USEK
Holy Spirit University of Kaslik Press

Revue juridique de l'USEK
USEK Law Journal
Nº Spécial | 2024

(OA) Open Access

eISSN 2664-8156

The Public-Private Partnership (PPP): a comparative law approach

Alexandre Zourabichvili, *Assistant Professor, USEK School of Law and Political Sciences*

Abstract

Public-private partnerships (PPPs) are being used more and more frequently across the world in projects to build infrastructure, public works and to manage public services. Success has not always been achieved, particularly in France and Europe where the legal framework has led to the emergence of a partnership contract model, the use of which has sometimes proved costly for public finances and ill-suited to the real needs of the public service. Some countries have had better results with PPPs, such as Brazil, which has made the concession contract central to its PPP legislation as a tool for attracting private investment, particularly foreign investment. This article compares French and Brazilian law on the matter before examining their implementation as well as public policies and public action in Europe and Brazil. Beyond the differences in the forms of contracting, the emphasis is placed, for the successful use of PPPs, on the importance of well-prepared co-contracting public entities supported by specialized institutions within the framework of a national strategy of PPP promotion.

The association between the State and private capital has always existed, for as long as the state has existed and in many forms. One of the symbols of the city of Paris, the Eiffel Tower, is the product of a partnership between the State and a private company selected during a public competition in anticipation of the 1889 Universal Exhibition. Public-private partnerships were revived in the 1990s in the United Kingdom under the name of the Private Finance Initiative (PFI) as a vehicle for disengaging the State from the production and management of public services and as an important source of financing for public investment.

For the same reasons, the use of public-private partnership contracts has become widespread in many countries, with the support of international institutions. The United Nations General Assembly (UN GA) stated, in a 2019 resolution, that "*public-private partnerships can play an important role in improving the provision and sound management of infrastructure and public services and in supporting government efforts to achieve the Sustainable Development Goals*[1]". The United Nations Commission on International Trade Law (UNCITRAL) drafted a "Legislative Guide on Privately Financed Infrastructure Projects" which was recommended by the UN GA[2]. The IMF and the World Bank have designed a "PPP Fiscal Risk Assessment Model" (PFRAM) aimed to help States anticipate the potential fiscal consequences of their PPP projects[3]. As part of its good governance recommendations directed at States, the OECD drew up a set of "Principles for public governance of Public-Private Partnerships"[4]. The support to PPP projects also comes from the World Bank's International Finance Corporation and multilateral development banks (Inter-American Development Bank, Asian Development Bank, African Development Bank, European Bank for Reconstruction and Development…) which provide technical expertise to States and contribute to mobilizing financing.

Although they differ according to the legislation of each country, the common feature of these contracts is that they associate, for the long term, a public entity with a private operator to carry out a large-scale project of public interest: construction of infrastructure, transport, energy, health, education, etc. The State is relieved of the responsibility for carrying out these investments while contractually controlling the actions of the private operator. The burden of

[1] General Assembly of the United Nations, Resolution of 18 December 2019, A/RES/74/183, p. 1.

[2] General Assembly of the United Nations, Resolution of 9 December 2003, A/RES/58/76, p. 1.

[3] IMF, <https://infrastructuregovern.imf.org/content/PIMA/Home/PPPs-and-PFRAM.html>, accessed on May 12, 2023.

[4] OECD, Recommendation of the Council on Principles for Public Governance of Public-Private Partnerships, May 2012.

financing PPPs is transferred from the state to the private operator, giving the former more resources available for operating expenses and other socially necessary commitments.

However, the use of PPPs has not proven to be without drawbacks and costs for States, mainly in Europe. Following a performance audit carried out in 2018, the European Court of Auditors concluded that many projects carried out under PPP contracts have not kept their promises and have had a negative financial impact on the finances of the States without providing any real economic added value.

In the countries of the "*Global South*", the use of PPP contracts has also revealed difficulties in application. Nevertheless, a group of these countries - notably Brazil, Chile, China and India - offer a more positive picture, Brazil's case having been cited in recent years as an example to follow among market economies[5]. PPPs have contributed to their efforts to catch up in terms of infrastructure development, a necessary condition for accelerating economic growth. PPP projects have also attracted foreign direct investment.

A comparative look at countries in different geographical areas and their regulatory policies shows that PPP contracts may present a definitive interest, particularly for countries with a significant need for infrastructure development. This article will first examine the French and European regulatory frameworks, highlighting the differences with the Brazilian regulatory framework (I), before comparing public policies and public authorities' action in the field of PPPs under these different legal frameworks (II).

I. The differences in the legal frameworks

The regulatory frameworks for PPPs in France and Europe, on the one hand, and in Brazil, on the other, are quite different. The regulatory framework for PPPs in France is provided by the Public Procurement Code of 2018, which is aligned with the European directives 2014 /23/EU on concessions, 2014/24/EU and 2014/25/EU of the European parliament and of the Council on public procurement. PPPs do not appear under this explicit name. The French and European law regroups different types of contracts under the generic category of public procurement contracts with two main categories: public procurement *per se* (*marchés publics*) and concession. In French law, the form of contract that comes closest to

[5] Economist Impact, *The Infrascope 2021/22 index*, commissioned by the Interamerican Development Bank, The Economist Group 2022.

what is meant by PPP is the contract by which the public entity entrusts the private operator with various tasks in exchange for payment of a price. In the Public Procurement Code of 2018, it is the partnership agreement (*marché de partenariat*).

But European law considers concessions to be a form of PPPs and concessions are the main form of PPP in several countries inside and outside the European Union. This is particularly the case in Brazil. It is therefore important to understand the differences between these contracts (A) differences that also arise in the specificities, in France, of the conditions of resort to and implementation of partnership agreements (B).

