"PARTNERSHIP CONTRACT" IN FRANCE: IN BETWEEN CONTROVERSIES AND PARADOXES[1].

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Introduction

Introduced in France by the Order No 2004-559 dated 17 July 2004, partnerships contracts are often forgotten about and merely referred to as 'Public-private partnerships' (PPP), the generic category within which they fall. Broadly speaking, PPP do not have any specific legal definition. The 2008 Report of the Organisation for Economic Cooperation and Development (OECD) defines them as '*an agreement between the government and one or more private partners (which may include the operators and the financers) according to which the private partners deliver the service in such a manner that the service delivery objectives of the government are aligned with the profit objectives of the private partners and where the effectiveness of the alignment depends on a sufficient transfer of risk to the private partners'*. Consequently, partnerships contracts fall into the category of existing contractual models in France, involving both the public and private sector, such as concession based models (concessions or service concessions - known as the 'affermage' system), administrative long leases ('Beaux Emphytéotiques Administratifs') of both ordinary and specialist law, and temporary occupation permit 'autorisations d'occupation temporaire du domaine public'.

These partnership contracts form part of a new logic of public management, which seek to increase the efficiency of the latter and better control the amount of public spending using an overall coast approach[2]. It reshapes the boundaries between public and private sectors, by introducing methods stemming from the private sector in the administrative sphere. These contracts change the role of the State in the economy, moving from a place of direct operator to one of organiser, regulator, and controller. Partnerships contracts also constitute an answer to the poor quality and adaptation of public procurement formulas in France, which are based on a dual system, composed of public service delegation contracts

[1] Traduction: Hubert Delzangles, Professor of Public Law, in collaboration with Valentine Chatelier, Sciences-Po Bordeaux.

[2] See CHAMMING'S G. (2011), Le droit français de la commande publique à l'épreuve du contrat de partenariat. Du partage des risques à la réforme de l'Etat, Thesis, Bordeaux IV University.

and public procurements.

With regards to public procurement reforms, the opportunity to adapt the British *Private Finance Initiative* (PFI) system is hence considered with great interest. Indeed, Great Britain launched this policy in the early nineties, influenced by John Major's government *New Public Management*. The *Private Finance Initiative* aims to promote the private sector's participation in the creation of infrastructures and public utilities[3]. The PFI then became British government's preferred tool to revive the public service. It was even re-launched by the New Labor and Tony Blair in the 1997 to finance the building program of educational and health facilities. This policy intends to ensure a real value in exchange of a cost: the 'value for money', as well as define the elements of performance: the 'best value for money'. In this context, private companies are no longer mere facilities suppliers but become long-terms providers. They combine the designing, building, financing and operating of structures within the framework of their relations with the public authority. They are referred to as 'DBFO' contracts, which correspond to partnerships contracts where the service is sold to the public sector and not made profitable through tolls, as it would follow from the logic of concession based model.

The idea of partnerships contracts, if it has not always been promoted, has been carried over by International fora and more specifically European. The World Bank highlighted the benefit for developing countries of using partnership contracts[4] in the way it is done in European countries, the United States or Canada for example[5]. The United Nations Commission International Trade Law (UNCITRAL) also relayed the advantages of this type of set up so as to modernize States legislations in relation with privately financed infrastructure projects. On the other hand, if partnership contracts have indeed been taken into account by the European Institutions, the latter have not gone so far as to effectively promote them. In the Green Paper on public-private partnerships and public procurement and concessions European law dated 30 April 2004[6], the European Commission mentions the 'PPP phenomena' and explains the increased resort to PPP operations through various factors, namely budget restrictions faced by European Member States; the contract's ability

[3] See MARET J. Les contrats de partenariat public – privé, action publique et performance, Thesis defended on 8 January 2013, Limoges, p. 50 et seq.
[4] « *Autoroute de l'avenir : Dakar s'offre le 2ème PPP routier subsaharien* ». Les Afriques N°114, April 2010
[5] See for Canada, PREFONTAINE L. et al.(2009). La capacité partenariale, pilier de la réussite d'un partenariat public-privé. RFPA, n°130, p. 323
[6] Commission Green Paper [COM (2004) 327 final]

to meet the public sector's need for private funding; and partnerships contracts' value to better benefit from the know-how and working methods of the private sector in public life.

Interest for this type of contracts has been spreading across Europe, particularly amongst our closest neighbors - Italy[7] or Spain being some of the examples, those countries having introduced contracts of collaboration between the private and public sectors through the Law dated 30 October 2007 governing the public sector contracts (LCSP)[8].

In the late nineties in France, the public works company contracts ('Marché d'entreprise de travaux publics', METP), that constitutes the only legal engineering established by case-law[9], was experimented by public bodies in an effort to constitute a third kind of contract alongside these of public procurement and public services delegation. This public works company contract, usually defined as a *'long term contract, which confers the building and exploitation -or only exploitation- of a public work to a company, in exchange of a remuneration by the public authority'*[10] indeed represented a new contractual formula providing several advantages in terms of funding[11]. An undefined legal regime and various abuses led to those contracts being qualified of public procurement by the State Council in a 1999 case law[12], and hence prohibited. However, as rightly pointed out by Fabrice Melleray[13], what the joint action of the administrative judge and the regulatory authority seemed to have wiped out has indeed started to partially rise from its ashes thanks to the legislator through the partnership contracts[14].

The Constitutional Council was however not wrong-footed by this appellation, and surrounded these contracts with appropriate precautions, as the reserve of interpretation

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[7] See for Italy BOUGRAIN F., CARASSUS J. et COLOMBARD-PROUT M., *Partenariat Public Privé et bâtiment en Europe : Quels enseignements pour la France ? Retour d'expériences du Royaume-Uni, d'Italie, du Danemark et de France*, Presses de l'Ecole Nationale des Ponts et Chaussées, 2005, p.13.

[8] Law n°30/2007, 30 october 2007 on public contracts (de Contratos del Sector Público), BOE 31 October 2007

[9] CE, 11 December 1963, Ville de Colombes, req. n°55972, Rec. p. 612

[10] BERGEAL C., conclusion on CE 8 February 1999, *Préfet des Bouches-du-Rhône c/ Commune de La Ciotat* AJDA 1999, p. 365; RFDA 1999, p. 1172, chron. S. Braconnier.

