1 OVERVIEW

In mainland China (China), public-private partnership (PPP) has been defined as the partnership between the government and the ‘social capital’. County or upper level governments are in charge of implementing the PPP projects within their territory. Social capital is a literal translation from Chinese. It refers to various capital providers including domestic and foreign enterprises acting as legal persons, inclusive of state-owned enterprises, but will not include those ‘platform companies’ established by the government in the territory of the project, which has the function to raise capital for the government. To avoid any confusion for the reader, we will use ‘private capital’ when referring to the second ‘P’ in PPPs in this chapter, including in the translation of the cited laws and regulations.

China accepted the PPP mode in three stages. The first stage was around the 1990s, which began with building power stations under build-operate-transfer (BOT) and followed with investments in toll roads. The second stage began with the landmark issuance of an administrative rule in 2004 by the then Ministry of Construction regarding the administration of concessions, as of which BOT, transfer-operate-transfer (TOT), build-own-operate (BOO) and other methods are formally accepted in the field of public utilities such as roads, water supply facilities, sewage or garbage treatment plants and gas stations. As the beginning of the third stage, the past two years witnessed a burst of PPP
growth in China. From the end of 2013 the Chinese government increasingly started to promote the PPP mode in the public product and public service fields. It is encouraging the adoption of various types of PPP mode to provide public services in more sectors, including the sectors of energy, transportation, water conservation, environmental protection, agriculture, forestry, science and technology, affordable housing, medical treatment, public health, elderly care, education and culture. Incomplete statistics show that the requested investment in the demonstration projects and recommended projects published by the Ministry of Finance (MOF) and the National Development and Reforming Commission (NDRC) during these two years amounted to over 3,500 billion yuan. Active promotion of the PPP mode in the field of infrastructure and public services had been written into the PRC 2015 Government Work Report.

On the other hand, the legal system for PPP is under development. Previously, the cooperation between government and enterprises in infrastructure and public utilities was mainly based on regulatory documents relating to concessions or investment policies in specific industries. The concept of PPP was not mentioned in any regulatory provisions. After 2013, the State Council and its relevant ministries issued a number of policies, guidelines and opinions specifically regarding construction of the PPP mode and the PPP legal system. PPP-related documents currently in force are a relatively low priority in the legal hierarchy. It is reported, however, that PPP law and a regulation regarding concessions are being drafted and have already been distributed for opinion.

II THE YEAR IN REVIEW

In 2015, PPP system construction further improved and PPP became more popular. Although higher level legislation regarding PPP/concession is still on the way, PPP system construction proceeded rapidly with the issuance of lower-level legislative documents. In 2015 the State Council and the related ministries also issued more documents structuring the framework and popularising PPP in various sectors. This includes the following.

On 19 May, the General Office of the State Council issued the Notice on forwarding the Guiding Opinions of the Ministry of Finance, the National Development and Reform Commission and the People's Bank of China on Promoting the Public-Private Partnership Mode in the Public Service Field (Guo Ban Fa [2015] No. 42, hereinafter the Guiding Opinions), which confirmed the importance of the PPP mode and that

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3 See the Guiding Opinions.
6 Ibid.
it will be broadly used to provide public services. The Guiding Opinions emphasised the significance and general requirements of promoting the PPP mode, and provided principles thereof, including setting up a healthy system, regulating the implementation of projects, the policy guarantee and the measures for organising implementation.

The MOF issued the Notice on Regulating the Operation of the PPP Integrated Information Platform (the Platform Notice) on 18 December 2015. According to the Platform Notice, the PPP centre under the MOF is in charge of developing, operating and managing a national platform for the management and publication of PPP project information. The Platform Notice also provides that all PPP projects must be listed in the project library of the national platform. The expenditure of the projects not included in the project library of the platform will principally not be listed in the government budget.7

The MOF also issued both guidelines for verification of fiscal capacity relating to PPP projects and guidelines for value for money (the VFM) assessment. If a project has failed to pass VFM assessment twice, or does not pass the fiscal capacity verification after it passes the VFM assessment, then the PPP mode will not be applied.8

With respect to guiding the direction of PPP investment and regulating finance support, legislation documents were issued in 2015 including the following:

a The Interim Administration Measures on the Government Investment Fund by the MOF, according to which local-level finance departments generally shall establish investment funds in the field of infrastructure and public service to encourage and guide the investment of private capital into this field.9

b The MOF Notice on Application of the Policy of Substitution of Subsidies with Rewards to PPP Projects10 (the Rewards Notice), according to which the MOF will grant awards to certain new PPP projects and existing projects that transfer into the PPP mode. For new projects listed as the PPP demonstration projects under central finance, the MOF will grant 3–8 million yuan in awards according to scale of investment. The funding of awards will be arranged by local departments of finance and used for government expenditure during the whole life of the project.