A. PPPs in the forms of partnership agreements and concession contracts

In French law, the partnership agreement (*marché de partenariat*) is the broadest category of contract that can best be related to the PPP concept. It is defined as "*a contract concluded by one or more purchasers with one or more economic operators, to meet their needs for works, supplies or services, in return for a price or any equivalent*[6]*"*. It can be a works contract, a product procurement contract or a service contract. The partnership agreement is defined as:

> *"a public contract whose purpose is to confer on an economic operator or a group of economic operators a* ***global*** *mission for the construction, transformation, renovation, dismantling or destruction of works, equipment or intangible assets* ***necessary for the public service*** *or the exercise of a* ***mission of general interest*** *and* ***all or part of their financing****. The holder of the partnership contract is the project manager for the operation to be carried out*[7]*"*.

We have highlighted in bold the salient elements of the above definition: the global character of the mission, the fact that the mission must be in the public interest and that all or part of the financing is provided by the private operator holding the contract. This last element is an advantage presented by this contract. It allows the State or the local authority to order the realization of a work without having to finance it.

The partnership agreement is characterized by its global mission since its purpose is to entrust the private operator with a broad mission that covers different activities such as "*the construction, transformation, renovation, dismantling or destruction of works, equipment or intangible assets necessary for the public service or for the exercise of a mission of general interest*". Article

[6] Code de la commande publique, art. L. 1111-1.

[7] Code de la commande publique, art. L. 1112-1.

L1112-1 goes on to list, in a non-exhaustive manner, what the object of this global contract may contain:

> "*This overall mission may further include:*
>
> *1° All or part of the design of the works, equipment or intangible assets;*
>
> *2° The development, maintenance, management or operation of works, equipment or intangible assets or a combination of these elements;*
>
> *3° The management of a public service mission or the provision of services contributing to the exercise, by the public person, of the public service mission for which it is responsible*[8]".

Whereas the purpose of the contract is, in the case of the works contract in particular:

> "1° *either the execution, or the design and execution of works listed in a notice annexed to this code;*
>
> *2° either the execution, or the design and execution, by whatever means, of a work that meets the requirements set by the purchaser who has a determining influence on its nature or design*[9]".

This global mission gives the partnership agreement (as with its predecessor, the partnership contract, in force between 2004 and 2018) a derogatory character to the common law of contracts, the latter being subject to the requirements of allotment in public procurement projects[10].

The fact of entrusting by a single contract to an operator or a group of private operators the whole of the tasks tending to the realization of a work undoubtedly simplifies the task of the public person. Another advantage is that the latter relies entirely on the technical and technical know-how of the specialized private operators[11].

The global mission that characterizes the partnership agreement is carried out over the long term and the public entity that wishes to use it must think in terms of the overall cost of the project. It is not only the investment cost (engineering costs, design costs, construction

[8] Code de la commande publique, art. L. 1112-1.

[9] Code de la commande publique, art. L. 1111-2.

[10] C. LAPUELLE, « Mode de gestion des services publics », *Rép. de service public*, Dalloz, janv. 2021, para. 137.

[11] *Ibid.*, para. 143.

costs…) but also the operating costs (including the costs of upkeep, maintenance and renewal of the facilities and equipment built) as well as the financing costs[12].

The overall cost of the project will be related to its budgetary sustainability, which gives rise to evaluation criteria before the choice of this type of contract[13]. The advantage of this contract, generally reserved for large-scale infrastructure works, is that the State does not start paying the private operator until the work is completed, i.e. several years after the conclusion of the contract[14]. This is also the hallmark of this contract, particularly in comparison with the concession contract, which we shall see below. It gives the State visibility on its future budgetary expenditure and allows it to commit to a project without having to incur expenditure immediately.

The execution of the contract itself is spread over time, as the Public procurement Code states: "*The duration of the partnership contract is determined according to the amortization period of the investments or the financing methods chosen*[15]".

Furthermore, in contrast to the old public works contracts where the State was the project supervisor, the private holder of the partnership contract provides both project supervision and management. The performance of the work of, or rather of the private operators (who are grouped together in a project company created for the occasion) is subject to performance criteria.

The concession contract is the second major family of contracts in French law. The purpose of this contract is either to carry out works or to manage a public service. Used by local authorities, this contract is called a delegation of public service (*délégation de service public*[16]). Its duration is limited[17]. This contract also constitutes, by its characteristics, a form of PPP. In developing countries such as Brazil or India, it is the PPP contract by essence[18].

---

[12] Code de la commande publique, art. R. 2213-1.

[13] As we will see below in subpart B. "The specificities of the conditions of use and implementation of partnership agreements".

[14] Article L. 2213-8 of the *Code de la commande publique* states: "The contractor's remuneration is paid by the purchaser as from the completion of the main compulsory tasks and for the entire duration of the contract".

[15] Code de la commande publique, art. L. 2213-2.

[16] Code général des collectivités territoriales, art. L. 1411-1.

[17] Code de la commande publique, art. L. 3114-7.

[18] For Brazil, see Law n°11.079 of December 30, 2004, art. 2. As for India, The Ministry of Economic Affairs' PPP Department only lists concession contracts as PPP projects. See <https://www.pppinindia.gov.in/home>. Accessed on April 16, 2023.

The concession contract differs from the partnership contract in many respects, particularly in the way it is remunerated by the public entity. As the Public procurement code states:

> "*A concession contract is a contract by which one or more conceding authorities subject to the present code entrust the execution of works or the management of a service to one or more economic operators, to whom a risk linked to the exploitation of the work or service is transferred, in exchange either for the right to exploit the work or service which is the subject of the contract, or for this right accompanied by a price*[19]".

