LEGAL REGULATION OF PUBLIC-PRIVATE PARTNERSHIP IN RUSSIA AND OTHER COUNTRIES OF THE EURASIAN ECONOMIC UNION

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This article examines comparatively legislation on the public-private partnership in the countries of Eurasian Economic Union and the relationship with Model Law "On Public-Private Partnership" adopted within the framework of the Commonwealth of Independent States. It is argued that the national acts of such countries could be improved and harmonized by developing their categorial apparatus and the extension of permissive regulation of public-private partnership. The legal qualification of an agreement on public-private partnership and other investment contracts with the participation of the State stipulated in other laws is also examined. It is concluded that such agreements comprise not only private, but also public law elements and might be regulated in special legislation containing rules of civil and public law on the basis of balancing private and public interests in public-private partnership.

Keywords: public-private partnership; investment; state; investor; investment law; Eurasian Economic Union.

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Introduction

Most countries of Eurasian Economic Union (EAEU), composed of Armenia, Belarus, Kazakhstan, Kyrgyzstan and Russia, have adopted laws introducing a new contractual form of investment activity with the participation of the State – the State-private partnership, which is better known worldwide as the public/private partnership (PPP). In 2015 Belarus, Kazakhstan, and Russia adopted three such legislative acts:

– Federal Law of the Russian Federation of 13 July 2015 No. 224-FZ "On State-Private Partnership, Municipal-Private Partnership in the Russian Federation and Making Changes to Individual Legislative Acts of the Russian Federation" (hereinafter Russian Law on the PPP);[1]

– Law of the Republic of Kazakhstan of 31 October 2015 No. 379-V "On State-Private Partnership" (hereinafter Kazakhstan Law on the PPP);[2]

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[1] Федеральный закон от 13 июля 2015 г. № 224-ФЗ «О государственно-частном партнерстве, муниципально-частном партнерстве в Российской Федерации и внесении изменений в отдельные законодательные акты Российской Федерации» // Собрание законодательства РФ. 2015. № 29. Ст. 4350 [Federal Law No. 224-FZ of 13 July 2015. On State-Private Partnership, Municipal-Private Partnership in the Russian Federation and the Amendments to Certain Legislative Acts of the Russian Federation, Legislation Bulletin of the Russian Federation, 2015, No. 29, Art. 4350].

[2] Закон Республики Казахстан от 31 октября 2015 г. № 379-V «О государственно-частном партнерстве» [Law of the Republic of Kazakhstan No. 379-V of 31 October 2015. On State-Private Partnership] (May 21, 2019), available at http://online.zakon.kz/Document/?doc_id=37704720.

– Law of the Republic of Belarus of 30 December 2015 No. 345-Z "On State-Private Partnership" (hereinafter Belarus Law on the PPP).[3]

In the Kyrgyz Republic the legislative regulation of PPP commenced in 2009. However, in 2012 it was updated by the adoption of the new Law of the Kyrgyz Republic of 22 February 2012 No. 7 "On State-Private Partnership in the Kyrgyz Republic" (hereinafter Kyrgyz Law on the PPP).[4]

In the Republic of Armenia such a law has not been adopted, but is being considered by the Government.

The legislative acts concerned were needed to establish appropriate legal conditions for the PPP as a form of cooperation between an investor and the State that attracts investments to the EAEU countries. This mechanism was based on the Private Finance Initiative (PFI) in United Kingdom[5] and demonstrated its relevance and effectiveness in the implementation of infrastructure projects in many countries,[6] including BRICS members. Usually it is any long term contractual arrangement between the government and a private partner whereby the latter delivers and funds public services using a capital asset, sharing the associated risks.[7] As a rule, it is within the scope of governmental authorities, who act in accordance with legislative provisions on public services, for example, in China, India, and South Africa. In such cases there are no special laws on PPP, but authoritative governmental bodies may enact standardized bidding documents or model PPP contracts.[8]

In contrast to those countries, the Federative Republic of Brazil adopted the Law for Bidding and Contracting of PPP Projects of 30 December 2004 No. 11.079,[9] which

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[3] Закон Республики Беларусь от 30 декабря 2015 г. № 345-З «О государственно-частном партнерстве» [Law of the Republic of Belarus No. 345-Z of 30 December 2015. On State-Private Partnership] (May 21, 2019), available at http://www.pravo.by/main.aspx?guid=12551&p0=H11500345&p1=1.

[4] Закон Кыргызской Республики от 22 февраля 2012 г. № 7 «О государственно-частном партнерстве в Кыргызской Республике» [Law of the Kyrgyz Republic No. 7 of 22 February 2012. On State-Private Partnership in the Kyrgyz Republic] (May 21, 2019), available at http://cbd.minjust.gov.kg/act/view/ru-ru/203607.

[5] *See* Paul Craig, *Administrative Law* 119 (7th ed., London: Sweet & Maxwell, 2012).

[6] *See* Практическое руководство по вопросам эффективного управления в сфере государственно-частного партнерства / Европейская экономическая комиссия ООН [U.N. Economic Commission for Europe, Guidebook on Promoting Good Governance in Public-Private Partnerships] (May 9, 2019), available at http://www.unece.org/fileadmin/DAM/ceci/publications/ppp_r.pdf.

[7] *See* OECD, Recommendations of the Council on Principles for Public Governance of Public-Private Partnerships (May 2012) (May 9, 2019), available at http://www.oecd.org/gov/budgeting/PPP-Recommendation.pdf.

[8] *See* National Treasury, Standardised PPP Provisions, 11 March 2004 (May 9, 2019), available at https://www.gtac.gov.za/Publications/1280-Standardised%20Public-Private%20Partnership%20Provisions.pdf. *See also* Standardized Bidding Documents, Public Private Partnerships in India (May 9, 2019), available at https://www.pppinindia.gov.in/standardized-bidding-documents (May 9, 2019).

[9] Lei nº 11.079, de 30 de dezembro de 2004 – Institui normas gerais para licitação e contratação de parceria público-privada no âmbito da administração pública [Law No. 11.079 of 30 December 2004

defines a PPP as a concession contract that may take one of two forms: a sponsored concession and an administrative concession. However, the doctrinal literature distinguishes concessions (since then styled common concessions) from PPPs based on certain features of a contractual arrangement.[10] Furthermore, in theory, as it will be shown below, a concession is usually just one form of PPP. It is not surprising that a new PPP Bill is under consideration in Brazil.[11]

It is thought that the introduction of the PPP with the use of State and municipal property, given the lack of budgetary funds, can be used for the construction of roads, bridges and other objects of economic and social infrastructure and thus ensure the more effective performance by the authorities of their public duty to provide favorable and comfortable living conditions for citizens. It is also important to further the unification of entrepreneurial law under EAEU, including those regulating investment activity. Moreover, the PPP takes into account the rules of international law, commercial contract, and arbitration practice and the accession of Russia and Kyrgyzstan to the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States.[12]

1. Legal Framework for PPP in Countries of EAEU

As noted, the legal framework for the PPP in EAEU countries includes special legislative acts on the PPP. In general, these acts determine the procedure for the preparation of a draft PPP project, the conclusion, performance, change, and termination of agreements on a PPP, the powers of various State agencies, guarantees of the rights and legitimate interests of the parties to the agreement on PPP, and others.

But the legal regulation of the PPP cannot be effectuated merely by those legislative acts. The PPP provides for investments which are regulated by other laws relating primarily to civil legislation. In this regard it is necessary to refer to Article 2(1) of the Russian Law on the PPP, which provides:

> The legislation of the Russian Federation on state-private partnership, municipal-private partnership is based on the provisions of the Constitution of the Russian Federation, the Civil Code of the Russian Federation, the Budget

for Bidding and Contracting of PPP Projects] (May 9, 2019), available at http://www.planalto.gov.br/ccivil_03/_Ato2004-2006/2004/Lei/L11079.htm.

