The Public-Private Partnership Law Review

Second Edition

Editors
Bruno Werneck and Mário Saadi

Law Business Research

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This article was first published in The Public-Private Partnership Law Review – Edition 2
(published in March 2016 – editors Bruno Werneck and Mário Saadi)

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-909830-87-5

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

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EDITOR'S PREFACE

We are very pleased to present the second edition of *The Public-Private Partnership Law Review.* Notwithstanding the existence of articles in various law reviews on topics involving public-private partnerships (PPPs) and private finance initiatives (in areas such as projects and construction, real estate, mergers, transfers of concessionaires' corporate control, special purpose vehicles and government procurement, to name a few), we identified the need for a deeper understanding of the specifics of this topic in different countries. The first edition of the book was an initial effort to fulfil this need.

Brazil marked the 10th year of the publication of its first Public-Private Partnership Law (Federal Law No. 11,079/2004) in 2014. Our experience with this law is still developing, especially in comparison with other countries where discussions on PPP models and the need to attract private investment into large projects dates back to the 1980s and 1990s.

This is the case for countries such as the United Kingdom, the United States and Canada. PPPs have been used in the United States across a wide range of sectors in various forms for more than 30 years. From 1986–2012, approximately 700 PPP projects reached financial closure. The UK is widely known as one of the pioneers of PPP model; Margaret Thatcher's governments in the 1980s embarked on an extensive privatisation programme of publicly owned utilities, including telecoms, gas, electricity, water and waste, airports and railways. The Private Finance Initiative was launched in the UK in 1992 aiming to boost design–build–finance–operate projects. Canada has developed a sustained and robust market for the development of public infrastructure using the PPP model. Since the 1990s PPP procurement has significantly expanded to the extent that PPP projects are now procured in the federal, provincial and municipal levels of government across that country.

On the other hand, in developing countries with similarities with Brazil, PPP laws are more recent. Argentina was the first country in Latin America to enact a PPP Law (Decree No. 1299/2000, ratified by Law No. 25,414/2000). The PPP Law was designed to promote private investment in public infrastructure projects that could not be afforded exclusively by the state, especially in the areas of health, education,

justice, transportation, construction of airport facilities, highways and investments in local safety. In Mozambique, Law No. 15/2011 and Decree No. 16/2012 stipulated the Public-Private Partnerships (PPP) Law and other related PPP regulations, which establishes procedures for contracting, implementing and monitoring PPP projects. In Paraguay, a regulation establishing the PPP regime has recently been enacted (Law No. 5102) to promote public infrastructure and the expansion and improvement of goods and services provided by the state; this law has been in force since late 2013.

In view of the foregoing, we hope a comparative study covering practical aspects and different perspectives on public-private partnership issues will become an important tool for the strengthening of this model worldwide. We are certain this study will bring about a better dissemination of best practices implemented by private professionals and government authorities working on PPP projects around the globe.

With respect to Brazil, the experience evidenced abroad may lead to the strengthening of this model in the country. In this preface, we call your attention to one specific feature of the PPP law in Brazil – state guarantees. This feature permits payment obligations undertaken by the public party in PPP agreements be guaranteed by, among other mechanisms authorised by law: (1) a pledge of revenues; (2) creation or use of special funds; (3) purchase of guarantee from insurance companies that are not under public control; (4) guarantees granted by international organisations or financial institutions not controlled by any government authority; or (5) guarantees by guarantor funds or a state-owned company created especially for that purpose.

The state guarantee pursuant to PPP agreements is, without question, an important innovation in administrative agreements in Brazil; it assures payment obligations by the public partner and serves as a guarantee in the event of lawsuits and claims against the government. This tool is one of the main factors distinguishing the legal regimen of PPP agreements from ordinary administrative agreements or concessions, and is viewed as crucial for the success of PPPs, especially from the private investors' standpoint.

Nevertheless, the difficulty in implementing state guarantees on PPP projects has been one of the main issues in the execution of new PPP projects in the country. This point is made worse due to the history of government default in administrative contracts.

In other jurisdictions, however, state guarantees are not a rule. On the contrary, unlike PPP projects in developing countries, government solvency has not historically been a serious consideration. That is the case in countries such as Australia, Canada, France, Ireland, Japan, the United Kingdom and the United States.

We expect that the consolidation of PPPs and the strengthening of the government in Brazil may lead to a similar model, enabling private investments in areas where the country lacks them most.

