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THE SETTLEMENT OF GOVERNMENT CONTRACT DISPUTES—A COMPARATIVE STUDY

by

ALAN W. MEWETT∗

The government contract is an event of extremely common occurrence, and so are disputes arising under such a contract. For the individual who enters into ordinary private contracts, disputes are rare, at least when they are carried so far as litigation or even the threat of litigation. The ordinary machinery of the common law was designed for individuals and for private contractors, and it is not difficult to see that procedure designed for such cases will not work as well when the volume of business is such that some easier method is essential. In both England and the United States it is almost invariably the practice for the settlement procedure to be provided in the government contract itself. Thus, the normal procedure is such that relatively few government contract disputes ever get before the courts.

In England, the usual term incorporated into a government contract is to the effect that on matters of fact, or on matters of law, disputes shall be submitted to an arbitrator or to arbitrators for decision under the provisions of the Arbitration Acts. This process is quick and efficient and does substantial justice to both sides; it is less expensive than taking the matter directly to court, although, as will be seen when we examine the procedure a little more closely, it depends upon the ultimate willingness of the parties to accept the decision of the arbitrator—a willingness which seems to be achieved in a large number of cases.

In the United States arbitration is not the usual practice, and it is that system which we will examine first.

Extra-judicial Remedies

(a) United States.

It has long been the practice to insert into United States government contracts a standard “disputes clause”, the wording of which might vary

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† Now the Arbitration Act (1950), 14 & 15 GEO. VI, c. 27.
from time to time, but the effect of which would be the same. Originally such a clause would have provided: "All disputes concerning questions of fact arising under this contract shall be decided by the contracting officer, subject to a written appeal by the contractor within 30 days to the Head of the Department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto." The decision of *United States v. Wunderlich*\(^2\) is the most recent important decision of the Supreme Court on this type of clause.

In that case the contract was for the construction of a dam, and the contract contained a clause similar, in all essential details, to that set out above. Disputes arose and the head of the department decided against the contractor. The Court of Claims found, as a matter of fact, that the department head had been "arbitrary, capricious, and grossly erroneous", and reversed his decision. On appeal, the Supreme Court, although it did not purport to disagree with this finding of fact, nevertheless restored the decision of the department head. The Court stated, at page 100: "This Court has consistently upheld the finality of the department head's decision unless it was founded upon fraud, alleged and proved. So fraud is, in essence, the exception. . . . The decision of the department head, absent fraudulent conduct, must stand under the plain meaning of the contract." This decision overruled the earlier case of *Needles v. United States*\(^3\) in which Judge Whitaker of the Court of Claims stated:

>"Whether or not these actions constitute a breach is not for the contracting officer to decide. Jurisdiction of such controversies is conferred on this court by Congress. Section 145 of the Judicial Code gives an aggrieved contractor the right to sue for breach of his contract. This right cannot be taken from him by the administrative agency with which he deals.

>"So, whether the decision of the contracting officer was arbitrary or grossly erroneous is immaterial. We are not bound by it, whether it was or not."

The considerable dissatisfaction which arose from the decision of *United States v. Wunderlich* led to the passing of an Act in 1954 which provided:\(^4\)

>"[No such provision] shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official . . . is alleged. Provided, however, that such a decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence."

\(^2\) 342 U. S. 98 (1951).
\(^3\) 101 Ct. Cl. 535, at 624 (1944).
Thus the position is now half way between the extreme views of Judge Whitaker in the *Needles* case and the opinion of the Supreme Court in the *Wunderlich* case. At the present time, the typical disputes clause will provide:

"... Any dispute concerning a question of fact arising under this agreement shall be decided by the Contracting Officer who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the contractor. Within thirty days from the receipt of such copy, the contractor may appeal to the [Head of the Department] and his decision shall, unless determined by a court of competent jurisdiction to have been fraudulent, or capricious or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not to have been supported by substantial evidence, be final and conclusive."

The practical effect of the disputes clause is still to remove from the jurisdiction of the courts all questions of fact which might arise under government contracts either directly or by way of appeal, except in circumstances mentioned.

On questions of law the courts have been careful to ensure that the contractor shall not lose his right to have the matter tried before a court of law. As the Court of Claims said in the case of *Penker Construction Co. v. United States*:

"Provisions preventing resort to the courts to settle the rights of the parties are to be strictly construed against excluding this right. This remedy will not be denied unless the language of the contract makes such a conclusion inescapable. ... This rule should be applied especially in this case because the contract was drawn by the defendant and it is provided that its officer should be the final arbiter and because the contractor had no option but to take the contract as it was written or lose the work. We think that disputes, as to which the contracting officer's decision is final and conclusive, should be narrowly limited."