[10] Cesar A. Guimarães Pereira, *Public-Private Partnerships (PPPs) and Concessions of Public Services in Brazil*, 1(1) BRICS Law Journal 25, 28 (2014).

[11] Brazil's Public-Private Partnership Law: Text of the Proposed Legislation (May 9, 2019), available at https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/ppp_testdumb/documents/brazilpppplaw.pdf.

[12] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 U.N.T.S. 159.

> Code of the Russian Federation, the Land Code of the Russian Federation, the Town Planning Code of the Russian Federation, the Forest Code of the Russian Federation, the Water Code of the Russian Federation, the Air Code of the Russian Federation and consists of the present Federal Law, other federal laws, and other normative legal acts of the Russian Federation, as well as normative legal acts of subjects of the Russian Federation, and municipal legal acts. The provisions contained in other federal laws adopted in accordance with the present Federal Law, other normative legal acts of the Russian Federation, as well as normative legal acts of subjects of the Russian Federation, and municipal legal acts shall comply with the present Federal Law.

The Constitution of the Russian Federation[13] distinguishes powers among three levels of the State: federal, regional, and municipal. A number of key provisions deal with investment activity:

– Everyone is equal before the law and the court (Art. 19(1));

– Everyone has the right to free use of their abilities and property for entrepreneurial and other economic activities not prohibited by law (Art. 34(1));

– Everyone has the right to be the owner of property and may not be forcibly deprived of their property except by a court decision and without payment of prior and equal compensation (Art. 35(2) and (3));

– Everyone has the right to compensation by the State for damage caused by unlawful actions (or failure to act) of State agencies or their officials (Art. 53).

In accordance with Article 71 of the Constitution of the Russian Federation, civil legislation is within the exclusive jurisdiction of the Russian Federation. The adoption of regional enactments containing civil law rules is inadmissible. The scope of civil legislation is determined in Article 2(1) of the Civil Code of the Russian Federation:[14]

> Civil legislation shall determine the legal status of the participants of civil turnover, the grounds for the origin and the procedure for the effectuation of the right of ownership and other rights to a thing, rights to the results of intellectual activity and means of individualization (or intellectual rights) equated thereto, shall regulate relations connected with participation in corporate organizations or management thereof (corporate relations), contractual and other obligations, as well as other property and personal

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[13] Конституция Российской Федерации от 12 декабря 1993 г. // Собрание законодательства РФ. 2014. № 31. Ст. 4398 [Constitution of the Russian Federation of 12 December 1993, Legislation Bulletin of the Russian Federation, 2014, No. 31, Art. 4398].

[14] Гражданский кодекс Российской Федерации (часть первая) от 30 ноября 1994 г. № 51-ФЗ // Собрание законодательства РФ. 1994. № 32. Ст. 3301 [Civil Code of the Russian Federation (Part One) No. 51-FZ of 30 November 1994, Legislation Bulletin of the Russian Federation, 1994, No. 32, Art. 3301].

non-property relations based on equality, autonomy of will, and the property autonomy of the participants thereof.

There are other codes and legislative acts of the Russian Federation of a general character adopted on the federal level for the purpose of developing the provisions of the Constitution of the Russian Federation. They have their own scope of regulation (civil, administrative, financial and other relations). Moreover, special federal laws directly regulate investment relations. Among them, the Federal Law of 25 February 1999 No. 39-FZ "On Investment Activity in the Russian Federation Effectuated in the Form of Capital Investments,"[15] defines the legal and economic basis for investment activity in the form of capital investments on the territory of the Russian Federation and establishes guarantees of the equal protection of the rights, interests, and property of the subjects of such activity, regardless of ownership.

Meanwhile, there are issues of joint jurisdiction of the Russian Federation and the subjects of the Russian Federation (for example, ownership, use and disposal of land and other natural resources, administrative legislation, establishment of general principles of taxation and charges in the Russian Federation), as well as issues of the exclusive jurisdiction of subjects of the Russian Federation (for example, the establishment and formation of the system of regional public authorities and the separation of powers among them, state ownership of subjects of the Russian Federation and the management thereof, regional budgets, regional programs in the field of economic development of subjects of the Russian Federation), according to which the State agencies of subjects of the Russian Federation have the right to adopt their own regional acts, including on the PPP and State regulation of investment activity on their territories. For example:

– Law of St. Petersburg of 25 December 2006 No. 627-100 "On the Participation of St. Petersburg in Public-Private Partnerships";[16]

– Law of Kemerovo Oblast of 26 November 2008 No. 102-OZ "On State Support of Investment, Innovation, and Production Activities in Kemerovo Oblast";[17]

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[15] Федеральный закон от 25 февраля 1999 г. № 39-ФЗ «Об инвестиционной деятельности в Российской Федерации, осуществляемой в форме капитальных вложений» // Собрание законодательства РФ. 1999. № 9. Ст. 1096 [Federal Law No. 39-FZ of 25 February 1999. On Investment Activity in the Russian Federation Performed in the Form of Capital Investments, Legislation Bulletin of the Russian Federation, 1999, No. 9, Art. 1096].

[16] Закон Санкт-Петербурга от 25 декабря 2006 г. № 627-100 «Об участии Санкт-Петербурга в государственно-частных партнерствах» // СПС «КонсультантПлюс» [Law of St. Petersburg No. 627-100 of 25 December 2006. On Participation of St. Petersburg in Public-Private Partnerships, SPS "ConsultantPlus"].

[17] Закон Кемеровской области от 26 ноября 2008 г. № 102-ОЗ «О государственной поддержке инвестиционной, инновационной и производственной деятельности в Кемеровской области» [Law of Kemerovo Oblast No. 102-OZ of 26 November 2008. On State Support of Investment, Innovation and Production Activities in Kemerovo Oblast] (September 9, 2017), available at http://base.garant.ru/.

– Law of Novosibirsk Oblast of 29 June 2016 No. 75-OZ "On Certain Issues of State Regulation of Investment Activity Effectuated in the Form of Capital Investments in Novosibirsk Oblast."[18]

2. Definition of PPP

Before analyzing the legal definition of the PPP, a small peculiarity in the name of the PPP used in the legislation of EAEU countries should be noted. It is a State/private partnership, rather than public/private partnership. Consequently, in Belarus, Kazakhstan, and Kyrgyzstan the parties of a PPP are called State and private partners.

In contrast, the Russian Law on the PPP refers to two forms: State/private partnership and municipal/private partnership, depending on which public law entity is a party to the private investor – the Russian Federation, subject of the Russian Federation, or municipality. This approach is understandable, taking into account the federative character of Russia and the distribution of State and municipal powers in Russia. However, this is not fully reflected in the Russian Law on the PPP, which stipulates a "public partner," rather than a "State partner" or a "municipal partner," as would be expected. In this regard it is deemed to be correct to use the concept of public/private partnership as a more general and appropriate name for the PPP, which can embrace both State/private partnership and municipal/private partnership. The difficulty and complexity of most PPP projects in which several public-law entities can sometimes participate on one side of the public partner at the same time should be taken into account. This understanding is consistent with Model Law "On Public-Private Partnership" (Arts. 2 and 14), adopted by Decree of the Inter-Parliamentary Assembly of Members of Commonwealth of Independent States (CIS) of 28 November 2004 No. 41-9 (hereinafter Model Law on the PPP),[19] many important provisions of which were unfortunately ignored by the national legislators of the countries in question.

Returning to the issue, it is important to emphasize that each law on the PPP in EAEU countries provides a legal definition of the PPP, which are similar in most aspects. The Russian Law on the PPP in Article 3(1) provides:

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[18] Закон Новосибирской области от 29 июня 2016 г. № 75-ОЗ «Об отдельных вопросах государственного регулирования инвестиционной деятельности, осуществляемой в форме капительных вложений на территории Новосибирской области» // СПС «КонсультантПлюс» [Law of Novosibirsk Oblast No. 75-OZ of 29 June 2016. On Certain Issues of State Regulation of Investment Activity Performed in the Form of Capital Investments in Novosibirsk Oblast, SPS "ConsultantPlus"].