The NDRC had issued several joint notices or guidance opinions respectively with the National Development Bank, the China Banking Regulatory Commission and the China Insurance Regulatory Commission, which provided the principles for the relevant organisations’ participation in PPP or infrastructure fields.

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7 Notice on Regulating the Operation of the PPP Integrated Information Platform, Regulation on the Operation of the PPP Integrated Platform, came into force on 1 January 2016, Article 19.
8 See Article 6 of the Guidelines for VFM Assessment for PPP projects and Article 5 of the Guidelines for Verification of Fiscal Capacity Relating to the PPP Project.
9 See Article 7(4). Similar general provisions are also stipulated in the Concession Measures.
10 According to this Reward Notice, the effective period for this policy of substitution of subsidies with rewards is temporarily determined to be three years as of 2016.
In September 2015, the MOF announced that the MOF and 10 other organisations had collaborated in promoting a fund that will participate in the PPP mode as a private partner to help finance the projects. The fund totals 180 billion yuan.\textsuperscript{11}

In China, concession is deemed one of the methods of PPP. On 1 June 2015, the Administrative Measures for Infrastructure and Public Utility Concession (the Concession Measures) came into force. The Concession Measures were promulgated by the NDRC, the MOF, the Ministry of Housing and Urban-Rural Development, the Ministry of Transport, Ministry of Water Resources and the People’s Bank of China.

The Central Committee of the Communist Party of China and the State Council issued several Opinions regarding the Promotion of the Reform of Price System. One point in these Opinions indicated that the pricing administration for public utility and public services will be updated so as to, among other things, promote partnerships between government and private capital.

In 2015, more guidance or opinions regarding the application of PPP in specific fields was issued by relevant authorities. This includes implementation opinions, such as in the field of elderly care services, important construction for water conservation, water pollution protection and treatment, toll roads, public rental housing and railways. Others mentioned PPP as one of the encouraged modes in the relevant industry, urban parking facilities, tourism projects, urban-rural reconstruction and matching infrastructures.

At the local level, a number of local implementation opinions regarding popularising the PPP mode, especially in the field of public services, had been issued, including from provincial level governments, such as Beijing, Chongqing, Tianjin, Zhejiang, Jiangsu, Sichuan, Shanxi and lower-level governments, such as Zhengzhou municipality, Anqing municipality, Xiamen municipality. Secondly, following the establishment of the Public-Private Partnerships Center at the end of 2014 within the MOF, some local governments, such as Hainan and Jiangsu, set up PPP centres to be responsible for policy and case studies, consultations, collection of statistics and regional communication on PPP projects.

Besides the system construction, both the MOF and NDRC promote PPP projects by publishing project lists and project information. More projects were published by the MOF and NDRC in 2015. The MOF announced the second batch of demonstration PPP projects including 206 PPP projects. In 2015, the NDRC set up a PPP project database and published two batches with over 2,000 recommended PPP projects. At the same time, local governments promoted PPP projects by publishing project lists or calling for project promotion meetings. The media reported 2015 as being the ‘year one of the PPP era’ in China.\textsuperscript{12}

\textsuperscript{11} The Chinese PPP Financing Support Fund. The 10 collaborating organisations include the China Construction Bank Corporation, the Postal Savings Bank of China, CITIC Group Corporation, the China Life Insurance Group Company and so on.

III GENERAL FRAMEWORK

i Types of public-private partnership
The types of PPP explicitly mentioned in the MOF PPP Guidelines mainly include operations and maintenance (O&M), management contract, BOT, BOO, build-own-operate-transfer (BOOT), TOT and rehabilitate-operate-transfer.

