Accountability and Contracting Out by Global Administrative Bodies. The Case of Externalization Contracts made by European Community Institutions[1]

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This paper would like to combine two perspectives. The first one is the very stimulating "Global Administrative Law" approach, as it has been initiated by NYU colleagues, notably Richard Stewart and Benedict Kingsbury. The second one is a more general theory of legal globalization, which I will try to sum up below: this theory is slightly different, mainly in the sense that, having its main focus on legal transnationality issues, it considers that international entities, institutions, mechanisms, are not the only location where global legal realities are placed, since globalization is a set of phenomena which affects – and can be observed in – national legal systems as well as international law.

Accordingly, I will start with some remarks concerning globalization and its consequences on public apparatuses (I) and on law (II).

Among the consequences globalization has on public institutions and law, there is certainly, as NYU colleagues think, a development of global administrative bodies, whose existence, powers, way of functioning, raise a lot of legal problems, in particular difficult ones concerning the kind and degree of accountability these bodies are subject to. And these problems seem to be highly aggravated where global administrative bodies do not operate fully their duties by themselves, because they entrust other entities with them, because they contract out some of them(III).

This is the particular topic on which the paper will concentrate, but, in order to make my discourse more concrete, I will use as an example some situations in which the European

[1] « Global Administrative Law » Workshop, New York University, 18 Oct. 2006

Community institutions – which can be considered as global bodies in an extent which will be made more precise below- delegate some of their duties through agreements made with various entities.

Thus, starting from some remarks on the kind of law global administrative bodies are subject too, and corresponding shortcomings, I will try to provide some examples of cases in which, like other global bodies, European institutions externalize some of their tasks by way of contractualization(IV).

My feeling, though, is that legal difficulties deriving from this kind of practices can be found in other contexts. In fact, they are typical of the issues which, generally speaking, derive from the rise of contract in the public sphere (V). In the domestic ambit as well as in the international one, privatizations, contracting out, etc…have brought in a series of very hard problems concerning the way partners to which public bodies entrust part of their activities do their job: their degree of transparency, their accountability, the way they are supervised, and so on (VI).

It is, then, interesting to observe how these problems are dealt with in the various systems in which they arise, in the international context as well as in the domestic one (VII).

I will then focus on the way they are addressed in the case of externalization contracts made by European institutions (VIII).

I will finally try to draw from this particular example some concluding remarks concerning the law of global administrative bodies (IX).

I. Globalization and its consequences on public apparatuses

1°. This is not the place for trying to devise a thorough and undisputable definition of such a complex reality as globalization is. Some brief remarks about what this set of phenomena is made of should suffice[2].

[2] See e .g. : Ulrich Beck, What is globalization ?, Cambridge, Polity Press, 2000 – Jan Aart Scholte, Globalization. A critical introduction, London, Mac Millan, and New York St.Martin Press Inc., 2000

In its core substance, globalization derives from a transformation of our world, which leads it from segmentation to intermingling, from separation to transitivity, from a territory-based organization to despatialization. It has its main roots in a dramatic process of economies opening: since the end of World War II, international trade has grown at a rhythm of 6.5 % per year, while customs rates decreased from about 25 % in the 1960's to about 3% at the end of the 20th century. Related to this is the strong development of multinational companies: they are more than 60,000, and some of them have an economic size which dwarfs the one of some states. Some expanding economic realities are becoming more and more "despatialized": financial markets, electronic commerce are more and more indifferent to the localization of both buyers and sellers.

What globalization is about is not only economic, though. Globalization has a cultural dimension: various global media tend to be available everywhere at any time, and they carry along values that tend to become a common worldwide ideology, and are related to economic competition and consumers rights as well as fundamental rights and environmental protection. Globalization has also a social dimension, which is related to the growing migration flows as well as to the consequences on jobs of the rise of various new economies.

Let us add that it would be an error to think that globalization would be only situated at the universal level. In fact, the phenomena which contribute to what globalization is can be observed at several levels: regional ones – regional integrations are spaces in which the opening trends which are typical of globalization are very intense-, and domestic ones, in so far as globalization impacts internal a lot of internal realities, putting them in direct contact with external markets, cultures, and so on.

2°. It is obvious that the globalization process is affecting public institutions, public apparatuses in a very intense way.