It is inconceivable that all rights of appeal to the courts should be taken away from the contractor, and there is no doubt that any attempt to make a contracting officer's decision on anything more than a question of fact binding and conclusive would not be upheld by the courts. For example, an equitable adjustment clause providing for a reasonable payment for extra work contemplated by the parties, but not expressly provided for in the contract, has been held to involve a question of fact, and therefore determinable by the contracting officer. Similarly, there are clauses providing for adjustment where the contractor has failed to meet the contractual specifications. As might be imagined, disputes will often arise as to what constitutes a question of fact, as distinct from a question of

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8 96 Ct. Cl. 1, p. 37 (1942).
7 General Steel Products Corp. v. United States, 36 F. Supp. 498 (1941).
law, but, of course, this is a problem which can only be solved in the last resort by the courts. The courts in the United States have firmly upheld their right to decide not only all questions of law but also whether a matter is a question of law or of fact. While, therefore, the courts have acknowledged the validity of the disputes clause, the effects and scope of it have been as limited as possible.

In the case of disputes arising on matters of law, the matter is usually brought, in the first instance, before the courts by way of an appeal from a decision of the General Accounting Office. The way in which this will occur is that this office is responsible for the payment of all sums claimed by persons against the United States, but, before it can pay any public money to a private person, it must first satisfy itself that he has a legal right to the sum claimed. If the United States does not dispute the legality of the claim, the Office will, in practice, pay the sum claimed, although, in theory, it is still under the duty of satisfying itself that the claim is legally justified. If the United States objects to the claimant's demands, the General Accounting Office will, again as a matter of practice, decide in favor of the United States and make no recommendation for the payment of any money to the claimant. The contractor's action will thus take the form of an appeal from such a decision of the General Accounting Office.

(b) England.

The contrast between the practice in England and that in the United States is most noticeable. In both countries, it is recognised that there is a need for a quick and efficient determination of all disputes which might arise under a government contract, but the methods of achieving this differ considerably. The method adopted in the United States of permitting the contracting officer to decide—virtually in every case—all questions of fact, and permitting the General Accounting Office to make the first and tentative ruling on disputed questions of law, has not been adopted in England. There, one of the usual standard terms in government contracts is to the effect that disputes will be settled by arbitration between the parties—a method which is common in commercial contracts in both England and the United States, but such clauses are not common in government contracts of the United States. The procedure to be adopted in arbitration agreements is now incorporated into the Arbi-

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8 31 U.S.C. § 65(d), § 71.
9 Brought in the District Court or the Court of Claims.
There are provisions for the enforcement of arbitration decisions, appeals to the courts, and limitations on the powers of an arbitrator. In fact, nearly all of the law relating to arbitration is statutory at the present time, and little is left to the agreement of the parties, except the original agreement to submit disputes to arbitration.

Since it is not possible for a contractor to contract away his right to appeal to the courts, the dangers which are inherent in the practice in the United States do not arise in England. It is not often that a court will reverse the decision of an arbitrator on questions of fact, and it will take considerable evidence of partiality, bias or incompetence before this will be done. But there is a power in the courts to do this where there are sufficient grounds, for the principle behind arbitration is that the parties agree voluntarily to submit their disputes to the decision of a third person or an independent body of persons. By Section 1 of the Arbitration Act, 1950, the agreement for arbitration is generally irrevocable, and it is therefore of the greatest importance that the arbitrator should approach the matter with an open and impartial mind. Arbitration is not, of course, as expeditious as the procedure in the United States under a standard disputes clause, but it does avoid the essentially undesirable state of affairs which necessarily results when one of the parties to a dispute is also the judge of that dispute.

It will be beneficial, at this time, to make some comparison of the extra-judicial remedies which are practiced in England and the United States. Arbitration is not entirely unknown in United States government contracts, although it is not, at least in recent years, a method which is generally adopted. In the case of the United States v. Ames the Federal Circuit Court in Massachusetts held that a contract clause providing for arbitration in the event of a dispute arising out of a government contract was a clause which, in that particular case, was outside the scope of the agent's authority. The clause was, therefore, held to be not binding on the United States. Before such a clause could be binding, so the court held, there was needed express or implied authority from Congress. It

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10 14 & 15 Geo. VI, c. 27.
11 See LAWRENCE: ARBITRATIONS AND AWARDS (1953); RUSSELL: ARBITRATION (1952).
13 Catalina (Owners) v. Norma (Owners), 61 Ll. L.R. 360 (1938).
14 9 WILLISTON, CONTRACTS (1945) 244 et seq. (contains a very full discussion of the question of arbitration in United States government contracts).
16 See also the case of Welch v. United States, 1 Ct. Cl. 859 (1863). And also Brannen v. United States, 20 Ct. Cl. 219 (1884).
is to be noted that there has not been, as yet, an authoritative decision on what constitutes an implied authority to bind the United States government to such an agreement. But this view has been adopted by the Comptroller General of the General Accounting Office, which, it will be recalled, has the responsibility of ensuring the legality of any claims against the United States public moneys before authorising payment. The history of arbitration in government contracts will be found admirably set out in the ninth volume of Williston on Contracts, and it is not proposed to repeat here what has been said. It is sufficient to say that there does not seem to be any valid legal reason why arbitration should not be adopted in government contracts in the United States. What is the best solution to the difficult problem of combining the three desiderata of efficiency, economy, and justice in the settlement of disputes is a question which will be postponed until we have considered the judicial remedies in the common law and the combined judicial-administrative remedies under the French system.

