

Arbitrability of PPP Disputes in China

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I. Introduction

A few days ago, Mr. Han Bin, the vice director of the Social Capital Cooperation Center of the Ministry of Finance delivered his address to the China First Finance Daily that the Ministry of Finance would soon introduce the third batch of Chinese Public-Private Partnership (“PPP”) programs, following the first batch in 2014 and the second batch in 2015. The overall amount of investment into the public private partnership in China was over 180 billion in RMB Yuan in 2014, the number of programs was only 30, while in 2015, the above two figures topped 650 billion and 206 billion in RMB Yuan respectively.¹ It is estimated that those numbers would come to another break-through this year. Despite the dramatic surge of investment in the public-private partnership sector, public-private partnership faces many dilemmas. Among these, the resolution of disputes concerning the PPP draws the most attention. There are different mechanisms of dispute resolution, but it remains difficult to determine which mechanism is the most dominant for resolving PPP disputes, because there is ambiguity in the definition about the nature of PPP contracts.

II. What is PPP under Chinese Legal Context?

A. Definition

PPP is short for Public-Private Partnership. There is no uniform definition for PPP, but the most commonly known version of the definition comes from United Nations Institute for Raining and Research. In its Report called, “PPP -For sustainable development” the UN describes PPP as “voluntary and collaborative relationships among various actors in both public (State) and private

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¹ China First Finance Daily, 12 May, 2016, available at: <http://finance.sina.com.cn/roll/2016-05-12/doc-ixsehvu8776172.shtml>

(non-State) sectors, in which all participants agree to work together to achieve a common goal or undertake specific tasks.²” The European Commission’s definition of PPP refers to a cooperative relationship between the public sector and the private sector, the purpose of which is to provide service or projects that are traditionally run by the public sector.³

In 2014, the year when PPP arrangements in China really took off, National Development and Reform Commission of China issued the Guiding Opinions of the National Development and Reform Commission on Work relating to Public-Private Partnership⁴. The provisions of this policy document define PPP as “[T]he relationship of benefit and risk sharing and long-term cooperation established by the government with private capitals by way of franchise, service purchase, equity partnership or otherwise in order to enhance the public product and service supply capacity and improve supply efficiency.”

B. The scope of public sectors of PPP in China

Starting from the end of 2013, PPP arrangements in China increased rapidly over the years. Over 30 provinces in China have PPP projects. PPP covers a wide range of industrial sectors in China, but PPP projects are concentrated in the railway infrastructure sector. Other industrial sectors in which PPPs have been concluded include⁵:

- power generation and distribution,
- water and sanitation,
- pipelines,
- hospitals,
- school buildings and teaching facilities,
- stadiums,
- air traffic control,
- railways,
- roads,
- billing and other information technology systems, and
- housing.

C. Characteristics of Chinese PPP

The PPP arrangements can be executed through various forms, namely the BOT (Build-Operate-Transfer), BOO (Build-Own-Operate), TOT (Transfer-Operate-Transfer) and ROT

²United Nations Institute for Raining and Research, (2000) “PPP--For sustainable development”.

³European Commission. (2003) *The European Commission Guidance for successful PPP*.

⁴ Ministry of Finance, Document serial number: FaGaiTouZi [2014] NO. 2724.

⁵ Xiao Chen, *Legal Framework of PPP in China*, 2010 master degree thesis in economic law of China University of Political Science and Law.

(Rehabilitate-Operate-Transfer)⁶. The purpose of the PPP program is to better provide public service to the common people, especially in the infrastructure building industry. Parties involved in PPP contracts include administrative agencies, social-capital-backed private investors, enterprises that are set up for operation of PPP projects, banks as the financing parties, and other parties such as the contractors of the projects, and possibly the sub-contractors⁷. And the role of the public sector, most often the administrative agencies in the PPP projects, are multiple, they are parties to the PPP contract, organizers of the PPP program and also the regulator who push the projects forward and ensure the projects are operated in a legal and sustainable manner.

III. Resolving Disputes in PPP contracts

A. The nature of PPP contracts under Chinese law and policy

The key for the operation of PPP projects or arrangements is the PPP contract itself, which means the contract entered into by the administrative organs and private investors, or civil capital facilitated enterprises. Resolving disputes arising from PPP contracts faces substantial obstacles in China.

