

# Public Contracts and the Public-Private Law Divide

Prof. Dr. Ulrich Stelkens

Lehrstuhl für Öffentliches Recht,  
insbesondere deutsches und europäisches  
Verwaltungsrecht



# Introduction

**Private Law = Law governing the relationships (above all) between private persons (legal persons or natural persons)**

- **General rule:** Every subject of private law is equal (no “subordination”) – everybody has the same rights and may be submitted to the same obligations if their legally required prerequisites are fulfilled

The same individual may e. g. be treated legally as a seller/aggrieved party/consumer in one case and as a buyer/liable party/trader in another case – but this does not change the nature and the content of the applicable rules and the way they have to be applied.

- **Principle of the individuals’ autonomy (“*Privatautonomie*”):** In general there is no need to justify why rights given by private law are exercised or not. Private persons are (in general) neither bound by human rights nor by a requirement to act rationally.

Anti-discrimination legislation is the exception which proves the rule.

# Introduction

**Public law = Special rules concerning the organization of the state and the administration and the competences, powers and obligations of public authorities and the rights of the citizen vis-à-vis public authorities**

- **General rule:** Public authorities on the one hand and citizens on the other hand are not equal but **fundamentally different before public law**. Their legal positions are not interchangeable.

It is something completely different if the state/administration exercises its powers and competences and has to comply with specific obligations of public authorities (e. g. fundamental rights, budgetary law, rules on the distribution of competences) or if the citizen exercises his rights or defends himself against claims of the state/administration.

- Public authorities can **not claim “individuals’ autonomy”**: Every state action or non-action must be justified by a legitimate public interest. Contractual freedom of the administration is an instrument to fulfill public functions not an expression of individual self-determination.

# Introduction

**General question:** Does private law apply to (the actions of) public authorities?

The answer depends on

- the function of the distinction between private law and public law in the national legal order concerned;
- the “construction” of the relation between private law and public law in the national legal order concerned.

Is private law considered as

- more advantageous for the citizen than public law?
- sufficient to comply with the needs of public administration?
- a general rule applicable in default of special rules for public authorities?
- a legal order strictly separated from public law?
- being able to be combined with the requirements of the specific duties and powers of public administration?

# Introduction

- I. **Functions and Demands of Public Contract Law**
- II. **Public Contracts Governed by Private Law: Advantages and Disadvantages**
- III. **The Administration as a Shareholder of a Company Submitted to Private Law**

# I. Functions and Demands of Public Contract Law

## What is a public contract?

- **Contract** means an agreement between two or more parties which is intended to create a binding legal relationship or to have some other legal effect.
- **Public contract** means a contract to which a public body is a party whether it is governed solely or not by public or private law or some mixture of public and private law.
- **Public body** means the state, municipalities and any legal person who cannot be founded by private persons concluding a company agreement governed by private law – public-private and public-public-corporations submitted to private company law are not to be considered as public bodies.

# I. Functions and Demands of Public Contract Law

## Different kinds of public contracts:

- **Public contracts between public bodies**

May have constitutional or administrative character. Are often (implicitly or explicitly) submitted to a special regime in view of the nature of the contract constituting an arrangement relating to administrative organization.

May be submitted to general rules if one party acts as a service provider on the market and concludes a contract as a private person would.

- **Public contracts which could be validly concluded between private persons**

*inter alia*: contracts concerning the purchase and sale of goods or real estate, rental and lease contracts, or contracts for the supply of services

- **Public contracts which necessarily imply the exercise of public authority**

*inter alia*: contracts which may only be fulfilled through a legal act which can only be issued by a public authority; contracts modifying or abrogating pre-existing public law relations between the parties (e. g. transactions).

# I. Functions and Demands of Public Contract Law

The law on public contracts has to give answers to the following questions:

– **How to choose the contracting party?**

Answers are given by administrative procedure rules/public procurement rules or/and private law (culpa in contrahendo)?

– **How to conclude a valid contract?**

Answers are given by rules establishing the prerequisites for the validity of a contract and the right to invoke invalidity – General rules or/and specific rules meant to guarantee the legality of administration?

– **How to execute a contract?**

General law of obligations or/and specific rules concerning specific obligations and rights of public authorities?

– **How to modify or terminate a contract?**

General law of obligations or/and specific rules concerning specific obligations and rights of public authorities?

