

ARBITRATION AS A DISPUTE-SOLVING MECHANISM IN PUBLIC PROCUREMENT: A COMPARETE VIEW BETWEEN PERUVIAN AND SPANISH SYSTEMS

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ABSTRACT. Pursuit of public interest is the main goal of Public Administration but, being realistic, the State cannot accomplish this alone: private actors appear into scene to invest and develop their expertise in a specific area, reinforcing the implementation of public policies through contractual techniques and stablishing links that, to be realistic, aren't always ruled by harmony. And when disputes arise, the way of solving them has different legal treatments in every country, which may imply, in diverse degrees, the participation of new private actors, as an alternative to judicial review of those contracts, usually qualified as slow, lacking specialisation and in some cases, corrupt. Our aim is to explore the role of arbitration as a swift and efficient mean of dispute-solving and, in that sense, on implementing a strong public procurement system, whose real sustainability, in our opinion, depends on three pillars: **efficiency, protection of public interest and respect for the rule of law**, comparing legal and real contexts of two countries (Spain, Peru) showing its differences and similarities. In the following lines, we will structure and deepen our analysis through core questions (and possible solutions) concerning this subject.

INTRODUCTION

In the core of the modern state, provision of goods, services and the development of public works by the private sector through public procurement is a very usual technique with a vital influence in the design of effective public policies. However, it is clear that this ever growing presence (1) of the state in the economy through public procurement isn't always governed by harmony: controversies with the private actors with which the state participates to fulfill its own goals may certainly arise. This has an impact (with degrees that vary, depending on the particular situation and/or the country's legal system), on the one hand, the public interest, and on the other hand, in the rights of the contract holders (private providers and/or public works executors), when the state does not comply with its obligations. What to do in this case?

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The problem is, normally, channeled through a third party to get a decision on the controversy (constitutionally, the judiciary). But, still, what happens if its decisions are slow, inefficient or belated? It is certain that the efficacy of the administration can be seriously damaged by these dysfunctions, as well as the general interest called upon to protect. This entire panorama can lead us to regard arbitration as an attractive way to solve these troubles, or at least carry them out in a more adequate way, rendering public procurement techniques even more functional, putting arbitration in a positive position, most of all because the administration requires dynamic solutions to reach an efficient fulfillment of its main public goals.

This paper is therefore focused on a comparative analysis of two legal orders anchored in the Romano-Germanic system of law. Both seem to be antithetic in its content and solutions: according to article 39° of the Spanish procurement law (Ley de Contratos del Sector Público - 30/2007 – hereafter LCSP), arbitration is an alternative tool of problem-solving in the case of problems that arise from the effects, complying and extinction of contracts signed by agencies not having the nature of public administration. The Spanish legal order establishes then an optional and restrictive arbitration system. At the same time, article 52° of Peruvian public procurement law (Ley de Contratación Estatal, Decreto Legislativo N° 1017 – hereafter LCE), establishes that those kind of controversies “will be solved through conciliation or arbitration”, prevailing, in the usual practice, this last solution (2). The Peruvian scheme, legally mandatory and “holistic”, exists in Peru since 1998: then an innovative procurement regime took place to unify the existing dispersed system. Before this point, controversies usually tried to be tackled using the Contentious Administrative process (judicial review derived from the administrative activity). Thus, our aims are concretely the following:

1. To explore the particularities of each legislative formula using a comparative approach.
2. To analyse the role of this mechanism in building efficacy and its real impact in the pursuit of public interest.
3. To take a look at the design of the thin line that divides and at the same time unifies the state action and the private one in the public interest sphere.
4. To propose possible solution formulas to the arising issues.

DEFINING THE PROBLEMATIC – THE NATURE OF ARBITRATION (DOCTRINAL APPROACHES)- ARBITRATION IN PERUVIAN AND SPANISH LEGAL SYSTEMS

Arbitration as a private presence in public law ¿mandatory or voluntary?

The theorists define it as a conflict solving instrument where the parts, by common agreement, decide that a third party, which is not the judiciary (Guasp), will decide on a controversy. According to Sabino Cassesse, this civil-law institution holds an “extensive dimension”: it means that its influence spreads into all legal branches, including public law. This is why arbitration has been qualified as a “jurisdictional equivalent” by the Spanish Constitutional Court, basically because the parties can obtain similar goals. Its nature is, in this sense, “truly alternative, alternativeness coming from the parts will (Trayter) (3). Cassesse, in this sense, clearly sentences: “*il lodo é una volizione*” (4).

Legal and doctrinary approaches:

Spanish arbitration law (Ley 60/2003, de arbitraje) (5), regulates how the “arbitral convention” should be. According to it, this instrument should necessarily express the will of the parts to submit some of the controversies derived from this juridical relation.

Even before this law’s publication, the Spanish doctrine in general expressed their worries about the traditional judiciary system, designed originally to be the framework for solving all the controversies derived from the application of public law in its whole and ample field. Some are conscious that the Spanish administrative organisation (which flows from the recent constitution of 1978) has suffered a deep transformation, as a result of a profound process of change in the society and administration that has substantially increased the “dispute amount” (or charge) between citizens and administrations (Martín Rebollo). This is why some authors (such as Tornos Mas) propose complementing the judiciary guaranties with other mechanisms to improve the administrative justice. Thus, arbitration isn’t senseless if it applies to the conventional-contractual administrative activity.

