that are associated with same (b). Finally, certain legal aspects of the contract (c).

(a) The Work Plan

Even if the service installations are turned over to him by the local authority, the lease-holder is called upon, during the course of the contract, to carry out certain works. He may even find himself responsible for major work operations. These tasks raise two important questions: is their devolution subject to prior competition? (*) Is the farmer able to ensure the supervision of the task? (**)

* The Devolution of the Works

The answer to the first question requires us to distinguish between several varying hypotheses:

* No particular procedure is required when the work is planned for at the time that the contract is concluded, as long as it was included in the contract at the time when the contract was put up for competition and provided that the work is covered by the remuneration collected by the lease-holder from his users.[60]

- If the work is assigned to the lease-holder over the course of the contract and is financed by an increase in the price of the water, then the regulation of public markets once again does not apply, as the method of remuneration selected excludes the classification of a public market. None the less, this direct devolution of the work to the lease-holder will not be legal unless it avoids any upset to the contract's economy or purpose, more broadly, if it does not alter in any substantial

[58] Article L1411-13 of the CGCT.
[59] Article L2224-5 of Executive Order number 95-635 dated May 6, 1995.
[60] Such is notably the case in maintenance work and the work involved in daily repairs (Article 34), in work involving renovation and major repairs (Article 35) or concessionary work (Article 37), awarded to the lease-holder by the Project Specifications.

manner the initial conditions of the competition. In the opposite circumstance, it will be up to the public authority to assign them within the context of classic procedures involved in public markets. The lease-holder may, if such be the case, become a candidate to these invitations for bids.[61]

- Finally, if the work is remunerated by means of the payment of a fee, the work may not be directly awarded to the lease-holder, but must be subjected to a procedure involving prior competition. Once again, the lease-holder may present his candidacy for this invitation for bids.[62]

**** Supervision of the Work**

The law of July 12, 1985, pertaining to the supervision of public works, imposes on public authorities an obligation to supervise themselves the Works carried out for their account. The law only permits them to delegate this obligation to a few limited individuals, and excluding private companies,[63]
From this arises the question: do these provisions prohibit the lease-holder from ensuing the supervision of certain tasks? In order to answer this question, we must, once again, formulate a distinction:

If the tasks assigned to the lease-holder are covered in the price of the water, then the lease-holder most certainly may ensure the supervision of the work. These tasks are, in fact, capable of being assimilated into the tasks carried out by concessionaires of public services. It is acknowledged, under this hypothesis, that it is not the public authority but rather the public service provider himself who is the contracting authority, notwithstanding the fact that the work that he is carrying out is deemed to have become the property of the public authority at the very outset.[64] Logically speaking, the same solution ought to benefit the lease-holder.

In the inverse sense, if the work gives rise to the payment of a fee, and is carried out within the context of a public market, there would be grounds for considering that the local authority is the contracting authority and may not delegate this function to its lease-holder as soon as this lease-holder is a private individual.[65]

(b) The capital equipment Plan

The capital equipment transferred to the lease-holder by the local authority or realized throughout the course of the contract may have defects. The question then becomes one of knowing who, whether the public authority or the lease-holder, is mandated to act against the contractors, notably within the context of their decennial warranty.

[61] See the references cited in Note 79, under Article 37 of the Standard Contract, as well as in notes 67 and 68 under Article 35.
[62] See the references cited in Note 80, under Article 37 of the Standard Contract, as well as in Notes 67 and 68, under Article 35.
[63] State Directorate, March 11, 1996, Moutiers Community Hospital, EC records, page 69, D 1990, SC page 112, observations by Ph. Terneyre.
[64] In this respect, see F. Llorens, a new application of the mandate under administrative law: the delegation of the supervision of public works, LPA June 27 and 30, 1986.
[65] See, in this respect, the references cited above, Note 63 and 65, under Article 35 of the Standard Contract.

The answer to this question obeys – curiously enough, a logic that is different from that which prevails in the exercise of the supervision of public works.

