THE CONCESSION NATURE OF PUBLIC - PRIVATE PARTNERSHIP

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Abstract

The Public - Private Partnership (PPP) is a formal contract for the execution of works or of delivery of services with risk allocation between the public sector and the private one. It constitutes essentially a modern variation of the concession type of contracting out. However, the main PPP contract is combined with ancillary agreements, such as the ones on supervision and the settlement of disputes, which are inspired by the concession model.
Keywords: Public Procurement, Concession, Ancillary agreements, Contracting out, Public - Private Partnership (PPP)

Introduction: The PPP innovation

Public - Private Partnership (PPP) nowadays has been an important trend worldwide, coming from the UK. The first time though we meet the term, is in the USA, four decades ago. In exception of the UK, states having institutionalized this innovation have adopted a specialized law on the matter (Maniatis, 2011). However, this way of either constructing immobile constructions or offering services to consumers on behalf of the state or another public carrier is not far away from the traditional model of concession, mainly of public constructions (Kitsos, 2014). So, it would be interesting to examine the juridical nature of PPP as a type of contract between the sectors of the national economy.
The hypothesis of the present paper is that PPP is a type of contract that is a variation of the concession contract.

The precedent of concession contracts

The first known case of concession contract 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.
Concession 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. The sovereign ideology of this bourgeoisie-type regime consisted in the economic initiative of private individuals, in an absolute form. The imposition of this principle led to the

abolition of a great part of institutions of the absolute Monarchy, such as extended state lands and public enterprises (Flogaitis, 1991). Afterwards, when the French state wanted to develop activities with a financial bargain, it made often use of the concession model and so, in this sense, it never adopted the principle of full abstention from economy.

The Revolution had initially the tendency of damaging monuments, as far as they represented the Ancient Regime, instead of protecting them as a part of the history and the architectural tradition of the country. The opposite movement was exemplified by the case of Louvre Palace, which nowadays constitutes one of the most important museums all over the world. That building was converted to the headquarters of the Central Museums of Arts, in 1793, which initially aimed at gathering the royal collections that had been confiscated (Bonetti and Bruno, 2006). So, this development proves that state – nation has created over the two last centuries new branches of the public sector, such as museums and similar infrastructures of culture, although these branches have a non-lucrative nature and, as a result, are rather incompatible with the concession methodology.

From the decade of 1970 on, the concession has become once more actual, as a mechanism of public services management. For instance, when in 1982 France put an end to the state monopoly on television emissions, the law previewed the exploitation of the emissions, and as a result the development and the promotion of culture, through the concession model. That development is quite indicative of the state interventionism as well as of the intrinsic relationship between traditional public monopolies, let alone the exclusive ones, and their functional privatization for a certain period of time through concession.

In modern history of Greece, there is no legislative definition of the contract of concession. However, this is an institution that is recognized and regulated by various constitutional provisions. Indeed, paragraph 2 of article 23 of the Greek Constitution refers to all forms of enterprises of public character or of common utility, whose function has a vital significance for the service of basic needs of the society, as for the restrictions of the right to strike.

Besides, paragraph 3 of article 106 refers to the right of the state or other public carriers either to buy or to participate obligatorily in companies, provided that these companies have a character of monopoly or vital significance for the exploitation of national wealth resources or they have as a principal purpose the provision of services to the society.

In the Greek legal order, the concession of public constructions, implicating the execution of the technical project against the right to benefit from the charges paid by the end-users of the project, is incorporated in the law on public constructions. It is to signalize that law does not make use of the name of this type of contract and has a rather elementary mention to this phenomenon, previewing that the concessionaire is designated upon not only the financial offer (as it is the case in public constructions) but also the technical one. Moreover, the alternate type of concession, namely the concession of offer of a public service, is not submitted to a concrete law on the matter! Concession contracts are submitted to ratification by the Greek Parliament through law, which is not the case of PPP contracts.

