
THE PUBLIC-PRIVATE PARTNERSHIP LAW REVIEW

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 1
(published in March 2015 – 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
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www.TheLawReviews.co.uk

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Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – gideon.roberton@lbresearch.com

ISBN 978-1-909830-33-2

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

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ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ALLENS

FASKEN MARTINEAU DUMOULIN LLP

HERBERT SMITH FREEHILLS LLP

JUN HE LAW OFFICES

KILPATRICK TOWNSEND & STOCKTON LLP

LIEDEKERKE

M & M BOMCHIL

MAPLES AND CALDER

MATTOS FILHO, VEIGA FILHO, MARREY JR E QUIROGA
ADVOGADOS

MORI HAMADA & MATSUMOTO

PAKSOY

PARQUET & ASOCIADOS

SYCIP SALAZAR HERNANDEZ & GATMAITAN

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EDITORS' PREFACE

We are very pleased to present this first edition of *The Public-Private Partnership Law Review*. Despite 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 but a few), there is a need for a deeper understanding of how different countries address specific matters on this topic. This book is an initial effort to fulfil this need.

In 2014, Brazil marked the 10th year since the publication of its Public-Private Partnership Law (Federal Law No. 11,079/2014). Our experience with this law is still very recent, 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 '90s.

In view of that, 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 the 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.

Our contributors have been drawn from the most renowned firms working in the PPP field in their jurisdictions and we would like to thank all of them for their support in producing this first edition of *The Public-Private Partnership Law Review*.

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

We hope you enjoy this first edition of *The Public-Private Partnership Law Review* and we sincerely expect that this book will become, in the coming years, 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 2015

Chapter 7

FRANCE

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

I OVERVIEW

Since 2004, more than €18 billion have been invested in French public-private partnerships (PPPs) in various economic sectors (e.g., transport, health, justice, education, urban equipment, environment, energy efficiency, telecommunications and culture).

Despite a certain climate of ideological distrust, financial difficulties faced by some local authorities² and the decrease in the number of executed agreements due to the weak economic climate, a closer look at activity in 2014 seems to indicate the possibility of a renewal of confidence in PPPs for the coming year.

In September 2014, the French Prime Minister stressed, for instance, that ‘in order to return to growth and thus employment, France must stimulate public and private investments in public works and construction’.³

In this chapter, we will focus on the two main forms of PPPs implemented in France: (1) concession agreements, notably subject to Law No. 93-122 of 29 January 1993 (the 1993 Law); and (2) partnership contracts, which are governed by Order No. 2004-559 of 17 June 2004 (the 2004 Order).

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

2 The Senate and the Court of Auditors published two reports highlighting the main difficulties regarding the implementation of partnership contracts.

3 During the inauguration of a viaduct in Dordogne on 1 September 2014, www.lemoniteur.fr/147-transport-et-infrastructures/article/actualite/25491116-manuel-valls-pour-une-reliance-des-partenariats-public-privé.

II THE YEAR IN REVIEW

Even if few partnership contracts were executed in France, it should still be noted that two landmark projects were finalised in 2014: a 25-year partnership contract for the financing, design, construction and maintenance of the Troissereux bypass near Paris⁴ and a 25-year partnership contract for the renovation of La Santé prison in Paris.⁵

With regard to concession agreements, several were executed in the transport sector. As an example, a 17-year concession agreement relating to a rolling motorway (the Autoroute ferroviaire Atlantique) was executed in April 2014 between the state and a subsidiary of the SNCF (the French national railway company) to link the city of Tarnos in the south-west of France to the city of Lille (1,050km).

Even if certain questions arose in 2014 about the level of tariffs applicable to motorway concessions, the state nevertheless initiated a tender procedure for the concession of the A45 motorway located in the Rhône-Alpes region (around 40km).⁶ The state has also relaunched the tender for the concession of the Strasbourg bypass on the A355 motorway, which was abandoned in 2012.⁷ In addition, the tender procedure for the A831 motorway concession, which was initiated in 2012 and put on hold, may also be relaunched in 2015.