[11] See inter alia « *la réalisation immédiate d'un ouvrage sans avoir recours à l'emprunt ni à l'impôt* », see Yann Aguila, Notion et régime du METP, *in Guide juridique et pratique du METP*, EFE, 1995, p. 54-55

[12] CE, 8 February 1999, Préfet des Bouches-du-Rhône contre Commune de la Ciotat, Req. n°150931,Rec., p. 19

[13] MELLERAY F. (2003), Le marché d'entreprise de travaux publics, un nouveau lazare juridique ?, AJDA, p. 1260. See also Rapp L. (2005), Aux origines du contrat de partenariat, Droit et ville, n°60, p. 29.

[14] Ord. n° 2004-559, sur les contrats de partenariat : Journal Officiel 19 Juin 2004 ; JCP G 2004, act. 329, recap S. Braconnier ; JCP E 2004, act. 146; JCP A 2003, 1890)

on the Decision dated 26 June 2003 with respect to the Law empowering the government to simplify the legislation illustrates. It considers on this matter that *'no rule or principle of constitutional value impose to entrust different persons or companies with the conception, building, transformation, exploitation and funding of public works, or the management of funding of services'* and *'nor does any principle of constitutional value forbid that in case of allotment, offers relating simultaneously to several consignments would be subject to a common judgment with a view to determine the most satisfactory offer from a global and balanced perspective'.* But it then goes on clarifying that *'The spread of such derogation to ordinary public procurement law or public domain would potentially deprive of legal guarantee the constitutional requirements inherent to equality before public procurement, protection of public domains and proper use of public funds; that, in such conditions, orders adopted on the basis of article 6 of the aforementioned legislation would reserve such derogations to situations responding to such general interest grounds that they have to be dealt with urgently, because of particular or local circumstances, in order to make up for a prejudicial delay, or the necessity to take into account technical, functional or economic features of a determined facility or service'*[15].

In the wake of the constitutional decision validating the principle of global contracts although circumscribed by a special legal regime, the premises of the partnership contracts' contractual philosophy had already been set up by the government order dated 17 September 2003 implemented long leases for health facilities, thus generating the notion of 'risk spread' between the two partnerships. Subsequently, the government order dated 17 June 2004 implemented partnership contracts in a form that has been deeply modified by the 28 July 2008 law n°2008-735 reforming the methods of funding's methods, of which the notion of risk-spread has become the first pillar.

This global contract, which prevailing interest is to allow a private pre-financing of public facilities, has been the subject of several controversies for the last ten years (I). But beyond these elements, partnership contracts remain a legal instrument that should be dealt with competently, inter alia as regards to the way it has been implemented in France, which raised various paradoxes (II).

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[15] LINDITCH F. (2003), Les partenariats public-privé devant le conseil constitutionnel, note sous Cons. Const., 26 juin 2003, DC n°2003-473, JCP A, p. 1293. See also, TERNEYRE P. (2003), Les nouveaux contrats de partenariat et la typologie des partenariats public-privé, RDI, p. 520

I - Partnership contracts in France, a controversial matter.

Partnership contracts are being widely debated, and are subjected to recurring criticism from the part of specialist media or law publications. Its road ahead has been fraught with obstacles from the very beginning, and throughout its development[16].

A - A debated advent.

If the drifts of public work company contracts and the development of public procurement law have highlighted the necessity to design a new global contract, no sooner was the latter created that it was already heavily criticized.

1. The global contract's advocates.

For Alain Ménéméris[17], this is indeed a "new kind' of public contracts. The French public procurement's system used to be dual. Everything not qualified of public procurement fell under public services delegation contracts, and vice versa. Since 2004, partnership contracts have been recognised as a third type of contract, borrowing on the one hand the system of public payment (opposed to payment by the service user) from the public procurement, and on the other hand the spread of financial burden and the transfer or share of risks with the private operator to public services delegation contracts – inter alia concessions. Ultimately, it amounts to a restoration of public payment concessions tolls[18].

Partnership contracts' advocates, amongst whom the government of the day, thought that such long-term global contracts through which public persons would entrust economic operators with funding, as well as conception, maintenance and exploitation of works or facilities, by transferring the management portfolio and entirely or partly compensating co-contracting parties by payment installments spread throughout the duration of the

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[16] See Report "*Contrats de partenariat, objets de controverses*", Emeline TOUZET, PPP Observatory, in the framework of the chair supported by the Bordeaux University Foundation, in partnership with GDF Suez and Sciences-Po Bordeaux.

[17] MENEMENIS A. (2004), L'ordonnance sur les contrats de partenariat : heureuse innovation ou occasion manquée ?, AJDA, p. 1737.

[18] LINOTTE D., (2005), Un cadre juridique désormais sécurisé pour les contrats de partenariat, AJDA, p. 16.

contracts, would offer decisive advantages.

These contractual formulas would facilitate the implementation of projects that the condition of public finances could not, and still cannot, consider without resorting to private pre-financing and spreading the costs over several years. They could procure, on the long term, a greater economic efficiency and financial gains. Indeed, *'Although private financing is,* a priori*, more costly than public financing, substantial savings would result, inter alia, from the reduction of transaction costs linked to the integration of realization tasks on the one hand and to exploitation of private operators' capacity to use public facilities on the other hand - for example by undertaking maintenance work on a regular basis to keep them in good conditions, or by not leaving them unused when they are no longer necessary to the public service'*[19] . More generally, the benefits of switching from *'a logic of means to a logic of results, in which the public administration's partner would be given performance targets and encouraged to reach, or better exceed them, though adequate financing mechanisms'*[20] were predicted. Beyond this idealistic vision however, criticisms emerged in practice.

2 – The actions of fierce opponents.

Three types of criticisms have emerged, relating to political, operational and institutional considerations.