Constant case law is of the opinion, in fact, that the actions in decennial responsibility belong to the owner of the installations. This results, therefore, in a situation under which as soon as an installation assumes the character of a returned good and is thereby found, as a result of this fact, to be the possession of the public authority, only this public authority is entitled to act on the grounds of the decennial warranty, to the exclusion of the concessionaire or the lease-holder.[66]

These latter parties are not entitled to legally exercise the decennial warranty unless the public authority consents to yield this warranty to them, or unless it substitutes these parties in its own rights vis-à-vis the contractors, as case law permits them to do.

(c) Disputed Claims under the Contract

It would be appropriate, last of all, to point out a legal aspect which, although it is of limited application, nevertheless is none the less a distinguishing characteristic of a lease, as opposed to a concession agreement.

As far as concession agreements are concerned, the administrative judge accepts to cancel the measures of termination taken by the local authority. In the case of a lease, it adopts the opposite solution with respect to the nature of this contract and with respect to the fact that the purpose of this contract is not the realization and operation of installations that require major investments on the part of the lease-holder. It limits itself to trying to determine if the contested measure is of such a nature as to open up the possibility of a right to indemnification to the profit of this latter party.[67]

Thus, the criterion relative to the costs of the initial installation – a criterion that allows us to distinguish leasing from concession agreements, and of which the solution that has just been stated constitutes the direct consequence - is confirmed.

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II. THE STANDARD CONTRACT

Leasing within the field of the distribution of drinking water services has been successively regulated by two Standard Contracts. The first of these Standards was approved on July 6, 1951, and the second was approved on March 17, 1980. Thus, as we indicated at the beginning of this introduction, these documents have none the less lost all regulatory effect, in so far as the local authorities are concerned, following the suppression of the State's technical Supervision as a consequence of the law passed on March 2, 1982. Although it was obligatory at the outset, the 1980 Standard Contract became transformed into a simple model to which the public authorities could refer should they so require.[68]

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[66] EC, February 15, 1984, Industrial Maintenance and Work Company, Requisition number 33-663, Mon TP April 13, 1984, page 107.

[67] EC, April 19, 1989, Urban Transportation Corporation of Angers, RDP 1999.1794, observations by F Llorens; CAA of Paris, September 21, 19922,, the Jerome Enterprise Company, Administrative Law 1993, number 17; EC, November 3, 1995, the Dumez Water Company of Lyon, DFR Administration 1997.68, notes by Duroy.

[68] In this respect, see the provisions of Article R 371-6 of the former Code of the Communes.

For the reasons already set forth (see the beginning of the introduction), the task of reworking this document had become necessary. The Standard Contract reproduced below is the result of this requirement. The purpose of the following requirements is to clarify the legal value (A), to outline the lines of force (B), and to explain the formal presentation (C).

A THE LEGAL VALUE OF THE STANDARD CONTRACT SPECIFICATIONS

From what has been said above, we would be tempted to conclude that this model has no legal value, or, in any event no binding effect. In reality, this matter must be further refined on the basis of whether we place ourselves before (1) or after (2) its adoption by the contracting parties.

1. The Legal Value of the Contract Specifications Before its Adoption by the Parties

At this point, it is clear that the Standard Contract Specifications presented here has neither any legal value nor binding effect. It constitutes, according to the terminology used, a simple model. The local authorities are therefore entirely free to submit to it or to ignore it. And in the event that they decide to adopt it, they may carry out a selection from among its clauses, retaining some and excluding others.

This liberty involves, none the less, two limitations that we should point out:

- In the first place, if they decide to carry out triage within the Standard Contract Specifications, the public authorities should take care to make sure that their choice does not impact upon the coherence of the overall orientation, the fact being that a number of its clauses are tied to each other;

- Subsequently, the public authorities are not allowed to carry out modifications (or in any case, they are not allowed to make substantial modifications) to the Standard Contract Specifications if, when they submitted the matter to competition, they forced the candidate to respect the conditions as laid out in the Standard.[69] If they wish to avoid this rigidity factor, they cannot be too strongly urged to purposely state that the candidates to the delegation be permitted to propose modifications in whole or in part of the clauses of the Standard Contract Specifications that is issued to them.

2. The Legal Value of the Contract Specifications After its Adoption by the Parties

Once the Contract Specifications has been adopted by the contracting parties, i.e., once it has been signed by them, the Contract Specifications undergoes a radical change in its legal standing. It becomes, in fact, a true contract and carries true binding authority.