Arbitrability (the characteristic of a subject to be arbitrable) is tightly linked to the voluntary essence many authors claim it holds, but neither in Spain nor in Peru the specific laws concerning arbitration (in Peru, it is the Legislative Decree N° 1071 –Hereinafter, the peruvian arbitration law –PAL) define it. It is established, in this sense, what is called

“*numerus apertus*”. Therefore, it is valid to define arbitration as a voluntary and heterocompositive mechanism of solving disputes, where arbitrability is constructed in connection with the specific legal texts regulating the particular fields where arbitration takes action. The key question that immediately emerges is: in each country’s (Spain and Peru) Public Procurement regime, how do we “complete” or “fill in” the content of “libre disponibilidad”?

The Spanish case: Restricted and Optional

According to the article 39° of the LCSP: “(...) the entities of the public sector lacking the status of Public Administrations, can use arbitration, in the terms established by Law 60/2003, of Arbitration, to solve the disagreements that may surge concerning the effects, complying and extinction of the contracts they sign”.

The sense of this paragraph has to be necessarily integrated with other articles of the same norm, to complete its content in its real dimension through systematic interpretation.

Subjective scope of the LCSP: 3 Axis : Public Sector, Public Administrations (in plural) and Contracting Authorities

As the previously mentioned article 39° states, arbitration, in Spanish public procurement, is restricted to those “(...) entities lacking the nature of a Public Administration”. The immediate question is: what should we understand by Public Administrations, as described and defined at the laws ruling common administrative procedure and public procurement in itself? We consider that this analysis is fundamental if we wish to fix clear boundaries to define what aren’t Public Administrations (6).

To clarify this first question, it is important to analyse as a “*point de départ*” the article 2° of Law 30/1992, “Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común” –hereinafter, Law 30/1992- the fundamental legal norm that rules the legal regime, common administrative procedure and the system of responsibilities of Public Administrations. Paragraph 1 establishes that, for this law’s purposes, the name “Public Administrations” should be assigned to the following entities: General Administration of the State, the Autonomous Communities Public Administrations, and the Local Administration. In addition to that, the paragraph 2 of the same article considers that the Public Law Entities linked to any of the mentioned Public Administrations belong to the Public Administration.

The LCSP is therefore a specific norm, searching to cover a more extense field than that covered by the Law 30/1992. In this sense, there

are three fields of action, of this specific law: the public sector, the public administration and the contracting authorities, this last notion comes from the European Law, and has been concretely defined in paragraph 1.9. of the Spanish version of the Directive 18/2004 (on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts). Consequently, in the first place, the article 3° of LCSP includes in the category of “Public Sector” a very ample variety of entities. Among them, we find:

- The General State’s Administration, The Autonomous Communities Administrations, the Entities integrating the Local Administration (almost a reproduction of the paragraph 1 of article 2° of the 30/1992 law, referred to “Public Administrations”).
- The autonomous organisms, public entities, public universities, state agencies and public law entities with their own juridical regime, linked to an agent belonging to the public sector or depending from it.
- Entities or organisms specifically created for the fulfillment of specific public needs, with no industrial or commercial purposes, as long as one or many of them belonging to the public sector finance their activity in a substantial amount, control their management or appoint more than half of the members of the administrative organ.

Secondly, on Public Administrations, the paragraph 2, article 3° of LCSP, states that for this law’s purposes we count as “public sector” the following entities:

- Public Autonomous Organisms.
- Public Law entities with regulation powers towards certain activity or sector.

Third, concerning contracting authorities, the analysed law would seemingly be transposing to the Spanish law’s scheme this definition, but seemingly not the way it’s been designed by European Law. In this sense, for the LCSP law, contracting authority is, among others: a. any public administration, b. any autonomous organism, public entrepreneurial entities, and public universities, etc. c. entities specifically created to fulfill needs of general interest, lacking an industrial or mercantile character.

On this concept, emerged from European Law in a clearer way, according to the Spanish specialist Gimeno Feliu it essentially

comprises: a. The State, b. The territorial entities, c. Public Law Organisms, d. Associations formed by one or more of those entities.

Indeed, Directive 18 is very concrete, setting “non exhaustive lists” that detail, for each member state, the entities that specifically qualify as contracting authorities and therefore submitted to the public procurement legislation. Gimeno Feliu considers this communitarian definition as “clear”, since it pursues homogeneity and because it takes good advantage of the subjective-functional criteria set by the European Court of Justice (7). We consequently agree with Gimeno Feliu’s opinion, when he refers to a “misconception” of the LCSP, basically because it presents itself as a “public sector contractual law” but at the end it regulates situations that are more exactly linked to public administrations (in Spain, as we have seen, the public sector isn’t necessarily the Public Administration). As a result, there is confusion in the term, having as a direct result of it, for instance, duplication of entities.

What is not a Public Administration? (Negative legal definitions)

The LCSP law determines the content of what should not be comprised under the term “Public Administrations” for its specific purposes. And which are the entities literally excluded by the Spanish lawmaker? The paragraph 2, article 3° gives us the answer: “the entrepreneurial public entities and the assimilated organisms which depend from the Autonomous Communities and local entities”. The first of the mentioned entities is regulated by article 53° of the LOFAGE –law of the general administration of the Spanish state- defining them as “(...) the public organisms intended to implement (...) the services’s gestion, the public interest goods production, literally submitted to private law, in general. Secondly, the norm excludes from this scope those “organisms assimilated and depending from the autonomous communities and local entities, which could be directly defined as “public autonomic entrepreneurial entities”.