The private operator is remunerated here by the operation of the facility, basically by charging users for its use. It is true that the legislator provided above that a price could supplement the remuneration of the private operator. However, this supplement is not supposed to conceal a public subsidy intended to cover a lack of revenue from the operation of the facility or public service[20]. A disguised subsidy would undermine the principle of free competition enshrined in European law as it might favor one company over other competitors in the market[21]. In its case law[22], the European Court of Justice states that such subsidies are acceptable "*as compensation for the services provided by the recipient undertakings in order to carry out public service obligations*". In this case, the subsidies in question were "*public grants intended to enable the operation of regular urban, suburban or regional transport services*[23]". The same court decision specified the criteria that the public authority must follow in order to justify the payment of compensation in addition to the remuneration derived from the exploitation of the work or service under the concession contract. These criteria have been adopted by the French administrative judge:

> "*the recipient undertaking must actually have a public service mission to discharge and these obligations must be clearly defined; the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner; the*

[19] Code de la commande publique, art. L. 1121-1.

[20] C. LAPUELLE, « Mode de gestion des services publics », para. 148.

[21] See Article 107 of the Treaty on the Functioning of the European Union.

[22] Court of Justice of the European Communities (now European court of justice), 24 July 2003, Altmark, case C-280/00.

[23] CJEC, *ibid.*

compensation may not exceed what is necessary to cover all or part of the costs incurred by the public service obligations[24]".

Unlike French law where the law on concession contracts is consolidated in a single law (Code la commande publique), Brazilian law has established a clear difference between the concession contract in PPP form and the concession contract per se, the former being a specific case of the latter which constitutes the common law of concessions. Both are governed by different laws: Law 11079 of 2004 on PPPs for the first and Law 8987 of 1995 for the second. The latter is directly based on the text of the constitution (which is also a difference from French law), which states that "*a law will provide for: I/ the regime of concessionaires and permissionaires of public services, the special nature of their contracts and their extension, as well as the conditions for expiration, inspection and termination of the concession or permission*; *II/ the users' rights; III/ tariff policy; IV/ the obligation to maintain adequate service*[25]".

Whereas the 1995 law concerns concession contracts by which the private operator is entirely remunerated by the operation of the work it has built[26], article 2 (1) of the 2004 law states that "*Sponsored concession is the concession of public services or of public works referred to in Law No. 8987, of February 13, 1995, when it involves,* ***in addition to the tariff charged to users, pecuniary compensation from the public partner to the private partner***[27]".

In comparison, French concession contract refers (as seen above) to "*a transfer of risk related to the operation of the work or service, in return for* ***either the right to operate the work or service that is the subject of the contract, or this right together with a price***[28]".

---

[24] CE, 13 juill. 2012, n° 347073 347170 350925. See also, for transparency obligations regarding the cost of compensation paid by the public entity: CE, 15 déc. 2017, n° 413193.

[25] Federal constitution of Brazil, 1988, art. 175.

[26] Law 8.987/95, art. 2 (III).

[27] The 2004 law also refers, in the same article, to a more specific contract called an "administrative concession", characterized as "*a service contract of which the Public Administration is the direct or indirect user, even if it involves the execution of works or the supply and installation of goods.*" According to V. Monteiro: "*In this administrative concession, it is the public administration that receives, directly or indirectly, the service to be rendered by the concessionaire and in this condition, assumes the burden related to its payment*". In other words, the public entity covers the full cost of the service provided. See V. MONTEIRO, Aspectos legais da experiência brasileira na modelagem de concessão e propostas para melhorar as normas vigentes, in International Finance Corporation, *Estruturação de Projetos de PPP e Concessão no Brasil*, <https://documents1.worldbank.org/curated/en/560271525341929281/pdf/WP-BR-Estruturacao-de-Projetos-de-PPP-e-Concessao-no-Brasil-PUBLIC.pdf>, accessed on May 22, 2023, p. 206.

[28] Code de la commande publique, art. L. 1121-1.

In contrast, the Brazilian law of 2004 reserves concession contracts in the form of PPPs for activities that are unprofitable through the sole application of a tariff to the user. According to an author:

> "*The* [Brazilian] *legislator understood that attracting private capital would be of fundamental importance to enable infrastructure and the provision of public services that, per se, would not generate commercial interest if structured according to the Concessions Law - Law 8.987/95. This is because the classic common concession model determines the remuneration of the concessionaire for the enjoyment of the service by the user, usually through the payment of tariffs, and not always a project generates such demand as to make the economic subsistence of the business viable. For purposes of application of Law 11,079/2004, the PPP should be understood as the partnership formed under the concession regime in which there is no relation of full remuneration by the end-user citizen*[29]".

The 2004 law provides for the possibility of guarantees to secure the financial compensation paid by the public entity: "*earmarking of revenues, institution or use of special funds provided by law; contracting insurance-guarantee with insurance companies that are not controlled by the public authority; guarantee provided by international organizations or financial institutions; guarantees provided by guarantee fund or state company created for this purpose*[30]". As will be seen below, the Law No. 1.052/2021 on the promotion of PPPs established guarantee funds envisioned in the aforementioned article. These funds, as well as guarantees provided by financial institutions such as the National Bank for Economic and Social Development (BNDES), have contributed to the growth of projects implemented as PPPs.

The share of the risk to be assumed by the private operator (concessionaire) is also a point of difference between French and Brazilian law. In French law, the risk borne by the private operator in concession contracts must therefore be real. It must be subject to the vagaries of the market which can even lead, in extreme cases, to the failure of the private operator. The law specifies that:

> "*The share of risk transferred to the concessionaire implies real exposure to the vagaries of the market, so that any potential loss borne by the concessionaire must not be purely theoretical or*

[29] F. DE A. MARQUES NETO, *Parcerias público-privadas: conceito*, Enciclopédia jurídica da PUC-SP. C. FERNANDES CAMPILONGO, A. de AZEVEDO GONZAGA e A. LUIZ FREIRE (coords.). Tomo: Direito Administrativo e Constitucional. V. S. NUNES JR. et al., (coord. de tomo). 1. ed. São Paulo: Pontifícia Universidade Católica de São Paulo, 2017 <https://enciclopediajuridica.pucsp.br/verbete/32/edicao-1/parcerias-publico-privadas:-conceito>, accessed on May 18, 2023.