Chinese legislation is hierarchical. The Constitution is at the top of the hierarchy, and then comes laws and subsequently administrative statutes. There is yet no special law in China enacted to regulate PPP. At the present time, the fundamental legal documents concerning PPP in China are all at the administrative statutory level, which has lower legal effect than law, for example, the Guiding Opinions of the National Development and Reform Commission on Work relating to Public-Private Partnership. Some documents regulating PPP arrangements are policies promulgated by different ministries or local governments in China, which as such have lower legal effect than law, for example, the Guidelines for Mode of Cooperation for Government and Social Capital (for Trial Implementation). Therefore, these lower-level directives can hardly be directly applied as legal basis in court rulings.

B. Traditionally PPP disputes are subject to Administrative Procedure Law

Noticeably, there is a provision in the Administrative Procedure Law of China which provides lawsuits filed in “cases where an administrative organ is considered to have failed to perform in accordance with the law or as agreed or modify or terminate in violation of laws the government concession operation agreements, land or housing expropriation and compensation agreements or other relevant agreements⁸” shall be accepted by the judicial court. From the above, it can be indicated that, as a major form of concession agreements in China, PPP contracts are characterized

⁶ *Supra* 4.

⁷ LihuaXu, (2015) *Prevention of Legal Risks under PPP Model, Modern SOE Research*, Vol. 12, No.2.

⁸ Article 12 (11) of the Administrative Procedure Law of China.

as administrative acts. They are therefore actionable under the Administrative Procedure Law of China.

In Chinese legal practice, traditional PPP contractual disputes are resolved by administrative litigation. For example, in the *Huijin Company Ltd. v Government of Changchun City* case, Huijin is a water discharge company that entered into contract with the Government of Changchun City to cooperatively exploit water discharge and sewage treatment business in Changchun City. After years of failure in cooperation projects operation, the Government issued a decision to terminate the cooperation. Huijin Company therefore filed an administrative lawsuit against the Government's action and prevailed in the end. This case is a good example of PPP contractual dispute gets resolved through administrative litigation. The result of this case is among the very few of administrative lawsuits in which a civil party prevailed over the administrative agencies. Winning administrative lawsuits can be challenging for civil parties in China.⁹

Many civil parties lose administrative lawsuits against the administrative agencies. In China, local governments manage the finances of local people's courts. Currently Chinese courts remain financially dependent upon the local government. Consequently, the judge is often perceived as unable to act as a neutral adjudicator in administrative lawsuits.

C. New approach: PPP disputes should be defined as civil or even commercial disputes

Typical mechanisms of dispute resolution include litigation, mediation, and arbitration. Under Chinese law, litigation is further categorized as either civil litigation or administrative litigation. Unlike what is stipulated in the Administrative Procedure Law, administrative statutes and policies promulgated in the last three or four years have more often characterized PPP contracts as civil contracts and can therefore be resolved through civil or commercial litigation, arbitration and mediation, such as the Notice of Promotion and Application of PPP Model issued by the Ministry of Finance, the Contract Guidelines for PPP Projects issued by the National Development and Reform Committee, and Measures for the Administration Procurement Concerning PPP Projects issued by the Ministry of Finance. The difference between civil contracts and administrative contracts is that parties in the civil contracts are equal in legal status, while parties in the administrative contracts are not, since public power is involved in the administrative contracts. Administrative contractual disputes can only be resolved by filing lawsuits to be heard before the administrative tribunal.

Recent judicial practice in China also shows a trend to define PPP contractual disputes as civil or even commercial disputes rather than administrative disputes. Taking one of the Fifth Pile of

⁹Jinmin Wang, (2015) *Can Civil Parties Prevail in PPP lawsuits*, Legal System, Vol. 12, No.1.

Guideline Cases issued by the Supreme People’s Court of China as an example, Case No. 53 is a PPP contractual dispute arising from contract between a local bank, a local sewage treatment company, and an SOE. In the decision of the court, it can be inferred that that all legal relationships were decided to be of a civil contractual nature, even when administrative agencies¹⁰ are involved.

As alternatives from litigation, arbitration and mediation could be introduced to resolve PPP disputes. According to the Arbitration Law of China, contractual disputes are arbitrable, just as are other disputes over rights and interests in property between citizens, legal persons and other organizations that are “equal subjects.”¹¹ Chinese Mediation law contains similar provisions. Because the “administrative” characteristics of the PPP contract, the parties to the contract are not “equal subjects,” so no explicit legal basis permits PPP contracts to be arbitrated or mediated under Chinese law. Only civil and commercial contractual disputes, where the parties to which are “equal subjects,” are entitled to arbitration or mediation. Due to the more tolerant and flexible judicial practice in China, characterizing PPP contracts as civil or commercial contracts would grant a new approach for PPP contractual disputes to be arbitrated or mediated.