In the first edition, our contributors were drawn from the most renowned firms working in the PPP field in their jurisdictions, including Argentina (M&M Bomchil), Australia (Allens), Belgium (Liedekerke), Canada (Fasken Martineau), China (Jun He Law Offices), France (White & Case), Ireland (Maples and Calder), Japan (Mori Hamada & Matsumoto), Mozambique (TPLA), Paraguay (Parquet & Asociados), Philippines (SyCip Salazar Hernandez & Gatmaitan), Turkey (Paksoy), the United Kingdom (Herbert Smith Freehills) and the United States (Kilpatrick Townsend &

Stockton LLP). We would like to thank all of them and our new contributors for their support in producing *The Public-Private Partnership Law Review* and in helping in the collective construction of a broad study on the main aspects of PPP projects.

We strongly believe that PPPs are an important tool for generating investments (and development) in infrastructure projects and creating efficiency not only in infrastructure, but also in the provision of public services, such as education and health, as well as public lighting services and prisons. PPPs are also an important means of combating corruption, which is common in the old and inefficient model of direct state procurement of projects.

We hope you enjoy this second edition of *The Public-Private Partnership Law Review* and we sincerely hope that this book will consolidate a comprehensive international guide to the anatomy of PPPs.

We also look forward to hearing your thoughts on this edition and particularly your comments and suggestions for improving future editions of this work.

Bruno Werneck and Mário Saadi
Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados
São Paulo
March 2016

Chapter 8

FRANCE

François-Guilhem Vaissier, Hugues Martin-Sisteron and Anna Seniuta[1]

I OVERVIEW

In France, public-private partnerships (PPPs) are implemented in many economic sectors (e.g., transport, health, justice, education, urban equipment, environment, energy efficiency, telecommunications and culture) for more than €100 billion of activity each year.

Despite a climate of ideological distrust, financial difficulties faced by some local authorities[2] and the decreasing number of executed agreements due to the weak economic climate, a closer look at 2015 activity seems to indicate a possible renewal of confidence in PPPs for the coming year.

Taking into consideration the many criticisms voiced against PPPs, the French PPPs legal framework has been reshaped through the transposition of the European directives pertaining to public procurements and concession agreements.

Such change, along with the renewed support of certain public entities following positive feedback on prior implementation,[3] could lead to an upturn of PPPs in France.

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1 François-Guilhem Vaissier is a partner and Hugues Martin-Sisteron and Anna Seniuta are associates at White & Case.

2 In 2015, the Court of Auditors published a report highlighting the main difficulties regarding the implementation of partnership contracts for local authorities. This report requests more transparency and a prior financial assessment in order to avoid the financial difficulties faced by local authorities.

3 During the international PPP meeting organised by the Club des PPP in Paris on 4 February 2016, several local authorities came to present the pros and the cons of the PPP implementation. It appears that the PPP implementation in past years had a satisfactory return in overall terms and allowed the development of many local projects.

In this chapter, we will focus on the two main forms of PPPs implemented in France: concession agreements (as regulated by Ordinance No. 2016-65 of 29 January 2016 and Decree No. 2016-86 dated 1 February 2016) and partnership contracts (as regulated by Ordinance No. 2004-559 of 17 June 2004).

II THE YEAR IN REVIEW

Even though few partnership contracts were executed in France in 2015, it should still be noted that some landmark projects were finalised that year in the education sphere: a 28-year partnership contract[4] for the financing, design, construction, and maintenance of a new facility for the Ecole Centrale Supelec near Paris and a 25-year partnership contract for the financing, design, construction, operation and maintenance of two University of Lorraine's buildings.[5]

With regards to concession agreements, one major agreement was executed in the transport sector: the A355 Strasbourg bypass motorway concession, consisting of approximately 24 kilometres, entered into between the state and a consortium formed by VINCI Concessions and SOC 44 on 2 February 2016.

Furthermore, works for one major PPP (the new French Ministry of Defence located in Paris whose costs reached approximately €4.2 billion)[6] and the new buildings were inaugurated in November 2015.

As previously stated, the main recent event was the transposition into French law of the 2014 European directives pertaining to public procurement contracts and concession agreements. This transposition aims to clarify and simplify the complex legal framework applicable to the two types of PPP contracts (partnership contracts and concession agreements) as several categories of contracts existing in the French legal framework.