To begin with, the political criticism has focused on the argument of a drift in the use of public funds through deferred payment. Article 96[21] of the Public Procurement Law Code prohibits the latter. Yet, the advantage of delayed payment is precisely to deconsolidate the debt of public-law bodies and the State. As such, the European Agency Eurostat, in a decision dated 11 February 2004 relating to public-private partnerships' treatment, specified the criterion of deconsolidation. It recommends that the assets linked to a public-private partnership should be classified as non-public assets and not registered in public administration's balance sheets if the two following conditions are not fulfilled. First, the private partner has to bear the risk of building and second, the private partner has to bear

[19] MENEMENIS A. (2004), L'ordonnance sur les contrats de partenariat : heureuse innovation ou occasion manquée ?, AJDA, p. 1737.
[20] *Ibid*
[21] Article 96 Code des marchés publics : « Est interdite l'insertion dans un marché de toute clause de paiement différé ».

at least one of the two following risks: this of availability, or this related to demand[22].

It seems that Eurostat intended taking into account the efforts undertaken to increase public spending efficiency and improve the quality of public services in the context of partnership contracts. Moreover, the European growth initiative, approved by the European Council in December 2003, aims to promote the resort to those partnerships, inter alia, to develop growth-related infrastructures. The question is to be addressed further, but this situation has persisted in France until the reform introduced by the Decree dated 16 December 2010 for the part relating to investment debt.

Secondly, the operational criticism from the masterminds (the architects) also caused a good deal of commotion. Indeed, the legal regime of partnership contracts allows to depart from the Law number 85-704 dated 12 July 1985, on Public Project Ownership and its relation to Private Project Ownership, to relations called the Public Project Ownership law ('MOP law'). Article 12 of the Order (for the State) and L-1414-13 of the General Local Authorities Code ('CGCT') (for local authorities) state that *'when the public person only entrusts the co-contractor with part of the works, facilities or intangible properties, it can, departing from the dispositions of the fourth paragraph of Article 7 of the Law number 85-704 dated 12 July 1985 on Public Project Ownership and its relation to Private Project Ownership, use the services of a project ownership team for the conception part that she is responsible for'*. This exemption clause very clearly spells out that concerning partnership contracts, once the public person whishes to entrust an architect upstream with the architectural design of its project, the latter would see the single contract rule of his whole mission provided for in the MOP Law deprived of all the post 'draft-projects' phases. This cut constitutes, for the masterminds, a shortfall on a MOP-type mission, and explains the objections that followed.

Thirdly, the judge acted as an intermediate to face the institutional criticism. The government created, with the Order number 2004-1119 dated 19 October 2004, a mission

[22] The construction risk covers inter alia the availability date of the asset, its final cost and technical quality; this risk is to be born by the public sector if, for example, rents are paid to the private partner without taking into account the state of the asset at the time upon which it is made available; thus regarding the MAPP, *'the State obligation to start paying a partner regularly without taking into account the effective state of the assets is proof that the State bear the bulk of the construction risks'*; the availability risk covers the asset's availability in accordance with the contractual provisions as well as the maintenance of the availability during the whole duration of the contract; it can be measured in terms of the level of penalty applied to the private person in case of unavailability; the risk of demand corresponds to the variation of the asset's use by users.

to support the achievement of partnership contracts, which advisory role is compulsory for States' projects and optional for local authorities. The Decree number 2011-709 dated 21 June 2011 modified the Decree dated 19 October 2004 by extending the mission's remit, which was renamed 'Support Mission for the achievement of Public-Private Partnerships' (MAPPP)[23], thus allowing to proceed to analyses and opinions of other contractual models[24].

As for partnership contracts, the expert body is responsible for supporting public authorities as wells as professional actors during the preparation of partnership contracts. It can also provide an expertise on the general economy of the operation and help the public person leading the project to conduct the required risk-assessment study. The mission also contributes to the award and negotiation phase of the contracts. It is compulsorily asked for an opinion on any partnership contract project launched on a State or public institution level, and has to validate the principle of resorting to contract in view of the prior assessment that the contracting authority submitted. It is again consulted at the end of the award procedure, in order to assess the contract's impact on public spending and budget sustainability before its signature. Local authorities can seise the MAPPP if they so whish, to benefit from a reasoned opinion.

However, since its establishment, the MAPPP has been questioned through a legal dispute initiated by the Paris Bar. The latter based its argument on a potential infringement of tree competition induced by the 'expert' role assigned to the MAPPP. The applicants did not succeed in this respect. Indeed, the State Council stated that *'in entrusting the support mission for the achievement of partnership contracts with the provision, to public person who ask for it, of support in the preparation, negotiation and follow-up of partnership contracts, Article 2 of the targeted Decree confines itself to implementing the general interest mission, which belongs to the State, to monitoring compliance with the principle of legality by the public persons and private persons entrusted with a public service mission ; (…) that thereafter it was neither the intention nor the effect of the dispositions (…) to infringe the principle of freedom of commerce and industry, and competition law'*[25].

Fourthly, and lastly, this criticism had no reach beyond specialist circle, it should be

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[23] Mission d'appui aux Partenariats Public-Privé.
[24] This relates in particular to administrative long leases and temporary occupation permits (BEA) of the public domain (AOT) for which the prior evaluation as intended by the Order becomes a prerequisite for all contracts which annual fee exceeds one million Euros before tax.
[25] CE, 31 May 2006, Avocats du Barreau de Paris, req. n°275987, Rec. p. 272.

noted that the definition of partnership contracts falls into a rather questionable and problematic definition. Indeed, in order not to overlap the field of public service delegation contracts, partnership contract has been the base of public service performance (works or facilities necessary to public service and other provisions of services contributing to the execution, by the public person, of the mission of public service it has been entrusted with). The delimitation between what is public service matter, and what is support or ancillary services, is undoubtedly a very sensitive issue[26].

Some of these criticisms have been echoed in the legislator's positions, which reformed this contractual formula on several occasions, so as to facilitate its use but also to provide it with a proper framework.

B – A reviewed implementation.

In response to this flow of criticism and the lack of interest of public bodies for this type of contracts[27], the legislator and regulatory power have taken over the issue. A succession of reforms, although maybe not always put to good use, consolidated the legal regime of partnership contracts.

1 - The legislative reform of the 28 July 2008: Law number 2008-735

The new 2008 text should put the concept of comprehensive income back to the center of the contractual procedure, and render this cooperation between public and private sector formula attractive. Nevertheless, it should be born in mind that the Constitutional Council had already largely framed the recourse to such contracts by specifying its special character[28].

