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# THE PUBLIC-PRIVATE PARTNERSHIP LAW REVIEW

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SECOND EDITION

EDITORS

BRUNO WERNECK AND MÁRIO SAADI

LAW BUSINESS RESEARCH

# THE PUBLIC-PRIVATE PARTNERSHIP LAW REVIEW

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Second Edition

Editors

BRUNO WERNECK AND MÁRIO SAADI

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# EDITOR'S PREFACE

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We are very pleased to present the second edition of *The Public-Private Partnership Law Review*. Notwithstanding the existence of articles in various law reviews on topics involving public-private partnerships (PPPs) and private finance initiatives (in areas such as projects and construction, real estate, mergers, transfers of concessionaires' corporate control, special purpose vehicles and government procurement, to name a few), we identified the need for a deeper understanding of the specifics of this topic in different countries. The first edition of the book was an initial effort to fulfil this need.

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

This is the case for countries such as the United Kingdom, the United States and Canada. PPPs have been used in the United States across a wide range of sectors in various forms for more than 30 years. From 1986–2012, approximately 700 PPP projects reached financial closure. The UK is widely known as one of the pioneers of PPP model; Margaret Thatcher's governments in the 1980s embarked on an extensive privatisation programme of publicly owned utilities, including telecoms, gas, electricity, water and waste, airports and railways. The Private Finance Initiative was launched in the UK in 1992 aiming to boost design–build–finance–operate projects. Canada has developed a sustained and robust market for the development of public infrastructure using the PPP model. Since the 1990s PPP procurement has significantly expanded to the extent that PPP projects are now procured in the federal, provincial and municipal levels of government across that country.

On the other hand, in developing countries with similarities with Brazil, PPP laws are more recent. Argentina was the first country in Latin America to enact a PPP Law (Decree No. 1299/2000, ratified by Law No. 25,414/2000). The PPP Law was designed to promote private investment in public infrastructure projects that could not be afforded exclusively by the state, especially in the areas of health, education,

justice, transportation, construction of airport facilities, highways and investments in local safety. In Mozambique, Law No. 15/2011 and Decree No. 16/2012 stipulated the Public-Private Partnerships (PPP) Law and other related PPP regulations, which establishes procedures for contracting, implementing and monitoring PPP projects. In Paraguay, a regulation establishing the PPP regime has recently been enacted (Law No. 5102) to promote public infrastructure and the expansion and improvement of goods and services provided by the state; this law has been in force since late 2013.

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

With respect to Brazil, the experience evidenced abroad may lead to the strengthening of this model in the country. In this preface, we call your attention to one specific feature of the PPP law in Brazil – state guarantees. This feature permits payment obligations undertaken by the public party in PPP agreements be guaranteed by, among other mechanisms authorised by law: (1) a pledge of revenues; (2) creation or use of special funds; (3) purchase of guarantee from insurance companies that are not under public control; (4) guarantees granted by international organisations or financial institutions not controlled by any government authority; or (5) guarantees by guarantor funds or a state-owned company created especially for that purpose.

The state guarantee pursuant to PPP agreements is, without question, an important innovation in administrative agreements in Brazil; it assures payment obligations by the public partner and serves as a guarantee in the event of lawsuits and claims against the government. This tool is one of the main factors distinguishing the legal regimen of PPP agreements from ordinary administrative agreements or concessions, and is viewed as crucial for the success of PPPs, especially from the private investors' standpoint.

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

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

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

In the first edition, our contributors were drawn from the most renowned firms working in the PPP field in their jurisdictions, including Argentina (M&M Bomchil), Australia (Allens), Belgium (Liedekerke), Canada (Fasken Martineau), China (Jun He Law Offices), France (White & Case), Ireland (Maples and Calder), Japan (Mori Hamada & Matsumoto), Mozambique (TPLA), Paraguay (Parquet & Asociados), Philippines (SyCip Salazar Hernandez & Gatmaitan), Turkey (Paksoy), the United Kingdom (Herbert Smith Freehills) and the United States (Kilpatrick Townsend &

Stockton LLP). We would like to thank all of them and our new contributors for their support in producing *The Public-Private Partnership Law Review* and in helping in the collective construction of a broad study on the main aspects of PPP projects.

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

We hope you enjoy this second edition of *The Public-Private Partnership Law Review* and we sincerely hope that this book will consolidate a comprehensive international guide to the anatomy of PPPs.

We also look forward to hearing your thoughts on this edition and particularly your comments and suggestions for improving future editions of this work.

**Bruno Werneck and Mário Saadi**

Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados

São Paulo

March 2016

## Chapter 12

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# KAZAKHSTAN

*Shaimerden Chikanayev*<sup>1</sup>

### I OVERVIEW

Since 1991, Kazakhstan, Central Asia's largest economy and oil producer, has had to rely on the deteriorating infrastructure it inherited from the Soviet Union. As a result, nearly every piece of public infrastructure (e.g., roads, hospitals, power plants, kindergartens, sewerages) in Kazakhstan requires a different degree of upgrading or expansion. Kazakhstan authorities have come to recognise that they cannot finance the necessary investments in public infrastructure from current budgets and that a major part of future financing must flow from the private sector. The need for the inflow of capital is becoming even more pressing because of sharp decline of the Kazakhstani commodity revenue. As a result, the authorities in Kazakhstan are trying to offer some fiscal incentives and optimise the legal framework to encourage private investment in public assets, including by way of PPPs.

Although Kazakhstan developed some experience of PPP-based projects during the 1990s, it became obvious that the successful implementation of such projects would not be effective without a more comprehensive statutory legislative package on concessions and PPP procurement. The first law, On concessions in the Republic of Kazakhstan, was adopted on 23 December 1991 and aimed to regulate administrative, economic and legal environment concession agreements in Kazakhstan only for foreign investors. The frameworks have been proofed and applied in at least four infrastructure projects with the Development Bank of Kazakhstan and three concession projects supported by the government of the Republic of Kazakhstan. This first concession law was already deemed invalid by April 1993. Despite the absence of any specific law on concessions in the period of 1993–2006, several concession projects occurred during

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1 Shaimerden Chikanayev is a partner at GRATA Law Firm.

that time relying on general provisions of the Civil Code of Kazakhstan, namely: (i) 6 July 2005 – execution of the concession agreement on construction and operation of the railway ‘Shar–Ust-Kamenogorsk Station’ and (ii) 28 December 2005 – execution of the concession agreement on construction and operation of the inter-regional power line ‘North Kazakhstan – Aktobe Region’.

