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(Fast translation. Do not disseminate).
Comparative administrative law. Prof. G. Napolitano

The decision of the Council of State of 25 June 2021 *Société Mezzi & Fonderia SRL*[1] is undoubtedly an important judgment. It is also a "fine judgment" because of both the facts of the case and the legal principles underlying it. In it, the Council of State applies the principles of private international law to administrative matters and recognises the existence of the public domain on foreign territory.

The Académie de France in Rome is a national public institution of an administrative nature under the supervision of the Minister of Culture[2] . Its headquarters are at the Villa Medici in Rome. Its public service mission is set out in Article 2 of a decree of 21 December 1971 and consists mainly of "promoting artistic and literary creation in all its fields, furthering the disciplines applied to artistic and literary creation as well as the history of art, more particularly for the period extending from the Renaissance to the present day"[3] . The Villa Medici, in which the Académie de France in Rome carries out its missions, is the property of the French State, which places it at the disposal of the assignee by agreement[4] . Under the terms of paragraph 3 of article 3-1 of the decree, the public establishment may issue authorisations for temporary occupation of the "domain" and enter into agreements with occupants. The decree is careful not to describe the "Villa Medici estate" as a public domain.

On the basis of these provisions, *Mezzi & Fonderia SRL was* awarded a concession to operate a café-restaurant in the historic garden and loggia[5] . Article 17 of the contract stated that the contract was subject to 'Italian law', but that 'any dispute arising in connection therewith, including disputes relating to its interpretation, validity or termination, shall be subject to the exclusive jurisdiction of the courts of Paris' (sic)[6] .

[1] CE, 8ème and 3ème united chambers, 25 June 2021, *Société Mezzi & Fonderia SRL v. Académie de France à Rome*, n° 438023, rec.
[2] Decree n°71-1140 of 21 December 1971, amended, implementing the decree of 1 October 1926 conferring civil status and financial autonomy on the Académie de France in Rome.
[3] Decree No. 71-1140 of 21 December 1971, cited above, Article 2.
[4] Decree No. 71-1140 of 21 December 1971, cited above, Article 3-1.
[5] See the description given by the public rapporteur Romain Victor in his conclusions published on the website of the Council of State.
[6] *Ibid*.

After a few months of operation, the Académie de France in Rome decided to terminate the concession because of various breaches committed by the occupier. While the Italian company brought the matter before the Italian courts, the Académie de France and the company itself brought the matter before the French courts. The Italian Court of Cassation issued a ruling on 26 November 2018 recognising the jurisdiction of the French courts[7] . In France, the case was brought twice before the Administrative Court of Paris for the purpose of evicting the occupier on the basis of Article L. 521-3 CJA. Both summary applications were dismissed for lack of urgency[8] . The Académie de France in Rome then referred the matter to the Paris Administrative Court for eviction, while the company *Mezzi & Fonderia* referred the matter to the same court with a "Béziers II" appeal[9] challenging the decision to terminate the contract and seeking the resumption of contractual relations. In a first judgment, the Paris Administrative Court ordered the company's eviction and ordered it to pay various sums, and in a judgment of the same day rejected the request to resume contractual relations. These two judgments were the subject of a single ruling by the CAA of Paris on 23 January 2020, a ruling that has already attracted the attention of the doctrine[10] . The main interest of the judgment was that, for the first time, the existence of the public domain abroad was recognised.

The decision of the Conseil d'Etat has the advantage of confirming the extraterritorial existence of the public domain. But it will be of interest for many other reasons, in particular because the rules of private international law are applied here to administrative matters, which constitutes a possible reversal of the *Tégos* case law[11] . If we use the conditional tense, it is because the decision commented on, to put it mildly, does not lack complexity. The paths by which the administrative judge recognises his competence and determines the applicable law are tortuous to say the least.

The encounter of French administrative law with elements of extraterritoriality generally creates complex solutions. Neither jurisdiction (I) nor the substance of the law (II) can remain "chemically pure" in the presence of such disturbances.

[7] Cass. civ. sezioni unite, 26 November 2018, no. 30527.
[8] According to the account given by the public rapporteur Romain Victor.
[9] CE, 21 March 2011, *Commune de Béziers*, n° 304806, *RJEP* n° 690, October 2011, note Philippe Cossalter.
[10] CAA Paris, 23 January 2020, n° 19PA01312: DA 2020 n° 8-9, comm. Maxence Chambon. AJDA 2020 p.1058, note Cédric Meurant.
[11] CE, Sec. 19 November 1999, Tegos, n° 183648, p. 356.

I. The narrow path of extraterritorial jurisdiction of the administrative judge

While the Conseil d'Etat retained the competence of the administrative judge to hear this case, the Italian Court of Cassation had previously declined the competence of the Italian courts, thus avoiding a positive conflict of competence. But the two cases are not strictly linked: the lack of jurisdiction of the Italian courts did not condition the jurisdiction of the French courts, as the two cases followed their course independently. It is possible, however, that the Council of State was helped in its analysis by the fact that the jurisdiction of the French administrative judge did not conflict head-on with the jurisdiction of a foreign court.

In any case, it is quite natural that the competence of the French administrative court (B) has responded to the incompetence of the Italian courts (A).

