THE PUBLIC-PRIVATE PARTNERSHIP LAW REVIEW

Fifth Edition

Reproduced with permission from Law Business Research Ltd
This article was first published in April 2019
For further information please contact Nick.Barette@thelawreviews.co.uk

Editors
Thiago Luís Sombra and Thiago Fernandes Moreira

THE LAWREVIEWS

PUBLISHER
Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGER
Joel Woods

SENIOR ACCOUNT MANAGERS
Pere Aspinall, Jack Bagnall

ACCOUNT MANAGERS
Sophie Emberson, Katie Hodgetts

PRODUCT MARKETING EXECUTIVE
Rebecca Mogridge

RESEARCH LEAD
Kieran Hansen

EDITORIAL COORDINATOR
Gavin Jordan

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Simon Tyrie

SUBEDITOR
Neil Fanning

CHIEF EXECUTIVE OFFICER
Paul Howarth

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-83862-012-7

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

© 2019 Law Business Research Ltd

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ASAR – AL RUWAYEH & PARTNERS

BOMCHIL

BRYAN CAVE LEIGHTON PAISNER LLP

EL-KHOURY & PARTNERS LEGAL COUNSEL

G ELIAS & CO

HENGELER MUELLER PARTNERSCHAFT VON RECHTSANWÄLTEN MBB

HERBERT SMITH FREEHILLS

HOUDA LAW FIRM

JPM JANKOVIC POPOVIC MITIC

LEE AND LI

LIEDEKERKE

MATTOS FILHO, VEIGA FILHO, MARREY JR E QUIROGA ADVOGADOS

NADER, HAYAUX Y GOEBEL, SC

NISHIMURA & ASAHI

PARQUET & ASOCIADOS

RAISIN GMBH

TMI ASSOCIATES

URÍA MENÉNDEZ

VELMA LAW

VIEIRA DE ALMEIDA

WEERAWONG, CHINNAVAT & PARTNERS LTD

WHITE & CASE

YOON & YANG LLC

ZHONG LUN LAW FIRM

CONTENTS

PREFACE

We are very pleased to present the fifth edition of *The Public-Private Partnership Law Review*. Notwithstanding the number of chapters in various publications in The Law Reviews series on topics involving public-private partnerships (PPPs) and private finance initiatives (in areas such as projects and construction, real estate, mergers, transfers of concessionaires' corporate control, special purpose vehicles and government procurement), we identified the need for a deeper understanding of the specific issues related to this topic in different countries.

In 2014, Brazil marked the 10th year of the publication of its first Public-Private Partnership Law (Federal Law No. 11,079/2004). Our experience with this law is still developing, especially in comparison with other countries where discussions on PPP models and the need to attract private investment in large projects dates from the 1980s and 1990s.

This is the case for countries such as the United Kingdom and the United States. PPPs have been used in the United States across a wide range of sectors in various forms for more than 30 years. From 1986 to 2012, approximately 700 PPP projects reached financial closure. The United Kingdom is widely known as one of the pioneers of the PPP model; Margaret Thatcher's governments in the 1980s embarked on an extensive privatisation programme of publicly owned utilities, including telecoms, gas, electricity, water and waste, airports, and railways. The Private Finance Initiative was launched in the United Kingdom in 1992, aiming to boost design-build-finance-operate projects.

In certain developing countries, PPP laws are more recent than the Brazilian PPP law. Argentina was the first country in Latin America to enact a PPP Law (Decree No. 1,299/2000, ratified by Law No. 25,414/2000). The Argentinian PPP Law was designed to promote private investment in public infrastructure projects that could not be afforded exclusively by the state, especially in the areas of health, education, justice, transportation, construction of airport facilities, highways and investments in local security. In Mozambique, Law No. 15/2011 and Decree No. 16/2012 govern the Public-Private Partnerships Law and other related PPP regulations, which establish procedures for contracting, implementing and monitoring PPP projects. In Paraguay, a regulation establishing the PPP regime has been enacted (Law No. 5,102) to promote public infrastructure and the expansion and improvement of services provided by the state; this law has been in force since late 2013.

In view of the foregoing, we hope a comparative study covering practical aspects and different perspectives regarding PPP issues will become an important tool for the strengthening of this model worldwide. We are certain this study will bring about a better dissemination of best practices implemented by private professionals and government authorities working on PPP projects around the world.