Anyway, on international scale the concession of public service is a dynamic phenomenon, following the needs of Public Administration and private investors. It has not been marginalized by the introduction of the PPP contracts in national legal orders, in spite of the fact that this novelty is regarded as equivalent to the archetype.

Finally, it is to signalize that the contract of concession and its current notion have been a typical product of the French legal system, which has elaborated the notion of the concession of public constructions. Moreover, European Union law has essentially adopted the definition of this notion in this legal order. Concessions have been treated differently under the European Union Directives against the other works contracts because, in the legal system of some Member States of the Union, they are regarded as a different type of legal relationship altogether and have not been regulated by public procurement law. Anyway, this type of contracts is endowed with major international significance as the contracts involved are very large, extending over a long period of time (usually 25-30 year, or more in some cases), and eventually very profitable.

The PPP contract

According to the Green Book of the European Commission, published in 2004, the characteristics of a PPP are the following:

- The long-term contract
- The private sector financing (sometimes with the public support)
- The risk allocation between the two sectors involved.

This type of contract has been introduced in the French legal order by Ordinance No. 2004-559 of 17th June 2004 and its implementing decrees. It is about administrative contracts under which the granting authority grants to a private entity -through a special company called ‘’Special Purpose Company’’ or "Special Purpose Vehicle" (SPV) - the right to carry out the design, construction (or renovation/refurbishing), financing, operation, maintenance and management of a public service asset.
In a similar way, PPP appeared in Greece as a new way of meeting the public requirements for public constructions and for the provision of public services. The introduction of this model took place via Law No 3389/2005, which was slightly modified through Law No 3483/2006.

In this legislative framework, many arrangements are deviating from the general rules of administrative, public, civil and commercial law in order to motivate the private sector to participate in such partnerships and activities (Venieris, 2007). For the submission of a construction or a service to the PPP model, the (substantive) conditions to meet are the scope of the contract, which is either a technical work on an immobile object or a service, the undertaking of an essential part of the risks by the private partner in the framework of the allocation of risks between the contracting partners, the financing model consisting in financing the contractual scope with assets coming from the private partner and the fact that the upper cap of the budgeted cost is two hundred million Euros (200.000.000,00 €). There are two state bodies, the Joint Ministers’ PPP Committee and the Special Secretariat for the PPP, which have several competencies, including the selection procedure, the evaluation of the proposal and, in general, the administration of the process. The Committee may decide unanimously the submission of a scope to the PPP model, even if one of the last three aforementioned material conditions is not met. It is to underline that this governmental mechanism ensures the procedure of preliminary assessment of the question whether the PPP contract model could be activated while law does not preview a similar procedure for the concession alternative.

The ancillary agreement on supervision

According to the aforementioned Greek Law No 3389/2005, the supervision on the execution of the PPP project may be exempted from the public partner's strict control, which is typical of the traditional model of public constructions. For instance, PPP contracts are monitored on account of the final technical results to achieve and, therefore, the contractor is endowed with the right, for instance, to select the relevant materials. This flexibility is conducive to creativity and is completed by the possibility of awarding the supervision to an independent third.

This crucial function may be held not only by the competent technical service of the state but also by private carriers, namely independent companies being hired by both partners in common, mainly in case of specialized projects, for which the contracting authority has no appropriate experience.

Given that the role of the Independent Controller is contradictory to the fact that he has to control his own employer, the public partner, his impartiality is considered as indispensable. Besides, the contracting authority reserves the right to award the control of the construction to receive, to another person or company, even after the emission of the certificate of use by the Independent Controller.