A./ Relative immunity of the State on foreign territory

Before the Italian courts, the Académie de France in Rome had invoked the immunity from jurisdiction granted to States under public international law.

The source of the immunity of foreign States from jurisdiction lies in international custom[12] . It finds procedural expressions: the judicial document served on a foreign State must follow the diplomatic channel provided for in Article 684 of the Code of Civil Procedure[13] .

As regards members of diplomatic and consular missions, the immunity from jurisdiction they enjoy is not customary but derives from Article 37 § 2 of the Vienna Convention of 18 April 1961 and Article 43 of the Vienna Convention of 24 April 1963. States may waive it. Thus, when an ambassador organises labour relations with local staff working for a diplomatic or consular representation, he is free to waive any privilege of jurisdiction and to submit the labour relationship to local law[14] which, in principle, excludes the jurisdiction of the French administrative judge in application of the Tegos case law[15] .

However, the immunity from jurisdiction granted to foreign States is not absolute. Foreign States and the bodies which constitute their emanation only benefit from it insofar as the act which gives rise to the dispute "participates, by its nature or purpose, in the exercise of the

[12] CE 14 Oct. 2011, n° 329788, Mme Saleh, Lebon with concl. ; AJDA 2011. 1980; ibid. 2482 , note C. Broyelle; RFDA 2012. 46, concl. C. Roger-Lacan; ibid. 2013. 417, chron. C. Santulli. Crim. 13 March 2001, n° 00-87.215, D. 2001. 2631, and obs. note J.-F. Roulot; ibid. 2355, obs. M.-H. Gozzi; RSC 2003. 894, obs. M. Massé; RTD civ. 2001. 699, obs. N. Molfessis

[13] Article 684(2) CPC: "A document intended to be served on a foreign State, a foreign diplomatic agent in France or any other beneficiary of immunity from jurisdiction shall be delivered to the public prosecutor and transmitted through the intermediary of the Minister of Justice for the purpose of service by diplomatic channels, unless, by virtue of a European regulation or an international treaty, transmission can be made by another means.

[14] CE, 10 January 2007, Syndicat national CGT du Ministère des affaires étrangères, No. 274873.

[15] CE, Sec. 19 November 1999, Tegos, n° 183648, p. 356, cited above.

sovereignty of those States and is therefore not an act of management"[16] . In this respect, it seems that French courts readily grant immunity from jurisdiction to foreign States, whereas the legal system of many foreign States takes a stricter approach[17] . The present case is an illustration of this. The Italian Court of Cassation refused to grant immunity from jurisdiction to the French Academy in Rome because of the nature of the contract at issue.

In 1994, in the *Perrini* case, the same Italian Court of Cassation recognised the immunity of jurisdiction concerning a dispute between the same Academy and a local contractual agent[18] , while the French administrative court settled the dispute subject, by virtue of the contract, to French public law[19] . The Italian Court of Cassation had recognised the immunity of the Academy because of the quality of the Academy on the one hand and the nature of Mrs Perrini's missions on the other. The Academy was recognised as a direct emanation of the Ministry of Culture, pursuing institutional purposes of the French State, financed by taxes[20] . As for Madame Perrini, she had the status of secretary-typist but performed the duties of a particularly qualified secretary (research, organisation of conferences, etc.), participating directly in the missions of the French Academy of Rome[21] .

If the Italian Court of Cassation refused to recognise immunity from jurisdiction this time, it is for detailed reasons that it is interesting to explain here. Firstly, the Court recognises the applicability and invocability of the customary rule "par in parem non habet jurisdictionem", by virtue of article 10 paragraph 1 of the Italian Constitution, which provides that the Italian legal system shall conform to the rules of international law[22] . But, secondly, the Italian Court of Cassation recognises, like many of its counterparts, the notion of restricted immunity

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[16] Cass. mixed ch. 20 June 2003, n° 00-45.629, D. 2003. 1805 : Rev. crit. DIP 2003. 647, note H. Muir Watt.

[17] Isabelle Pingel, "De l'immunité de juridiction des sociétés de classification maritime et des agences de sécurité aérienne", *Rev. crit. DIP* 2005. 468. Régis de Gouttes, "L'actualité de l'immunité de juridiction des Etats étrangers", *D.* 2006. 606. Fabien Marchadier, "L'immunité souveraine en matière civile dans le contexte du droit européen des droits de l'homme", Revue critique de droit international privé, 2017/2 (No. 2), pp. 159-172.

[18] Cass. it., sez. un., 26 May 1994, n° 5126: *Il Foro italiano*, 1994 p. 2073.

[19] CE 23 June 2000, n° 176359.

[20] Cass. it. sez. un. 26 May 1994, n° 5126: *Il Foro italiano*, 1994 p. 2073: "La finalità pubblicistica del Accademia èunque di tutta evidenza; essa è diretta emanazione del ministero degli affari culturali operancese. 2073: "La finalità pubblicistica dell'Académie è dunque di tutta evidenza; essa è diretta emanazione del ministero degli affari culturali francese operante in Italia; persegue finalità istituzionali dello Stato straniero [...]".