With respect to Brazil, the experience evidenced abroad may lead to the strengthening of this model. One specific feature of the PPP law in Brazil, for instance, is state guarantees. This

feature permits that the obligation of the public party to pay a concessionaire be guaranteed by, among other mechanisms authorised by law: a pledge of revenues; creation or use of special funds; purchase of a guarantee from insurance companies that are not under public control; guarantees by international organisations or financial institutions not controlled by any government authority; or guarantees by guarantor funds or state-owned companies created especially for that purpose.

The state guarantee pursuant to PPP agreements is an important innovation in administrative agreements in Brazil; it assures payment obligations by the public partner and serves as a guarantee in the event of lawsuits and claims against the government. This tool is one of the main factors distinguishing the legal regimen of PPP agreements from ordinary administrative agreements or concessions – one that is viewed as crucial for the success of PPPs, especially from a private investor's standpoint.

Nevertheless, the difficulty in implementing state guarantees on PPP projects has been one of the main issues in the execution of new PPP projects in the country. This is made worse by the history of government default in administrative contracts.

In other jurisdictions, however, state guarantees are not a rule. Unlike PPP projects in developing countries, government solvency has not historically been a serious consideration in other jurisdictions. That is the case in countries such as Australia, France, Ireland, Japan, the United Kingdom and the United States.

We expect that the consolidation of PPPs and the strengthening of the government in Brazil may lead to a similar model, enabling private investments in areas where the country lacks the most.

Brazil must adopt cutting-edge models for awarding PPP agreements. The winner is usually chosen based solely on the price criterion (offering of lower prices or highest offers), which sometimes leads to projects lacking advanced or tailor-made solutions. Despite the legal provisions on the role of technical evaluation of offers, they are becoming less relevant. However, some ongoing discussions regarding amendments to the Brazilian procurement legislation and new criteria, which are based on the international experience, could (fortunately) be approved.

We highlighted some discussions regarding the amendment to the Federal Procurement Law (Federal Law No. 8,666/1993), which is expected to expedite public procurement in Brazil. One of the main innovations proposed in this debate is the competitive dialogue, a type of bid in which the authority engages with bidders to discuss and develop one or more solutions for the tendered project. After the conclusion of the dialogue phase, the authority will establish a term for the submission of bids.

Competitive dialogue is a reality in many jurisdictions (e.g., Australia, Belgium, China, France, Ireland, Japan and the United Kingdom). In Japan, for example, some projects are procured through the competitive dialogue process. This process may be adopted if a relevant authority is unable to prepare a proper service requirement, in which case it proposes a dialogue with multiple bidders simultaneously to learn more about the specific service it seeks to implement. As another example, in France a dialogue will be conducted with each bidder to define solutions on the basis of the functional programme. At the end of the dialogue period, the procuring authority will invite the candidates to submit a tender based on the considered solutions. After analysis of the tenders, a partnership contract will be awarded to the bidder with the best price in accordance with the criteria established in the contract notice or in the tender procedure. We hope the importance of this tool is recognised in Brazil and reflected in our legislation.

Further, the Investment Partnerships Programme, as established in Federal Law No. 13,334/2016, is a legal plan regarding infrastructure development in the country, providing conditions for the attraction of investments in infrastructure projects and creating environments for greater integration between public and private sectors.

The PPI is comprised of two relevant bodies within the federal government: the PPI Board and the PPI Secretariat. The first one evaluates and recommends to the President the projects that should be part of the PPI, as well as decides on subjects concerning the execution of partnership contracts and privatisations. The second one is a taskforce that acts in support of the Ministries and Regulatory Agencies to execute the PPI's activities. These entities, together with other bodies and controlling agencies, are expected to act in an articulated manner as to ensure stability, legal certainty, predictability and effectiveness of the investment policies.

With regard to the plans of the president-elect for infrastructure investments in Brazil, the responsible governmental team has already confirmed the continuity of the PPI, linked to the presidency and preserving the members of its current technical team. In addition, the new government team endorses the development of a programme by PPI to support public-private partnerships of states and municipalities, which would mainly cover sanitation and public lighting sectors. Given the lack of operational, technical and economic-financial ability of municipalities to manage such programmes, the federal government is expected to act closely with local entities to boost projects in priority areas.

In the fifth edition of this book, our contributors were drawn from the most renowned firms working in the PPP field in their jurisdictions. We would like to thank all of them for their support in producing *The Public-Private Partnership Law Review*, and in helping with the collective construction of a broad study on the main aspects of PPP projects.

We strongly believe that PPPs are an important tool for generating investments (and development) in infrastructure projects and creating efficiency not only in infrastructure, but also in the provision of public services, such as education and health, as well as public lighting services and prisons. PPPs are also an important means of combating corruption, which is common in the old and inefficient model of direct state procurement of projects.

