

THE PUBLIC–PRIVATE  
PARTNERSHIP  
LAW REVIEW

NINTH EDITION

**Editors**

Matthew Job and Tom Marshall

THE LAWREVIEWS

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PARTNERSHIP  
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# PREFACE

It has been a privilege to contribute to and edit *The Public–Private Partnership Law Review* over the past three years and we are very pleased to present this ninth edition. Doing so has provided an insight into how public–private partnerships (PPPs) are used and perceived around the world and has introduced us to people and opportunities that would otherwise not have arisen for us. Since the publication of the eighth edition a year ago, there have been significant developments in the design and use of PPPs in some parts of the world, while in other parts little has changed. The purpose of this volume is chiefly to report the current state of PPP across a range of jurisdictions around the world.

Twelve months ago the world was finally beginning to look beyond the impact of the covid-19 pandemic and we speculated that PPP might have a role to play in the economic recovery that was then anticipated. In practice, the past year has been dominated by fallout from the war in Ukraine. While the conflict may be geographically limited, the economic consequences have been felt around the world.

Many international businesses have closed down their operations in Russia and most of Europe has been forced to move its supply of natural gas from Russia, resulting in an energy price spike and fears about energy security. Russia's blockade of Ukrainian food exports has resulted in food shortages and higher food prices across the globe. Energy and food prices have triggered global inflation, which many commentators felt was always a latent but inevitable consequence of quantitative easing and covid lockdown support measures. Higher inflation has led to fiscal tightening and higher interest rates, finally calling time on the low (often virtually zero) interest rate environment that has prevailed since the financial crisis in 2008. All in all, the economic background for PPPs could hardly be more different than it was a year ago.

Against that backdrop, PPP continues to be a key procurement tool for both national and local infrastructure projects in a diverse range of countries such as Australia, France, Italy, Pakistan, Saudi Arabia, South Africa, Thailand, the United Arab Emirates and Uzbekistan. PPP legislation has been bolstered in Indonesia and Italy, following on from the new PPP laws that we saw in 2021 in Senegal and Uzbekistan. Indonesia continues to have an ambitious PPP pipeline although progress to implement its national development plan has been slow. Perhaps the most impressive national performance for PPP has been in Uzbekistan – in a year that our contributors describe in Chapter 15 as 'truly pivotal', Uzbekistan has signed 178 PPP projects with a total capital value estimated at US\$4.5 billion.

Meanwhile, PPPs continue to be under examination in a number of jurisdictions, particularly in European countries that have long-established and relatively mature relationships with PPPs (such as the United Kingdom, the Netherlands and Portugal), but also in Latin American countries such as Argentina and Mexico (where some large projects

that were previously slated to be PPPs have been restructured as traditional public works contracts). As ever, the principal case against PPP is the embedding of a private sector cost of capital in place of cheaper sovereign borrowing and the assertion that this makes it an expensive procurement model whatever the benefits in terms of risk transfer and private sector procurement expertise.

Climate change and energy transition has been a global trend for several years, but arguably it has been concerns about energy security as a result of the Ukraine war that have accelerated a push towards new privately financed energy transition projects in Europe, particularly in the United Kingdom and France, which have seen new revenue models and legal structures for new nuclear power, carbon capture and storage and hydrogen projects. PPP projects for renewable energy and grid stability to support renewable energy have also been seen in Australia and South Africa.

So where does this leave the outlook for PPP during 2023 and beyond? Concerns regarding value for money, flexibility and, not least, the validity of the fundamental element of partnership within the PPP model remain. In addition, attention has been given in many places to the most appropriate contractual model for PPPs, and industry consultations have been undertaken as to the extent to which those models remain best suited for the purpose. However, the inclination of many governments to invest in new infrastructure is arguably stronger than at any time in the past 50 years; energy transition alone will require huge infrastructure investment that is largely incremental. The question for those in the industry is how PPP can evolve in order to respond to this opportunity and we are already seeing evidence of this in the United Kingdom in particular.

Furthermore, the advent of inflation and higher interest rates is squeezing growth in many countries, but in particular in Europe. This comes on top of ruinously expensive covid support schemes that have pushed national debt above GDP in many cases and make it less attractive to finance new infrastructure on the national balance sheet. The role that PPP could play in alleviating this remains unclear. In countries such as Germany and, to a lesser extent, the Netherlands and Portugal, there are still concerns as to the suitability of traditional PPP and whether it represents value for money. This has been a particular issue during the past 15 years of very low-cost borrowing for governments and it remains to be seen whether the return of a higher cost of government borrowing will dilute the incremental cost of private sector borrowing in a PPP when compared with sovereign debt.

Meanwhile there is an expectation that infrastructure development will benefit PPP and PPP-like structures in other countries such as Italy, France and the United Kingdom (in those 'consumer pay' sectors where private sector investment in infrastructure is prevalent). In these jurisdictions the prospect of stimulating the economy and delivering new infrastructure, without an immediate cost to the public purse, may be more attractive than ever – especially in sectors where the costs can be routed directly to consumers rather than being a burden on taxpayers and the public finances.

In the United Kingdom we are now seeing the cycle of private finance initiative (PFI) projects from the 1990s turning to hand-back on contract expiry. Although the number of early projects reaching expiry in 2023 will only be in single digits, it rises steadily into double digits over the next two or three years and then continues to rise to a peak of 80 projects scheduled to expire in 2037 alone. Inevitably this begs the question of what will come next and how the government will wish to handle facilities management and refurbishments on a fleet of ageing projects as the existing arrangements come to an end.



Perhaps the most important characteristic of PPP in 2023 and beyond will be its adaptability. PPP in countries as diverse as Argentina, Indonesia and Uzbekistan has never followed the mould of UK 1990s PFI. Elsewhere we have seen the PPP model adapting, for example, in countries such as Norway and the Netherlands where public sector capital contributions on completion reduce the impact of private sector cost of capital over the life of the project, while preserving typical PPP risk transfer and efficiencies during construction. In the United Kingdom and Australia, we have seen the advent of price adjustments and risk sharing based on how the outturn construction cost compares to a target cost; in parallel, the regulated utility model that was traditionally reserved for established operating monopoly networks is increasingly being used to procure new greenfield infrastructure assets.