The ancillary agreement on non-judicial confrontation of the PPP disputes

According to Law No 3389/2005, any dispute on the application, interpretation or validity of PPP contracts or ancillary agreements will be settled through arbitration, upon the Greek material law. The same act clarifies that PPP is regulated by the contract terms (included in the text of each PPP contract) and, in a complementary way, by Civil Code. Although according to the motivation report of this law, in principle the public constructions legislation is not applicable in the PPP projects, in practice it is applied indirectly, through the relevant contract terms. So, the civil law principle of contractors' freedom, institutionalized through the prevision on contract terms, leads to the traditional public law and, as a result, PPP highlights an original circuit of public law (public constructions law excluded by PPP law – PPP contract terms resuming public constructions law!). Therefore, it is to underline that absolute restrictions for successful legal tools are to avoid…

As for arbitration, it presents, compared to the trial before the state courts, the advantages of quickness, specialty of arbitrators and confidentiality. Moreover, the PPP contract or ancillary agreements define the rules on the appointment of arbitrators, the arbitration rules, the fees for arbitrators, the headquarters of the arbitration court and the language in which the arbitration will be conducted. The judgment of the arbitration organ is irrevocable and automatically enforceable. The exclusion of state courts has raised severe criticism as it transgresses the disposition of paragraph 1 of article 20 of the Greek Constitution, on the right to legal protection by the tribunals.

The abovementioned remark against absolute restrictions is reinforced by the fact that law implies that the arbitration method, which costs money and may be a reason of delay, is not the unique one available. Indeed, the PPP contract or an ancillary agreement may institutionalize the consensual resolution of disputes. In a theoretical level, therefore the following methodology prior to eventual arbitration emerges (Venieris, 2007):

A. Consensual resolution

It is about the settlement of disputes between the contracting parties without any intervention of thirds.

B. Expertise

It is not about a team of jurists, on the opposite the experts usually have only technical knowledge. These thirds are supposed to assess the factual data and the emerging problems on the basis of technical or economic parameters. Their decision is not obligatory, unless the parties have previewed within the PPP contract that a third expert will be appointed on concrete technical questions and judge in a binding way for both parties.

C. Mediation

This method consists in the emission of a non-binding opinion of an independent team of persons that is likely to include jurists and engineers. This committee works like arbitrators do in the arbitration procedure.

An informal version of concession: institutional PPP

The term «institutional PPP» refers to enterprises owned by the public sector and the private one in common, namely to companies of mixed economy. For instance, this is the case of water infrastructure in Portugal, although this project has also been combined with the PPP contract model (Marques and Berg, 2010). It is to pay special attention to the fact that European Commission considers as institutional PPPs the public enterprises that after their creation (by law or administrative act) are partly privatized or the enterprises that belong from scratch to public entities and private entities or individuals. So, a form of concession is implied, given that the state concedes a part of its own existent or potential rights, to the public enterprise or the enterprise to create, to the private sector. It is not about a full privatization (that probably is to avoid) but a downgrade of a legal privilege of the state, due to financial and entrepreneurial reasons.

In Greece, the Constitution consecrates this phenomenon in article 106 without using the name "companies of mixed economy", as already indicated. Besides, it is to signalize that there are companies that are entitled to act neither as public partners nor as private partners within a PPP contract because they are enterprises of mixed economy. So, the legal framework on PPP contracts has introduced an absolute distinction of this innovation against the institutional structure of the enterprises that themselves constitute an autonomous type of partnership between the public sector and the private one (Maniatis, 2008). Therefore, even if national legal orders do not recognize them officially as a type of PPP, they do constitute a complementary version, eventually of no contractual nature, against the official contractual type.

It is about legal entities under the private law, through which a public entity establishes a partnership with a private one, to implement a project of public utility, whose budget may be higher than the one described in Law No 3389/2005. For instance, this model is exemplified by the Gas Public Corporation, which has been created to implement the major project to introduce natural gas to the energy balance of Greece.