[19] Модельный закон «О публично-частном партнерстве» (принят постановлением Межпарламентской Ассамблеи государств – участников СНГ от 28 ноября 2004 г. № 41-9) [Model Law "On Public-Private Partnership," adopted by Decree of the Inter-Parliamentary Assembly of Members of Commonwealth of Independent States of 28 November 2004 No. 41-9] (May 21, 2019), available at http://www.parliament.am/library/modelayinorenqner/305.pdf.

> [C]ooperation legally formalized for a certain period and based on the pooling of resources, the distribution of risks, between the public partner, on one hand, and the private partner, on the other hand, which is effectuated on the basis of the agreement on PPP concluded in accordance with this Federal Law.

A similar definition can be found in Article 1(1) of the Belarus Law on the PPP:

> A PPP is a mutually beneficial cooperation of public and private partners for a certain period of time in order to pool resources and distribute risks, meeting the goals, objectives and principles defined by the present Law, effectuated in the form of the agreement on the PPP.

The Kyrgyz Law on the PPP (Art. 1) stipulates attributes which reveal the essence of the PPP:

> A PPP is long-term (up to 50 years) cooperation between public and private partners concerning the involvement of the private partner by the public partner into the design, financing, construction, restoration, reconstruction of facilities, as well as the management of existing or newly-created facilities, including infrastructure.

In addition to the excessively general definition of the PPP provided in Article 1(6) of the Kazakhstan Law on the PPP, this Law in Article 4 also identifies four exclusive features of the PPP:

> (1) Building relations between the State partner and private partner by concluding the agreement on PPP;
> (2) Medium-term or long-term period for the implementation of a PPP project (from three to thirty years, depending on the specific features of the PPP project);
> (3) Joint participation of the State partner and private partner in the implementation of a PPP project;
> (4) Pooling the resources of the State partner and private partner for the implementation of a PPP project.

3. Parties to PPP

Two parties are generally recognized as participants of a PPP. They are the State and private partners. This understanding underlies the legislative acts on the PPP under consideration. However, they differ substantially in determining who may be a State or private partner.

3.1. State Partner

Usually a State partner is regarded as the State. However, in civil law this subject can be different public law entities. Pursuant to Article 124(1) of the Civil Code of the Russian Federation:

> The Russian Federation, subjects of the Russian Federation – republics, territories, regions, cities of federal significance, autonomous region, autonomous national areas, and also city and rural settlements and other municipal formations shall act in relations regulated by civil legislation on equal principles with other participants of these relations – citizens and juridical persons.

Similar provisions are embodied in the Russian Law on the PPP (Art. 3(4)):

> A public partner can be:
> – The Russian Federation, on behalf of which the Government of the Russian Federation or its authorized federal executive agency acts or;
> – A subject of the Russian Federation as represented by the highest executive agency of State power of the subject of the Russian Federation or its authorized agency of executive power of the subject of the Russian Federation or;
> – A municipality, on behalf of which the head of the municipality or other competent local State agency acts in accordance with the charter of the appropriate municipality.

In the Belarus Law on the PPP (Art. 1(1)) a State partner can also be not only the State (that is, the Republic of Belarus), but an administrative-territorial unit thereof.

The Kazakhstan Law on the PPP in Article 1(5) provides for the only one subject capable of being the State partner. It is the Republic of Kazakhstan. It seems strange, because in conformity with Article 112(1) of the Civil Code of the Republic of Kazakhstan[20] administrative-territorial units are regarded as participants of civil law relations. Nevertheless, many persons have the right to act on behalf of the Republic of Kazakhstan in a PPP in accordance with Article 1(5) of the Kazakhstan Law on the PPP. They are State agencies, State institutions, State enterprises, and limited responsibility partnerships, joint-stock societies, 50% or more of the stocks in the authorized capital or voting stocks of which are directly or indirectly owned by the State.

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[20] Гражданский кодекс Республики Казахстан (Общая часть) (принят Верховным Советом Республики Казахстан 27 декабря 1994 г.) [Civil Code of the Republic of Kazakhstan (General Part), adopted by the Supreme Council of the Republic of Kazakhstan on 27 December 1994] (May 20, 2019), available at http://online.zakon.kz/Document/?doc_id=1006061#pos=5;-100.

A similar broad approach is found in Article 1 of the Kyrgyz Law on the PPP. Unlike the other laws on the PPP, it does not designate the Kyrgyz Republic as the State partner, but enumerates many other subjects:

> The State partner is State agencies of executive power, including ministries, State committees, administrative departments, and local State administrations, as well as executive agencies of local self-government, and State and municipal enterprises.

It would be a mistake to shift the emphasis from public-law entities as participants of civil law relations to State agencies, which represent the interests of such public law entities and to act on their behalf. In PPP State agencies, having sometimes the status of a juridical person and therefore able on their own to enter into civil law relations, indeed pursue not their own interests, but the State's interest when creating and reconstructing infrastructure facilities.

In addition, the Kazakhstan Law on the PPP in Article 5(1) permits the participation of several State partners in a PPP. This possibility is also enshrined in the Model Law on the PPP in Article 14(3):

> Several public agencies and organizations (public entities) may act on the side of the public partner. The rights and duties of these entities in connection with their joint participation on the public partner's side are determined by the agreement concluded between them.

The participation of several public law entities in a PPP is thought to be reasonable, given the complexity of infrastructure projects and the need to involve objects of different State and municipal ownership for the implementation of such projects. However, the Russian legislator for unknown reasons chose another mechanism for the interaction of public law entities: a joint competition for the right to conclude an agreement on a PPP (Art. 22 of the Russian Law on the PPP). This gives rise to questions of the distribution of powers among public law entities. For example, it is unclear why the decision on the implementation of PPP projects should be effectuated only by the Government of the Russian Federation or the supreme executive agency of a subject of the Russian Federation, omitting municipalities (Arts. 16(4), 17(1), 18(1) of the Russian Law on the PPP). Other provisions restrict the rights of municipalities in the implementation of their projects: assessment of effectiveness of the project on municipal-private partnership and determination of its comparative advantage are to be performed by an authorized executive agency of the subject of the Russian Federation (Art. 17(2) of the Russian Law on the PPP), rather than an appropriate municipal State agency.

3.2. Private Partner

As for a private partner, in Russia it can be only a Russian juridical person, in conformity with Article 3(5) of the Russian Law on the PPP. Nevertheless, the list of such juridical persons is restricted in Article 5(2) of the Russian Law on the PPP:

> The following juridical persons may not be private partners or participate on the side of the private partner:
>
> (1) State and municipal unitary enterprises;
>
> (2) State and municipal institutions;
>
> (3) Public law companies and other juridical persons created by the Russian Federation on the basis of federal laws;
>
> (4) Economic partnerships and societies, economic partnerships under the control of the Russian Federation, subject of the Russian Federation, or municipality;
>
> (5) Subsidiaries of economic entities under the control of the organizations referred to in subpoints (1)–(4) of this point;
>
> (6) Non-profit organizations established by the Russian Federation, subjects of the Russian Federation, or municipalities in the form of funds;
>
> (7) Non-profit organizations created by the organizations specified in subpoints (1)–(6) of this point in the form of funds.

A broader list of potential private partners is stipulated in laws of Belarus, Kazakhstan, and Kyrgyzstan. They include foreign juridical persons and individual entrepreneurs. In addition, it is sometimes indicated that private partners may be foreign organizations that are not juridical persons (Art. 1(1) of the Belarus Law on the PPP), simple partnership, consortium (Art. 1(2) of the Kazakhstan Law on the PPP).