At Herbert Smith Freehills we are proud of having a long and successful history working within the PPP industry for more than 30 years. We were at the forefront of the market when the PFI model was introduced in the mid-1990s and have followed its evolution around the globe since that time. We continue to believe that PPPs, where used appropriately, are and will remain an important tool for creating the most financially advantageous development, financing, operation and maintenance of infrastructure assets. The use of the PPP model, in addition to financial benefits, imports added scrutiny, rigour and arm's-length contracting practice, which ultimately benefit both the public and private sectors and, most importantly, the consumer and taxpayer. This may prove to be all the more important following the economic shocks of the covid pandemic and the Ukraine war.

In this, the ninth edition of *The Public–Private Partnership Law Review*, our contributors are drawn from the most renowned firms working in the PPP field in their jurisdictions. We hope that you will enjoy and find useful this edition of *The Public–Private Partnership Law Review*. We look forward to hearing any thoughts or comments that you may have on this edition and any thoughts for the content of future editions.

**Matthew Job and Tom Marshall**

Herbert Smith Freehills LLP

London

March 2023

# FRANCE

*François-Guilhem Vaissier, Alain Chan Hon, Sacha Ruffié and Lisa Gehin<sup>1</sup>*

## I OVERVIEW

In France, public–private partnerships (PPPs) are implemented in various economic sectors (e.g., transport, health, justice, education, urban equipment, environment, energy efficiency, telecommunications and culture), accounting for around €110 billion of activity each year on average.

In 2018, a decision was made to reshape and modernise the French PPP legal framework as legal rules governing this were scattered throughout about 30 different texts. The PPP Code was finally enacted at the end of 2018 through Ordinance No. 2018-1074, dated 26 November 2018, Decree No. 2018-1075, dated 3 December 2018 and Decree No. 2018-1225, dated 24 December 2018. The new PPP Code entered into force on 1 April 2019. Since then, no major change has been brought to this legal framework.

In this chapter, we will focus on the two main forms of PPP implemented in France: concession agreements and partnership contracts.

## II THE YEAR IN REVIEW

During 2022, beyond the continued consequences of covid-19 on the French economy, it is worth noting that the armed conflict in Ukraine led the European Union to set up a global strategy aiming at isolating PPPs from said conflict. To that effect, Council Regulation No. 2022/576 was adopted to make contracting authorities terminate existing concession agreements and to prevent them from entering into new agreements with many economic operators linked to Russia.<sup>2</sup>

In addition, the French and European authorities decided to improve energy supply channels and reduce greenhouse gas emissions by fostering the development of PPPs. In this respect, a plan to invest €300 billion until 2030, REPower EU, was announced on 18 May 2022. This will allow for the financing of a gas and hydrogen pipeline, H2Med, designed to transport green hydrogen from Spain and Portugal to France and Germany, as well as of a French hydrogen plan, made public on 8 September 2022, which provides for the investment of €7 billion in the hydrogen sector until 2030.

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1 François-Guilhem Vaissier is a partner and Alain Chan Hon, Sacha Ruffié and Lisa Gehin are associates at White & Case.

2 Council Regulation (EU) No. 2022/576 of 8 April 2022 amending Regulation (EU) No. 833/2014 concerning restrictive measures in view of Russia's actions destabilizing the situation in Ukraine.

Moreover, France has continued to develop its industry through its initial €30 billion plan, Plan France 2030, whose budget has been increased to €58 billion. In 2022 alone, €8 billion was invested in various sectors, such as the renewable and nuclear energy, green hydrogen, critical minerals and digital sectors.

The French public local authorities have also maintained a high level of activity, launching multiple PPP projects in several industry sectors, including the following in particular:

- a* on 14 February 2022, the French Ministry of the Armed Forces signed a 35-year concession agreement with Nové, a subsidiary of Eiffage and Arcade-VYV, for the management of state-owned housing stock throughout metropolitan France, with an estimated value of €7 billion;
- b* on 16 April 2022, the French Ministry of Transport signed a 55-year concession agreement with ATOSCA (a subsidiary of NGE) for the design, upgrade, construction, operation and maintenance of a highway, worth €450 million; and
- c* on 19 September 2022, the city of Montpellier awarded jointly to Enedis and EDF a 25-year concession agreement for the public service of the development and operation of an electricity distribution network, and for the supply of electricity, worth €3.5 billion.

In 2023, PPP French activity is also shaping up to be dynamic: on 16 December 2022, SMA de Beauvais-Tillé, the public entity managing Beauvais-Tillé Airport, published a call for tenders for the takeover of a 30-year concession to operate, manage, maintain and promote Beauvais-Tillé Airport, with an estimated value of €4 billion.

As for environmental and social legal requirements applicable to PPPs, Decree No. 2022-767 dated 2 May 2022 brought into force several measures from Law No. 2021-1104 dated 22 August 2021. In particular, a grantor will be able to exclude from the bidding procedure, as early as the application stage, companies that do not comply with the obligation to draw up a due diligence plan (which must include ecological considerations), except when technical, economic or competitive considerations do not allow it.<sup>3</sup>

Finally, two bills, currently being discussed in the French Parliament, may further contribute to the development of PPPs in upcoming years. They both aim to accelerate the low-carbon production of electricity and hydrogen, one from renewable energies, the other from nuclear. The second bill, as amended by the senators, notably provides for the construction of up to 14 new nuclear reactors, and simplifies the legal framework relating to EPR2 reactors, small modular reactors and hydrogen electrolyzers.