[30] Law n° 11.079 of December 30, 2004, art. 8.

> *negligible. The concessionaire assumes the operating risk when, under normal operating conditions, it is not assured of recovering the investments or costs, related to the operation of the facility or service, that it has borne*[31]".

The risk is therefore clearly assumed by the concessionaire, which is in the interest of the public entity. This is not the case in a partnership contract where the risk, which exists, may be shared or even borne by one or other of the parties to the contract. The sharing is specified in the contract[32]. The public entity may take a minority stake in the capital of the project company alongside private investors, in which case the distribution of risk between these different shareholders will be set out in the company's charter[33].

Brazilian common law on concessions also clearly establishes the transfer of risk to the private operator. The latter is considered to be "*a legal entity or consortium of companies that demonstrates capacity to perform the concession, on its own account and risk, in such a way that the concessionaire's investment is remunerated and amortized through the exploration of the service or work for a determined period of time*[34]". However, the 2004 special law on PPPs refers to a sharing of risks, which the contract must provide for, between the parties, "*including those relating to unforeseeable circumstances, force majeure, acts of God and extraordinary economic acts*[35]". This distribution of risks with a guarantee of public intervention in the situations mentioned in the article is the consequence of the not necessarily profitable character of the activities foreseen by this type of PPP contract and which could lead the private operator to bankruptcy in the above-mentioned situations. Apart from these situations, the 2004 law leaves a margin of discretion to the contracting parties to decide in which other situations and to what extent the public authority should share the risk with the private operator. A flexibility undoubtedly necessary for the efficiency of the execution of the contract. According to F. Marques Neto:

> "*In general, the government is responsible for remuneration, which does not necessarily mean that the state pays for the activity provided. The private partner, on the other hand, tends to be responsible for the conception, execution and viability of the enterprise during the term of the*

[31] Code de la commande publique, art. L. 1121-1.

[32] C. LAPUELLE, « Mode de gestion des services publics », para. 141.

[33] Code de la commande publique, art. R. L. 2213-6.

[34] Law 8.987/95, art. 2 (III).

[35] Law n°11.079 of December 30, 2004, art. 5(3).

partnership. However, the allocation of risks between the parties is not peaceful, being the subject of great doctrinal debates[36]".

The duration of the contract marks a difference between the partnership contract and the concession contract under French law, concession contracts being shorter than partnership contracts, but in the fields of drinking water, sanitation, household waste and other waste, the maximum duration of 20 years can be extended on specific conditions[37]. In this respect, Brazilian legislation is different, since concession contracts, the main form of PPP, have a minimum duration of 5 years and can last up to 35 years and can be extended[38].

The choice of the form of contract best suited to the project to carry out works or provide a public service takes into account the conditions for resorting to the relevant contract.

B. The specificities of the conditions of use and implementation of partnership agreements

The predecessor of the partnership contract, the partnership contract, could only be used for projects that were considered complex ("*the public entity cannot alone define in advance the technical means to meet its needs or establish the financial or legal structure of the project*[39]") or if there was an urgent need, from the point of view of the general interest, to complete the project. There was also a third alternative criterion, that of economic efficiency, according to which, given the characteristics of the project, the use of a partnership contract would present a more favorable balance of benefits and drawbacks than other forms of contract[40]. These three criteria – particularly the criterion of urgent need – could limit too strongly the recourse to this contract although this latter corresponds by essence to projects of great complexity with the presence of several private operators within the project company and a global mission having for object various activities. These criteria have been abandoned in the new Public Procurement Code but the choice for the new partnership agreement is conditioned to the need to show that it presents

[36] F. de A. MARQUES NETO, Parcerias publicas-privadas : conceito.

[37] Code de la commande publique, art. L. 3114-8.

[38] Law n° 11.079 of December 30, 2004, art. 5(1).

[39] Ordonnance n° 2004-559 du 17 juin 2004 sur les contrats de partenariat, art. 2 (now repealed).

[40] Ordonnance n° 2004-559 du 17 juin 2004 sur les contrats de partenariat, art. 2 (3°), now repealed.

a “more favorable balance score” compared to other forms of contract. The legislator specifies that this "more favorable balance score" is assessed on the basis of:

> “*The characteristics of the project,*
>
> *the requirements of the public service*
>
> *or the general interest mission for which the purchaser is responsible,*
>
> *or the shortcomings and difficulties observed in the implementation of comparable projects*[41]”.

As one author notes, this balance of benefits and drawbacks is not only financial but also involves technical, economic and legal characteristics[42]. The regulatory provisions of the Public Order Code specifically mention the cost element and reintroduce the criterion of complexity as one of the elements to be taken into account. It specifies that “*in order to establish this assessment, the purchaser shall take into account its capacity to carry out the project, the characteristics, cost and complexity of the project, the objectives pursued and, where appropriate, the requirements of the public service or the mission of general interest for which it is responsible*[43]”. These different elements that must be taken into account to justify the use of a partnership contract confirm the derogatory nature of this type of contract.

The main criterion that the public entity must examine before embarking on a partnership agreement is the budgetary sustainability of the project. The contract must not put an excessive strain on the budget, let alone jeopardize essential, long-term functional expenditure particularly in the case of local or regional public institutions. According to art. R2212-9 of the Public procurement code:

> “*The budgetary sustainability study takes into account all the financial aspects of the partnership contract project. It includes in particular:*
>
> *1° The estimated overall cost of the contract as an annual average;*
>
> *2° An indication of the proportion that this cost represents in relation to the purchaser's annual self-financing capacity and its effect on its financial situation;*
>
> *3° The impact of the contract on the evolution of the purchaser's mandatory expenses, its consequences on its indebtedness and its off-balance sheet commitments;*

[41] Code de la commande publique, art. L. 2211-6.

[42] C. LAPUELLE, « Mode de gestion des services publics », para. 139.

[43] Code de la commande publique, art R. 2211-3.