Firstly, regarding partnership contracts, Ordinance No. 2015-899 dated 23 July 2015 (the Partnership Contract Ordinance) transposed the 2014/24/EU and 2014/25/EU public procurement directives.[7] The Partnership Contract Ordinance provides for a new legal framework for the procurement contracts and qualifies the partnership contract as a specific type of public procurement contract, renaming it *marché de partenariat* (instead of *contrat de partenariat*).

Under this new definition the Partnership Contract Ordinance aims to encompass, under a unique type of contract, all the other existing PPP contractual forms existing under French law that were similar to partnership contracts (e.g., administrative long lease or administrative emphyteutic lease).

4 www.partnershipsbulletin.com/news/view/86417.

5 www.partnershipsbulletin.com/projects/view/8875.

6 www.wsws.org/en/articles/2015/11/12/hexa-n12.html.

7 Directives 2014/24/EU and 2014/25/EU related to public procurement, which were approved by the European Parliament on 15 January 2014 and adopted by the Council on 11 February 2014.

The new legal framework applicable to partnership contracts takes into account the French recent PPP practice. It secures and strengthens the partnership contracts' regime through the incorporation of French and European principles set out by case-law in recent years.

The transposition of the public procurement directives under French law has not entirely been achieved as the implementing decrees have not been enacted yet. We understand that the French legislator should implement these decrees soon as the finalisation of the transposition must be implemented no later than April 2016.

Since the transposition has not yet been finalised, the chapter describes provisions of Ordinance No. 2004-559 of 17 June 2004 (the 2004 Ordinance), which is currently the legal framework applicable to partnership contracts prior to the full transposition. However, as the final transposition of the directive is imminent, we also point out the innovations set out by the Partnership Contract Ordinance.

Secondly, regarding the 2014/23/EU directive pertaining to concession agreements, the complete transposition into the French legal framework occurred through Ordinance No. 2016-65 of 29 January 2016 (the Concession Agreement Ordinance) and the implementing Decree No. 2016-86 dated 1 February 2016 (the Concession Agreement Decree).[8]

While preserving certain specificities of French law, the Concession Agreement Ordinance and the Concession Agreement Decree aim to simplify, clarify and unify the existing legal framework governing the awarding and implementation of concession agreements in accordance with recent French and European case law.

This new single legal framework applicable to concession agreements will enter into force on 1 April 2016 and replace the legal provisions currently applicable (in particular Law No. 93-122 dated 29 January 1993 applicable to public services concession agreements and Ordinance No. 2009-864 dated 15 July 2009 applicable to work concession agreements).

III GENERAL FRAMEWORK

i Types of PPPs

As stated above, there are two types of PPPs that are mainly used in France: (1) concession agreements, which serve to implement major infrastructure projects such as canals, motorways, water distribution systems and toll bridges; and (2) partnership contracts which can be compared to private finance initiative contracts.

Concession agreements[9] and partnership contracts[10] are both administrative contracts under French law. This distinction is important as the contractual relationship

8 Ordinance No. 2016-65 of 29 January 2016 about concession agreements.

9 For concession agreements this is stated under Article 3 of the Concession Agreement Ordinance.

10 For partnership contracts this is stated under Article 3 of the Partnership Contract Ordinance.

in an administrative contract is different from that in a private contract. Indeed, the parties are, *de facto*, unequal insofar as the public person benefits from public authority powers.

As stated in the Concession Agreement Ordinance, 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 (1) a risk linked to the operation of such works or such service must be transferred to the economic entity in exchange for the right to operate the said works or service, (2) a fee in favour of the entity can be added to such operation right and (3) the risk transfer to the economic entity necessarily implies a real exposure to the market's fluctuation.

The 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.

The Partnership Contract Ordinance also clarifies that dismantling and destruction works as well as the management of a public service can also be transferred to the private party under a partnership contract.

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

ii The authorities

The Concession Agreement Ordinance provides that, in addition to public authorities (the French 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 in order to jointly perform certain activities and public undertakings acting as network operators) will be allowed to grant concession agreements.

The 2004 Ordinance is also flexible regarding the grantor that may enter into a partnership contract. The state and its public institutions, local authorities and local public institutions as well as public health facilities, social security bodies and some public or private entities pursuing a public-interest mission and mainly financed by public funds[11] (i.e., public–private joint ventures and state-owned public industrial and commercial institutions) may all enter into partnership contracts.

