

International Conference on Investment Arbitration
Syrian Investment Agency

*Dispute Avoidance and Arbitration as
conditions of success of resilient
PPP projects*

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The need for PPP

➔ PPP have always been essential for economic development

Without PPP in the core public service sector many infrastructures which have permitted the economic development of the western world in the 19th centuries would not have been built and operated so quickly and efficiently (railways, ports, water and power utilities, water ways, etc.).

PPP, had difficulties to survive to the technical, economic and political turmoil of the early 20th century in most countries due to the difficulty to adapt their long term cycle to the economic circumstances.

The need for PPP (ctd)

 **In countries having both civil Code and separate public contract law tradition PPP have continued their life** and thousand of PPP have completed successfully their lifecycle (thanks to a very pragmatic and equitable case law designed by a “**super regulator**” reinstating contract equilibrium and promoting partnership).

This has also been the situation of Syria decades ago.

Thereafter the interest for PPP spread again over the world: scarcity of public resources and poor performance of public sector in delivering essential public services.

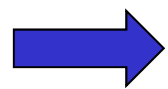
In the early 90's the privatization of public service has been aggressively promoted: in countries not having recent track-record of PPP (example UK)

The results have been mixed and often disappointing in developing countries and currently many PPP are in distress.

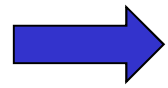
 **However with the current economic crisis there is no doubt that most countries have no choice but to organize resilient PPPs**

Which PPP have best chances to become popular in Syria?

The PPP World can be broadly divided in 2 families: (with subfamilies)

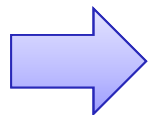


Availability based PPP or Public Payment PPP (in essence the PFI model: ex. UK)



Concession type PPP or Private payment PPP (the traditional model of countries having developed public contract law: ex. France)

- Each model has its merit and both models cross-fertilize and should develop jointly
- However when
 - Essential public service infrastructure are needed
 - The tax budget can not meet the cost of payment for PPP infrastructure services for many years
 - End users are ready to pay directly to the private sector all or most of the costs for the service rendered



The concession type PPP (including “affermage”) is generally the preferred scheme (avoiding public budget constraint)

This is supported by the most recent studies from experts groups (WB Group, PPIAF, IFEJI, CICA, etc.)

PPP are more a source of potential disputes than other contracting forms

➡ Their long term nature (often twenty to thirty years) are creating insurmountable problems to traditional negotiators and transactional lawyers who are used to detail all rights and obligations in the four corners of a contract

➡ It is often a nightmare for the traditional lenders who try to protect themselves through various guarantees and privileged rights colloquially referred to as “Project Finance Techniques”

➡ They must be resilient to situations which are sometime imposed to both parties :

- change in the nature quality/price of the services
- change in contributing capacity,
- change in public policy
- change in the economic circumstances

How to overcome the sources of dispute?

➡ **By a good appraisal of the economic fundamentals** for the life cycle of the PPP showing a reasonable rate of profit and adequately referred to contractually (Resilience of PPP is primarily linked to the quality of the initial studies and economic analysis shared by the parties).

➡ **By a series of clauses and underlying legal principles** developed for more than a century of precedents on thousands concession PPP, having completed successfully their lifecycle.

➡ **By a PPP law** including institutional and contractual framework taking into account the lessons learnt around the world: This is currently underway in Syria

➡ **By reference to a structured system of dispute avoidance and appropriate dispute resolution**

Lessons learnt in Dispute avoidance and Dispute Resolution in PPP

Resilient PPP are based on three pillars which deserve to be well appraised and organized in a PPP agreement

- 1) **Structured partnering system**
- 2) **Conciliation system which may include a provisionally binding decision**
- 3) **Efficient and equitable dispute resolution**

Lessons learnt in Dispute avoidance in PPP

1) Structured partnering system

- This is the essence of “partnership” between the public and private sector : main components of partnering
 - Disclosure of common objectives of the parties at the start of the venture
 - Obligations to evaluate and exchange in common on the objective and goals (meeting on regular basis with a simple preparation and in a “friendly” manner)
 - Appointment of an outside facilitator
 - Obligation to agree on a partnering charter
 - Obligation to refer potential disagreements to the partnering committee
 - In case of disagreement a report is drawn by the facilitator

Lessons learnt in Dispute avoidance in PPP (ctd)

2) Structured conciliation system: Conciliation

a) Conciliation through an ad hoc committee: condition of success

- Appointment of the members of the conciliation Committee :
qualities of the members
- Simple and structured conciliation proceedings : timing and costs
issues
- Limited party representation
- Limited exchange of documents
- Limited and structured hearing
- No duty to comply with contradictory rules
- Possibility of separated hearings (caucus)
- In the absence of voluntary conciliation the committee makes a non
binding recommendation

Lessons learnt in Dispute avoidance in PPP (ctd)