On 7 July 2006 the Law of the Republic of Kazakhstan On Concessions No.167-III 3PK (the Concession Law) was adopted, which enabled in 2007 execution of the now specifically recognised by Kazakh law concession agreements on the Passenger Terminal of International Airport in Aktau City, the Yeraliyevo-Kuryk railway line, Electrification of the Makat-Kandyagash railway line and in 2008 execution of the concession agreements on Gas Turbine Plant in Kandyagash City of Aktobe Oblast and Railway Line Korgas-Zhetygen.

To the best of our knowledge, as of the beginning of 2016, therefore, there are six concessional projects that are currently being implemented in Kazakhstan. Three concession facilities are already functioning: (1) North Kazakhstan–Aktobe region power line; (2) Shar–Ust-Kamenogorsk railway; and (3) the passenger terminal of the airport in Aktau. However most if not all of them did less well than expected. This was partly caused by bad structuring of these concession projects and there is apparent lack of proper balance of the risk sharing between an investor and the state. The railway, for example, has seen lower than expected freight volumes, and several of the enterprises expected to use the power line were out of action or operating below full capacity.

The lack of popularity of concessions<sup>2</sup> so far, however, is also due to excessive regulation of concession relationships by the relevant legislation, which diminishes the parties’ flexibility in determining project terms and because the process for granting concessions in Kazakhstan is very bureaucratic and time consuming.<sup>3</sup>

In order to address this issue, on 31 October 2015 the Republic of Kazakhstan enacted a new law, On Public-Private Partnerships No. 379-V 3PK (the PPP Law). Public-private partnerships can now be structured not only as concessions and can be used to implement projects under the PPP Law framework in any sector of the economy, though declared priorities are education, healthcare, transport, power industry and housing and public utilities.

## **II THE YEAR IN REVIEW**

The year 2015 became extremely fruitful in terms of making changes in PPP legislation as the PPP Law and all necessary by-laws have been adopted. Having now solid legal basis for the structuring of the PPP projects in place, the government of Kazakhstan officially confirmed that each region in Kazakhstan would have to meet a target of realisation of

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2 As the only available form of PPPs in Kazakhstan before the PPP Law (as defined below) has been enacted in the end of 2015.

3 In practice it takes more than a year.



at least five PPP projects per year. It also plans to develop by the end of March 2016 a road map for implementation of the PPPs in all sectors and regions of Kazakhstan with the specific target indicators.<sup>4</sup>

Even though the PPP Law took legal effect just at the end of 2015, according to publicly available information,<sup>5</sup> there are already around 102 PPP projects at different stages of implementation in Kazakhstan as of February 2016, and eight of them are of a national importance. The biggest of these projects are construction of a 1,500-bed correctional facility in Shymkent city (construction of 300-bed hospitals in Ust-Kamenogorsk city and Aktau city, construction of a children's hospital in Semey city and construction of an innovative cluster in Almaty city on the ground of the Al-Farabi Kazakh National University.

Still the biggest and most expected PPP project in 2016 in Kazakhstan is, however, a concession project. The Ministry for Investments and Development of Kazakhstan kicked off a tender under the Concession Law framework for the concession of a toll road in Almaty, the country's business centre and former capital, at the beginning of 2015. To the best of our knowledge, as of the beginning of February 2016, tender evaluation of the five shortlisted consortia is going on and, if successful, the Big Almaty Ring Motor Road, also known as BAKAD, will provide the government with some room to develop an ambitious PPP project pipeline largely focused on infrastructure developments amid challenging economic circumstances. The BAKAD 20-year, build-transfer-operate (BTO) PPP offers an enticing risk/reward combination. To the best of our knowledge, the government of Kazakhstan agreed to assume all the traffic risk. Toll revenues will be collected by the concessionary and transferred to the government straight away. In turn, the government will pay a front-loaded availability payment to cover the capex, plus interest within the first 10 years of operation to mimic the debt repayment schedule. At the same time, opex, replacement capital expenditure (Repex), taxes, cost of capital and other costs will be covered throughout the whole operation period. The government will also mitigate currency fluctuation risks and compensate for any devaluation-depreciation of the tenge (local currency) against the US dollar above 5 per cent. If successful, the BAKAD project would pave the way for more PPPs in the transport sector.

### **III GENERAL FRAMEWORK**

#### **i Types of public-private partnership**

Kazakhstan's legal system is a civil law system similar to the systems in most other former Soviet jurisdictions. Its laws are contained in the Constitution, various codes, laws, edicts, decrees (having the force of law), regulations, instructions, orders and other normative acts of the Republic of Kazakhstan.

The current legal framework governing PPPs consists of the following key legal acts:

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4 <http://strategy2050.kz/en/news/30290/>.

5 [www.inform.kz/rus/article/2857776](http://www.inform.kz/rus/article/2857776).

- a* the Constitution of Kazakhstan;
- b* the Civil Code of Kazakhstan;
- c* the PPP Law;
- d* the Concession Law;
- e* the Commercial Code of Kazakhstan;
- f* the Law of Kazakhstan On State Property;
- g* the Tax Code of Kazakhstan;
- h* the Land Code of Kazakhstan;
- i* the Budget Code of Kazakhstan;
- j* the Law of Kazakhstan On Securities Market;
- k* the Law of Kazakhstan On Project Finance and Securitisation;
- l* the Law of Kazakhstan On Special Economic Zones; and
- m* the Law of Kazakhstan On Natural Monopolies.

In addition, there are various special by-laws and regulations with regard to PPPs, including the following key regulations:

- a* Order of the Minister of National Economy No.743 dated 30 November 2015, On approval of the rules of formation and ratification of the tariffs (prices) for regulated services of the subjects of natural monopoly that carry on their activities on the basis of public-private partnership agreement, in particular concession agreement (Order 743);
- b* Order of the acting Minister of National Economy No. 725 dated 25 November 2015, On some questions of planning and implementation of PPP projects (Order 725);
- c* Order of the Minister of National Economy No. 731 dated 26 November 2015, On approval of the methodology of determining of limits of state obligations for the PPP projects, including state concession obligations, obligations of the government of Kazakhstan and local executive bodies;
- d* Order of the acting Minister of National Economy No. 713 dated 25 November 2015, On approval of the Rules on acceptance of PPP objects in state ownership;
- e* Order of the Minister of National Economy No.724 dated 25 November 2015, On approval of the Template tender documentation of a PPP project and template PPP agreement for PPP projects in different sectors of economy;
- f* Decree of the Government of Kazakhstan No. 1056 dated 25 December 2015, On some questions of the Public-Private Partnership Center;
- g* Decree of the Government of Kazakhstan No. 1057 dated 25 December 2015, On determination of the legal entity to be responsible for the support of PPP projects of the Republican (national) level; and
- h* Edict of the President of Kazakhstan No. 172 dated 14 January 2016, On the List of objects that cannot be transferred for implementation on the basis of PPP (Edict 172).