4° An analysis of the costs resulting from early termination of the contract".

The budgetary sustainability study is submitted to the minister in charge of the budget for his comments[44].

Among the important obligations to which the public entity is bound is the commitment to entrust a minimum share of the value of the partnership agreement to small and medium-sized enterprises. This obligation responds to the fear that global contracts entrusted to large groups will leave out small and medium-sized enterprises.

A report by the French Senate, written in the context of the previous legislation which had no provision for this requirement, spoke of the "*crowding out*" of small and medium-sized enterprises (SMEs) caused by partnership agreements, together with the emergence of oligopolies[45]. PPPs and partnership agreements in particular concern mainly large-scale projects for which the large groups have a natural technical and cost advantage over SMEs. The thresholds for recourse (for the public entity) to these contracts are set at 5 million euros when they concern network infrastructure works (energy, transport, urban development, sewerage, etc.) or even 10 million euros for some other projects[46]. Nevertheless, SMEs' access to these markets is important for the local economy in terms of maintaining jobs and know-how. In the current French law, the minimum required share allocated to these companies in the estimated amount of the partnership contract excluding financing costs except, as the law states, "*when the economic structure of the sector concerned does not allow it*[47]".

Besides, the French public authority must also monitor the proper execution of the contract. It receives a report from the private operator every year and "*during and at the end of each phase of execution of the tasks provided for in the contract*". This enables the public authority to monitor the private operator's compliance with the performance targets to which the latter is subject and which constitute the counterpart of the price paid by the public entity. These regular

[44] Code de la commande publique, art. R. 2212-10.

[45] J.-P. SUEUR and H. PORTELLI, *Rapport d'information fait au nom de la commission des lois constitutionnelles, de législation, du suffrage universel, du Règlement et d'administration générale sur les partenariats publics-privés*, Sénat, 2014, p. 30.

[46] See Code de la commande publique, R. 2211-1.

[47] Code de la commande publique, art. R. 2213-5.

reports "*shall be transmitted to the deliberative assembly or body and shall be the subject of a debate*[48]".

The resort to the concession contract is not subject to conditions such as those seen above for partnership agreements. Its use, especially by local public administrations (*collectivités territoriales*), is therefore more frequent.

The legislator requires that specific public interests, such as the objectives of sustainable development in their economic, social and environmental dimensions, be taken into account when defining the needs that are the subject of the public service entrusted to the concessionaire[49]. Such requirements are also to be found in the Brazilian law together with the efficiency in the fulfillment of state missions and in the employment of society's resources as well as other objective criteria such as:

> "*Transparency of procedures and decisions;*
>
> *fiscal responsibility in the signing and execution of partnerships;*
>
> *non-delegation of regulatory and jurisdictional functions, of the exercise of police power and other activities exclusive to the State;*
>
> *respect for the interests and rights of the service recipients and of the private entities entrusted with its execution*[50]".

These criteria above are aimed at a general public interest. This general public interest is also protected at the procedural stage for awarding the contract. In French law: "*The concession contract is awarded to the bidder who has submitted the best offer with regard to the overall economic advantage for the concessioning authority on the basis of several objective, precise criteria linked to the subject matter of the concession contract or its performance conditions*[51]". The overall economic benefit criterion aims to prevent corruption, bribery, favoritism, and conflicts of interest[52].

---

[48] Code de la commande publique, art. L. 2234-1 à 3.

[49] Code de la commande publique, art. L. 3111-1.

[50] Law n° 11.079 of December 30, 2004, art.4.

[51] Code de la commande publique, art. L. 3124-5.

[52] See the intervention of Professor P. DELVOLVÉ at the conference on the "regulation of public procurement" organized by the Maurice Hauriou Institute of the University of Toulouse and by the Administrative Court of Toulouse, December 1, 2017.

All in all, partnership agreements and concession contracts have this in common: they both represent one of the highest forms of partnership between the public authority and the private sector, since the former entrusts the latter with a certain number of key tasks which go beyond simple execution and which traditionally fell to it, notably the design of the project.

The rationale for PPPs is to improve the delivery of public services by improving the management of these services, and to transfer to the private operator the cost of financing the investment to manage these services or build new facilities. However, their implementation over the last 20 years has not shown that these benefits have been achieved in France and in several European countries. A different picture emerged in Brazil where significant and coherent efforts have been made in public policy and action.

II. The differences in public policy and action

The use of PPPs in France and Europe has had mixed results. The mixed record concerns in particular the implementation of some major infrastructure projects, for which precisely the use of a PPP seemed to be the most appropriate. In this respect, reports have revealed the lack of clear policies and strategies on the part of governments and local authorities that have entered PPP contracts (A). This contrasts with a consistent PPP policy and strategy developed in Brazil over the last 20 years (B).

A. The controversial relevance of using PPPs for certain projects in France and Europe

The problems mainly concern delays in implementation, financial abuses, and breaches of the principle (central to European law) of competition.

The "*Campus operation*" launched in 2008 by the French government to modernize ten university campuses and create clusters of excellence by bringing together several universities used the PPP form[53]. There was also the intention to take into account from the outset all the costs of the operation, including the cost of maintenance as well as certain objectives such as estate asset optimization. and energy performance. The choice of the PPP form was precisely that the operation, of great dimension, be realized as quickly as possible whereas the universities

[53] This plan also accompanied the implementation of the reform of university autonomy.

had little expertise in large-scale real estate projects[54]. However, the implementation of this operation has been subject to significant delays and changes, including in the financing and legal form of the contracts concluded between the public authority and the private operators.

