



# International Workshop Report

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Project Number: 48007-001

**People's Republic of China:**  
TA 8717: International Workshop:  
Legislation on Infrastructure and Utilities  
Concessions

9 June 2015  
Beijing

Asian Development Bank

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## **Summary**

This report summarizes the presentations of the Legislation on Infrastructure and Utilities Concessions workshop held in Beijing on 9 June 2015. The workshop was organized by Department of National Development and Reform Commission (NDRC), PRC and the Asian Development Bank (ADB).

More than 80 participants attended the workshop from central governments, the financial and consulting sectors, academia, and development partner institutions. The workshop focused on concession legislation work of PRC, British and French experiences, and international practices and experience on legislation on infrastructure and utilities concession.

# Promotion of the Legislation on Infrastructure and Public Utilities Concession Briefing

Department of Laws and Regulations,  
National Development and Reform  
Commission

By Zhao Chengfeng

June 9, 2015

## Contents >>>

I.

Background of Legislation (necessity)

II.

General idea and highlights of the *Administrative Measures for the Concession Operation of Infrastructure and Public Utility* (hereinafter referred to as "the Measures" )

III.

Legislation in the future

## Background of Legislation

- » Since Shenzhen Shajiao B Power Plant implemented concession in 1984, PRCs concession has experienced over 30 years.
- » The past 30 years have seen more than 60 local laws, regulations or normative documents released by the relevant departments of the State Council and provinces and cities.
- » A large number of infrastructure and public utilities concession projects have been launched.

## Background of Legislation

### Problems

1

**Different  
systems and  
specifications**

2

**Unsound  
safeguard  
mechanism**

3

**Poor  
department  
cooperation**



**Passed at the 89<sup>th</sup> Executive Meeting of the State Council**

- » Important reform and system innovation that stabilize the social capital
- » Good for stimulating social investment, and increase of public products and services supply
- » Forming the "twin engines" for economic development with "public entrepreneurship and innovation"

**General idea**

One basis: Practice in PRC  
(draw lessons from international experience)  
Two ways: Problem orientation, reform and innovation  
Four principles: Reflecting the basic policy guidance of legislation

## Four principles of the Measures



(I)

Give full play to the advantages of social capital and improve public service quality and efficiency



(II)

Transform government functions, and strengthen the cooperation between government and social capital



(III)

Protect the lawful rights and interests of social capital, and ensure the continuity and stability of concession



(IV)

Balance business and public welfare, and maintain the public interest

## Highlights of the Measures

### Highlights

#### Rights and interest protection

Stabilize expectations of franchising

#### Policy Support

Stimulate social capital investment

#### Efficiency and convenience

Improve the efficiency of franchising

#### Balance of interests

Balance business and public welfare



**Rights and  
interests  
protection**

**I. Investor protection**

**II. Enhancement of government' s contract  
performance**

- » Lay emphasis on mutual cooperation
- » Enhance government' s contract performance
- » Identify government' s responsibility for breach of contract

**Policy support**

1. Financing service innovation
2. Government investment support

**Efficiency and  
convenience**

1. Strengthen department cooperation.
2. Simplify the audit content to avoid repeated review.
3. Ban new administrative examinations and approvals.
4. Identify government obligations in improving efficiency.
5. Improve mechanisms to promote dispute resolution.

**Balance of interests**

1. Identify implementation conditions.
2. Strengthen administrative supervision.
3. Strengthen social supervision.
4. Perfect safeguard mechanism.



**Four Tasks:**

- (1) Strengthen department coordination through legislation
- (2) Summarize the implementation of the Measures, and make corresponding institutional arrangements.
- (3) Entrust experts research, organize research and listen to opinions.
- (4) Continue to draw lessons from international experience, and combine them with PRCs national conditions.

**Thank you!**



Infrastructure UK

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## **An Holistic approach to Law, Policy and Regulation**

**Karineh Grigorian**

June 2015

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Infrastructure UK

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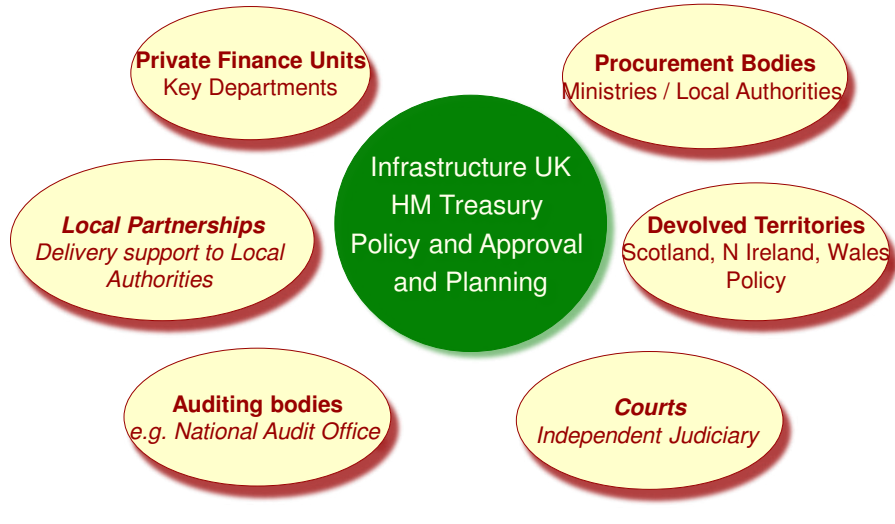
### **Agenda**

- Overall Perspective - UK Regulatory Institutions
- Why have a law?
- The Regulatory Pyramid
- Holistic approach to Law / Policy / Guidance / Contract
- What works – What doesn't



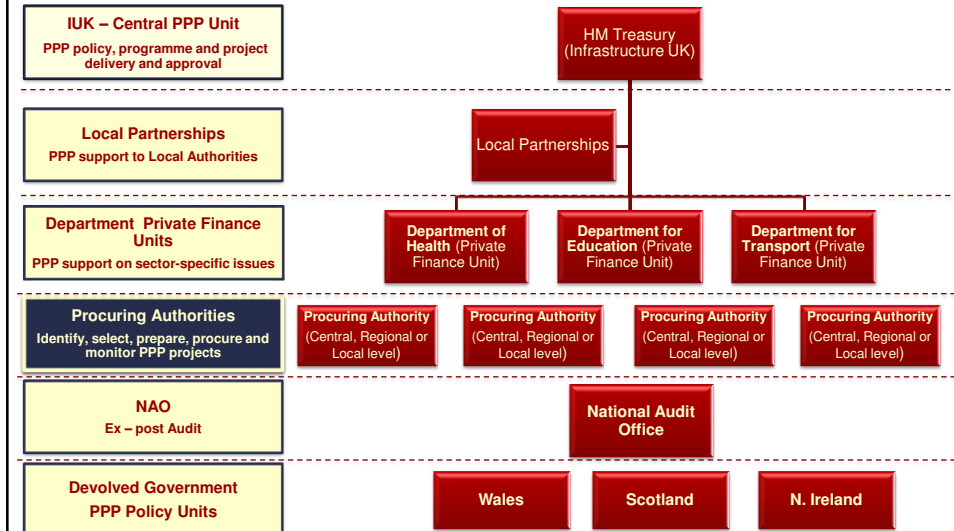
## Infrastructure UK

### UK PPP Regulatory Institutions



## Infrastructure UK

### UK PPP/PFI Institutional Framework





### Why have a law ?

- Main Purposes of law is:
  - to **Enable**
  - to **Control**
  - to **provide Legal Certainty**
- Civil code countries / common law countries
  - Different traditions
  - UK does not have a PPP law ! Does not need one
  - Ministries already have the power to contract
- UK Approach : the contract is king !
  - In UK you do not need to know the law to understand the contract. Everything goes in the contract
  - Interfere with the contract at your peril (destroys market confidence)
- Civil law countries
  - Public bodies need to be empowered
  - Here you need to know the contract and the law



### Common Mistakes in drafting PPP laws?

- Countries normally draw them too narrowly
  - The law becomes a straightjacket and hard to change
  - It quickly goes out of date
  - Countries draft with one model in mind (e.g. concession)
  - Then the facts don't fit
- Countries often make them too detailed
  - This actually creates uncertainty – a lawyers paradise
  - “Less is more”
- Countries often publish the law before completing their thinking on overall policy and approach



## What is needed is .....

- a holistic approach to the problem
- the regulatory pyramid



## The Regulatory Pyramid - A Holistic Approach





## The pyramid: What goes into the law

- Law should be wide and enabling
  - Civil and Common law approaches
  - Do not attempt to regulate too much at the top legal level
- Law, Regulation or Decree
  - Which is better?
  - If you are not yet ready for a law perhaps start with something less (presidential decree etc)
  - Law is for the long term (hard to change) but is also a declaration of national intent (useful for international market)
- Clarify relationship with existing laws
  - Which over-rides? If in doubt, disapply others (e.g. BOT laws)
  - Relationship with e.g. procurement law, banking law
- Set national controls / limits (but not micro management)



## The Pyramid: What goes into the law

- Introduce overall concept of the PPP
  - But almost impossible to define (provide a “menu”)
- Clarify who can enter into PPPs
- Does existing law allow for provision of “banking security” interests
- Does existing law allow for public sector funding/financial support
- How to deal with disputes
  - Are there enforceable remedies at law
  - Is there independence of judiciary
  - Is overseas arbitration allowed





## The Pyramid: What goes into the Policy (UK)

- Business case methodology
- Tender evaluation criteria
- Conduct of tender negotiations
- Contract length
- Contract payment methodologies
- Types of project best suited to PPP treatment
- Types of services suitable and not suitable for PPP treatment
- User pay / government pay models
- Tax



## The Pyramid: What goes into the Policy (UK) continued





- Refinancing
- Share Ownership and transfer provisions
- Compensation methodologies on termination
- Transparency / information

In civil law countries some of these areas (dealt with as policy in the UK) are sometimes dealt with as law BUT beware of doing too much as law. The UK can change its policy in 24 hours (law may take a year).

An important part of policy is “when to use and when not to use” private finance.



### **Private finance may not work so well where**

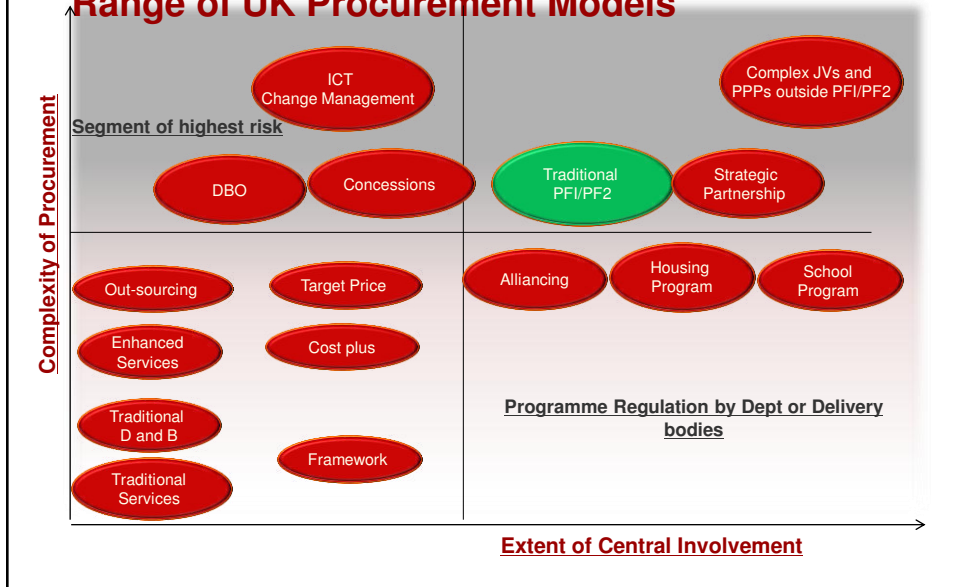
-  Uncertain long term need
-  Political uncertainty
-  Fast changing technology
-  No fixed cost pricing



### **What is out of scope for typical UK private finance contract?**

- Projects where unstable policy
- Projects where no stable long term need
- Projects with no clear service outputs
- Joint ventures
- Privatisations
- short term projects
- Projects with fast changing technology (IT)
- Equipment- only projects
- Service-only projects
- Very complex projects / small projects

## PF2 is only one model of many. Example Range of UK Procurement Models



Infrastructure UK

## The Pyramid: What goes into the Guidance (UK)

- In UK, our Guidance provides further explanation of our policy and contracts (for instance explaining drafting assumptions)
- What are the assumptions?
  - Central Government or Local Government contract
  - Concession or availability-based contract
  - Bidder provides land or State
  - Corporate finance or project finance
- Funding assumptions
  - Funding stream for availability projects
  - Viability gap funding
  - Government Guarantee
  - Contingent liability



## The Pyramid: What goes into the Contract

Provides further detail on policy and sector specific issues. e.g.