**Judicial Remedies**

(a) The United States.

As a general proposition, it may be stated that all actions against the United States for breach of contract are to be commenced in the Court of Claims, except for those involving a comparatively lesser amount, which are to be commenced in the Federal District Courts. The Court of Claims was established in 1855 to deal with certain claims against the United States. After a long history of legislation, the jurisdiction of the Court was consolidated. This consolidation will be found in the United States Code, Title 28, Section 1491, which provides:

"The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States:
(1) Founded upon the Constitution; or
(2) Founded upon any Act of Congress; or
(3) Founded upon any regulation of an executive department; or
(4) Founded upon any express or implied contract with the United States; or
(5) For liquidated or unliquidated damages in cases not sounding in tort."

The Federal District Courts have, however, original jurisdiction concurrent with that of the Court of Claims of any

...civil action or claim against the United States not exceeding $10,000

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17 WILLISTON, supra, note 14.
18 Supra, note 8.
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Any action against the United States must, it will therefore be appreciated, be commenced in the Court of Claims, or, if the amount involved does not exceed $10,000, in the Court of Claims or Federal District Court.

Procedure in the Court of Claims is set out in the Rules for that court. The action is commenced with a petition, which is filed with the clerk of the court, who, thereafter, sends copies of the petition to the Attorney-General or, where appropriate, to an agent designated by him. (Rules 1 and 2). The government will then file its answer to the petition and, if the answer contains an averment of fraud or a counterclaim, the petitioner is permitted to make a reply. (Rule 6). There are special provisions relating to discovery, calls, and depositions which are contained in Rules 26 to 36, some of which will be examined subsequently. The actual trial before the Court of Claims is submitted to a special procedure which it would be well to note here.

Trial does not take place before the court. Under the provisions of the United States Code, Title 28, Section 792, the Court of Claims has power to appoint up to seven Commissioners with authority to examine witnesses, receive evidence, and report findings of fact and make recommendations of law to the Court. The actual trial thus takes place before a Commissioner who will send his report to the court. The Court will then deliver its judgment on the facts as found by the Commissioner. The powers of the Commissioners under the United States Code are set out in the Rules of the Court of Claims, Sections 37 to 48, and, in general, give the Commissioner wide powers to act on behalf of the Court.

The procedure in the Federal District Courts, where the defendant is the United States, does not greatly differ from cases involving actions between private citizens. There are special provisions in the statutes and District Court Rules dealing with cases where the United States is the defendant. Actions are tried without a jury, and there are special rules as to notice of commencement of action, venue, and the like.

(b) England.

The Crown Proceedings Act of 1947 swept away the complicated procedure under the old petition of right, and substituted therefor a procedure as nearly alike as possible to the normal procedure in actions against an ordinary individual. The action is commenced in any court

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which is appropriate, such as, for example, the Queen's Bench, or the Chancery Divisions of the High Court, or in the County Court if the subject matter is contractual and the sum involved does not exceed £200. It must be commenced by the normal writ of summons addressed to the proper solicitor of the appropriate government department or other Crown servant. In order that the appropriate government department may be ascertained by all the relevant parties, the indorsement on the writ is required, by Order 3, Rule 3a of the Supreme Court, to contain a little more than is usually required. It shall contain

"information as to the circumstances in which it is alleged that the liability of the Crown has arisen and as to the Government departments and officers concerned."

It is clear that the aim of the Crown Proceedings Act was to make proceedings against the Crown as simple as possible and to assimilate them to proceedings in private actions. As we shall see later, there are certain remedies which are not open to the subject as against the Crown, and, in addition, there are certain extraordinary defenses which are open to the Crown, but, in general, the aims of the Act have been largely fulfilled. The plaintiff's writ may be issued in any registry, either a District Registry or the Central Registry, but it must state that the Crown may enter its appearance either at that District Registry or at the Central Registry, at its option. Where the Crown enters its appearance at the Central Registry, all proceedings leading up to the trial must take place at the Royal Courts of Justice in London, and, in any case, the trial itself must take place in London, although the Crown has power to consent to trial being taken at assizes. Furthermore, by Section 20(i) the Crown has the absolute right to have a case which has been commenced in the County Court transferred to the High Court, but the unreasonable refusal on the part of the Crown to agree to a case being taken at assizes in place of the Royal Courts of Justice may result in its being penalised in costs under the provisions of Section (19) (2) of the Act.

(c) France.