Very rare decisions were also taken in 2014 as two PPPs were terminated after the completion of the relevant works. After months of uncertainty, the state decided to terminate the partnership contract relating to the Ecotaxe lorry tolling system in October 2014. In April 2014, the 30-year PPP contract relating to the CHSF hospital located in Evry was also terminated following numerous implementation difficulties.⁸

To respond to some criticisms relating to the use of PPPs for the implementation of public projects, a new form of PPP that strengthens the role of local authorities has been created. Law No. 2014-744 of 1 July 2014 created a new category of public-private joint ventures on the model of European institutionalised public-private partnerships (IPPPs). As a consequence, local authorities can now create – with a private partner selected through a transparent competitive tendering procedure – a public-private joint venture for a single transaction and a limited period.⁹ This new form of PPP should mainly be used by local authorities for construction projects, management of public services or implementation of general interest operations.

Finally, we note that the 2015 Budget Law provides that from 1 January 2015 the state will be empowered to enter into partnership contracts on behalf of some public entities (i.e., public health institutions and state agencies).¹⁰

4 www.partnershipsbulletin.com/news/view/73936#sthash.gDUVHee4.dpuf.

5 www.partnershipsbulletin.com/news/view/73782#sthash.pDdMDO1X.dpuf.

6 www.developpement-durable.gouv.fr/IMG/pdf/CP_-_A45_Saint_Etienne_Lyon_-_20-02-14.pdf.

7 www.partnershipsbulletin.com/news/view/76066#sthash.0Cd7zvvh.dpuf.

8 www.partnershipsbulletin.com/news/view/76322.

9 *Société d'économie mixte à opération unique*.

10 The 2015 Budget Law also specified that from 1 January 2016, local authorities wishing to conclude a partnership contract will have to submit their preliminary evaluation to the PPP Support Service (MaPPP).

III GENERAL FRAMEWORK

i Types of PPPs

As stated above, there are two types of PPPs that are mainly used in France: (1) concessions 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 PFI contracts.¹¹ However, by way of introduction, it is necessary to briefly describe all types of existing PPPs in France.

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

Concession agreements are a category of public service contracts, which are subject to the provisions of the 1993 Law. Under a concession agreement, a public authority (i.e., the state or local authorities) grants to a private person the right to finance, design, build, operate and maintain a project linked to the public service for a limited period of time. Within this framework, all or part of the public service will be provided by the private person at its own risk and its remuneration will arise, to a significant extent, from the commercial operation of the service.

In addition to concession agreements, an Order No. 2009-864 of 15 July 2009¹² created a new category of concession in France: the public works concession. Payment terms and risk transfers are the same as under concession agreements. However, the purpose of such contract is different as the public works concessionaire operates an infrastructure and does not directly operate a public service.¹³ Nevertheless, the infrastructure can also be linked to a public service and the public works concession designation will thus be decided on a case-by-case basis.

Apart from the concession agreements and before the introduction of the partnership contracts in the French legal system, public authorities could only use another form of contract: public procurement, governed by the restrictive provisions of the Public Procurement Code, which prohibits deferred payments and global tenders for construction and operation of the same infrastructure.

However, to allow private parties to pre-finance construction of public works, local authorities and the state were authorised to grant temporary occupancy permits conferring

11 These two contracts are both administrative contracts under French law. This distinction is important as the contractual relationship 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.

12 This new category of contract was created pursuant to European Directive 2004/18/EC of the European Parliament and of the Council dated 31 March 2004.

13 Indeed, these contracts are defined as 'administrative contracts whose purpose is to carry out building or civil engineering works by a concessionaire whose remuneration consists either in the right to exploit the works or in such right together with the payment of a price'.

property rights on works, buildings and immovable facilities for the performance by the contracting private party of a public-service mission or for carrying out a general-interest operation (e.g., administrative long lease¹⁴ or a temporary occupation permit).