Having agreed with the need to consolidate a wide range of persons who could become private partners, the inaccuracy of the concepts used in the laws on PPP in Kazakhstan must be noted. It is considered that a private partner shall have the necessary legal capacity to enter into civil and other legal relations with a public partner. In this regard, as a private partner should be recognized not a simple partnership (association, consortium), but two or more juridical persons and/or individual entrepreneurs operating without the formation of a juridical person on the basis of an agreement, as is correctly stated for example, in Article 14(1) of the Model Law on the PPP.

3.3. Other Participants

Unlike the other laws on the PPP, the Kazakhstan Law on the PPP in Articles 1(14) and 5(2) provides for other persons involved in the implementation of PPP projects, who are called subjects of PPP as well. They may be:

– Financial and other organizations providing financing for the PPP project;

– Operators of the industry (a system operator, national company for subsoil use, national infrastructure operator, national railway company, national cargo carrier,

national carrier of passengers, national operator for the management of roads, other juridical persons performing the functions of a national operator or operator in a particular industry (sector) of the economy in accordance with the laws of the Republic of Kazakhstan).

The former is stipulated in the Russian and Belarus Laws on the PPP as follows:

– Financier, who is a juridical person or an association of two or more juridical persons operating without a juridical person under a joint venture agreement, providing loan funds to the private partner for the implementation of the agreement on the PPP on conditions of return, payment, and duration (Art. 3(6) of the Russian Law on the PPP);

– Creditors of the private partner, who include a bank, non-banking credit and financial organization, other organization providing credit and/or borrowed funds to the private partner for the implementation of the PPP project (Art. 1(1) of the Belarus Law on the PPP).

Indeed they participate in contractual relations with the public and private partners, but on the basis of another agreement which is concluded in relation to the performance of the agreement on the PPP: a direct agreement (Art. 3(7) of the Russian Law on the PPP) or contract of cooperation (Art. 1(1) of the Belarus Law on the PPP).

4. Objects of PPP

The objects of a PPP are usually deemed any property which is to be constructed or reconstructed under a PPP project. They typically belong to engineering, industrial, social, transport, and other infrastructure and may include a wide range of objects. In particular, pursuant to Article 5 of the Belarus Law on the PPP:

> A PPP can be carried out in relation to infrastructure in the following areas:
> – Road and transport activities;
> – Public utilities;
> – Health;
> – Social service;
> – Education, culture;
> – Physical education, sports, tourism;
> – Telecommunications;
> – Energy;
> – Oil refining, transportation, storage, delivery;
> – Transportation, storage, gas supply;
> – Agroindustrial production;
> – Defense, law enforcement;
> – Scientific, scientific and technical activities;
> – Other areas.

In addition, the Kazakhstan Law on the PPP (Art. 1(13)) stipulates that objects of a PPP can include works (or services) and innovations to be introduced during the implementation of a PPP project. Such a provision needs to be clarified. Works and services usually mean activity and characterize the subject of a contract (key actions of the parties that constitute the legal essence of the contract) in post-Soviet civil law. In this regard, Article 24(2) of the Belarus Law on the PPP, which describes the subject-matter of a PPP agreement, is more correct and accurate:

> The subject-matter of an agreement on PPP is the implementation of infrastructure for design, construction and (or) reconstruction, restoration, repair, modernization, as well as maintenance and (or) operation.

Another idea used in the Kazakhstan Law on the PPP – innovation – is new, but needs to be clearly defined in accordance with the basic categories of civil law.

In contrast to other laws on the PPP, the Russian Law on the PPP (Art. 7) provides for an exhaustive list of property to be created (constructed and (or) reconstructed) subject to a PPP project:

> – Private roads or sections of private roads, bridges, protective road structures, artificial road structures, production facilities (facilities used in repair and maintenance of roads), elements of road construction, facilities intended for charging (including toll collection points), road service facilities;
> – Public transport, except metro;
> – Railway transport facilities;
> – Pipeline transportation facilities;
> – Sea ports, river ports, specialized ports, objects of their infrastructures, including artificial land plots, port hydraulic engineering constructions, except for objects of infrastructure of seaport which can be in federal property and not subject to alienation in private property;
> – Sea vessels and river vessels, vessels of mixed (river - sea) navigation, as well as vessels carrying out icebreaking wiring, hydrographic, research activities, ferry crossings, floating and dry docks, except for objects that in accordance with the legislation of the Russian Federation are in State ownership and not subject to alienation into private ownership;
> – Aircraft, aerodromes, airports, technical means and other means intended for flight operations of aircraft, except for the objects referred to the property of the state aviation or to the unified system of air traffic management;
> – Facilities for the production, transmission, and distribution of electricity;
> – Hydraulic structures, fixed and/or floating platforms, artificial islands;
> – Underwater and underground engineering structures, bridges, communication facilities, communication lines and communications, and other linear features communication;

– Healthcare facilities, including facilities intended for sanatorium treatment and other activities in the field of health care;

– Objects of education, culture, sports, facilities used for recreation and tourism, other social services;

– Facilities where processing, utilization, neutralization, placement of solid municipal waste are carried out;

– Objects of improvement of territories, including for their lighting;

– Land reclamation systems and objects of their engineering infrastructure, with the exception of state reclamation systems;

– The objects of production, primary and (or) subsequent (industrial) processing, storage of agricultural products included in the list confirmed by the Government of the Russian Federation according to the legislation of the Russian Federation on development of agriculture and determined according to the criteria established by the Government of the Russian Federation;

– The objects of hunting infrastructure;

– Property complexes intended for the production of industrial products and (or) the implementation of other activities in the field of industry;

– Programs for electronic computers (computer programs), databases, information systems (including state information systems) and (or) sites in the information and telecommunication network "Internet" or other information and telecommunication networks, which include such computer programs and (or) databases, or a set of specified objects, or objects of information technologies and the property which is technologically connected with one or several such objects and intended for ensuring their functioning or implementation of other activity provided by the agreement;

– A set of buildings, parts of buildings or premises, united by a single purpose with movable property, technologically related to the objects of information technology, and designed to automate the use of computer programs and databases of the processes of formation, storage, processing, reception, transmission, delivery of information, access to it, its presentation and distribution (data processing centers).

Such a narrow approach limits possibilities for use of the PPP in many areas of the Russian economy, including, for example, scientific and innovation activity. As a result, Article 7 of the Russian Law on the PPP needs to be changed by introducing an open-ended list of objects of PPP, as is provided for in other laws on the PPP.

5. Legal Forms of PPP

5.1. Legal Forms of PPP in Russia and Belarus

Despite a common definition of a PPP, there are two different approaches to understanding the forms of a PPP in EAEU countries. Unlike Kazakhstan and

Kyrgyzstan, Russia and Belarus regard the PPP in a narrow sense and stipulate the only one form of PPP – an agreement on a PPP. For example, in accordance with the definition of the PPP embodied into Article 1 of the Belarus Law on the PPP, a PPP is "to follow purposes, objectives and principles, defined in the present Law and to be effectuated in the form of an agreement on a PPP." Similar provisions can be found in Article 3(1) of the Russian Law on the PPP, in which a PPP (State/private partnership or municipal/private partnership) is to be "effectuated on the basis of an agreement on State/private partnership, an agreement on municipal/private partnership, concluded in accordance with the present Federal Law…" This Law in Article 3(3) provides for a legal definition of such an agreement:

> An agreement on a PPP is a civil contract between a public partner and a private partner, concluded for a period of no less than three years in the procedure and on the conditions established by the present Federal Law.