For partnership contracts executed by the state, the ministries that are involved will depend on the scope of the particular contract. For partnership contracts, approval by the Minister of the Economy and the Budget is additionally required before signature.[12]

11 As mentioned in Article 19 of the 2004 Ordinance.

12 See Article 1-II of Decree No. 2012-1093 dated 27 September 2012. A partnership contract may be signed by the state or a state public institution having a public accountant after

The Partnership Contract Ordinance provides for an extended list of potential procuring authorities. Indeed, the granting authorities will be the same as those described in the Concession Agreement Ordinance.[13] As such, private entities could also enter into a partnership contract.

Nevertheless, central administrations, public health facilities and medical cooperation public structures which used to be grantors before the European Directive, will no longer be able to enter into partnership contracts.[14]

Another important actor in the PPP sector in France is the PPP Support Service (MaPPP). The MaPPP is a dedicated unit within the Ministry of the Economy that assists grantors in the implementation of partnership contracts.[15] The MaPPP is primarily responsible for the validation of the preliminary evaluations prepared by grantors before launching a tender. The MaPPP 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.

According to the Partnership Contract Ordinance, the MaPPP will still be a major actor given that it will also have to issue an opinion about the financial sustainability of each partnership contract.[16] This new requirement should be 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 are different for the use of partnership contracts and concession agreements.

The Concession Agreement Ordinance provides that concession agreements must include provisions pertaining to the duration of the contract and tariffs applicable to service users. The Concession Agreement Ordinance also provides that concession agreements can include provisions pertaining to sustainable development and social objectives.

Moreover, to optimise cost monitoring, the Concession Agreement Ordinance 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., type of investments, tariffs).

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approval by the Minister of the Economy and the Budget. Such approval will be presumed if no reply is given within one month from the transmission of the contract. For local authorities, the principle of their free administration exempts them from any requirement for state approval. Thus such authorisation by the Minister of the Economy and the Budget is not needed.

13 Article 10 of the Partnership Contract Ordinance and Article 9 of the Concession Agreement Ordinance.

14 Article 71 of the Partnership Contract Ordinance.

15 The MaPPP was created by Ordinance No. 2004-1119 dated 19 October 2004.

16 Article 76 of the Partnership Contract Ordinance.

Contrary to concession agreements, the use of partnership contracts is strictly regulated. The project has to be related to the construction or conversion, upkeep, maintenance, operation or management of work, equipment or intangible assets necessary for public service. Moreover, the concerned projects have to be comprehensive in nature. As partnership contracts are specific contracts not governed by the Public Procurement Code, they may be entered into only if the grantor demonstrates an element of complexity, emergency or economic efficiency. First, a preliminary evaluation has to be made to demonstrate one of these criteria. A report must set out a general presentation of the project, the objectives of the procuring authority, an analysis of the costs with and without the partnership contract and the consequential budgetary allocation. State procuring authorities (e.g., ministries and public institutions) are obliged to submit their preliminary evaluation to the MaPPP for its validation. Currently, local authorities may choose whether or not to submit such an application. However, following various financial and implementation difficulties encountered by local authorities, as of 1 January 2016, they will also be obliged to submit their preliminary evaluations to the MaPPP for its validation.

The Partnership Contract Ordinance aims to simplify this procedure and answer criticisms raised during the last decade regarding the implementation of partnership contracts. After 1 April 2016, the grantor will only be entitled to enter into a partnership contract if the economic efficiency criterion is fulfilled. Moreover, prior assessments about the different ways to perform the project and a financial sustainability study will have to be issued by the grantor.

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 AWARDING PROCEDURE

Bidding and awarding procedures for partnership contracts are closely regulated.

Regarding concession agreements, the Concession Agreement Ordinance and the Concession Agreement Decree regulate the bidding and award procedures for concessions of a value greater than or equal to €5,225,000. The new legal framework applicable for concessions will remain flexible with the aim to ensure effective and non-discriminatory access for all potential bidders (including small and medium-sized companies). Nevertheless, in practice, most of those minimal requirements already existed in French case law.

As regards partnership contracts, the 2004 Ordinance provides that three granting procedures can be implemented:

a a competitive dialogue,[17] 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[18] for small projects below a certain amount defined by decree;[19] or

c a restricted call for tenders.[20]

As competitive dialogue is the most common procedure for the awarding of partnership contracts, we will focus on it.

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.[21]

For partnership contracts of which the value exceeds €135,000. The state and its public institutions are required to publish a notice of public tender in the Official Journal of the European Union and in the French Official Public Procurement Bulletin.[22] For local authorities, the applicable threshold is €209,000.

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

17 Article 7 I of the 2004 Ordinance. 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.

18 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.