Finally, there are certain concession-specific regulations, including, following key legal acts:

- a* Order of the Minister of National Economy No. 157 dated 22 December 2014, On some questions of planning and implementation of concession projects (Order 157);
- b* Order of the Minister of National Economy No.24 dated 23 February 2009, On approval of the methodology of determination of the value of the concession project, total amount of the state support for the concessionary and sources of cost recovery;
- c* Order of the acting Minister of National Economy No. 277 dated 27 March 2015, On approval of the template concession agreement in different sectors of economy;
- d* Decree of the Government of Kazakhstan No. 1060 dated 7 October 2014, On approval of the list of concession projects of special importance;
- e* Decree of the Government of Kazakhstan No. 109 dated 10 March 2015, On determination of the organisation for financing of concession projects; and
- f* Edict of the President of the Republic of Kazakhstan No. 294 dated 5 March 2007, Concerning the List of Facilities Not Subject to Concession' (Edict 294).

Implementation of a PPP project in Kazakhstan is possible, generally, either under the legal framework of the PPP Law, that allows to use all possible PPP structures, or the Concession Law, that provides only for one of the specific PPP structures – concession.

Below is a high-level overview of both options.

### *The concession agreement*

In Kazakhstan a relevant state authority may grant a concession to a project company by awarding a concession agreement for up to 30 years in accordance with the Concession Law.

Granting the concession by way of a licence or special enabling legislation is not permitted under Kazakh law. A concession involves mutual obligations of the parties to the concession agreement, rather than an exclusive right or authorisation issued by the authority to the project company to develop a project (as may be the case in some countries). Kazakh law classifies the concession agreement as a private law contract that combines several types of civil law agreement envisaged by the Civil Code. All concessions in Kazakhstan are one-off concessions, while routine concessions from the State or municipal authorities are not permitted. It should be noted, however, that a concessionary, that properly performed its obligations, upon expiration of the concession agreement, shall be entitled to conclude a new concession agreement without conducting a new tender, apparently, with regards to the same concession facility (see Article 23.2 of the Concession Law).

According to Article 21-1 of the Concession Law, a concession agreement can be signed in one of the following four types or as a mixture thereof:

- a* as a concession agreement that provides for the construction of a concession facility by the concessionary with a subsequent transfer of the concession facility into the state property;

- b* as a concession agreement that provides for joint activity of the concessionary and conessor on the construction (or reconstruction) and operation of a concession facility;
- c* as a concession agreement that provides for the transfer of a concession facility from the state property into trust management or into tenancy (lease) of the concessionary for the purpose of reconstruction and operation; and
- d* as a concession agreement that provides for the transfer of a concession facility being in the property of the concessionary into the tenancy (lease) of the conessor or a person authorised thereby, as well as with the right of redemption of the concession facility by the conessor.

### *The PPP agreement*

The PPP Law, unlike the Concession Law, has enabled to implement a PPP project in one of the following two ways: either on an institutional basis (with the creation of a special purpose vehicle<sup>6</sup> as a joint venture) or a contractual one (without the creation of the SPV). Article 7 of the PPP Law enlists possible types of public private partnership contracts, including concession agreements, trust management of state-owned property, rental/lease of state-owned property, finance lease, contracts for the development of technologies and pre-production prototypes, for conducting pilot tests, and for short-run production, life cycle contracts and after-sales service contracts, however, the list remains open, so it is possible to enter into 'other agreements, which comply with the features of public private partnership'. Thus, the PPP Law allows entering into other contractual forms of PPP, even not provided by the PPP Law, but mainly meeting the public private partnership features specified in Article 4 of the PPP Law.

In accordance with Article 7 of the PPP Law, the concession agreements remain governed by the general provisions of the PPP Law, save for peculiarities clearly provided by the Concession Law. In our view, however, the legislator failed to make clear how these two laws (i.e., the PPP Law and the Concession Law) shall correlate and what are the distinctive features of the Concession Law that shall make it preferable option in certain cases in comparison with the implementation of a PPP project on the basis of the PPP Law. Based on our comparative analysis of the Concession Law and the PPP Law herein, we came to the conclusion, that any potential PPP project with a tenor of more than three years is preferably to implement under the PPP Law framework and that in future the Concession Law would be redundant in practice, as it does not provide any advantages.

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6 <http://strategy2050.kz/en/news/30290/>.

<i>Issue</i>	<i>Concession Law</i>	<i>PPP Law</i>
Parties to agreement	In contrast to the PPP Law, the Concession Law provides only two parties to the concession agreement (i.e., a conessor and a concessionary).	<p>Unlike a concession agreement, in a public private partnership agreement the parties can be both one or several public and private partners. Moreover, the parties to a public private partnership agreement can also be financial and other organisations that provide funding for public private partnership, as well as the ‘industry operators’<sup>1</sup> (see Article 5 of the PPP Law).</p> <p>Section 14 of Article 1 of the PPP Law provides a concept of ‘subjects of a public private partnership’ (the PPP entities), which are defined as ‘a public partner and a private partner, and other persons involved in the implementation of a public private partnership project and specified by this Law’. The concept of PPP Entities is, evidently, wider than a concept of ‘parties to a PPP contract’ (i.e., not every PPP entity is a party to a PPP contract, but each party to a PPP contract is a PPP entity).</p>
Public partner	Under the Concession Law, only the Republic of Kazakhstan itself <sup>2</sup> can be the grantor. Either the government of Kazakhstan or local executive bodies (Akimats) or authorised state bodies can act on behalf of the Republic of Kazakhstan and execute the concession agreements.	PPP Law also provides that only the Republic of Kazakhstan can act as a public partner. Unlike the Concession Law, however, the PPP Law provides that in addition to the government, local executive bodies (Akimats) and authorised state bodies, also a “corporation of quasi-public sector” <sup>3</sup> 50 per cent or more of voting shares (participatory interests in the charter capital) of which are directly or indirectly owned by the state, can act on behalf of the Republic of Kazakhstan as a public partner and execute PPP agreements.
Private partner	<p>Pursuant to the Concession Law any individual, even foreigner, conducting entrepreneurial activity and (or) legal entity (except for state institutions and ‘corporations of quasi-public sector’ 50 per cent or more of voting shares (participatory interests in the charter capital) of which are directly or indirectly owned by the state), including foreign legal entities and legal entities conducting their activity based on the agreement on joint activity (simple partnership<sup>4</sup>), can participate in the concession tender.</p> <p>One of the types of the simple partnership is a consortium,<sup>5</sup> which can comprise only legal entities. Herein, the consortium is not a legal body but a temporary association of legal entities on the basis of an agreement on joint business activity (consortium agreement) which is created for a certain period of time or to attain a respective objective.</p>	<p>The PPP Law provides the concept of a private partner identical to the concept of the concessionary, save that unlike the Concession Law, PPP Law requires an individual to procure individual entrepreneur official status to be able to act as a private partner (i.e., under the Concession Law an individual does not necessarily have to have individual entrepreneur status).</p> <p>Since in Kazakhstan commercial organisations can only be established in the form of a joint stock company, economic partnership, production cooperative, or state enterprise, it is obvious that a private partner can be a subject of private entrepreneurship of any of the above organisational legal forms.</p> <p>In addition, the definition is so broad that a private partner can be, apparently, a non-profit organisation and a foreign legal entity.</p>