The type of PPP project is chosen based on the specific conditions of each project and business or political requirement of the parties. In fact, neither the MOF Guidelines nor other government guidelines prohibit the selection of other types of PPP. This is provided that, although the BT (Build-Transfer) mode formerly applied in some previous public utility projects, it is not deemed as a type of PPP in China in practice. Based on our understanding, this is because, first, BT is generally prohibited in most public projects when being deemed as a disguised form of government debt raising, and secondly, BT does not cover the operation and maintenance of a project, and does not comply with the long-term/full life cycle cooperation and risk-sharing nature of PPP projects that is emphasised in China.

ii The authorities
At the central government level, ministries of the state council take charge of the guidance and supervision of PPP promotion in relevant fields according to the division of functions. According to the Guiding Opinions, the MOF shall, jointly with relevant departments, enhance policy communication and coordination as well as information communication and improve relevant systems and mechanisms. The industrial administrative departments\(^\text{13}\) shall, in light of the characteristics of the industry, make active use of the PPP mode to provide public services and explore and improve relevant regulation systems. Although not specifically mentioned in the Guiding Opinions, the NDRC also plays a major role in the administration and promotion of PPP projects. It is the co-issuer of several important legislation documents regarding PPP with the MOF, including the Guiding Opinions. Both the MOF and NDRC issued guideline opinions of PPP mode and published guidelines of PPP contract. Both the MOF and NDRC publish PPP project lists and project database so as to promote the PPP mode. The NDRC recently pays more attention to concession.

In practice, most PPP projects are promulgated by county, municipal or upper-level local governments. Besides following rules and policies issued by the central level government, the local level governments are in charge of promulgating specific policies and carrying out the implementation thereof pursuant to the existing plan and the realities of the region. Based on provisions of the MOF PPP Guidelines and the

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\(^{13}\) This includes the departments of education, science and technology, civil affairs, human resources and social security, national land and resources, environmental protection, urban and rural construction, transportation, water conservation, agriculture, commerce, culture, healthcare and family planning, etc.
Concession Measures, in a specific PPP project, the competent county or upper-level government is mainly responsible for the review, organisation or coordination, as well as the examination and supervision of the PPP project.

For the purpose of implementing a single PPP project, the government will appoint an implementation institution to be responsible for the preparation, procurement, supervision and transfer work of the project. According to the MOF PPP Guidelines, the local government itself and functional departments or non-profit institutions appointed by the local government could act to implement a PPP project. In practice, local governments may authorise a government-invested company to act as an implementation institution in some PPP projects. This could be a remnant of previous practice; other possible negative effects could be a failure of the relevant PPP project being listed in the MOF demonstration projects list, and thus be unable to apply for a reward under the Reward Notice.

iii General requirements for PPP contracts
There is still no PPP law promulgated in China. PPP projects are currently implemented in accordance with rules and guidelines regarding PPP or concessions or both, as well as laws, regulations and rules regarding fixed asset investments, construction, contracts and the relevant industries.

According to Chinese law, all newly built fixed asset projects shall subject to the approval, verification and approval, or record-filing administration of the NDRC or its local counterpart. The law is still silent on how the project library and PPP procurement mechanism comply with this formality from a procedural aspect.

According to the Platform Notice, all PPP projects must be listed in the project library of the national platform otherwise the expenditure will principally not be listed in the government budget. This means payment by government for this project cannot be made. The project library has three categories: the storage project library, implementing project library and demonstration project library. Before being listed in the storage project library, the proposed PPP project will pass through examination by a provincial finance department. Before becoming listed in the implementing project library, the project must pass the VFM assessment, and, for the projects involved in the government payment or viability gap funding (VGF), fiscal capacity is verified to ensure long-term fiscal sustainability. To be listed in the state or provincial demonstration project library, the project must pass a specific evaluation by the state or provincial finance department.

Private capital shall be selected through legal procedure. Public bidding is the most accepted choice. The choice of other methods will be subject to approval of the department of at a certain level of government (see Section IV, infra). The bidding invitation should provide whether the private capital is required to establish a special purpose vehicle (SPV) to execute and perform the PPP contract with the implementation institution. The government may appoint certain institutions to participate in the SPV.14

According to the Concession Measures, the term of concession shall not exceed 30 years, but exceptionally for projects with large investment and long return cycle, a

14 See the MOF Guidelines and the Concession Measures.
longer concession term is permitted. Currently there is no mandatory requirement for the minimum term of PPP under effective laws and regulations. We note that according to the PPP Law (draft for comments), the minimum term of PPP will be no less than 25 years. No value thresholds for PPP contracts are specifically provided in legislative documents.