The reasons for these hiccups are the resistance with which the project quickly met from local authorities and some universities themselves. This led the State (Ministry of Higher education) to abandon the exclusive use of partnership contracts and to resort to the form of a public works contract called "*Maîtrise d'ouvrage publique*" (MOP, now abrogated) by which the public entity itself takes charge of the financing of the project, the "*choice of the process according to which the work will be carried out and it concludes, with the project managers and contractors that it chooses, the contracts having as their object the studies and the execution of the work*[55]". The financing of works had to change as a result and the government obtained a loan from the European Investment Bank[56]. The public financial institution "*Caisse des dépôts et consignations*" (CDC) also participated in the financing of works concerning several universities in partnership projects involving these universities, the regions as public authorities and the CDC. For the modernization of Bordeaux University, the region has committed to finance half of the rehabilitation and construction work and half of the company's operating costs during the investment period[57]. The State also intervenes in the financing by paying a consequent endowment. This is a far cry from the partnership market as it will be set up by the legislator in 2018.

According to the report of the *Cour des Comptes* (French national audit chamber), the major delays – the campus operation should not be completed until 2023 – can be explained not only by the reluctance of some local authorities or universities but also by "*the unpreparedness of the universities to deal quickly with projects of such magnitude and the procrastination on the modalities of implementation*[58]". Some universities have attributed the cause of delays to the state administration:

> "*The delay in certain operations is mainly attributable to the between the freezing of the PPP procedure (end of June 2012) and the authorization to the authorization to restart the projects*

[54] Cour des comptes, rapport public annuel 2018, p. 390.

[55] Loi n° 85-704 du 12 juillet 1985 relative à la maîtrise d'ouvrage publique et à ses rapports avec la maîtrise d'œuvre privée, art. 2 (abrogated).

[56] Cour des comptes, rapport public annuel 2018, p. 397.

[57] Convention partenariale de site, Oct. 8, 2010.

[58] Cour des comptes, rapport public annuel 2018, p. 397.

> *within the framework of the Law on public contracting (March 2013), and then to the need to submit to our supervisory authorities an expertise report for each of the operations (including those that had already given rise to an expert report validated in the framework of the PPP), and lastly, the sometimes lengthy duration of certain competition procedures. competition*[59]". https://www.deepl.com/translator?utm_source=windows&utm_medium=app&utm_campaign=windows-share

Also, the part of the project financing paid by the State turned out to be less than expected: the sale, by the State, of shares it held in the EDF company did not bring in as much as was announced because of a drop in the value of the shares. In addition, the use of the sale of shares to finance the Campus operation was not in line with the rules set out in the finance laws of the time. In addition, the objective – set by the State – of merging universities has not been achieved and has been abandoned for some universities[60]. This objective was however essential in order to create internationally competitive universities.

However, the problems identified above are not systematic and the initially chosen form of PPP is not itself at issue everywhere[61] if one considers that several of the public bodies directly involved - the universities in particular - noted the success of certain PPP operations. In the words of the University of Bourgogne's president:

> "*The campus operation was a real and effective opportunity to develop its Dijon campus. It has given the campus an international dimension through a strong higher education development project that has brought together the Burgundy region and the Greater Dijon metropolitan area. The PPP procedure, despite its great complexity of implementation and the strong rigidity that it entails in the application of its economic model, has led to the completion on schedule of the four projects*[62]".

Echoing the problems encountered by the campus operation, the report carried out by the French Senate pointed out the risk of a "*poor initial definition of the needs of the public entity*" downstream from the phase of concluding PPP contracts i.e. the risk that the partnership

[59] President of the community of universities and establishments of the federal University Toulouse - Midi Pyrénées, *in* Cour des comptes, rapport public annuel 2018, p. 421.

[60] Cour des comptes, rapport public annuel 2018, p. 393.

[61] The President of the community of universities and establishments of the Grenoble Alpes University considers that the adjunction of smaller operations to the major PPP operations was a mistake because they did not lend themselves to this PPP form and their conversion to the MOP form with other financing was inevitable. See Cour des comptes, rapport public annuel 2018, p. 428.

[62] Cour des comptes, rapport public annuel 2018, p. 424.

contract (which, at the time, was most similar to the PPP form) might be poorly adapted to certain projects[63]. The unsuitability of the PPP form for certain types of projects is also due to a local authorities' practice of over-dimensioning the scope of the contract in order to respect the criterion - existing at the time (see above) - of complexity which justified, in the eyes of the law, the use of partnership contracts. This led the Public Finance Inspectorate to say that "*some projects, such as those for public lighting, which were a priori basic, were artificially made more complex by adding of additional services*[64]". The urgency criterion provided for by the law on the former partnership contract was also used for municipal political purposes in order to justify, in the run-up to an election, the launch of important projects[65].

The unsuitability of the PPP was confirmed by the words of the President of the community of universities and establishments of the Grenoble Alpes University who considered that the adjunction of smaller operations to the major PPP operations was a mistake because they did not lend themselves to this PPP form and their conversion to the MOP form with other financing was inevitable[66].

The Senate report also exposes the problem of the additional budgetary cost of certain projects carried out under PPP, whereas the justification for using this form of contract was, on the contrary, to allow the public entity to save budgetary resources by leaving the financing of the project to the private operator. In addition, the fact of entrusting a whole mission to a single operator or (more often) to a project company was supposed to represent a source of budgetary savings. Here too, the report points to a lack of appreciation on the part of local authorities of the risks that may arise during the long period of the project, among which a "*double risk of rigidity and crowding-out on the budget of public entities*" that may transform the contract into a "*contractual straitjacket*". The report quotes the General Inspectorate of Finance here as saying that the use of partnership contracts "*has constrained government budgets for several decades by increasing the share of their so-called "rigid" expenditures, which are the budgets of public administrations over several decades by increasing the share of their so-called "rigid" expenditures that is, unavoidable, and by limiting their capacity for redeployment. Thus, a partnership contract creates "an effect of inertia that intervenes, moreover, on public budgets already marked by the predominance*

[63] J.-P. SUEUR and H. PORTELLI, *Rapport d'information…,* p. 27.

[64] *Ibid.,* p. 28.

[65] *Ibid*.