19 Article 5 of Decree No. 2009-243 of 2 March 2009.

20 Article 4 of Decree No. 2009-243 of 2 March 2009 and Article 7 II of the 2004 Ordinance.

21 For now this requirement is outlined in 2014/23/EU, 2014/24/EU and 2014/25/EU Directives.

22 Article 1 of Decree No. 2009-243 of 2 March 2009 as modified by Decree No. 2015-1904 of 30 December 2015.

ii Requests for proposals and unsolicited proposals

For both partnership contracts and concession agreements, tendering documents will be communicated to shortlisted applicants.[23]

Regarding concession agreements, the grantor shall deliver a programme document to the applicant that defines 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 will have to meet in a functional programme that will be transmitted to the applicants selected for the dialogue.

Moreover, one of the partnership contract specificities is that a private person can directly suggest to grantors projects to be developed under a partnership contract scheme.[24] However, being at the origin of the proposal does not guarantee the awarding of the partnership contract. Indeed, the grantor will make a preliminary evaluation and then selects the private partner according to the ordinary advertising and competition rules set out for partnership contracts (see subsection iii, *infra*). The possibility of an unsolicited proposal is not contemplated for the concession agreements.

iii Evaluation and award

For partnership contracts, a dialogue will be 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 will invite the candidates to submit a tender based on the considered solutions. After analysis of the tenders, a partnership contract will be 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[25] and performance objectives defined according to the purpose of the contract. As soon as the preferred bidder is selected, the contracting authority shall 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[26] to allow for any eliminated candidate to initiate a summary proceedings challenge on

23 In concession agreements, the public authority lists applicants admitted to tender after consideration of their professional and financial guarantees and their ability to ensure the continuity of public service and equality of service users.

24 Article 10 of the 2004 Ordinance and Article L. 1414-11 of the General Code for Local Authorities.

25 The 2004 Ordinance specified that overall cost of the tender is intended to mean the sum, in current value, generated by the design, financing, construction or conversion, upkeep, maintenance, operation or management of works, equipment and intangible assets, and the provision of services specified for the term of the contract.

26 The duration is either 11 or 16 days depending on certain criteria (i.e., in case of electronic transmission of the decision to the rejected bidders).

grounds of a breach of the relevant procurement rules.[27] It should be stressed that for the partnership contracts to be entered into after 1 April 2016, an awarding notice will have to be enacted and published according to the Partnership Contract Ordinance.[28]

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

For all partnership contracts, once the signature occurred, the procuring authority is required to send an executed copy of the partnership contract to the MaPPP.

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.[29] Once, they have been selected, applicants have to submit tenders that will be freely negotiated with the contracting authority. At the end of these negotiations a concessionaire will be chosen and the applicants who have had their offers rejected will be notified. A standstill period shall, however, be respected.[30]

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 economical 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 the payment of rents by the grantor to the private partner throughout the term of the

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

28 Article 56 of the Partnership Contract Ordinance.

29 Article 22 of the Concession Agreement Decree.

30 Article 1-1 of the Decree No. 93-471 of 24 March 1993 and in 2016, Article 29 of the Decree No. 2016-86 of 1 February 2016.

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 infrastructures.

The partnership contract shall define the terms of the rents calculation and disbursement of the payment, which may be monthly, quarterly or half-yearly.

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 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[31] – the 2004 Ordinance allows the private partner to develop structures and equipment in order to benefit from complementary incomes.

The Partnership Contract Ordinance specifies that should a partnership contract include the transfer of a public service management, 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 parties will have to be expressly distinguished in order 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.

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. The MaPPP examined four projects worth a total of over €13 billion, but only one project – under a concession agreement scheme – was selected to benefit from the guarantee: the high-speed railway, Sud Europe Atlantique, which was the biggest rail PPP ever launched in Europe (financing of €7.8 billion). This concession agreement was granted by Réseau Ferré de France to a consortium led by VINCI and the state guaranteed a €1.06 billion senior secured debt to the lenders.

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

31 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 body may be reduced depending on ancillary revenues collected by the partner.

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 the 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.[32]

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 general interest grounds) as the contract provisions may define the financial consequences of the use of public authority powers by the grantor.

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[33] and meeting clauses.

Amendments can also be entered into, but only if the overall structure of the contract is not materially altered.[34] Should the grantor be a public authority, the PPP contract can be unilaterally modified by it. As stated in subsection iii, *supra*, French administrative case law establishes the 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. Administrative case law protects the co-contracting party of the administration. In fact, the economic balance of the contract must be maintained and the private co-contractor must be adequately compensated for the damages suffered.