Therefore, the Law dated 28 July 2008 provides for a series of additions to the 2004 text[29].

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[26] See *infra*.

[27] Update: barely 30 contracts signed before the legislative reform, which adds to the need to revitalise the tool (172 on the 30 April 2013 –MAPPP source - amongst which 133 by local authorities and 39 by the State).

[28] Constitutional Council, decision dated 26 June 2003, n° 2003-473 DC, *loi habilitant le Gouvernement à simplifier le droit* : Rec. Cons. const. 2003, p. 382 ; Official Gazette 3 July 2003 ; JCP A 2003, act. 348.

[29] For a detailed study of this benefits, LINDITCH F. (2008), Premier regard sur la loi n°2008-735 du 28 juillet 2008 relative aux contrats de partenariat. JCP A, n°37, p. 17.

Beyond the possibility of assigning the claims subject to conditions[30], the opportunity to entrust a private partner with the income management and some procedural and tax reliefs[31], the legislator took this occasion to introduce three essential elements to the legal regime of partnership contracts.

Firstly, their scope has been reviewed. On the one hand, in its initial version, the text submitted to the Constitutional Council widened the conditions for resorting to certain sectors greatly lacking investments – such as universities, hospitals, police stations, prisons, transport infrastructure etc. In those fields, the text stipulated that the requirement of emergency should always be satisfied, subject to the only condition of the evaluation not being negative. This particular matter has been subjected to the Constitutional Council's censorship, which considered that it had the effect of limiting the scope of the preliminary assessment and impeaching the judge to exercise its legal control over the requirement of emergency[32]. By doing so, the Constitutional Council confirmed its two case law of 26 June 2003[33] and 2 December 2004[34] in which it took the view that such a broadening of partnership contracts was depriving of legal guarantees the constitutional requirements inherent to the principle of equal access to public procurement, protection to public properties, and proper use of public money.

However, the legislator introduced a new option to implement the partnership scheme: the combination of a positive cost-effectiveness and the principles of complexity and emergency. Article 2 of the Order and L-1414-2 of the CGCT now indeed provide for the possibility of using this formula if *'in view of either the characteristics of the project, or the requirements of the public service that the public person is entrusted with, or the insufficiencies and challenges observed in the achievement of similar projects, the resort to such a contract presents a more favourable balance of the pros and cons of a differed payment than others public procurement contracts. The criteria of deferred payment alone shall not constitute an advantage'*.

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[30] In order to facilitate the contract holder's funding, the legislator trivialised the resort to assignment. The contract can thus provide that a fraction not exceeding 80% of the total of the fee owed by the public person as regards to investments-costs may be transferred.

[31] As regards to tax relief, in order to allow partnership contracts to be compered and put to tender with other types of public procurements, the legislator granted a series of financial and fiscal benefits, similar to those of public procurements and intended to insure the neutrality of the scheme.

[32] Const.Council, decisions dated 24 July. 2008, n° 2008-567 DC.

[33] Const.Council, decision n° 2003-473 DC, aforementioned.

[34] Const.Council, decision n° 2004-506 DC: Const.Council Recital 2004, p. 211 ; Official Gazette 10 December 2004.

A few observations can be made regarding this new resort to partnership contracts. It should first be noted that if the criteria of differed payment is not excluded from the benefits that should be taken into account, yet, it couldn't alone constitutes a benefit. Furthermore, the text regulates the elements used to evaluate the balance sheet through three criteria. But in the light of these criteria's ambit, that broadens the access to these contracts, the issue of the administrative judge's position could be addressed. It is possible to consider that this criteria is, *a priori*, not a legal one because it comes on top of the benchmarking demonstration using a referencing scheme within the preliminary assessment, and subordinated to the demonstration of the complexity of having recourse to a competitive dialogue within the scope of the application of the Directive 2004/18/CE. The mere demonstration of a positive cost-effectiveness suffices to start a procurement procedure in the form of an invitation to tender, thus excluding all negotiations or dialogue with private operators candidates, the procurement model *par excellence* of the partnership contract[35].

Secondly, the legislator removed the mandatory insurance coverage for structural damages for contracts between the State and its public institutions. The likely aim was to achieve a lesser global cost for these contracts, by removing the relatively high fees of the mandatory insurance coverage for structural damages. The initial article of the project included all contracts, whoever their public partner. It was removed by the Senate, then partially restored by the National Assembly who limited the exemption of insurance coverage to partnership contracts between the State and its Public Institutions. Without necessarily considering this a benefit granted to very large contractors, it should however be stressed that the argument of the Constitutional Council for justifying this different treatment is highly questionable. Indeed, the latter considered that in the light of '*the capacity to face the financial risk resulting from the co-contractor's failure, the State and its Public Institutions are not put in the same position as local authorities and their public institutions*'. If the State were indeed its own insurer, the cost would still be born by the community at large.

Thirdly, the legislator authorized an asset evaluation of public authorities' private

[35] CHAMMING'S G. (2011), Le droit français de la commande publique à l'épreuve du contrat de partenariat. Du partage des risques à la réforme de l'Etat, Thesis, Bordeaux IV University, p. 354-363

properties (State domain goods being excluded from it)[36]. By doing so, it thus allowed public persons to reduce royalty expenses 'by offsetting'. It should be noted on that basis that the text does specify that it is a matter of promoting the dependence on public belongings. This theoretically shows that it is not simply a source of income. But, there again, the limitation between upgrading and simple benefit is difficult to draw. Furthermore, the leases or right in rem created by the holder *'can be granted for a longer duration than this of the partnership contract'*[37]. This dissociation of time shows that the aim is not merely to increase the value of the asset but also to find an additional method of financing that would enable to reduce accordingly the amount owed by the public partner. If the legislator did frame the process by specifying, on the one hand, that the public person shall expressly agree to each of the partnership contracts, and on the other hand, that the contract shall establish under which conditions the money earned from the upgrading of the private domain by the holder would reduce the amount of the remuneration paid by the public person, the facts remains that it is the Constitutional Council that has conditioned the principle by specifying that at the end of the partnership contract, the leases granted would be transferred to the public person[38]. However, the amount of revenue would logically not be known at the time of the conclusion of the contract and its estimation, which is a sensitive issue to consider, is of great importance when it comes to add value to the possible resort to such a method of financing.