### III GENERAL FRAMEWORK

#### **i Types of public-private partnership**

As stated above, there are two types of PPPs that are mainly used in France: concession agreements, which serve to implement major infrastructure projects such as canals, motorways, water distribution systems and toll bridges; and partnership contracts, which can be compared to private finance initiative contracts.

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<sup>3</sup> Article L 3123-7-1 of the PPP Code.

Concession agreements and partnership contracts<sup>4</sup> are both administrative contracts under French law, save for narrow exceptions. This distinction is important as the contractual relationship in an administrative contract is different from that in a private contract. The parties are, *de facto*, unequal insofar as the public person benefits from public authority powers.

A concession agreement is defined as an agreement under which a grantor assigns, for a limited period of time, to one or several economic entities, the performance of works or the management of a service, it being specified that:

- a* a risk linked to the operation of such works or service must be transferred to the economic entity in exchange for the right to operate the said works or service;
- b* a fee in favour of the entity can be added to such operation right; and
- c* the risk transfer to the economic entity necessarily implies a real exposure to the market's fluctuation.<sup>5</sup>

A partnership contract is an administrative contract under which a grantor entrusts to a private party, for a period set according to the amortisation of investment or agreed financing terms, a comprehensive project relating to the design, construction or conversion, maintenance, operation or management of works, equipment or intangible assets necessary to the public service, as well as to the total or partial financing of the latter. Dismantling and destruction works, and the management of a public service, can also be transferred to the private party under a partnership contract.<sup>6</sup>

The two main PPPs can be differentiated according to their payment terms: under a partnership contract, the grantor pays a rent to the private partner in exchange for the performance of the mission, while under a concession agreement, the compensation of the concessionaire mainly arises from payments made by users of the service.

## ii The authorities

In addition to public authorities (the state, local authorities and their public institutions), private entities (entities specially created to satisfy a non-commercial public interest or formed by several public entities to jointly perform certain activities and public undertakings acting as network operators) are allowed to grant concession agreements and partnership contracts.<sup>7</sup>

In particular, public health facilities, social security bodies and some public or private entities pursuing a public-interest mission and mainly financed by public funds<sup>8</sup> (i.e., public-private joint ventures and state-owned public industrial and commercial institutions) can also do so.

Nevertheless, central administrations other than the state, public health facilities and medical cooperation public structures are, in principle, not able to enter into partnership contracts on their own.<sup>9</sup>

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4 Article L 6 of the PPP Code.

5 Article L 1121-1 of the PPP Code.

6 Article L 1112-1 of the PPP Code.

7 Article L 1211-1 of the PPP Code.

8 As mentioned under Article L 1211-1 of the PPP Code.

9 Article L 2211-1 of the PPP Code.

For partnership contracts executed by the state, the ministries that are involved in the tendering procedure depend on the subject matter of the particular contract. Moreover, approval by the Minister of the Economy and the Budget is required before signature.<sup>10</sup>

Another important actor in the PPP sector in France is the PPP Support Service (FIN INFRA).<sup>11</sup> The FIN INFRA is a dedicated unit within the Ministry of the Economy that assists grantors in the implementation of partnership contracts. The FIN INFRA is primarily responsible for the validation of the preliminary evaluations prepared by grantors before launching a tender. The FIN INFRA also assists and advises public authorities in the preparation and negotiation of partnership contracts as well as any other complex public contracts or public contracts implying an innovative financing scheme.

The FIN INFRA is a major actor given that it also has to issue an opinion about the financial sustainability of each partnership contract.<sup>12</sup> This requirement is an efficient way to avoid the financial difficulties deriving from the implementation of some partnership contracts in France.

### **iii General requirements for PPP contracts**

Requirements to be satisfied to resort to a concession agreement or a partnership contract are different.

Concession agreements must include provisions pertaining to the duration of the contract and the tariffs applicable to service users. They may also include provisions relating to sustainable development and social objectives. Moreover, to optimise cost monitoring, the current concession agreement legal regime aims to increase transparency relating to the performance of concession agreements. As a consequence, concession agreements must specify that the concessionaire will be required to provide an annual report to the grantor and that the grantor will have to annually publish essential data pertaining to the concession (i.e., the type of investment and applicable tariffs).

Unlike concession agreements, the use of partnership contracts is strictly regulated. First, a preliminary evaluation has to be carried out to evaluate the project's implementation method. Then, a second evaluation must assess the financial sustainability of the project. In light of these evaluations, the grantor must demonstrate that the use of a partnership contract shows better cost-effectiveness than any other type of agreement. Finally the grantor is compelled to submit these evaluations to the FIN INFRA, which is in charge of issuing an opinion on the project's implementation structure.

This preliminary procedure was introduced by Ordinance No. 2015-899 dated 23 July 2015, which concerns public procurement and partnership agreements and aims to simplify the former implementation procedure and answer criticisms raised during the past decade regarding the implementation of partnership contracts.

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10 See Article R 2223-1 of the PPP Code stating that a partnership contract may be signed by the state or a state public institution only after approval by the Minister of the Economy and Minister of the Budget. In addition, under Article R 2223-2 of the PPP Code, a public body established by the state must obtain the approval of the minister in charge of its supervision. For local authorities, the principle of their free administration exempts them from any requirement for state approval.

11 The FIN INFRA was created by Decree No. 2016-522, dated 27 April 2016.

12 Article L 2212-4 of the PPP Code.

A partnership contract must include several mandatory provisions, such as the duration of the contract, the conditions for sharing risks between the grantor and its co-contracting party, the performance objectives assigned to the co-contracting party, the payment terms and the consequences of termination of the contract.

Both partnership contracts and concession agreements are thus entered into for a period determined by the depreciation period of the selected investments or financing terms.

#### IV BIDDING AND AWARD PROCEDURE

Bidding and awarding procedures for partnership contracts are closely regulated.