This binding authority is not, however, exactly the same according to whether or not the clauses concerned are of a nature termed *"regulatory"*, (a) or whether or not they are purely *"contractual"* in nature (b).

[69] See above, notes 43 and 44.

(a) Regulatory Clauses

Like the contractual clauses, those that are regulatory in nature do not bind the parties until the parties have signed them. However, they see themselves subject to a particular plan, which distinguishes them one from the other.

- In the first place, they may be modified unilaterally by the local authority for reasons of general interest and, in particular, in the interest of the users, subject to an indemnity being paid to the lease-holder in the event that he suffers prejudice.

- In the second place, users and third parties may take advantage of these clauses in order to obtain an cancellation of the decisions taken by the public authority, which impinge upon the clauses, or for public authority's refusal to impose the clauses on a lease-holder.[70] These parties may even use these clauses in order to obtain recompense for any prejudice that they may have suffered as a result of their violation.[71]

- Finally, the regulatory clauses are available for recourse as a result of an *ultra vires* action on the part of users and third parties, in the same manner as a true regulation.[72]

Those clauses that are of such a nature are the ones that determine the conditions of the organization and functioning of the service, those that pertain, for example, to the sub-delegating or the transfer of the contract, to relationships with users, to tariffs that are applicable to these latter, etc.[73]

Their existence (and their effects) are explained both by the fact that the lease bears upon the operation of a public service over which- in spite of it having been delegated- the local authority must retain the supervision, and by the fact that, as a result of its purpose, the contract has results that go beyond the contracting parties and, in particular, results that impact upon the users of the service, users whose protection it is vital to ensure.

(b) Contractual Clauses

Contractual clauses are, by definition, all those clauses that do not bear upon the organization and functioning of the service. Specifically, they are those that do not produce any effects other than those they have on the relations between the local authority and the lease-holder and which, to go back to a classical analysis, would have no reason for their existence if the service were operated in direct management by the public authority. They essentially concern the material and financial conditions offered to the co-contractor (duration of the contract, benefits conferred upon the lease-holder in the form of an advance, loan guarantees, privileges of exclusivity; or the opposite, taxes payable by the lease-holder to the local authority[74]).

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[70] EC, December 21, 1906, Union of the Neighborhood of Croix de Seguey Tivoli, EC records, page 962, conclusions by Romieu; EC, December 11, 1968, Union for the Defense of the Bort-Engueyrande railway, JCP 1964.13753, notes by J. Dufau, EC, January 14, 1998, County of Toulon and the Water and Ozone Company, EC records, page 8.

[71] EC Section, November 7, 1958, Madagascar Water and Electricity, EC records, page 530, conclusions by C. Heumann.

[72] EC Assembly, July 10, 1996, Cazeele, Notes of the State Directorate, page 274AJDA 1996.732, Chronicle by D. Chauvraux and T.X. Giradot; DFR Administration 1997.89, Notes by P. Devolve; CJEG 1996.382, notes by Ph Terneyre; EC April 29, 1999, Alexandre DFR Administration 1999.1124.

[73] In this respect, see the model Book of Project Specifications, note 84, under Article 39.

[74] See the references cited in Note 110, under Article 48 of the Standard Contract Specifications, and with respect to these clauses that impose upon the delegatee to present an annual report to the local authority, EC

B THE "LINES OF FORCE" OF THE STANDARD CONTRACT SPECIFICATIONS

The model which has been drawn up does not result from a simple grooming of the preceding Contract Specifications. It constitutes a true reworking. In a general way, it is characterized by:

- In the first instance, by the taking into account of the legislative and regulatory evolution that has taken place since 1980.

- Subsequently, by means of a greater reduction in the number of the clauses intended to fix, in a more precise manner, the rights and obligations of each of the parties.

But it is above all by means of the general philosophy that it obeys that the new Standard Contract Specifications is distinguished from the older one. The editors of the new Standard Contract Specifications are, in fact, preoccupied with restoring the great principles that guide the delegation of public services in general, and leasing in particular.