New Public Management and the PPP contract

In the late 1970s and early 1980s, the concept of New Public Management (NPM) appeared. Its first practitioners emerged in the UK, under Thatcher, and in the USA municipal governments (e.g., Sunnyvale, California) that had suffered most heavily from economic recession and tax revolts. Their successes put NPM administrative reforms on the agendas of most OECD countries and other nations as well. According to this movement, Public Administration should adopt the principles and values of the private sector in order to meet financial objectives and goals. Its two main ideas are the organizational policies and procedures for the implementation of the decisions and a systematic analysis of administrative practice (Koimtzolgou, 2005).
This School of Thought is characterized by the following elements:

- Reflection of an ideological commitment confirming the superiority of market over the state, emphasizing the introduction of market forces and principles of private management in the domain of Public Administration.
- Support of the opinion that the enhancement of competition between the public sector and the private one as well as within the function of the public sector promotes efficiency and makes public services more ‘’responsive’’ to citizens.
- Concentration of the formation of the political strategy (mainly the political objectives and the budget) in the hands of a few senior officials at the core of the government, by creating a narrow but strong network of service officials and political ones.
- Extraversion (the citizen - recipient of the service is considered as a customer and is treated in this way).
- Quality of services.
- Effectiveness (qualitative and economic).
- Lack of vertical hierarchy. It decentralizes the executive area of public policy through many public offices and agencies, including local authorities, private contractors, etc. that exercise operating administrative authority within the frame of the central political strategy that is fixed by the political power. It “cuts” the Public Administration into many pieces by encouraging further division related to customers / contractors and providers / buyers.
- Interdisciplinary character (Sociology, Economics, Law Science, Psychology, Political science are the sciences supporting the function of NPM) (Gruening, 1998). It is to pay special attention to the fact that law may promote seriously the above-mentioned practice, through the institutionalization of not only types of synergies and of competencies but also of standards and incentives that are implied by the focus on high quality of services to society. So, legislation is expected to be enriched by its connection with this radical School of Thought.

The reasons having led to the emergence and consolidation of this ‘’Conservative Revolution’’ are:

- The functional failure of large bureaucratic organizations in conditions of financial crunch.
- The informational and technological bang.
- The economic globalization and the international competition.

- The increased demands of the citizens-customers of public services for high quality of the services and their distrust in capacity of state institutions to provide it.
- The employees' need in jobs that do not offer them merely a reward but also allow them to develop their own personality (Koimtzoglou, 2005).

In accordance to NPM, the entrepreneurial governance is exemplified by PPP that constitutes a democratic model of relations between the public partner and the private one. A contract of this type gives to the private partner the opportunity to offer services without having to comply with specific orders and requirements, particularly from the public partner himself. This partner is exempted from extensive paperwork in relationship with the implementation of the project and may benefit from methods prior to arbitration or, at least, to trial as for the confrontation of eventual disputes related to the PPP. He may also suggest ways and tactics, by taking advantage of the explosion in technological development, to achieve the best possible result in the best time with minimal financial burden.

It is to underline that the empirical data prove that the PPP mechanism is conducive to various other innovations, particularly in the built environment, even if these are not necessarily produced uniquely through this institutional framework. For instance, the first cultural PPP project in France consists in the construction of a new cross-border Catalan theatre in Perpignan, which was inaugurated in October 2011. The project for this theatre was carried out jointly by Perpignan and the city of Salt in Spain in order to offer to the public a shared season of shows and co-productions, as well as a cross-border festival. The theatre's mission is to open its doors to all audiences, thanks to a varied program of performing arts, classical, contemporary, or current (theatre, music, dance, circus, and opera). Moreover, the construction of the Museum of Civilisations from Europe and the Mediterranean (*MuCEM*) in Marseille, inaugurated in 2013, includes the Fort Saint-Jean, being out of use for centuries! This emblematic monument has been converted to a sort of "museum-walk", connected to the main building through a long bridge. The Biarritz Marine Museum is another PPP project, inaugurated in December 2011, which constitutes a scientific approach to oceanography. The heat balance of the building is noteworthy, as it needs no winter heating or summer air-conditioning (Vassilakou and Maniatis, 2012).

Anyway, the private partner has a special commitment to the success of the project as his reward depends on the accomplishment of his long-term contractual obligations. This is on international scale the main gain from the PPP contract method for the public partner against the traditional model of construction, let alone the fact that a very big number of PPP scopes are not reciprocal.