<p>The object of agreement</p>	<p>A concession object can be any property that can be recognised as the so-called ‘social and vital infrastructure facility included into the list,<sup>6</sup> which shall be constructed (or reconstructed) and operated under a concession agreement’. In accordance with Section 2 of Article 1 of the Concession Law, ‘social and vital infrastructure facilities are facilities [or] complexes of facilities used for the satisfaction of public needs, the securing of which is imposed on state authorities in accordance with the legislation of the Republic of Kazakhstan’. The Concession Law, therefore, cannot be used for construction of, for instance, a fertiliser plant, as it is unlikely to be considered as a facility used for the satisfaction of public needs, the securing of which is imposed on state authorities.</p>	<p>Unlike the Concession Law, under the PPP Law practically any property can be considered as the PPP object.</p> <p>In accordance with Section 13 of Article 1 of the PPP Law, in particular, any property, including property complexes, where design, construction, development, reconstruction, modernisation and operation are carried out under the framework of the PPP project, as well as the works (services) and innovation, subject to introduction during implementation of the PPP project, can be considered as the PPP object.</p>
<p>Governing law and possibility for international arbitration</p>	<p>Even though the Concession Law does not specifically prohibit having a foreign law as the government law of the concession agreement, our interpretation of the law suggests that only Kazakh law can be governing law of the concession agreements.</p> <p>Only ‘concession projects of special importance’<sup>7</sup> can benefit from an international arbitration clause in the concession agreement, even if all parties to it are residents of Kazakhstan, but at least one shareholder<sup>8</sup> of the concessionary is a non-resident (see Article 27.2 of the Concession Law).</p>	<p>The PPP Law explicitly confirms that if a private sector partner under a PPP agreement is a non-resident, the parties shall have discretion to choose the applicable law of the PPP agreement (see Article 46.3 of the PPP Law).</p> <p>Only PPP projects of special importance can benefit from international arbitration clause in the PPP agreement and provided the private partner is a non-resident (see Article 57.2 of the PPP Law).</p>
<p>Direct agreement</p>	<p>The Concession Law stipulates the concept of direct agreement, but it is available only for the concession projects of special importance (see Article 26-2 of the Concession Law).</p> <p>In case of replacement of the concessionaire at the request of the creditors, an assignment of claim and (or) debt of the concessionaire under the concession agreement can be performed without a new tender in the manner determined by the direct agreement (i.e., it is allowed to be transferred to a replacement company without going through the whole re-tendering process) (see Article 21.6 of the Concession Law).</p>	<p>The PPP Law stipulates the concept of ‘direct agreement’, but, same as in the Concession Law, it is available only for the PPP projects of special importance<sup>9</sup> (see Section 21 of Article 1 of the PPP Law).</p>

<p>Tariff setting</p>	<p>In accordance with the Law of Kazakhstan ‘On Natural Monopolies’, individual entrepreneurs and legal entities operating within certain enumerated industries<sup>10</sup> which are recognised as ‘natural monopolies’ shall render ‘regulated services (goods, works)’. Natural monopolies in Kazakhstan cannot charge for the regulated services (goods, work) in excess of the established for all natural monopolies in Kazakhstan general tariffs.</p> <p>A subject of natural monopolies in Kazakhstan that executed PPP or concession agreement can have, however, its own special tariff (as a cap) to be stipulated in the PPP/ concession agreement.</p> <p>Such tariff shall be not less than estimated costs to be incurred while rendering the regulated services plus it shall secure recovery of the invested amount<sup>11</sup> (see Section 3 of the Order 743).</p> <p>The tariff shall be calculated based on the formula provided in Schedule 1 of Order 743 and the term of validity of such tariff shall not be less than the term of the PPP/concession agreement (see Section 34 of Order 743).</p>	<p>Same as for concessions.</p>
<ol style="list-style-type: none"> <li>1 Industry operator as defined in Section 21 of Article 1 of the PPP Law can be, depending on the sector of economy in which the particular PPP project is implemented, for instance, Kazakhstan Electricity Grid Operating Company (KEGOC) (national transmission grid operator), or the National Company Kazakhstan Temir Zholy (the national railway company of Kazakhstan).</li> <li>2 And not municipal entities or regions as the case may be in some other countries.</li> <li>3 As defined in Section 31 of Article 3.1 of the Budget Code. In general, these are companies that have the state as a shareholder.</li> <li>4 As defined in Article 228 of the Civil Code.</li> <li>5 As defined in Article 233 of the Civil Code.</li> <li>6 The list of potential concession projects to be implemented in the medium-term approved by the Ministry of National Economy if the concession project of the republican (national) level or by the local parliament (maslikhat) of the region/Astana/Almaty city if the concession project is of municipal level (see Section 24 of Article 1 of the Concession Law).</li> <li>7 Criteria to be recognised as a ‘concession project of special importance’ is stipulated in Schedule 8 of the Order 157 and provides, among others, requirement to have a total value of estimated construction or reconstruction of the concession facility of not less than 4 million so-called monthly calculated indexes (equivalent of about US\$23 million as the monthly calculated index in 2016 is equal to 2,121 tenge). As of the beginning of February 2016 the only recognised concession project of special importance in Kazakhstan is BAKAD.</li> <li>8 As a general rule, under Kazakh law parties can refer to international arbitration only if one of such parties of an agreement itself is a non-resident (i.e., having foreign shareholder of the counterparty is, generally, not sufficient to confirm foreign nexus).</li> <li>9 Criteria to be recognised as a PPP project of special importance is stipulated in Schedule 4 of the Order 725 and provides, among others, requirement to have a total value of estimated construction or reconstruction of the PPP facility of not less than 4 million monthly calculated indexes (roughly US\$23 million in 2016).</li> <li>10 Such industries include, among others: (1) generation, transportation, distribution or supply with heat energy; (2) airport and harbour services; (3) operation of water and sewage systems, etc.</li> </ol>		