If all those elements put together enabled local authorities to regain trust and interest for such a contract, the current global economic crises also gave a new impetus to the development of partnerships, as reflected by the Law on the acceleration of construction programs and the investment under the Economic Recovery Plan (LAPCIPP below)[39].

2 – The Law on Recovery plan: LAPCIPP 2009-179 dated 17 February 2009.

The Law on the acceleration of construction programs and the investment under the

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[36] *« […] si le titulaire du contrat est autorisé à valoriser une partie du domaine de la personne publique dans le cadre du contrat de partenariat, cette dernière procède, s'il y a lieu, à une délimitation des biens appartenant au domaine public. La personne publique peut autoriser le titulaire à consentir des baux dans les conditions du droit privé, en particulier des baux à construction ou des baux emphytéotiques, pour les biens qui appartiennent au domaine privé, et à y constituer tous types de droits réels à durée limitée. L'accord de la personne publique doit être expressément formulé pour chacun des baux consentis au titulaire du contrat de partenariat »* (CGCT, art. L. 1414-16).

[37] CGCT, art. L. 1414-16.

[38] Const.Council., decision dated 24 July. 2008, n° 2008-567 DC

[39] Law n°2009-179 dated 17 February 2009, 'LAPCIPP' – *loi pour l'accélération des programmes de construction et d'investissement dans le cadre du Plan de relance pour l'économie.*

Economic Recovery Plan comes in response to the then President's announcement of a Recovery Plan set up to address the financial crisis. In particular, it brings up a number of elements allowing partnership contracts, instruments likely to revive public investment, to address the issue of the difficult access to funding.

Beyond elements such as the possibility to obtain a guarantee paid for during two years by the State under certain conditions, in order to facilitate the funding of projects that are given priority like large facilities, the law once more alters the definition of the contract and enables the rolling nature of funding arrangements.

On the one hand, Article 14 of the text alters the very definition of the partnership contract, in its relation to funding. The initial text included funding in the very subject of the contract, covered by the private partner, although without specifying to what extent it would be covered. Practice would tend to lead to a full funding. The holder of the contract can now insure 'all or part' of the funding. Consequently, in this context of crisis, possibilities of co-funding are now explicitly authorised between private partners and public authorities. A local authority can thus benefit from the public-private partnership, while covering part of it's funding. If the argument of denaturation was indeed put forward by some, and criticised by others[40], it should be noted that the text limits the ambit of the disposition by prohibiting the public person, except for some contracts[41], from participating in the capital of the project company that would be created to hold the contract. The implementation of institutionalized public-private partnerships has thus not been enshrined in the text[42].

Furthermore, Article 13 of LAPCIPP[43] authorizes a public person, as part of the

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[40] TENAILLEAU F., « Les contrats de partenariat, la crise financière et la loi », JCP A, n° 14, 30 March 2009, 2078.

[41] This relates to partnership contracts concluded between local authorities and their public institutions. The major part of the final funding has to be provided by the private contractor, except for contracts exceeding a certain threshold, which has to be determined by Decree. During the Parliamentary discussion, it was mentioned that this threshold would only be designed to apply to projects 'for which public and parapublic funding are a majority in structural terms, in particular the project of Seine-Nord Europe Canal, but also high speed lines or large stadiums.

[42] PPPI European Law, Com (2007) 6661 dated 5 February 2008 regarding the application of European public procurement law and concessions to institutionalised public-private partnership.

[43] Article 13 « *En 2009 et 2010, par dérogation aux articles 7 et 8 de l'ordonnance n° 2004-559 du 17 juin 2004 sur les contrats de partenariat et aux articles L. 1414-7, L. 1414-8, L. 1414-8-1 et L. 1414-9 du code général des collectivités territoriales, la personne publique peut prévoir que les modalités de financement indiquées dans l'offre finale présentent un caractère ajustable. Mention en est portée dans l'avis d'appel public à la concurrence. Le candidat auquel il est envisagé d'attribuer le contrat présente le financement définitif dans un délai fixé par le pouvoir adjudicateur ou entité adjudicatrice. A défaut, le contrat ne peut lui être attribué et le candidat dont l'offre*

procurement procedure, to provide for the funding arrangements indicated in the final offer have to a rolling nature. The aim is to compensate for the reduction of bank financing offer for large projects that does not allow 2009 and 2010 candidates to provide a final offer with a full funding. The option is introduced for 2009 and 2010 and is due to be announced in the Notice of a competitive public tender. The Constitutional Council declared the provision valid, subject to interpretation. According to its decision[44], *'these provisions cannot call into question the call for competition's conditions, by exempting the local authority from the obligation to respect the principle of the most economically advantageous tender to the local authorities'* and *'cannot allow prospective candidates to fundamentally change the economy of the partnership offer'*. If the initiative could be relevant in particular to some large investments projects, practice did manage to adopt a literal interpretation of the text, in order to avoid its application to small-scale projects. This was a simple matter of avoiding mentioning the option in the Notice of a competitive public tender

2 – Isolated regulatory measures.

Two other regulatory provisions complement the general system, this time seeking a stricter framework for resort to such contracts. The first one addresses the criticism on the mechanism of deconsolidation of the debt. The Decree dated 16 December 2010 [45] reforms the budgetary instructions and integrates in public accounting the investment part of partnership contracts. It will thus not be possible to deconsolidate the investment debt anymore. The second tightens the award procedures' dispositions[46]. From now on, *'any partnership contract which conclusion is considered either by the State or a state public organization with a public accountant gives rise to a study conducted by the contracting authority to evaluate the whole consequences of the operation on public or private State domain as well as the availability of credits, and when it involves the occupation of public or private State domain, its accountability coupled with the orientations of its building policy.*' Conditions for the resort to partnership contracts for Public Health Institutions were also tightened through the revision of articles R 6148-1 et seq of the Public Health Code. Finally,

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a été classée immédiatement après la sienne peut être sollicité pour présenter le financement définitif de son offre dans le même délai ».

[44] Const.council., decision dated 12 February 2009, n° 2009-575 DC.