Alongside states and traditional international institutions, new actors have started to play an important role in global economic, political and social life. They are multinational companies, non governmental organizations, various private bodies exercising regulatory functions – for example, in standardisation, local governments – in transborder cooperation, for example-, and so on.

Correspondingly, globalization is contributing to a process of "destatalization" of societies and the world. The states – and international institutions through which they used to act together- have lost a significant part of their influence on the world's economic and political destiny, even if this loss of influence is not as dramatic as it is sometimes said.

Moreover, a prominent aspect of globalization is the kind of sophisticated distribution of powers it creates between a set of governance tiers, international, regional, statal, infrastatal, and so on. The habit has been taken to use the concept of "multi-level governance" in order to take this new kind of realities in account.

II. Consequences of globalization on law: legal globalization[3]

Globalization, in its economic, cultural, social, aspects, exercise a certain pressure on law: it pushes it towards certain directions, which are mainly the following ones. It tends to favour norms, legal devices, which are indifferent to localizations, which are detached from the traditional division of the world in national territories. It tends to develop transnational mechanisms and legal solutions. It tends to increase the number and substantial importance of international norms which are not directed at states, like in the pre-global world, but at individuals, private entities – companies, NGOs-, substatal public entities, and so on.

It tends, in a related way, to weaken the grasp of states on law. As mentioned above, they are not any more the only law-makers, they are not any more the only regulators. This is complemented by other evolutions in normativity, notably the fact that legal hierarchies become less clear, more complex. Even the divide between international law and national law is blurred since international law is more and more addressing issues which were traditionally considered as purely internal: democracy, the rule of law, the independence of the judiciary, and so on.

[3] Jean-Bernard Auby, La globalisation, le droit et l'Etat, Paris, Montchrestien, 2003- Sabino Cassese, Lo spazio giuridco globale, Rome, Editori Laterza, 2003- Gunther Teubner, Global Law without a State, Dartmouth, 1997 – Jarrod Wiener, Globalization and the Harmonization of Law, London and New York, Pinter, 1999

What is also a prominent feature of legal globalization is that it encourages new types of relationship between legal systems. It makes them more permeable to external influences – stemming from international law, or foreign laws-. It increases constantly the competition between them. And it concurs to their growing harmonization.

III. Global administrative bodies: accountability problems, especially where they contract out

In the numerous international bodies which form part of the global architecture of "multi level governance", some are typically administrative in nature. They are not traditional political international institutions: their members are not necessarily representatives of states, their task is more on the side of implementation than on the one of dealing with political orientations. Typical examples are: the Inspection Panel of the World Bank, the Codex Alimentarius Commission, the Basel Commission. Various European agencies also belong to the category.

NYU colleagues have rightly suggested that issues concerning these bodies 'legal status become a matter for research and analysis[4]. It appears, indeed, that legal frameworks in which they are acting often show deficiencies: at least, they usually do not provide with rules capable of imposing on concerned bodies sufficient obligations in terms of transparency, reliability, accountability.

These shortcomings become particularly apparent and damaging in situations where global administrative bodies decide not to exercise all their duties by themselves, but to entrust part of them to external entities, be these companies, or NGOs, or entities of other kinds. This is exemplified by the office of the United Nations High Commissioner for Refugees (UNHCR), which has entered partnerships with hundres of NGos around the world for services including refugee protection, community services, field security, child protection, engineering, and telecommunications in emergency relief situations[5].

[4] The Emergence of Global Administrative Law, Law and Contemporary Problems, Benedict Kingsbury, Nico Krisch, Richard Stewart & Jonathan Wiener (special ed.), vol.68, Summer-Autumn 2005, n°3-4
[5] Laura Dickinson

It is clear that, in these cases of externalization, the transparency, reliability, accountability problems are made much more acute. If responsible bodies are already in a position of low accountability, reliability, transparency, this can only be made worse where they derive their tasks to external entities. If supervision which is exercised on them is already weak, the agency problem can only be increased by the externalization.

Thus, the situation in which global administrative bodies contract out some of their tasks must be considered as a very relevant matter for concern in global administrative law.

IV. Contracting Out by European Institutions

In theory, European Union authorities should not find themselves in position of externalizing their administrative tasks, since implementation of European policies is normally for the member states to operate: it is based upon a scheme of "indirect administration", under which it is supposed to be performed by national administrations, and not by EU bodies.