[21] Cass. it., sez. un., 26 May 1994, n° 5126 : *Il Foro italiano*, 1994 p. 2073 : "In secondo luogo, risulta, per ammissione della stassa Perrini, che costei era stata assunta in qualità di imiegata di concetto, ufficialmente per attività di classificazione e dattilografia di schede per la sezione artistica, ma che, effetivamente, svolgeva lavori di segretaria particolarmente qualificata (ricerca archivi, gestione prestito gessi ed opere d'arte destinate a mostre, organizzazione di conferenze, collaborazione alla mostra di Andre Castel a Villa Medici, etc.). Si tratta, con tutta evidenza, di mansioni non meramente materiali e/o subalterne ma fiduciarie, correlate all'attività pubblicistica dell'ente nel perseguimento dei suoi compiti istituzionali [...] ".

[22] Italian Constitution of 1948, Article 10 paragraph 1: "L'ordinamento giuridico italiano si conforma alle norme del diritto internazionale generalmente riconosciute" (The Italian legal order conforms to generally recognised rules of international law).

(immunità ristretta), which prevents the application of the rule of immunity when acts are involved whose application in local law does not imply the use of sovereign powers. The Court's analysis is based on a "reasonable relationship of proportionality" between the recognition of the sovereignty of the foreign State and the protection of individual rights.

This need for a reasonable application of the principle of immunity was recalled by the European Court of Human Rights[23] in another case involving a Roman emanation of the French State, the Ecole française de Rome, and a contractual agent: the *Guadagnino* case[24] . The *Guadagnino* case pitted the Ecole française de Rome against an agent recruited by contract for nearly thirty years as an assistant in the publications department. Mrs Marianna Guadagnino had requested a reclassification, a reconstitution of her career and the payment of salaries not received, before being dismissed. In a decision of 20 June 1997, the Plenary Assembly of the Italian Court of Cassation declared that the Italian courts had no absolute jurisdiction and accepted the immunity invoked by the French Government. It stated that "the applicant's activity, linked to the dissemination abroad of French culture and civilisation through the publication of literary and scientific works, fell within the institutional purposes of the French Ministry of Education"[25] . For its part, the French Conseil d'Etat had declined the jurisdiction of the French administrative court by making a classic application of the Tegos jurisprudence: The French Council of State had declined jurisdiction of the French administrative court, applying the classic Tegos case law: "the common will of the parties [having] been to subject the performance of the employment contract of the interested party to the provisions of Italian legislation and, [...] the situation of Mrs Guadagnino as an assistant to the publications of the French School of Rome [not being] governed by any rule of French law, [...] the French administrative court [was] not competent to hear Mrs Guadagnino's applications [...]"[26] . In this case, Mrs Guadagnino had made a mistake by not bringing her case before the French court, which has jurisdiction over an international contract for the recruitment of an agent abroad in the absence of a jurisdiction clause[27] and *a fortiori* after the foreign court had declined

[23] For a general presentation, see Fabien Marchadier, "L'immunité souveraine en matière civile dans le contexte du droit européen des droits de l'homme", Revue critique de droit international privé, 2017/2 (No. 2), pp. 159-172, supra.

[24] ECHR, 18 January 2011, Guadagnino v. Italy and France, no. 2555/03.

[25] This is how the ECHR summarises the judgment of the Court of Cassation, point 14.

[26] CE, 29 July 2002, *Guadagnino*, n° 235575, unpublished in the recueil.

[27] TC, 22 October 2001, 01-03.236, *Bulletin* 2001 Conflits, No. 20, p. 29: "[...] it is not clear from the employment contracts that were executed in Senegal that the parties' common will was to submit them to French law; it follows, in the absence of legislative or regulatory provisions to the contrary, that the dispute between Mmes Issa and Le Gouy and the Lycée Jean-Mermoz in Dakar and the Agency for French Education Abroad concerning the modification and then the termination of their employment contracts falls within the jurisdiction of the court [...]".

jurisdiction[28] . Despite the absence of exhaustion of remedies under French law, the ECHR, applying its case law in Cudak v. Lithuania , condemns the French government for having failed to comply with its obligations under the contract. Lithuania[29] , the ECHR condemned Italy because "by declaring that the domestic courts lacked jurisdiction to hear the applicant's claims relating to the reconstitution of her career and the legitimacy of her dismissal, Italy failed to maintain a reasonable relationship of proportionality and exceeded the margin of appreciation recognised to States when it comes to limiting an individual's right of access to a court"[30] . Indeed, for the Court, there was no reason to presume that Mrs Guadagnino was exercising functions of public authority or related to the higher interests of France[31] .

It is clear that the position of the Italian Court of Cassation in the case under discussion is directly derived from the *Guadagnino* case law, even though it is not a question of employment relationships. The question of participation in the public service missions of the Académie de France in Rome is, however, of central importance. The dividing line drawn by the Court of Cassation is as follows: "the Italian judge is deprived of his jurisdictional competence insofar as the protection invoked [by the applicant] would interfere with the organisation and functions of the body itself, but regains his competence to adopt decisions of a purely patrimonial nature"[32] . In the present case, although the Court considers that the Academy's premises belong to the public domain of the French State, it finds that the café and restaurant activity does not form part of the Academy's cultural tasks and that the contract concluded with the company *Mezzi e fonderia s.r.l.* has a purely patrimonial purpose.