- Change of Law Protection
- Covenants
- Warranties
- Defaults
- Compensation
- Indemnities
- Provision of Information
- Confidentiality
- Project specific matters

***Contract must reflect policy, guidance and law***



## How to Achieve Contract Consensus

Start with Guidance ----- Move towards mandatory drafting

### Consultation

- To achieve consensus
- What is in and what is out
- Public and private

### Identify Stakeholders

### Core provisions/non core

- Compliance
- Derogation regime

### Model contractor model drafting?

### Negotiation ?

- Updating



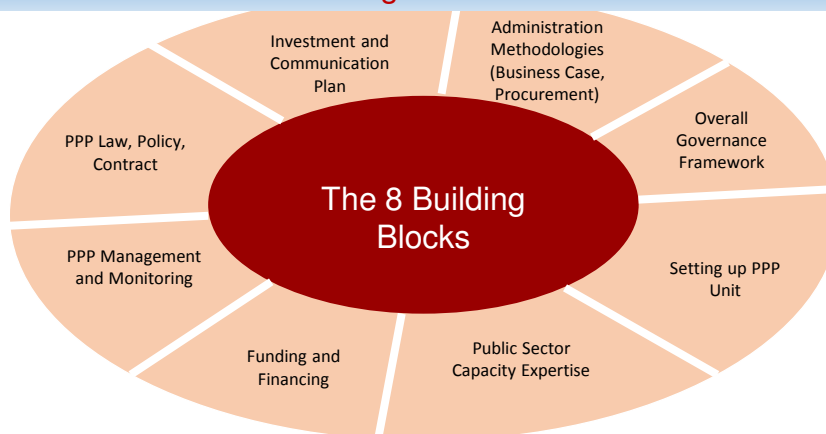
### Why have model contract provisions?

- Achieve market buy-in and gives confidence
- Roll out policy
- Achieve consistency
- Optimise balance of risk transfer
- Improve quality of contracts
- Reduce negotiation time/cost
- Reduce procurement time
- Apply international standards to attract international investment

***Need for a strong sponsor and regulatory platform***



### Eight Building Blocks for Developing a Successful PPP Programme





### Conclusion

- Every country is different and has a different legal and regulatory environment
- There is accordingly no “one size fits all” PPP law
- By adopting a holistic approach (and using the “pyramid”) however, countries may avoid some of the pitfalls that befell early drafting of PPP legislation
- But a law is not enough. By putting in place the 8 building blocks (alongside the law) countries can develop successful PPP programmes



### Web Sites

IUK publications:

IUK Website:

<https://www.gov.uk/government/organisations/infrastructure-uk>

HMT/IUK: Private Finance 2 (PF2) Policy Paper:

<https://www.gov.uk/government/publications/private-finance-2-pf2>

HMT/IUK: A new approach to public private partnerships: consultation on the terms of public sector equity participation in PF2 projects:

<https://www.gov.uk/government/consultations/a-new-approach-to-public-private-partnerships-consultation-on-the-terms-of-public-sector-equity-participation-in-pf2-projects>

HMT/IUK: (Standardisation of PF2 Contracts) Draft

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/207383/infrastructure\\_standardisation\\_of\\_contracts\\_051212.PDF](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/207383/infrastructure_standardisation_of_contracts_051212.PDF)

HMT/IUK: (National Infrastructure Plans):

<https://www.gov.uk/government/collections/national-infrastructure-plan>

HMT/IUK (Projects data):

<https://www.gov.uk/government/publications/pfi-projects-data-march-2013>

HMT/IUK (Government Construction Pipeline):

<https://www.gov.uk/government/publications/government-construction-pipeline>

HMT/IUK (UK Guarantees scheme key documents):

<https://www.gov.uk/government/news/government-uses-fiscal-credibility-to-unveil-new-infrastructure-investment-and-exports-plan>

<https://www.gov.uk/government/publications/uk-guarantees-scheme-key-documents>

HMT/IUK (Cost Review):

<https://www.gov.uk/government/publications/infrastructure-cost-review-annual-report-2012-to-2013>

HMT/IUK (Cost Review & Infrastructure Procurement Routemap Archive):

[http://webarchive.nationalarchives.gov.uk/20130410173120/http://hm-treasury.gov.uk/iuk\\_cost\\_review\\_index.htm](http://webarchive.nationalarchives.gov.uk/20130410173120/http://hm-treasury.gov.uk/iuk_cost_review_index.htm)

CONCESSION LAW FOR INFRASTRUCTURE AND PUBLIC SERVICES  
基础设施和公用事业特许经营法

International Consultation Workshop

研讨会

9 June 2015

2015年6月9日

Beijing

北京

*The French concession and laws experience Key  
lessons of common issues with PRC*

By Bruno de Cazalet

Member of the Business Advisory Board

UNECE PPP International Centre of Excellence



ADB

The French concession and PPP laws experience  
and the key lessons with respect to common issues with PRC.

SUMMARY & INTRODUCTION

I-Historical background: Dual French system for Concession and PPP

II-Relevance of the Dual system for Concession and PPP in PRC

III-Common Legal PPP Issues between France and PRC

- I will show why and how a double regime does work in a country like France
- I will try to demonstrate from actual French experience why a dual system may be relevant to PRC.
- I have identified common PPP issues as well as common gaps/weaknesses in PRC and France PPP legal frameworks and I will show you the way we have dealt with these issues in France

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## The French concession and PPP laws experience and the key lessons with respect to common issues with PRC.

### SUMMARY & INTRODUCTION

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## I-Historical background: The Dual French system for Concession and PPP

### THE TRADITIONAL CIVIL LAW CONCEPT OF CONCESSION

- Concessions are **commonly used** in continental Europe and **civil law countries**, specifically in France, **for centuries**.

(Concession was traditionally the contractual technique used for the partnerships between the public and private sectors for the delegation of the management of public services and building infrastructure.)

- Curiously for a civil law country France had **no general law on concession** which is mainly regulated by case law of the State Counsel.

(Few recent regulations dealing with procedural rules for selection of concessionaire or the provision of securities for the financing of concessions (pledge and mortgage of concession asset and proceeds) have been enacted but not a general concession or BOT law.)

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## I-Historical background (2): The Dual French system for Concession and PPP

THE EVOLUTION OF THE CONCESSION AND PUBLIC PRIVATE PARTNERSHIP  
LEGAL CONCEPTS OVER THE LAST 20 YEARS UNDER COMMON LAW  
INFLUENCE

- **The concept of concession has been revisited by common law** practitioners over the last twenty years to transform it into a modern project financing instrument.
- The concession concept has been **adopted by common law** countries, as the main piece of the PPP contractual structure for project financing.
- **“Concession”** and **“concessionaire”** have become a familiar English language term.

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## I-Historical background (3): The Dual French system for Concession and PPP

### PFI policy in the UK

- The UK Private Finance Initiative (PFI) policy initiated in 1992
- Following the Channel Tunnel project.
- It involves all type of private financing of infrastructure project:
  - with different scope, ownership and transfer mode reflected by different acronym (BOT, BOO, ROT, DBFO...)
  - It apply to “greenfield” and “brownfield” projects
  - with or without delegation of the management of public service,
  - with remuneration coming from the users or (partially/totally) from government.
- PFI has disseminated successfully among common law countries (Australia, Ireland...) and
- has also influenced back civil law countries

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## I-Historical background (4): The Dual French system for Concession and PPP

### THE MOVE TOWARD PARTNERSHIP CONTRACTS

- France was **obviously interested** in the English PFI policy which went beyond the traditional concession model remunerated by the users for the financing of its infrastructure,
- As matter of principle **French administrative law prevents the use of deferred payment from the State** for public works or services procurement in the absence of specific enabling legislation.
- Public-private partnerships have been enjoying a significant revival in France since **2002** with the enactment of sector regulations allowing the private financing of infrastructure and public services in specific sectors, such as **national security and justice and health care.**
- In **2004**, a French Government Ordinance launched a new comprehensive agreement entitled “**Partnership contract**” (*Contrat de Partenariat*) for all sectors of public intervention, whether national or local.

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## I-Historical background (5): The Dual French system for Concession and PPP

### THE PARTNERSHIP CONTRACT

- The legal term “**Partnership Contract**” is used in France, only for private investment in a public infrastructure and servicing of this infrastructure,
  - without provision of the public service, and
  - remuneration coming exclusively from the State and not from the users.
- The **enactment** of the Partnership Contract Law has been very **difficult** (Architects opposition to global contracts and political sensitivity of issues touching public wealth or Public service, justifying restriction of use
- As a result the Partnership Agreements could only be used in very **exceptional circumstances** where one of the three conditions were met :
  - Effective urgency ,
  - Real complexity or
  - Prove to be the best public procurement solution.
- Such conditions have been slightly relaxed by a law in 2008 and are to be lifted soon with respect to the two first ones.

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I-Historical background (6):  
The Dual French system for Concession and PPP

THE DUAL FRENCH SYSTEM

- There are now, therefore, at least **two different legal frameworks for PPP in France**:
  - The **traditional concession** projects which is a delegation of the management of public services for the construction and/or use of facilities and public services (including BOT type of project), delivering public services and remunerated by the users, and
  - The **partnership contracts**, without the outsourcing of the public service (which remains within the activity of the public party) but with services to the facilities for the whole life of the contract with remuneration coming exclusively from the public side.

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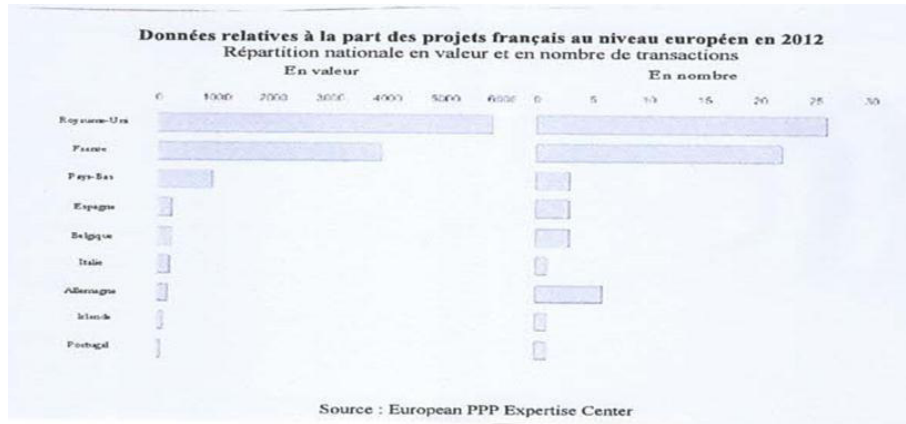
I-Historical background (7):  
The Dual French system for Concession and PPP

THE FRENCH DUAL SYSTEM RESULTS

- France in the last **10 years** has shown **good results** through the development of Partnership contracts and through the establishment of new administrative institutions for promoting PPP (MAPPP)
- **France** is now statistically the **most important PPP country in continental Europe**, despite some political resistance to PPP projects since 2012 with **particular success at local level**.