The procedure in France will require a rather more detailed examina-

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21 Crown Proceedings Act (1950), Section 15. County Courts Act (1934), Sections 40-72, as amended, for which see Halsbury's Statutes, vol. 27, pp. 108-126.
22 Rules of the Supreme Court, Order 1a, rule 1b.
23 Usually the Treasury Solicitor.
24 Order 5, rules 3 and 4a.
25 C.P.A. Section 19 (2) and Order 36, rule 1(b) (a).
26 For a discussion of this topic, Bell, Crown Proceedings, c. VIII.
It is impossible to distinguish practicably between judicial and extra-judicial remedies without implying several distinctions which do not exist. There are different remedies and different procedures which, however, depend upon the type of contract into which the administration has entered and not upon any agreement as to the settlement of disputes which the parties might have come to. The distinctions here adopted will therefore be between remedies for breach of a contrat administratif and remedies for breach of a contrat de droit civil.

All disputes which arise under a contrat administratif are submitted for settlement to administrative tribunals, the nature of which will be considered later. Since the year 1800, there have been in existence in France certain conseils with the power of hearing and determining disputes which arise in connection with the acts of the administration, and, formerly, jurisdiction in contractual questions lay with the Conseil d'Etat, the supreme administrative disciplinary body, or with the conseils de préfecture, local administrative tribunals with limited power to hear disputes, usually of a minor local character. However, the décret of September 30, 1953, made some considerable alterations in the organization and jurisdiction of these local tribunals, particularly in contractual matters, and it will be necessary to consider their present position in some detail.

The conseils de préfecture interdépartementaux have been replaced by local tribunaux administratifs, although largely the change is one in name only. Of these tribunaux there are twenty-two which cover the whole of France, with the exception of Paris, and which sit in, and take their names from, the chief town in the area over which they have jurisdiction. In addition, there are the tribunaux which decide disputes which arise in the Paris area and the various colonies. The list of tribunaux and the areas which they cover will be found set out in the Décret-Loi of September 6, 1926; and the situation is not affected in this respect by the decree of September 30, 1953. Before this latter decree, the local tribunals had no jurisdiction over any matter which was not expressly conferred upon it by statute. Residuary jurisdiction lay in the Conseil d'Etat. Jurisdiction of the local tribunals to hear contractual disputes before 1953 was mainly in connection with contracts for public works to be performed in their area, or contracts concluded by the local authority situated within their territorial jurisdiction.

However, Article 2 of the Decree of 1953 confers upon the tribunaux administratifs original jurisdiction over all matters subject to the right to appeal to the Conseil d'Etat, save for those matters which are expressly reserved for the Conseil. These exceptions are not of great concern here
for our purposes, and we may state generally that in the case of disputes which arise under a contrat administratif, the tribunal to decide the matter in the first instance will be either the local tribunal administratif or the tribunal administratif de Paris.

The organization of these tribunals may be briefly noted. With the exception of the Paris tribunal, each is composed of a president and four councilors, who are appointed by the Minister of the Interior, with the agreement of the Keeper of the Seal and the Minister of Justice. The Paris tribunal consists of one president, two presidents of sections, and ten councilors, similarly appointed. This latter tribunal sits in sections, for which one president and any three councilors form a quorum. The procedure which is to be adopted before these tribunals is set out in the loi of July 22, 1889, as amended, chiefly by the Decree of 1953. In the case of disputes arising out of government contracts, the matter is brought before the appropriate tribunal by way of an appeal from a decision of the Minister refusing the plaintiff's request to be paid a sum of money which he claims is owing to him. The first step of the contractor, therefore, is to submit a claim to the officer or agent of the ministry or other department with which the contract has been concluded, and it is only in the event of a refusal of that claim, that the matter will be brought before the tribunal. This is done by submitting a written petition stating all the relevant facts and materials, together with a copy of the decision which is being attacked. This must be done within two months of the receipt of the notice that the minister has disallowed the claim. If the minister or other officer does not reply to the claim of the contractor within four months of its submission, this is to be taken as a denial of the claim, and the procedure is the same as if there had been a direct and express denial.

On receipt of the claim, a copy is sent to the defendant, and a time fixed within which a reply must be made. During this time, the minister or officer who first refused the claim may reconsider his decision, but, if he fails to do so, the tribunal will commence its proceedings. Through an agent de service the tribunal has the power to hear the parties and any other witnesses which they may wish to call, provided they are given notice of the hearing, and it has the power to call expert evidence, where this is deemed necessary or desirable. Either party may withdraw his

27 Under the name of Conseils de Préfecture more detailed accounts will be found in DE LAUBADÈRE, TRAITE ELEMENTAIRE, pp. 267 et seq.; WALINE, DROIT ADMINISTRATIF, pp. 75 et seq.; DUEZ, TRAITE, pp. 298 et seq. An excellent account in English will be found in SCHWARTZ, FRENCH ADMINISTRATIVE LAW AND THE COMMON-LAW WORLD, pp. 42 et seq.
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claim or defense before the judgment is given, and, in this event, judgment will be given for the other side. If the tribunal decides in favor of the petitioner, all his costs are refunded.