This scheme leaves however some room for contracting out for two reasons. The first one is that, by way of exception, some of the EU policies are not subject to the "indirect administration" arrangement, and are implemented by EU bodies, and not by the member states: this is the case of competition policy, this is also the case of development policy. The second one is that, even where "indirect administration" prevails, European bodies must deal with various tasks of the conception kind, or the expertise one, or the supervision one, which they can be sometimes willing to externalize partly, like all public or private organizations frequently do nowadays.

And, as a matter of fact, contracting out by European agencies is provided for in EU legislation.

1°. This is the case, firstly, in the field of some specific policies, whose best example is the development one. Aids to developing countries are often delivered with the support of local entities, and notably by what is, in the EU jargon, called "non-state

actors"[6]. Council Regulation n°1292/96 of 27 June 1996 on food-aid policy and food-aid management and special operations in support of food security lays down the conditions non profit-making non-governmental organizations must meet in order to be eligible for Community financing for the implementation of food-aid operations.

2°. More interestingly, contracting out is also expressly made possible by some pieces of general EU legislation.

Under Council Regulation n°1605/2002of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, it is made possible for the Commission to delegate tasks in two different ways.

According to its article 54, "*tasks of public authority and in particular budget implementation tasks*" can be entrusted by the Commission, either to some specific European bodies, or to "*national public-sector bodies or bodies governed by private law with a public-service mission providing adequate financial guarantees and complying with the conditions provided for the implementing arrangements*…". Some complementary provisions are laid down in article 38, 39 and 41 of Commission Regulation n°2342/2002 of 23 December 2002 concerning the implementation of the Financial Regulation. Is in particular worth noticing the article 41, in which it is provided that, where the Commission uses this possibility of delegating tasks, it shall conclude an agreement with the concerned body (although, in some cases, the latter will be designated by the Member State or the country concerned).

According to article 57 of the Financial Regulation, the Commission is entitled to entrust "*by contract to external private-sector entities or bodies other than those which have a public-service mission", "technical expertise tasks and administrative, preparatory or ancillary tasks involving neither the exercise of public authority nor the use of discretionary powers of judgment*". Article 40 of the implementation Regulation states that corresponding contracts must be concluded in accordance with the rules on procurement contracts which are provided by the Financial Regulation.

[6] See : Communication from the Commission of 7 November 2002 on « Participation of non-state actors in EC development policy » [COM(2002) 598 final]

3°. Regulations of 25 June 2002 and 23 December 2002 contain other relevant general rules - i.e. not concerning a particular policy- of a narrower scope.

Two sets are worth mentioning. According to article 108 of the Financial Regulation, and articles 163 sq. of the implementation Regulation, the Commission may conclude "framework partnership agreement" with beneficiaries of EU grants, in order to establish long-term cooperation: one can suppose that, now and then, this kind of agreement will have as an effect to entrust the contractor with some part of the Commission implementation duties.

Article 166 of the Financial Regulation and 232 of the implementation Regulation set up rules concerning the agreements which will be made, in the field of external actions, either with beneficiaries or with "national or international public-sector bodies or natural or legal persons responsible for carrying out the actions".

4°. Thus, we realize that European institutions are widely authorized to externalize some of their tasks.

The problem of how, when they do so, make sure that externalized functions remain enclosed in the limits of proper rules on accountability, transparency, reliability, and so on, is consequently a very serious one for the European system.

V. Issues deriving from contracting out are a common concern to many administrative laws

Before investigating further the way European law deals with accountability, transparency, reliability problems, I would like to insist on the fact that these problems are not at all specific to some international or European practices. In fact, they have become familiar in domestic public laws.

1°. In all major industrialised countries, one can detect a common tendency to a growing contractualization of relations between administrative bodies and the society[7], and

[7] Jean-Bernard Auby, Comparative Approaches to the Rise of Contract in the Public Sphere, forthcoming, Public Law (London, Sweet & Maxwell), 2006

one prominent aspect of this evolution[8] is the rise of "contracting out", of externalization contracts. These contracts take variable legal forms, but their common basic feature is well expressed by the concept of public-private partnership, since what they have fundamentally in common is that they rest on the putting in common of private and public– economic and legal – means for the purpose of achieving a public duty, of which they become the instrument.