We hope you enjoy this fifth edition of *The Public-Private Partnership Law Review* and we sincerely hope that this book will consolidate a comprehensive international guide to the anatomy of PPPs. We also look forward to hearing your thoughts on this edition, and particularly your comments and suggestions for improving future editions of this work.

Thiago Luís Sombra and Thiago Fernandes Moreira*
Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados
São Paulo
March 2019

* The authors would like to thank Bruno Werneck and Mário Saadi for their assistance in preparing this article.

Chapter 16

RUSSIA

Olga Revzina, Roman Churakov and Lola Shamirzayeva[1]

I OVERVIEW

In Russia, the public-private partnership (PPP) sector is dynamically developing and contains many examples of successful projects in all key areas of the Russian economy – in particular, transport, healthcare and utilities. However, in comparison with some other countries, Russian PPP legislation is relatively new, as it was first introduced in 2005 when the Federal Law No. 115-FZ On Concession Agreements, dated 21 July 2005 (the Concession Law), was adopted.[2] Based on it, one of the famous first concession agreements in relation to the Moscow–Saint-Petersburg Toll Express Motorway[3] (15–58 kilometres) was signed in 2009. Along with this, some Russian regions started to introduce their own PPP laws. For example, Saint Petersburg was a pioneer in adopting its own law in 2006, which led to many successful infrastructure projects. The most notable projects with foreign investments in this city include the Western High Speed Diameter[4] and Pulkovo international airport.[5] Saint Petersburg has always been very active in promoting PPPs and developing legislation in this area.

Many other regions have decided to follow this approach and have adopted similar legislation. In 2009, the expert committee on PPP legislation under the Committee on economic policy and entrepreneurship of the State Duma of the Russian Parliament recommended that regional parliaments adopt the Model Regional Law on Participation of the Regional, Municipal Organisations in PPP Projects. This model law helped regions to develop their own legislation, and by 2015, more than 70 Russian constituent entities had their own PPP laws. Moreover, an important step in further establishing PPP legislation in Russia was the adoption in 2014 by the CIS Inter-Parliamentary Assembly of the Model Law on PPPs for CIS Countries.

Until recently, the Concession Law was the main legislative act in Russia governing the procedure for the implementation of PPPs at the federal level. However, concession legislation limits the structuring of PPP projects to a scenario where the right of ownership

1 Olga Revzina is a partner, Roman Churakov is a senior associate and Lola Shamirzayeva is an associate at Herbert Smith Freehills.

2 Prior to its adoption, the sphere was regulated by general regulation, such as Federal Law No. 160 on Foreign Investments, Federal Law No. 178 on Privatisation of State and Municipal Property and Federal Law No. 135 on Protection of Competition.

3 Total construction cost was estimated in 2009 at approximately 152.8 billion roubles. The project involves the European investors.

4 This project was one of the largest PPP projects in Europe and was awarded numerous internationally recognised awards as the PPP deal of the year. The project cost is approximately 109 billion roubles. The PPP agreement was signed in 2012.

5 The project cost is approximately 74.3 billion roubles.

of a facility remains only with the public authority (BOT scheme). Regional PPP laws often provided a greater flexibility for project participants, although this was not fully supported by federal legislation. This factor, together with a number of controversial provisions of the legislation and practical problems, led to the development of a special federal regulation in respect of PPP projects. On 1 January 2016, Federal Law No. 224-FZ On Public-Private Partnership, Municipal-Private Partnership in the Russian Federation and Amending Certain Legislative Acts of the Russian Federation (the PPP Law) entered into force. The adoption of this law represented a huge step forward in developing the PPP regulatory framework and market in Russia.

The PPP Law now coexists with the Concession Law, creating the legal framework for a wider use of PPP models that also allow the transfer of the ownership of a facility to an investor (project company). The regional PPP laws have been brought into compliance with this federal law.

However, the PPP Law currently has a number of provisions that are either unclear (and the approach to the application thereof must first be tested in courts) or too onerous to the business (such as the obligation to demonstrate that a PPP project has better value for money than a conventional state procurement) that are planned to be addressed in the future to make this model more appropriate for investors. This is why the concession model remains the most popular for investors and public partners.

In this chapter we will mainly focus on regulation of the concession agreements (CAs), if not specified otherwise.