Thus the creation of a new category of contract granting an overall role to a private partner (i.e., construction and operation of an infrastructure) and authorising deferred payments was eagerly anticipated. It was allowed through the 2004 Order, which created partnership contracts.

The partnership contract is an administrative contract under which a public entity 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, the construction or conversion, the 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 two main PPPs can be differentiated according to their payment terms: under a partnership contract, the public entity will pay rents to the private partner in exchange of the performance of the mission, while under a concession agreement the compensation of the concessionaire will mainly arise from the payments made by the users of the public service.

ii The authorities

The 1993 Law specifies that the public service delegation is a contract by which a public entity assigns the management of a public service for which it is responsible. As such, only the state, local authorities and public institutions responsible for managing a public service may enter into concession agreements.

The 2004 Order is more flexible regarding the contracting authorities 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 funds¹⁵ (i.e., public-private joint-ventures, and state-owned public industrial and commercial institutions) may all enter into partnership contracts.

For PPPs executed by the state, the ministries that are involved will depend on the scope of the particular contract. For partnership contracts, an approval by the Minister of the Economy and the Budget is additionally required before signature.¹⁶

14 Law No. 88-13 dated 5 January 1988.

15 As mentioned in Article 19 of the 2004 Order.

16 See Article 1-II of Decree No. 2012-1093 of 27 September 2012. A partnership contract may be signed by the state or a state public institution having a public accountant after 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 conduct of administration prevents them from any requirement for state approval. Thus such authorisation by the Minister of the Economy and the Budget is not needed.

Another important actor in the PPP sector in France is the PPP Support Service (MaPPP). The MaPPP is a dedicated unit of the Ministry of the Economy that assists public bodies in the implementation of partnership contracts.¹⁷ The MaPPP is primarily responsible for the validation of the preliminary evaluations prepared by procuring authorities before launching a tender. 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.

iii General requirements for PPP contracts

Requirements are different for the use of partnership contracts and 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 projects concerned have to be comprehensive in nature. As partnership contracts are specific contracts not ruled by the Public Procurement Code, they may be entered into only if the public authority 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 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 to submit such an application or not. 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.

Being a delegation of public services, a concession agreement can be entered into by a public authority if: (1) the contract relates to a public service;¹⁸ and (2) there exists an actual delegation (i.e., the operational risk must be borne by the concessionaire). In fact, the use of the concession agreements is not too restrained as the notion of a public service is broadly interpreted by French administrative judges.

Regarding the content of these two types of PPPs, a partnership contract must include several mandatory provisions such as the duration of the contract; the conditions for sharing risks between the public authority 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. In contrast, the only mandatory clauses

17 The MaPPP was created by Order No. 2004-1119 dated 19 October 2004.

18 The notion of public service is governed by administrative case law. In brief, the three cumulative criteria of a public service are (1) an activity of general interest; (2) the control by a public entity; and (3) holding prerogatives of a public authority. If the relevant service or project does not meet one of these criteria, it cannot be contracted through a public service delegation (Supreme Administrative Court, 22 February 2007, *APREI*, decision No. 264541).

for a concession agreement relate to the duration of the contract and the necessity to operate the public service at the concessionaire's risk.¹⁹

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

Whereas bidding procedures for partnership contracts are closely regulated, the 1993 Law is more flexible and provides that concession agreements only have to be subject to a tender procedure 'enabling the presentation of several competing offers'.

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

- a* a competitive dialogue,²⁰ in the case of particularly complex projects where contracting authorities are not objectively able to define the technical means or to specify the legal or financial aspects of a project;
- b* a negotiated procedure²¹ for small projects below a certain amount defined by decree;²² or
- c* a restricted call for tenders.²³

As competitive dialogue is the most common procedure for the award 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 an adequate publicity.