Externalization contracts flourished in relation with privatization and contracting out policies which were followed in a more or less intense manner in all industrialised countries, especially in the 1970s and 1980s.

In the United States, outsourcing, contracting out, expanded then in various ambits such as social services, health services, education, water provision, power provision, etc…And, as it is well known, in prisons management[9]. In Australia, the same kind of policy was applied to prisons, health services, education[10]. In Great Britain[11] since the thatcherite period, and continuously onwards – even with noticeable inflexions –, a firm policy was led which consisted in inciting – even, in some cases, forcing – public entities to externalize all activities which were susceptible to be performed in a more efficient way by private entities. This policy was in particular applied to local governments, which were obliged by a statute made in 1988, to weigh respectively direct rule and contracting out each time they were creating a new activity. Afterwards came some legislation concerning outsourcing in various state activities, such as prisons, roads, bridges… In order to give an economic and legal shape to these various hypotheses of externalization, legal patterns were provided by the government, especially those which took place in what was called the "Private Finance Initiative" (PFI). In 2002, 400 PFI contracts were in force, their global amount being more than 100 billion pounds.

In France, from the 1980s on, a similar tendency to contract out public duties could be noticed. It was particularly apparent in the local government. In the early 1980s, significant

[8] Which also affects procurement contracts, and contracts used as regulatory tools
[9] Jody Freeman, The Contracting State, p. 164 et s. : when this article was published– in 2000- 43 States had passed statutes allowing for the outsourcing of prisons management
[10] Cheryl Saunders and Kevin Yam, Government regulation by contract: Implications for the rule of law, Public Law Review, vol.15, n°41, 2004, p. 51
[11] French lawyers are rather well informed about the British evolution in the matter, since this evolution – and in particular the PFI policy – inspired very much – and quite explicitly- a new legislation made in 2004 about « contrats de partenariat » - public- private partnerhsip contracts-. About this reform, see for example: François Brenet et Fabrice Melleray, Les contrats de partenariat de l'ordonnance du 17 juin 2004, Litec, 2005

decentralizing reforms were made, which gave local authorities full responsibility for public services they were, previously, only partly in charge of, if at all. Quite often, they chose not to operate these activities directly, but instead to entrust private companies with them: that was especially done in fields such as water provision, transport, waste management, etc… In the late 1980s, governmental authorities tried to extend this externalization move to their own duties, although with more limited success[12].

These various examples are simply illustrations of a general trend. In 1997, an author could spot the existence of legal devices akin to a delegation of public services all around the world[13].

2°. Externalization contracts seem to be everywhere a source for intense legal questioning[14]. And among the problems they raise, one of the most critical concerns their submission to public law principles and values.

Every time a contract is made about an administrative activity, one of the consequences is that the achievement of that activity is not any more in the hands of the administration alone: it depends partly on the other party. Of course, things are much more so where the contract is an externalization one: then, it is really a part of this activity's monitoring which has been transferred to the private party.

Thus, a crucial issue becomes to make sure that the part of the administrative duty which is not any more mastered by the administration itself, does not get out of the reach of usual legal principles and values administrative activities are normally submitted to.

The problem has in fact two different aspects.

The first one is related to the means by which it is possible to avoid the part of the contractualized activity which is performed by the private party to escape from any supervision by authorities who are normally in charge of monitoring administrative activities.

[12] Laurent Richer, Droit des contrats administratifs, Librairie Générale de Droit et de Jurisprudence, 4th ed., 2004, p.46 ss.
[13] Christian Bettinger, La gestion déléguée des services publics dans le monde. Concession ou BOT, Berger-Levrault, 1997
[14] See e;g;: The Province of Administrative Law, Michaël Taggart dir., Hart Publishing, 1999)

This is, one could say, the "institutional" side of the problem: it is its accountability aspect, strictly speaking.

The second aspect, less institutional, and more substantial, is about the ways by which administrative laws deal with the risk that contractualization place public authorities and their contractors in position of getting away with the principles to which the contractualized activity is normally submitted by public law.

The problem is: how to make sure that respect of such principles as transparency, non-discrimination, proportionality, and so on, is still imposed where an administrative duty is contractualized? Obviously, this question has some links with the previous one – since one of the functions supervision devices fulfil is checking that these principles are respected-, but it is a different one, since it is also deeply related with the way each system analyzes the legal essence of public contracts.