Possible nuances of the restricted scope of public arbitration in Spain

As we have explained, this is a system where, on the one hand, three “categories” (not necessarily combined with the maximum rigour and strictness): public sector, public administration and contracting authorities, and on the other hand, there is a very short “area” able to use arbitration as a mechanism to solve disputes. As a result, it should be understood that arbitrability seems to be articulated, in the Spanish procurement norms, firstly when the public entity does not possess, according to the specific norms regulating these issues (regarding the subjective scope of the LCSP), a nature of “public administration” and

secondly when those controversies are related to the differences that may surge about the effects, compliance and termination of the contracts signed. At this very point, it is important to study the differences between administrative and private contracts in Spain, and the legal meaning and practical consequences: the applicable jurisdiction.

On this distinction, it should be said that the history of administrative contracts, in French and Spanish systems (the latter influenced by the first one), is imbricated with the contentious administrative history. For this reason, from its origins in both countries, the differences between both public contractual figures have been progressively set in a close link with the applicable jurisdiction. Hence the concrete goal of this distinction is found in withdrawing from the civil judge the competences related to the preparation, effects and extinction of the “administrative contracts”, operation that articulates the whole administrative prerogative system and which directly connects with the assignation to the contentious administrative jurisdiction, for examining at a judiciary stage those issues. As a conclusion, administrative contracts and contentious administrative competences are tied by mutual need. The regime configured by the LCSP takes this traditional distinction, as well as the dual-legal regime (where there’s a confluence between administrative and private law for the public sector contracts). Reflecting this spirit, article 18° of the LCSP establishes as a premise that the public sector contracts can hold either an administrative or private nature. In this sense, article 19° LCSP, circumscribes the administrative character to those contracts of public works in general, public work’s concessions, goods providing, public/private partnerships contracts, all signed by an entity qualifying as a Public Administration according to paragraph 2 article 2 LCSP, as well as those contracts with a different object but linked to the administration’s scope, or searching to fulfill in a direct way a public goal different from its specific competence.

Concerning the “private contracts of the administration”, the article 20° LCSP defines them as those signed by the entities, organisms from the public sector lacking the nature of “Public Administrations”, as well as those signed by those who hold this condition but are excluded from the legal field of the administrative contract, according to article 19°.

In conclusion, for the LCSP and its purposes, all contracts subscribed by entities lacking the nature of a public administration are considered “private”, but not all contracts subscribed by a public administration are considered “administrative” (or public). In fact, in the spanish legal system, the figure of the “private contract of the administration” holds a very residual position, derived from the supreme court’s tendency to

qualify all contracts as administrative, deriving this nature from elements such as the intervening factors in contracts and the wide application of the general interest concept and the underlying public service concept.

Concrete effects of this difference and administrative control jurisdiction

The LCSP's article 21° regulates the distribution of jurisdictional power in public procurement affairs. Thus, to resolve all controversies linked to the preparation, adjudication, effects, compliance and extinction of administrative contracts, the competence belongs to the "contentious administrative process" which will also be applicable in the case of private contracts subscribed by the public administrations. In the case of those controversies emerged and linked with the effects, compliance, and extinction of the private contracts of the public sector, it is competence of the civil jurisdiction as well as the preparation and adjudication of the private contracts signed by entities lacking Public Administration's nature, unless we speak about a contract submitted to "harmonised regulation" (which is not part of the present research).

The Peruvian case: mandatory and omnicomprehensive arbitration

Article 52° of the currently ruling "Ley de Contratación Estatal" (hereinafter, LCE), approved in 2008 by Legislative Decree 1017, regulates as follows the controversy-solving systems/techniques derived from public procurement: "The controversies that arise between the parts about the execution, interpretation, resolution, inexistence, inefficacy, nullity or invalidity of the contract shall be solved through conciliation or arbitration, according to the part's agreement, being mandatory to ask the launching of these procedures at any moment preceeding the time of the contract's end".

This text shows us that the LCE does not distinguish among entitites (thus its application spreads to all of them) establishing as a result a mechanism of dispute-solving that all of them must follow, in the case any controversy related to any of the described matters arises. Even more clearly, the paragraph b) of article 42° of the LCE provides that "(...) any controversy surged during the execution of the contract should be solved through conciliation or arbitration. In case of the bidding conditions/specifications or should the contract omits the corresponding clause, a "model clause", set by the corresponding reglamentary norms will instantaneously be part of the contract".

Subjectivity Scope of state procurement activity in Peru

Article 3° of the LCE comprises (or defines) as “entities” the following ones (of course) among others:

- The national government and its dependencies.
- The regional governments and its dependencies.
- The Constitutional Autonomous Organisms (9).
- The local governments
- The State’s entrepreneurial entities (either public or private, being either owned by the national, regional or local government and the “mixed shareholders” state enterprises, unther the corporate control of the State.