Once the immunity defence has been rejected, the Italian Court of Cassation applies Article 25 of the Brussels I bis Regulation[33] and recognises the effect of the jurisdiction clause in the "courts of Paris".

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[28] Cass. Soc. 9 July 1996, Bulletin 1996-V No. 266: "[...] as a result of the decision that the foreign court initially seized did not have jurisdiction and the consequent relinquishment of jurisdiction, the employee had recovered the right to bring the same action before the French court on the basis of Articles 14 and 15 of the Civil Code [...]".

[29] ECHR, 23 March 2010, *Cudak v. Lithuania,* no. 15869/02: Journal of International Law (Clunet), 2011 p. 1300, note by Paul von Mühlendahl.

[30] ECHR, 18 January 2011, *Guadagnino v. Italy and France*, no. 2555/03, cited above, pt. 74.

[31] ECHR, 18 January 2011, *Guadagnino v. Italy and France*, no. 2555/03, cited above, pt. 72.

[32] Cass. civ, sezioni unite, 26 November 2018, no. 30527: " [...la giurisprudenza di questa Corte si è orientata nel senso che, nei confronti degli enti etranei all'ordinamento italiano, perchè enti di diritto internazionale, e immuni dalla giurisdizione, the Italian judge is responsible for the legal authority within the limits in which the protection invoked interferes with the organisational assets and proper functions of the entities, while he may issue provisions of an exclusively patrimonial nature".

[33] Regulation EU 1215/2012 of the Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Art. 25: "1. If the parties, irrespective of their domicile, have agreed on a court or courts of a Member State to hear and determine disputes which have arisen or which may arise in connection with a particular legal relationship, those courts shall have jurisdiction, unless the validity of the agreement conferring jurisdiction is null and void as to its substance under the law of that Member State. Such jurisdiction shall be exclusive, unless the parties agree otherwise. [...] ".

B. The mandatory jurisdiction of the French administrative court

Whatever the reasons that led the Italian courts to decline jurisdiction, it remained for the French courts, and specifically for the administrative court seized in its turn, to establish its jurisdiction to decide the dispute.

It could have done so by basing itself, as the Italian courts did, on the common will of the parties, who had designated the "*courts of Paris*"[34] in the contract in question. The Conseil d'Etat also seems to be taking this route since it expressly refers to Regulation 1215/2012, known as "Brussels I bis". However, it deviates from it in a way that is as surprising as it is radical in its reasons by asserting the exclusive jurisdiction of French administrative courts with regard to contracts for the occupation of the public domain, in defiance of the regulation in question.

The Conseil d'État, in its turn, seized the dispute between the Villa Médicis and the Italian company and confirmed the decisions taken by the lower courts. It thus confirmed the bold and original solution they had devised, which consisted, after having affirmed that French public property could be located abroad[35] , in seeing in Article L. 2331-1 of the CGPPP a rule inducing the international jurisdiction of the French administrative judge.

However, it deviates from this from a formal point of view by expressly referring to the so-called Brussels I bis Regulation governing the international jurisdiction of the courts of the Member States. This understandable concession to the spirit of European law and its influence introduces an element of ambiguity which the previous judgments lacked.

One of the many interests of the present solution is that the Council of State renews the methods for determining the international jurisdiction of the administrative court. In so doing, it breaks with the logic of the *Tegos* ruling, which has governed the administration's transnational contracts for some twenty years[36] .

[34] Art. 17 of the contested agreement. V. Romain Victor, conclusions cited above.

[35] The Conseil d'Etat begins by stating that '*it follows from the General Code of the Property of Public Persons (...) that both property located on the territory of the Republic and property located abroad fall within its scope*'. It explicitly adds that the property mentioned in Article L.1 of the said code "*constitutes dependencies (of the) public domain, even though it is located abroad*", point 2.

[36] Judgment cited above.

This logic consisted in refusing any total break between jurisdiction and substance in the transnational sphere. If the Council of State considers that '*the French administrative judge does not have jurisdiction to hear a dispute arising from the performance of a contract which is not in any way governed by French law*', it is because 'a *contract* which is *entirely subject to foreign law is not an administrative contract* and that, from this analysis, the conclusion must be drawn that *the French administrative judge does not have jurisdiction to hear it*'[37] .

This reasoning, which can be criticised from the point of view of private international law[38] but is understandable from the point of view of administrative law[39] has the consequence, on the one hand, of linking the question of jurisdiction and that of the applicable law and, on the other hand, of requiring the resolution of the latter in order to resolve the former. However, this reversal of the logical order of the questions disappears in the present judgment.

Seeking to determine the jurisdiction of the administrative court, the Conseil d'Etat, after specifying that the Villa Médicis building constitutes a dependency of the public domain, rather than designating the national law applicable to the merits, as it would have done under the *Tegos* case law, applies Article L. 2331-1 CGPPP, which limits itself to establishing the jurisdiction of the administrative court to deal with contracts for the occupation of the public domain[40] . It adds in this respect that, in the event that the parties have, as in this case, opted for a foreign law to govern the contract between them, "*the administrative judge shall apply the foreign law (...) subject to the rules of public order provided for by the General Code of the Property of Public Persons with a view to guaranteeing the protection and integrity of the public domain*. The rejection of the *Tegos* solution could not be more clearly stated.