Thus, some American authors explain that, although public authorities make contracts which have sometimes a genuine regulatory nature, they are not, when doing so, submitted to the procedural constraints imposed by the Administrative Procedure Act in the ambit of rulemaking[15]. Some of them express a wish of an extension of the APA's reach to these situations[16].

In Great Britain, a key issue is to determine whether the Human Rights Act 1998 could be considered as applicable to some situations concerning public contracts. Apparently, the answer is negative[17], and, though, it seems that the Act could find itself applicable to entities entrusted with public interest tasks by externalization contracts[18].

VI. Solutions admitted in corresponding administrative laws

[15] Alfred Aman, Privatizations, Prisons, Democracy and Human Rights: the Need to Extend the Province of Administrative Law, Indian Journal of Global Legal Studies, Summer 2005, vol.12, Issue 2, p. 511
[16] John Scheib, Administrative Agreements : Shouls They Be in the Shadows of the Administrative Procedure Act ?, Administrative Law Review, vol.55, n°3, 2003, p. 477
[17] David Bonner and Cosmo Graham, The Human Rights Act 1998 : The Story So Far, European Public Law, vol.8, Issue 2, 2002, p. 177
[18] Patrick Birkinshaw, op.cit.

What solutions do the various administrative laws give to the aforementioned problems, where they give any?

Of course, a certain part of them often derives from the contracts themselves, in so far as they organize the supervision by the contracting public authority of the contractor's performance. However, even where the contract is very efficiently drafted in this respect – which is not necessarily the case at all-, it can only provide a limited part of the solution. The contracting public authority must not only be in position to monitor its contractor, it must also be subject to accountability mechanisms concerning its own behaviour towards the contracted activity and the contractor.

1°. Contractual public policies are often conducted in such a way that they are largely out of the reach of any parliamentary supervision. This is noted frequently by commentators[19], and has notably been stressed by analysts of the British PFI contracts[20].

2°. What about judicial review?

In jurisdictions where the concept of "public law contracts" is accepted, litigation concerning this kind of contract will be dealt with by administrative courts, and submitted to the usual procedural and substantial rules of administrative contentious law. With, however, a significant reservation: in general, administrative courts can only be refered to for challenges aimed at the public party in the contract, or for claims made by the public party against its contractor, not for recourses coming from citizens, users of the contractualized activity[21]…The latter will then find difficult to have the administration, or the contractor, recalled to the respect of their rights, of the rules governing the contractualized activity, and so on.

[19] See: Jody Freeman, The Contracting State, op.cit., p. 201 et s. - Cheryl Saunders and Kevin Yam, Government regulation by contract: Implications for the rule of law, op.cit.

[20] Mark Freedland , Government by Contract and Public Law, op.cit. – Public Law and Private Finance: Placing the Private Finance Initiative in a Public Law Frame, Public Law, 1998, p. 288

[21] Another reservation normally derives from the fact that not all contracts made by public bodies are considered as "public law contracts": public authorities also enter into "private law" contracts. In principle, litigation concerning the latter comes under the jurisdiction of ordinary courts. However, some of the administrative laws we are refering to here, accept the possibility of a partial judicial review, concerning decisions which can be considered as "detachable" from the contract. This is the case of French administrative law, as wall as of Spanish administrative law: Eduardo Garcia de Enterria et Tomas- Ramon Fernandez, Curso de derecho administrativo, op.cit., p. 707

French administrative law provides a partial remedy in this respect: in 1906, the Conseil d'Etat ruled that users of a delegated public service could ask the administration to react where the company performing the service infringes its contractual obligations, and in case of a refusal, challenge the administration before an administrative court[22].

In jurisdictions where the concept of "public law contract" is unknown, the reach of judicial review, and of corresponding substantial and procedural rules, will obviously be even narrower. It will not necessarily be absent, though. In common law systems, in fact, there is a part of litigation concerning public contracts which is susceptible to be submitted to judicial review: in English law, for example, judicial review procedures can sometimes be turned to in cases where the public authority's contractual capacity is debated, as well as, according to recent case-law, in cases initiated by companies whose bid have not been accepted in procurement contracts devolution procédures[23].