As we have already seen and mentioned in past paragraphs of this paper, in Peru (as in Spain), it is also necessary to connect/complement arbitrability with other normative structures to build a whole structure, completing the content. But more concretely, as a result, in contrast with the Spanish legal system in the analysed field, the scope of public arbitration and the possibility of using this mechanism in Peru is articulated in a substantially wider way, because the norms make it clear and not only that: entities not only can but must finally go to arbitration. This is how an arbitration of an obligatory type has been established, situation that makes it easy to wonder if a free disposition truly exists. With a mandatory arbitration legal scheme, where can we find the element of choice, that characterizes free disposition and thus arbitration in itself?

Brief notes about Public Procurement in Peru and how has mandatory arbitration been introduced in the Peruvian legal system

To understand the evolution of the contractual technique at the Peruvian public administration, and regarding the possibility that all readers must not necessarily be familiar with it, we consider it’s important to take a chronological look at how this figure has been progressively constructed.

This way we see how the Peruvian state (from its republican foundation in 1821), has always needed from private intervention, signing contracts with them. In fact, the history of the country registers an active promotion of public works by different presidents (9). In spite of this fact, the main feature of the contractual activity of the Peruvian

state in these times is the absence of a “systematic regulation”, until a certain (and recent) point in time.

For this reason some say, accurately, that the Peruvian constitution of 1979 marks a milestone in the legislation of public acquisitions. Its article 143° sets the general state’s obligation of “making a public bid” whenever it wanted to procure itself with private participation. This article says literally the following: “The contractual activity using public finance, when it comes to public works, acquisition of goods and services, as well as the sale of the state’s goods, is made exclusively by a public bid (...) the law establishes the procedure, the exemptions, and, if applicable, the liabilities.

This article, as we can see, sets the basics for a progressive legal production, aiming to establish (although in the first times dispersely) a legal course for an ordered contractual activity of the Peruvian state. This purpose was legally crystalised at a first stage by the following set of norms: 1. RULCOP (Supreme Decree N° 034-80-VC, 1980, the rules for public works), 2. RUA (Supreme Decree N° 065-85-PCM, 1985, the rules for goods acquisitions), 3. REGAC (Law 23554, 1987, the rules for public work’s consulting services). In this context, the cited norms were the first legal attempts towards a unified system of public procurement, establishing the possibility of diverse administrative procedures and judiciary review, this last through the contentious administrative procedure, without recognizing arbitration yet.

The subsequent publication of the Law N° 26850, published in 1997 (hereinafter Law 26850), implied a second milestone in public procurement legislation, a radical change of the scheme and regime, consolidating in only one legal text the process of public contracts related to goods, services and public works, and regulating the rights and obligations derived from them. After substantial changes on the texts of the norms, in June 2008 the Peruvian executive power, using the faculties for delegated legislation conferred by the congress in the context of implementing the NAFTA with the USA, publishes the Legislative Decree N° 1017, the new and actual law that regulates the state’s contract system in Peru (LCE).

Arbitration in Peruvian public procurement

In February 1992, the “*Instituto Libertad y Democracia*” (ILD), a peruvian *think-tank*, published in the official journal “El Peruano” (10) a project named “Project of norms on Arbitration”, as a “recommendation” and as a way of divulgating/disseminating the idea of arbitration among the public opinion. This project highlights the idea of how urgent was to

adopt measures to alleviate the heavy workload of the courts, proposing legal structures to consider: 1. the public interest in developing arbitration as an alternative way of problem-solving, 2. the possibility of submitting to arbitration all issues/controversies derived from the contracts signed by the state and the public entities with private nationals.

In December of the same year, the first specific arbitration law in Peru is published (Law Decree N° 25932). Years later, in 1996, the arbitration law N° 26572 (which replaces the first one), establishes that “(...) the controversies derived from contracts signed by the Peruvian state and the public entities in general with national-privates or foreigners domiciled in Peru (including those concerning its goods as well as those contracts signed between two public entities) can be submitted to national arbitration with no previous authorization.” All this panorama shows us how (although timidly) arbitration was being introduced in public Peruvian administration.

At this point, it is very important to focus on the idea that arbitration in general, as an “independent” (or exceptional) jurisdiction, was already set by the constitution of 1979. In principle, the “jurisdictional function” is “exclusively” reserved to the judiciary power. There are, however, two exceptions to this rule: 1. the military courts, 2. arbitration. Peruvian author César Landa mentions that, in the debate held at the Constitutional Assembly convoked at that time, it was Andrés Aramburú Menchaca (an expert in arbitration, and member of this assembly) who defended the inclusion of independent arbitration courts, under the premise that they would facilitate, by attracting it, the entry of foreign capital in Peru. We find here the main drive for arbitration in Peru. The now ruling Peruvian constitution (1993) reproduces the text and idea taken at the 1979 constitution (in the article 139°-7).

Nevertheless, only since law N° 26850, administrative arbitration becomes legally obligatory for the state: before arbitration was only voluntary. At this respect, Latorre, a Peruvian specialist in this area, reminds that the arbitration’s launch was produced at this chronological point.

