AN ASSESSMENT OF THE FRENCH PUBLIC - PRIVATE PARTNERSHIP LAW

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Abstract

Public - Private Partnerships (PPPs) are formal contracts, within which public sector bodies enter into long-term agreements with private sector entities for the construction or management of public sector infrastructure facilities by the private partners, or the provision of services (using infrastructure facilities) by the private partners to the community on behalf of the public partners. France has recently adopted a legislative framework on PPP while public works law is not applicable for it. This paper examines whether the framework is an actual enhancement of the traditional law on public works.

Keywords: Concession, French legal order, Heritage, Public - Private Partnership (PPP), Public works law, Sustainable development

Introduction: Regulations on PPP contracts and on heritage

Public - Private Partnership (PPP) has recently constituted a worldwide trend. PPPs are formal contracts, within which public sector bodies enter into long-term agreements with private sector entities for the construction or management of public sector infrastructure facilities by the private partners, or the provision of services (using infrastructure facilities) by the private partners to the community on behalf of the public partners.

Heritage is an official term for inheritance, namely the property that has been or may be inherited, in the field of Private Law. However, juridical doctrine has enriched the term and developed it in the field of Public Law. Indeed, heritage signifies various elements, such as pieces of art and immaterial cultural goods, like cooking recipes and folklore, which have been passed on from earlier generations. It is to underline that the notion of heritage is a dynamic one and Cultural Law has the tendency to broaden it. For instance, the Convention on the protection of the world cultural and natural heritage, adopted by UNESCO in 1972, protects not only cultural heritage but also the natural one, namely formations and landscapes made by nature without human intervention. There is also an actual trend of codification on the matter, exemplified by the French legal order. Indeed, in 2004 France adopted a heritage code, the creation of which the Council of Europe encouraged. Codification is particularly useful as, on the one hand, it presents the dispositions (archives, libraries, archaeology, museums or even

the historical monuments) in a single set and, on the other hand, it facilitates the access to these dispositions.
The first known case of concession from the public sector to the private one has to do with a great civil engineering project for the people of Eretria, in Greece, in the 4th century BC. They hired a foreign engineer, Chairephanes, in an attempt to drain a marshy area, situated rather far from the city, at the heart of their territory. This project exemplifies the "Build – Operate - Transfer (B.O.T.)" model, whose financing was undertaken by the contractor and his partners, who would take advantage of the land for ten years.
The concession model was in use in the times of the Roman Empire and later, in various countries. In France, it acquired a particular significance due to the fact that in the period of the one-class (liberal) state, which was formed in the 18th century, the principle of the abstention of the state from any economic activity was strictly applied whilst the entities of local self-government enacted an active role to build up the welfare state.
It is to pay special attention to the fact that the concession model is compatible with cultural projects, even museums that are by definition non-lucrative organizations, in spite of the fact that, as a general rule, concessions are used for reciprocal scopes. For instance, before the introduction of the legal framework on PPPs, in France the so-called ''delegations of public service'' and concessions were used in the cultural domain, as it was the case of the museum Jacquemart – André. In 1995, this museum, located in Paris, had 20.000 visitors and an operation deficit of 458.000 euros. Since the adoption of the concession model, the museum annually has acquired 180.000 – 240.000 visitors and perceived 137.000 – 150.000 euros. It is not about an abandon of responsibilities but an allocation of them, within which the state prefers to concentrate its efforts to the collection and the rehabilitation of the pieces of art.
In the same country, Law 85-704 (called in French "MOP") and Ordinance 2004-559 constitute the hard-core legislation, as modified, on public works and PPPs respectively. This paper focuses on these ways of constructing and of delivery of services, with a special reference on cultural heritage.
The paper hypothesis is that PPP regulations constitute an actual enhancement of the legislation on public works, in the French legal order.

Criteria of option of the PPP model

According to Ordinance 2004-559 and the relevant newer legislation, it is obligatory to proceed to a preliminary evaluation of legal, financial and administrative nature, to demonstrate that PPP contract is preferable to any other type of public contract.
The process of pre-assessment is carried out in two stages: the first stage investigates whether the selection criteria of the contract are met and the second one consists in a comparative analysis to confirm that PPP is the most appropriate.
The criteria are the following:
1. The complexity of the project
There is a complex task and situation and the public sector is unable to determine in advance the technical tools for the needs of the construction or operation of the project or to determine the economic-legal settings (weak financial structure, identification of needs in human resources, etc.). It is to pay special attention to the fact that this criterion is usually activated for cultural projects.
2. The urgency of the project
It is about avoiding a delay being prejudicial to the public interest in the project, regardless of the cause of the delay, or acting as a response to an unforeseen situation

in form of force majeure. Projects that have security problems and cases of lack in equipment also have an urgent character. The evaluation reports must analyze the positive effects of the rapid project execution while justification is not only based on the criterion of the emergency but also on other ones, like the complexity.