Except for these limited reservations, public contracts litigation, in common law systems, does not fall within the perimeter of judicial review[24]. The technics of which, actually, would probably not be adapted: for instance, some American authors suggest that it would not be possible to extend to contractual litigation the usual deference judges have towards administrative interpretations in judicial review procedures[25].

The main flaw commentators point at in the way common law systems deal with public contracts litigation is that, generally speaking, they do not provide with efficient remedies citizens who are not parties, but are affected by the way the contract is implemented – among others, the users of an externalised public service-: neither through judicial review mechanisms, nor through the common law ones[26].

3°. In some jurisdictions, political and judicial supervision are complemented – or their defects are compensated –, notably in protection of citizen's rights affected by contractualized activities, by the possible recourse to ombudsmen, parliamentary

[22] Conseil d'Etat, 21 december 1906, Syndicat des propriétaires et contribuables du quartier Croix-de-Seguey-Tivoli
[23] Contrats publics et contractualisation de l'action publique. Un point de vue anglais, op.cit.
[24] In Australian law : Nicholas Seddon, Government contracts, op. cit., p.13
[25] Jody Freeman, The Contracting State, op.cit., p. 183, 208
[26] In the case of Unites States : Jody Freeman, op.cit., p. 178, 226, 239 – In the case of Australia: Nicholas Seddon, op.cit. , p. 20- In the case of England: Patrick Birkinshaw, op.cit.

commissioners for administration, médiateurs….In Great Britain, the Parliamentary Commissionner seems to play a significant role in this respect[27]. Commentators from Australia mention a similar situation[28].

4°. In various common law jurisdictions, an academic debate has arisen about the suggestion of a "publicization" of the public contracts regime. Some authors[29] express the opinion that it would be a good idea to set up a special group of rules for public contracts, in order to help addressing the various difficulties which the rise of contract in the public sphere conveys. These authors suggest that, in particular, it would be the best way of ensuring the submission of public contracts and contractualized public activities to public law values.

Are continental administrative laws less uneasy on these issues? It is difficult to give a general answer. In those where the concept of "public law contracts" is accepted, contracts which fit in the concept remain in the ambit of public law, and, therefore, do not normally escape from the reach of public law values. For example, in French administrative law, entities which are entrusted with the performance of a public service – by the way of a "délégation de service public"- are supposed to respect some corresponding fundamental principles – equality, continuity…-, and also some statutory rules applicable to all entities in charge of a public service – about freedom of information, for example-. However, it would be an optimistic assessment to claim that enforcement of these principles and rules when infringed by private contractors is quite efficiently guaranteed.

VII. The status of externalization contracts made by European bodies

Generally speaking, contracts made by international organizations are submitted to the rules which the parties have chosen – in accordance with the principle admitted, for all international contracts- by the Rome Treaty of 19 June 1980. Parties can opt for the law of the State where the contract will be implemented, or any other law, including the one of the organization. It seems that, in the current period, there is a trend to

[27] Patrick Birkinsahw, op.cit.
[28] Nicholas Seddon, Government Contracts, op.cit., p. 23
[29] Mark Freedland, Michaël Taggart, Patrick Birkinshaw, in articles cited above. Also: Ann CL Davies, English Law's Treatment of Government Contracts: The Problem of Wider Public Interests, in The Public Law:Private Law Divide (Mark Freedland and Jean-Bernard Auby, eds.), Hart Publishing, 2006, p. 113

exclude the reference to a national legal system, and rather submit the contract to general principles, possibly of international law[30].

1°. Like contracts made by other international bodies, the ones passed by European agencies are, in principle, submitted to the law the parties will have chosen. This is made clear by article 288 of the Treaty, which provides that "*contractual liability of the Community shall be governed by the law applicable to the contract in question*".

In most cases, one national law is chosen[31].

However, we must also remember that, as it has been explained above, externalization contracts made by European authorities are also often regulated by legislative provisions, either general or specific to the particular policy in the ambit of which they are made.

Then, the law applicable to the contracts is in reality a mixture of these legislative provisions, of the national law which the parties referred to… and of the specific provisions of the contract, of course.