[45] Decree dated 16 December 2010, relating to budget and accountability instruction M.14 applicable to municipalities as well as local and inter-municipal public institutions of an administrative nature (JORF n°0297 dated 23 December 2010 p. 22566).

[46] Decree n° 2012-1093 dated 27 September 2012 supplementing the provisions regarding the granting of public procurements (JORF n°0227 dated 29 September 2012 page 15356).

it should be noted that those two Decrees, although of significance, were issued quietly. However, the first one is particularly interesting for it prevents deconsolidating the part devoted to operating expenditures. These elements naturally lead us to consider the partnership contract as a subject of paradoxes.

II – partnership contracts in France, subject to paradoxes.

If one had to highlight a sole paradox, one would find it within the very sub-title of this symposium: *'in between public need and private expertise'*[47]. Maybe because there is no legal definition of public-private partnership contracts, the slider of effectiveness of this very 'partnership' does not have a regulatory framework.

It may well be from these inaccuracies, for lack of legal loophole, that we can observe all the paradoxes of a public need often ill-define and a private expertise that barely fits into a contractual model where the aforesaid performance objective does not always go hand in hand with the efficiency desired. In this regard, one should not lose sight of the ultimate destination of the partnership, which is satisfying the need of users of a public service.

Therefore, just as an expert in monochrome photography would, one could freeze the picture and consider both negatives and positives aspects of paradoxes.

A – The negative image of paradoxes: a forgotten target of public need.

Because it seemed a sine qua non to provide a secured framework to partnerships' establishment, so far taken over by legal engineering, efficiency results could have legitimately be expected, even though the Constitutional Council had imposed a special status to partnership contracts, derogating from the pubic procurement's principles in ordinary law. Indeed, in practice, it is a difficult challenge to question the virtues of a contractual modal where private expertise is displayed as a symbol for efficiency, on behalf of global contractual arrangements, and where by contrast public persons, greatly inclined resort to the traditional supervision of pubic work, face the unresponsiveness of a system favoring delays and cost overruns.

Along with the controversies surrounding the implementation of the tool in French Law, which will soon celebrate its tenth anniversary, paradoxes can be raised as to the

[47] 13th International symposium, MDI Business Scholl, Partenariat public-privé : bilan et perspectives. Entre nécessité publique et expertise privée. Alger, 26 May 2013

adverse effects of the very principles of French Constitution's lauded virtues on the one hand, and the of the proper role of the administrative judge on the other.

1. The inconsistencies between the treatment of public persons and their detrimental effects on public need.

The origin of all the paradoxes leading to a difference in treatment between the State and local authorities is to be found at article 72 of the 1958 French Constitution. In the name of the principle of the free administration of the latter, the State has a priori no right to examine a decision to start a procedure then sign a partnership contract, without prejudice to the control of the financial jurisdiction a posteriori. Therefore, the text of the Decree includes two main titles, one relating to State partnership contracts and the other to Local authorities partnership contracts, codified in the General Code of State Local Authorities (articles L1414-1 et seq). This distinction does have consequences upon several details, among which, at a very early stage, the opinion of the Organization expert on such matters, the MAPPP. If no public person, whatever her status, is exempted from the obligation to set up a preliminary assessment allowing to highlight the derogatory eligibility criterion to start a partnership contract's procedure, local authorities have an option to ask the mission for its opinion, notwithstanding the fact that 75% of signed contracts are originated by local authorities.

If some local authorities diligently oblige with the mission's consultation, with the aim –not always admitted- of legitimizing the project before the deliberating assembly that could be against it, a great number of them do not do so, for lack of time in the schedule of the operation, or as to avoid feeling overran. Even though the opinion of the mission is only advisory, and hence not binding on the executive power, it can easily be asserted that the situation, in the event of a negative opinion, can become very inconvenient.

In the same line of argument, and notwithstanding the reference to the operation's proportionality in annual charges when the deliberating assemblies are to be consulted (such as the town council), local authorities do not have to demonstrate their financial capacity in setting up a project, neither in its procurement procedure nor in its execution. If such a liberal attitude at a local level regarding the management of public moneys can indeed offend, the situation is different for project carried on by the State – and particularly those started by Public Health Institutions subject to the consolidated Decree, like other

State's services.

Indeed, the recent Decree n°2012-1093 dated 27 September 2012 aforementioned supplementing the dispositions on the procurement of some 'budget sustainability' public contracts set up new steps of validation in the contractual process of public-private partnership, adding up to heavy restrictions prompt to purely and simply destruct the tool.

Hence, the opinion of the ANAP for health operations has generally been reduced to long lease projects for Health Institution only[48]. Any project relating to partnership contract of a Health Public Institution is now MAPPP's territory. Furthermore, either the ANAP or MAPPP's opinion will be expressed on the basis of a preliminary assessment coupled with a budget sustainability study, of the Institution's accounts and over time. It is only then that the Decree imposes that the opinion be forwarded to the Regional Health Agency (Agence Régionale de la Santé, 'ARS). The latter then has a month to address it to the relevant ministerial bodies which themselves have a month to submit an authorisation to start the procedure. On completion of the procedure, when the assignee is designated and the long lease contract developed, the Health Institution further has to address the finalised project to the ARS, which has a month to address it to the designated ministers, who themselves have a month to authorize the Health Institution to sign.

Albeit the ministers' silence is worth acceptance, in practice, an obvious drift has been observed regarding the lengthening of the procedure – about 6 to 9 month for both validations' steps imposed under the Decree.

There lie all paradoxes, from the moment a negative opinion or an absence of authorization occurs during one of these steps. Hence, and in the best of scenarios, the negative opinion would be issued by one of the expert organizations – the latter usually leading the Institution towards a feasibility within a model under the public project ownership that does not require any authorization - and the facility would thus lose the whole time from the preparation of the preliminary assessment report, the submission, and the expectation of a reply and the advocacy costs. Without prejudice to the legal option to consult the other organization, which was not involved in the uses, the new regulatory obligations generate deficiencies that should not be under evaluated in terms of pubic

[48] BEH result from the 2003 Health Order (aforementioned) codified in article L 6148-2 of the Public Health Code.

moneys management. Indeed, despite the time lost, the facility would engage its project through a tool that would keep the project ownership while being deprived of both the achievement of its initial objectives and of the private expertise having regard to performance commitments and risk-share that it could have hoped to get with a PPP type of partnership contract, or a long lease contracts for Health Institutions[49].