IV BIDDING AND AWARD PROCEDURE

As indicated in the PPP Procurement Measures and the MOF PPP Guidelines, private capital shall be selected through legal procedure. The MOF provides that the selection of private capital should be a government procurement (PPP procurement), and provided five methods for PPP procurement, including public bidding, invitation bidding, competitive consultation, competitive negotiation and single-source procurement. If a method other than public bidding is proposed to be selected, the implementation institution should first apply for approval of the finance department of a certain level of government. The Concession Measures also provide that concessionaire shall be selected through bidding, competitive negotiation, or other competitive ways, according to the approved scheme of implementing concession projects.

i Expressions of interest

According to the PPP Procurement Measures, pre-qualification shall apply to PPP project procurement. An announcement of pre-qualification shall be released via the government procurement information release media designated by the relevant finance department of the people’s government at or above the provincial level. The time period for submission of application documents for pre-qualification shall not be less than 15 working days from the date of release of the announcement. Where there are at least three applicants that pass the pre-qualification, the implementation institution may continue the preparation of procurement documents. Where there are fewer than three applicants that pass the pre-qualification, the implementation institution shall organise a new round of pre-qualification after adjusting the content in the announcement of the pre-qualification. Where there are fewer than three private capitals that pass the new round of pre-qualification, the procurement method for the project may be changed in accordance with the law. The result of the pre-qualification shall be notified to all the private capital that submit application documents, and an evaluation report of the pre-qualification shall be submitted to the finance department (public-private partnership centre) for record filing.

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15 See Article 26 of the Concession Measures.
18 The minimum requirement for qualified candidate is changed into two for the method of competitive consultation. See Cai Ku [2015] No. 124.
The procurements documents of a PPP project shall contain all the procedural and substantive requirements of the procurement and the project, and shall contain the evaluation method and criteria, draft contracts and other legal instruments for the PPP project. Among other things, the procurement documents shall point out the variable details of the project contract during the negotiation for confirming procurement results. The PPP procurement documents shall also expressly state that the project contract must be submitted to the people’s government at the corresponding level for approval and shall not take effect until it is approved.

Where a competitive negotiation or competitive consultation procurement method is adopted, the project procurement documents shall, in addition to the contents prescribed in the preceding paragraph, specify the contents that may be substantively changed by the evaluation team based on negotiations with private capital, including the technical and services requirements under procurement needs and the terms of the draft project contract.

ii Requests for proposals and unsolicited proposals

Generally the requirements for competitors’ proposals are set forth in the procurement document. If PPP procurement is carried out through bidding, generally the proposal of bidders will respond to the substantial requirements and conditions as provided in the procurements documents.\(^\text{19}\)

Compared with the public bidding procedure, the other methods, especially by way of competitive negotiation and consultation, provide relatively more space for the private capital respecting the variable details. Briefly speaking, in the process of competitive consultation, the consultation group may make material changes to the technical and service requirements of the procurement and terms of the draft contract based on the consultation documents and the actual consultation situations.\(^\text{20}\) The material changes shall be effective parts of the consultation documents and be sent to all private capital candidates. The candidates will submit a new response document accordingly.

The PPP project can be proposed by both the government and private capital, but principally the government. Both the MOF and NDRC confirmed in their respective ministry guidelines that private capital may propose PPP projects. According to the MOF PPP Guidelines, the recommendation of potential PPP projects by private capital organisations shall be made to the financial departments (PPP centre) in the form of a project proposal.\(^\text{21}\) Detailed procedures in this regard are not yet regulated.

\(^\text{19}\) Please refer to Article 34 of the Implementing Regulations of the Government Procurement Law.

\(^\text{20}\) See Article 20 of Interim Measures for the Management of Competitive Consultation in Government Procurement.