From the decision of a tribunal administratif, an appeal will lie to the Conseil d'Etat, requesting that the decision of the lower tribunal be annulled. The composition of the Conseil d'Etat is highly complex, and no more than a bare outline may be given here. The form of the Conseil for matters arising out of disputes with the administration is governed mainly by an Ordonnance of July 31, 1945, and a decree of the same date. The judicial section (with which we are presently concerned) is subdivided into nine parts, called subsections, each composed of three councilors, one of whom acts as president of the subsection. The normal court to hear an appeal from a decree of a tribunal administratif will be two of the four sections which are assigned the duty of hearing appeals sitting together. The remaining five subsections are charged with the responsibility of hearing those cases over which the Conseil has jurisdiction in the first instance. Normally, therefore, the Conseil, sitting as an appeal court, will consist of six member councilors. In certain cases of greater importance, there are provisions for the establishment of a court consisting of the president of the whole judicial section of the Conseil, the nine presidents of the subsections, and two councilors from the subsections in which the case first arose. In the rarest cases of the greatest importance, a plenary session of the entire judicial section of the Conseil may be called. In this case, the court will consist of the vice-president of the Conseil, the president of the judicial section, the nine presidents of subsections, and four councilors. Such extraordinary courts are called when, on the presentation of a case, the president of the subsection in which it arose certifies that it is a matter of unusual public importance.

Finally, it should be noted that procedure in the Conseil d'Etat takes the form of the normal procedure in French administrative tribunals. The plaintiff presents his petition, and notice is sent to the other side. The Conseil may hear any evidence which it desires—although this will not be usual on appeal—through the medium of agents or commissioners, known as maîtres de requêtes or auditors, one of whom acts as the Commissaire du Gouvernement, and who presents to the court a statement of the facts as they have been found and a tentative conclusion of the law, which the Conseil is free to adopt or reject. If it adopts the conclusions of the Commissaire—which, more often than not, is the case—they

become the judgment of the Conseil itself, and have the authority of such. Any aggrieved party has the right to make an appeal to the Conseil, but beyond that he may not go. It is the final court for all administrative purposes.

As has already been explained, however, the contract into which the administration has entered may be a contract of the civil law. We have seen that acts of the administration done administratively are not cognizable in the civil judicial courts, whereas those acts which the administration performs, and which are intended to be done under the rules of the civil law, are cognizable not in the administrative tribunals, but in the ordinary courts. Since the administration has this power of insuring that none of its acts will be questioned in the law courts merely by taking the necessary steps to show that it is acting administratively, it is now beyond question,29 that a contract which has been entered into by the administration and which is clearly intended to be governed by the rules of private law, is within the jurisdiction of the civil courts and not the administrative courts. This is equally true where the dispute arises out of a contract of this nature. Thus, disputes with the administration arising from a contrat de droit privé are submitted to the ordinary civil courts for determination, and are subject to all the rules of procedure which are appropriate before such courts.

In view of the fact that the ordinary rules of procedure apply, it is not proposed to examine these in detail at this time, since they are somewhat outside the scope of this treatise.30 The hierarchy of French civil courts is composed, starting from the highest court, of the Cour de Cassation, the Cour d'Appel, and the tribunal civil. The Cour de Cassation has power to quash judgments of lower courts only; it has no power to substitute its own decision and must, in the event that an appeal is allowed, send the case back to the lower court for a rehearing. This latter court is not obliged to follow the directions of the Cour de Cassation, at least in the first instance.31 The Cour d'Appel was first established under the name of the Tribunal d'Appel by the loi of 27 Ventôse, An VIII (1801). Of these courts there are twenty-six situated throughout France in localities corresponding to the administrative areas of the arrondissements. They have full powers to hear an appeal, and may substitute their own judg-

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29 Société Anonyme Minière, C. E. January 26, 1951, s. 1951.111.44.
30 GLASSON ET TISSIER, TRAITE DE PROCEDURE CIVILE (1925); AUBRY ET RAU, DROIT CIVIL FRANCAIS (1922). In English, the best work is ENGELMANN AND MILLAR, HISTORY OF CONTINENTAL CIVIL PROCEDURE, Book IV, Part II, Chapter IV (1927).
31 GUTTERIDGE, COMPARATIVE LAW, pp. 91-92; Deak and Rheinstein: The Machinery of Law Administration in France and Germany, 84 U. PA. L. Rev. 846.
ments. The tribunal civil, apart from such courts as those of the justices of the peace and industrial tribunals, which do not concern us here, is the major court of first instance. It was substantially reorganized in 1926,\textsuperscript{32} although there have been subsequent modifications. The composition, jurisdiction, and locality of the tribunaux civils will be found set out at length in the décret-loi of September 3, 1926, as amended and augmented by subsequent legislation. It will be sufficient for our purposes to note that this is the court in which any action against the administration upon a dispute which has arisen from a contrat de droit privé into which it has entered will be commenced.