The PPP Code provides detailed regulations applicable to bidding and award procedures for concessions of a value greater than or equal to €5.382 million, excluding tax.<sup>13</sup> This legal framework applicable for concessions remains flexible, with the aim of ensuring effective and non-discriminatory access for all potential bidders (including small and medium-sized companies).

As regards partnership contracts, three main granting procedures can be implemented:

- a* a competitive dialogue<sup>14</sup> in the case of particularly complex projects where grantors are not objectively able to define the technical means or specify the legal or financial aspects of a project;
- b* a negotiated procedure;<sup>15</sup> or
- c* a restricted call for tenders.<sup>16</sup>

We will focus on the rules applicable to the competitive dialogue since it is the most common procedure for the tendering of partnership contracts.

##### **i Expressions of interest**

To allow effective competition among applicants (it being specified that applications can be submitted through a consortium), partnership contracts and concession agreements must be the object of adequate publicity.<sup>17</sup>

Nevertheless, partnership contracts may only be used in the following cases: if the value exceeds €2 million for immaterial assets or if the contract contains specific targets on performance; if the value exceeds €5 million for network infrastructure; or if it exceeds €10 million in other cases.<sup>18</sup>

Regarding concession agreements, publication requirements are less strict. The public tender notice has to be published in a newspaper authorised to carry legal advertisements

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13 Notice relating to the procedural thresholds and the list of central public authorities (JORF No. 0286 dated 9 December 2021).

14 Article L 2124-4 of the PPP Code. The grantor conducts a dialogue with the candidates admitted to the procedure with the aim of developing one or more suitable alternatives capable of meeting the specified requirements.

15 Article L 2124-3 of the PPP Code. The negotiated procedure is defined as the procurement procedure in which 'the contracting authorities consult the economic operators of their choice and negotiate the terms of contract with one or more of them'. The negotiation process enables grantors to negotiate the terms of the contract.

16 Article L 2124-2 of the PPP Code.

17 Articles L 2131-1 and L 3122-1 of the PPP Code.

18 Articles L 2211-5 and R. 2211-1 of the PPP Code.

and in a specialised newspaper of the relevant economic sector. The notice must also specify the procedures for the applications' submission and the essential characteristics of the concession agreement, including its purpose and nature. Granting authorities may also require the production of documents from the bidders in support of their applications (i.e., the presentation of sufficient professional and financial guarantees to ensure the continuity of the public service).

In both cases, the publication notice must specify the deadline for applications.

## **ii Requests for proposals and unsolicited proposals**

For both partnership contracts and concession agreements, tendering documents are communicated to applicants shortlisted on the basis of their professional and financial capabilities.<sup>19</sup>

Regarding concession agreements, the grantor must deliver reference documents to the applicant that define the quantitative and qualitative characteristics of the required benefits and, if applicable, the service pricing conditions applicable to the end user.

Regarding partnership contracts, in a competitive dialogue, the grantor has to define the detailed needs and objectives that the project has to meet in a functional programme that is transmitted to the applicants selected for the dialogue.

The possibility of an unsolicited proposal is contemplated neither for concession agreements nor for partnership contracts under the PPP Code.

## **iii Evaluation and grant**

For partnership contracts, a dialogue is conducted with each candidate to define solutions on the basis of the functional programme. The dialogue typically involves two or three phases, which are normally carried out over a period of nine to 12 months.

At the end of the dialogue period, the procuring authority invites the candidates to submit a tender based on the considered solutions. After analysis of the tenders, a partnership contract is awarded to the candidate with the most economically advantageous tender in accordance with the criteria set out in the contract notice or in the tender procedure. The awarding criteria must include the overall cost of the tender and performance objectives defined according to the purpose of the contract.<sup>20</sup> As soon as the preferred bidder is selected, the contracting authority must inform the unsuccessful candidates that their tender was rejected. A standstill period of at least 16 days is required between the date of notification of the decision and the date of execution of the contract<sup>21</sup> to allow for any eliminated candidate to initiate a summary proceedings challenge on grounds of a breach of the relevant procurement rules.<sup>22</sup>

For sole partnership contracts to be entered into by the state or entities linked to the state, the FIN INFRA must assess the impact on public finances and the fiscal sustainability of such agreement before its execution.

For all partnership contracts, once they have been signed, the procuring authority is required to send an executed copy of the partnership contract to the FIN INFRA.

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19 Article L 3123-18 of the PPP Code.

20 Article R 2152-8 of the PPP Code.

21 The duration is either 11 days (when the decision has been electronically transmitted to the rejected bidders) or 16 days.

22 Article L 551-1 of the Administrative Justice Code.

At the end of the awarding procedure, a notification must be sent within 30 days to the European Union Official Journal.

Regarding concession agreements, before the negotiation phase, the grantor selects the potential bidders based on their capacities and abilities in accordance with the criteria set out in the publication notice.<sup>23</sup> Once they have been selected, applicants have to submit tenders that are freely negotiated with the contracting authority. At the end of these negotiations a concessionaire is chosen and the applicants who have had their offers rejected are notified thereof. A similar standstill period, however, must be respected.<sup>24</sup>

## V THE CONTRACT

### i Payment

Concession agreements and partnership contracts can be differentiated according to their payment terms.

Under a concession agreement, the operating risk is transferred to the concessionaire and this transfer necessarily implies a real exposure to the market's fluctuations. As such, the compensation of the concessionaire is linked to the results of such operation. Therefore, the concessionaire's compensation mainly arises from service users.

However, this requirement does not prevent the payment of subsidies by the procuring authority. Given the requirements that could be imposed by the concession agreement, maintaining the financial viability and economic balance of the concession agreement is necessary so that the concessionaire does not apply very high rates to service users. For example, significant financial contributions are paid in concession projects related to railway infrastructure (high-speed railway) or motorways. Local authorities usually subsidise public transport or school catering concessions.

Apart from the revenue collected from service users and subsidies granted by public authorities, the concessionaire may also earn additional revenues (e.g., proceeds from side activities such as advertising and fines).