- 11 An invested amount means the sum the private partner's own capital and borrower capital for construction or reconstruction of the PPP facility (see section 2 of Order 743).
- 12 The approved list of potential concession projects to be implemented in the medium-term, as defined in Section 24 of Article 1 of the Concession Law.
- 13 Article 6 of the PPP Law and Edict 172 provides for an exhaustive list of exceptions like a backbone railway network or strategic dams that cannot be transferred for implementation of a PPP project.
- 14 Such excessively broad definition means that as a public private partnership in Kazakhstan may, strictly speaking, be claimed charity, grants, student loans, scholarships, joint activities with the business community on improving educational programmes and plans, etc., as it is very easy to satisfy the above PPP features for the many possible forms of cooperation between the state and businesses, even if they are not related to entrepreneurial activities.

## ii The authorities

There is no single central government or quasi-government agency to regulate the public private partnerships in Kazakhstan. Each of the Concession Law and the PPP Law separately define the responsibilities of respective government bodies, but with regards to concession projects only and other contractual forms of PPPs respectively.

The Concession Law, in particular, defines the responsibilities of the respective government bodies, but with regards to concession projects only:

- a* the government of Kazakhstan, among other authorities, approves the list of concession projects of special importance.
- b* the Ministry of National Economy, among other authorities, approves the list of the republican (national) level concession projects recommended for implementation in a mid-term perspective. It is also responsible for approval of the tender documentation and draft concession agreements and any amendments to them.
- c* the Ministry of Finance, among other authorities, registers the state concession obligations and executes state guarantee agreements and state surety agreements related to concession agreements on behalf of the state.
- d* State Property and Privatisation Committee, among other authorities, accepts republican level concession facilities created under the concession agreements into state ownership.
- e* The Sector Ministry,<sup>7</sup> among other authorities, prepares concession proposals related to concession facilities that are the national state property, taking into account investment proposals made by individuals and legal entities filed as a matter of private initiative. It also acts as organiser of a tender with regard to concession facilities that are the republican (state property and signs on behalf of the state all concession agreements related to concession facilities that are the republican state property and monitors implementation of the concession agreements related to concession facilities that are the republican state property.
- f* Local executive body (i.e., akimat) of the respective region or Astana or Almaty city, among other authorities, prepares concession proposals related to concession facilities that are the municipal property of a corresponding region or city, taking

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7 For example, the Ministry for Investments and Development of Kazakhstan for tall road concession projects.



into account investment proposals made by individuals and legal entities as a matter of private initiative. It also acts as organiser of a tender with regard to concession facilities that are the municipal property and signs on behalf of the State all concession agreements related to concession facilities that are the municipal property and monitors implementation of the concession agreements related to concession facilities that are municipal property. Finally it accepts municipal (local) level concession facilities created under the concession agreements into state ownership.

- g* Local parliament (i.e. *maslikhat*) of the respective region or Astana or Almaty city, among other authorities, approves the list of potential municipal level concession projects to be implemented in the medium-term.

The PPP Law defines the responsibilities of respective government bodies, but with regards to non-concession PPP projects only:

- a* the government of Kazakhstan, among other authorities, approves the list of the 'PPP projects of special importance'. It also approves the list of PPP facilities that require closed competitive bidding to select a private partner.
- b* the Ministry of National Economy, among other authorities, develops and approves the list of potential national level PPP projects for implementation. It is also responsible for approval of the national level PPP project concept, tender documentation and draft PPP agreements and any amendments to them.
- c* The Ministry of Finance, among other authorities, executes state guarantee agreements and state surety agreements related to PPP agreements on behalf of the state.
- d* The State Property and Privatisation Committee, among other authorities, accepts national level PPP facilities created under the PPP agreements into state ownership.
- e* Sector Ministry, among other authorities, develops and approves the Republican level PPP project concepts. It is also acts as organiser of a tender and direct negotiations with regard to the national level PPP projects and signs on behalf of the state all PPP agreements of the national level and monitors implementation of the national level PPP projects.
- f* local parliament (i.e., *maslikhat*) of the respective region or Astana or Almaty city, among other authorities, approves the list of local potential PPP projects for implementation.
- g* Local executive body (i.e., Akimat) of the respective region or Astana or Almaty city, among other authorities, develops and approves the local (municipal level) PPP project concepts. It is also acts as organiser of a tender or direct negotiations with regard to local PPP projects and signs on behalf of the state all PPP agreements related to local PPP projects and monitors implementation of the local PPP agreements and local PPP projects. Finally, it accepts local level PPP facilities created under the PPP agreements into state ownership.

### ***PPP entities***

Unlike the Concession Law, the PPP Law explicitly provides for different forms of participation of the state bodies, business entities and subjects of quasi-public sector in the PPP projects.

The form of participation of the business entities (both local and foreign) has been extended to the maximum extent and provides, among others, for participation in financing of PPP projects, designing, creation, reconstruction and operation of PPP facilities, and transfer of property and property rights for the purposes of PPP implementation (see Article 29 of the PPP Law).

The form of participation of the Kazakh state bodies implies, among others, granting of land plots, the right to use state property objects, participation in the establishment and activities of PPP companies, provision of PPP facilities with engineering infrastructure and provision of state support (see Article 27.1 of the PPP Law).

The PPP Law also provides, among others, for the following forms of participation of 'subjects of quasi-public sector' in PPP projects: shared participation in PPP projects via establishing legal entities or acquiring (alienating) shares (participation interests in the charter capital) of legal entities; transfer of exclusive rights to intellectual property items; service support, including services on transfer of technologies, support for innovations, consulting, engineering, staff education and advanced training; provision of services to industrial parks, business incubators, special economic and industrial zones; construction, creation, reconstruction, modernisation or operation of facilities; export promotion (see Article 30 of the PPP Law).

Furthermore, the PPP Law secures the forms of participation of the National Chamber of Entrepreneurs in PPPs, that shall be responsible, in particular, for development and maintenance of the Register of Potential Private Sector Partners (see Article 28 of the PPP Law).