Regarding concession agreement, all duration which is more than five years will be determined in light of the period needed to amortise the investments required.

In addition, the Concession Agreement Decree clarifies the legal framework applicable to concession agreements' amendments by stating six alternative cases allowing a valid modification of the concession agreement.

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

33 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.

34 According to Article 11 of the 2004 Ordinance, the conditions under which amendments to the partnership contract can be made shall be provided directly in the contract.

The provisions of the Concession Agreement Decree pertaining to the modification of the concession agreements will apply even for concession agreements entered into before 1 April 2016. This is a real improvement as the modification of a concession agreement used to be very strictly regulated, which had led to a lack of flexibility in the implementation of concession agreements.

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:

a the assets of compulsory reversion that shall 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,[35] 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 the 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 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 the 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 public service.

Regarding partnership contracts, the private partner is the owner of the assets. The private partner sets up a financing that covers (1) the acquisition of assets; (2) the cost of the works; and (3) 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.

35 The contract may assign: (1) 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 (2) rights on such property (Supreme Administrative Court, 21 December 2012, Commune de 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.

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 terminations are the same for partnership contracts and concession agreements.

Specific legal frameworks exist for two types of termination: termination on the grounds of general interest and termination for contractual breach by the contracting authority.

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 contractual breach by the public authority

Should the grantor be a public entity, the 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 confirmed the possibility to include in a contract, not related to the performance of the public service, a provision allowing the partner to terminate the contract for a contractual breach by the public authority.[36] Consequently, certain partnership contracts not related to the performance of the public service could potentially include such contractual provision.

Termination for failure to fulfil the obligations as determined by the Court of Justice of the European Union

Both the Concession Agreement Ordinance and the Partnership Contract Ordinance provide that the agreement has to be terminated, in case of major breach, if the Court of Justice of the European Union states that the grantor has awarded the contract without complying with the obligations imposed by the European Directive (as provided under Article 258 of the Treaty on the Functioning of the European Union).

36 Supreme Administrative Court, 8 October 2014, Société Grenke Location, No. 370644. It must be noted that: (1) the case law did not concern a concession agreement or a partnership contract but there is a reference to administrative contract; and (2) the termination is not automatic. Indeed the public authority shall have the possibility to contest the termination.

Except for these three types of termination that are regulated, the terms and conditions of other forms of termination can be freely negotiated by the parties.

If a force majeure event or an unforeseen event occurs, the contract may be terminated and the contract will usually provide that the private entity will be indemnified on the basis of the 'useful expenses' theory developed by the Supreme Administrative Court.[37] 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.[38]

One of the major points of both the Partnership Contract Ordinance[39] and the Concession Agreement Ordinance,[40] is the enshrinement of the principle of indemnification of financial expenses incurred under the partnership or the concession agreement in case of judicial cancellation following a third-party challenge.

Indeed, in case of cancellation of the contract, the 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.

In respect of the concession agreement, such financial expenses are defined broadly and include the costs for the concessionaire relating to the financing instruments and those arising from the early termination.

It shall be noted, however, that the indemnification of the useful expenses can only apply when a schedule of the concession agreement and the partnership contract specifies in respect of the concession agreement, the main characteristics of financing to be set up for the purposes of the contract performance, and in respect of the partnership contract, the provision that binds the contracting partner to the financial institutions.

Finally, both the Partnership Contract Ordinance and the Concession Agreement Ordinance provide that, if specified, in the agreements either partnership contract and concession agreement, the indemnification clause is deemed separable from the rest of the said agreements.

The provisions of the Concession Agreement Ordinance pertaining to the indemnification of the useful expenses are the only provisions that will enter into force on the day the Concession Agreement Ordinance is published in the Official French Gazette (i.e., 30 January 2016). Indeed, the others provisions of the Concession Agreement Ordinance and the Concession Agreement Decree will only enter into force on 1 April 2016.

37 Supreme Administrative Court, 19 April 1974, Société Entreprise Louis Segrette, No. 82518.

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

39 Article 89 of the Partnership Contract Ordinance.

40 Article 56 of the Concession Agreement Ordinance.

The Concession Agreement Ordinance clarifies the quantum of the financial indemnification applicable in case of cancellation or termination of a concession agreement by a judge following a third-party challenge.