For partnership contracts of which the value exceeds €133,000, 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.²⁴ For local authorities, the applicable threshold is €207,000.

19 Article 40 of the 1993 Law.

20 Article 7 I of the 2004 Order. The contracting authority 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.

21 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 contracting authorities to negotiate the terms of the contract.

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

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

24 Article 1 of Decree No. 2009-243 of 2 March 2009.

Publication requirements are less strict for concession agreements. 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.

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

Regarding concession agreements, the notice also has to specify the procedures for submission of applications and the essential characteristics of the agreement, including its purpose and nature. Public authorities may require the production of documents in support of applications (i.e., the presentation of sufficient professional and financial guarantees to ensure the continuity of the public service).

ii Requests for proposals and unsolicited proposals

For both partnership contracts and concession agreements, tendering documents will be communicated to shortlisted applicants.²⁵

Regarding partnership contracts, in a competitive dialogue, the public entity 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.

Regarding the concession agreements, the public entity 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.

Moreover, one of the partnership contract specificities is that a private person can directly suggest to public authorities projects to be developed under a partnership contract scheme.²⁶ However, being at the origin of the proposal does not guarantee the award of the partnership contract. Indeed, the public authority 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, the 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 award criteria must include the overall cost of the

25 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 public service users.

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

tender²⁷ 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 contract²⁸ to allow for any eliminated candidate to initiate a summary proceedings challenge on grounds of a breach of the relevant procurement rules.²⁹

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 obliged to send an executed copy of the partnership contract to the MaPPP.

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

Regarding concession agreements, applicants 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 of 11 days shall 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 compensation of the concessionaire must be 'substantially linked to the results of operations'. Therefore, the concessionaire's compensation mainly arises from users of the public service.

However, this requirement does not prevent the payment of subsidies by the procuring authority. Given the public service requirements 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 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.

27 The 2004 Order 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.

28 This standstill period can be reduced to 11 days in case of electronic transmission of the decision.

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

30 Article 1-1 of the Decree No. 93-471 of 24 March 1993.

Apart from the revenue collected from 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 public authority 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 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 public entity; and
- b* the collection of ancillary revenues³¹ – the 2004 Order allows the private partner to develop structures and equipment in order to benefit from complementary incomes.

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.

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

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.

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 public entity.

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 clauses³³ and meeting clauses.

Amendments can also be entered into, but only if the overall structure of the contract is not materially altered.³⁴ The PPP contract can also be unilaterally modified by the public authority. 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.

v Ownership of underlying assets

To comply with the principle of public service continuity following the contract's end, the legal regime applicable to concession agreements 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

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 Order, the conditions under which amendments to the partnership contract can be made shall be provided directly in the contract.

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 a rent to the private partner, the contracting public 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 public entity 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 public 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 public entity; 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.

Termination on the grounds of general interest

The public authority 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

Pursuant to the relevant administrative case law, the termination for contractual breach by the public entity 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 will necessarily have to 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 the 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.

Except for these two types of termination that are regulated by case law, 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 difficult to determine which costs are deemed to be useful expenses and consequently are to be indemnified. However, financial expenses should be indemnified.³⁸

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.

36 Supreme Administrative Court, 8 October 2014, *Société Grenke Location*, No. 370644. It has to be noted that: (1) the case law did not concern a concession contract or a partnership agreement 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.

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

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

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.

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.

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;
- 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 which define 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 (EIB), 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 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 lenders might be entitled to act individually in enforcing its specific security interests rights (subject to any restrictions of 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 2014, several orders affecting the legal framework for PPPs were issued by administrative judges.

Ruling on the validity of a partnership agreement, administrative judges have ordered the state and local authorities to terminate some contracts due to the absence of complexity, which is a criterion required for the award of a partnership contract.

In a decision dated 30 July 2014, the Supreme Administrative Court ruled out for the first time the option of using a partnership contract on the grounds of the lack of technical complexity of the project. The Court decided that the construction of the City of the Ocean and the extension of the Sea Museum in Biarritz was not sufficiently complex to justify the use of such type of contract.