### ***PPP units***

Beside the government agencies mentioned above that are playing an active role in PPPs, including concession, projects in Kazakhstan, in August 2008 Kazakhstan established its specialised PPP unit called JSC Kazakhstan Center for Public-Private Partnership (the PPP Center) located in Astana city, to facilitate and promote PPP projects. The main activities of the Kazakhstan PPP Center include economic evaluation of PPP, including concession, projects at each stage of their preparation including evaluation of: investment proposals, feasibility study, tender documentation; bids of potential concessionaries or private partners and drafts of the concession/PPP agreements. The PPP Center, in general, plays the role of an external independent adviser of the government of Kazakhstan.

In 2014 the LLP Public Private Partnership Advisory Center (the PPP Advisory Center) was established in Astana city as a joint venture by JSC National Holding Baiterek and the PPP Center. The declared main purpose of the PPP Advisory Center is to promote infrastructure development in Kazakhstan through the provision of services on structuring and support of infrastructure projects, including those implemented via PPPs. The PPP Advisory Center, in particular, can assist with development of documentation (the concession proposal, tender documentation, the draft concession/PPP agreement). It is also supposed to be involved in negotiating with potential investors and concessionaries, as well as being in the process of approval of project documentation with the state authorities.

Finally, almost each region in Kazakhstan nowadays has its own local PPP centre (usually established by a local executive body, i.e., *akimat*) responsible for development of the PPPs in its respective region.

**General requirements for PPP contracts**

Mention any mandatory considerations the competent authority must evaluate before selecting a public-private partnership over other options. Highlight any government approval requirements before a PPP procedure is initiated.

Issue	Concession Law	PPP Law
<p>The Subject of Agreement</p>	<p>The Concession Law is not industry-specific and, generally, state assets from any sector of the economy can be transferred under concession, save for an exhaustive list of exceptions like a backbone railway network or strategic dams (see Article 4 of the Concession Law and Edict 294). In particular, pursuant to Section 6 of Article 1 of the Concession Law, ‘a concession is an activity aimed at the construction (or reconstruction) and operation of concession facilities, that shall be performed at the expense of concessionary funds or on conditions of co-funding by a conessor’. A concession facility in Kazakhstan can only be for the ‘social and vital infrastructure facilities included into the list,<sup>12</sup> which shall be constructed (or reconstructed) and operated under a concession agreement’. In accordance with Section 2 of Article 1 of the Concession Law, ‘social and vital infrastructure facilities are facilities [or] complexes of facilities used for the satisfaction of public needs, the securing of which is imposed on state authorities in accordance with the legislation of the Republic of Kazakhstan’.</p> <p>The Concession Law, therefore, cannot be used for construction of, for instance, a fertiliser plant, as it is unlikely to be considered as a facility used for the satisfaction of public needs, the securing of which is imposed on state authorities.</p> <p>Importantly, the Concession Law is not applicable to subsoil use matters that are regulated by the Law ‘On Subsoil and Subsoil Use’ (see Article 2.1 of the Concession Law).</p> <p>The subject of concession agreements, therefore, is the construction and (or) development of the social and vital infrastructure facilities by a private partner, at the expense of full or partial funding attracted by him, as well as the implementation by the private partner of operations and (or) maintenance of the object of the agreement.</p>	<p>The PPP Law enables to implement PPP projects in all sectors of economy<sup>13</sup> and, therefore, PPP facilities under the PPP Law, unlike the Concession Law, do not necessarily have to be used for the satisfaction of public needs, the securing of which is imposed on state authorities (e.g., a fertiliser plant project can be implemented under the PPP Law). Section 6 of Article 1 of the PPP Law provides for a extremely broad concept<sup>14</sup> of a public private partnership as a ‘form of cooperation between the public partner and a private partner that corresponds to the features defined by the Law’. Such features include: (1) building of relations between the state partner and private partner through entering into PPP contract, (2) medium-term or long-term PPP project implementation (from three to 30 years depending on peculiar features of PPP project), (3) joint participation of the state partner and private partner in PPP project implementation, (4) combining resources of the state partner and private partner for PPP project implementation (see Article 4 of the PPP Law).</p> <p>The subject of the PPP agreements is not clearly defined by the PPP Law, however, it can be determined through the essential elements of the PPP agreement, stipulated in Article 46 of the PPP Law. The subject of the PPP agreements is, therefore, a form of cooperation between the public partner and a private partner that corresponds to the PPP features defined by the PPP Law and that can be related to any types of activities, including construction and (or) development of infrastructure or rendering services or even, arguably, charity.</p>

The Term of the Agreement	A concession agreement can be executed for up to 30 years and it has no lower limit (see Article 23.1 of the Concession Law).	Unlike the Concession Law, the PPP Law provides that to be classified as a PPP agreement, an agreement must be for a minimum of three years and maximum 30 years (see Article 4 of the PPP Law).
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#### IV BIDDING AND AWARD PROCEDURE

##### i Expressions of interest

Generally, an open single-stage tender is required for selection of the concessionary, however, tenders of potential concession projects that either require the collection and analysis of innovative, creative, architecture-planning, or organisational-technological solutions or innovations or require running experiments or research studies, should be conducted in two stages rather than the single stage (see Article 20-1 of the Concession Law).

The procedure of the transfer of objects to concession includes four key phases (see Article 15.1 of the Concession Law):

- a* preparation and selection of the concession proposals;
- b* approval<sup>8</sup> of the list of objects offered for a transfer to concession;
- c* conducting a concession tender with regards to a particular object of concession; and
- d* determining a concessionary and entering into a concession agreement.

The Concession Law provides exhaustive list of the qualification requirements for the potential concessionaries. For instance, the concessionary is obliged to have its own capital that can be used for implementation of the concession agreement purposes of no less than 10 per cent of the total cost of construction and reconstruction of the concession facility (see Article 18.1 of the Concession Law).

Unlike the Concession Law stipulating a unified procedure for concession of facilities, the PPP Law provides for a possibility to select a private partner via holding either a tender (open/closed, two-stage/simplified) or on the basis of ‘direct negotiations’ (see Article 31.1 of the PPP Law).<sup>9</sup>

The simplified procedure for the competitive selection is stipulated for the tenders held using model tender documentation and model agreements for local projects that involve amounts not exceeding the statutory limit of 4 million monthly calculated indexes

8 It is the Ministry of National Economy that approves the list of the Republican level concession projects recommended for implementation in a mid-term perspective and a *maslikhat* (local parliament) of the respective region/Astana/Almaty city, who approves the list of the local municipal level concession projects (see Section 24 of Article 1 of the Concession Law).