2) Structured conciliation system (ctd) : Dispute Boards

b) Conciliation through a Dispute Board

- Dispute board are becoming very popular for complex projects
- They can be well adapted to PPP
- Boards have some similarity with a conciliation Committee : main differences
 - The board members are appointed as from the signature of the contract
 - They are operational even in the absence of dispute throughout the PPP
 - They may either propose a settlement (DRB) or make a decision (DAB) subject to arbitration
 - Their efficiency is much related to their capacity to understand the PPP relationships and to an organization which is acceptable in terms of costs
- Useful references for Dispute Board organization and proceedings: ICC, DRB Foundation and World Bank Standard Bidding documents

Lessons learnt in dispute resolution in PPP

3) Efficient and equitable dispute resolution

a) The local courts vs. arbitration: an universal debate

- Evaluation of the track-record efficiency, time and cost of local court vs. arbitration
- Why arbitration is a prerequisite for attracting international investors in PPP?
- The particular issue of arbitration and public contract of economic nature: the international best practices
- Current issue how to organize efficient, equitable and affordable arbitration in the light of current problems and best international practices?

Lessons learnt in arbitration in PPP

3) Efficient and equitable dispute resolution

b) Which arbitration structure ?

- Ad hoc vs. international arbitration: why institutional arbitration should generally be preferred?
- Which international arbitration institution is the most suitable for a PPP project : main questions to address :
 - Is it possible to secure a good arbitration panel fully independent and really qualified?
 - Is it possible to streamline in advance the arbitration proceedings for guaranteeing an optimized result in terms of value for money
 - What about the choice of applicable law to the substance and to the procedure ?

Lessons learnt in arbitration in PPP (ctd)

3) Efficient and equitable dispute resolution

c) How to secure an efficient arbitration panel?

- The choice of arbitrators must be adapted to the very particular nature of PPP : some key features
 - An incomplete contract which organizes a “partnership relationship”
 - A contract sometime closer to company law than to contract law
 - A contract which always needs to be adapted to the public needs
 - A contract where the private party must be compensated for the obligation to adapt and to accept sovereign decisions
 - A contract where termination cannot stop the provision of the services
 - A contract where economic equilibrium is of the essence of the rights and obligations

Lessons learnt in arbitration in PPP (ctd)

3) Efficient and equitable dispute resolution

d) How to render arbitration efficient and attractive?

- What is the role of the arbitration panel?
 - Discover the truth and direct the parties?
 - Playing a passive role during the proceedings on the basis of the parties submissions and claims?
 - Consequence in term of cost and satisfaction of the parties
- Some current issues and status of best practices
 - Best practices in evidence (IBA rules)
 - Limit electronic evidence?
 - Limit discovery?
 - Witness evidence: written evidence,
 - Witness examination, cross-examination : benefits and limits
 - Expert evidence: party-appointed experts and arbitrators appointed expert
 - Counsels duties and rights during the procedure
 - Enforcement issues

CONCLUSION

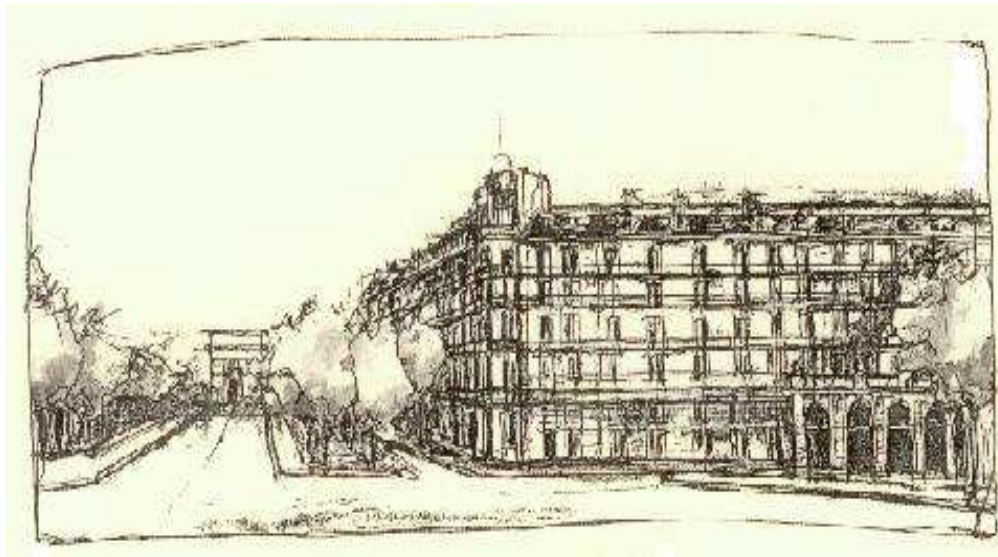
➔ Resilient PPPs are highly dependent of simple and well tested structured partnering, dispute avoidance and dispute resolution schemes adapted to the particular nature of PPPs.

➔ This is a major area of a “capacity building” for all PPP stakeholders (Private sector, Banking sector, Public sector).

➔ A better understanding and promotion of best practices will greatly participate to the legal comfort that investors and the financial world are expecting for seriously considering a PPP project.

The current financial crisis may be a catalyst. PPPs could play in the future like in the past a major role for economic development of the countries having limited funds to allocate to the most needed public infrastructure services

THANK YOU



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