The context where the cited Law 26850 was conceived and saw the light, was indeed the structural reform mentioned before, which implied a deep reform of the Peruvian judiciary power. In the second regional forum “Good Government for empowering the poor”, organized by the World Bank, it is mentioned that this process, started during Alberto Fujimori’s government, was formally designed to reinforce the

judiciary's reputation among all citizens, in the search for a better government". At the same time, the data shown by a 1997's poll by the "Comisión Andina de Juristas", confirms the citizens' views towards the judiciary power, emphasizing that, for them, the deepest problem is corruption (45% of the interviewed), the justice's delays (27%) and the lack of expertise of the jurisdictional operators (16%). De Belaunde, another Peruvian jurist specialised in justice reform, refers to an "almost total collapse" of the judiciary power in 1990, that coincides with a need of setting juridical stability for private investment, generating a context of "judiciary reform" (always in the framework of the structural reform mentioned before), proposing at its very beginnings the need/goal of "accessibility, efficiency, celerity and equity" but that, according to people's final perceptions on the outcomes of the whole process, the concrete reform plan had resulted in a subordination of the judiciary to the government. Probably because of this the reform seemed to keep only in the rhetorical stage. At the time, this process is still pending and the structural reform of the Peruvian state appears to be far from its main goals, in spite of the efforts.

Absence of a legal differentiation between administrative and private contracts in the Peruvian public administration

Differently from traditional and actual Spanish procurement regulation, the Peruvian case doesn't show the figure of differentiation between "private contracts" and public ones. Nonetheless, after reading diverse articles of the norms cited before, it is not hard to deduce (at least at a theoretical stage) the contractual special position of the state towards private actors (as an example, article 35° of the LCAE sets some formal requirements, and in general there are some limitations to the formation of the "free will" or freedom of choice that in principle is inherent to contractual activities, as for instance the strict administrative procedure that must be followed for enlarging the deadlines concerning public works. On the contrary, the development of this subject in the Peruvian doctrine is rather bigger than the legal development of the distinction. Some time after the Law N° 26850 appeared, the civil law specialist Manuel de la Puente y Lavallo held that modern doctrine considers that the contracts in which Public Administration takes part are of two kinds: the administrative contract in itself and the civil law contracts subscribed by the public administration. Differently, for Peruvian specialists on administrative law such as Ricardo Salazar, "(...) it's underlying to the notion of Administrative Contract that at least one of the parts subscribing it is a Public Administration entity. In the line of Salazar, other authors, such as Guzmán Napurí, point that the defining character

of the Administrative Contract is constructed when the Administration is one of the parts of it with the main aim to fulfill public needs. A radically contrasting vision (of a liberal type), however with a rather similar outcome, (which leads to a non-distinction), Fernando Cantuarias considers the differentiation, literally, an absurd, by saying that, if on the one hand the state should regulate the way it shapes and expresses its contractual will when looking to obtain goods and services (regulation that according to this same author is important to prevent from negative incentives to corruption), it should not lead us to consider that for that sole reason the contract, with a clear private essence, stops being a contract, and becomes an administrative instrument “just by magic”.

As a conclusion, it could be said that in the administrative law doctrine (in Peru), the prevailing trend is to consider that all state’s contractual activity is administrative procurement (because of the only fact that is the Administration the one that intervenes and because there is a legal regime providing a special content to contracts subscribed by the Administration. Thus we have two major trends: most of administrative jurists deny the category of “private contracts of the administration” in the peruvian legal system, whereas from a perspective that combines in the juridical aspect a “civil law” vision and on the ideological side a liberal one, all contracts, even the ones subscribed by the State, are intrinsically private (or commercial). At the same time, regardless of the position that one may hold on the juridical/legal nature of the contracts signed by the Administration, it is clear that the resolution of all conflicts derived from it must be necessarily procured through arbitration, because that’s the legal provision of the specific norms regulating public procurement in Peru.

This situation seems to be, however, somehow paradoxal. To clearly illustrate these views, Alfredo Bullard, another liberal jurist, points that, on the one hand, Administrative Law has traditionally been perceived as a mean to bring the concept of public interest to the “real world”, being in fact the “*summum*” of the expression of state’s prerogatives to regulate the private sector and/or the individuals (in this author’s opinion, “the most public of the public”), while commercial arbitration has been considered as “an affair between private actors” (“the most private from the private”). In this order of ideas, Bullard concludes that the natural consequence of what he names the “contractualization of Administrative Law” is its “arbitrarization”, and because of that he points out that there should be solutions to secure investments needed by our countries (11).

COMPARED ANALYSIS: DIFFERENCES AND COMMON TRACES

From what has been explained so far, we point that the most important comparative feature is the voluntary and restrictive (circumscribed to only an specific kind of entities) of spanish procurement arbitration, contrasting with the mandatory and ample administrative arbitration in Peru. The question immediately surging (and that in fact inspired this present research) is linked with the reason of this contrast. In the following lines, we will try to draw some lines on this fundamental point.

The visions on administrative control in Spain and the consideration of arbitration as an “exceptional jurisdiction” in Peru since 1979’s constitution

Article 106°.1 of the Spanish constitution establishes that “the courts control the reglamentary power, as well as the legality of administrative action and the submission/subordination of this to the goals justifying its existence”. This constitutional clause is described by Martín Rebollo as an essential note of the Rule of Law (“estado de derecho”) mentioning that, through the possibility of controlling all administrative activity, the public interest represented by the public administration connects with the rights and interests of the private actors. We may find a clear legal reflex of this constitutional perspective in the 21° article of the LCSP, cited before, that in effect reserves the problem-solving competences, in the public procurement field, to the jurisdictional order (contentious administrative), leaving for the civil jurisdictional order the task of solving those controversies related to the effects, complying and extinction of private contracts (as well as for the adjudication and preparation of the private contracts subscribed by those lacking the nature of a “public administration” according to the concerning laws. Thus, while the law does not provide with any exceptions for an inevitable contentious-administrative jurisdiction to solve disputes in the Administrative-Contractual field, there is just a little and only exception to civil jurisdiction, as we might see in the following Table I.