On 6 November 2014 the first-level administrative court of Cergy Pontoise also ordered the state – on the same ground – to terminate the partnership contract entered into in 2010 for the construction and maintenance of 63 maintenance and intervention centres on the French road network.

Concerning direct agreements, the Bordeaux Administrative Court of Appeal decided on 17 June 2014 that a direct agreement is a subordinated contract to the main contract (a partnership contract in this case) and a stand-alone contract independent of the main contract. Subject to the interpretation of the Supreme Administrative Court (to which an appeal of the decision has been filed), it seems that direct agreements should be stand-alone contracts independent of the main public contract, which would not be affected by the cancellation of the latter.

Moreover, the Supreme Administrative Court issued an important decision related to third-party recourse against public law contracts,³⁹ which falls within the general willingness to simplify remedies against public law contracts and stabilise contractual relationships between the parties.

VIII OUTLOOK

French PPP laws include several regimes (i.e., administrative long leases, temporary occupation permits, partnership contracts and concession agreements) with many specifications, which can complicate the implementation of PPPs.

It should be noted that the transposition into French law of the new European directives on public procurement adopted on 26 February 2014⁴⁰ will be a real opportunity to clarify this complex legal regime.

39 Supreme Administrative Court, 4 April 2014, *Tarn et Garonne*, No. 358994.

40 Directives 2014/24/EU and 2014/25/EU related to public procurement and Directive 2014/23/EU related to concession contracts of 26 February 2014, which were approved by

These new directives separate public procurement contracts into two categories: public procurement and concession. As these directives must be transposed by April 2016,⁴¹ the French Ministry of the Economy, which is in charge of the transposition, has initiated discussions on the opportunity to simplify the Public Procurement Code and to publish a new code including all the public law contracts.

However, this transposition could create specific difficulties on different matters. The main question is about the degree of transposition. The most difficult issue will be to find the right balance between the general legal regime for French PPPs, with its own particularities, and the exact transposition of the European legislation.

Another issue of this transposition will relate more specifically to partnership contracts, since they will necessarily be included in the public procurement category.⁴² Indeed, if under French law the partnership contract is a separate category, under European jurisprudence it has always been assimilated into public procurement. There is also a discussion about a reunification of the partnership contracts with other sectoral PPPs.

With regard to concession agreements, the Ministry of the Economy wishes to unify the concession model by bringing together works concession agreements and concession agreements, which would simplify the applicable regime.

If simplifying the general legal regime for PPPs is undoubtedly necessary, the state should nevertheless bear in mind the grounds and the reasoning set out over the years by the Supreme Administrative Court's case law in order to preserve certain French particularities linked to the protection of the 'public service'.

the European Parliament on 15 January 2014 and adopted by the Council on 11 February 2014.

41 http://ec.europa.eu/growth/single-market/public-procurement/modernising-rules/reform-proposals/index_fr.htm.

42 If the partnership contract is a separate category under French law, it has always been assimilated into public procurement under ECJ case law. Moreover, under the new Concession Directives, the definition of concession has been clarified, in particular by referring to the concept of operating risk. Consequently, as in the partnership contract this risk is borne by the public authority, a partnership could not be assimilated to a concession.

Appendix 1

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François-Guilhem Vaissier is a counsel in the Paris office's energy, infrastructure and project finance team. His practice mainly includes the private sector participation and all aspects of the structuring and financing of infrastructure and industrial and energy projects (notably regarding power projects).

As expert in public and construction law, François-Guilhem Vaissier managed the negotiation and drafting of project documentation relating to large transactions in France (railway, motorways, road tunnel, airport operation, co-generation plant, wind farms), Europe (underwater tunnel, water and wastewater concession), Africa (hydro-power plant and aluminium smelter project, coal-fired power plant, cement plant, motorway concession, 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).

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