[66] Cour des comptes, rapport public annuel 2018, p. 428.

of inflexible expenditures[67]". And the crowding-out effect denounced by the senators is the consequence of the rigidification of public expenditure, which forces the local authority to cut back on certain operating or even investment expenses in order to be able to continue to pay the parcels of remuneration due to the private operator[68].

The problems described above by the French senators can be found at the European level. An audit of PPP carried out by the European Court of Auditors revealed delays, ranging from several months to several years, in the execution of projects in several countries[69]. This generated additional costs for the public entity concerned: 30% additional public expenditure for the construction of five freeways in Greece and Spain for example. The reasons put forward were the financial crisis of 2008-2010, poor project preparation by the public partner, a lack of comparative analysis of other possible options for carrying out the projects and changes in regulatory requirements[70]. As the report noted: "*Decision-makers may scrutinize PPPs less carefully than they do traditional contracts, as capital costs for the latter are budgeted up front and they must compete with other projects for a limited pool of funding […] If the PPP option is chosen without any comparative analysis to ensure a level playing field between different procurement methods, there can be no guarantee that it is the one that maximizes value-for-money and best protects the public interest*[71]". The absence of a prior comparative analysis often goes hand in hand with an underestimation of the risks linked to the project and a poor distribution of these risks between the public entity and the private operators[72].

Among the cases noted, there is the construction, by concession contracts, of motorways in Greece, financed largely by tolls paid by users. The 2010-2011 financial and economic crisis in Greece negatively impacted the use of the motorways and consequently the private operator's income. This has led the private operator, who was contractually responsible for the exploitation

---

[67] J.-P. SUEUR and H. PORTELLI, *Rapport d'information…,* p. 23- 24.

[68] *Ibid.*, p. 25.

[69] Even if the legislations are not identical in the countries studied, they all follow the European law and the Court of Audit bases its audit on the definition given by the OECD and applicable to these countries: "*long term contractual arrangements between the government and a private partner whereby the latter delivers and funds public services using a capital asset, sharing the associated risks*". The report states the 3 main categories of PPP: "*(a) concessions, where, typically, final users of the service pay the private partner directly, with no (or reduced) remuneration from the public sector; (b) joint-ventures, or institutional PPPs, where both the public and private sector become shareholders in a third company; (c) contractual PPPs, where the relationship between the parties is governed by a contract*". European Court of Auditors, *Public Private Partnerships in the EU: Widespread shortcomings and limited benefits*, 2018, p. 12.

[70] European Court of Auditors, *Public Private Partnerships in the EU…*, p. 10 *ff* and p. 25.

[71] *Ibid.*, p. 35.

[72] *Ibid.*, p. 38.

and demand risks, to suspend the execution of works and other services related to the maintenance of the highways otherwise he risked going bankrupt. This was a case of force majeure, which was the subject of an amendment to the contract. And the choice was made by the authorities not to terminate the contract but to renegotiate it in order to continue the execution of the works and the exploitation of the highways by the private operator. All in all, this resulted in a delay of quite a few years and an additional cost for the public partner[73]. The responsibility of the authorities in the initial negotiation of the contract, in the sub-optimal distribution of the risks with the private operator and in the financial and economic crisis that led to the invocation of force majeure is indisputable.

B. The development of a coherent PPP public policy and strategy in Brazil

The report of the European Court of Auditors also pointed out the responsibility of the States and their governments which do not have well-defined institutional and legal frameworks for PPPs or the administrative capacity and expertise to successfully carry out PPPs[74]. The national PPP framework of some countries does not apply to projects that are nevertheless concerned by the public-private partnership (public service delegation for local authorities in France, very large infrastructure projects in Greece)[75].

More broadly, the absence of a national strategy for the use of PPPs leads to their under- or misuse and deprives the state of necessary investments as well as of budgetary savings from a sound management of expenditures for the payment of private PPP partners[76]. The existence of a real strategy (coherent institutional and legal framework, capacity, and expertise of public authorities, targeting of economic sectors and types of projects to be carried out in PPP) is what explains the good results of non-European developing countries like Brazil, Chile, India, and others.

The Brazilian legal framework differs, as we saw in the first part, from the French framework in that it deals with a specific form of concession. The Indian model also focuses on the concession. But there is more than one clear and consistent framework. Brazil, like India

[73] European Court of Auditors, *Public Private Partnerships in the EU…*, p. 25-30.

[74] *Ibid.,* p. 42.

[75] *Ibid.,* p. 49 to 51.

[76] *Ibid.*

and other countries in the South, have made PPPs a key tool in their strategy for economic development and catching up in terms of infrastructure, which involves mobilization of private investment including foreign direct investment[77].

Indeed, Brazil accounted for 40% of all PPP infrastructure investments in Latin America and the Caribbean between 2011 and 2020. In almost the same period, PPPs accounted for a quarter of infrastructure investments in the country, mostly in the energy sector but also in road, air transport, ports, and other sectors[78]. These results come from the construction of a solid legal framework: the aforementioned 2004 law, the law no. 13.334 of September 13th 2016 "On the Investment Partnerships Program" and a recent PPP incentive law[79].

The second of these laws creates an investment partnership program to strengthen PPPs mainly in the key infrastructure sector, whether the projects are initiated by the central government or by the states and municipalities[80]. This program makes concession contracts (in its various forms regulated by the 1995 et 2004 laws) the preferred instrument for encouraging investment in infrastructure, with the ultimate goal of accelerating the country's economic and social development. The law establishes the principles of stability of public policies in terms of infrastructure, efficiency and transparency of public action. It refers to the regulatory power (by decree) of the Executive to set long-term policies for PPPs in the infrastructure sector[81].