Other provisions in the Russian Law on the PPP confirm the narrow understanding of the PPP in Russia. For example, other investment agreements between a private investor and the State, such as a concession agreement, are not regarded as agreements on a PPP. Article 2(2) of the Law expressly stipulates that the relations arising in connection with the preparation, conclusion, performance, and termination of concession agreements, with the guarantee of the rights and legitimate interests of the parties to the concession agreement, are regulated by the Federal Law of 21 July 2005 No. 115-FZ "On Concession Agreements."[21] The view that an agreement on a PPP and a concession agreement are different agreements also follows from analyzing other legislative acts of the Russian Federation (Arts. 39.6(2) and 39.8(8) of the Land Code of the Russian Federation;[22] Art. 60(2) of the Town Planning Code of the Russian Federation;[23] Arts. 38(2)–(4), 40–42 of the Federal Law of 8 November 2007 No. 257-FZ "On Roads and Road Activity in the Russian Federation and on Amending Certain Legislative Acts of the Russian Federation"[24]; and others).

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[21] Федеральный закон от 21 июля 2005 г. № 115-ФЗ «О концессионных соглашениях» // Собрание законодательства РФ. 2005. № 30. Ст. 3126 [Federal Law No. 115-FZ of 21 July 2005. On Concession Agreements, Legislation Bulletin of the Russian Federation, 2005, No. 30, Art. 3126].

[22] Земельный кодекс Российской Федерации от 25 октября 2001 г. № 136-ФЗ // Собрание законодательства РФ. 2001. № 44. Ст. 4147 [Land Code of the Russian Federation No. 136-FZ of 25 October 2001, Legislation Bulletin of the Russian Federation, 2001, No. 44, Art. 4147].

[23] Градостроительный кодекс от 29 декабря 2004 г. № 190-ФЗ // Собрание законодательства РФ. 2005. № 1. Ст. 16 [Town Planning Code of the Russian Federation No. 190-FZ of 29 December 2004, Legislation Bulletin of the Russian Federation, 2005, No. 1, Art. 16].

[24] Федеральный закон от 8 ноября 2007 г. № 257-ФЗ «Об автомобильных дорогах и о дорожной деятельности в Российской Федерации и о внесении изменений в отдельные законодательные акты Российской Федерации» // Собрание законодательства РФ. 2007. № 46. Ст. 5553 [Federal Law No. 257-FZ of 8 November 2007. On Roads and Road Activity in the Russian Federation and on Amending Certain Legislative Acts of the Russian Federation, Legislation Bulletin of the Russian Federation, 2007, No. 46, Art. 5553].

In addition, the Russian Law on the PPP in Article 6(1) mentions forms of a PPP. They can be determined by an authorized State agency by making a decision whether to implement a PPP project. However, it is insufficient to say that a new type of an agreement is permitted to be used. Such a provision might be interpreted to belong to types of agreements on the PPP, rather than types of PPP. In this regard, an agreement on a PPP may include a set of imperative and other elements which define its specific features. The list of such elements is stipulated in Article 6(2)–(3) of the Russian Law on the PPP:

> 2. The obligatory elements of the agreement are:
>
> (1) Construction and/or reconstruction of the object of the agreement by the private partner;
>
> (2) Implementation by the private partner of full or partial financing of the creation of the object of the agreement;
>
> (3) Implementation by the private partner of the operation and/or maintenance of the object of the agreement;
>
> (4) Private partner's ownership of the object of the agreement, subject to encumbrance of the object of the agreement in accordance with this Federal Law.
>
> 3. The following elements may be included in the agreement for determining the form of State/private partnership or municipal/private partnership:
>
> (1) Designing by the private partner of the object of the agreement;
>
> (2) Implementation by the private partner of a full or partial financing of the operation and/or maintenance of the object of the agreement;
>
> (3) Maintenance by the public partner of a partial financing of the establishment of the object of the agreement by the private partner, as well as financing its operation and/or maintenance;
>
> (4) Private partner has the obligation to transfer the object of the agreement on State/private partnership, the object of the agreement on municipal-private partnership to the ownership of the public partner upon the expiry of the deadline specified by the agreement, but no later than the day of termination of the agreement;
>
> (5) Maintenance by the public partner of the operation of the objects of the agreement when the private partner performs only maintenance of the object of the agreement.

5.2. Legal Forms of PPP in Kazakhstan and Kyrgyzstan

A different approach to forms of PPP is employed in Kazakhstan and Kyrgyzstan. It is wider and provides for numerous legal forms of PPP. In accordance with Article 6 of the Kyrgyzstan Law on the PPP:

The participation of the private partner in PPP projects can be in various forms, depending on the type of infrastructure facility or infrastructure services, their industry affiliation, the purpose of the PPP project and the arrangements of the parties to the agreement on PPP. Instructions for the use of forms of participation of the private partner in PPP projects (or PPP models) are developed and approved by an authorized State agency.

The Kazakhstan Law on the PPP in Article 7 goes further and stipulates two main ways of PPP. They are institutional and contractual:

2. An institutional PPP is implemented by a PPP company in accordance with a contract on PPP.

3. In other cases, the PPP is carried out by the method of contractual PPP.

The contractual PPP is effectuated through the conclusion of a contract on PPP, including the following types:

(1) Concessions;

(2) Trust management of State property;

(3) Property hiring (rental) of State property;

(4) Leasing;

(5) Contracts concluded for the development of technology, prototype production, pilot-industrial testing, and small-scale production;

(6) Life cycle contract;

(7) Service contract;

(8) Other contracts that correspond to the features of PPP.

In the implementation of certain types of contractual PPP in the part not regulated by the present Law, the provisions of the relevant laws of the Republic of Kazakhstan, including the features provided by the Law of the Republic of Kazakhstan "On Concessions," are applied.

5.3. Comparative Analysis

In general it is necessary to note that the broad concept of PPP, which underlies the legislation of Kazakhstan and Kyrgyzstan, is widely shared in theory (in Russia[25] and abroad)[26]

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[25] *See* Публично-частное партнерство в России и зарубежных странах: правовые аспекты [*Public-Private Partnership in Russia and Foreign Countries: Legal Aspects*] (V.F. Popondopulo & N.A. Sheveleva (eds.), Moscow: Infotropik Media, 2015); *Ламазов Э.З.* Правовые формы государственно-частного и муниципально-частного партнерства в Российской Федерации // Юридическая наука и практика. 2016. № 12(4). С. 72–77 [Eldar Z. Lamazov, *Legal Forms of State-Private and Municipal-Private Partnership in the Russian Federation*, 12(4) Juridical Science and Practice 72 (2016)].

[26] *See* Mark Freedland, *Public Law and Private Finance: Placing the Private Finance Initiative in a Public Law Frame*, 2 Public Law 288, 290–291 (1998); Richard Rawlings & Carol Harlow, *Law and Administration* 413 (3rd ed., Cambridge: Cambridge University Press, 2009); Chris Skelcher, *Public-Private Partnerships and Hybridity* in *The Oxford Handbook of Public Management* 347, 351–359 (E. Ferlie et al. (eds.), Oxford: Oxford University Press, 2007).

and in practice.[27] For example, the Model Law on the PPP in Article 6(1) explicitly provides:

> A PPP project can be implemented by the public and private partners through the conclusion and performance of an agreement on PPP, participation in a PPP company, as well as in any other forms in accordance with the legislation of the State and an international treaty.

The UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects (2003)[28] also lists, first, a concession contract as an agreement between the contracting authority and the concessionaire, which specifies the conditions for the implementation of an infrastructure project.

Moreover, even in Russia before the adoption of the Russian Law on the PPP there were many regional and municipal legal acts on the PPP which provided for various forms of PPP. For example, according to Article 6 of the Law of the Republic of Altai of 5 March 2008 No. 15-RZ "On the Basics of State/Private Partnership in the Republic of Altai,"[29] the PPP in the Republic of Altai could have the following forms:

> (1) Equity participation in the authorized capital of juridical persons by providing them with budgetary investments;
> (2) Joint participation in the implementation of investment projects, including those having regional status;
> (3) Providing property owned by the Republic of Altai in trust management, leasing, including on concessional terms;
> (4) Operation of special economic zones;
> (5) Participation in concession agreements;
> (6) Other forms provided by federal legislation.