\(^\text{21}\) The MOF PPP Guidelines, Article 6.
Evaluation and grant
A legally established evaluation team shall be responsible for pre-qualification and bid evaluation. The members of the evaluation team shall sign the pre-qualification report and the evaluation report.

The implementation institution shall establish a special working group responsible for the negotiation and confirmation of the final bidding results according to law. The group shall negotiate with the private capital candidates in turn according to the ranking of the candidate private capital recommended in the evaluation report, and confirm the variable details in the project contract. The first one reaching a consensus with the group is the bid-winner.22

The public body and the bid-winning private capital to conclude transactions shall enter into government procurement contracts within 30 days after the notice of winning the bid or concluding transactions is issued, according to the matters decided in the procurement documents.23

Public notification and public announcement are requested in each step above.

V THE CONTRACT

i Payment
There are mainly three kinds of payment mechanisms in PPP projects in China: government payment, user charges and the VGF.

The three mechanisms apply to different kind of PPP projects. The public transportation such as highways, bridges and subways and public infrastructure for water and heat supply usually takes user charges. VGF refers to the economic subsidies the government provides to the project company to fill the gap for those PPP projects in which the user charges cannot cover the input cost and reasonable profits.

In practice, the VGF can take different forms such as investment subsidies, equity investment, concessional loans, grant of other developing and operating rights and interests related to concession projects and so forth.24 In some projects applying the VGF mechanism, the government takes partial payment responsibility during the operation period.

According to the Guiding Opinions, the principle for pricing of public utilities includes cost compensation, fair return, resource conservation, high quality and high price, and equitable burden sharing. In practice, the price is decided during the PPP procurement procedure, but is also subject to the restriction by the government. For PPP projects applying the government payment mechanism or VGF mechanism, the proposal of PPP projects including a payment or subsidy arrangement must pass verification of

22 Ibid, Article 15.
23 Government Procurement Law of the People's Republic of China, Article 46; the PPP Procurement Measures, Article 19.
24 See Article 17 of the Concession Measures and the definition of VFM in the MOF Guidelines.
fiscal capacity before the project applies the mode of PPP. For PPP projects applying the user charges mechanism, the price shall be subject to the approval of the price administration bureau, if it is listed in the catalogue of prices fixed by the government.\(^{25}\)

Both the guidelines for PPP contracts of the NDRC and MOF confirm that the parties will provide the adjustment of price in the PPP contract. The adjustment of price will be according to the project execution situation and performance evaluation results. A public hearing will be held before the price is adjusted.\(^{26}\)

ii State guarantees

According to Chinese law, the state organs are not permitted to provide guarantees, except in the case of securing loans, for on-lending, from a foreign government or an international economic organisation as approved by the State Council.\(^{27}\) The payment made by the government is subject to the government fiscal budget. In practice, although not of the nature of a guarantee and possibly not fully in line with private capital, the most popular method of local government to ensure payment to the private capital according to a PPP contract is to confirm to the private capital that the expenditure of the PPP project will be listed in the local annual budget of the payment year. Previously confirmation was generally in the form of a comfort letter, which has the risk of being deemed invalid.\(^{28}\) The current system of construction work on PPPs sheds light on listing government payment and subsidy under PPP contracts into the budget in a formal and more controllable way. According to the Guiding Opinion, China will set up systems to guarantee sustained and healthy development of the PPP mode by including operating subsidies, correct operating charges and other considerations in the annual budget and medium-term financial planning, it will reflect and manage the same in the government’s financial reports, and report to the People's Congress at the same level or to its standing committee. The Concession Measures also provide that the payment or subsidy by the government in VGF concession projects shall be linked to the government’s annual budget and mid-term fiscal planning to ensure the requirements of fund appropriation. According to the Opinion of the State Council on setting up mid-term fiscal planning (2015), China is to begin setting out a medium-term financial planning administration system.

iii Distribution of risk

The parties may provide a specific risk allocation mechanism in the PPP contract upon negotiation. According to the MOF Guidelines, risks shall be allocated among the government and the private capital according to the principle of risk allocation.

\(^{25}\) See the Price Law of China.

\(^{26}\) See Article 10 of the Guiding Opinions.

\(^{27}\) See the Guarantee Law of PRC.