Procedure follows the normal course under French civil law. Indeed, one of the most fundamental results of the ability of the administration to decide whether or not it will act in an administrative capacity, or whether or not it will act under the rules of civil law, is that, if it chooses the civil law, it will be treated exactly as if it were a private entity. This is true in respect both of its substantive rights and of matters of procedure, although, it is true, there are certain differences as to the execution of judgments and some extraordinary defenses which will be considered later.

Before the action is properly commenced, an attempt must be made to arrive at a settlement, known as a conciliation, which takes place before any available justice of the peace. After the conciliation proceedings, a memorandum is drawn up by the justice giving the terms of the settlement, if any, and, if a settlement has not been reached, a note of this fact. A copy of this procès verbal, as this memorandum is called, will be forwarded by the plaintiff when he commences his action. The summons (ajournement) contains a brief statement of the plaintiff's case, the name and address of the defendant (which, in this case, will be the department or other public body with whom the contract was concluded), and any supporting documents. This summons is filed in the court, and the officer of the court will serve a copy upon the defendant. The defendant must then make an appearance if he wishes to defend the action, and may later submit a reply, much as under the common-law rules of procedure. Finally, a date is set for the hearing before the appropriate tribunal civil.

Before leaving this brief résumé of the procedure which is adopted in France, it will be necessary to note the position of the Tribunal des Confis.\textsuperscript{33} It occasionally occurs that a dispute arises as to whether the administration has acted in such a way as to give the civil courts, or the

\textsuperscript{32} Décret-Loi of September 3, 1926.

\textsuperscript{33} SCHWARTZ, \textit{op. cit.}, pp. 62 et seq.
administrative courts jurisdiction. This, for example, might happen where it is not certain whether the contract to which the administration has been a party was a contrat administratif or a contrat de droit privé. If the former, of course, only the administrative courts have jurisdiction, and if the latter, only the civil courts have jurisdiction. The Tribunal des Conflits is the court which has power to hear and determine problems of this nature. It is the court which decides whether a matter is within the jurisdiction of the administrative courts or the civil courts. The tribunal is usually composed of an equal number of the members of the Cour de Cassation, who represent the judiciary, and of the Conseil d'État, who represent the administration. It is presided over by the Minister of Justice. The Tribunal was established in 1872 and consists of nine members, including the Minister of Justice, elected for a period of three years.

Procedure before the Tribunal des Conflits is somewhat complicated and only an outline will be given here. The Tribunal was primarily established in order to protect the independence of the administration from judicial interference in acts which were not properly within the competence of the judicial courts. Basically, a matter can only be submitted to the Tribunal by the administration on the grounds that the judicial courts have improperly exercised their jurisdiction. When a plaintiff commences an action on a contract, which the administration maintains is a contrat administratif, in the civil courts, the representative of the latter, for example, the préfet, must address a request to that court that it refrain from exercising authority over the case. If the court agrees with the request, the plaintiff's action is dismissed for want of jurisdiction. If the court denies the request, the matter is taken to the Tribunal des Conflits, which court decides whether the proceedings below were invalid for want of jurisdiction, or whether the contention of the civil court that it had jurisdiction should be upheld. It will be noticed that, when this method is followed, it is only the administration which has the right to protest to the Tribunal des Conflits that the civil court does not possess jurisdiction. An individual may not use this procedure.

If the Tribunal does uphold the contention of the administration that the civil court did not have jurisdiction, the position may become complicated. If the plaintiff wishes to proceed with his claim, he must now commence again in the administrative courts, where he should have

34 Usually, since two members are elected by the other seven i.e. by the three judicial members, the three administrative members and the Minister of Justice.
35 Loi of May 24, 1872.
proceeded in the first place. These courts, being bound by the decree of the Tribunal des Conflits cannot refuse to take cognizance of the matter.

If, however, the plaintiff first commences his action in the administrative courts, and these courts decide that they have no jurisdiction, the plaintiff cannot appeal to the Tribunal des Conflits, for, as we have seen, it is only the administration protesting against the usurping of authority by the civil courts which has this right. In this case, the only recourse open to the plaintiff is to commence his action all over again in the civil court. This latter court, however, is not bound by the judgment of the administrative court, and it may hold that it is the administrative court and not the civil court which properly has jurisdiction. Thus there arises the situation in which both the civil courts and the administrative courts refuse to hear the case on the grounds that the other is the only court with jurisdiction. This is the only case, apart from one which is shortly to be examined, in which a private individual has the right to appeal to the Tribunal des Conflits. This, he cannot do, unless he first shows that he is denied a remedy by both of the only two possible courts. In this event, the Tribunal will decide the matter and hold that one or other of the courts—either the judicial or the administrative—has jurisdiction and should hear and determine the case. In this type of case, the function of the Tribunal is merely one of determining jurisdiction. It does not, itself, determine the case on the merits. Armed with the decree of the Tribunal, the plaintiff, or the administration, as the case may be, returns to the proper court, where the action is tried on its merits.