II THE YEAR IN REVIEW

The key trends of 2018 included the continuing focus on the application of PPP tools in different sectors, as well as the further development of the legislation. No game changing legislation was adopted during the year. Here are some of the more prominent changes:

a the law now legitimises concession and PPP agreements for the creation or rehabilitation of: information technology and its associated infrastructure and agriculture objects (if they comply with the criteria established by the government). The PPP Law now enables PPP agreements (PPPAs) around communication facilities;

b federal state budget institutions can now be a party to the agreement along with the grantor or public side in healthcare projects – this amendment will speed up and improve chances for a successful PPP because healthcare services in Russia are still mostly provided by budget institutions;

c a Russian state infrastructure fund aimed at supporting a number of infrastructure projects has been established;

d project companies running a road concession since 2018 were given a value added tax (VAT) relief till 2023; and

e from a budget law perspective capital grants can now be formalised as a budget subsidy which simplifies the implementation of projects with state support.

III GENERAL FRAMEWORK

i Types of public-private partnership

Broadly speaking, there are different forms of public-private cooperation agreements and PPPs in Russia:

a CA under the year 2005 Concession Law;
b PPPA under the year 2015 PPP Law;
c life-cycle contract based on the state procurement law (Federal Law No. 44-FZ On the Contract System in State and Municipal Procurement of Goods, Works and Services dated 5 April 2013 (Law No. 44-FZ));[6]
d offset contract for the period of up to 10 years with a minimum investment of 1 billion roubles under the Law No. 44-FZ (this type of contract was introduced in 2016);
e privatisation;
f leasing agreement with investment conditions; and
g other forms of cooperation between public and private sides.

In a more narrow and practical sense, usually only CAs and PPPAs are referred as PPPs, and we side with this approach.

ii The authorities

In Russian PPP projects, the public side (the grantor) is usually represented by central government, and governments and administrations at the regional and municipal levels.

The key authorities working in the Russian PPP market are the following:

a the central government – adopts regulations on PPPs and concessions (e.g., Regulation No. 1044, dated 11 October 2014, On the Support Programme of Projects Implemented on the Project Financing Basis, and Regulation No. 300, dated 15 March 2015, On the Approval of the Form of a Proposal to Conclude a Concession Agreement with a Person Initiating the Conclusion of a Concession Agreement). One other important function is that it appoints authorities to oversee private finance initiatives (unsolicited proposals) submitted by private interested parties;
b the Ministry of Economic Development – takes part in the legislative procedure (develops guidelines and best practices reviews for PPP projects);
c the Ministry of Finance – prepares draft budget laws, provides state support, and regulates subsidies and budget investments in accordance with the Budget Code of Russia;
d other line ministries (Ministry of Transport, Ministry of Healthcare, etc.) are responsible for PPPs in their areas;
e the Federal Antimonopoly Service (FAS) is the authorised government body controlling the compliance of market players and the public side with the competition legislation (and is entitled to challenge tenders and awards); and
f the Accounting Chamber – controls the expenditure of budget funds, conducts investigations and publishes reports.

iii General requirements for PPP contracts

The requirements of the CA and the PPPA have some common features, but there are also important differences. We briefly summarise some features of both schemes below.

Parties

Under the CA, the private party (the concessionaire) may be, in particular, a foreign entity, a Russian entity, or two or more legal entities acting as a simple partnership (under an agreement on mutual activities). Exceptions are IT and military concessions and PPPAs, where a concessionaire must be a local company (also beneficially controlled by a Russian entity or individual). Under the PPPA, the private partner must be a Russian-incorporated legal entity only. However, there are no restrictions on indirect foreign companies' participation in a project company under the PPPA. In comparison to the Concession Law, the PPP Law does not allow the state-controlled organisations (including banks) to act as a private partner or on their side.

Facilities

The list of the types of property that can be objects of a CA or PPPA (i.e., facilities or underlying assets) is quite broad and includes all key infrastructure objects (with some exceptions). The PPPA facility cannot be property that is exclusively owned by the state and that cannot be provided to a private owner. Thus, unlike CA facilities, the following property in particular may not be considered as PPPA facilities: highways (except where privately owned), subways, heat, gas, electricity or water supply, water treatment facilities, and seaport infrastructure facilities that can only be in federal ownership. Immovable property or immovable property and movable property, technologically related to each other and intended for carrying out activities stipulated in the contract can only be facilities under the CA and PPPA. However, one exception to this rule is if the IT infrastructure is an object under a CA or a PPPA (which could be represented depending on the project as just movable property).