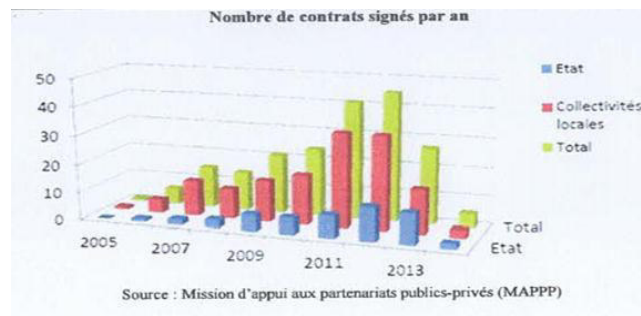
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## Statistics of PPP in Europe (value & % number)



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## Statistics of number of Partnership contract signed in France(State/Local)



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## I-Historical background (8):The International success of Dual system for Concession and PPP

### THE FRENCH DUAL SYSTEM

- PPP Partnership Contract law has developed in the sphere of traditional French legal influence who have adopted similar dual legislation for concession and Partnership contracts. (**Ivory coast, Burkina Faso, Senegal, Tunisia, Morocco....**)
- Many other very different countries have either enact a specific PPP law or involved partnership type of PPP in their PPP law (**Brazil, Bulgaria, Romania, Serbia, Mongolia.....**)
- Recently **Thailand** enacted the “Private Investments in State Undertakings Act B.E. 2556” (**2013**) which provides for Partnership type of contract (art30 ),and **Philippines** Amended it BOT Law R.A 7718 to include in addition to BOT all sort of contracts corresponding to Partnership contracts.

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## II-Relevance of the Dual system for Concession and PPP in PRC (1)

### Eligible Form of PPP in PRC

- At the **initial stage** of pilot projects ( Labin B power plant, Ghengdu water treatment plant)the only form of PPP legally available in PRC was **limited to BOT** in the initial circular issued in the 1990 and a progressive extension has been noticed since then.
- **Currently** local regulations, such as the Beijing 2006 Regulation (Art. 4), only **include BOT, BOO and TOT**, like the recent **2015 “Measures** on concession for infrastructure and public utilities”(article 5).
- The questions of **ownership and transfer may give other variants** not expressly provided for under the existing PPP legal framework for PRC.
- Like France, PRC make the **ownership transfer** compulsory at the time of achievement of the construction of the facilities excluding BOO form of PPP without ownership transfer which should **not be a deal breaker**.

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## II-Relevance of the Dual system for Concession and PPP in PRC (2)

### Scope of PPP

- Most of the PPPs in **France until 2004** had been developed in the **merchant sectors** to finance infrastructure such as transport, water and energy and not in the social sector for non-merchant activities.
- In the case of **PRC** most PPP activities still remain within the **economic sector** and do not cover the social sector (except in exceptional cases).
- There is an emerging area for **social needs** such as social **housing, schools, hospitals**, etc. and it is the main sector of development of PPP worldwide in recent years.
- This area of PPP is not expressly covered under Article 2 of the **2015 Measures** for PRC which only refer to demand for gap subsidy (Article 35) (and not fixed rent payments fully paid by the governments).

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## II-Relevance of the Dual system for Concession and PPP in PRC (3)

### Ways to enlarge the Scope of PPP

- In order to cope with the objective of enlarging the scope of PPPs (if this is one of the goals of the government) it could be recommended either:
  - to adopt a broad general definition of PPPs in the future national PPP law for the PRC or
  - to adopt a dual system with a specific Partnership contract law (French present position)
  - or a specific treatment in the Public Procurement Code for PPP with public remuneration and without delegation of public services. (future French position)

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## II-Relevance of the Dual system for Concession and PPP in PRC (4)

### Ways to enlarge the Scope of PPP

- **A broad general definition for PPPs** in the future PPP law would encompass any cooperation that mobilizes private capital for the infrastructure and public services required for economic and social development,
- Broad definition **irrespective to the form of remuneration** and the **delegation or not of the management of the public service**,
- **Excluding** only simple **supply and service contracts** under public procurement and **EPC** type of construction contracts.

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## II-Relevance of the Dual system for Concession and PPP in PRC (5)

### Single Law v/ two separate laws : Pros & Cons

- **Most of the provisions of a PPP law** (including objectives, principle, selection process and major provisions of the agreement ) **can apply to both** concession and Partnership Contract but there is still some particularities requiring special treatment for each of them to be included either in the same law or in two different text.
- According to **international present practice** we can notice a clear trend of numerous regulation to include the possibility of PPP agreement in the social non merchant sector and it can take different ways.
  - For many country which already have a satisfying concession or BOT law they may elect to enact a **specific Partnership agreement law**. (Tunisia, Morocco, Bulgaria, Ivory Coast, Senegal ...)
  - Other countries where no PPP law existed (Mongolia..)have chosen to enact a **global PPP law**.
  - but some with an existing concession or BOT Law have preferred to repeal their existing text and to enact a **new more general PPP law** (Serbia, Romania, Thailand...) or to extend the scope of their existing law (Philippines).

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## II-Relevance of the Dual system for Concession and PPP in PRC (6)

### Single Law v/ two separate laws : New trend in France

- France has opted for **separate laws** starting with **sectorial laws** in **2002** (national security and justice and health care) and a **general partnership law** in **2004** which has the merit to put more emphasis of the government determination to promote the extension of PPP to the social sector.
- In France a **draft new Ordinance** presently under discussion will probably cancel the 2004 Partnership contract Ordinance and reintegrate Partnership contract into the **Public Procurement Code** with a very similar treatment for partnership type of contract to be included in the Code (in compliance with EU Directives).
- **EU 2014 Directives** does not recognize the existence of a new category of contract in between Concessions and Public procurement and has always considered Partnership contract as part of the public procurement regime.

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## II-Relevance of the Dual system for Concession and PPP in PRC (7)

### Reduction of Illegal form of PPP

- In PRC some other licenses, contractual or institutional forms such as **licenses, management service contracts or joint ventures**, seem to be considered, at least by Chinese statistics, as PPP but not subject to the same procurement bidding regulation or fiscal treatment and therefore used **outside the boundaries of the existing legal framework for PPP in PRC**.
- Such licensed, contractual or institutional forms of deals **should be subject to the PPP law if they enter into the definition of PPP** (or of any of the PPP type of agreements as defined under Article 4 of the Beijing 2006 Regulation) **irrespective of its title** and it should be illegal to pursue it under any form other than the PPP agreement form provided for in the PPP law. This is precisely the case in France.
- The directions given by the **2015 State Counsel Measures** to all concerned Ministries and relevant departments at or county-level should help to avoid any bypass of the concession legal framework in the future.

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### III-Common Legal PPP Issues France/PRC (1)

#### LEGAL VALIDITY OF PARTNERSHIP TYPE OF AGREEMENT IN PRC

- Chinese PPP regulations **prohibits the government guaranteeing a fixed return rate** on investment to the private party (Article 21 of the 2015 Measures).
- The Partnership Agreement remuneration from public budget mainly based on a **fix rent for availability** of the facility or services may appear to be contrary to this principle.
- Some existing PPP regulations also restrict the government's **right to share “commercial risks”**. This prohibition is set out under Articles 17 of the Beijing and the Shanghai regulations.  
*"the governments may not make commitments of sharing the commercial risks, the fixed return rate of investment and other matters prohibited by laws and regulations".*

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### III-Common Legal PPP Issues France/PRC (2)

#### LEGAL VALIDITY OF PARTNERSHIP TYPE OF AGREEMENT IN FRANCE

- **France faced a similar legal problem.** Like many other civil law countries, there is an administrative basic rule stating that **deferred payment** of public expenses to future generations is not permitted.
- However the **economic advantages** resulting from this form of financing of public infrastructure has obliged numerous civil law countries like France to reconsider their position and to enact specific enabling law for Partnership contract.
- **Partnership contracts** have been recognized as of a **different nature** from traditional public procurement and **not just a deferred payment** method. It involves a specific new combination of provisions of goods and services (availability of the facility and service to the facility).
- **Payments** under Partnership contracts are **conditioned to such availability and service performance and not just fixed investment return** prohibited by French law. (like for PRC-Article 21 of the 2015 Measures).

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### III-Common Legal PPP Issues France/PRC (3)

#### FINANCIAL / FISCAL ISSUE OF ALL PPP

- One of the main issues presently faced by PPP in PRC is apparently the **lack of sufficient control of liabilities** which may result from any PPP agreement.
- Local governments are often unaware of the **contingent or direct liabilities** they have retained, resulting in provincial/central fiscal authorities being **unable to assess** or plan for fiscal needs.
- Local governments also often retain (contingent or direct) liabilities which they **cannot sustain**, even when they have properly understood and calculated them.

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### III-Common Legal PPP Issues France/PRC (4)

#### FINANCIAL ISSUE SPECIFIC TO PARTNERSHIP CONTRACTS

- Partnership contracts may be a **dangerous financing method**, as the rent to be paid by the Government or the municipality on the facility or service will be **fixed for the duration of the PPP contract**, often without any market adjustment or price regulation mechanism or periodic review provision.
- Partnership contracts bring **direct financial obligations** to bear on the contracting authority in any event and not only a contingent liability as it is the case for a concession in general (except agreed subvention or loan or equity participation).
- In addition, **explicit and implicit contingent liabilities** also usually arise (upper government guarantee).
- Partnership Agreement may even be **more dangerous** in the case of **unsolicited proposals** or direct negotiation which will have to be considered with the greatest care, as these types of selection process are often prone to bad governance.
- It is therefore particularly important to provide a **framework for risk/liability assessment and reporting** to all concerned authorities at the initial stage of project selection for this Partnership Agreement form of PPP.

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### III-Common Legal PPP Issues France/PRC (5)

#### BUDGETARY ISSUE SPECIFIC TO PARTNERSHIP CONTRACTS

- The public party and its guarantors **creditworthiness** and their **ability to pay** are the **main payment guarantee** of the sponsors and lenders (not the proceeds from the Project like for project finance).
- The necessary public disbursement over a long period also requires **pluri-annual budgetary** commitments.
- The **validity** of government payments or guarantees may also need **to be secured** through a **legislative act** (such as a Finances Law or other laws that align financial resources with expenditure responsibilities)

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### III-Common Legal PPP Issues France/PRC (6)

#### REQUIREMENT FOR PRIOR EVALUATION AND COMPARATIVE STUDY

- One of the most important factors to consider for a Partnership Agreement is whether it presents some **advantages to the public sector** over the whole contract period through a prior evaluation report
- All potential Partnership Agreement projects have to be **compared to the long-term costs of providing the same facility and services** under other forms of public procurement.
- They should satisfy the **Value for Money (VfM)** criteria which incorporate other advantages (risk of delay, cost overrun, quality of services, socio-economical consideration....) in a complex calculation which may require the use of **“comparators”**.

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### III-Common Legal PPP Issues France/PRC (7)

#### THE FRENCH INSTITUTIONAL FRAMEWORK for EVALUATION

- In France the **French PPP Unit (MAPPP)** is in charge of such **evaluation** and shall render an **advice** on whether or not the Partnership projects meet eligibility criteria.
- The MAPPP Advice shall be **made public** (not binding for local governments)
- This MAPPP evaluation main role may be **conflicting** with its PPP promotional duty.
- In addition to the Feasibility study a specific **Ordinance in 2012** render compulsory a **budgetary impact study** to be performed by the concerned administration to confirm the **affordability and financial sustainability** over the contract period France for Partnership contracts.