This broad concept of PPP is laid down in some present regional laws on the PPP adopted after the Russian Law on the PPP entered into force. For example, Article 3 of the Law of Sverdlovsk Oblast of 21 December 2015 No. 157-OZ "On the Participation

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[27] Guidebook on Promoting Good Governance in Public-Private Partnerships, *supra* note 6.

[28] Типовые законодательные положения ЮНСИТРАЛ по проектам в области инфраструктуры, финансируемым из частных источников 2003 г. [UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects (2003)] (May 21, 2019), available at http://www.uncitral.org/pdf/russian/texts/procurem/pfip/model/03-90623_Ebook.pdf.

[29] Закон Республики Алтай от 5 марта 2008 г. № 15-РЗ «Об основах государственно-частного партнерства в Республике Алтай» // СПС «КонсультантПлюс» [Law of the Republic of Altai No. 15-RZ of 5 March 2008. On the Basics of State-Private Partnership in the Republic of Altai, SPS "ConsultantPlus"] (abolished).

of Sverdlovsk Oblast in State/Private Partnership"[30] stipulates two forms of PPP: an agreement on PPP and a concession agreement.

It is surprising that the Russian and Belarus legislators moved away from established practice and employed a new, unjustifiably narrow approach to understanding the PPP, which allows only one contractual form to be used – an agreement on the PPP, thereby isolating such a contract from other investment agreements with the participation of the State, which are, nevertheless, stipulated in Russian legislation (concession agreements, production sharing contracts, service contracts, agreements on performance activity in a special economic zone, agreements on the development of a built-up territory, and others).[31]

In sum, it is important to conclude that the forms of the PPP can be diverse. From this point of view, the PPP should be regarded as a general category combining different types of contracts between public and private partners for the implementation of infrastructure projects.

6. Subject-Matter and Other Essential Terms of Agreement on PPP

According to Article 432(1) of the Civil Code of the Russian Federation:

> 1. A contract shall be considered to be concluded when agreement regarding all the material conditions of the contract has been reached in the form required in appropriate instances.
>
> Conditions concerning the subject-matter of the contract, conditions which are named in a law or other legal acts as material or necessary for contracts of the particular type, and also all those conditions relative to which agreement must be reached according to the statement of one of the parties, shall be material.

As it is seen, the subject-matter of the contract is an essential term for any contract. It always allows distinguishing contracts from one another. The definition of such conditions for an agreement on PPP can be found only in Article 24(2) of the Belarus Law on the PPP:

> The subject-matter of an agreement on a PPP is the effectuation of infrastructure for design, construction and/or reconstruction, restoration, repair, modernization, as well as maintenance and/or operation.

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[30] Закон Свердловской области от 21 декабря 2015 г. № 157-ОЗ «Об участии Свердловской области в государственно-частном партнерстве» // СПС «КонсультантПлюс» [Law of Sverdlovsk Oblast No. 157-OZ of 21 December 2015. On Participation of Sverdlovsk Oblast in State-Private Partnership, SPS "ConsultantPlus"].

[31] *See* in more details in Valeriy Lisitsa, *The Concept of Investment Contract in Russian Law*, 2 Russian Law: Theory & Practice 72 (2011).

The Russian Law on the PPP does not contain a special article on the subject-matter of a PPP agreement, but this can be elicited after analyzing Article 12(1) describing the conditions of given agreement in its definition:

> Under the agreement, the private partner undertakes to create fully or partially from its own or borrowed funds the object of the agreement, that is, immoveable and movable property, technologically related to each other (except for the object provided for in point 19 of Article 7(1) of the present Federal Law) and intended for the activity provided for by the agreement, to carry out the operation and/or maintenance of such property, and the public partner shall provide the private partner with the right to possess and use the property to carry out the activity specified in the agreement and ensure the emergence of the private partner's property right to the object of the agreement, subject to the requirements provided for in the present Federal Law and the agreement.

In this definition one inaccuracy may be found. It is related to mixing two objects:

– The object of the PPP, which is to be created or reconstructed, but in any case is always a new object;

– The object located in State (or municipal) ownership, which is subject to transfer to the private partner for the implementation of the activity specified in the agreement on the PPP.

As follows from the definition, the subject-matter of an agreement on PPP is deemed to be the creation of the object of PPP by the private partner, the implementation of its operation and/or maintenance, as well as the transfer of the public partner's right of ownership and use of State or municipal property to the private partner, and the emergence of the private partner's property right to the object of the PPP. Under the agreement, the parties can undertake to fulfill other obligations that arise from elements of the agreement on the PPP defining a particular form of a State/private partnership or municipal/private partnership. Such elements are envisaged in Article 6(2) of the Russian Law on the PPP:

> Obligatory elements of the agreement are:
>
> (1) Construction and/or reconstruction of the object of agreement by the private partner;
>
> (2) Implementation by the private partner of full or partial financing of the object of the agreement;
>
> (3) Operation and/or maintenance of the facility by the private partner;
>
> (4) Emergence of the private partner's ownership of the object of the agreement, subject to encumbrance of the object of the agreement in accordance with the present Federal Law.

The list of essential conditions of agreements on the PPP includes not only the subject-matter of the agreement, but also others, given the complicated character of PPP projects. It is stipulated in Article 12(2) of the Russian Law on the PPP:

> The agreement shall include the following essential conditions:
>
> (1) Elements of the agreement on State/private partnership, the agreement on municipal/private partnership, defining the form of the State/private partnership or municipal/private partnership, as well as the obligations of the parties to the agreement arising from these elements;
>
> (2) Indicators of efficiency criteria of the project on the PPP and the values of its comparative advantage, on the basis of which a positive conclusion of the authorized State agency was obtained, as well as the obligations of the parties to implement the agreement in accordance with these values;
>
> (3) Information about the object of the agreement, including its technical and economic indicators;
>
> (4) The obligation of the public partner to ensure the provision to the private partner of the land plot intended for the implementation of the activity provided for in the agreement, the duration of the lease agreement for such a land plot in accordance with Article 33(2) of the present Federal Law, and the amount of the rent for such a land plot or the procedure for its determination;
>
> (5) Duration and/or procedure for determining the period of existence of the agreement;
>
> (6) Conditions and procedure for acquisition of the right of private ownership to the object of the agreement;
>
> (7) Duty of the parties to the agreement to ensure the performance of measures for the implementation of the agreement on the PPP, including the fulfillment of obligations arising from the elements of the agreement, in accordance with the schedules of each event in the stipulated time frame, as well as the procedure for the implementation of such measures;
>
> (8) Procedure and conditions of reimbursement of expenses of the parties to the agreement, including in case of its early termination;
>
> (9) Methods of ensuring the fulfillment of obligations by a private partner under the agreement (providing a bank guarantee, transfer of the private partner's rights arising from a contract on a bank account to the public partner as a pledge, insurance of the risk of liability of the private partner for breach of obligations under the agreement), the amount of financial security provided and the period for which it is provided;
>
> (10) Obligations of the parties in connection with the early termination of the agreement, the obligations of the parties in connection with the replacement of the private partner, including the obligation of the private partner to transfer the object of the agreement to the public partner in cases provided for by this Federal Law and the agreement;

(11) Responsibility of the parties to the agreement in case of non-performance or improper performance of obligations under the agreement;

(12) Other essential terms provided for by federal laws.

Special attention needs to be drawn to the significant list of essential conditions. After analyzing them carefully, not all may be deemed to be essential in the traditional understanding, for example, such conditions, in respect of which the consent of the parties must be reached; otherwise, the contract shall be considered not concluded (Art. 432(1) of the Civil Code of the Russian Federation). In particular, it is concerned with the procedure for the emergence of private ownership rights to the object of the agreement, the obligations of the parties in connection with the early termination of the agreement, and the replacement of the private partner, the responsibility of the parties to the agreement in case of failure or improper performance of obligations under the agreement. All can be determined by the general rules of current legislation, including other provisions of the Russian Law on the PPP, and thus be regarded as implied terms.