Significant amendments have been introduced to the PPP and concessions legislation in 2018 with respect to IT infrastructure projects. The underlying law on amendments extends the lists of objects of CAs and PPPAs with IT facilities (in particular, software, databases, information systems, including with regard to states, and internet websites that include software and databases).

The law also sets forth a special regime for implementation of IT infrastructure projects and provides in both the Concession Law and PPP Law separate chapters with the rights and obligations of the parties to such facilities, and the specifics of drafting, executing and performing the relevant agreements.

Main obligations

According to the Concession Law, the concessionaire undertakes at its own expense to create or reconstruct certain facilities and carry out activities using the facility (i.e., to operate it). The ownership right to the facility belongs (or will belong) to the public party (the grantor).

The grantor undertakes to grant to the concessionaire the rights of possession and use of the facility under the CA for the implementation of the respective activity during the term established by the agreement. As a general rule, the concessionaire is obliged to maintain the object of the CA in good order, to carry out (at its own expense) renovations and to bear the maintenance costs.

The concessionaire is obliged to provide security for ensuring the performance of its obligations under the CA. The concessionaire can choose any of the following types of security: irrevocable bank guarantee, pledge of the concessionaire's rights under a bank deposit contract in favour of the grantor, or insurance of the risk of the concessionaire's liability for a breach of the obligations under the CA.

Term

The minimum term for the PPPA is three years; the Concession Law does not provide a minimum term but instead requires that it should correspond to the project payback period.

Provision of land plots

The public side is obliged to provide the investor with the required land plots for the whole term of the contract without conducting any separate tender procedures. Usually land plots are provided based on the lease agreements, although it is possible to provide land on any other legal basis.

Participation of third parties

The concessionaire or private partner is entitled to enlist third parties to perform its obligations (both at the construction and operation stages) provided that the concessionaire will be fully responsible to the public side for the third parties' actions. The PPP Law explicitly states that the investor can be responsible only for technical operation and maintenance (which may be relevant for investors in, for example, the healthcare sector if they do not plan to provide medical services or if the public side prefers to leave medical services within the state budget enterprises). The Concession Law assumes that the concessionaire will be fully responsible for both the technical and designated use of the facility (i.e., its full operation). That said, we expect this to be revisited in the draft bill currently undergoing public hearings that permits concessions for technical operation.

Right of assignment

Rights under a CA may be assigned at any stage of the implementation of a project with the prior consent of the grantor. Rights under a PPPA may not be assigned, except in certain cases.

Dispute resolution

Subjecting PPP disputes to the Russian state courts is common. Generally, dispute resolution under CAs via international arbitration is possible, although the venue of arbitration shall be in Russia. The PPP Law does not contain any special provisions in relation to dispute resolution but our reading of the arbitration law is such that disputes under the PPP Law are non-arbitrable.

IV BIDDING AND AWARD PROCEDURE

i Expressions of interest

There are two main ways of entering into the project: tender procedure[7] and the unsolicited proposals, the latter available since 2015. The competitive dialogue procedure is not used in Russia.

7 In exceptional cases the CA can be signed without tender (e.g., if there is a special government decision to implement a project without a tender).

The bidding procedure starts from the procurement notice and comprises two subsequent phases: the pre-qualification phase (submitting and evaluation of the tender applications); and the submission and evaluation of the proposals (bids).

Notably, the PPP Law obliges authorised bodies prior to entering into the PPPA to analyse the project in the context of value for money and comparing the effectiveness of agreeing the PPPA using traditional government procurement contracts. There is a detailed and quite complex regulation of the value-for-money testing. At present there is no such requirement under the Concession Law, which simplifies the procedure for launching the project (although applying the same approach to concessions has been discussed).

ii Requests for proposals and unsolicited proposals

The legislation provides detailed requirements for submitting both tender applications and bids. Generally, the tender requirements are similar to tender requirements in other CIS-countries, although they have their own peculiarities. Tender documentation and other documents related to the tender must be published on a special official website (torgi.gov.ru) in order to ensure the transparency of the process.

The procedure for entering into a CA by way of private initiative (unsolicited proposal) may take up to 150 days (approximately) if there are no other applicants; under the PPP Law it is approximately 300 days (because of the value-for-money test procedure).

Tender procedures often take around one year from the announcement of the tender up to the signing of the CA or PPPA.

iii Evaluation and grant

The following tender criteria, in particular, may be set for the evaluation of bids:

a time for construction and (or) reconstruction of the object of the CA;
b technical-economic characteristics of the object of the CA;
c volume of output of goods, execution of work, and provision of services in the course of planned activity under the CA;
d amount of the concessionaire's payment;
e maximum prices (tariffs) for goods to be produced, work to be executed and services to be rendered or long-term parameters of regulation of the concessionaire's activities; and
f amount of the capital grant and the grantor's payment (if these are provided).