3. Greater efficiency (favourable balance of advantages - disadvantages) against other forms of procurement

This alternate criterion has been inserted through article 2II of Law 2008-735, modifying the initial legislation on PPP, in order to facilitate the use of the PPP mechanism. Therefore, a feature of PPP projects consists in the fact that their requirements are defined in terms of outputs rather than inputs on contrary to the conventional public works projects that usually focus on inputs. The choice of the partnership contract presupposes a comparative socio - economic analysis as well as a sensitivity one and a risk assessment and, as a result, it reminds of the concept of «best value for money» of the Private Finance Initiative (P.F.I.), namely of the PPP in the United Kingdom.

This method constitutes an important innovation against the traditional legislation on public works. The traditional law includes dispositions which refer to pre-assessment but they are not as precise and demanding as those of the PPP contracts. MOP law could usefully be modified to reflect the appearance of new contracts that it does not include but it needs a comparative study between the advantages and disadvantages, to perform a pre-evaluation of different alternatives (Grange, 2010).

Ensuring assets for the scope

Financing is carried out exclusively by the government in the common type of public works while in the case of PPP mechanism things are different. In France, the private sector must establish a Special Purpose Company, or “Special Purpose Vehicle” (SPV), which bears the responsibility and the risk of the financing of the execution of the contract. Using private funds for construction and operation of projects can accelerate the infrastructure development program, without additional funds from the government. In case of constraints on governmental budgets, the development of PPP projects contributes to the enhancement of both employment and economic growth.

There is a very important European Union practice, adopted by Eurostat and the European Investment Bank (EIB) and called 50% rule. According to this (non-juridical) rule, co-financing by the public sector should not exceed 50% of the contract budget, as for either a concession contract or a PPP one. Otherwise, EIB does not borrow public carriers, as a general rule.

PPP contracts and culture

In the cultural context, the recourse of the French Administration to PPP contracts model remains restricted but rather encouraging on international scale (Maniatis, 2011). The scopes of the contracts in the cultural domain are discerned by their novelties, which could be considered as inspired by the innovative character of PPPs.

For instance, the Theatre of Archipelago in Perpignan has been in operation since October 2011 and hosts a cross-border festival, shows and co-productions. Besides, the Maritime Museum of Biarritz has been constructed through a PPP contract of the municipality of Biarritz as a public partner and comprises the Museum of the Sea and the City of the Ocean and of the Surf. The City of the Ocean was inaugurated in December 2011 and constitutes a scientific attempt of approach to the oceanography

through experiments, spectacles and images. It is to pay special attention to the fact that the building has ensured temperature balance, so it acquires no heating in winter and no air condition in summer. The Museum of the Sea was inaugurated in June of the same year and includes new various aquariums of 1.920 cubic meters.
The latest successful example of cultural PPP in France consists in the National Museum of Civilisations of Europe and of the Mediterranean, in Marseille. It includes an ancient fortress with an emblematic tower, closed for centuries and converted to a "museum-walk" connected with the main museum through a long bridge. This intervention indicates the recommended, creative approach to the legal principle of sustainability for the historical monuments. In other words, monuments should not be treated statically, upon the negative alternative having the sense of mere prevention from damage (Maniatis, 2013).
On the contrary, the enhancement of the computers system in the Palace of Versailles constitutes the unique fiasco in the cultural domain through PPP. The failure was due not to mere incapacity of the private partner but to various reasons and the French museum managed to resume its normal operation soon, without making use to the contracting out phenomenon, again (Vassilakou and Maniatis, 2012).