IV. Can Arbitration Be Applied to Settlement of PPP Contractual Disputes

If PPP contractual disputes could be defined as civil or commercial contracts, rather than administrative contracts, then such disputes could be resolved by arbitration. And settling PPP contractual disputes through arbitration has many advantages.

A. The feasibility of PPP contract arbitration

Theoretically speaking, there are three different kinds of academic opinions regarding the nature of PPP contract. Namely, the public law contract opinion, the private law contract opinion, and the third one as a hybrid of the previous two. The mainstream voice in Chinese PPP industry is the third opinion, which agrees that PPP contracts are both public law and private law in nature. Especially when the principal PPP contract contains many sub-contracts, the nature of these contracts can vary, and particular situations in different contracts must be taken into account. The adjudicators in specific cases concerning PPP related disputes have wide discretion in deciding the nature of the contracts and whether or how to distinguish the public aspects from the private aspects.

Traditionally, administrative agencies are not equal subjects in civil or commercial contracts. Now, with the accumulation of judicial practice, PPP practitioners have discerned that it is possible to

¹⁰ SOE in China is count as administrative agency, since leaders in the SOE have “Bianzhi”, which stands for authorized identity of civil servants.

¹¹Article 2, Arbitration Law of China.

make a distinction in PPP contracts as to which part of the contracts is administrative and which part is civil or commercial. When an administrative party acts as a cooperator instead of a regulator in the PPP contract, the contract is more of a civil or commercial one entered into by equal subjects, thus disputes arising therefrom can be settled by arbitration. In the Guidelines for Mode of Cooperation for Government and Social Capital, Article 28 provides that interested parties to the PPP projects are entitled to apply for arbitration or file lawsuits in front of the People's Court if they are not able to settle the disputes through amicable negotiation. Though the Guideline is still at trial, it affirms the arbitrability of PPP related disputes.

B. The advantages of resolving PPP contractual disputes through arbitration

Resolving PPP contractual disputes by arbitration is not only feasible, but also advantageous. According to statistical research in 2015, the rate of final conclusion of PPP contracts was actually very low. Characterizing PPP contracts as administrative contracts hampers private businesses' investment enthusiasm. A major concern is that in administrative lawsuits, private parties seldom prevail. However, if PPP contractual disputes are characterized as civil or commercial contractual disputes, they can be settled through arbitration instead of litigation. Arbitration offers advantages over litigation in many aspects. Resolving PPP contractual disputes requires higher levels of special and technical knowledge. Parties can choose professional and specialized practitioners in the PPP industry to decide the case. Arbitrators with professional PPP related knowledge are more appropriate candidates to decide the case than judges, because very often judges are not equipped with professional knowledge in a specific field like the PPP industry. And in return, bring PPP related disputes to arbitration also reduces the considerable heavy amount of caseload of judges.

Aside from considerations of professionalism and technical expertise, resolving PPP contractual disputes through arbitration strengthens and safeguards neutrality. Unlike the Chinese judicial system, there are no hierarchical structures within arbitration institutions. This assures the neutrality and independence of the arbitration tribunal's award. . Therefore, settling disputes through arbitration guarantees more neutrality and safeguards the ultimate fairness of the decision.

V. Conclusion

In China, there is no specific law on PPP so far, however, many administrative agencies have published circulars regarding PPP, and in these administrative policies, the arbitrability and civil or commercial nature of PPP contracts are affirmed. In addition, in international practice, PPP related disputes are defined as civil and commercial contracts, in particular in countries where the PPP has developed into a mature stage, special arbitration institutions are established to resolve PPP related disputes. With the increasing number of PPP related disputes ever since 2014, defining PPP contractual disputes as civil and commercial disputes and resolving them through arbitration

become a voice for reform of relevant PPP legislation in China. It seems that Chinese government policy and judicial practice are one step ahead in PPP regulation. Chinese PPP practitioners are looking forward to the promulgation of a special law to regulate PPP related disputes, which would affirm the arbitrability of PPP contracts as civil or commercial contracts entered into by “equal subject” parties.