---

[77] Different strategies to increase investment have followed or complemented each other with the changes of government in Brazil, all of them, especially since 2004, making PPPs a privileged instrument: *Programme of growth acceleration* (2004), *Investment Partnerships Program* (2016), *new programme announced in March 2023* under a name to be determined. In the view of the Brazilian authorities, the adoption of public-private partnership (PPP) to leverage investments in works all over the country is key to the new investment strategy for the years to come. See A. VEDELIO, *Governo federal adotara parcerias com setor privado para investimentos*, March 10, 2023, accessed on May 22, 2023, https://agenciabrasil.ebc.com.br/economia/noticia/2023-03/governo-federal-passara-fazer-investimento-direto-por-ppp.

As for the importance for Brazil (like other developing countries) of mobilizing private investment through PPP, a report made for the Interamerican Bank of Development noted in 2014 that: "*The investment needs are so vast that the country's public resources are not enough to meet all the required level of investment. Despite such needs, the level of investments in Brazil has been relatively low. While China, for example, has aggregate investment levels of over 40% of its GDP, investments in Brazil have been only about 19% of its GDP […] Knowing the limitation of her country's budget and public debt, the President of Brazil, Ms. Dilma Rousseff, has clearly concluded that "without private sector involvement, the infrastructure Brazil needs will never be built."[…] There seems to be a consensus that the model of increased consumption and indebtedness of Brazilian citizens has been exhausted and growth has to come from investments, local and foreign. As a result, further development of public private partnership in Brazil has become crucial*." C. QUEIROZ, G. ASTESIANO and T. SEREBRISKY, *An Overview of the Brazilian PPP Experience from a Stakeholders' Viewpoint*, Interamerican Bank of Development, Infrastructure and Environment Sector, Technical Note, p. 15.

[78] Economist Impact, *The 2021/22 Infrascope*, The Economist Group 2022, p. 14.

[79] Law derived from Provisional Measure 1.052/2021.

[80] Law n° 13.334/2016, art. 1 (§1).

[81] Law n° 13.334/2016, art. 3.

According to article 5 of this law: "*The projects qualified in the PPI [Private participation in infrastructure] will be treated as projects of strategic interest and will be given national priority before all public agents in the administrative and controlling spheres of the Union, the States, the Federal District, and the Municipalities*".

The 2021 PPP incentive law regulates, among other things, the procedures for awarding contracts (including the *"competitive dialogue"* as in the European law). This law also enables the federal government to contribute to a special fund to promote PPPs by providing specialized technical and professional services, covering the risks associated with the public counterparty of PPPs through guarantee instruments, and participating in the initial capitalization of investment funds regulated by the Brazilian Securities and Exchange Commission.

Brazil has also strengthened the institutional framework of its PPP strategy through the creation of specialized bodies including, in 2016, the Special Secretariat for the Investment Partnership Program (under the Ministry of Economy then, in 2019, under the direct authority of the Prime Minister) in charge of coordinating, monitoring, evaluating and supervising investment partnership actions and of supporting the execution of these actions[82]. The Brazilian Export and Investment Promotion Agency (*ApexBrasil*) has also carried out actions to promote PPPs to foreign investors.

All this explains why Brazil ranked first in Latin America in the *Economist Impact / Inter-American Development Bank Infrascope 2022* index, which measures country by country the impact of the regulatory framework and government policies in favor of PPP development. Among the highlights noted by this index: the significant resources (experts and budget) allocated to the Special Secretariat created in 2016, the effective preparation of PPP projects; the attention paid to environmental and social aspects in the project preparation phase; and frequent performance and impact evaluation during project implementation. The index also noted the increasing participation of foreign investors in the PPP projects selected at the end of

[82] See law n° 13901/2019, art. 8 amending article 8 of law n° 13.334/2016. The Chief Minister of the Civil Case, under whose authority the above-mentioned Special Secretariat is placed, is the equivalent of a Prime Minister who shares the functions of head of the executive branch with the President of the Republic. The functions of the Special Secretariat for the Investment Partnership Program are described in articles 8-A and 8-B of that law and also added as articles 8-A and 8-B to the law n° 13.334/2016. This amended law n° 13.334/2016 makes also reference to the creation of a Council of the Investment Partnership Program in the Office of the President of the Republic, which empowers the Head of State to monitor and intervene directly in this program - in parallel with the work done by the above-mentioned Special Secretariat – just as in.

the procurement procedures, thus testifying to an effective implementation of the competition principle[83].

* * * *

In conclusion, the case of Brazil displays the importance of having a comprehensive national PPP strategy, which undoubtedly contributed to the improvement of this vast country's infrastructures. Not all PPP projects have been successful, especially when the pre-feasibility studies and contract preparation were of poor quality and the local public authorities were not prepared in their technical assistance[84]. The *Infrascope 2022* survey actually noted that "*the lack of clear guidance on compensation mechanisms for early termination or contract defaulting and the vagueness of force majeure clauses create legal uncertainty for the private sector*[85]". Contract changes may be unavoidable in the face of unexpected events, which is more frequently the case in developing countries. Hence the need for transparent criteria to prevent disputes.

It should be noted that it is still difficult to take into account, in the comparison of public policies and actions of the countries cited in this article, the partnership agreement, which is the main contractual form of PPP in France but which has only been implemented as of 2019 and is designed for long-term projects. This form of contract was conceived as a facilitating instrument for the State and the local authorities, in particular with the possibility of paying the private operator once the work has been completed. But beyond the advantages of this contract and the advantages of the concession contract, the success of PPPs depends on improved public action and the existence of a clear and effective national strategy for supporting and accompanying projects.

[83] Economist Impact, *The Infrascope 2021/22 index*, commissioned by the Interamerican Development Bank, The Economist Group 2022, p. 15- 16.

[84] C. QUEIROZ, G. ASTESIANO and T. SEREBRISKY, *An Overview of the Brazilian PPP Experience…*, p. 38.

[85] Economist Impact, *The Infrascope 2021/22 index*, p. 15. Situations of force majeure and other causes of impossibility of contract performance are not uncommon in developing countries, particularly where sudden economic or political reversals can occur, although in Brazil the country risk is generally below the average for these countries and the macroeconomic and legal environment is stable.