In 1932, 37 jurisdiction was conferred upon the Tribunal des Conflits to try certain cases on their merits in certain exceptional circumstances, although it still does not possess the power to deliver a final judgment. These circumstances will arise in the following manner. Neither the administrative court nor the judicial court, of course, is bound by the finding of facts made by the other. It may thus happen that the action is commenced in an administrative court, and that court finds that, because of the existence of a certain fact, the only court with jurisdiction is a civil court. The action is then commenced again in the civil court and that court finds that because of the existence of other facts, or because it ignores the particular fact stressed by the administrative court, it does not have jurisdiction either. This has the effect of denying the plaintiff any remedy at all. Nor would this, apart from the legislation of 1932, be a suitable case for the Tribunal, since the conflict is one of fact, and, no matter to what court the Tribunal remits it, that court will find the

37 Loi of April 20, 1932.
facts to be such that only the other court could possibly have jurisdiction. The only solution, and the one adopted in 1932, is to give the Tribunal, in this case, the power to try the matter on the question of fact. The case is then sent back to the court which is appropriate on the facts as found by the Tribunal with instructions to give judgment in accordance with those facts. In such cases, the lower court has no power to decide the facts and must accept the finding of the Tribunal.

Conclusions

It will be more useful to attempt an analysis of the principles behind the systems for the settlement of disputes in the three countries than a mere comparison of the practical technicalities. Contracts made with the government are innumerable, and disputes which arise out of them, ranging from major disputes to minor disagreements, can be just as numerous. The settlement of all such disputes must be as efficient, as economical, and as just as can possibly be achieved. At the same time, it is right that, in certain circumstances, as, for example, where a major point of law or large sums of money are involved, both parties should have a right to appeal to the highest tribunal. This, of necessity, will be expensive and usually prolonged.

The judicial remedies afforded under the common law have been assimilated, as far as possible, to the remedies in actions between private citizens. In France, on the other hand, great pains have been taken to assure that remedies under the public law are kept totally distinct from remedies under the civil law, and that the appropriate court for each exercises different and exclusive jurisdiction. The difficulties which are encountered in the French system will be apparent from what has already been stated in the examination of the Tribunal des Conflits. The only occasion when a private person can appeal to this tribunal is when he has first presented his claim to both the administrative and civil courts, and it might well happen that an appeal to the Tribunal des Conflits is the only way in which he can get a hearing. In such cases, it requires, on his part, three trials before three different courts before his case can even get before the proper tribunal. There still remains the disposition of the case on its merits. It is quite true that this is an exceptional instance, but it is by no means exceptional to find that a contractor chooses the wrong court in the first instance. He might, for example, commence an action in the civil courts, only to be told that the proper tribunal with jurisdiction is the administrative court. It is only in the rarest case that
one court will refuse jurisdiction which has already been refused by the other. In the field of contracts this unfortunate state of affairs is less likely to occur than in other matters, since it is usually apparent whether a contract is administrative or civil, and this is the sole deciding factor in such problems. But the theoretical, and all too practical, objections to the French method of settling disputes remain. It may prove overwhelmingly expensive, often dilatory, and, as a result, unjust. One cannot, of course, ignore the fact that, in practice, this state of affairs is the exception rather than the rule, but these considerations are sufficient to make it difficult to embrace the system without hesitation.

In both England and the United States, the administration possessed a basic immunity from the courts for, *inter alia*, breaches of its contracts, and it is only recently that it has become completely amenable to the ordinary civil courts. The difficulty in attempting to treat the administration, in this respect, as an ordinary individual lies in the fact that the administration is a more complex and an infinitely larger entity than any other known to the common law. In modern society, of course, government contracts are varied and many, and if contracts are varied and many, then disputes arising from those contracts will be even more varied and more numerous. What is a rare event for the individual is a matter of every day business for the administration. It is therefore quite understandable that the administration, and, to a lesser extent, the individual contractor, should seek a way of circumventing the necessity for a court action for each and every dispute which arises under a contract. The criticisms which can be directed against the common-law remedies are not so much criticisms of the judicial remedies as of those extra-judicial remedies invented by the administration as a way of avoiding the delays and expense of court actions. The hardships caused by these remedies are primarily felt by the smaller contractor who cannot afford to have his case reviewed by the higher judicial tribunals.