The same should be said in relation to Article 46(1) of the Kazakhstan Law on the PPP. It contains twenty-eight imperative conditions of the agreement on the PPP. However, many can hardly be regarded as essential, for example:

– Information on authorized persons representing the interests of the parties to the agreement on the PPP;

– Rights and obligations of persons involved in the execution of the agreement on the PPP;

– Requirements for environmental protection and safety of work;

– Responsibility of the parties to the agreement on the PPP;

– Grounds for change and termination of the agreement on the PPP;

– Procedure for reimbursement of expenses of the parties in case of early termination of the agreement on the PPP;

– Procedure for settlement of disputes under the agreement on the PPP;

– Criteria for the evaluation of the implementation of the obligations of the parties of the agreement on the PPP, the payment of a penalty in cases of default or improper performance;

– Exceptional cases of unilateral refusal to perform the agreement on the PPP;

– Procedure and conditions for compensation of losses in case of early termination of the agreement on the PPP;

– Procedure for monitoring the performance of the agreement on PPP;

– The location (legal address) and bank information details of the parties to the agreement on the PPP, and others.

To some extent, a more balanced approach to understanding the essential terms of a contract with their narrower interpretation can be found in judicial practice

of arbitrazh courts of the Russian Federation in cases arising, for example, from the conclusion and performance of concession agreements. The Federal Law "On Concession Agreements" (Art. 10(1)), as well as the Russian Law on the PPP, stipulate an unreasonably extensive list of conditions called essential. However, some cannot be so qualified from the standpoint of civil law. In particular, the purpose of the use (or operation) of the object of a concession agreement may be evident from other circumstances (for example, the nature of the object of the agreement, the obligations of the parties to carry out activity related to the use of the object, and others).

For example, in *Committee on Property Management and Land Use of Ulan-Ude v. Sibenergostroy LLC*[32] three instances of arbitrazh courts of the Russian Federation, including the Federal Arbitrazh Court of the Eastern Siberian District, pointed to the need to take into account all the facts of the case, noting that the essential term for the purpose of use (operation) of the object of the agreement – garages after the completion of their construction – was indeed agreed as the parking of vehicles, although this was not clearly written in the agreement.

Thus, the list of essential conditions in Article 12(2) of the Russian Law on the PPP and Article 46(1) of the Kazakhstan Law on the PPP needs to be reduced in accordance with civil law doctrine and practice, as well as written more clearly without internal contradictions, that corresponds to recommendations made by international organizations not to set unnecessary restrictions for public and private partners in the preparation and implementation of PPP projects.[33] Essential are only those conditions which can influence the fact of the conclusion of the contract and cannot be filled otherwise by the parties:

– The subject-matter of the contract, which defines the actions (activity) of the private and public partners;

– The object of the PPP;

– The objects of State (or municipal) property to be transferred by the public partner to the private partner;

– The name (or content) of the works provided for in the agreement, the scope and conditions of their performance;

– The volume, conditions, and conditions of financing the PPP project;

– Duration of the agreement;

– Other conditions provided by legislation and the agreement of the parties.

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[32] Постановление Федерального арбитражного суда Восточно-Сибирского округа от 21 ноября 2011 г. № А10-444/2011 // СПС «КонсультантПлюс» [Resolution of the Federal Arbitration Court of the Eastern Siberian District of 21 November 2011 No. A10-444/2011, SPS "ConsultantPlus"].

[33] Guidebook on Promoting Good Governance in Public-Private Partnerships, *supra* note 6.

7. Legal Nature of Agreement on PPP

7.1. Civil Law Approach

As follows from the legal definition of the agreement on the PPP contained in Article 1(3) of the Russian Law on the PPP, this agreement is a civil law agreement under Russian legislation. The object of a PPP is any property, usually to be constructed by a private partner with the use of their funds. Admittedly, this substantial feature of the agreement refers to the scope of civil law as law governing property relations based on the legal equality of the parties. This approach is mostly shared in jurisprudence.[34]

Judicial practice of arbitrazh courts of the Russian Federation usually confirms the civil law concept of various agreements between public and private partners for the implementation of investment projects.[35] The opposite can hardly imagined, bearing in mind the legislative provisions of Article 3(2) of the Federal Law "On Concession Agreements," which actually refers to the civil legislation:

> The concession agreement is a contract that contains elements of various contracts provided for by federal laws. The relations of the parties to the concession agreement shall be applied in the relevant parts by the rules of civil legislation on contracts, the elements of which are contained in the concession agreement, unless otherwise provided by the present Federal Law or the substance of the concession agreement.

Furthermore, the Russian Law on the PPP states in Article 3(3) that an agreement on a PPP is "a civil law contract." Yet, the difficulty exists in the issue of correlation of the agreement on the PPP with other civil law contracts. It is of interest to compare the agreement in question with such an investment contract with the participation of the State as a concession agreement. According to Article 3(1) of the Federal Law "On Concession Agreements":

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[34] *See Доронина Н.Г.* К вопросу о правовой природе концессионных соглашений // Право и экономика. 1997. № 1. С. 47–53 [Natalia G. Doronina, *To the Issue of Legal Nature of Concession Agreements*, 1 Law & Economics 47 (1997)]; *Сулейменов М.К.* Правовое регулирование иностранных инвестиций и недропользования в Казахстане [Maidan K. Suleimenov, *Legal Regulation of Foreign Investments and Subsoil Use in Kazakhstan*] 297–301 (Almaty, 2006); *Самоловов Д.А.* Соглашение о государственно-частном партнерстве как гражданско-правовой договор // Имущественные отношения в Российской Федерации. 2015. № 8(167). С. 21–30 [Dmitry A. Samolovov, *Agreement on Public-Private Partnership as Civil Law Contract*, 8(167) Property Relations in the Russian Federation 21 (2015)].

[35] *See* Постановление Президиума Высшего Арбитражного Суда Российской Федерации от 6 сентября 2011 г. № 4784/11 // СПС «КонсультантПлюс» [Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation of 6 September 2011 No. 4784/11, SPS "ConsultantPlus"]; Постановление Президиума Высшего Арбитражного Суда Российской Федерации от 24 января 2012 г. № ВАС-11450/11 // СПС «КонсультантПлюс» [Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation of 24 January 2012 No. VAS-11450/11, SPS "ConsultantPlus"].

> Under the concession agreement one party (the concessionaire) undertakes at their own expense to create and/or reconstruct the property determined by this agreement (object of the concession agreement), the ownership right to which belongs or will belong to the other party (concessionaire), to carry out activity of the use (operation) of the object of the concession agreement, and the grantor undertakes to grant to the concessionaire for the duration established by this agreement the rights to possess and use the object of the concession agreement for the implementation of this activity.

After comparing the subject-matter of the agreements concerned, it can be concluded that they are akin. Both provide for the effectuation of investment activity: one party (investor) undertakes within the prescribed period on their own and at their expense to create construction or reconstruction of the object of the agreement (property), and the other party (public law entity) – to provide the investor with property which is in State or municipal ownership and necessary for the implementation of the investment activity. In the concession agreement its object shall peculiarly belong to the concedent, that is, the State. In the agreement on the PPP the object, on the contrary, is usually to be transferred to the ownership of the private partner. However, in accordance with Article 6(3) and (4) of the Russian Law on the PPP, the agreement on PPP may stipulate otherwise, and that indeed erases the differences between such contracts. That is why in doctrinal literature they are often considered as a variety of the others.[36]

7.2. Public Law Approach

Because one party to the PPP agreement is a public law formation with special legal capacity determined mainly by public law and is obliged to provide the private partner with State or municipal property, including budgetary funds, the legal regulation of contractual relations between the public and private partners is first based on rules of public law. The administrative law nature of the agreements with the State is recognized in legal literature.[37]

The implementation of the State's right to dispose of State or municipal property, the State or municipal support of investment activity, and the financing of capital construction with budgetary funds always imply the exercise of executive power

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[36] *See* Отдельные виды обязательств в международном частном праве [*Certain Types of Obligations in International Private Law*] 114 (V.P. Zvekov (ed.), Moscow: Statut, 2008).