Unlike concession agreements, partnership contracts are characterised by a regular payment from the grantor to the private partner throughout the term of the contract. This remuneration is determined for the services provided by the private partner (works, intangible investments, supplies and services) and is divided into several parts. One part represents the compensation of the partner for the supply of equipment and the cover costs for servicing the loans contracted to carry out the investment, financing costs, taxes and fees that the partner pays on its investments. The compensation also takes into account the services provided by the private partner. Finally, the compensation of the partner must cover the maintenance costs and expenses for major maintenance and the renewal of certain infrastructure.

The partnership contract must define the terms of the calculation and disbursement of the payment to be made by the grantor. Such payment may be monthly, quarterly or half-yearly.

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23 Articles R 3123-11 and R 3123-12 of the PPP Code.

24 Article R 3125-2 of the PPP Code.



Under partnership contracts, the compensation is not necessarily fixed as it can take into account:

- a* the completion of performance objectives: the compensation of the private partner may depend on performance targets set in the partnership contract. Premiums or bonuses may be paid (e.g., if the works are completed before the date specified in the contract). Likewise, penalties (e.g., in the case of a delay in completion) may reduce the amount of the rent to be paid by the grantor; and
- b* the collection of ancillary revenues:<sup>25</sup> the private partner may develop structures and equipment to benefit from complementary incomes.

Should a partnership contract include the transfer of the management of a public service, the contractor could receive direct payments from service users on behalf of the public authority responsible for this public service. As such, the cash flows of each of the parties have to be expressly distinguished to avoid any confusion with the legal framework applicable to concessions.

## **ii State guarantees**

There are no state guarantees *per se* issued for PPPs in France.<sup>26</sup>

Unlike the state, local authorities may guarantee loans subscribed by the project company under a concession agreement or a partnership contract.

Moreover, the contracting authority (including the state) may enter into direct agreements with the private party and its lenders to cover specific issues (cancellation or nullity of the concession agreement or the partnership contract) and preserve the lenders' interests.

## **iii Distribution of risk**

PPPs rely on a clear allocation of the risks between the public and private entities. This allocation of risks is negotiated by the parties and is usually the object of a risk matrix. Except for the risk of use of the works, the risk matrix is fairly similar for concession agreements and partnership contracts.<sup>27</sup>

Risks relating to the performance of the contract (e.g., delays in the completion and delivery of the works, archaeological discoveries and design risk) are generally transferred to the private entity.

In France, particular attention is given to public authority powers (i.e., powers to unilaterally amend or terminate the contract on public interest grounds) as the contract provisions may define the financial consequences of the use of public authority powers by the grantor.

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25 The collection of ancillary revenues serves as a financial incentive for the partner, but also for the public party. Indeed, the rent paid by the public party may be reduced depending on ancillary revenues collected by the partner.

26 However, in early 2009, the state established a guarantee system for priority PPP projects in response to the financial crisis, which was affecting a number of very large PPPs.

27 Under concession agreements, the risk of the works being used by the end user is borne by the concessionaire.

#### iv Adjustment and revision

Being long-term agreements, PPPs often include specific clauses for the review of contractual terms, such as tariff-variation clauses, indexation clauses<sup>28</sup> and meeting clauses.

Amendments can also be entered into, but only if the overall structure of the contract is not materially altered. Should the grantor be a public authority, the PPP contract can, as a principle, be unilaterally modified by it. The PPP Code establishes such possibility for the public authority to unilaterally amend the contract for reasons of general interest. However, the power of amendment is regulated so that the modification cannot result in a disruption of the overall structure of the contract. Embodying the protection offered by administrative case law, the PPP Code protects the co-contracting party of the administration: the economic balance of the contract must be maintained, and the private co-contracting party must be adequately compensated for the damage suffered.<sup>29</sup>

Similarly, administrative case law regarding hardship<sup>30</sup> has been codified in the PPP Code and is applicable to both concession agreements and partnership contracts. Thus, the private party is entitled to an indemnity to be paid by the grantor when an unforeseen event beyond the control of parties temporarily disrupts the balance of the contract.<sup>31</sup>

The legal framework applicable to both partnership contracts and concession agreements strictly regulates their amendments by stating six limitative alternative cases under which modifications are acceptable.<sup>32</sup>

#### v Ownership of underlying assets

The legal regime applicable to concession agreements where the grantor is a public authority is organised around a classification distinguishing three types of assets:<sup>33</sup>

- a assets of compulsory reversion that must revert to the public authority automatically once the contract ends. Because they are crucial to the provision of the public service, these assets are considered, when the contract does not address this issue,<sup>34</sup> as the property of the public authority *ab initio*, that is to say, from the moment the concessionaire acquires an asset or completes specific works. Assets of compulsory reversion must necessarily return free of charge to the public authority at the end of the contract;
- b assets of optional reversion, which are useful to the provision of the public service but are not necessary to ensure its continuity. The concessionaire is the owner of such assets

28 These clauses must comply with Articles L 112-1 to L 112-3 of the Monetary and Financial Code that prohibit, with certain exceptions, indices based on overall inflation and requires the use of indices related to the obligations whose price is indexed.

29 Article L 6 of the PPP Code.

30 Supreme Administrative Court, 9 December 1932, No. 89655.

31 Article L 6 of the PPP Code.

32 Articles L 2194-1 and L 3135-1 of the PPP Code.

33 Article L 3132-4 of the PPP Code.

34 The contract may assign ownership of the works to the concessionaire for the duration of the contract, which, although necessary for the operation of public service, are not established as the property of a grantor; or rights on such property (Supreme Administrative Court, 21 December 2012, Commune of Douai, No. 342788). At the end of the contract, if assets of compulsory reversion are not fully amortised, the co-contracting party is entitled to a payment equal to the net book value shown on the balance sheet if the depreciation period of the assets involved is less than or equal to the duration of the contract, or the net book value resulting from the depreciation of these assets over the term of the contract when the term of the agreement is less than the normal depreciation period of the assets.

for the duration of the concession agreement, and they only become the property of the public authority if the public authority exercises its recovery right at the end of the concession agreement. The terms of payment of such assets are specified in the contract; and

- c assets that belong to the concessionaire. They are not subject to being returned to or eventually recovered by the public authority as they do not aim to ensure the continuity of a public service.