Bids are assessed in accordance with the procedure stipulated in the tender documentation. After the preferred bidder is announced, there may be negotiations before entering into the CA or PPPA.

If a contract is awarded through an unsolicited proposal mechanism, the applicant initiating the conclusion of a CA only needs to show that it has or is capable of raising at least 5 per cent of the amount of investments provided in the draft CA (confirmation may take different forms). This approach differs from the PPP Law regulation providing an obligation of the initiator to submit the independent guarantee (or bank guarantee) in the amount of 5 per cent of the forecasted amount of financing under the PPP project. The phrase 'forecasted amount of financing' is not specified in the law but our vision is that this refer both to capex and opex of a project.

V THE CONTRACT

i Payment

The Concession Law provides for two opportunities for co-financing of a project by the public side:

a The grantor is entitled to assume part of the costs for the creation or reconstruction of the facility and its operation (capital grant). The amount of the costs being covered by the grantor should be specified in the grantor's decision in respect of signing the CA, in the tender documentation and in the CA itself.

b There is the possibility of providing a 'grantor's payment' (which can be used along with the capital grant in the same project). The Concession Law does not include any detail on this form of state support, but in practice, this refers to what is well known in international practice as 'availability payment'. The absence of a legal definition of the 'grantor's payment' or a more detailed regulation governing this type of payment raises a number of legal questions (including the procedure and timing of the payment, how it relates to the capital grant, etc.) and may cause disputes in practice. The *Bashkir* case (see Section VII) demonstrates this problem.

At present, the Concession Law prohibits full financing of the costs of the concessionaire using a capital grant, but it does not contain any restrictions on the size of the grantor's payment. Compensation of the minimum guaranteed revenue is also possible and is being carried out in practice.

The grantor may require from the concessionaire the provision of the 'concession payment', which should be provided during the operation stage. The amount and type of the payment (e.g., money or property) should be set out in the grantor's project kick-off decision, which is taken prior to the tender procedure.

Russian concession law provides different options for investment return (direct toll and availability payments). However, the availability model is more popular in Russia at present. The direct toll model was used in some projects (for example, in M11 Moscow–Saint-Petersburg, 7–8 section) but its use is now quite limited.

ii State guarantees

Russian legislation gives the option to provide state guarantees under CAs and PPPAs. The Concession Law explicitly states that the grantor is entitled to provide the concessionaire with state or municipal guarantees in accordance with the budget legislation of the Russian Federation; the size, procedure and conditions for granting state or municipal guarantees to the concessionaire should be specified in the formal decision in respect of signing the CA, the tender documentation and in the CA. However, in practice, the public side does not grant such guarantees because of a lack of budget financing. Nevertheless, the state often provides contractual guarantees, which are formalised as relevant payment obligations envisaged in the CA or PPPA. They are equally enforceable and bankable as confirmed by numerous financial closes.

iii Distribution of risk

The regulatory framework does not involve an extensive risk allocation mechanism, so in practice, while there are certain market approaches to risk allocation, ultimately it will depend on the contractual agreements between the parties, the type of project and regional practice.

Like in many other countries, in Russia there are special guidelines and recommendations on how to distribute risks: this is issued by the Ministry of Economic Development together with the National PPP Development Centre (a non-commercial organisation promoting PPPs and monitoring the developments in this area), as well as by other line ministries and public authorities at regional level. The general principle of risk allocation is in line with standard international practice – the party that is best able to manage the risk (influence the occurrence of any risk and deal with the consequences) should bear it. Some examples of risk allocation in Russia are:

a inflation risk is usually shared between parties or taken by public side;
b risks of project delays, as well as construction risks, are generally borne by the private party, except if otherwise agreed;
c land provision, political risks, as well as the discriminatory legislation changes' risks are within the public side;
d foreign exchange risk in Russian projects is often not taken by the public side;
e social risks (including protests) can be borne by the public side or jointly; and
f risks from *force majeure* are generally jointly distributed.

The Concession Law states that in the event that new legislation leads to an increase in the aggregate tax burden on the concessionaire or deterioration of its position in such a way that it is largely deprived of what it expected to receive when entering into the CA, the grantor is obliged to take measures to ensure the return of the concessionaire's investments and the receipt by the concessionaire of the gross proceeds in a volume no less than that originally set out in the CA.