9 Generally, it shall take about seven months from the date of initiation of the PPP project by the private partner until the date of signing of the PPP agreement, if the private partner would be selected on the basis of the direct negotiations without a tender, whereas tender procedures require more than 12 months.

(equivalent of about US\$23 million as of 2016) and that are not natural monopolies projects (see Article 43 of the PPP Law). Potential private partners for the simplified tender shall be selected from the Register of Potential Private Sector Partners maintained by the National Chamber of Entrepreneurs.

According to the general rule, it is contemplated that a private partner will be selected via holding an open tender. In exceptional cases determined by the government of Kazakhstan, a closed tender may be used in respect of facilities relating to Kazakhstan defence, state security or environment.

The PPP Law also provides general qualification requirements to a private partner (see Article 32 of the PPP Law). Unlike the Concession Law, however, the PPP Law does not require a private partner to have own capital that can be used for implementation of the PPP agreement purposes of not less than 10 per cent of the total cost of construction or reconstruction of the PPP facility.

Finally, it worth mentioning that PPP Law provides for a ‘competitive dialogue procedure’, which allows the public partner to enter into a dialogue with prequalified bidders before finalising the tender documentation. It allows structured discussions with each of the prequalified bidders and helps identify key issues and amendments needed for the project (see Section 13 of Schedule 1 of the Order 725).

## ii Requests for proposals and unsolicited proposals

The Concession Law, generally, provides neither possibility to execute the concession agreement without a public tender nor on the initiative of the private partner.

A potential concessionary (i.e., an individual or legal entity) who has a good potential project he wants to implement, however, has a right to file an investment proposal with the respective sector ministry or *akimat* as the matter of private initiative and, if such investment proposal would be accepted, the sector ministry or *akimat* would prepare respective concession proposal to implement this project as a concession project. As discussed above, the preparation the concession proposals by the respective sector ministry or *akimat* is the first of the four key phases of the procedure of the transfer of objects to concession.

Unlike the Concession Law, the adopted PPP Law establishes the possibility in certain cases of concluding an agreement without a public tender and on the initiative of the private partner. For example, a private sector partner may be selected through direct negotiations if such private sector partner initiates a PPP project involving assets that it owns or has leased on a long-term basis, or the proposed PPP project is inextricably linked with the exercise of such private sector partner’s exclusive rights to results of intellectual creative activity (see Article 44.1 of the PPP Law).

This method may be of interest to projects currently being carried out by private investors in Kazakhstan (e.g., if a businessman has a proper building that can be used to start the kindergarten, etc.), and also to projects based on unique technologies owned by private investors (such as IT projects).

**iii Evaluation and grant**

The organiser of the tender<sup>10</sup> shall publish an announcement on the proposed tender in a periodic printed publication distributed all over the territory of Kazakhstan not less than 60 calendar days before the date of the proposed tender (see Article 19.3 of the Concession Law).

Review and selection of the competitive bids of potential concessionaries is the responsibility of the special commission established by the government of Kazakhstan for the national level concession projects or by the respective local executive body (Akimat) of the region/Astana/Almaty city for local municipal projects (see Article 19.4 of the Concession Law).

The commission shall slit all envelopes with competitive bids in them open at the exact time and venue as specified in the tender documentation. Criteria for selection of the best competitive bid of potential concessionaries is stipulated in Schedule 7 of the Order 157 and the commission shall engage in negotiations (to clarify the terms of the concession project and concession agreement) with the potential concessionary whose competitive bid has been recognised as the best bid (see Article 20.3 of the Concession Law). The commission than determines the winning bid and announces the winner, with whom the organiser shall execute the concession agreement within 90 days from the date of the announcement of the results of the tender.

In the PPP Law the key phases of the preparation of, for example, a local municipal PPP project by way of one stage open tender shall include:

- a* development of the local PPP project concept by the relevant Akimat of the respective region or Astana or Almaty city;
- b* development of the tender documentation;
- c* development and approval of the list of the potential PPP projects for implementation;
- d* announcement and holding of the competitive tender;
- e* consideration of the competitive bids;
- f* election of the winner; and
- g* execution of the PPP agreement.

The organiser of the tender<sup>11</sup> shall publish an announcement on proposed tender in periodic printed publication and post same announcement on its own official website, not less than 60 calendar days before the date of the proposed tender (see Section 77 of Schedule 1 of the Order 725).

Review and selection of the competitive bids of potential private partners is the responsibility of the special commission established by the organiser (see Section 75 of Schedule 1 of the Order 725).

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10 That is the respective sector ministry for the concession projects at national level and respective local executive body (*akimat*) for local municipal concession projects.

11 That is the respective sector ministry for the PPP projects of national level and respective local executive body (*akimat*) for local municipal PPP projects.

The commission shall slit all envelopes with competitive bids in them open at the exact time and venue as specified in the tender documentation. Criteria for selection of the best competitive bid of potential private partners is stipulated in the tender documentation and Section 103 of Schedule 1 of Order 725. Commission shall engage in negotiations (to clarify the terms of the PPP project and PPP agreement) with the potential private partner whose competitive bid has been recognised as the best bid. The commission then determines the winning bid and announce the winner, with whom the organiser shall execute the PPP agreement within 90 days from the date of the announcement of the results of the tender.

## **V THE CONTRACT**

### **i Payment**

The Concession Law provides concepts of a ‘concession facility availability payment’ and ‘state subsidies’ as additional sources of income and reimbursement of expenses of the concessionary as listed in Article 7 of the Concession Law. The concession facility availability payment includes payments from the state budget as compensation of certain investment expenses of the concessionary, compensations of certain operational expenses of the concessionary and, if applicable, any service fees for trust management of the state property (i.e., concession facility) or lease payment paid by state for the use of a concession facility owned by the concessionary. For each concession project the sources of income and reimbursement of a concessionary’s expenses will be determined on the basis of the results of the concessionary-selection tender. Importantly, the Concession Law provides possibility to obtain an ‘availability payment’ only for concession projects that have been classified as ‘socially important’,<sup>12</sup> such as kindergartens, but not, for instance, a fertiliser plant (see Article 7.3 of the Concession Law).

The PPP Law provides, as in the Concession Law, a wide range of methods to compensate potential investors (see Article 9.2 of the PPP Law). The methods that are available for all types of PPP arrangements include the compensation of investment expenditures, operating costs and accessibility charges, all of which shall be payable out of the state budget. Importantly, unlike the Concession Law, the PPP Law does not provide a requirement for the PPP project to be ‘socially important’ to qualify for the availability payment.