## II. Public Contracts Governed by Private Law: Advantages and Disadvantages

**It has not to be taken for granted that private contract law is the “natural contract law” that should be applied to all public contracts!**

- Public contracts which necessarily imply the exercise of public authority may better be governed by specific rules modelled in accordance with the rules governing single case decision making. Similarities with “real” private law contracts may only exist on the surface.

**Example:** The consequences of illegality of a contract may reasonably be modelled in accordance with the rules governing the consequences of illegality of an administrative decision if the public body has the choice between these forms of legal action. The question of legitimate expectations has to be solved independently of the nature of administrative action.

## II. Public Contracts Governed by Private Law: Advantages and Disadvantages

**It has not to be taken for granted that private contract law is the “natural contract law” that should be applied to all public contracts!**

- But also: It may be adequate to submit public contracts which could be concluded between private persons to a special regime:

**Example:** Contracts granting subsidies can be considered as contracts which could also be concluded between private parties (cf. e. g. scholarship agreements, contracts on external funds). However, it makes sense to legally foresee “privileges” of the administration during the execution of the contract not known by common law.

## II. Public Contracts Governed by Private Law: Advantages and Disadvantages

**Advantages of submitting public contracts which could be validly concluded between private persons under private law:**

- Does not hinder the existence of special rules governing the administrative procedure leading to their conclusion (e. g. public procurement law).
- Facilitates the use of present knowledge concerning the contract design, above all concerning “every-day contracts” (e.g. use of pre-formulated standard terms).
- Makes judicial decisions concerning the execution of contracts better foreseeable: Legislation and case law concerning contracts concluded by private parties is directly applicable (and not only a source of inspiration).
- Special rules for public contracts may be considered as unjustified ‘privileges’ for the contracting public body.

## II. Public Contracts Governed by Private Law: Advantages and Disadvantages

**Disadvantages of submitting public contracts which could be validly concluded between private persons under private law:**

- How to ensure, that the administration can not “escape” from its obligations to comply with fundamental rights, general principles of administrative law, budgetary rules and with other general or specific obligations on public authorities by concluding private law contracts?
- How to reconcile the requirements of the principle of legality of administration and the exigences of legal certainty?

**Example:** Does the non-respect of budgetary law/public procurement rules/fundamental rights etc. has any effect on the validity or the continuation of the contract?

## II. Public Contracts Governed by Private Law: Advantages and Disadvantages

**“Fausse bonne idée” for a general solution:** Interpreting general civil law notions (e.g. “good faith”, “public policy”, “statutory prohibition”, “bonos moros”) etc. in such a way that the specific public law obligations of the administration can be taken into account.

- May work, if only few and obvious specific public law obligations are taken into account.
- Becomes more and more complicated the more public law obligations of the administration are „intensified“ by national and European jurisprudence: In the end this leads to an intermediate regime, which would be comparable to the German concept of ‘Verwaltungsprivatrecht’ (‘administrative private law’).
- This solution contributes to legal uncertainty and a lack of transparency as the contractors would neither be able to assess the rules applicable to contract, nor their substantive content (as the German experiences with ‘Verwaltungsprivatrecht’ show).
- This may even lead to risk surcharges, higher interest demands, even investment-treaty like solutions (see French experience with Eurodisney).

## II. Public Contracts Governed by Private Law: Advantages and Disadvantages

**Better solution:** Making the specific public law obligations of the administration constituent components of the contract, e. g. by ensuring that any contract includes a clause enabling the public body to terminate the contract where it is subsequently established that the specific obligations of the public authority have not been complied with.

### Problems

- Everything has to be foreseen and made object of contractual clauses!
- Drafting public contracts becomes highly demanding!
- Difficulties for administrative controls: Supervisor bodies or municipal councils may be overstrained!

# III. The Administration as a Shareholder of a Company Submitted to Private Law

## Main questions from the perspective of the public private law divide

- Are these companies to be treated directly as public bodies or as private persons integrated in the fulfilment of the tasks of public bodies (like private service providers)?
- Are these companies directly bound by fundamental rights, budgetary rules and other specific obligations of the public authority or does the public shareholder only have to ensure the respect of these rules by using “corporate law measures”?
- It is possible to create a special „private-public-law-statute“ of these corporations and would this be confirmed with the need of the public interest of protection of creditors, of transactions and the respect of capital maintenance rules and transparency?
- And again: Unclear solutions may lead to risk surcharges, higher interest demands etc.

**Thank you for your kind attention!**

**Prof. Dr. Ulrich Stelkens**

Lehrstuhl für Öffentliches Recht,  
insbesondere deutsches und europäisches  
Verwaltungsrecht