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### III-Common Legal PPP Issues France/PRC (8)

#### THE CHINESE MEASURES FOR FEASIBILITY STUDY

- Article 11 of the 2015 **Chinese Measures** provides for such **Feasibility study analysis** to be made by the proposing department with third party assistance
- Article 12 specify what the Feasibility studies shall cover the **project rationality and financial data** but also the **market maturity** and the **user appetite**
  - Concrete measures shall be prescribed by the department of finances under the State Council (and more detailed through implementing rules or the future PPP law).

ADB

### III-Common Legal PPP Issues France/PRC (9)

#### CHINESE RISK OF THE INVOLVEMENT OF SOE FOR THE COMPETITIVE SELECTION PROCESS

- “Private” participant in a PRC PPP is often a State-Owned Enterprise (**SOE**), and/or is often **invested in, controlled by or related to the Implementation Agency**
- Resulting in:
  - a negative result on the competition process
  - a risk conflict of interest and unclear allocation of risk
  - the risk of and cost that is shifted to the concessionaire is not actually lifted (or not fully lifted)

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### III-Common Legal PPP Issues France/PRC (10)

#### POTENTIAL SOLUTION TO THE SOE RISK OF DISRUPTION OF COMPETITION

- Involving SOE in PPP activities is a requirement for country with dominant public sector with SOEs as major actors in the economic field,
- Possibilities to **avoid serious disruption of the competition**:
  - Share capital of the project company not opened to public interest,
  - Share capital of the project company opened to public interest within certain limits.(Egypt 20%),
  - Prohibit governments from granting PPPs to commercial entities that are closely related to the Implementing Agency.
- An alternative would be to **consider SOEs as business entities** if they are sufficiently **independent from the Implementing Agency** and therefore to accept them as private party(or as members of private party consortium) eligible as candidate for a transparent selection procedure or to follow an IPPP procedure. (as it is the **case in France**)
- **2015 Measures** of the State Council appear to be silent on this issue

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### III-Common Legal PPP Issues France/PRC (11)

#### DEALING WITH INSTITUTIONAL PPP (IPPP)

- Institutional PPP, through joint venture agreements between public and private entities for the performance of PPP projects, are increasingly popular:
    - Covered by **recent PPP laws** and regulations particularly in Europe (Serbia, Bulgaria....)
    - **UE Commission Interpretative Communication** of 2008 on IPPP
    - **British Treasury PF2** (Government become a minority equity investor in project companies in order to allow sharing of excessive profit and for a better control of the PPP)
- (PF2 approach to avoid conflict of interest and public inefficiency: Capital own by special government holding, not involved in the day to day management and [Standardization of PF2 contracts](#) (Equity Documents which comprise model Shareholders Agreement and Articles of Association).

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### III-Common Legal PPP Issues France/PRC (12)

#### FRENCH NEW WAY TO DEAL WITH IPPP

- **SEMOU: sole purpose mix companies**, new in France (Law n° 744 of **July 2014**) corresponding to an IPPP specifically incorporated for a unique operation which can be the provision of a public service including the construction of the infrastructure .
- **Competitive selection** of private partners of a mix project company with a local community participation between 34% and 85%.
- **Management shared** in the same proportion of the share capital.
- **Two stage process:**
  - Incorporation by the public partner of SEMOU which is granted a PPP project "in house" by the local community (or a group of them)
  - transparent bidding process for the acquisition of the private share of the capital of SEMOU.

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# Law International Stock-take

Philip J Kelly Lawyer and Economist  
Beijing 9 June 2015

## Four Parts to Presentation

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1. International Experience with PPP Law Content
2. Observed Trends in Evolution of PPP Laws
3. PPP Law – Macro and Micro Perspectives
4. Concluding Remarks

Note: The text of the presentation has been prepared in note form to assist understanding of the Chinese translation and is not in the more visually attractive powerpoint format



## International Stock-Take

- ▶ United Nations Commission on International Trade Law (UNCITRAL) Legislative Guide to Privately Financed Infrastructure Projects Guide 2001
- ▶ UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects 2003
- ▶ OECD Basic Elements of a Law on Concession Agreements 2003
- ▶ EBRD Core Principles of Modern Concession Law 2006
- ▶ EBRD Assessment of Concession Legal Framework and Indicators
- ▶ EIU Infrascope Reports Asia Pacific and Central and Eastern Europe
- ▶ ERIA Review PPP Framework 10 ASEAN countries
- ▶ USA Key Elements for State level PPP Enabling Laws Highway Projects
- ▶ UNECE / Simmons & Simmons Core Principles of PPP Legal Framework
- ▶ Commonwealth of Independent States (CIS) Model PPP Law 2014
- ▶ EPEC Review of PPP Legal Framework Western Balkans 2014
- ▶ EU Concession, Public Procurement, Utilities Directives 2014
- ▶ Individual Country PPP / Concessions Laws as introduced and later amended



## UNCITRAL PFIP Instruments

- ▶ Legislative Guide contains 71 recommended legislative principles to assist in making informed choices and decisions on a PPP legislative framework with explanatory notes on financial, regulatory, legal, policy and other issues.
- ▶ Model Legislative Provisions is not, and was not intended to be, a model PPP law. It converts 57 of the recommendations in the Legislative Guide into 51 Model Legislative Provisions (MLPs) that address:
  - the general and legislative framework, including authority to enter into contracts (MLPs 1 - 4)
  - the procedures for issuing tenders, running tender processes and selection of contractors (MLPs 5 - 27)
  - the contents of the contract, including the creation of security interests over project assets and cash-flows (MLPs 28 - 42)
  - the duration, extension and termination of the contract including compensation (MLPs 43-48)
  - the settlement of disputes (MLPs 49 - 51)





## UNCITRAL FPIPs

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- ▶ 48 of the Model Legislative Provisions relate to 57 of the Legislative Recommendations in the UNCITRAL Legislative Guide
  - ▶ 14 Legislative Recommendations are not reflected in Model Provisions – 8 of these relate to
    - scope of authority to award PPP contracts
    - administrative coordination
    - authority to regulate infrastructure services
  - ▶ there are no institutional framework legislative recommendations or model provisions
- 
- ▶

## Sample Items **Not** in UNCITRAL PFIPs

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- ▶ Prioritisation of projects
  - ▶ Fiscal risk and commitments, affordability and contingent liabilities
  - ▶ Guarantees provided by international financial institutions or guarantees provided by export credit agencies and investment promotion agencies
  - ▶ Project risk and risk allocation
  - ▶ Government support is given limited recognition in a legislative recommendation but not in a model provision
  - ▶ Viability gap type funding where Government support is used to enable a project which has economic viability but not financial / commercial viability
  - ▶ Contract management and monitoring
- 
- ▶

## UNCITRAL Secretariat Review of FPIPs 2014

- ▶ Emerging forms of funding mechanism and risk distribution are changing the governance and structure of PPPs including selection methods
- ▶ Existing PPP laws vary in scope and quality
- ▶ Many jurisdictions struggle to enact effective PPP laws and try to design laws in isolation from experience internationally
- ▶ PPP laws passed after 2009 are more comprehensive especially on governance and planning - earlier PPP laws focussed on procurement issues
- ▶ Frequent updating of PPP laws to address deficiencies in earlier legislation identified through experience
- ▶ The absence of a robust institutional framework is serious obstacle to effective PPPs
- ▶ Convergence of policy solutions for some aspects of PPPs
- ▶ EBRD Review of Concession Laws says that many countries are aware of the need for a PPP law in addition to or inclusive of concession law. There is a need to improve and enlarge the concession and PPP framework for proper instruments to develop PPP. PPP procedures require a more flexible and effective mechanism than public procurement or concessions.



## UNECE / Simmons & Simmons Core Principles of PPP Legal Framework

- ▶ Identify / establish the entities responsible for the implementation of the PPP programme (and development of a PPP pipeline of projects)
- ▶ Confirm / grant power to Contracting Authorities to enter into PPP contracts / PFI Concession Agreements which are binding on the relevant State / Municipality body
- ▶ Permit Contracting Authorities to negotiate or amend the terms of PPP contracts / PFI Concession Agreements, if necessary within limits or guidelines specified in the law
- ▶ Identify / clarify / amend any potentially conflicting provisions of other national laws
- ▶ Confirm / provide for fair and transparent tendering and selection procedures
- ▶ Confirm / provide for enforceable remedies, either through courts or international arbitration
- ▶ Provide for State to provide financial support for or guarantees of the Contracting Authority's obligations in relation to PPP contracts / PFI Concession Agreements. (The purpose of is not to facilitate the implementation of unprofitable projects, but to enhance the credit rating of the relevant Contracting Authority)
- ▶ Confirm / provide for the validity of security interests granted by the Contractor over its assets or cash-flow and to grant step-in rights to its lenders
- ▶ Establish / confirm the public policy framework and governance structure within which the PPP programme is to be implemented



## OECD Basic Elements Law on Concession Agreements

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- ▶ 1 Scope of The Law And Definitions
  - ▶ 2 The Concession Agreement - Powers of Contracting Authorities and Binding Force of Concession Agreements
  - ▶ 3 Selection of The Contractor - Pre-Selection, Procedures For Requesting Proposals, Procedure For Complex Projects, Evaluation Criteria, Selection of Bidder Or Bidders, Award of Concession Agreements Without Competitive Procedures, Notice of Award
  - ▶ 4 Validity - Review of Project Award And Validity of The Concession Agreement
  - ▶ 5 Contents of The Concession Agreement - Party Autonomy, Elements of The Concession Agreement, Security Interests, Settlement of Disputes, Stabilisation Clause
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## EBRD Core Principles Concession Law

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- ▶ Modern Concession Law (MCL) should be based on a clear policy for private sector participation.
  - ▶ MCL should create a sound legislative foundation for concession
  - ▶ MCL should provide clarity of rules showing the scope of application of PPP, elaborates on what is meant by concession / PPP, identifies the parts of Government with authority to carry out different elements of PPP, and the sectors and activities where PPP can be implemented
  - ▶ MCL should provide a stable and predictable concession legal framework / stability clauses in agreements
  - ▶ MCL should promote fairness, transparency and accessibility of concession rules and procedures to guarantee a transparent and competitive selection process (including exceptions from competitive procedure), equal treatment of potential investors, opportunity to challenge the rules and decisions of contracting authorities and competitive rules for unsolicited proposals.
  - ▶ MCL should be consistent with the country's legal system and particular laws to avoid contradictions and inconsistent application
  - ▶ MCL should allow for effective negotiation and implementation of concession agreements to address the wide range of issues and risk allocation.
  - ▶ MCL should allow for enforceable court or arbitral determinations.
  - ▶ MCL should allow for state undertakings, guarantee of contracting authority's obligations or financial support
  - ▶ MCL should permit security arrangements through which lenders take security over its rights under the concession agreement together with a state assurance of lender step-in rights.
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## EPEC Review Legal Framework Western Balkans 2014

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► In most cases the PPP laws address:

- definition of PPPs;
- creation and operation of the national body responsible for promoting PPPs;
- procedures for the preparation and approval of PPP projects before they are tendered;
- tender process;
- form and content of PPP contracts; and
- dispute resolution process between parties to the contract



## Crown Agents Review of PPP Laws 58 Countries and UNCITRAL Legislative Guidelines 2014

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- Is the main topic included in UNCITRAL Legislative Guide reflected in the country law (Yes / No);
  - Are the UNCITRAL Legislative Recommendations associated with the topic satisfied (Yes / Partially / No);
  - Are the UNCITRAL Model Legislative Provisions satisfied (Yes / Partially / No)?
- 
- Main topics in Sections I-VI of the Legislative Guide are reflected in country laws on average 57% of the time,
  - 77% reflected Chapter I: General and institutional framework
  - 38% reflected Chapter II Project Risks and Government Support
  - 63% reflected Chapter III: Selection of the Private Party
  - 66% reflected Chapter IV: Construction and operation: legislative framework and project agreement
  - 63% reflected Chapter V: Duration, extension, termination of project agreement
  - 33% reflected Chapter VI: Settlement of disputes
  - Chapter III and IV together account for 66% of the Legislative Recommendations.
  - Where the main topics were reflected in a country's law on average 57% of the laws satisfied and 37% partially satisfied the *Legislative Recommendations* for the topics and 6% failed to satisfy the Legislative Recommendations.