- On the one hand, they constantly had in mind the fact that, in order to be considered as under delegated management, public water services remain a type of public service concerning the operation of which the local authority cannot relax its vigilance. The local authority must take an interest in its operation, and are required to deliver ever more detailed accounts of these operations to the users. From this notion, the editors of the new *Standard* have drawn the conclusion that the powers of the local authority ought to be increased.

- However, on the other hand, they have also been very careful to avoid having this desire for greater control result in a substantial alteration in the essence of leasing: as with any delegation of a public service, the process must involve a genuine transfer of the management of the service to the lease-holder's account, with all that this implies for the reinforcement of his operating freedom, though also with all that this implies concerning the lease-holder's responsibilities.
- Finally, it was obvious to the editors of the new *Standard k* that, in order for it to achieve the desired results, the double measure that has just been described required a clearer definition of the respective obligations of the parties.

Reinforcement of the powers accruing to the local authority (1); a clarification of the responsibilities both of the local authority and of the lease-holder (2); reinforcement of the lease-holder's freedom of management, as well as of his responsibility (3); such are the lines of force along which the current model of the Standard Contract Specifications is modeled.

1. Reinforcement of the Powers of the Local Authority

The reinforcement of the powers of the local authority, with a view towards ensuring the protection of the users' interests, takes concrete expression in the following three ways: through an increased supervision of the service instruments, and in particular, of the subscribers' meters (a); through greater transparency in the management of the service, achieved through more extensive and precise methods of monitoring (b); and finally, by means of a range of sanctions that is more efficient (c).

December 29, 1999, County of Port Saint Louis du Rhone RD Imm 2000.173, observations by F Llorens and P. Soler-Couteaux.

(a) An increased Supervision of the Service Instruments: the Problem of the Meters

Frequently during the past it came about (it continues to happen at the present time as well), that the meters that served the subscribers belonged to the lease-holder. This situation result in difficulties when the contract came to an end, difficulties involving both the maintaining of the allocation of the meters to the service, and the financial conditions involved in this process.
To get right to the heart of these difficulties, and to satisfy the expectation of a majority of the responsible local authorities, the new Standard Contract Specifications takes care to affirm the local authority's ownership of the meters.[75] It therefore advises the local authority to buy back, if necessary all those meters that belong to the operator in place, when the contract next comes up for renewal.[76]

(b) Greater Transparency in the Management of the Service

One of the most frequent complains addressed (whether rightly or wrongly) towards leasing has to do with the opacity of their management. In a symmetrical manner, one of the most frequent wishes, expressed by both the elected authorities and the users is for a better understanding of the service, to be brought about by greater transparency in the conditions of its operation.

The realization of this objective is by means of information measures set out in the texts in effect at this time (in materials, for example, through the improved presentation of water bills sent to consumers or the making available to the public those documents that pertain to the operation of the service). The objective is also to be realized through means of control that the local authority has available, along with the information that the lease-holder shall provided to the local authority.

The Standard Contract Specifications emphasizes these two points.

On the one hand, in fact, it defines the local authority's power in the broadest possible manner (Article 51.2) and makes incumbent upon the lease-holder precise obligations that are destined to simplify their exercise (for example, the designation of a spokesperson responsible solely for information to the public authority; an obligation to respond to all requests on the part of the public authority when a subscriber's claim is concerned…..See Article 51.3).

On the other hand, it requires the lease-holder, in his annual report, to supply the maximum amount of information concerning the operating conditions- the annual report being the essential instrument through which the local authority is able to exercise control- this information is to cover both the technical and financial aspects of the management of the service (See Articles 53 to 55 of the Standard Contract Specifications).

Thus, without getting too deeply involved in the said management, (a development that would conflict with the goal of making the lease-holder more responsible), the local authority does possess the means required to achieve a greater knowledge concerning, and thus to ensure a better supervision over, the functioning of the service.

(c) A More Efficient Power to Sanction the Lease-holder

[75] See Article 13.2.2.
[76] See Article 28 and above, I B, of the present introduction.

Experience shows that in so far as sanctions are concerned, we have to guard against two opposite excesses: on the one hand, sanctions may be so mild as to become inefficient; on the other hand, inversely but having pretty much the same final result, an arsenal of sanctions may be put into place that are so severe that they are practically never used.