As a consequence, the concessionaire may request to be indemnified for the expenses incurred under the concession agreement that have been useful to the grantor, including financing expenses and costs.

From a project finance perspective, this express reference to the theory of 'useful expenses' (*dépenses utiles*) should be reassuring for both sponsors and lenders.

Indeed 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.

The contract may also be terminated for breach by the private entity. The possibility to terminate the contract on this ground and its consequences must be provided for in the contract. In this case, the private entity cannot receive compensation for the damage resulting from the early termination of the contract.

In any case of termination, it is preferable to contractually provide the financial consequences and terms of payment of owed indemnities in the contract.

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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 Partnership Contract Ordinance provides that the procuring authority must be informed of any change in the project company shareholding. The partnership contract must contain provisions regarding the procuring authority information, and as applicable, the proceeds sharing terms in 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 liability companies or partnerships.

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.

Prohibited under the 2004 Ordinance, the Partnership Contract Ordinance now 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 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.[41]

The Partnership Contract Ordinance also provides that partnership contracts are eligible to 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. Such provision was already provided by the 2004 Ordinance.

In respect of financing adjustment, the Partnership Contract Ordinance also specifies that the procuring authority may provide that financing terms referred to in the final tender can be adjusted, provided that this adjustment may not affect the conditions of the biding procedure by exempting the procuring authority of the obligation to respect the principle of choice of the most economically advantageous tender or allowing the prospective candidate to affect the economic balance of its tender.[42]

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 others lenders. A wide range of French law debt instruments are also available to issue subordinated, high-yield or convertible bonds.

The standard types of project finance credit agreements may notably include:

a the term sheet – an initial agreement between the project company (in its capacity as future borrower) and the lenders outlining the key terms and conditions of the financing;

41 Article 80 of the Partnership Contract Ordinance.

42 Article 82 of the Partnership Contract Ordinance.

b senior facility agreements – agreements between the lenders and the project company setting out the rights and obligations of each party regarding the senior debt;

c a common terms agreement – an agreement entered into by the financing parties and the project company that defines the terms and conditions that are common to all the financing instruments and the relationship between the parties (for instance, definitions, events of default, order of drawdowns, project accounts, permitted investments, voting process for waivers and amendments, undertakings, covenants, representations and warranties, etc.). Such agreement ensures that all the finance parties have a common understanding of the key definitions and critical events;

d subordinated loan agreements – loan agreements whereby subordinated creditors agree not to be paid until the senior creditors have been repaid. These loans are usually provided by the project sponsors or by third-party investors such as investment funds;

e a shareholders' agreement – an agreement that sets forth the rights and liabilities of each project company shareholder especially with respect to capital contributions, transfers, conflicts of interest and restrictions on competition;

f an intercreditor agreement – an agreement between the project company and the lenders (senior lender, mezzanine lender, hedging counterparty, loan noteholders and intra-group lenders, etc.), which regulates the creditors' rights to receive payments (such as principal, interest and fees) notably in the event of default;

g hedging agreements – agreements that enable the project company to fix the interest rate on all or part of its debt or to limit its exposure to exchange rate risks;

h a direct agreement between the lenders and the project company under which the lenders will be entitled to take over the project (step in) regarding the key project agreements should the project company default under certain circumstances;

i sponsor support and third party guarantee – senior lenders will often require sponsors or third parties to put in place certain credit-enhancement measures (parent guarantee, letter of credit, comfort letter);

j public sector support – public sector support instruments may also be set up (e.g., direct funding support by way of public sector capital contributions);

k contingent support or guarantees by the public sector or other private sector participants involving specific risks which cannot otherwise be effectively controlled by the project company or other private sector participants (e.g., minimum traffic and revenue guarantees for a toll road); and

l EU loan guarantee – an example is the Loan Guarantee for Trans-European Transport Network Projects, which is a credit-enhancement instrument set up and developed jointly by the European Commission and the European Investment Bank, facilitating a larger participation of the private sector involvement in the financing of Trans-European Transport Network infrastructure.

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 creditor(s) of the secured obligation.

Although there is no concept of parallel debt clause, French law recognises the role of security agent. Pursuant to Article 2328-1 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. Indeed, security interests are 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.