## Crown Agents Review of PPP Laws 58 Countries and UNCITRAL Model Legislative Provisions 2014

- ▶ Model Provisions associated with Chapters III and IV of the Legislative Guide account for 75% of all Model Provisions
- ▶ 21% of PPP Laws did not satisfy Chapter I General and institutional framework
- ▶ 34% of PPP Laws did not satisfy Chapter III Selection of the Private Party Model Provisions
- ▶ 46% of PPP Laws did not satisfy Chapter IV Construction and operation: legislative framework and project agreement
- ▶ 38% of PPP Laws did not satisfy Chapter V Duration, extension, termination of project agreement
- ▶ 70% of PPP laws did not satisfy the Model Provisions in Chapter VI Settlement of disputes with only 25% and 5% satisfying, or partially satisfying Chapter VI Model Provisions respectively
- ▶ On average 39% of PPP Laws of the 58 countries did not satisfy the Model Provisions

## PPP Trends as Experience Grows

- ▶ Greater scope and flexibility in what is considered to be PPP due to (i) evolution of many hybrid forms, a growing range of (ii) innovative finance from private and public sources, (iii) Government support mechanisms (iv) payments for facilities and services by users and Government with emphasis on performance related payments
- ▶ Less emphasis on (i) specifying forms of PPP, (ii) state owned property issues, (iii) novelty and implications of private provision of public infrastructure and services and more emphasis on substance of projects and agreements throughout project life
- ▶ Less emphasis on (i) individual projects that are subjectively chosen or advocated on unsolicited basis and favouritism in awards, (ii) PPP as off-balance sheet financing and use of PPP as temporary escape from budget constraints, (iii) procurement / tender stage of project cycle, (iv) construction phase to neglect of operation phase
- ▶ More emphasis on (i) impact of overall PPP programme, (iii) whole of life costing, efficiency and value for money relative to conventional public procurement, (iv) competition for projects, (v) how PPP relates with public investment management in selecting priority projects for PPP based on economic and financial viability and value for money, (vi) how PPP relates with public financial management for fiscal risk assessment and management and affordability decisions, (vii) contract management, monitoring, renegotiation, refinancing etc. through construction and operation phases of project, (vii) how PPP agreement relates with financial and other project related agreements (viii) evaluating value for money performance compared with estimate at time of agreement

## PPP Law: Macro Level – PPP Programme and Government System

- ▶ PPP law needs to reflect that a PPP programme is consistent with the aims, laws and systems of
  - (i) public investment management, (ii) public financial management, reporting, auditing (iii) public procurement
- ❖ (i) Unified investment management system for conventional public procurement and PPP projects
  - step 1. identifies priority investment projects
  - step 2. identifies those priority investment projects that are best suited to PPP and achieving better value for money
- ❖ (ii) Affordability / fiscal risk assessment and management
- ❖ (iii) Fairness, transparency, competition in selecting PPP partner generates efficiency gains that underlie value for money
- ▶ PPP law and institutional framework must reflect that PPP is implemented through a network of Government entities working together and not through a single entity with sole responsibility for PPP
- ▶ Context is critical and influences PPP law content as there are differences between or within countries due to availability of expertise, credibility and quality of political, public administration, public investment, public financial management and decision-making systems, financial system, legal system, economy and market system, property rights
- ▶ PPP legal framework is broader than PPP Law as it includes all other laws that relate to PPP



## PPP Law: Micro Level – PPP Projects

- ▶ Provide certainty regarding power of different types of public contracting entities (Ministries, agencies etc) at national and sub-national levels of government to enter PPP arrangements and obligations that may be entered into by government
- ▶ Identify sectors and activities open to PPP or excluded from PPP arrangements
- ▶ Broad scope and description of characteristics of PPP arrangements (not a listing of specific types), financing and funding by private and public sources, government support, bankability issues e.g. direct agreement – step in rights, security for loans etc.
- ▶ Identify institutional / organisational roles and responsibilities in a coordinated network with details of interface in operational regulations / procedures
- ▶ PPP project cycle from identification of potential projects due diligence / PPP feasibility, procurement, construction, operation, contract management with details in regulations and procedures
- ▶ Law to provide for issuing of regulations, guidelines and instructions that apply to different entities of Government involved with PPP with binding force on how to implement PPP e.g. a PPP Manual of Guidance, Tools and Techniques e.g. project appraisal, risk management, financing and refinancing etc. and standardised definitions and clauses for agreements, to be prepared in a manner that permits flexibility to respond to circumstances but not looseness regarding steps to be taken
- ▶ Where supporting regulations and other measures carry sufficient authority to bring about compliance the PPP law can be concise and precise



## Concluding Remarks

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- ▶ Process of preparing PPP law and planning PPP implementation that is suited to PRC is critical to building understanding of PPP throughout Government and private sector
  - ▶ Throughout the drafting process and as PPP implementation takes place review these questions
    - ❖ Is the approach to PPP in the Law and in the broader PPP legal framework working effectively?
    - ❖ Is the legal and regulatory framework capable of being implemented and enforced?
    - ❖ Is the machinery for implementation adequate in quality and delivering results?
    - ❖ Is the legal and regulatory framework winning respect within Government and with private sector and general public and delivering results?
  - ▶ The PPP law will need to be amended and updated from time to time to reflect experience and changed circumstances but this should be done in a way that does not create uncertainty
- 



## CONCESSIONS LAW FOR INFRASTRUCTURE AND PUBLIC SERVICES

An International Stocktaking; Implications for People's  
Republic of China

by

Christopher Clement-Davies  
(International Lawyer and Consultant)

## Introduction and Summary

- Thank you for the privilege of participating in this distinguished and stimulating workshop
- PRC now stands at the threshold of some very exciting developments in the PPP/ concessions field
- This talk will focus on the some of the lessons to be learnt from the international experience summarised by Philip Kelly and others; their implications for the PRC
- Draw out some common themes from that experience for a comprehensive and effective PPP legal framework
- Common gaps in these frameworks and how to address them
- Typical contents of a concessions law and issues commonly arising
- A few words about my relevant experience

## Assessing the wider legal framework(1)

- Need to reflect carefully on the wider legal framework before deciding on contents of a new concessions law
- A concessions law may not be necessary at all (as in most common law countries)
- Studies of a country's existing laws as a viable basis for PPPs (e.g. Russia/ Kazakhstan/Turkey/ Czech Republic and Georgia)
- PPPs can touch on a wide range of branches of existing law, including
  - Commercial contract      Procurement
  - Company law                Property
  - Tax                              Sector specific and regulation
  - Finance and Security      Investment Protection
  - Competition                Dispute resolution
- All need to be compatible with PPPs as proposed. One “glitch” can be fatal (e.g. Turkey)
- Difficult to generalise about problem areas, which can be subtle and jurisdiction-specific
- Often many “gaps”. Need for thorough and meticulous due diligence



## Assessing the wider legal framework (2)

- Due Diligence Questionnaire
- Designed to assist the process of evaluating a country's legal framework for PPP purposes
- Some 85 specific questions, categorised as shown in the following slide
- Questions range from the very general to the very specific (see examples on next slide)
- Important to be thorough, but unforeseen difficulties will always arise in practice → modifications almost certainly necessary over time → need for flexibility in concessions law

## The wider legal framework (3)-Due Diligence Questionnaire

General legislative/institutional framework	Scope of authority to award concessions	Administrative coordination	Regulatory Authority
Government Support	Selection of Concessionaire	Project Agreement	Project site/assets/rights
Finance and Security	Construction Works	Operation of the Facility	Ancillary Contractual Arrangements
Tariffs and Settlement of Disputes	Duration and Termination of Concession	Termination of Project Agreement	Risk Allocation

## The wider legal framework (4)-Due Diligence Questionnaire

- Examples of questions include;
  - Are there any undesirable restrictions within the country's legal framework on private-sector participation in infrastructure development and operation?
  - Does the law clearly identify the public authorities (national/provincial/local) that are empowered to award concessions?
  - Does the law identify with sufficient clarity the sectors or types of infrastructure in respect of which PPPs may be granted?
  - Have adequate institutional mechanisms been established to coordinate the activities of conceding authorities and other public bodies responsible for issuing approvals and permits?
  - Are there any unnecessary legal limitations on the parties' ability to agree on an appropriate allocation of risks?
  - Does the law allow sufficient scope and flexibility to allow the parties to agree on the contents of the concession agreement?
  - Does the law make possible the full range of charges and tariffs for different types of project?
  - Does the law impose any constraints on the range of available funding and security structures?
  - Does the law contain any particular restrictions on design, construction and operation of the facility?
  - What limits are there to the parties' ability to agree on appropriate dispute resolution mechanisms?

## Precedents and Guidance Materials

- Many available sources to draw on, as Philip Kelly has demonstrated
- A number of well-regarded precedents (existing concessions laws); e.g. Mongolia/ Lithuania/ Latvia/ Slovenia/ Egypt
- CIS Model PPP Law
- EBRD assessment tools over 10 year+ period
  - Legal Indicator Survey ("LIS") ("effectiveness")
  - Concessions Law Assessment ("CLA") ("effectiveness", "extensiveness" and "compliance"); → Bruno de Cazalet
  - Core principles for a Modern Concessions Law
- UNCITRAL Model Legislative Provisions for Privately-Financed Infrastructure
- UNECE Guide to Best Practice in Implementing PPPs
- Comparisons indicate rapid and impressive progress; the EBRD has referred to a "tremendous level of legislative activity in this area"

# Contents of Concessions Laws(1)

- Concessions Law are sometimes introduced, even where technical necessity debatable, to provide the clarity, certainty, authority and coherence necessary for a PPP programme
- How much consistency is there to these precedents, and what common themes can be discerned?
- Typical contents cover the areas shown in the next slide;
- Considerable similarity between many Concessions Laws;
- But there will be many differences between jurisdictions; unique features reflecting idiosyncrasies and traditions of each
- The Measures cover many of the same themes, but have a number of innovative features of their own

## Content of Concessions Laws (2)

- |   |   |
|---|---|
| <p>(1) <b>Preliminary–Purpose and Scope/Power and Capacity</b><br/> Preamble and definitions<br/> Sectoral scope and permissible structures<br/> Excluded sectors and/or assets<br/> Awarding authorities – identity and powers<br/> Administrative coordination and interface/budgetary mechanism<br/> Regulatory provisions</p>           | <p>(4) <b>Project Agreement and Implementation</b><br/> General (e.g. flexibility of terms and binding force)<br/> Project site and assets<br/> Organisation of the Concessionaire<br/> Finance and security<br/> Concession agreement terms - specific<br/> Term and Termination<br/> Step-in rights<br/> Dispute resolution</p> |
| <p>(2) <b>Project Risks and Government Support</b><br/> Flexibility to allocate risks<br/> Available forms of government support</p>  | <p>(5) <b>Miscellaneous</b><br/> Inter-relationship with other laws and legal obligations (eg treaties)<br/> Supporting Regulations</p>   |
| <p>(3) <b>Selection of the Concessionaire</b><br/> Promotion of competition<br/> Pre-selection<br/> Procedures for submission – one/two stage<br/> Comparing proposals and concession award<br/> Awarding concessions without competitive procedures<br/> Unsolicited proposals<br/> Confidentiality and records<br/> Review procedures</p> |   |