The Standard Contract Specifications takes care to avoid this double snag. In addition to the most serious sanctions, such as putting the lease-holder under sequestration and forfeiture

(Articles 58 and 59) that remain in effect, the *Standard* institutes a system of pecuniary sanctions and penalties (Article 57); this system has the following characteristics:

- In the first place, it covers a maximum number of occasions on which a lease-holder fails to meet his obligations, whether these failures are of a technical order (network yield, water quality, realization of works…) or consist of failures on an administrative level (delay in forwarding the information documents…);

- Finally, they may be modified depending on, in particular, the importance of the obligation or failure that has been sanctioned, or other parameters; once again, all of this is intended to ensure that the penalty remains efficient, while still capable of application.

We should take note, in addition, that the lease-holder's respect for his obligations is also ensured by means of contractual guarantees. These guarantees take the form, in particular, of a security bond, the renewal of which is systematically imposed each time it is used (Article 56).

2. Clarification of the Respective Responsibilities of the Local Authority and the lease-holder

The two main questions that come up concerning the awarding of leases are invariably the following: "What must be done?" (understood as meaning what is required in order to ensure a satisfactory functioning of the service), and "Who should do what?"

Experience shows that the answer that the contract gives to these queries, though they are elementary, is not always as clear as might be wished. Too often, if fact, the local authority finds itself faced with two situations that it had not foreseen, and which yet constitute nasty surprises for it: some piece of equipment or installation that it had believed was in good repair turns out to be defective, and an unforeseen replacement or repair is at his responsibility; these types of repairs that the local authority had thought were incumbent upon the lease-holder then come back to them under the provisions of clauses in the contract whose scope the authority had only improperly understood, perhaps as the result of insufficiently clear wording, etc. This type of situation is not, in addition, much more comfortable for the lease-holder, who finds that he must justify certain requirements , requirements that he may take advantage of under the full right of the contract, but which may turn out appearing like unjustified claims, simply as a result of the lack of clear formulation in the text.

Equally, a new Standard Contract has been created to remedy this situation and to clarify the respective responsibilities of the parties. To this end, it uses three main tools: the taking of an inventory at the outset of a contract (a); recourse to scheduling concerning the work itself (b) and the setting up for the lease-holder of precise goals (c).

(a) The Initial Inventory

One of the clauses most frequently encountered in the situation described above is found in the failure to recognize the condition of the service installations. The local authority itself is the first to be guilty of this failing. However, the recognition of this state of affairs is of the utmost importance. Without such recognition, the candidates to the leasing are not able to make their offers in a satisfactory manner, nor can the local authority correctly assess the amount. Without this recognition, neither can the contract be pursued without the risk of litigation, litigation having its origin in the poor condition of certain installations that the lease-holder might be tempted to impute to the local authority, and which the local authority might be tempted to make the responsibility of his co-contractor. In order to avoid these difficulties, the new Standard Contract Specifications recommends the setting up – even before the leasing contract is awarded- of a complete inventory of all of the installations (Article 11), an inventory that will first be put into the possession of the candidate to the delegation, and then appended to the contract. In the light of this inventory, the parties will be able to come to an agreement as to a program of repair work (to be divided between them), destined to put the said installations back into good repair. (Article 12.2). In this manner, it will be on a known –and therefore healthier- basis that contractual relations will be established between the lease-holder and the public authority.

(b) The Program of Works

Still in pursuit of the same goal, i.e., the clarification of the respective obligations of the parties, the Standard Contract Specifications provides for more systematic recourse regarding the scheduling of the work, with a precise sharing of the work between the local authority and the lease-holder.

Such is the case, as we have seen, in so far as the repair and renewal of the installations following the initial inventory is concerned (See the above paragraph and Article 37). But such is equally the case for those works initially rendered necessary by the legislation or regulations in effect, and pertaining to the working conditions (Article 17.1) and, in a more general way, for renewal work and major repairs as will be discussed below (Article 35), as well as for those works termed "concessive", provided for under Article 37.

In order to reach the stated goal, the work must be as precise as possible, otherwise disputes may subsequently arise (or there may be eventual surprises for one or the other of the parties). Elsewhere, in order for this scheduling to avoid acquiring a character of excessive rigidity, in so far as major repairs and renovations are concerned, the possibility of revision has been provided for, in the full knowledge, however, that this possibility of revision are limited by the fact that an infringement of the initial conditions of the competition, would be illegal.