The most common types of security interests used in PPP project finance transactions in France are:

a pledge over bank accounts (governed by Article 2355 et seq. of the Civil Code);

b a pledge over securities accounts (governed by the provisions of Article L 211-20 of the Monetary and Financial Code) involving a pledge over shares or other financial securities and a pledge over the bank account on which cash proceeds relating to such shares or financial securities are credited (e.g., dividend);

c a pledge over the project company's ongoing business (governed by Article L 142-1 et seq. of the Commercial Code) notably involving lease rights, logo and corporate name, goodwill, commercial furniture, equipment and machinery used for the operation of business, and certain intellectual property rights attached thereto;

d a pledge over equipment (governed by Article L 525-1 et seq. of the Commercial Code);

e a pledge over intellectual property rights (governed by Article 2355 et seq. of the Civil Code);

f a pledge over receivables – including future receivables – (governed by Article 2355 et seq. of the Civil Code);

g assignment by way of security over receivables (including contingent or future receivables if such receivables are sufficiently identified). Under French law, receivables are assigned by way of security which is a simplified form of assignment of receivables for security purpose. It transfers the ownership of a receivable to the relevant secured creditor. Such security interest, which is governed by Article L 313-23 et seq. of the Monetary and Financial Code is only available provided that: (1) the assignee is a credit institution licensed in France or otherwise licensed to carry out its activities in France through the European Passport; (2) the assigned receivables secure a credit granted by a credit institution (the assignee) to the assignor in connection with its business activities; and (3) the assigned receivables relate to business or professional activities;

h delegation of receivables (governed by Article 2355 et seq. of the Civil Code). A delegation is commonly used to take security over receivables under insurance policies. The debtor agrees to make payments directly to the secured creditor; and

i security interests (mortgage, lender's lien, antichresis) on real property (land, buildings, rights of way and easements). Such security interests must be entered into by way of notarised deed and registered to the relevant land registry.

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, including (for the first drawdown): organisation and existence of the project company, execution and delivery of facility agreement and related financing documents, security interests filings, availability of funds, related equity documents, sponsors supports documents, third-party support document, guarantees, enforceability of project contracts, permits, insurances policy endorsements and insurance report, real estate surveys and title insurance, financial statement of project company and other project participants, construction budget and construction drawdown schedule, revenue and expenses projections, engineering report, consultant reports, environmental review, legal opinions, no material adverse change, no defaults and no litigation.

VII RECENT DECISIONS

In 2015, only a few rulings affecting the legal framework for PPPs were issued by administrative judges.

Ruling on the validity of a partnership contract, administrative judges have ordered local authorities to terminate some contracts because they have not fulfilled the legal requirements, due notably to the absence of complexity of the project (which is a criterion required for the awarding of a partnership contract).

In a decision dated 29 April 2015,[43] the Supreme Administrative Court decided that a local authority cannot use a partnership contract to grant to the private entity a mission composed of a firm tranche relating to studies and several conditional tranches pertaining to the design, the building, the finance and the maintenance of a waste protecting plant. This decision clarifies that only an overall mission can be granted to the private partner under a partnership contract.

On 15 September 2015, the Bordeaux Administrative Court of Appeal ruled that technical complexity was justified for the construction of new offices for 800 public agents of the city of Bordeaux administration. Indeed, the project aimed to create a building with positive energy efficiency (i.e., producing more energy than is needed to function after a few years) and thus required highly technical skills. It should be noted that such decision is opposed to the previous trend as in 2014 several Administrative Courts of Appeal ruled that complexity of works was not justified and ordered local authorities to terminate partnership contracts considered illegal.

VIII OUTLOOK

The transposition of the European directives pertaining to concession agreements and public procurements substantially modifies the existing French PPP laws that included several regimes with strong specificities (i.e., administrative long-term leases, temporary occupation permits, partnership contracts and concession agreements).

43 Supreme Administrative Court, 29 April 2015, No. 386748.

The previous French PPP legal framework was rather complex in comparison with other European countries.

While preserving certain specificities of French law, the new provisions aim to simplify, clarify and unify the existing legal framework governing the award and implementation of concession and partnership agreements in accordance with recent French and European case law.

Nevertheless, only the complete transposition of the directives pertaining to public procurement, which should be published before April 2016, will allow to determine whether or not all anticipated benefits of the transposition are effectively implemented.

Moreover, to further increase the clarification of the legal system applicable to public law contracts, the French Economy Ministry – in charge of the transposition – decided to seize the opportunity provided by the 2014 European directives to simplify the French Public Procurement Code and to publish a new code encompassing all public law contracts (including partnership and concession agreements) in the next few months.

Without any doubt, 2016 will be a key year for PPPs in France.