TABLE I

	Public Administrations (according to LCSP)	Non-Public Administrations (according to LCSP)
Jurisdiction to solve public procurement issues	Contentious administrative	Arbitration
Exception	NONE	Arbitration

As it can be seen, the only exception is the one found in the already cited article 39° of that same legal norm. A similar article is impossible to find in the Peruvian legal system.

In fact, in spite of the crisis of the justice's administration in Spain, noted by many authors with serious concern and worry, there's still a strong resistance to introduce arbitration in the fields of public procurement, to solve controversies between the public and the private sector (12). Specifically at a doctrinal level, we notice a deep opposition/resistence towards the sole possibility that controversies between the private and the state could be solved by another private actor: an arbitration court, which is not the judiciary power.

Contrarily to this perspective, in Peru, as we have pointed and seen along this paper and so far, considering arbitration as a mean of administration's control finds constitutional basis considering this alternative dispute-solving technique as an "exceptional jurisdiction" (or, using a more correct term according to the views of the specialists, as the possibility of generating "independent tribunals"). As we have also said, this constitutional basis was set in 1979, and the reasons why it was inserted into our legal system holds a direct liaison with the encouragement of private investment (mostly foreign) in Peru, desire deepened while Alberto Fujimori was ruling the country and that is still (and inceasingly) the impulse that maintains in the private justice's hands issues like public procurement, so inherent to the day-to-day activities of Public Administrations; in order to procure the accomplishment of public goals and interests into the framework of what we call "a modern state". The legal obligatory nature of peruvian arbitration would hence underly over an allegedly "privatistic bias", paradoxally applied to public procurement, facing a judiciary power that is not acting at this time as what it normally should be: a warrant of the juridical stability, in other words an actor to consolidate clear rules of the game for attracting investors. This situation has favored the enormous development of arbitral activity in the fields of public contracts in Peru, and arbitrators,

nowadays, solve practically all controversies flowing from public contracts. In this context, the arbitral (at the end private) penetration in public law holds a very positive consideration by many (including actors coming from the state) basically because of their rather fast decisions and their quality, as a result of the expertise of many arbitrators in Administrative Law and Public Contracts, gaining some respect versus a judiciary power deeply discredited by the citizens with an excessive workload (13) that in this sense would reveal itself as unable to fully fulfill and operativize the jurisdictional function that's been formally assigned to the judiciary, to, in this concrete case, hold the ability of completing with at least a minimum standard of efficacy the task of reducing, through dispute resolution, what has been called "the infrastructure gap", configuring an scarcity of premises (COPIAR NOTA 96 LINK BID) to provide public services in the search of general welfare. As many authors note, this scarcity puts Peru in terms of infrastructure behind other Latin American countries such as Brazil, Argentina, Chile and Ecuador, and it is certainly worrying⁽¹⁴⁾.

Compared visions about efficacy and public interest

Article 103° of the Spanish constitution provides that "Public administration serves, objectively, the general interest, and acts according to the Efficacy Principle, subordinated wholly to the law". With a similar inspiration, article 3° part 1 of Law 30/1992 of the Juridical Regime of Public Administrations and Common Administrative Procedure, provides that Public Administrations act, among others, according to that mentioned principle. In this sense, being the Constitution an essentially political-juridical norm, it is clear the option for constitutionalizing the desire and need of an "optimal operativity" of the Administration as a mechanism to protect the public interest. At the same time, article 1° of the LCSP mentions a principle of an "efficient use of the funds aimed to public works, goods acquisition and hiring services".

The Peruvian constitution is not as explicit as the Spanish in this aspect, but this is largely regulated at a legal level. In fact, Law 27444, Law of General Administrative Procedure (2001) –hereinafter, Law 27444), which is currently ruling, designs and describes sixteen principles, among which we find those of celerity and efficiency, whose binding power isn't only circumscribed to administrative procedure in itself, but yet it displays its effect to material activities (the material acts made through the exercise of the state's administrative function) of public administration, in order to have it protect the public interest, and defend the rights and interests of the citizens touched by administrative

dispositions and laws, respecting the constitutional and juridical system. At its turn, LCE only refers to a “Efficiency Principle”, applicable to its specific ambit. Thus, according to article 4° -f) of Legislative Decree N° 1017: “(...) all contracts made by the public Entities will be made under the best conditions of quality, price, and the quickest execution deadlines, promoting a better use of the material and human resources available. The contract processes should be made according to celerity, economy and efficacy criteria (...)”

From this constitutional and legal dispositions it is natural to notice that efficacy should be understood as a tool for getting the fundamental goal of Public Administration: protection of public interests, through a rational state’s intervention in society to serve it with objectivity, with the goal of getting, as Ortega mentions, “(...) harmony between the public power’s prerogatives aiming to achieve the public interest and the control of those prerogatives on behalf of the warranty of the citizen’s liberties” (15). On this point, we should interpret that public interest is a qualified one: not any “interest” can be considered as that, and as Garcia de Enterría clearly states, the determination of these interests is always under the court’s control (16).