Regarding partnership contracts, the private partner is the owner of the assets. The private partner sets up a financing that covers the acquisition of assets, the cost of the works and the cost of maintenance and renewal. Consequently, by paying rents to the private partner, the contracting authority pays for the acquisition of proprietary interests in certain assets. At the end of the partnership contract the partner transfers the assets to the contracting authority.

Assets that are not integrated in the financing base (i.e., not acquired by the grantor through the rent) can remain the property of the private partner. However, they may be subject to a contractual provision providing for their transfer against payment to the public authority at the end of the contract.

#### **vi Early termination**

The provisions for early termination are the same for partnership contracts and concession agreements. Specific legal frameworks exist for several types of termination, the main ones being as follows.

##### ***Termination on the grounds of general interest***

Should the grantor be a public entity, it cannot waive its unilateral right to terminate a public law contract on the grounds of general interest. The quantum of the indemnity owed to the private entity is the highest of all termination cases.

##### ***Termination for a public authority's contractual breach***

Should the grantor be a public entity, termination for contractual breach by the grantor cannot be a contractual ground under which the concessionaire may require the termination of a concession agreement.

To terminate a concession agreement on the basis of a contractual breach by the grantor, the concessionaire must request such termination before the relevant administrative jurisdiction. The concessionaire would then be entitled to be indemnified in accordance with the principles established by administrative case law, namely to be indemnified in respect of losses suffered, as well as in respect of the loss of profits. Recent case law has confirmed the possibility of including in a contract not related to the performance of the public service a provision allowing the concessionaire to terminate the contract for a contractual breach by the public authority.<sup>35</sup> Consequently, certain partnership contracts not related to the performance of the public service could potentially include such contractual provision.

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35 Supreme Administrative Court, 8 October 2014, No. 370644. It must be noted that the case law did not concern a concession agreement or a partnership contract, but there is a reference to an administrative contract; and the termination is not automatic. Indeed, the public authority must have the possibility to contest the termination.

### ***Termination for force majeure***

If a *force majeure* event or an unforeseen event occurs, the contract may be terminated. The contract usually provides that the private entity will be indemnified on the basis of the useful expenses theory developed by the Supreme Administrative Court.<sup>36</sup> As it is a jurisprudential theory it is still difficult to determine which costs are deemed to be useful expenses and consequently are to be indemnified. However, financial expenses should be indemnified.<sup>37</sup>

### ***Termination for a private contracting party's contractual breach***

The grantor may also terminate the contract for breach by the private contracting party, as long as such breach is sufficiently severe.<sup>38</sup> Such power to terminate the contract exists even when no contractual provisions address it.

When the contract is so terminated, the private contracting party is not entitled to any compensation.<sup>39</sup>

In addition, the grantor can decide to terminate the contract at the expense and risk of the private contracting party, meaning that the latter will have to bear the additional costs related to the new tendering procedure that the grantor will have to launch to find a new contracting party.

However, doing so requires satisfying two conditions:

- a* the new contract cannot include any new obligations compared to the terminated contract; and
- b* the initial private contracting party must be notified of the new tendering procedure and has a right to monitor its implementation as well as the execution of the new contract to protect its own interests.<sup>40</sup>

### ***Indemnification***

One of the major points of the PPP Code is the enshrinement of the principle of indemnification of financial expenses incurred under the partnership contract or the concession agreement in the case of judicial cancellation following a third-party challenge.

In this situation, private entities can seek indemnification for all expenses incurred in accordance with the concession agreement or the partnership contract, which may include the financial expenses incurred to ensure the performance of the contract, to the extent that the said expenses have been useful to the grantor.<sup>41</sup>

However, the indemnification of these financial expenses in particular can only apply when a schedule to the contract specifies the main characteristics of financing to be set up for the purposes of the contract performance.

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36 Supreme Administrative Court, 19 April 1974, No. 82518.

37 The Supreme Administrative Court has recently held that financial expenses can be considered as useful expenses (Supreme Administrative Court, 7 December 2012, No. 351752). However, it must be specified that in this case, the concession agreement was not terminated on the grounds of *force majeure*.

38 Articles L 2195-3 and L 3136-3 of the PPP Code.

39 Supreme Administrative Court, 20 January 1988, No. 56503; Supreme Administrative Court, 12 November 2015, No. 387660.

40 Supreme Administrative Court, 10 June 1932, *Sieur Bigot*, Rec. p. 572.

41 Articles L 2235-1 and L 3136-7 of the PPP Code.

Finally, the PPP Code provides that, if an indemnification clause is provided under the partnership contract or the concession agreement, then it is deemed separable from the rest of the agreements.

From a project finance perspective, the express reference to the theory of useful expenses should be reassuring for both sponsors and lenders.

The indemnification of useful financial expenses constitutes a major achievement for the lenders and all finance parties involved in a partnership or concession project because it covers the risk of third-party challenge, in particular, should a concession agreement or a partnership contract be held to be void as result of a challenge.

In any case of termination, it is preferable to anticipate at a contractual level the financial consequences and terms of payment of owed indemnities resulting from contract termination.

### **vii Dispute resolution**

As administrative contracts under French law, concession agreements and partnership contracts are traditionally subject to the jurisdiction of French administrative courts. Parties are in principle forbidden from entering into arbitration agreements under Article 2060 of the Civil Code, except for international matters.