The Council of State's willingness to return to a simpler and more rigorous solution, at least in appearance, is therefore to be welcomed. It is indeed more logical to decide the question of jurisdiction first and probably more practical to decouple it from the question of applicable law in transnational disputes.

This is also apparent in the last point relating to jurisdiction, where the Council of State partially departs from the decision of the Administrative Court of Appeal. Unlike the latter, the Council of State refutes the characterisation of Article L. 2331-1 CGPPP as a police law. It is indeed equivocal to use an expression that designates rules that are necessarily applicable on the merits, even though the Conseil d'État, like the Court, expressed the desire to decide the question of

[37] J. ARRIGHI DE CASANOVA, conclusions cited above, *RFDA* 2000, p. 835.
[38] M. Laazouzi, "La nature des contrats administratifs internationaux. L'emprise du droit national applicable", *AJDA* 2012, p. 2420.
[39] Maxence Chambon, *Conflict of laws in space and administrative law*, Mare et Martin, 2016.
[40] Item 4.

jurisdiction before and independently of that of the applicable law. This is, however, a formal correction which leads the Council of State to simply consider the ground as superfluous.

But if Article L. 2331-1 is not a police law, what is its *status*? The answer to this question is theoretically very easy. The rules governing the international jurisdiction of national courts, whether they are of national or European origin, all know the hypotheses of exclusive jurisdiction. The aim is often to guarantee the jurisdiction of the courts of the State whose bodies have carried out public action[41] without the category of overriding mandatory rules having to be mobilised.

It is here that a second, more discreet but perhaps more profound, divergence appears between the present decision and that drawn up by the Administrative Court of Appeal. Whereas it was admissible to consider, like the CAA, that Article L. 2331-1 CGPPP constitutes a national rule of exclusive jurisdiction of the French courts deduced from the imperative of administrative jurisdiction to rule on public domaniality[42] , the Conseil d'État places itself under the aegis of the European Regulation on judicial jurisdiction known as "Brussels I bis"[43] . This is an additional and considerable innovation because, unlike two previous CAAs[44] , the Council of State had previously refrained from referring to the European rule on international jurisdiction.

However, even though the express reference to the regulation in the citations of the decision seems to demonstrate the Council of State's willingness to apply it, it is doubly at odds with it. On the one hand, not content with applying only the CGPPP in the grounds of the judgment, the Conseil d'Etat takes care to specify that '*the jurisdiction thus conferred on the administrative judge, without it being possible to derogate from it by contract, extends to disputes relating to contracts involving the occupation of French public domain property located on the territory of a State other than France, even if the parties to the contract have agreed that it is governed by the law of that State*'[45] . In other words, the Council set aside the cardinal rule established by the European regulation allowing the parties to a contract to choose the judge who will decide

[41] Understood in the sense of private international law as the establishment of public registers or the granting of patents.
[42] On this issue, see our study, *DA* 2020, No. 8-9, cited above.
[43] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
[44] This was precisely the Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, known as "Brussels I", CAA Douai, 29 May 2012, *SA King Consult*, No. 10DA01035, *AJDA* 2012, p. 2223; CAA Paris, 26 October 2015, No. 14PA03509
[45] Pt. 4.

their possible dispute[46] . It was in fact by virtue of this rule that the Italian courts had previously declared themselves incompetent[47] and it was indeed the rule that the Public Reporter proposed that the panel of judges apply[48] .

This solution could, however, be in line with the Brussels I bis Regulation, since it itself provides for a number of cases in which national courts have exclusive jurisdiction[49] . However, the Council of State then made a second departure from the application of the Regulation. The list of exclusive jurisdictions contained in the Regulation is exhaustive and is limited to disputes concerning real estate, the formation of companies, the establishment of public registers, patents and enforcement procedures. It is silent on administrative contracts and, more generally, on administrative activity, since the Regulation is careful to specify that it applies to civil and commercial matters only and not to administrative matters[50] .

Even though administrative matters are understood more narrowly in European law than in French law[51] , the fact remains that the Council of State does not apply in any way the European rule of international jurisdiction, even though it is expressly referred to. One may therefore wonder about the value of these citations and the Council of State's intention to truly apply the Brussels I bis Regulation. It is not impossible to think that the reference to the European Regulation is a way of justifying the Council's refusal to refer a question to the Court of Justice for a preliminary ruling, even though this was a subsidiary request made by the representatives of the applicant company.

However troubling this ambiguity may be, it should not obscure the essential contribution of the present solution. Departing from the *Tegos* case law, the Conseil d'Etat establishes the international jurisdiction of the French administrative court prior to and independently of the law applicable to the merits, by virtue of the extraterritoriality of public property and the imperative nature of the national rules of substantive jurisdiction of the administrative court that are attached to it.