\(^{28}\) Government organs are now prohibited to issue this kind of comfort letter. See Notice of the Ministry of Finance, the National Development and Reform Commission, the People's Bank of China and the China Banking Regulatory Commission on Deterring the Illegal Financing Behavior of Local Governments (2012).
optimisation, risk return equivalence and risk controllable, and upon overall consideration the management capability on government risk, the project return mechanism and the management capability on market risk. In principle, the commercial risks including design, construction, finance and operation and maintenance of the project shall be borne by the private capital, and the risk of laws, policies and minimum requirements shall be borne by the government. Force majeure and other risks shall be borne by the parties jointly on a reasonable basis. NDRC also provided a similar risk allocation principle and arrangement in the PPP guidelines promulgated by it.

iv Adjustment and revision

Generally in practice, the PPP contract contains a general term saying that the contract can be revised or modified by the parties through mutual agreement and the revisions shall be in writing and formally signed by both parties. Even though a PPP contract does not have this term, the revision of contract by both parties through mutual agreement is a right under Contract Law. And the material change to the cooperation agreement shall be submitted to the original approving authority for approval.

The parties may also provide in the PPP contract conditions or restrictions for the revision of contract on a specific issue. Of course, the conditions and restrictions can be abandoned through negotiation.

Changes to the level of payment shall be a material change, which, unless provided in the PPP contract, could be agreed by the parties via negotiation, and shall be subject to the approval of the original government approved the PPP contract.

In an earlier notice issued by the MOF, prices of PPP project should be adjusted according to project performance evaluation. We note the draft PPP Law (Draft for Comment) also mentioned this by providing if the project is greatly overpaid or underpaid for three years in a row and the range exceeds the agreed term, the payment of government or the price of the products and services shall be adjusted according to the agreement. 29

v Ownership of underlying assets

The transfer of the ownership of the underlying assets depends on the different type chosen (for example, BOT, BOOT, TOT, etc.) and the terms of the PPP contract. In some types of PPP projects, as listed in the MOF Guidelines, the ownership of the underlying assets is not necessarily required to be transferred to the private capital together with the transfer of occupation, for example, O&M. Some types of PPP projects do not have the necessity of ownership transfer, such as BOO. But most types have one or more asset ownership transfer steps. For example, in a BOOT project, the private capital (in most cases through its SPV for the project) builds the project asset, owns the asset and operates the same in the cooperation period, according to the PPP contract. Upon the expiration of the contract or early termination, it will transfers all the facilities, rights and interests therein (land use rights, etc.) to the government or the institution it appointed.

Transfer includes the transfer of occupation and the transfer of ownership. PPP contracts

29 Non-official version. Article 27.
generally provide that, within a certain period after the occupation of underlying assets is transferred, the parties shall collectively go through the necessary ownership transfer formalities. This includes change of land use right certificates and real estate ownership certificates, change of vehicle certificates and change of IP registration. PPP contracts generally prohibit the transfer of ownership to a third party and prohibit the asset from being used as security for other projects. Besides the above, competent authorities generally use the performance test to assure the smooth running of the assets and the validity of the intellectual property rights and technical documents when the underlying assets is transferred to the government under relevant types such as BOT and TOT.

vi Early termination

The PPP contracts generally provides detailed mechanism for early termination in the following situations:

- by the private capital owing to defaulting by the government partner;
- by the government owing to the default by the project company or the private investor;
- the government partner unilaterally terminates the contract under specific circumstances according to its legal power, which shall strictly follow the law and be accompanied by adequate compensation;
- any party may terminate the contract owing to force majeure incidents that last a long time or accumulate to some extent; and
- reach mutual agreement to terminate upon negotiation.

The early termination is usually followed by repurchase obligations and compensation. Most PPP contracts provide the government with the obligation to buy back the project. The compensation paid by the government to the private capital for the buy-back varies according to the reason for early termination. Compensation formalities may be listed in the PPP contract.

VI FINANCE

Beside traditional bank loans, financing PPP projects with new financial methods is encouraged. Social security funds, insurance funds and other public funds are permitted to support project financing through debt, equity investment and other ways. Furthermore, the PPP SPVs are encouraged to conduct structural financing and issue project earning bonds, project earning notes and asset-backed notes, among others.