In many projects, the parties usually provide a list of 'special events' (which is a combination of relief and compensation events known to many other jurisdictions) within the CA or the PPPA. In the case of the occurrence of such events, the concessionaire has the right to extend the terms under the agreement, compensate any additional expenses and – in the event of a prolonged special event – terminate the agreement early.

iv Adjustment and revision

Subject to the following exceptions, parties to a CA or a PPPA are free to amend it. Changing the material conditions of the CA requires the prior consent of the FAS. The list of 'material conditions' is laid out in the Concession Law and includes, *inter alia*, the amounts payable by the grantor, construction completion date, provisions governing compensation upon early termination, etc. Changes to the material conditions should be carried out in accordance with the Resolution of the RF Government as of 24 April 2014 No. 368 On Approval of the Rules for the Provision by the Antimonopoly Authority of Consent to Amend the Terms of the Concession Agreement. This resolution provides an exhaustive list of events when the CA can be changed (e.g., *force majeure* or significant deterioration of the position of the concessionaire). Amendments to the CA that lead to changes in the revenues of the budgets of the budget system can be taken in accordance with the requirements established by the budget legislation (which may have provisions requiring amendments to the budget laws, which could be a tricky process). Changes in the terms and conditions of the CA that were determined on the basis of a decision on signing a CA and a bid proposal may only be changed: on the basis of a decision of the respective public side; and in some other exceptional cases. Therefore, generally we would say that in many projects parties are attempting to cover as much as possible important provisions in the CA upon signing, because after that the

process of introducing amendments (except for not 'material' provisions in the sense of the Concession Law) is quite restricted. Amendments to PPPAs can be done in basically the same manner as with the CA.

v Ownership of underlying assets

As previously mentioned, under a CA there is only public ownership of underlying assets, which is different to PPPAs, where the investor acquires the right of ownership. However, if the amount of financing by the public partner and the market value of the property contributed by the public partner (or rights thereto) totally exceed the amount of expenses of the private partner, the right of ownership of the object should be transferred to the public partner upon the expiration of the term of the PPPA. The facility itself cannot be pledged under the Concession Law, although rights under the CA may be pledged in favour of financial providers. The private partner under the PPPA may pledge both the facility and the rights to the facility in favour of the financing organisations on the basis of a direct agreement.

vi Early termination

According to the Concession Law, the CA can be terminated in the following key situations:

a upon the expiration of the CA;
b upon the agreement of the parties;
c in the case of early termination of the CA on the basis of a court decision;
d upon the decision of the public side if the failure to perform or the improper performance of the concessionaire's obligations under the CA causes harm to life or to the health of people; and
e in some other exceptional cases provided by the Concession Law.

The CA can be terminated on the basis of a court decision following a significant violation of the agreement by one of the parties (the law stipulates which violations are deemed 'significant', although this list can be supplemented for in CAs), a significant change of circumstances, noncompliance with the CA of a reorganised concessionaire or other grounds provided in the laws or in the CA.

In case of early termination of the CA, the concessionaire has the right to demand from the grantor the reimbursement of expenses for the construction and (or) reconstruction of the facility. The amount of compensation ultimately depends on the parties' agreement and the judge's discretion (if it is claimed in court).

In practice, parties often provide a detailed regime for early termination (providing a list of grounds for termination without the court's intervention on the initiative of the grantor, the concessionaire or by mutual agreement) and the amount of compensation based on the ground for termination. In any case, the private party attempts to include the sum of the senior debt and some other components in the compensation to be provided upon termination. Russian legislation includes the possibility of entering into lender direct agreements (between grantor, concessionaire or private partner, and financial institutions) in order to secure the interests of financial institutions (return of provided loans, step-in rights, etc.).

VI FINANCE

Russian PPPs are usually implemented on the basis of project finance with senior debt and equity provided by investors. Debt generally funds around 70 to 90 per cent of project costs, and equity provides around 10 to 30 per cent of the remaining costs. However, there are, of course, different financial structures depending on the project. The current economic situation in Russia has also contributed to the state and investors searching for new financial solutions. In many federal and large-scale regional projects, the governments co-finance construction, as well as provide availability payments during operation. Infrastructure bond financing is also used in certain projects for both the development and operation stages. This type of financing has potential for growth, however, this has not yet featured prominently in the Russian market. Some new mechanisms are also currently under development (e.g., infrastructure mortgages).