## Concessions Laws-central themes, issues and challenges (1)

- Range of possible sectors-permitted/priority/excluded sectors (Kazakhstan)
- Definition of PPP/Concession-need for breadth and flexibility-the two terms are usually treated as interchangeable by concessions laws
- Existing assets as well as new ones? (Lithuania)
- Available project structures (BOT/BOO/BOOT/ BLT/DBFO/leasing/JV etc.); need for flexibility and to avoid unnecessary restrictions
- Power and authority to award and enter into PPPs/ Concessions (national/regional/local); create “*vires*” and remove uncertainties (e.g. Georgia)
- Administrative coordination? Difficult but desirable. Refine existing structures but distinguish between laws and procedural guidance;
- Sector regulation; address any interface issues carefully, especially where regulatory structures evolving (e.g. Russia/Romania)

## Concessions Laws-central themes, issues and challenges (2)

- Risk Allocation
  - The heart of PPP structuring
  - Avoid trying to prescribe patterns - remove unnecessary restrictions - ensure appropriate freedom for parties to agree detail;
  - Negotiating a concession agreement is all about risk allocation
- Forms of Government Support. Enable or clarify feasibility of full range of available forms of support, including;
  - commercial undertakings to reflect risk allocation;
  - asset contributions;
  - equity investments;
  - funding or guarantees;
  - tax breaks and exemptions;
  - subsidies
- Budgetary Constraints can impinge on award and structure of PPPs in surprising and challenging ways, such as
  - may constrain financial commitments (revenue stream/guarantees/termination compensation)
  - undertakings subject to annual budgetary processes or even parliamentary approval?
  - accounting for government liabilities also needs to be thought through and can be controversial (e.g. Russia)
  - political sensitivity of PPPs and “off-balance sheet” structures (e.g. UK)
  - concessions laws may not be able to make critical difference here; budgetary mechanisms will govern

## Concessions Laws-central themes, issues and challenges (3)

- Selection of the Concessionaire; tendering procedures often a critical area
- Basis for selecting a concessionaire is a vital aspect of the success of any PPP programme. Can include
  - Full open tender;
  - Qualified or limited tender;
  - Negotiated procedure;
  - Sole selection
- Importance of allowing for unsolicited proposals
- Clarity, consistency, precision and predictability are fundamental
- Approach differs from jurisdiction to jurisdiction. But inter-relationship with a country's existing public procurement laws always needs careful thought
- Those laws and procedures may be too generalised or uncertain in the way that they apply to PPPs
- PPPs often larger and more complex than construction contracts or commercial outsourcing, and often need to be evaluated differently

## Concessions Laws-central themes, issues and challenges (4)

- Concessions Laws therefore often address the subject of procurement in detail, even exhaustively (e.g. Lithuania)
- Even where they do not, key evaluation criteria and procedures may need to be spelled out
- Criteria for selecting a concessionaire will typically include;
  - Qualifications for role;
  - Experience of similar projects;
  - Quality of proposals;
  - Price;
  - Quality of strength and team
- Price alone often not the final determinant. Need for more complex test, such as the “most economically advantageous offer”
- Some flexibility and open-endedness to tests often desirable, allowing refinement over time;
- May also need also to take account of expectations of international investors and lenders, especially development banks;
- Even where Concessions Law must fit into existing public procurement framework, it may be possible for it to establish a PPP ‘sub-set’, with regulations or guidance notes

## Concessions Laws-central themes, issues and challenges (5)

- How should a Concessions Law address the Project or Concession Agreement?
- Concessions Laws often defective or misguided in this area. They can attempt to go too far by
  - Prescribing range of clauses
  - Insisting on binding model form contract (e.g. Russia and Gujarat, India)
  - Laying down legislative parameters for clauses (e.g. Czech Republic)
- Concessions Law most helpful when adopt an “enabling” approach to agreements, confirming parties’ right to negotiate clauses flexibly and availability of types of provision
- e.g. It might say that the agreement “shall provide for such matters as the parties deem appropriate” and set out indicative list
- Objective should be to promote flexibility; “can” rather than “must”
- Otherwise risk of practical deadlock, inability to craft appropriate clauses, deter investors or make project “unbankable”
- Perhaps only exceptions are unavoidable legal constraints and firm policy requirements

## Concessions Laws-central themes, issues and challenges (6)

- It can therefore be helpful for Concessions Laws to identify a range of provisions in the Project Agreement in order to confirm their viability
- These provisions may have particular legal significance within the jurisdiction, or be subject to legal doubt about their operation
- Examples include;
  - Concessionaire’s corporate structure
  - Classification of project assets (Romania/ Slovenia)
  - Project site and compulsory purchase powers
  - Range of funding sources
  - Grant of security interests over concessionaire assets
  - Available tariff structures
  - “Financial balance” or “stabilisation” clauses;
  - Term of concession agreement
  - Termination and compensation
  - Step-in rights and “Direct Agreements”
  - Applicable law and dispute resolution mechanisms; international arbitration
- Moot point as to whether and to what extent this is necessary; but often helpful
- Guidance notes and model clauses can achieve same result; need to consider appropriate use of these and legislation respectively

## Supporting Regulations; Uses and Abuses

- How and when are they/should they be used?
- The question often arises; where to draw demarcation line?
- No simple answers, and in reality not many well-defined precedents. Much depends on drafting and jurisprudential practices within jurisdiction
- Perhaps avoid temptation to rely on regulations as a substitute for well-conceived, complete and comprehensive statute (e.g. Turkey/ Romania)
- Regulations make most sense as tool for “filling out” or developing flexible aspects of Concessions Law which may need future development or refinement
- Examples might include;
  - Identifying certain conceding authorities for certain types of project (e.g. Croatia)
  - Detailed aspects of tendering procedures (e.g. Portugal/ Croatia)
  - Criteria for evaluating PPPs or reaching certain key decisions (Mongolia)
  - Addressing detailed, sector-specific regulatory issues (Romania)
  - Overcoming specific legal difficulties (e.g. Russia)
- Again, however, best not to use regulations for matters which are more appropriate for guidance or practice notes. Distinguish law and policy.

## Conclusions

- “Landscape” for PPPs has changed dramatically in past 15 years
- Many helpful precedents and guidance materials now available
- Clear, coherent, and relatively simple Concessions Laws now readily achievable
- But need to be clear about their purpose, limits, weaknesses and strengths
- PRC’s work in this field already far advanced; the Measures cover many of the themes touched on today
- PRC seems to be embarking on exceptionally ambitious programme of PPPs and Concessions
- The PRC’s laws in this area could quickly come to represent another leading international precedent
- But an impressive legislative “cornerstone” is only the first step on a long, hard road!
- Thank you for the privilege of speaking today

# Legal Frameworks for PPP Projects

**Joint ADB and NDRC International  
Consultation Workshop**  
Beijing, June 9, 2015

Public-Private Partnerships Group  
The World Bank Group

## Outline of Presentation

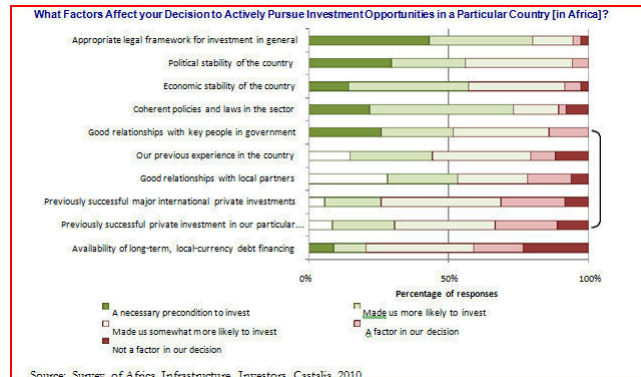
- **Legal Frameworks for PPPs – General Principles**
- **Legal Frameworks for PPPs – Key Issues**
- **Design of PPP Agreements – Typical Expectations of International Investors**



## Legal Frameworks for PPPs

### General Principles

- World Bank surveys of investors have repeatedly shown that the issue of 'protection of legal rights' is the primary concern of investors
- in 2010, the IFC commissioned a survey of PPP investors (in Africa), asking for the factors affecting their investment decisions



## Legal Frameworks for PPPs

### General Principles (cont.)

- although individual PPP transactions can take place on an ad hoc basis, a proper legal and institutional framework is needed to develop a 'pipeline' of PPP transactions
- there is no 'universal' PPP legal framework that is suitable for all countries:
  - UNCITRAL has published the Model Legislative Provisions on Privately-Financed Infrastructure Projects (2003)
  - however, most countries with successful PPP programs have developed their own approaches: whilst some common law countries (the UK, Australia, Canada) developed PPP programs without having particular laws relating to PPP, many (especially economically aspiring) countries (whether common or civil law) have opted for PPP-specific legislation in order to address key institutional and legal issues, send a positive signal to prospective investors and to provide clarity for all government entities involved



## Legal Frameworks for PPPs

### Key Issues

- Procurement processes
  - mixed country practice: either regulated under a (general) already existing procurement law or directly in PPP-specific legislation
  - in terms of an already existing public procurement regime, sufficient flexibility for the procurement of PPPs has to be ensured – e.g.,
    - is the issuance of an interim and final Request for Proposals with respect to the procurement of complex PPP foreseen?
    - are the criteria for evaluating proposals for a PPP project clearly set out?
    - are clear and transparent procedures for dealing with unsolicited proposals provided for?
    - can a PPP project agreement (such as a Concession Agreement) be extended without a new competitive tender?
  - if new procurement rules are written into the PPP legislation, it will have to be particularly specified what role existing procurement authorities should have in regard to PPP transactions



## Legal Frameworks for PPP

### Key Issues (cont.)

- Clear institutional arrangements for PPPs
  - which ministry or local government entities are authorized to enter into PPP agreements with the private sector – are there legal limitations on activities that can be undertaken by the private sector?
  - is there a Cabinet-level group (e.g., a Council of Ministers) that approves PPP transactions and how does it function?
  - involvement of the Ministry of Finance as regards the management of fiscal risks in PPP
  - is there a central PPP Unit – what are its specific duties and what is its relationship with other government institutions involved in the appraising and approval process of PPP transactions?
- Process of selection and appraisal of PPP projects
  - which requirements have to be met and which studies have to be conducted for a project to be procured as a PPP?
  - which government entities are involved in the process of identifying a project to be procured as a PPP?



## Legal Frameworks for PPP Key Issues (cont.)

- Prescription of minimum requirements of a PPP agreement, such as, e.g.,
  - performance targets
  - calculation of project revenue/payments under the PPP agreement
  - Duration of the agreement
  - Events of default and related damages to be paid by either party
  - early termination of the agreement
- Monitoring and evaluation of PPP projects
  - which mechanisms are foreseen for the monitoring of a PPP project during its implementation?
  - which government entity will monitor PPP projects?