The debt financing instruments based on project income are still in the preliminary stage of development in China. The first project-earning bond was successfully issued

30 In some places a ownership certificate of fixed assets.
31 The Guide on Contracts for PPP Projects (30 December 2014 MOF) mentioned the first four occasions.
32 Ibid.
by the Fourth Refuse Incineration Power Plant Project in Guangzhou in 2014. On 5 August 2015, NDRC released the Interim Measures for the Administration of the Project Earning Bond, which provide guidance on the main aspects of the bonds.

What is more, the above-mentioned Chinese PPP Financing Support Fund established this year and more expected government investment funds at all levels will play more important roles in the financing of PPP projects in the near future.

One big obstacle faced by private capital is the issue of guarantee. Although policies say that the earnings of a PPP project may be used as a pledge to support loans, there is no legal support at the state law level. Where the finance provider deems this a risk, it will be hard for the PPP project to be financed in the mode of project finance.

With respect to cross-border finance, foreign-invested SPVs are free to raise cross-border loans within the surplus between the total investment and the registered capital of the SPV. The foreign exchange rate risk involved is generally considered as a commercial risk and usually assumed by private capital.

VII RECENT DECISIONS

The following two cases show the understanding of local courts regarding the different contract nature and application of law in PPP lawsuits. The differences between the two cases could be worth researching by the legislative branches to improve PPP legislation in the future.


The plaintiff launched a civil suit against the local government for the compensation for buying back a BOT project. The defendant argued that the BOT agreement on which the plaintiff’s claims were based was an administrative contract and ruled according to the Administrative Litigation Law. The court finally decided in favour of the plaintiff holding that the matters about financing, remuneration and default are agreed by the both parties as equal civil parties and the disputes arising therefrom are civil disputes.


The plaintiff filed a civil suit against the defendant upon the default in payment of sludge treatment fees. The intermediate court upheld the original judgment that the BOT agreement in the case was a concession agreement and that the disputes arising out of it proceed according to the Administrative Litigation Law.

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33 Article 23 of the Concession Measures mentioned that the prospective earnings pledge loans for concession projects shall be explored and utilised. Using relevant earnings as a source of repayment is encouraged.
Another decision was made in 2013 but was only published by the Supreme People's Court of the PRC on 19 November 2015 as one of the guiding cases. This guiding case is to some extent referrable when seeking a solution to the issue of guarantees for financing PPP projects:


The court illustrated the key point of the decision that (1) the right of the concessionaire’s earnings may be pledged, and shall be registered as the pledge of receivables; and (2) the right of the concessionaire’s earnings, owing to its nature, is not suitable for conversion, auction or sell off. If the pledgee claims priority for receiving payment, the court may rule that the debtor pay the pledgee having priority over other payment, with the receivables out of the earnings of the concessionaire.

VIII OUTLOOK

PPP is being promoted and developed both in practice and in the regulatory framework construction in China. Although the PPP law is still under preparation, with the issuance of dozens of regulatory documents at ministry and local level, the construction of PPP took a big step forward in 2015. The improved legal system will help to promote PPP being pushed forward in a more formal way. Because of the rapid urbanisation in China and the increasing number of demonstrable projects by the MOF, recommended projects by the NDRC and promoted projects by various local governments, it is reasonable to assume that the practice of PPP will go on developing. Legislation in this field would be further improved as regards the requirements of PPP practice.
Appendix 1

ABOUT THE AUTHORS

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Hui Sun is a non-equity partner at Zhong Lun Law Firm. She has provided legal services in the area of infrastructure and public utility for 20 years and has especially rich experience in projects applying the PPP mode. She has provided legal services in a number of important and large-scale projects. Her legal practice covers water, sewage treatment, solid waste, gas, roads and bridges, undersea tunnels, smart city, new city development, fire power, clean energy, etc. She mainly provides legal services to domestic and foreign investors and also represents the government in other cases. Ms Sun has an in-depth understanding of the requirements of each party in all stages of infrastructure and public utility projects and cultivates providing one-stop legal services in this field.

She is listed as a Chambers Global Leading Individual and a Chambers Asia-Pacific Leading Individual (project and infrastructure).

Ms Sun received her LLB (1992) and LLM (1995) from Peking University. She is a member of the Beijing Lawyers Association.

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