[37] *See Бахрах Д.Н.* Административное право [Demian N. Bakhrakh, *Administrative Law*] 174 (Moscow: BEK, 1996); *Васильев Е.В.* Административно-правовая природа соглашений о разделе продукции в нефтегазовом комплексе России // Вопросы российского и международного права. 2016. № 10А. С. 190–201 [Evgeny V. Vasiliev, *Administrative Law Nature of Production Sharing Agreements in Oil & Gas Sector of Russia*, 10A Issues of Russian and International Law 190 (2016)]; *Шорохов С.В.* Концессионное соглашение как форма публичного управления (сравнительно-правовое исследование): Автореф. дис. … канд. юрид. наук [Sergey V. Shorokhov, *Concession Agreement as Form of Public Governance (Comparative Legal Research): Synopsis of a Thesis for a Candidate Degree in Law Sciences*] (Moscow, 2009).

by State agencies of different levels in accordance with the requirements and restrictions contained in public law. They are provided in the Budget Code of the Russian Federation;[38] Federal Law of 6 October 1999 No. 184-FZ "On General Principles of Organization of Legislative (Representative) and State Agencies of the Subjects of the Russian Federation";[39] Federal Law of 6 October 2003 No. 131-FZ "On General Principles of Organization of Local Self-Government in the Russian Federation";[40] and by other federal, regional, and municipal laws.

Examples of public law obligations in the PPP agreements can be found in the Russian Law on the PPP:

– Financing of the creation of the object of the agreement, its operation and/or maintenance at the expense of the budgets of the budgetary system of the Russian Federation, which shall be carried out exclusively with the use of subsidies from the budgets of the budgetary system of the Russian Federation in accordance with the budget legislation of the Russian Federation (Arts. 6(5), 10(4) and (5), 12(5));

– Obligation of the public partner to ensure the consideration and approval of the project on planning area and the project on surveying the territory (Art. 12(11));

– Change of essential conditions of the agreement which leads to change of the revenue or expenses of budgets of the budgetary system of the Russian Federation, in accordance with the budget legislation. This can be done only in cases when an appropriate law on a relevant budget for the corresponding financial year and planning period is changed (Art. 13(6));

– Obligation of the public partner to provide for assistance to the private partner in obtaining necessary permits or approvals of federal, regional, or municipal executive authorities which are required for achievement of the purposes of the PPP agreement (Art. 15(10)), and so on.

Similar arguments appear in judicial practice. In *Market JSC v. Administration of Sochi*,[41] in accordance with the investment agreement signed by the parties, the

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[38] Бюджетный кодекс Российской Федерации от 31 июля 1998 г. № 145-ФЗ // Собрание законодательства РФ. 1998. № 31. Ст. 3823 [Budgetary Code of the Russian Federation No. 145-FZ of 31 July 1998, Legislation Bulletin of the Russian Federation, 1998, No. 31, Art. 3823].

[39] Федеральный закон от 6 октября 1999 г. № 184-ФЗ «Об общих принципах организации законодательных (представительных) и исполнительных органов государственной власти субъектов Российской Федерации» // Собрание законодательства РФ. 1999. № 42. Ст. 5005 [Federal Law No. 184-FZ of 6 October 1999. On General Principles of Organization of Legislative (Representative) and State Agencies of the Subjects of the Russian Federation, Legislation Bulletin of the Russian Federation, 1999, No. 42, Art. 5005].

[40] Федеральный закон от 6 октября 2003 г. № 131-ФЗ «Об общих принципах организации местного самоуправления в Российской Федерации» // Собрание законодательства РФ. 2003. № 40. Ст. 3822 [Federal Law No. 131-FZ of 6 October 2003. On General Principles of Organization of Local Self-Government in the Russian Federation, Legislation Bulletin of the Russian Federation, 2003, No. 40, Art. 3822].

[41] Постановление Президиума Высшего Арбитражного Суда Российской Федерации от 5 февраля 2013 г. № 12444/12 // СПС «КонсультантПлюс» [Resolution of the Presidium of the Supreme Arbitrazh Court of the Russian Federation of 5 February 2013 No. 12444/12, SPS "ConsultantPlus"].

investor was obliged to carry out the reconstruction of the trade and market complex "Central" at the expense of own and/or raised funds on three land plots leased to the investor. The parties agreed on the condition of the investor's participation in the development of social, engineering, and transport infrastructure of Sochi City by transferring about 10 million rubles to the budget of the municipality. In turn, the city administration was to provide for assistance to the investor within the framework of the current legislation in the implementation of the investment project on issues within its competence, including the preparation and adoption of the necessary administrative documents for the reconstruction, as well as to make the act on the results of the investment project in case of providing the necessary documents by the investor.

Initially, the arbitrazh courts of three instances of the Russian Federation assumed that the disputed agreement was not an investment agreement, and the Administration of Sochi itself could not be a participant of investment activity in the sense that is laid down in the Federal Law of 25 February 1999 No. 39-FZ "On Investment Activity in the Russian Federation Effectuated in the Form of Capital Investments." At the same time, by virtue of Article 421 of the Civil Code of the Russian Federation, the parties had the right to conclude that civil contract, but did not agree its subject-matter.

The Presidium of the Supreme Arbitrazh Court of the Russian Federation disagreed with such conclusions. It held that the disputed contract did not mostly give rise to civil obligations of the municipality to Market JSC. The obligations defined in the investment agreement were public-law in their nature, directly related to the performance of public powers of executive State agencies. Therefore, an agreement in which a public-law formation has obligations to fulfill and follow the requirements of public legislation cannot be qualified as a civil law transaction. Nonetheless, it was argued that the conclusion of investment contracts with the inclusion of those conditions does not contradict civil legislation and is not a ground for deeming such contracts to be invalid or not concluded under the Civil Code of the Russian Federation. It was also noted that the disputed agreement contained civil obligations, for example, obligations to transfer funds to the budget of the municipality in the amount and within the periods established by this agreement.

In summary, it would be wise to conclude that a PPP agreement cannot not be regarded as a civil law contract to the full extent. It has private and public law elements, which empower the agreement with a new quality and make it autonomous or special within the system of contracts.

Conclusion

At present, the EAEU countries, with the exception of Armenia, have mainly formed the legislation on the PPP through the adoption of special legislative acts.

Although such laws have a common scope of regulation, they contain provisions which distinguish the legal regulation of investment activity on the terms of a PPP in those countries and do not take into account a number of conceptual ideas laid down in the Model Law on the PPP and other recommendatory instruments drafted on the international level. As a result, they need to be improved and harmonized with each other.

This concerns the nature of the PPP and its legal forms, the parties and object of the agreement on PPP, the legal regulation of which is often characterized by excessive imperativeness to the detriment of the interests of private and public partners. Contractual forms of cooperation between a private investor and public law formation can be diverse and should be expanded in the legislation on the PPP in Russia and Belarus.

It is advisable to combine the special laws on the PPP and other investment contracts concluded with the State. Such new legislative provisions should develop the freedom of contract to a greater extent for the private and public partners to specify the conditions of their cooperation and to conclude different types of PPP agreement.

The legal qualification of a PPP agreement and other investment contracts with the participation of the State stipulated in legislation should be examined. Such agreements contain not only private, but also public law elements and be governed in a special law containing rules of civil and public law on the basis of a balance of private and public interests in a PPP.

In addition, the essential conditions of the agreement on the PPP, as they are worded in laws on PPP, are not sufficiently clear. The list is unreasonably extensive and restrictive and significantly narrows the freedom of contract. This can hardly foster harmonizing the interests of public and private partners in the development of variety of investment projects.

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