Literature and cultural legislature in France

Victor Hugo's contribution to the French and the wider technical legislation has been significant. In his classic work "The Hunchback of Notre Dame" essentially makes this building as the main theme of his novel. Moreover, his article titled "War to people that demolish" in the "Journal of Two Worlds'', in 1832, states that there are two things in a building: the use and the beauty. Its use belongs to the owner, the beauty to the world, therefore the owner has no right to destroy the building. The philosophy of heritage protection, especially of the architectural heritage, clearly derives from this text (Maniatis, 2013).
The first major act of the French state, from 1830 on, relevant to the protection of monuments is to create the position of a general inspector of historical monuments. This central decision-maker localized monuments to preserve and gave a motivated opinion on the feasibility of servicing and maintenance work to undertake for the monuments of the State. In 1834, Prosper Mérimée, a member of a generation of romantic writers, was appointed as an inspector general of historical monuments and he travelled throughout France and also abroad. His approach to heritage, particularly the religious one, was scientific, stripped of sentimentality, which renews the approach to heritage at the time. He achieved inter alia to save the Cluny building (in the centre of the city of Paris) and discovered and saved the textile masterpiece 'The Lady and the Unicorn" at the Boussac Castle. This project is nowadays the key attraction in the Museum of the Middle Ages, namely in the Cluny building.
In France, there was a very early legislation on the protection of cultural heritage. The Fifth Republic, under the influence of André Malraux, politician and writer, gives a major role to the State, as for cultural affairs, and mainly provides for the first time a body of doctrine relevant to cultural policy, summarized in the Decree of 24th July 1959 (Maniatis, 2013).
The first generation of heritage legislation comprises initially law of 30th March 1897, in virtue of which private buildings could not be listed without the agreement of their owners (but, in case of discrepancy, the Council of State could decide expropriation) and then law of 31th December 1913. That crucial text, institutionalizing the modern

status of "historical monuments", has been incorporated since 2004 into the aforementioned Code of Heritage.
The second generation of heritage legislation started with L. 903 of 4th August 1962, the so-called ‘’Malraux law’’ on "safeguarded domains". Besides the existent status of listed buildings, this pioneer law previews the potential creation of protected areas, to save and keep in economic operation entire sets of buildings, even in the very centre of cities.
PPP model, being inherently innovative, requires a preliminary evaluation (design) procedure for its activation, in addition to the similar, traditional procedure of the state (urban planning) and the modern one (spatial planning).

Categories of scopes irrelevant to the PPP model in France

A relatively new trend in PPP projects consists in the commercialization of traditional infrastructure of public entities. This development is well exemplified by various prisons, managed by private partners through PPP contracts, not in France but in some Anglo-Saxon countries, such as the USA and New Zealand. In modern times, the United Kingdom was the first country in Europe to make use of private jails on the basis of 25-year duration PFI contracts. The Wolds prison became in 1992 the first to be managed by the private sector, within a contract of 5-year duration. On the contrary, in Greece, according to article 2, par. 3 of L. 3389/2005, no PPP methodology is permitted for operations of state sovereignty in a strict sense (national defence, policing, administration of justice and enforcement of sentences imposed by the courts). In a similar way, Supreme Court of Israel has recently blocked the PPP policy for jails.
For the management of prisons, specialized companies have been created, let alone introduced in the stock market. In such centres, lower cost is achieved, through prisoners’ work and the delivery of services (correctional specialized services) with small fees.
Most companies pay the minimum wage, but many of them pay much less. The AT & T, for example, paid only $ 2 an hour for prisoners of telemarketers, and Honda gets made car parts from convicts (convict-made), from the prison in Ohio, to $ 2.05 per hour. Detainees usually only keep 20% of their payment, the state government grabs the rest, that is why the government is to support the provision of services of prisoners (Hightowe, 1998).
Last but not least, private management has raised severe criticism due to security problem and to lack of discipline. A high percentage of prisoners’ escapes suggests bad management and raises security issues to local residents. Traditional – type prisons are more open to public scrutiny whilst PPP prisons are less transparent. It is quite hard to regulate and monitor the modern jails, as violations of contractual obligations are difficult to detect. The use of prisoners as labourers is increasing unemployment for lawful citizens.
Besides, the PPP mechanism has not been used for nuclear energy technical works in France yet, although this country is intensively related to this non-renewable form of energy. Even after the very serious accident in the nuclear stations of Fukushima, in Japan, in March 2011, France did not decide to put an end to its traditional dependence on this ambivalent energy for its own needs. However, in 2006 it had already evolved the national legal framework towards the modern principle of transparency, as severe criticism had been raised against the opacity of this environmental danger. Furthermore, it announced its political will, before presidential election in 2012, to construct the already programmed reactor 4, in Flamanville, through a PPP. This scope would be the

first case of use of the PPP mechanism in the sensitive domain of nuclear energy but no correlation of these two tools has been made, to date.