It is to pay special attention to the fact that important reciprocal scopes, particularly in the crucial domain of transports, remain in the field of the concession of public construction. So, it is obvious that PPP contract has been invented and used mainly for non-reciprocal projects, as it was the case of the archetype plan of PPP in the United Kingdom, namely the Private Finance Initiative (PFI), whose scopes were jails, hospitals and schools. This empirical datum is thoroughly confirmed by comparative experience, like the Greek one related to non-reciprocal projects, such as schools and Fire Brigade stations, whilst the state keeps creating and maintaining national roads through the traditional model of concession.

In conclusion, in managerial terms PPP is a legal tool of the contracting out arsenal, well exemplifying the NPM prevailed School of Thought. It has been planed to fill the

vacuum between the big majority of constructions, ordinarily of non-reciprocal nature (for instance, museums), to construct upon the traditional law on public works, and the reciprocal scopes particularly in the transports domain, to construct through concession of public constructions.
More precisely, concessions and recently PPPs have constituted a way of abstention of the public sector from entrepreneurial activity while an important new branch of economy, particularly of the public sector, has emerged, namely the museums. The following scheme describes the history of management of the public infrastructure and the cultural goods (particularly heritage), from 18th century on, on international scale, mainly in France:

PHASE OF THE PERIOD 18th C. -21st C.	*PUBLIC INFRASTRUCTURE MANAGEMENT (PROGRESS TO OPERATIONAL PRIVATIZATION)*	*(PUBLIC) CULTURAL HERITAGE AND ARTS MANAGEMENT (CREATION AND GROWTH OF THE MUSEUMS BRANCH OF THE PUBLIC SECTOR)*
1	***STATE MONOPOLIES***	***ROYAL COLLECTIONS & ROYAL BUILDINGS (PALACES)***
2	***CONCESSIONS***	***CULTURAL HERITAGE AND ARTS PUBLIC MUSEUMS ENDOWED WITH FORMER ROYAL COLLECTIONS AND BUILDINGS (PALACES)***
3	***CONCESSIONS AND THEIR NEW VARIATION: PPP CONTRACTS***	***CULTURAL SPONSORSHIP CONTRACTS AND CONCESSION CONTRACTS AND PPP CONTRACTS FOR CULTURAL ACTIVITIES AND MUSEUMS***

Table 1: Phases of public infrastructure management and of cultural heritage management (18th c.– 21st c.)

Although the PPP contract model is informally a variation of the concession archetype model, in practice it resembles more to the common phenomenon of public constructions than to concessions. Therefore, a danger emerges, consisting in downgrading this innovation as a technique of saving public assets for a long period of time, after the completion of the construction.

Conclusion: PPP=Concession either of public technical works either of public services delivery or of a part of a public firm

The hypothesis of the present paper has been confirmed as long as the PPP contract is quite similar to the concession of constructions or services, both submitted to the category of alternative contracting out. Nevertheless, this position needs completion, in the sense that the paper analysis has led to the following findings:

A. PPP contract is combined with ancillary agreements that are inspired by concession

Each PPP contract may be accompanied by other contracts, namely the ancillary agreements. Two categories of them, having to do with the supervision of the execution of the PPP contract and the settlement of disputes emerging from this execution, could be interpreted as informal PPPs within the official PPP because they implicate the involvement of thirds coming from the private sector, usually having an independent status towards both partners (controllers, mediators, arbitrators…). So, there is an important upgrade of the role of engineers, exemplified not only by the legal position of the private partner but also by the involvement of various other carriers. Moreover, these categories constitute essentially techniques of "concession", in a wider sense of the term, because they implicate non-use of traditional privileges of public entities, such as supervision by the competent technical public service and state trials instead of other procedures like arbitration. Formal contracts of concession have traditionally made use of arbitration and of supervision by independent technical carriers. Anyway, it is recommended to correlate the three formal or informal PPP agreements within the PPP contract model (the so-called contract itself, the agreement on supervision and the agreement on resolution of disputes), through the relevant legislation by upgrading the two ancillary agreements. Some scholars, like Law Professor Sue Arrowsmith, have tried in vain to persuade European Commission for more than 10 years for the adoption of a unique legal framework on PPP contracts and concession contracts. However, European Union has adopted a set of the following directives:

- Directive 2014/23EU of the European Parliament and the Council of 26 February 2014 on the award of concession contracts, having to do with concessions of works and of services,
- Directive 2014/24/EU of the European Parliament and of the Council on public procurement and repealing Directive 2004/18/EC and
- Directive 2014/25/EU of the European Parliament and of the Council on public procurement and repealing Directive 2004/17/EC.

B. PPP contract is symmetrical to institutional PPP that is inspired by concession

There are also PPP techniques even beyond the official PPP contract model, which may have a contractual nature. This is the case of the companies of mixed economy, accomplishing a complementary and, as a result, an alternative function in comparison with the one of the PPP contract model. Indeed, institutional PPP exemplifies NPM, just like contractual PPP does. In these two versions of concession (in a wide sense of this term) the state acquires a private official collaborator, as a partner (shareholder) in its own company or as a contractor in the legal framework of a PPP contract. Besides, another sense of potential symmetry emerges, as the PPP contract is in use mainly for non-reciprocal scopes while trading companies, even the public ones, are by definition profit organizations (commercial enterprises).

C. There are other important types of synergy besides PPP

The traditional type of public constructions contract may be proved to be financially better than the PPP contract at least in some cases. Anyway, there are other important types of synergy out of the PPP contract framework. These alternatives may serve the public interest, such as *inter alia* the acquisition of a private company by the state or another public entity as well as energy performance contracting. In legal terms, it is plausible to preview various types of contractual or organizational osmosis between the public sector and the private one.

References

1. Bonetti M., Bruno S. (2006), *Louvre*, RCS Quotidiani S.p.A. (in Italian).
2. Flogaitis, S. (1991), *The Administrative Contract. Notion and nature*, Athens – Komotini, Ant. N. Sakkoulas Publishers (in Greek).
3. Gruening, G. (1998), *Origin and theoretical basis of the New Public Management (NPM).*
4. Kitsos, I. (2014), *Public – Private Partnership Contracts and Concession Contracts*, Athens – Thessaloniki, Sakkoulas Publishers (in Greek).
5. Koimtzoglou, J. (2005), *The legal approach to administrative reform* http://www.pspa.uoa.gr/data/download/ede/conferences/SDE_2005/papers/Koimtzoglou_Ioannis.pdf (in Greek).
6. Maniatis, A. (2008), *Legislation and Safety in technical works - Studies and execution of public technical works legislation,* Hellenic Open University, Patras (in Greek).
7. Maniatis, A. (2011), ''Aspects of the French Cultural and Technical Legislation'', *Law and Nature*, May http://www.nomosphysis.org.gr/articles.php?artid=4247&lang=1&catpid=1 (in Greek).
8. Marques, R. and Berg, S. (2010), *Risks, Contracts and Private Sector Participation in Infrastructure,* (Paper of 16 pages).
9. Vassilakou, A. and Maniatis, A. (2012), ''PPP in French Law and Practice'', in EuroMed Academy of Business: Demetris Vrontis, Yaakov Weber, Rudi Kaufmann, Shlomo Tarba (Editors), *5th Annual EuroMed Conference of the EuroMed Academy of Business. Building New Business Models for Success Through Competitiveness and Responsibility*, EuroMed Press.
10. Venieris, I. (2007), *Public Private Partnerships – The contractual framework*, Legal Library, Athens (in Greek).

Η Σύμβασης παραχώρησης δημοσίου – ιδιωτικού φορέα

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Λέξεις - κλειδιά
Δημόσιες Συμβάσεις, Παραχώρηση, Παρεπόμενα σύμφωνα, Συμβάσεις έργου (Contracting out), Σύμπραξη Δημόσιου και Ιδιωτικού Τομέα (ΣΔΙΤ)