As a result, it seems that in the juridical Spanish system, in spite of the constitutional range of the efficacy principle, and the justice administration crisis that we have already mentioned, some resistances persist. Consequently, we have noticed that the traditional judiciary control of the administrative activity (reinforced with the constitutionalization of that control, in article 106.1.º of the Spanish Constitution), prevails over the possibility of leaving to third parties, because of mere matters of efficacy, the task of solving disputes arose from public procurement. In Peru, on the contrary, even if efficacy and celerity are not constitutional provisions, they are indeed understood as the main goals of public procurement, most of all in a developing country that needs an injection of investment. It seems thus that efficacy is above the need of a strictly judiciary control of administrative activity that in principle and contrasting with the Spanish case, is not in the 1993’s Peruvian constitution.

CONCLUSIONS, RECOMMENDATIONS AND POSSIBLE FEEDBACKS

The legal and doctrinal analysis, as well as the reflections we share in this paper, may lead us to conclude and/or recommend the following:

1. Arbitration, as an alternative mechanism for dispute solving, holds a pure voluntary nature, flowing from its private and conventional character.
2. In spite of this, even referring to a “jurisdictional institution”, belonging to private law (Cassese), the comparative experiences show how in the juridical systems of different countries, its application in the public arena has been seriously considered to solve disputes that might appear in public procurement to fulfill public goals, introducing arbitration at different levels and degrees.
3. These diverse degrees are visible in the Spanish and Peruvian legal orders, which are different. In the first case, as we have mentioned, arbitration remains voluntary and is restricted only to two kinds of public entities (public entrepreneurial state entities and assimilated organs depending from Autonomous Communities, because they are not considered as Public Administrations according to the LCSP). In Peru, arbitration is mandatory for all entities that are considered public according to the Peruvian LCE.
4. Restricted and voluntary arbitration in Spain may respond to a certain perception on administrative control, circumscribed to the Judiciary Power, according to 106^o article of the Spanish Constitution. Even if the Contentious Administrative crisis has been signaled by many Spanish authors, the resistances persist.
5. In the Peruvian case, mandatory and “universal” (holistic) arbitration might have been established due to the following factors:
 - 5.1. Perception of a double need: a. an intense investment flux and b. the intervention of specialized agents in certain ambits of public impact, in order to reduce the infrastructure gap existing in Peru as a developing country.
 - 5.2. A constitutional and legal framework that favors the institution of obligatory arbitration (since the constitution of 1979).
 - 5.3. Lack of internalisation, among juridical operators, of the differences between private and administrative contracts: this dogmatic absence can be found at the doctrinal level, from a variety of perspectives (administrative, civil, and trade law specialists), and, specially, this difference is totally absent from the legal provisions, a radical contrast with those in Spain (where the law draws a line between them). In our opinion, this differentiation at the legal level strenghtens any argumentation

leading to put the stress on the restrictive nature of arbitration, because a glance at the historical development of this concept, allows us to notice a distinction linked to the jurisdiction that is applicable. And, being arbitration an essentially civil institution (see conclusion #1), it's in principle an "equivalent to civil jurisdiction" and not precisely to the Contentious Administrative one.

5.4. A deep feeling among the population of a severe crisis of the judiciary in general, a lack of confidence (i.e. image of corruption projected by the Judiciary), and at the same time a crisis of "functionality" (i.e. slow processes and the lack of specialization of many judges) (17).

5.5. With a judiciary like this, the development of arbitration in Peruvian public procurement, since the very beginnings of its obligatory force, is somehow a breath of fresh air, mostly because it contributes to reduce the "infrastructure gap" through the quality of the arbitration's function, which in many cases offers quicker processes and "arbitration awards" guided by expertise.

6. **The rule of the efficacy in public procurement is extensible to the efficacy to the resolution of its possible conflicts.** In other words, it is impossible to say that a system of public procurement fulfills its fundamental goals if the decisions taken about the disputes it might generate are slow and/or don't contribute to an efficient public management, or are taken in a context of corruption.
7. Perú, as obvious, needs a strong and institutionalised State, with a dynamic Judiciary power, that following its natural function, controls the legality of administrative action also in the fields of procurement. Nevertheless, in the present context, it would be equally dangerous to remove the instrumental obligatory feature in Peruvian arbitration without, at the same time, taking seriously the duty of reinforcing the institutional framework in Peru, through a coherent state reform implying an improvement of the systems of controlling the administrative activity through the judiciary, aiming to place it at its real level under the institutional basis set by the rule of law. Of course this formula covers the harmonization of administrative efficacy with judiciary control and provides the rule of law with operativity/functionality.