A comparison between PPP and public works

From the legislative framework on PPP and the public works result the following principal differences and similarities:

Similarities	Differences	
	PPP	Public works
Main principles within the process of selection of contractors are the transparency and the protection of the free competition.	The private sector assumes substantial part of the risk of financing, construction etc.	The government bears all risks of the project after the definite completion of the project.
	The private sector deals with the public one through a Special Purpose Vehicle (SPV).	The private sector deals directly with the public one.
In final analysis, the cost of the project is carried out by state (unless PPP scopes are reciprocal)	Funding for the construction of the project (initially) is carried out by the private sector.	Funding for the construction of the project is carried out exclusively by the state.
	The repayment of the private sector is usually done by the contracting authority (e.g. availability payments, shadow tolls) or by users (e.g. motorway tolls), or by a combination of both (e.g. low user charges along with public operating subsidies).	The repayment of the private sector is done by the public sector on successful delivery of the project.

Table 1: Similarities and differences between PPP and traditional-type public works

A Comparison between PPP and public works concession

The concession contract model could be considered as an alternative of the public works contract one, mainly for reciprocal scopes. Indeed, it looks like the public works mechanism with the exception of the fact that the consideration for the works to be carried out consists either solely in the right to exploit the works or in this right along with payments made by the public contractor. For instance, the concession alternative was used in France in 1666 for the construction, financing and management of the project of "Canal du Midi'' (Mediterranean – Atlantic Channel).
In French law, concessions are officially called by law ''Delegations of Public Service (DSP)'', as already signalized. This scheme includes not only the concession, but also leases, advantageous contracts management etc (Lichère *et al*, 2009). It is to pay special

attention that on international scale concession implicates transmission of power from the public authority to the private contractor (Lampropoulou, 2011).
The doctrine has already signalized that PPP is not far away from the concession model, mainly of public works (Kitsos, 2014). It would be rather more accurate to formulate the position that PPP and concession are quite similar (Maniatis, 2016). The most significant similarities and differences between these models are the following:

Similarities	Differences	
	PPP	Concession
They both consist in designing and constructing public works and providing services.	The private sector deals with the public one through a Special Purpose Vehicle (SPV).	The private sector deals directly with the public one.
Main principles within the process of selection of contractors are the transparency, the proportionality and the free competition.	Usually selected for non-reciprocal scopes.	Usually selected for reciprocal scopes.
They are contracts for pecuniary interest.	There is a central administrative body (MAPPP in France) competent for the contracts	There is no central administrative body competent for the contracts.
The private partner takes on a substantial part of the risks, let alone the fact that this contractor initially must ensure the financing of the contract execution.	The repayment of the private sector is usually done by the contracting authority (e.g. availability payments, shadow tolls) or by users (e.g. motorway tolls), or by a combination of both (e.g. low user charges together with public operating subsidies).	The repayment of the private sector is done by the users.

Table 2: Similarities and differences between PPP and concession

Conclusion: The PPP challenge for sustainable development

PPP constitutes one of the most crucial reform models within Public Administration, exemplifying the School of Thought of New Public Management (Lane, 2000). It is about a modern tool, endowed with a lot of innovative regulations, such as the obligatory preliminary evaluation procedure that should be adopted by the traditional law on public works, in order to select the best type of carrying out each project. These dispositions are indeed an enhancement of the French law of public works.
On international scale, a recommendation for governments of countries with a separate and specific PPP law consists in considering the degree to which the requirements of traditional law on public works and of PPP law are aligned (Burger P. and Hawkesworth I., 2011). Anyway, partnerships should not be seen as a panacea but be used in case that they add value (Her Majesty's Stationery Office, 2000).
In general, they may be considered as an important challenge for the modern legal principle of sustainable development, in a global context (Evangelatou et al, 2013). For

instance, they should promote green policy and be correlated to a similar modern type of contracts, "Energy Performance Contracting", for either public buildings or private ones. Furthermore, they are to modernize ecological public infrastructure, such as railways. Above all, humanity is in need of a more audacious strategy for crucial legal goods, above all for public health through constructing and operating hospitals according to current medicine standards and achieving treatment solutions for incurable diseases. These topics exemplify well the recommended pioneer added value of PPPs in the framework of the entire public policy. Otherwise, innovation coming from this model may be proved to be rather superficial, let alone towards the recognized model of public works law and the diachronic success of the concession alternative. It is without saying that concession is the contract type that has been extremely compatible with various economic systems and emerging new technologies (railways, planes…) of each era, so the PPP contract type has indirectly this important historic background.

Last but not least, state policy is unique and effect-orientated…

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Λέξεις – κλειδιά
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