However, if there is any ambiguity at the jurisdictional stage, it seems even more significant at

[46] Art. 25 Brussels Ia Regulation.
[47] Cass. civ. sezioni unite, 26/11/2018, cited above.
[48] Conclusions cited above.
[49] Art. 24 Regulations.
[50] Article 1er of the Regulation states that "*it shall not apply, in particular, to revenue, customs or administrative matters or to the liability of the State for acts or omissions in the exercise of its public authority*".
[51] The decisive criterion seems to consist for the Court of Justice in the implementation of prerogatives of public power, CJEC, 14 October 1976, *Eurocontrol*, aff. 29/76, *R.*, p. 1541; *RCDIP* 1977, p. 772, note G. DROZ; *JDI* 1977, p. 707, note A. HUET; CJEC, 16 December 1980, *Rüffer*, aff. 814/79, *R.*, p. 3807. See however for a more precise and nuanced approach, D. BUREAU, H. MUIR WATT, *Droit international privé*, 4e ed., PUF 2017, t. 1, n° 110.

the applicable law stage.

II. The uncertain recognition of the extraterritorial prerogatives of public power

The decoupling of jurisdictional competence and applicable law naturally leaves open the question of the law intended to settle the dispute. The Council of State then persisted in its desire to break with the *Tegos* case law and the solutions it had established since then by applying Italian civil law to a contract for the occupation of the public domain by virtue of the European conflict-of-laws rule[52] . In sum, the Council of State attached the contract to the jurisdiction of the administrative judge not by applying public law rules but by establishing that they could be applied (A). However, their actual application seems purely hypothetical, which makes the solution proposed by the Council of State extremely artificial (B).

A./ The potential application of French law

The break with the *Tegos* ruling is probably less radical than it seems. Indeed, if the administrative judge does not hesitate to separate the jurisdiction and the merits, it is because he ensures the intangibility of the link between the applicable law and the matter in dispute. In other words, it is because it considers that public ownership always entails, albeit potentially, the mobilisation of administrative law rules that the Council of State sees no problem in applying Italian civil law exclusively in this case.

However clever it may be, this construction is not without artifice. It is also possible that it is favoured by the specificity of the domaniality. This is why the scope of this solution remains uncertain.

The present judgment says little about the question of the applicable law and, *ultimately, about the* resolution of the dispute on the merits. Ruling as a court of cassation, the Conseil d'Etat, seized by the applicant company of submissions seeking the resumption of contractual relations, confined itself to repeating the reasons established by the Court and to stating that, in considering that the company had failed to fulfil its contractual obligations, the Court had not distorted the facts submitted to it[53] . The fact remains that by ruling in this way while referring to and applying, as the Administrative Court of Appeal had done before it, the European conflict

[52] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, known as "Rome I".
[53] Item 7.

of laws rule, the Council of State seems to be reverting to a mimetic application of the methods that have long governed private international relations, without taking into consideration the administrative dimension of the dispute[54] .

Unlike the Brussels I bis Regulation, the Rome I Regulation is effectively applied by the Council of State. Moreover, its inclusion in the citations is not insignificant, as this is the first time since the *Tegos* judgment that the Council of State has placed its decision under the authority of the European conflict rule[55] . This confirms that the Council of State has adopted the European understanding of civil and commercial matters broadly conceived and administrative matters narrowly conceived, so that certain disputes falling within the scope of administrative matters in the French sense are subject to the European conflict rule even though it excludes these matters from its scope.

The Council of State thus agreed to extend the criterion of the law of autonomy[56] to a contract that it had nevertheless considered as involving the occupation of the public domain. As the parties had agreed in Article 17 of the contract to submit their relationship "*to Italian law*", the Council of State assessed the various breaches of the company in view of this law as well as the regularity of the unilateral termination by the French public establishment, which therefore had nothing to do with a termination for reasons of general interest[57] .

This clear dissociation between jurisdiction and substance seems to revive a distinction that existed before the *Tegos* judgment, contrasting "*jurisdictionally*" and "*legally*" administrative contracts[58] . While the latter entail the competence of the administrative judge and the application of administrative law as in domestic law, the former see the administrative qualification of the contract as the sole basis for the competence of the administrative judge without in any way influencing the question of the applicable law.

A number of authors have expressed their unease at the mention of administrative contracts relating to concepts specific to French law, such as the status of public official or participation

[54] CE, 28 January 1983, *Dame Johnston*, *Rec.* p. 28; *R.C.D.I.P.*, 1985, p. 316, concl. FRANC and p. 322, note P. RODIERE; CE, 7 January 1987, *Dame Félicien*, *Rec.* p. 805; *D.*, 1987, summa cum laude, p. 350, obs. B. AUDIT; *R.C.D.I.P.*, 1988, p. 687, note P. RODIERE; CE, 10 March 1997, *Madame de Waele*, *Rec.* 741; *R.C.D.I.P.*, 1997, p. 695, note PH. COURSIER.

[55] Although it did not subsequently repeat this choice, the Council of State expressly referred to the European conflict rule in the citations to the *Tegos* judgment, but with the nuance that it was the ancestor of the Rome I Regulation, the Rome Convention of 1980, i.e. a rule established by an international convention drawn up in the European context but which had not yet become a norm of secondary legislation.