8. To strengthen the state reform process in Peru, we propose to elevate to a constitutional range, as clearly as the article 103° of the Spanish constitution, the “principle of efficacy”. At the same time, a provision in the Spanish legal system, related to the celerity principle that we do find in the peruvian LCE (in conjunction with the priority of the general/public interests in front of extremely particular interests that don’t have any incidence in the public ones, which are the point of arrival of any public efficacy, principles clearly designed by Law 27444.
9. The current “fashion of arbitration” in Peru, as well as its legal design, beyond an state of “euphoria” that gives it the status of a “magic solution” to cope with the inoperativity of the judiciary, is, objectively, a lot more than a simple innovative and creative tool: it is, indeed, an enormous support and input towards an efficient public procurement, efficiency that at the same time, has as a result an attraction of all the private investments that our country needs as an injection to economy. But it is even more important because in several cases it represents a dispute solving tool of high quality, quality in many senses that has a clear impact on the protection of the public interest.
10. The positive experience of arbitration in the public procurement Peruvian system shows us how suitable can arbitration be as a palliative to confront and/or overcome the crisis of the contentious-administrative judiciary mechanism noticed by a considerable amount of specialists in Spain. In this sense, we consider important all those inputs aimed to inject, in a crisis context, a dosis of innovation and flexibility to problem-solving in the Spanish public procurement; it shouldn’t though mean that it reaches the point of breaking the strength of a certain view of administrative control, incarnated by the contentious administrative jurisdiction.

FINAL THOUGHTS

As a final conclusion of all the ideas we try to share through this working paper, it could be said that this subject combines in an interactive way a conceptual-theoretical richness with, at the same time, a practical relevance. These features allowed us to trace the most important features of a juridical institution (arbitration), in its insertion in public law and procurement, and its contrasting treatment in two legal orders and two judiciary contexts that show us, although in different degrees, great complexities. In general, the conclusions reached provide

us with a clear panorama showing how useful can the comparative methodology be, not only in the pure research field, but also in the practical application and feedbacks given by the global perspective of public law, towards the implementation of concrete measures to a smart application of effective public policies, harmonizing them with the respect to the rule of law and the nature of juridical institutions.

EXPLANATORY FOOTNOTES

1. In the Euro zone this technique represents around 16% of the GDP (Moreno Molina). In a developing country as Peru, it reaches a 9% of the GDP (Latorre Boza).
2. When it comes to controversies related to public procurement, in Peru, it is hard to find one actually solved by conciliation, because this mechanism is perceived as a way of disposal of public resources, and the fears of being audited by the national comptroller office are a powerful deterrent.
3. At the point that, for example, Italian jurisprudence (Constitutional Court of Italy) has clearly stated that mandatory arbitration contravenes the Italian constitution.
4. Casesse, Sabino, "*L'arbitrato nel diritto amministrativo*". At: *Rivista Trimestrale di Diritto Pubblico*, N° 2, Roma, 1996, page 317.
5. Its design took as an example the Uncitral's model law.
6. In Spain, the legislation employs the term "Public Administrations", in plural, due to the particular features of the Spanish organization of the State (that we can call "multiple") which divides government and administration and where administration is, at its turn, divided into three categories: 1. General State's Administration, 2. Autonomous Community's Administrations, 3. Local Administration Entities.
7. Gimeno Feliú, José María, "*El nuevo ámbito subjetivo de aplicación de la ley de contratos del sector público: luces y sombras*". At: "*Revista de Administración Pública*, CEPC, Spain, N° 176, may-august, 2008.
8. Constitutional Autonomous Organs can be described as those given special autonomy by the Peruvian Constitution (1993).
9. I.e., President Augusto B. Leguía, in the early XX century, was a quite active promoter of public works, which were considered "the essence of the '*Patria Nueva*' –as his 11-year period of government was named. For more information, see:

<http://blog.pucp.edu.pe/item/25062> (Orrego Penagos, Juan Luis, Blog of Peruvian History, XIX y XXth centuries).

10. Where norms are published and from this publication they start to effectively rule. There are also publications of legal projects and legal reform proposals.
11. See: Bullard González, Alfredo, “*Enemigos Íntimos: El Arbitraje y los Contratos Administrativos*”. At: *Revista Peruana de Arbitraje N° 2-2006*, Editora Grijley, Lima, 2006. p. 156.
12. There is currently a legal project (*anteproyecto de ley*), to reform Spanish Law 60/2003, of arbitration, but in the public arena it only proposes to add arbitration to “intra-administrative” conflicts –the ones that involve two public entities- which are not aimed by this research (for more information see: http://www.la-moncloa.es/ConsejodeMinistros/Referencias/_2010/refc20100219.htm#Arbitraje).
13. Most of all in the Contentious Administrative field: as an example, only for the year 2007, there were 9,925 causes pending in the judiciary about this subject. Source: Pease García, Henry; Peirano Torriani, Giovanni (editors), “*Reforma del Estado Peruano: Seminario en los 90 años de la Pontificia Universidad Católica del Perú*”. Fondo Editorial PUCP, Lima, 2008. p. 388.
14. On this point, see: Campos Medina, Alexander, “*El Arbitraje y su impacto en el desarrollo de la Infraestructura Pública en el Perú*” At: “*Arbitraje: ponencias del Congreso de Arbitraje 2007 – Primera Parte*”. Mario Castillo Freyre – Palestra Editores, Lima, 2008. pp. 359-363.
15. Ortega, Luis, “*El Reto Dogmático del Principio de Eficacia*”. At: *Revista de Administración Pública*, N° 133, january-april, 1994. p. 7.
16. García de Enterría, Eduardo, “*Democracia, Jueces y Control de la Administración*”, Fifth Edition, Civitas Ediciones, Madrid, 2000.
17. The problem of justice in Peru goes, as we see, beyond a simple “crisis of the contentious – administrative” as it happens in Spain.

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