(c) The Fixing of Goals

The setting of goals for the lease-holder to achieve is important in all respects. It is important, first of all, because it makes it possible to determine with precision the precise scope of his obligations. But it also is important to the extent that it makes it possible for the local authority to adopt a certain level of requirements in the management of the service.

There will doubtless come a time when the leasing contracts will become, above all, performance contracts involving goals within the context of which the lease-holder will find himself in a

position to have freedom in his management that will be even greater in counterpart to the realization of more precise goals, goals upon which the level of his remuneration will depend.[77]

In the expectation of more scientifically proven indicators that will make possible the bringing about of this transformation, the current Standard Contract Specifications fixes goals for the lease-holder for two essential domains, goals that come with sanctions: One concerns the overall yields in water drawn from the network (Article 21), whereas the other concerns the quantity and the pressure, as well as the quality of the water itself (Article 27);

In concluding our consideration of these items, we would like to draw attention to the importance that is involved in this clarification of the respective responsibilities of the parties. Quite beyond its function in the *"defusing"* of any eventual litigation involved in the situation and which might arise subsequently as a result of the execution of the contract, this clarification provides two further advantages:

- In the first place, it will make it possible to ensure conditions of healthy and fair competition in the awarding of the contract;
- Subsequently, it will make it possible for the local authority to dispose of the tools necessary to the correct assessment of financial offers received from candidates, to the extent that they have accurate information concerning, on the one hand, the financial efforts that they will be required to approve, and, on the other hand, the lease-holder's undertakings both in regards to the quality of the service and the investments to be realized in so far as the work is concerned.

3. Reinforcement of Freedom and the lease-holder 's Responsibility for Management

With this orientation, we are getting involved in one of the most important, if not the most important, aspects of the new Standard Contract Specifications. The reinforcement of the lease-holder's responsibility for and freedom regarding management constitutes, in effect, a counterweight to the reinforcement of the powers accruing to the local authority, as well as making up a supplement to the clarification of the responsibilities previously enumerated. Additionally, it fits in well with the concept of leasing as a way of actually transferring the risks involved in the management of the service to the co-contractor, something that cannot take place without recognizing that the co-contractor must possess an equivalent degree of freedom of management. Greater liberty (b) in return for greater responsibility (a): such might be the philosophy behind this new Standard Contract Specifications, a Standard that, as we will see, expresses itself mainly through the essential field of the work involved in renewal and major repairs.

(a) A Responsibility for Increased Management: the Guarantee of a Properly Functioning Service

The idea that informs the new Standard Contract Specifications, and which is enshrined in Article 35 pertaining to renewal work and major repairs, consists of imposing upon the lease-holder an obligation to achieve results. This obligation would take the form of a guarantee concerning the proper functioning of the service. This guarantee would require the lease-holder to attain all of the goals and satisfy all of those obligations imposed upon him by his contract; it would be the lease-holder's responsibility to employ those means that seem to him the most appropriate to the attainment of this objective.

[77] Concerning this perspective, see Towards New Performance Indicators, TP Mon., December 1, 2000, Page 76.

(b) Increased Freedom of Management: the Distinction Between Functional(operational) and Patrimonial (capital stock)Logic

Among the means available for the management of the service, the most important is made up- and this point is beyond any possible discussion- of the work involved, in the broadest meaning of the term (maintenance and daily repairs, major repairs, renewal repairs and renovations, as well as replacement of the installations….) These are the tasks that determine quality, and thereby determine whether or not the obligation to guarantee the quality, an obligation that is incumbent upon the lease-holder, can be met or not.

Some of these works do not involve any particular difficulties, either because they are almost invariably the lease-holder's responsibility (maintenance work or daily repairs- See Article 34), or the responsibility of the local authority (reinforcement or extension work, as defined under Article 36). In addition, they may be scheduled in the contract in the category of concessive work, taken in hand by the lease-holder as part of his remuneration (Article 37). In reality, the main problem concerns the renewal work and the major repairs. Should they be made the responsibility of the local authority or the lease-holder? Within the context of earlier contracts, this question gave rise to discussions that were both recurrent and delicate. It was rendered more complex by the fact that renewals and major repairs may turn out to be useful without really being necessary to the proper functioning of the service. We might even suppose that they may have been made the responsibility of one or the other of the contracting parties, or shared between the parties. However, this sole circumstance would not be sufficient to shut off debate concerning the obligation of each concerned party to proceed with the renewal work and major repairs for which they are responsible.