What is even more paradoxical, practice highlights that albeit a partnership contract could be perfectly eligible on such a project, a refusal of contractual BEH from the ANAP, which would be the 'naturally' seized organization, affects the facility's chance to resort to a PPP. Hence, and in the case of a Health Institution which budgetary flexibility is extremely fragile, the only option left is to go directly into debts by way of loan, without being given the benefit of a private project ownership and freed of temporal and financial drifts of public project ownership.

2 - The rebounds frustrating the administrative judge's action.

While having regard to the criteria of emergency, it is established in the text[50] for the State and in case law[51] for local authorities that public persons do not have to justify the causes for delay leading to emergency even though this criteria is scarcely used – the legal assessment does not in practice take into account the purely instrumental view regarding the need to 'act fast', the criterion for emergency recently suffered the adverse rebounds of the administrative judges' decisions in Bordeaux[52] and Lyon[53].

Indeed, and while the doctrine could have been deploring the lack of case law on partnership contracts, it is stepping in where it is not expected, thus questioning the very notion of complexity such as it has been used since 2004 – in accordance with the European Directive 2004/18/CE.

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[49] It should however be noted that a design-execution-support-maintenance build contract, as intended in articles L 6148-7 of the Public Health Code and 73 of the Public Procurement Code do not exclude the insertion of clause regarding risk-share. To this end, the contracting authority, project owner, have to use Article 13 of the Public Procurement Code to avoid mentioning the markets' general provisions (CCAG type) but implement a true head contract engaging the licensee. Nevertheless, project ownership remains public and the conception of risk share cannot be intended like for private project ownership.

[50] Article 2 of the consolidated Order 2004-559 dated 17 June 2004.

[51] CE, 23 july 2010, *Sieur A et SNESO*, req. 326544, published in the ECR.

[52] CAA Bordeaux, 26 July 2012, Ville de Biarritz, req. 10BX02109.

[53] CAA Lyon, 2 January 2014, Conseil Régional de l'Ordre des Architectes d'Auvergne, req. 12LY02827.

The first decision of the Administrative Court of Bordeaux relates to the renovation of the Museum of the Sea and the simultaneous construction of a 'City of Surf' on a separated site. The city of Biarritz has, at an early stage, initiated a management project's election competition so as to define the architectural plan of the project and hence its functional program. The administrative judge in Bordeaux harshly reflected on the complexity of the project, justifying the partnership contract as being a special contractual model, in a pithy Recital that seems to be questioning, far beyond the type, from the preliminary assessment report to the opinion of the MAPPP, consulted under the option provided to the town: ' *'Considering that the partnership contract constitutes a special regime in the ordinary law of public procurement, restricted to the sole situations where general interest's motives justifying their use are fulfilled ; that such a motive addresses, besides the emergency attached to the achievement of the project, its complexity, understood as objectively impeaching the pubic person to define, alone and beforehand, the technical means meeting its needs or establishing the project's financial or legal scheme ; that the objective incapacity of the public person to alone define these means must result in the inadequacy of classic contractual models in providing the expected answer ; that the demonstration of this impossibility is for the public person to bear, and shall not be limited to the mention of challenges that may arise from any project ; that in this regard, final screening assessment nor the opinion of the public-private partnership's support mission shall, before the judge, be proof of the invoked complexity ; that the possibility given to the local authority in article L.1414-13 to entrust its co-contractor only with part of the work's conception shall exempt it from justifying its incapacity to complete the part of the work realized in partnership, given its complexity'.*

The lesson that could be drawn from this case is not leaning more towards an easier resort to design studies at an early stage of a partnership contract procedure, and albeit scarcely used in practice - public persons preferring to engage in 'fully' holistic consultations relating to conception, construction, care and maintenance of structures – this position is not likely to silence all disputes with project managers. Just as paradoxically, it is worth considering the legitimacy, yet sought after, of the support mission's opinion even though it is only advisory.

The second, and recent decision of the Administrative Court of Appeal in Lyon restrictive assessment seems to be going even further in the notion of complexity. Indeed, in the event, the City of Commentry made a partnership contract for the construction of a

swimming pool that should have been allocated to a heating network, also in the planning stage. If the Administrative Court, on appeal from the decision of the Regional Council of the Architects' Association of Auvergne, did not question the eligibility of the partnership contract on the complexity criterion, the appeal judge decided that the elements of the demonstration did not satisfy the definition of complexity in the following wording: *'Considering that Commentry, a municipality of 7 1000 inhabitants, decided simultaneously of the construction of a municipal pool and the set up of a new heat distribution network, which was to supply the former; that it further intended to establish the cross-compliance criteria required to get subsidies; that it is clear from the supporting documents that these constraints, even taking into account the further need to respect existing standards for this type of structures, appear inadequate to express, under the circumstances of this case, such a complexity that the City was not objectively able to define, alone and beforehand, the technical means appropriate to its needs, with particular reference to the opportunity it had, regarding the municipal pool and in the absence of any sufficient specificity of the project, to establish technical specifications in terms of either functionality or performance; that it is also clear from the supporting documents that the municipality could not establish legal and financial arrangements for the project; that, in such circumstances, the criterion of complexity allowing the resort to partnership contracts as it results from the aforementioned dispositions of Article L.1414-2 of the General Code of Local Authorities, was not satisfied on the facts of the present case ; that it followed that the Regional Council of the Architects' Association of Auvergne is right to argue that the resort to the partnership contract was unlawful and, for that reason, allowed to ask for the annulment of the 'detachable' decisions in dispute'*. Moreover, the judge considered that *'the defect flawing the deliberation and the decision in dispute, drawn from the wrongful resort to the partnership contract, affected the legitimacy of the contract; that in so doing, this irregularity, particularly serious and that cannot be regularized, is of such nature as to justify the termination of the contract'*. This is beside the fact that the pool has now been constructed and the nature of this decision's consequences could seriously and actually hamper the proper use of the municipality's public money for implementing the cancelling clause in the contract, and the holder's right to damages in respect thereof.