## Legal Frameworks for PPPs Key Issues (cont.)

- Lender issues
  - the lender's rights to 'step-in', i.e. take over the project
  - direct agreements between lenders and government entities
- Foreign investment issues
  - restrictions on ownership of local companies by foreign investors
  - restrictions on currency conversions
- Land issues
  - limitations on private ownership of land, including foreign owners
  - planning permissions
  - environmental and social impacts



## Legal Frameworks for PPPs

### Key Issues (cont.)

- Dispute resolution
  - does the court system satisfy the investors' need for a fair, transparent and efficient dispute resolution mechanism?
  - if not, is domestic or international arbitration a possibility?
  - are international arbitration awards recognized, and can they be enforced?
  - other dispute resolution mechanisms – dispute boards, mediation, expert determination



## Design of PPP agreements – Typical Expectations of International Investors

### Risk allocation

- Adequate risk allocation from the perspective of all stakeholders involved, including:
  - the government
  - the private investors
  - the lenders
  - the end-users
- risks typically assigned to the private sector:
  - design and construction financings and costs of the respective facility
  - maintenance and lifecycle costs
  - operational service quality



## Design of PPP agreements – Typical Expectations of International Investors (cont.)

- risks typically assigned to the public sector:
  - political risks: expropriation, political violence, currency convertibility and transfer
  - inflation, interest rate and exchange rate fluctuations
  - regulatory risks: changes in tariffs, problems with rights-of-way, etc.
- risks that are either shared or allocated to either the private or the public sector:
  - demand/traffic risk, i.e. the risk pertaining to the extent to which the respective project structure (e.g. a toll road) will be used



## Design of PPP agreements – Typical Expectations of International Investors (cont.)

### Protection of lenders' rights

- possibility of pledging the project facilities under the PPP agreement (requiring that the private partner may be granted ownership over such facilities)
- possibility for the private partner (e.g., the concessionaire) to pledge its rights under the PPP agreement
- lenders rights to 'step-in', i.e. take over the project in the event of poor performance by the private partner to the PPP agreement



## Design of PPP agreements – Typical Expectations of International Investors (cont.)

### Unequivocal provisions on early termination events

- which events of default on either side entitle the respective party to an early termination of the PPP agreement?
- restriction of cases in which the public sector may confiscate and expropriate the project facilities on grounds of public interest and, following, may terminate the PPP agreement
- compensation in cases of early termination



## Design of PPP agreements – Typical Expectations of International Investors

### Dispute resolution provisions

- even in contracts with well-designed risk allocation provisions and adjustment mechanisms, there will be a need for dispute resolution provisions, ideally of a 'multi-tier' variety
- commonly, the dispute resolution provisions in major PPP agreements will involve some combination of the following steps, to be taken after one of the parties to the contract has given formal notice of a dispute:
  - negotiation of the dispute by the parties themselves;
  - submission of the dispute to an expert for determination;
  - mediation and conciliation;
  - domestic or international arbitration; and
  - judicial proceedings



## *Concession Law for Infrastructure: Are there lessons from common law countries?*



*Michael Schur, June 2015*

### **AGENDA**

- PPP Legal framework in South Africa and Australia
- The context for the South African approach to the regulation of PPPs
- The focus of legislation that governs PPP
- Ensuring the PPP model is not abused
- Possible lessons for PRC

### ***Legal Framework for PPPs in South Africa & Australia***

- Neither South Africa nor South Africa has overarching concessions law
- The Primary reason for this is that in common Law countries, “everything which is not forbidden is allowed”
- Australia relied on state-based procurement laws, with PPP-specific procurement rules laid down in state-based PPP policies and guidelines (later national guidelines)
- Australia embedded approval processes in state (and national) legislation governing financial management of government agencies
- South Africa also relied on existing procurement laws and created new regulations under existing financial management legislation



### ***Legal Framework for PPPs in South Africa & Australia***

#### **Australia**

- In NSW, the Public Authorities Financial Arrangements (PAFA) Act was amended to regulate PPPs
- PPPs are defined in the Act as joint financing arrangements and require statutory approval
- The Act requires Treasurer’s approval of all PPP arrangements and Government guarantees
- Similar arrangements exist in other state based financial management laws and regulations

#### **South Africa**

- In 2004, South Africa established new regulations, Treasury Regulation 16, under the Public Finance Management Act, 1999 (PFMA), which regulates the use of PPPs at the national and provincial level
- Similar regulations under the Municipal Finance Management Act, 2003 were developed for a consistent financial accountability system for local authorities
- Treasury Regulation 16 defines PPPs and sets out clear approval processes for various stages of the PPP procurement cycle





### ***Context for the Regulatory Framework for PPPs in South Africa***

- In 2009 the South African Government cancelled the PPP procurement process for four new prisons after receiving bids from the private sector
- The project preceded the regulatory framework for PPPs
- The key reason for the cancellation was that the contract was unaffordable
- The procuring Department had confused affordability with value for money
  - These are not the same thing
- If the government had gone ahead with these contracts it would have seriously curtailed its ability to build any other prisons



### ***The focus of PPP legislation in South Africa and Australia***

- Neither country required an overarching law to enable PPPs
- Both however saw the importance of embedding the approval of PPPs in existing legislation governing the financial management of government agencies
- South Africa provided Treasury a prominent role in the approval process - feasibility study, bid documents, VfM report, negotiations
- Australia provided Cabinet a prominent role in the approval process - procurement, EOI, RFP, bidder, contract execution
- In both cases the motivation was concern that PPPs might create fiscal risks if used to circumvent budget discipline
- Both jurisdictions understood that PPPs cannot be financed unless they are fully funded by users and / or taxpayers
- Both jurisdictions understood that the primary purpose of a PPP is to harness private sector incentives for performance



***Both Australia and South Africa have very developed policy frameworks that ensure the PPP model is consistently applied***

**Australia has national PPP Policies & Guidelines**

Including...

- PPP budget rule:
  - Projects must be approved and funded for conventional procurement before a decision is taken to pursue PPP procurement on value for money grounds
- Standardised VfM test, discount rate methodology, commercial principles

**South Africa has a specialised PPP Unit & National PPP Manual**

Including...

- Three tests for a PPP:
  - Affordability
  - Value for money
  - Appropriate risk transfer
- Standardised risk allocation principles, model contract provisions



***Why Did Australia / South Africa Forgo Overarching Law***

- As already mentioned, an overarching law was not required
- But there were other reasons
  - Both countries wanted flexibility offered by policy over law – evolution of policy over time makes sense of this preference
  - Both countries relied on pre-existing strong cabinet processes
  - Both countries relied on strong financial management laws and well resourced Treasuries / Department of Finance which made it difficult to circumvent the rules. Where necessary, these laws and regulations were strengthened
  - Institutional support for PPP was strong across national, provincial and local government – allowing focus to be on good governance
  - Australia in particular had strong track record and practice of economic regulation – particular in water and energy sectors, but also a clear national framework for third party access regimes in these and other sectors



## ***Australia: How Typical Concession Law Provisions Dealt with***

### **Typical Concession Law Provisions**

- Preliminary–Purpose and Scope/Power and Capacity
- Project Risks and Government Support
- Selection of the Concessionaire
- Project Agreement and Implementation
- Miscellaneous
  - Inter-relationship with other laws and legal obligations (eg treaties)
  - Supporting Regulations

### **Australia Practice**

- Purpose and scope generally dealt with in State-based PPP Guidelines; power and capacity in existing procurement laws and in amended financial management laws
- Risk dealt with in national guidelines; Government support in Budget Rule
- Selection of Concessionaire – procurement laws and PPP Guidelines
- Specific laws (Financial Management, Tax) amended to incorporate requirements for PPPs



## ***What are the key lessons for PRC***

- Australia and South Africa's reasons for not developing an overarching law were facilitated by common law legal framework and pre-existing institutional, policy and regulatory settings
- One should not read into this the validity or otherwise of the benefits of an overarching law for PRC
- While an overarching PPP law may be necessary, it is unlikely to be sufficient for a successful PPP program
- Policy consistency and strong national guidance is also necessary, as shown in Australia and South Africa
- Together, PPP legislation and policy must ensure that PPPs are not miss-used
  - The purpose of a PPP is to harness private sector incentives for performance
  - Funding shortfalls can not be addressed through financing structures



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**Jin Yongxiang,**  
**Dayue Consulting**  
**June, 2015**

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### 1. The Current Situation and Problems of Concession of Public Utilities

### 2. Propel the Concession System, and Promote the Management Efficiency

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## 1. The Current Situation and Problems of Concession of Public Utilities

#### ➤ Does concession exist in the traditional regime?

In a certain development zone, a traditional state-owned gas company collided with a SOE that was about to enter the zone for gas business.

#### ➤ Why does gas enclave appear in some cities?

In the downtown area of a certain city, the gas supply is mainly supported by a city-owned enterprise; but the gas in several small areas of the same place was supplied by social capitals, which causes alarming security risks.

#### ➤ What illumination could be found in the conduction of concession by Beijing Drainage Group?

Beijing Municipal Government grants the right of concession to Beijing Drainage Group, which clarifies the borders of government and traditional enterprises.

#### ➤ Could concession be applied to the projects that government pays for services?

Almost all the waste incineration PPP projects that social capitals involved have signed the concession agreements.

#### ➤ Is there any supervision for concession in state-owned companies?

The game between cats and rats never stops

——The lack of standardized concession system directly causes the very low efficiency of public utilities managements.

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DAYUE CONSULTING

## 2. Propel the Concession System, and Promote the Management Efficiency

- The concession system construction should be taken as an important measure of state administration modernization;
- Both the connotation and extension of concession shall be regulated to fit the situation of PRC;
- The system of monopolized industry management by relative ministries shall be optimized, thus the Chinese characteristic concession system is built;
- The concession projects involved with social capitals could be the entry point to promote the concession system;
- The concession system of traditional SOE shall be regulated step by step.
  - The concession system will clarify the borders of government and enterprises in various forms of ownership, reduce internal friction, and promote the management efficiency of public utility as well as the appeal to social capitals.

# Thanks !

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## **On the Government As One of Party to PPP Agreement**

## **The capacity to be a party**

## The capacity to be a party

- What kind of governmental agency can be a party to the PPP agreement? New administrative litigation law 2014 puts forward such question.
- A concession agreement can not be taken as civil contract any more. The legislation on PPP is expected to introduce substantial rule on concession agreement, including the capacity of parties while there is not yet a system on “public legal person”.

### Administrative Litigation Law of the People's Republic of China (2014 Amendment)

- **Article 12**
- The people's courts shall accept the following complaints filed by citizens, legal persons, or other organizations:(11) A complaint claiming that an administrative agency has failed to perform according to the law or as agreed upon, or illegally modified or rescinded, an agreement, such as a government concession agreement or a land and building expropriation compensation agreement.



## State organ as legal person for civil contract

- Before 2015, a concession agreement could be taken as a civil contract, the government as a party of "state organ legal person", and the dispute solved by means of civil litigation or arbitration.
- "General Provision of Civil Law 1986" stated "an **independently funded** official organ could be qualified as a legal person on the day it is established".

## Key points to be a party

- "Official organ legal person" for civil contract: an independent funding.
- "Public legal person" for the public contract: an administrative competence authorized by law.
- Government above county level, instead of its separated agencies, possess fully competence for a party of concession agreement.
- **Problem:** If government is a party to agreement, how to deal with relationship between government and its department while some agencies keep independent function?
-

## Regulatory Provision

- Article 14 ,Regulatory Rule on PPP 2015
- “The people's governments above the county level shall authorize the its department or unit in charge of the concession as the implementing agency for the implementation of the project work, and specify mandate.”

## The Role of Gov. In Exercising Supervision

## The Bodies of Supervision

- The functions of supervision are kept separately by government, its agency for agreement and the public in accordance with Regulatory Rule of PPP.
- **The problems** : to what extent the function of supervision could be included in the agreement? Where is the boundary between a party's right and an administrator's function?

## Supervision by the departments

- Government' agencies could carry out supervision independent of the government as a party of PPP agreement according to the Regulatory Rule on PPP 2015 .
- To what extent it could be justified in terms of relationship with the government?

## Regulatory Provision

- Article 41, Regulatory Rule on PPP 2015
- The departments of people's governments above the county level shall, in accordance with their respective responsibilities, implement laws, administrative regulations, industry standards, technical specifications of products or services, and other related regulatory requirements for supervision and management to the concession, and strengthen supervision and review to the costs according to law.
- Department for Audit above the county level should be take audit to the operation of concession according to the law .

## Supervision by the Gov. Party

- The gov. party of concession agreement could take supervision over operations of project by the means of monitoring and analysis based on the agreement.
- Is this term based on lawful requirement or on the negotiation of two parties?

# Regulatory Provision

- Article 43, Regulatory Rule on PPP 2015
- The implementing agency shall, according to the concession agreement, monitor and analysis the operations of concession projects on a regular basis, evaluate the performance together with relevant departments, and establish mechanism of the price or financial subsidies adjustment based on the results of performance evaluation according to the arrangement of concession agreement, in order to ensure the quality and efficiency of public goods or public services.
- Implementing agency should take public opinion as an important part of monitoring and analysis and performance evaluation.