[56] Art. 3

[57] Art. 1456 Italian Civil Code.

[58] B. DOLEZ, "Le juge administratif et les conflits de lois", *RDP* 1985, p. 1029.

in the performance of a public service, without any administrative law[59] . It is, moreover, the desire to break with such contracts '*which are administrative only in name*'[60] that explains the reversal in the *Tegos* judgment, which made the classification of the contract as administrative conditional on the effective application of even a fragment of French law[61] . However, even though the Conseil d'Etat specifies here that, even if foreign civil law is designated, it will have to apply it 'subject to *the rules of public policy*' relating to the public domain, one looks in vain for the application of such rules in this case.

B./ The unlikely meeting of public policy rules and foreignness

However, it would be wrong to believe that the case law prior to *Tegos* has returned. It is not insignificant that the Council of State should specify, in a kind of *obiter dictum,* the necessary applicability of rules of public policy that cannot be found in this case. This warning is clarified by the conclusions of the Public Reporter.

Firstly, it states that "*if it were simply a matter of entrusting the administrative judge with the task of applying the stipulations of the contract and Italian law, without an ounce of public law, we would have the greatest reluctance to approve the solution of the judgment under appeal. The logic of the* Tegos *judgment would then lead to the recognition of the competence of the judiciary*". He goes on to explain that "*here, the justification for the intervention of the administrative judge lies, even in a dispute concerning a contract entirely subject by the parties*

[59] B. Audit was thus surprised that "*relations with persons qualified as public servants can also be subject to a foreign law*" since "*the concept of administrative contract is largely specific to French law*", note under CE, 7 January 1987, *Dame Félicien*, cited above. Similarly, Ph. Coursier wondered as follows: "*insofar as the employment contract is subject to Mexican law, by what means does the Council of State qualify the employee as a 'public agent' within the meaning of French law*", note under CE, 10 March 1997, *Madame de Waele*, cited above.

[60] J. ARRIGHI DE CASANOVA, conclusions cited above.

[61] This was the case, for example, with the decree of 18 June 1969 specifying the rules for the recruitment of French public employees working abroad, Article R. 6134-1 of the Public Health Code stipulating that international cooperation initiatives between French and foreign hospitals must comply with the contract of objectives previously concluded with the ARS, and the decree of 13 August 1981 specifying the rules for the recruitment of French public employees working abroad. 6134-1 of the Public Health Code providing that international cooperation actions established between French and foreign hospitals must comply with the contract of objectives previously concluded with the ARS, or the decree of 13 August 1981 specifying the rules relating to the pricing of visas and the protection of personal data, the mere mention of which was generally sufficient to affirm the administrative nature of the contract, even though foreign law was quite widely applicable. See respectively, CE, 7 January 1987, *Dame Félicien*, *Rec.* p. 805; *D* 1987, somm. p. 350, obs. B. AUDIT; *RCDIP* 1988, p. 687, note P. RODIERE; TC, 24 April 2006, *SCP de médecins Reichheld et Stürtzer*, *Rec.*, p. 629; *RFDA* 2006, p. 1077; *AJDA* 2006, p. 2456, concl. D. CHAUVAUX; CE, 29 June 2012, *Société Pro 2C*, *Rec* p. 2013, p. 258; *RJEP* December 2012, p. 15 concl. N. BOULOUIS; *AJDA* 2012, p. 1314 and p. 2420, note M. LAAZOUZI; *RDI* 2012, p. 560, note S. BRACONNIER.

to a foreign law, in the possible involvement of *mandatory rules of administrative property law* which are always implicitly reserved"[62] .

In short, the Council does not intend to abandon the logic of the *Tegos* judgment, but to reinforce it. By considering that administrative rules of public order always *potentially* govern any contract for the occupation of the public domain, it affirms the impossibility of a split between the matter in dispute and the substance of the law. Admittedly, this link between administrative contract and administrative law may not be made concrete, as here, in the context of a given dispute because of the *question of* law before the court. But the present solution suggests that, although it may be implicit or underlying, this link always *potentially* exists as soon as the *situation* in dispute relates to public property.

In other words, even if the Council of State is seized of a request to resume contractual relations as a result of the opposition between the parties and the previous instances, the fact remains that this legal issue is embedded in and forms, as it were, the accessory to a broader dispute relating to the occupation of the public domain, which is the cause of the dispute. While it is possible to envisage the application of foreign civil law to *this* question of law, this is not the case for the disputed situation or for any question that relates directly to it, since the public domain entails the incompressible applicability of French administrative law rules. This is illustrated by the Court's previous judgment, in which the contentious configuration was somewhat different and was undoubtedly more explicitly aimed at ruling on expulsion from the public domain.

The convoluted nature of the present solution is reminiscent of the technique of dismemberment used in private international law in relation to complex transactions in order to distinguish between several legal issues with a view to submitting them to the appropriate conflict rule[63] .

It is also possible that this intellectual distinction made within the contract between the provision of a service, subject to Italian law, and the occupation of the public domain, subject to French administrative law, is favoured by the attraction produced by domaniality.