If all these adverse effects that have since long lost sight of the public need that this paper is concerned with have thus been established, far beyond texts and current controversies, positive and promising elements can been noticed in practice.

B – The positive image of paradoxes: an answer to controversies.

If controversies have been fueling the debates over the past ten years, and if some, such as public debt cover-ups, have become obsolete since the Reform of Budgetary and Accounting Procedures for Local Authorities dated 16 December 2010, it would be arbitrary and subjective not to highlight the practice feedbacks and observations leading to a forward thinking on what tomorrow's partnership contract could be.

1 – The existence of beneficial contractual mechanisms.

The legal regime of partnership contracts, very discretely worded in the definition, enables the integration of *'benefits contributing to the performance of public service missions*' within the scope of the contract. It is a sensitive approach to relate to the very philosophy of partnership contract, the latter not being a management tool for public service but only its carrier.

Having regard to the notion as a whole, it is worth quickly pointing out that the legal doctrine is divided. Some refute any integration of the public service into the scope of partnership contracts[54]; others assert that the matter is already possible[55] or even offer a more nuanced, intermediate approach by attempting to draw, if not a frontier, a line between what is a matter of public service and what merely contributes to it[56]. Based on this assumption, the partnership contract can integrate benefits not subjected to any sovereignty mission with respect to the constitutional reserve[57], which aim to link the private holder with the performances on the work to which he is contractually obligated, and hence subjected to a mechanism of penalty for non-achievement. Traditionally conferred on a subsidiary basis as part of a public service delegation, or conferred to public agents as part of a direct State-run service, these benefits seek to contain the management of interfaces of contractual models' superimposition, one of which purpose is the mere structure, and the other the management of the service strictly speaking.

In an equally rational manner, it can be noted that the partnership contract, without

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[54] DELELIS P., (2010), Contrat de partenariat et exploitation du service public. AJDA, p. 2244
[55] RAYNAUD T. (2010), Les amours contrariées du contrat de partenariat et du service public. BJCP, n° 70, p. 166
[56] CHAMMING'S G. (2011), Le droit français de la commande publique à l'épreuve du contrat de partenariat. Du partage des risques à la réforme de l'Etat, Thesis, Bordeaux IV University, p. 449-455
[57] Const.Council., 26 June 2003, DC n°2003-473, considering 19

prejudice to the MAPPP clause-list types that provided security to public users, has nothing of a standardised contract. Each contract has its own uniqueness, having regard to its object as well as the parties concerned, their aversion to risk, their level of ownership of the tool allowing the adjustment of the clauses on consideration of elements that might affect technical aspects, responsibility commitments or financial settings. The partnership contract thus provides for a configurable flexibility. The mechanisms of pre-financing and pre-empted crystallization of rates before the contract is made available are interesting examples to note, and in times of economic crisis, favor public persons through the substantial decrease in interest rates. Accordingly, the vigilance and establishment of an observatory for rates with the lenders on a given project may bring significant benefits on investment debt for the whole duration of the contract. A rather strange paradox, when some protest against the prohibitive costs of a private pre-financing.

Profits on 'positive' externalities that the MAPPP identifies as 'social and economic benefits' may finally be noted, having triggered positive consequences through the implementation of a partnership contract. Thus, observing the contractual deadline, partnership contracts would allow operating a public service sooner and faster than a traditional public project ownership, and generating gains or creating jobs before the latter.

2 – The saving effects of global contract.

Albeit derogatory from tools of ordinary public procurement law – namely from the public project ownership subject to the Public Procurement Code that prohibits deferred payment (Article 96) and that choses the allotment as guiding principle (Article 10), the partnership contract initiates the concept of global contract that seeks to entrust a private partner with both the construction and the care and maintenance of a structure.

It could be counter argued that the holder of the aforesaid contract gathers several companies that are contractually bound to one another by the undertaking of a whole operation, often as an ad hoc company. However, the public person is only contractually bound to a single legal entity, and the failures of one of them often take precedence over the responsibility of the holder, without any possibility left to the latter to be relieved from its obligations. These mechanisms can also be observed, although within different legal regimes, for long lease agreements associated to a 'non detachable' Convention. The Decree n°2011-2065 dated 30 December 2011 on administrative long leases' procurement rules is

a perfect example of this twinning.

Does the performance start form here? It constitutes the major asset of the contractual model. Associated with risk share, the notion of performance is the heart of the fundamental aim of global contracts, the guarantee of the structure's sustainability and above all of the disappearance of the deterioration and obsolescence syndrome of public facilities. Public person would also need to demonstrate their ability to define their genuine need and, thus identifiers the suitable indicators that would enable them to assess the performance and penalize its non-fulfillment.

A recent study lead by the Chair on PPP of the University of Panthéon Sorbonne[58] highlighted some successful results of associating both construction and maintenance, and thus the overall contractual relationship. These evidences hence confirm the paradox.

CONCLUSION

What would French public contractual culture need to harmonise both controversies and common sense? What does French public procurement law lack for these paradoxes to become the future ordinary law?

If it is unanimously ascertained that all types of PPP are not necessarily well founded for all uses, the fact remains that to comply with the principles of effectivity and efficiency for complex and burdensome operations, both for local authorities and for the State and its public facilities, a type of partnership contract as defined by the 2004 Decree, clearly demonstrated its assets and successfully pulled away from high-profile and isolated scandals. A conclusive evidence of this success could be the fact that other types of models, such as public long-lease contracts or temporary occupation permit, constantly seek to mimic partnership contracts by adopting elements of its legal regime.

Two obstacles are yet to be overcome, although smoothly: on the one hand the derogatory approach of PPP that could become ordinary law when public need requires it, and on the other hand the very scope of the 'global' contract, which would indeed be entirely global if it was to truly take the measure of the extent of its missions, without

[58] http://chaire-eppp.org/performance-contrats-de-partenariat

interface nor prejudice to the sovereign character of some of them. From the researches conducted on these performances, and more than thirty year ago, Professor H.G. Hubrecht had described this type of model as 'unnamed devoluted public service contracts'.

Finally, the practice of partnership contracts allows observing and confirming the legal doctrine assertiveness regarding the need to implement a real Code of Public procurement, so as to put the house back in order. In between controversies and paradoxes, could the current reform on Public Procurement Directive be the key…?

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