VII RECENT DECISIONS

Below, we discuss two important cases that directly deal with aspects of PPPs. Although both cases date back to 2017, they remain relevant.

i *Bashkir* case (No. A40-23141/17)

In 2017, the State Committee of the Republic of Bashkortostan for Transport and Roads (the organiser of tender) and LLC Bashkirdorstroy (the winner of the tender) brought a claim against the FAS to invalidate the FAS order to annul the results of the concession tender in relation to the Sterlitamak–Magnitogorsk road. The FAS and the court of first instance came to the conclusion that this project should have been implemented under the public procurement law (Federal Law No. 44-FZ) because the tender documentation provided that all the concessionaire's costs for the construction and operation of the road are to be paid entirely out of the regional budget (via the capital grant and the grantor's payment). The total cost of the project was around 12 billion roubles.

However, the appeal court overturned the judgment of the court of first instance and said that full budget financing of the concessionaire's expenses is allowed, but only if different financing instruments are used – namely, both the capital grant and the grantor's payment. The appeal court said that, unlike the capital grant, the grantor's payment is not made for a particular purpose and may be used for purposes other than the compensation of the costs of construction and (or) reconstruction of the facility.

In this case, the courts, literally interpreting the law, only analysed the situation where the investor's expenses are fully compensated by the state. Therefore, the model, which presumes that the costs are partially offset from the budget and partially from the revenues generated by the project itself, was not examined.

At the same time, the following question remains unresolved: if not completely, which part of the revenue (if not all of it) can be compensated for by the budget? There is no answer to this question in the law, and such uncertainty creates risks for investors. Although the private party won this case, to ensure future investment in infrastructure the FAS and the government decided to reform the current regulatory framework and prepare amendments to the law to minimise the risk of challenging PPP projects that provide for full coverage of investor's costs.

This case is also notable because the courts also considered other issues in relation to PPPs, for example, with respect to the requirements for financing experience, as well as the peculiarities in relation to providing a bank guarantee as a bid bond.

ii *Glavnaya Doroga* case (No. A40-93716/17)

Another famous dispute was *JSC Glavnaya Doroga v. State Company Avtodor* (2017).

The appeal court overruled the decision of the first instance, stating that disputes in respect of CAs are arbitrable, as is stipulated in Article 17 of the Federal Law On Concession Agreements. Further, the fact that Russia is a party to the CA does not mean that any related dispute has a public nature and is of public interest. It was identified that the dispute in question was one of private interest to the plaintiff, and that there were no grounds for recognising arbitration clause as null and void. On the issue of equating the nature of CAs to contracts on state procurement, it was indicated that: the Federal Law On Concession Agreements provides for a special competition process, which is not analogous to the procedure for entering into state contracts; and the Federal Law On Concession Agreements itself is not part of Russian procurement legislation.

VIII OUTLOOK

Within the current lack of budget financing, there is high demand for investments, and the public side has shown its willingness to implement a wide range of projects and create opportunities for efficient cooperation with investors. There is good evidence that parties to PPP projects in Russia are coming to a compromise to ensure, on the one hand, successful implementation of projects, and on the other hand, the return of investments.

Generally, we believe that in Russia the greenfield market will continue to be very attractive to investors. The transport and healthcare sector will also see development. According to the Order of the Government of Russia No. 1734-P, dated 22 October 2008, On the Russian Transport Development Strategy up to 2030, the use of PPP mechanisms was named as a priority tool for attracting investment. Based on the Presidential Decree as of 7 May 2018 No. 204, On the National Goals and Strategic Tasks of the Development of the Russian Federation up to 2024, the government adopted the complex plan on the modernisation and extension of the main infrastructure. It is reported that there are plans to spend more than 6 trillion roubles on such developments up to 2024. We also see there being a growing interest and readiness of the public side to modernise healthcare infrastructure by using PPPs.

Notably, the secondary (brownfield) market has also started to develop (e.g., the acquisition of the shares in the project company under the Pulkovo project by a foreign investor) and we expect new M&A deals in the infrastructure sector in the future.

The number of unsolicited proposals will increase in the years to come as market players are eager to suggest new ideas for projects to the public side.

The Russian PPP regulatory framework is expected to develop further There is also currently a draft law undergoing public hearings, which proposes substantial amendments to the PPP legislation to make the market and the regulatory framework more favourable for investors. For instance, among other changes, in relation to the Concession Law, the draft law provides for a more detailed description of possible means for the public side's

financial participation in projects, elaborates on the prequalification criteria and includes a provision for compensation of the reasonable expenses incurred by the initiator of the private concession initiative.