Who has jurisdiction in case of litigation? The answer is given by the combination of article 238 and 240 of the Treaty. According to the former, "*the Court of Justice shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Community, whether that contract be governed by public or private law*". According to the latter, "*save where jurisdiction is conferred on the Court of Justice by this Treaty, disputes to which the Community is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States*".

[30] Manuel Diez de Velasco Vallejo, Les organisations internationales, Economica, 2000, p. 30 – P. Glavinis, Le slitiges relatifs aux contrats passés entre organisations internationales et personnes privées, Paris, 1990 – F. Seyersted, Applicable Law in relations between Intergovernmental Organizations and Private Parties, Academy of International Law, 1967, n°122, p. 427

[31] Sean Van Raepenbusch, Droit institutionnel de l'Union Européenne, Larcier, 4th ed., 2005, p.706 – Jean-Luc Sauron, Droit et pratique du contentieux communautaire, La Documentation Française, 3d ed., 2004, p. 52

2°. Does this legal context place externalization contracts under satisfactory requirements in terms of accountability, transparency, reliability in the operation of the contractualized activity?

It would be unwise to give a too affirmative general answer.

On the one hand, it is sure that, where contracting out concerning situation submitted to the pieces of legislation which have been mentioned, it has then to respect a lot of strict rules concerning both conditions under which contractualization is possible, and supervision of the contractors, the kind of checks they are subject to, the kind of information they must make available to the Commission, and so on.

On the first side, for example, article 54 of the Financial Regulation of 25 June 2002 provides that implementing tasks can only be entrusted to public-sector bodies or private-law entities with a public-service mission if: "*(i)the basic act of the programme or action concerned provides for the possibility of delegation and lays down the criteria for the selection of the bodies concerned, and (ii) the delegation of budget-implementation tasks is a response to the requirements of sound financial management as shown by prior analysis and ensures compliance with the principle of non-discrimination and the visibility of Community action. No implementing tasks entrusted in this way may give rise to conflicts of interests*".

On the second side, for instance, article 41 of Regulation of 23 December 2002 provides that the agreements made, still with public-sector bodies or private-law entities - must include the following provisions: "*(a) a definition of the tasks assigned; (b) the conditions and detailed arrangements for performing the tasks, including appropriate provisions for demarcating responsibilities and organising the controls to be carried out; (c) the rules on reporting to the Commission on how the tasks are performed; (d) the conditions under which performance of the tasks terminates; (e) the detailed arrangements for Commission scrutiny; (f) the conditions governing the use of separate bank accounts, the beneficiary of the interest yielded and the use made of it; (g) the provisions guaranteeing the visibility of Community action in relation to the other activities of the body; (h) an undertaking to refrain from any act which may give rise to a conflict of interests within the meaning of Article 52(2) of the Financial Regulation*".

On the other hand, these legislative provisions do not solve all possible problems. They do not provide the Commission with clear powers for interrupting or terminating the contract where the contractor does not respect it, let alone with powers for modifying the contract where it turns out to be ill-adapted to the evolution of the Commission's policy. If the contract itself does not include provisions on these aspects, they are then left to the national law the contracts is subject. Strong differences may appear: in systems where a notion of "public law contract" is admitted – like in the French one-, these termination and modification powers are considered as inherent in this type of contract. Elsewhere, the matter will be left to private law, which is usually very reluctant to admit them.

Another flaw must be underlined, which concerns litigation. Third parties, such as citizens concerned by the externalized activity, will generally have no particular remedy when they are harmed by the way the externalized activity is operated. Neither in European law, since particular acts made by European organs can only be challenged by persons and entities which are directly addressed by them, nor in the national law to which the contract will be submitted, since, in most of European systems, litigation faculties concerning contracts are restricted to the parties- with some exceptions, like the one admitted by French law, which we have mentioned-.

VIII. Conclusion

One can consider the case of contracting out from European agencies as a very good test for the analyses of global administrative law and legal globalization in general.

European institutions do externalize tasks, and obviously in a significant number of cases. Difficulties which arise from this has become a concern for European law, as it is showed by the substantial legislation which has been made, in order to regulate practices of contracting out, and the contractors'behaviour.

The case of externalization contracts made by European bodies also shows the kind of interconnection of various rules which is occurring in legal globalization. Global bodies often act in a legal context which tends to straddle international law and national law, public law and private law. It is exactly so in the case of European bodies, in their contractualized activities.