However, the PPP Code has brought some clarifications in this regard:

- a* in both concession agreements and partnership contracts entered into between private parties only, the parties can submit their dispute to arbitration;<sup>42</sup> and
- b* in addition, public and private parties to a partnership contract (but not to a concession agreement<sup>43</sup>) are expressly allowed to submit their dispute to arbitration, provided that the governing law is French law.<sup>44</sup>

## **VI FINANCE**

In France, PPPs are usually financed under a project finance scheme. The key feature of project financing is that it is an off-balance sheet financing for the sponsors.

Project finance generally involves high debt-to-equity ratios depending on the particular project and market. It refers to a limited recourse (or non-recourse) financing structure that does not impose any obligation on the project sponsors to guarantee the repayment of the project debt, should the project revenues not be sufficient to cover the total debt service. Shareholders of the project company are generally only liable up to the extent of their shareholdings.

In respect of the partnership contract, the procuring authority must be informed of any change in the project company shareholding. The partnership contract must contain provisions regarding the procuring of authority information and, as applicable, the proceeds sharing terms in the case of the sale of the project company shares.

The borrowing entity is a project company, namely a special purpose vehicle (with no previous business or record) that will finance, design, build, operate and maintain the project. In France, project companies are often incorporated as limited liability companies or partnerships.

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42 Articles L 2197-7 and L 3137-5 of the PPP Code.

43 Article L 3137-4 of the PPP Code.

44 Article L 2236-1 of the PPP Code.

The repayment of the project loans by the project company relies on the future cash flow projected to be generated from the operation of the project (primarily allocated to operating costs and then to debt service).

One of the main concerns of the lenders is to analyse the bankability of the project, which depends on several factors. For instance, the project's cash flow capacity, the mitigation of the risks between all stakeholders, the project company's contractual documentation and the security package must all be examined to ensure the successful financing of a PPP in France.

Many sources of financing are available, including commercial lenders (banks, insurance companies, credit corporations, etc.), sponsors' equity, public bodies, international (multilateral) agencies, bilateral agencies and bondholders. These financiers might be based in France or abroad.

The PPP Code also contemplates the possibility for a procuring authority to contribute to the financing of the project.

State or local authorities or other public bodies, whether acting as the procuring authority or not, are now entitled to take a minority stake in the project company. In this case, the project company by-laws must specify the allocation of risk between the shareholders and the measures implemented to prevent any conflict of interest.<sup>45</sup>

The PPP Code provides that partnership contracts are eligible for subsidies or other financial contributions. The terms and the payment schedule of the subsidies and other financial contributions can be adapted to the duration of the contract.

In respect of financing adjustment, the procuring authority may provide that financing terms referred to in the final tender can be adjusted, provided that this adjustment does not affect the conditions of the bidding procedure by exempting the procuring authority of the obligation to comply with the principle of selecting the most economically advantageous tender or by allowing the prospective candidate to affect the economic balance of its tender.<sup>46</sup>

In a typical project finance transaction, the lenders provide different types of debt to the project. Senior lenders provide a debt with a right of payment senior to that of the subordinated lenders. Moreover, some lenders might provide a tranche of debt for a specific period of time and with a specific interest rate and an amortisation differing from the tranche provided by other lenders. A wide range of French law debt instruments are also available to issue subordinated, high-yield or convertible bonds.

As project finance is carried out on a limited (or non-recourse) basis, it is critical to secure the finance parties through a collateral security package, which also helps to enhance the bankability of the project and the creditworthiness of the project company in its capacity as borrower.

Under French law, a security interest is generally created in favour of the creditors of the secured obligation.

French law recognises the role of security agents. Pursuant to Article 2488-6 of the Civil Code, a security agent may be in charge of setting up, registering, managing and enforcing any security interest for the benefit of the secured creditors.<sup>47</sup> Indeed, security interests are

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45 Articles L 2213-4 to L 2213-7 of the PPP Code.

46 Article L 2222-1 of the PPP Code.

47 The legal regime applicable to the security agent has been modified by Ordinance No. 2017-748, dated 4 May 2017. However, please note that, according to most French practitioners, this modification establishes an incomplete legal regime and does not address many uncertainties.

granted in favour of each lender and not only for the benefit of the security agent, which means that each of the lenders might be entitled to act individually in enforcing its specific security interests rights (subject to any restrictions in the financial documentation). The security agent is thus appointed by the creditors and acts under a power of attorney granted by the lenders.

Commonly in PPP project finance transactions in France, security interests may be granted over a wide variety of the project's assets such as bank accounts, securities accounts, the project company's ongoing business (which includes lease rights, logo and corporate name, goodwill, commercial furniture, equipment and machinery used for the operation of the business, and certain intellectual property rights attached thereto), equipment, intellectual property rights, receivables (including future receivables, to the extent that they are sufficiently identified) and real estate.

In addition to the above-mentioned security interests, creditors may require the sponsors to provide personal guarantees, notably independent guarantees such as first-demand guarantees and standby letters of credit.

On 15 September 2021, the government issued the French Security Interests Ordinance,<sup>48</sup> reforming the French securities laws and entering into force on 1 January 2022. This was subsequently supplemented by the implementation texts. The main changes pertaining to project finance are the following:

- a* clarification and better efficiency of guarantees;
- b* harmonisation of publicity rules and formalities applicable to the different security interests;
- c* extension of the French guarantee grantor-protective regime to security interests guaranteeing obligations of third parties;
- d* clarification as to the receivable pledge regime;
- e* creation of an ordinary law assignment of receivables by way of security;
- f* creation of a regime for cash collaterals in the French Civil Code;
- g* facilitating the creation of security interests by electronic means (i.e., electronic signature); and
- h* amendments of the rules governing security interests within the framework of insolvency procedures.

At the closing date and before any subsequent disbursement of the loan, lenders will require that the borrower first comply with a set of conditions precedent. These conditions precedent are outlined to ensure that, among other things, prior to any disbursement of funds by the lenders, the project is or continues to be economically and technically feasible and viable, all required permits are and continue to be in place, the project contracts remain valid and enforceable, and the adequate security package guaranteeing the lenders' credit exposure is duly in place and enforceable.