It is not necessary to reiterate the criticisms which have been made of the United States' practice of the insertion and approval of "finality clauses" or the standard disputes clause in government contracts. It is remarkable that they should ever have been upheld by the courts in the first place. Although in practice, no doubt, contracting officers attempt to decide questions of fact in as fair and as impartial a manner as possible, it cannot be expected that they do not, perhaps unconsciously, start adjudicating matters of fact with the idea that, as government employees, they must assume the facts to be in favor of the administration until the contrary is proved. The contractor, therefore, has the onus of disproving
what the contracting officer assumes to be the facts. It is for this very reason that no one ought to be a judge of his own cause—a principle that is not altered by the fact that one of the parties happens to be the government. The desire of the government to ensure an efficient and favorable determination of disputes is understandable, but that the courts should countenance such a flagrant abuse of the rights of the contractor is inexplicable.

If one wishes (and the desire is perfectly reasonable) to provide a quick, inexpensive, and extra-judicial method for the determination of disputes, one must start from the proposition that the person with the responsibility for making the decision must be some person who is not connected with the contract or the contracting parties. The English system of arbitration starts from this premise and has proved to be satisfactory to all parties. What is sacrificed in time and economy when compared to the United States disputes-clause method is amply made up for in fairness and equality of decision. Submission to arbitration is safeguarded by the overriding controls which have been kept both by the courts and by the legislature. Perhaps the better features of both methods could be incorporated into a sort of permanent arbitration board for the settlement of disputes arising out of government contracts. This could be of general jurisdiction, with a right of appeal to the proper courts, or limited to questions of fact with no right of appeal.

There is already in existence in the United States an Armed Service Board of Contract Appeals which has the power of hearing appeals from decisions of contracting officers on questions of fact arising out of contracts made with the Armed Services. The Board is merely substituted for the “Head of the Department” who appears in the majority of the standard disputes clauses. This body is, of course, an administrative body and, further, it is composed of members of that branch of the administration with which the contract was originally made. But one must balance the desirability of having completely impartial judges who are not connected with the administration against the desirability of having judges who are persons with some familiarity with the subject matter of the dispute. What is important for any decision which has to be made is that the arbitrator should approach the case without any preconceived ideas of what he thinks the facts are. A Board whose sole function is the determination of disputes will be far more likely to act in an impartial

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89 The Arbitration Act (1950), 14 & 15 GEO. VI, c. 27.
manner when it has no previous knowledge of the case, even though it is a branch of the administration, than a contracting officer who must inevitably begin his decision by looking at the case from his own point of view although with no suggestion of acting arbitrarily or capriciously. If the settlement of disputes on factual matters is to be quick and efficient, it is essential that there be specialized judges who are used to handling similar problems. Experience in France has shown that, given a judicial function, a person, whether or not he is a member of the administration, will usually act judicially and in an impartial manner. While the English practice of an independent arbitrator is theoretically preferable, it cannot be said that a government board which has the sole function of determining disputes will necessarily be biased merely because it is a government body.

The disadvantage of the Armed Services Board of Contract Appeals is that, as its name implies, it is a Board which can only entertain appeals. That one's right of appeal is only to the immediate superior of the contracting officer making the decision, which, as we have seen, is deplorable enough, is tantamount to having very little right of appeal at all. The head of the department will naturally start from the assumption that his inferior is right, and it will, equally as naturally, be as difficult for the contractor to persuade the department head to reverse a finding of his inferior as it would have been for him to persuade the contracting officer to decide in his favor in the first place. Again, this is not because either the head of the department or the contracting officer will be unjust or capricious, but because they will inevitably start from certain assumptions which should not be there. But even if a Board of Appeal is substituted, the contractor will still be suffering from the disadvantage always involved in persuading any court to overrule what has already been decided. So long as this pernicious practice of allowing the contracting officer to have any power of deciding questions of fact remains in operation, the contractor is placed in a totally unfair position.

It is recognized that the settlement of factual disputes in government contracts must be speedy. One cannot, for the sake of efficiency in government and the smooth running of the courts, permit all factual questions the luxury of a court settlement. It must also be efficient, and for that reason, it is suggested that it would be preferable for the judges of fact to be specialists with sound knowledge of the practice of government contracts. It must be just, in that the contractor must not be placed in an unfair position. It is difficult to perceive how all three requirements can be achieved absolutely. In the United States, justice appears to have
been effectively sacrificed for the sake of speed and a type of efficiency. In England, speed and efficiency have had to give some ground to the demands of justice. In France, while in the majority of cases some elements of all three requisites are achieved, there is danger, through the dual system of courts and the jealously with which each regards the other, of not being able to achieve any of them.

It is suggested that perhaps something could be designed along the lines of the Armed Services Board of Contract Appeals, except that such a body would have to have original deciding powers. This would reduce the speed at which decisions are arrived in the United States, while gaining considerably in the amount of justice which the contractor gets. At the same time, it would achieve rather more efficiency than the English practice of having an entirely independent arbitrator with perhaps little knowledge of the intricacies of government contracting. It would mean a little more expenditure of public money on the part of the governments of both the United States and England, but the amount would be trifling compared to the amount involved every day in government contracting. All that one can plead for is that the three desiderata of speed, efficiency, and justice be properly balanced, and that one or other of them is not allowed completely to swamp the rest.