基础设施和公用事业特许经营制度与实践国际研讨会/International Workshop for Regulations and Practices on Infrastructure and Utilities Concessions



**分类推进基础设施和公用事业特许经营**  
**Promote Infrastructure and Utilities Concessions Respectively**



中国国际工程咨询公司 李开孟

Li Kaimeng

China International Engineering Consulting Corporation (CIECC)

中国国际工程咨询公司研究中心 CIECC Research Center

## 一、什么是特许经营?/What is concession?

- 如何理解“经营性项目”、“准经营性项目”和“非经营性项目”? /How to understand “Operational”, “Quasi-Operational” and “Non-Operational” Projects?
- 准经营性项目是否属于经营性项目? /Do quasi-operational projects belong to Operational items?
- 如何理解基础设施和公用事业“特许经营”? /How to understand “concession” for infrastructure and public utilities?

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## 二、为什么要开展“特许经营”? /What's the main rationale of concession?

- 特许经营的核心内涵是什么? /What is the core connotation of concession?
- 30年来我国“特许经营”概念有何变化? /What are the developments of the concept of concession in PRC in the past 30 years?
- 中国式“特许经营”与欧盟《特许经营合同授予程序指令》、俄罗斯《联邦特许经营法》、蒙古国《特许经营法》等的“特许经营”有何区别? /What are the discrepancies among “concessions” in PRC, Europe (Directive of the European Parliament and of the Council on the award of Concession Contract), Russia (Federal Law on Concession Agreements), and Mongolia (Law of Mongolia on Concessions)?

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### 三、特许经营是国际普遍采用的模式吗？/Is concession common applied internationally?

- **PPP不是基础设施和公共事业项目运作必须采用的模式/PPP is not a must choice for infrastructure and utilities.**
- **特许经营也不是基础设施和公共事业项目运作必须采用的模式/ Concession is not a necessity either.**
- **明确特许经营的适用范围并分类推进非常重要/It's significantly important to specify the application scope of concession, and promote concessions respectively in the context of Chinese economy.**

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### 四、重点关注公营机构的特许经营/Focus on concessions of public organizations

- **由政府出资成立及营运/Funded and operated by government;**
- **负责基础设施和公共事业运营/In charge of operation of infrastructure and utilities;**
- **不属于政府体系，不是公务员，需要政府授权/Not belong to the government system, not public officials, government authorization needed.**

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#### 五、市场化项目不宜采用特许经营模式

It's inadvisable to apply concession to business projects.

- 我国基础设施和公共事业投资体制改革的方向是什么？ / What's the direction of the reform on the infrastructure and utilities investment system in PRC?
- 市场化经营项目，是否必定需要“特许经营”？ / Do we need to apply concession definitely to a business project or a market operated project?
- 市场化改革应减少政府介入 / Government intervention should be reduced through marketization reform.
- 需要开展特许经营的商业性项目有何特点？ / What are the characteristics of the business projects which should apply concession to?

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#### 六、PPP项目可以采用“特许经营”模式

Concession can be applied to PPP projects

- **PPP**模式采用购买服务、特许经营和股权合作等方式 / There are different modes of PPP, such as governmental purchase of services, concession, equity cooperation, etc.
- 特许经营是实现**PPP**理念的路径之一 / Concession is just one possible choice among all PPP modes.
- 应恰当理解特许经营和**PPP**的关系 / The key point is to understand the relations and differences between Concession and PPP mode practically in Chinese context.

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七、政府购买服务可采用“特许经营”模式/Concession can be applied to governmental purchase of services.

- 应区别“政府购买服务”和“使用者付费”的不同特点/The Characteristics of Governmental purchase of services and “User’s Payment” should be identified;
- 中国目前的特许经营主要应用于“使用者付费”类项目/The Concession Applied In PRC now mainly focused on the projects of “User’s Payment”.
- 政府购买服务可采用服务外包（O&M）、管理合同（MC）、租赁合同、特许合同等模式/ The Patterns of government purchase of services include Operation and Maintenance, Management Contract, Leasing Contract, and Concession Contract also.

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八、如何理解“特许经营”合同性质？/How to identify the nature of concession contract?

- 是“授予特许经营权”还是建立“平等合作伙伴关系”？/Granting a Concession Authorization or establishing a equal partner-relationship?
- 是“民事合同”还是“行政许可行为”？/ Civil Contract or Administrative Approve Act?
- 争端解决方式，是“申请仲裁”、“提起民事诉讼”还是“申请行政复议”或“提起行政诉讼”？/Choosing Arbitration, Civil Litigation, Administrative Reconsideration or Administrative Proceedings to settle dispute?
- 关键在于，在中国语境下，针对不同类型的情况如何正确理解/The key points is to define the intention respectively in Chinese context.

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九、如何处理特许经营和PPP模式的关系？/How to deal with the relationship between concession and PPP?

- 特许经营是强调对“经营”的授权吗？/Does Concession stress the grant to the activities of “operation”.
- PPP如何实现可持续的“伙伴关系”/How PPP model reach the goal to establish a sustainable “partnership”.
- 特许经营强调对经营行为的规范/Regulation of operation activities is highlighted in concessions.
- 特许经营的授予对象一定是“社会资本”主体吗？/Is Concession necessarily granted to a “social investors”.

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十、为什么要推进“特许经营立法”？/Why should concession legislation be propelled?

- 推动投资立法/It is a very useful opportunity to Impel the legislation of investment in PRC.
- 规范政府行为/It is also a good chance to regulate the behavior of the governments at different level in PRC.
- 推动市场化改革/It if a very important approach to promote the reform of marketization in the field of infrastructure and public utilities in PRC.

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基础设施和公用事业特许经营立法国际研讨会

International Workshop: Legislation on Infrastructure and Utilities Concessions

2015 年 6 月 9 日

9 June 2015

北京  
Beijing

AGENDA  
议程

会议地点：中国职工之家 B 座三层多功能厅东厅 East room of Multi-Function Hall, Third floor, Tower B, China Palace Hotel	
9:00 – 9:15	<b>开幕式 Opening Session:</b> <ul style="list-style-type: none"><li>- 李亢，国家发展改革委员会法规司司长 Mr. Li Kang, Director General, Laws and Regulations Department of National Development and Reform Commission(NDRC), PRC</li><li>- 哈米德·谢里夫，亚行东亚局中国代表处首席代表 Mr. Hamid Sharif, Country Director, East Asia Department, Asian Development Bank (ADB)</li></ul>
9:15 – 9:45	<b>议题一：介绍中国基础设施和公用事业特许经营立法</b> <b>Session 1: Introduction to the Concession Legislation work of PRC</b>  主持人：康飞燕，亚洲开发银行法律总顾问办公室首席法律顾问 <b>Moderator:</b> Ms. Fiona Connell, Principal Counsel, Office of the General Counsel, ADB  发言人：赵成峰，中华人民共和国国家发展改革委员会法规司副处长 <b>Presentations:</b> Mr. Zhao Chengfeng, Deputy director, Laws and Regulations Department of NDRC
9:45 – 10:15	<b>议题二：介绍英国相关制度建设及实践经验</b> <b>Session 2: The British Experience Internationally Introduction</b>  主持人：康飞燕，亚洲开发银行法律总顾问办公室首席法律顾问 <b>Moderator:</b> Ms. Fiona Connell, Principal Counsel, Office of the General Counsel, ADB  发言人：Karineh Grigorian，英国基础设施局国际处官员 <b>Presentations:</b> Ms. Karineh Grigorian, Office of International, Infrastructure UK
10:15 – 10:45	<b>议题三：介绍法国相关制度建设及实践经验</b>

会议地点：中国职工之家 B 座三层多功能厅东厅 East room of Multi-Function Hall, Third floor, Tower B, China Palace Hotel	
	<b><u>Session 3: The French Experience Introduction</u></b>  主持人：康飞燕，亚洲开发银行法律总顾问办公室首席法律顾问 <b>Moderator:</b> Ms. Fiona Connell, Principal Counsel, Office of the General Counsel, ADB  发言人：Bruno de Cazalet，联合国欧洲经济委员会国际 PPP 中心商务咨询委员会成员 <b>Presentations:</b> Mr. Bruno de Cazalet, Member of the Business Advisory Board, UNECE PPP International Centre of Excellence
10:45 – 11:00	茶歇 Tea/coffee break
11:00 – 12:00	<b><u>议题四：介绍国际相关制度建设及实践经验（第一部分）</u></b> <b><u>Session 4: The International Experience Introduction (Part 1)</u></b>  主持人：康飞燕，亚洲开发银行法律总顾问办公室首席法律顾问 <b>Moderator:</b> Ms. Fiona Connell, Principal Counsel, Office of the General Counsel, ADB  发言人 <b>Presentations:</b> 1. Mr. Philip Kelly, International Consultant, 国际专家 2. Mr.Christopher Clement-Davies, PPP Legal Advisor, PPP 法律专家
12:00 – 12:30	互动问答 <b>Question &amp; Answer</b>
12:30 – 14:00	午餐（自助）：中国职工之家 C 座一层山水湘连餐厅 <b>Lunch（Buffet）：</b> Dining Hall at the 1 Floor of C Tower, China Palace Hotel
14:00 – 15:00	<b><u>议题五：介绍国际相关制度建设及实践经验（第二部分）</u></b> <b><u>Session 5: The International Experience Introduction (Part 2)</u></b>  主持人：柯瑞格，亚洲开发银行东亚局首席 PPP 专家 <b>Moderator:</b> Mr Craig Sugden, Principal PPP Specialist, East Asia Department, ADB  发言人 <b>Presentations:</b> 1. Ms. Cristina Paul, World Bank（世界银行） 2. Mr. Michael Schur, Managing Director, Castalia and former Secretary of the New South Wales Treasury, Australia (澳大利亚 Castalia 公司总经理，新南威尔士州财政厅前任秘书)  互动问答 <b>Question &amp; Answer</b>
15:00 – 15:15	茶歇 Tea/coffee break
15:15 – 16:45	<b><u>议题六：中国特许经营立法专题研讨</u></b> <b><u>Session 6: Implications for the Concession Legislation of PRC</u></b>

会议地点：中国职工之家 B 座三层多功能厅东厅 East room of Multi-Function Hall, Third floor, Tower B, China Palace Hotel	
	<p>主持人：柯瑞格，亚洲开发银行东亚局首席 <b>PPP</b> 专家  <b>Moderator:</b> Mr Craig Sugden, Principal PPP Specialist, East Asia Department, ADB</p> <p>发言人：1.金永祥，亚行特许经营立法技援项目首席专家            2.于安，清华大学公共管理学院教授            3.李开孟，中国国际工程咨询公司研究中心主任</p> <p><b>Presentations:</b></p> <ul style="list-style-type: none"> <li>- Mr. Jin Yongxiang, Team Leader of ADB TA Program on Concession Law</li> <li>- Mr. Yu An, Professor, School of Public Policy and Management Tsinghua University</li> <li>- Mr Kaimeng Li, Director General of Research Centre, China International Engineering Consulting Corporation</li> </ul> <p>问答时间 <b>Question and Answer</b></p>
16:45 – 17:00	<p><b>闭幕式 Closing Session:</b></p> <ul style="list-style-type: none"> <li>- 赵成峰，中华人民共和国国家发展改革委员会法规司副处长            Mr. Zhao Chengfeng, Deputy director of Laws and Regulations Department, NDRC</li> <li>- 康飞燕，亚洲开发银行法律总顾问办公室首席法律顾问            Ms. Fiona Connell, Principal Counsel, Office of the General Counsel, ADB</li> </ul>
17:00 –	<p>晚餐（自助）：中国职工之家 C 座一层山水湘连餐厅  <b>Dinner (Buffet):</b> Dining Hall at the 1 Floor of C Tower, China Palace Hotel</p>