The current Standard Contract Specifications attempts to break this vicious circle by drawing a distinction between two types of renewal and major repairs (*) which it submits to two separate plans (**). One of these distinctions ought to contribute to a clarification of the responsibilities alluded to above.

*** The Distinction between Work that is Functional (operational) and Work that is Patrimonial (capital stock)**

Drawing this distinction consists of separating two kinds of renewal and major repair:

Work involving renewals and major repairs of functional character, in the first place, which as is indicated by their designation, is work that is intended to ensure the proper functioning of the service; they are therefore essential to the service.

Work involving renewals and major repairs that are designated as patrimonial is work that is not required for the proper functioning of the service, but rather is decided upon as a result of policies deliberately adopted by the public authority. Such work is intended to preserve and/ or increase the value of the heritage that the service installations represent.

**** The Plan that is Applicable to Functional (operational) Work and to Patrimonial Work(capital stock)**

The new Standard Contract Specifications opts for submitting both types of constituent tasks, to two separate plans.

Renewal work and major repairs that are patrimonial in nature are scheduled at the beginning of the contract (with a limited possibility of subsequent revision). They are either carried out by the local authority within the framework of its own scheduled tasks, or they are confided to the lease-holder in exchange for the remuneration that is paid to him.

- Work involved in renewals and major repairs that is functional in nature covers all of the other tasks of this sort that have not been scheduled in advance as patrimonial. They are carried out by the lease-holder under his own initiative, as part of his responsibility and at his cost. The lease-holder is

Thus, free to undertake them or not. He may opt for maintenance or repair, if he feels would be adequate. His freedom of choice as to the means is complete. It is only limited to the extent of the guarantee of proper functioning that he has pledged to provide, i.e., he is bound by his obligation to supply a level of service that meets his contractual obligations. This solution is logical, since, by definition, renewals and major repairs that are functional in nature are not intended to preserve the service installations, but are solely for the purpose of ensuring their normal functioning.

***** <u>Such a System Offers a Four-Fold Advantage</u>**

- In the first place, it clarifies the responsibilities in so far as matters of renewal and major repairs are concerned, thereby eliminating any subsequent legal battles that might arise.

- Next, it allows the local authority to better estimate the work that it is entitled to expect from the lease-holder, in exchange for the remuneration that he is receiving.

- In the third place, it guarantees the lease-holder the freedom, in accordance with the logic behind the delegation, in the choice of the means destined to ensure an optimal management of the service. The local authority finds this to its advantage, as it is relieved of the necessity of trying to determine whether or not such or such a renewal or major repair is necessary in order to ensure the proper functioning of the service. In other words, the system adopted by the Standard Contract Specifications is oriented towards an evolution of the leasing contract towards this performance-oriented contract as described above.

Finally, this system offers the advantage of flexibility. The local authority may, in fact, vary the respective importance of work it considers functional and work that is patrimonial in nature, at its pleasure. It may undertake an extensive (patrimonial) capital investment program, in which case the functional load weighing on the lease-holder will be accordingly reduced. On the other hand, it may limit its policies concerning the preservation of its heritage, perhaps opting to preserve nothing, in which case all of the work involved in renewal and major repairs would fall to the lease-holder under the mantel of his pledge to ensure the proper functioning of the service. The secondary advantage of this broad range of choices is found in the fact that the local authority is thereby forced to become responsible for deciding what sort of policy it wished to put into place.

******* <u>Applying the distinction between the Functional and Patrimonial Lines of Thought that have just been described requires, however, that the Local Authority take certain Precautions</u>**

- The local authorities should be aware, at the very outset, that the choices that they make are not neutral on financial grounds. To the extent that the patrimonial policy that is adopted assumes the upper hand, becoming more important, then the less will the functional load weigh heavily on the

lease-holder. The inverse is also true. The remuneration that is paid to the lease-holder will therefore vary as a consequence. This is a parameter that the local authority ought to take very strictly into account in its evaluation of those offers presented by the candidates.