In domestic law, it implies that any contract whose object but also only effect is to occupy the public domain is an administrative contract subject to the jurisdiction of the administrative judge[64] and to administrative law[65] . Even though this magnetisation may have been discussed,

[62] Conclusions cited above.

[63] Civ. 1ère , 3 January 1980, *Bendeddouche*, *GADIP* n° 61, *RCDIP* 1980, p. 331, note H. Battifol; *JDI* 1980, p. 327, note M. Simon-Depitre.

[64] Decree-Law of 17 June 1938.

[65] V. Not. Ph. Godfrin, M. Degoffe, *Droit administratif des biens*, Sirey 2020, n° 216.

the case law remains sensitive to it. It explains that it is irrelevant, on the one hand, that the dispute concerns not the existence or performance of the agreement, but its termination or even the eviction of the occupant without title[66] and, on the other hand, that the contract does not involve any delegation of public service[67] . Thus, a simple catering activity carried out on a beach is subject to an administrative regime as soon as the site on which it is carried out is a public domain[68] .

However, if the unity of the French legal system can give rise to a generalised and indistinct application of administrative law to simple service contracts involving incidental occupation of the public domain, the same cannot be said of such contracts containing a foreign element. The encounter with other legal orders and their legitimate influence leads to a necessary accentuation of the contractual freedom of operators and a relativisation of administrative law[69] . However, the constraints resulting from transnationality do not imply giving up the specificity of the administrative matter or its regime; they only require that the exorbitance resulting from the "administrative nature" of the contract be determined and delimited more carefully. Thus, if the protection of the domain justifies the imperative competence of the administrative judge and the incompressible application of the rules of public order which are related to it, it does not prohibit and even allows that the simple provision of service being deployed on its dependences is subjected to the foreign civil law.

But is the reasoning followed here really specific to public domain? Can it not be extended to the whole of administrative law and, contrary to what the Public Reporter suggests, carry the *Tegos* solution?

Firstly, although there is not always an equivalent to Article L. 2331-1 CGPPP, many administrative contracts - public business contracts in particular - are qualified as such by the law[70] . In this case, even if the competence of the administrative judge is not expressly affirmed, the qualification of the contract is fixed by the law independently of the applicable law. It would

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[66] TC, 24 September 2001, *Société BE Diffusion c/ RATP et société Promo Metro*, *R.*, p. 747; BJCP 2002, p. 61, concl. D. COMMARET; *CJEG* 2002, p. 217, note Ph. YOLKA; *Contrats et Marchés publics* 2002, comm. 242, note G. ECKERT.

[67] This is even the principle in matters of public domain occupation agreements, CE, 13 June 1997, *Société des transports pétroliers par pipeline*, *R.*, 230, *AJDA* 1997, p. 794, concl. C. BERGEAL; CE, 12 March 1999, *Ville de Paris*, *T.*, p. 778, *AJDA* 1999, p. 439, note M. RAUNET and O. Rousset; Dr. adm comm 127. ROUSSET; *Dr. adm.* comm. 127. For an overall study, C. LAVIALLE, "Délégation de service public et domanialité publique, *Dr. adm.* 1998, study 3.

[68] CE, 9 November 1988, *SARL " Le royaume de la Bouillabaisse "*, n° 80151.

[69] M. AUDIT, "La compétence extraterritoriale du droit administratif", *in* AFDA, *La compétence*, Actes du colloque des 12 et 13 juin 2008, colloques et débats, Litec, 2008, p. 69.

[70] Art. L.6 code de la commande publique.

therefore be possible to consider, as in this case, that the qualification of the contract is in a way fixed and that it constitutes a solid basis for jurisdictional competence without the applicable law weakening the textual qualification.
Secondly, it is clear that administrative law is characterised by a "*densification of the fabric of public policy rules*"[71] compared to civil law. Even more fundamentally, did not Dean Vedel warn that "*there always remains, even in a civil or commercial dispute as soon as a public person is involved, a "fringe" of public order*"[72] ? Under these conditions, it always seems possible to postulate the potential application of public policy rules, if not to the legal issue, at least to the situation in dispute.

At the end of his conclusions, the Public Reporter makes a revealing reference to the *Fosmax* judgment, in which the Administrative Jurisdiction Division laid the foundations of a public law of international commercial arbitration. The illustration is relevant because the present solution is based on the reduction of law and administrative litigation to considerations of public order. The temptation may then be strong to generalise this tendency to '*imperative*' administrative law, which is observed in arbitration matters but which now also permeates the most classic contractual disputes.
This judgment may remain a case-by-case solution. It may also be the premise of a new stage in the way transnational administrative activity is understood. It is regrettable that the administrative courts have not dealt more fully with questions of conflicts of jurisdiction and conflicts of law by forging their own instruments adapted to administrative matters. But is it still possible to assume such particularism in the context of the internal market and, more generally, in the context of globalisation?

[71] B. PLESSIX, "Transaction et droit administratif", *in* B. MALLET-BRICOUT, C. NOURISSAT (eds.), *La transaction dans toutes ses dimensions*, Paris, Dalloz, 2006, p. 133, spec. p. 139.
[72] G. VEDEL, "Rapport devant le congrès international de l'arbitrage", *Rev. arb.* 1961, p. 116, spec. p. 122.