## VII RECENT DECISIONS

In 2022, a few important rulings were issued by French judges regarding the French PPP legal framework.

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<sup>48</sup> Ordinance No. 2021-1192.

In a decision dated 28 March 2022,<sup>49</sup> the French Supreme Administrative Court stated that a co-contracting party's incomplete application at the stage of the bidding procedure does not necessarily mean that the concession agreement entered into between the said party and the contracting authority shall be terminated. However, in this case, the co-contracting party had not filled out a form certifying that it did not fall under any mandatory bidding exclusion (e.g., a conflict of interests). The French Supreme Administrative Court deemed this missing documentation as a sufficient ground for terminating the concession agreement.

In a decision dated 16 May 2022,<sup>50</sup> the French Supreme Administrative Court ruled that the administration rights of social network pages, as long as they are necessary for the functioning of the public service, must revert for free to the contracting authority upon the termination or expiry of the PPP contract.

In a decision dated 15 September 2022,<sup>51</sup> the French Supreme Administrative Court outlined the legal mechanisms allowing parties to keep implementing PPP contracts in the context of rising costs caused by the economic recovery following covid-19 and the Ukrainian conflict. It clarified the application of the theory of hardship to PPP contracts and, in particular, the possibility of inserting a price variation or hardship clause during the implementation of the contract, or the possibility of adapting a price clause that proves insufficient, subject to compliance with PPP regulation requirements.

## VIII OUTLOOK

In 2022, the PPP legal framework was impacted by the entry into force of several measures tied to environmental considerations, as well as the armed conflict between Ukraine and Russia.

However, the private sector and public authorities have quickly anticipated such events in order to avoid any major impacts.

Public authorities have also showed their renewed focus on the development of national PPP projects in certain sectors. It is expected that French and European political authorities will keep engaging in strong economic investment policies, namely to produce safe and low-carbon energy in France and Europe, that could translate into additional public subsidies to the benefit of several PPP projects.

In any event, 2023 will definitely involve critical developments regarding the legal and economic environment of PPP projects, which will have to keep adapting, in the context of the management of the effects of covid-19, to the new geopolitical and energy challenges.

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49 Supreme Administrative Court, 28 March 2022, Commune de Ramatuelle, No. 454341.

50 Supreme Administrative Court, 16 May 2022, Commune de Nîmes, No. 459904.

51 Supreme Administrative Court, 15 September 2022, No. 405540.



## ABOUT THE AUTHORS

### **FRANÇOIS-GUILHEM VAISSIER**

*White & Case*

François-Guilhem Vaissier is a partner in White & Case's Paris office's energy, infrastructure and project finance team. His practice mainly involves private sector participation and all aspects of the structuring, procurement and financing of energy, infrastructure and industrial projects.

An expert in public, construction and energy law, François-Guilhem Vaissier has managed the negotiation and drafting of project documentation relating to large transactions in France (railways, motorways, road tunnels, airport operations, co-generation plants, wind farms), Europe (underwater tunnels, water and wastewater concessions), Africa (hydro-power plants and aluminium smelter projects, coal-fired power plants, cement plants, motorway concessions, mining concessions, free-zone areas, oil production sharing agreements and privatisation of a national air carrier), Asia (first public-private partnership for a metro project in India) and the Middle East (airport BOT, real estate financing).

### **ALAIN CHAN HON**

*White & Case*

Alain is an associate in the project development and finance group of the Paris office, specialising in project and asset finance.

He previously worked in White & Case's Washington, DC office and recently completed a secondment to the headquarters of the International Finance Corporation (IFC) – World Bank Group in Washington, DC.

Alain advises lenders and sponsors in energy and infrastructure project financing in Europe, Africa and the Middle East (roads, railways, motorways, co-generation plants, hydropower plants, railways, mining, oil and gas).

He further developed significant experience on projects in francophone Africa involving foreign stakeholders (including Chinese stakeholders).

Before joining White & Case, Alain was trained in the Paris and Hong Kong offices of a magic circle law firm.

Alain also worked as a legal counsel for a leading European investment bank and a leading US investment bank.

## **SACHA RUFFIÉ**

*White & Case*

Sacha is an associate in the project development and finance group of the Paris office of White & Case.

Sacha represents a variety of clients (sponsors, builders, operators, lenders and governments) in the development of complex international projects, primarily in Africa and Europe, such as special economic zones, energy (hydroelectric, photovoltaic, wind and non-renewable), water, hydrocarbon, mining and highway infrastructures, among others.

Sacha negotiates and drafts all project contracts (PPP, concession, EPC, O&M and interface contracts, direct agreements) and provides advice on regulatory issues relating to public business law, construction law and international protection of foreign investments.

Sacha spent four months at the World Bank's International Centre for Settlement of Investment Disputes (ICSID) where he honed his skills in the field of international dispute resolution mechanisms applicable to foreign investments in various countries and industries.

## **LISA GEHIN**

*White & Case*

Lisa is an associate in the project development and finance department of White & Case's Paris office.

Lisa advises on public law, mainly on public contracts for infrastructure projects in France and abroad, both in terms of advice and litigation.

Before joining White & Case, Lisa worked for several law firms as well as for a world leader in road construction, a social security organisation and the Ministry of Europe and Foreign Affairs.

## **WHITE & CASE LLP**

19, Place Vendôme

75001 Paris

France

Tel: +33 1 55 04 58 19

Fax: +33 1 55 04 15 16

[fgvaissier@whitecase.com](mailto:fgvaissier@whitecase.com)

[alain.chanhon@whitecase.com](mailto:alain.chanhon@whitecase.com)

[sacha.ruffie@whitecase.com](mailto:sacha.ruffie@whitecase.com)

[lisa.gehin@whitecase.com](mailto:lisa.gehin@whitecase.com)

[www.whitecase.com](http://www.whitecase.com)