Furthermore, in order for these offers to be framed in terms that are comparable, and in order to make sure that the equality of the candidates is respected, it will be appropriate for the local authority to define the patrimonial policy that it intends to adopt before the lease is put up for competition. It should also so inform all interested enterprises.

In a more general manner, the efficiency of the system and the advantages that it offers depend in addition, on the precision with which the public authority adopts its renewal and major repairs program for patrimonial matters .In order to understand this system, as with the other provisions contained in the Standard Contract Specifications, the parties could derive profit from referring to the complementary explanations that the Standard contains, and which the formal presentation intends to portray below .

C. THE FORMAL PRESENTATION OF THE STANDARD CONTRACT SPECIFICATIONS

Like its predecessors (and like any contract), the standard contract specifications that follows is divided into Articles. It is not, however, limited to these Articles. In order to open up certain possibilities of choice for the parties, or in order to facilitate an understanding of these provisions, its basic text is, in effect, made up of two variants (1): of comments, warnings and notices (2), and finally, of notes (3).

1. The Variants

The basic text of the Standard Contract Specifications corresponds to those solutions that seemed to the editors to be the most desirable, or best adapted to the most common situations. Some of the Articles that make up the Standard are nevertheless provided with variants that have been inserted into the actual body of the Standard Contract Specifications.

These variants serve a double function:

- Some of them correspond to hypotheses that vary from those judged the most current or the most desirable (for example, a situation in which an inventory has not been set up before the awarding of the contract, Article 11.3; the hypothesis under which the lease-holder is also the manager of the waste water service, or on the contrary, does not collect the water treatment tax on behalf of the local authority for the waste water service, Article 47…).

- Other variants correspond more so to choices that are open to the local authority (for example, in matters that concern the transfer of the contract, Article 5, or the collection of a royalty tax for the occupation of a public domain, Article 48.1).

2. Comments, Advice, Warnings

These have been inserted in the body of the Standard Contract Specifications, generally at the end of an Article or sub-Article. They are laid out in a material presentation that makes them easy to identify. Their respective functions are those that are indicated by their denomination.

The observations are intended to serve as explanations destined to clarify the meaning or the scope of some of the clauses contained in the Standard Contract Specifications.

The items of supplied advice are intended to address the recommendations to the co-contractor concerning the best point of view to adopt when the contract affords him the possibility of choice (for example, concerning the carrying out of an inventory prior to the awarding of the contract; concerning the re-purchase of the meters, concerning the fixing of the amounts of the penalties…).

- Finally, the warnings are intended to draw the parties' attention to the risks (legal, technical, financial) that they are running in adopting such or such a measure, or they advise as to what measures should be taken in order to avoid these risks (for example, the risk of illegality concerning certain riders or extra clauses; the legal obligation that is attached to fixing the length of the contract, etc….)

3. The Notes

In addition to the various explanations inserted into the contract itself, the editors of the Standard Contract Specifications have decided to accompany its text with notes, notes that for reasons of clarity of the text have been placed at the end of the contract.

A reading of the text will supply the essentials of two kinds of information:

- Comments or advice first of all, the minimal importance of which would not justify their mention within the body of the text of the Standard Contract Specifications itself, or which, inversely, because they are of such substantial size that they would have difficulty finding a place within the text.

- Finally, and above all, the mention of legislative provisions or regulations as well as solutions found in case law govern certain acts or situations to which Articles in the Standard Contract Specifications refer (for example, texts that pertain to the quality of the water, to the awarding of public markets; a solution adopted in so far as the duration of the contract is concerned, or in matters involving amendments or extra clauses…).

Whenever any of these notes complement the observations or notices found in the Standard Contract Specifications, mention is deliberately made within the text itself.

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By way of completion, through the use of this set of tools, i.e., the Standard Contract Specifications that follows, the editors have thus desired, not only to facilitate an understanding on the part of the users, but also to guide them in the choices that are open to them. Just as it is true that there may exist models contracts, it is also equally true that no individual contract should ever, as a result of these models, be less carefully thought out in light of the particular case that the contract in question is called upon the regulate.