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12 Criteria for the concession project to be recognised as a socially important is stipulated in Schedule 9 of Order 157.

**ii State guarantees**

The Concession Law contemplates the following measures of state support for the concessionary to encourage private investments into the concession projects (see Article 14 of the Concession Law):

- a* state sureties for infrastructure bonds issued and placed in accordance with the concession agreement on the Kazakh stock exchange;
- b* state guarantees for loans, the proceeds of which are to be used for concession agreement purposes;
- c* transfer of the exclusive IP rights owned by the state to the concessionary;
- d* provision of ‘in-kind grants’ (e.g., land, machinery);
- e* co-financing of concession projects by the state; and
- f* guaranteed offtake by the state of a certain amount of goods (works, services) to be produced by the concession facility.

A concessionary may be granted one or several of the above measures of state support, however, if the concession facility is to remain private property when completed, rather than being transferred to state ownership, the concessionary cannot expect state support in the form of state sureties for infrastructure bonds, state guarantees for loans and co-financing by the state (see Article 14.2 of the Concession Law).

The Concession Law also provides that the total amount of obligations of the conessor related to:

- a* the compensation of investment expenses of the concessionary;
- b* state surety for infrastructure bonds;
- c* state guarantees for loans;
- d* transfer to the concessionary of exclusive rights for intellectual property that belongs to the state;
- e* provision of ‘in-kind’ grants; and
- f* co-financing of the concession project, shall not exceed the concessionary’s total expenditures for construction or reconstruction of the concession facility or both, incurred under the relevant concession agreement (see Article 14.3 of the Concession Law).

The PPP Law provides measures of state support identical to the Concession Law, though, unlike the Concession Law, the list of these measures of the ‘state support’ in the PPP Law is not exhaustive (see Article 27.2 of the PPP Law). Another difference is that unlike the Concession Law, the PPP Law does not require the infrastructure bonds to be placed on the Kazakhstan stock exchange only (i.e., they may be placed abroad).

The PPP Law also provides that the total amount of measures of state support and payments from the state budget for the purposes of financing (recovery of costs) in relation to creation and (or) reconstruction of the PPP facility, cannot exceed the total amount of expenditures for construction and (or) reconstruction of the PPP facility.

**iii Distribution of risk**

One of the main principles of the concession is securing proper balance of allocation of risks between conessor and concessionary (see Article 3 of the Concession Law). One of



the imperative terms of the concession agreement is the contractual provision on agreed risk allocation between conessor and concessionary (see Article 21 of the Concession Law).

Importantly, only concession projects of special importance can benefit from possibility to have specific provision in the concession agreement to address the currency exchange risk (see section 4-2 of Article 21.2 of the Concession Law).

The Concession Law lacks the ‘stability clause’ that is meant to protect the concessionary from the possible changes in legislation, which is often important for attracting international creditors and investors.

One of the main principles of the PPP is securing mutually beneficial balance of allocation of risks between public and private partners (see Article 3.2 of the PPP Law). As a general principle of the PPP Law, risk should be placed where it is best managed and such allocation shall be stipulated in the PPP agreement (see Article 14 of the PPP Law).

The PPP Law also lacks the ‘stability clause’ that is meant to protect the private partner from the possible changes in legislation, however, unlike the Concession Law, the PPP Law allows to have specific provision in the PPP agreement to address the currency exchange risk even if it is not a ‘PPP project of special importance’.

#### **iv Adjustment and revision**

As a general rule, the terms of the concession agreement shall remain in force for the whole validity period of the agreement, with the exception of cases, when modification of the concession agreement is executed upon agreement of both parties (see Article 21.3 of the Concession Law).

A concession agreement shall provide an imperative contractual provision that shall allow the conessor to unilaterally modify the terms or even terminate the concession agreement in certain cases for public and state interest. Importantly, the concession agreement shall provide an exhaustive list of such cases, that do not contradict the legislation of the Republic of Kazakhstan, in particular when such actions are committed for the purpose of securing of the national and ecological safety, health care and good morals (see Article 21.4 of the Concession Law). As a remedy, the concessionary is entitled to claim from the conessor a compensation of additional expenses, related to modifications of terms of concession agreement, as well as compensate for losses incurred by a concessionary in connection with termination of the concession agreement (see Article 21.5 of the Concession Law).

Unlike the Concession Law, the PPP Law does not provide for a statutory right to unilaterally modify the terms of the PPP agreement in certain cases (i.e., it can be done only upon agreement of both parties) (see Article 49.1 of the PPP Law).

## Ownership of underlying assets

Issue	Concession Law	PPP Law
The Right of Private Ownership of the Object of the Agreement	<p>Upon completion of the construction phase, ownership of the relevant concession facilities, generally, shall be transferred to relevant state authority (see Article 5.3 of the Concession Law).</p> <p>The concession agreement, however, may provide for a concessionary option to reserve the right to the concession facility upon completion of the concession project, and, therefore, under a concession agreement all available PPP schemes (i.e. BOT, BOOT, ROT, BTO, BOMT, BOO, etc) may be structured.</p> <p>If in accordance with the concession agreement the state provides co-financing of the concession project and (or) covers the compensation of investment expenses of the concessionary, however, the concession facility must be transferred into the state ownership (see Article 5.8 of the Concession Law).</p> <p>Concession Law also provides that a concession facility cannot be disposed/ alienated for the whole term of the concession agreement (see Article 5.6 of the Concession Law).</p> <p>Finally, a concession agreement may not include terms, directed on alienation in a private property of a concession facility, being in the state property (see Article 21-1.3 of the Concession Law).</p>	<p>The requirement to transfer the object of an agreement to the ownership of a public partner is, generally, not an obligatory element in the PPP agreement.</p> <p>If in accordance with the PPP agreement the State covers the investment expenses compensation, however, the object of public-private partnership must be transferred into the state ownership (see Article 12.4 of the PPP Law).</p> <p>The PPP Law also provides that if the public partner gives to the private partner balance the PPP facility itself and (or) any other property for implementation of the PPP project, such transferred property shall be separated from the private partner's own property and shall be reflected in a separate accounting (see Article 12.3 of the PPP Law).</p> <p>Unlike the Concession Law, the PPP Law generally allows the transfer of the PPP object to a third party. Article 12.2 of the PPP Law, in particular, provides that upon prior consent of its counterparty, the party to the PPP agreement has the right to transfer the PPP object and (or) any other property necessary for implementation of the PPP project to a third party, subject to requirement that such third party shall comply with obligations of the transferring party under the PPP agreement. The law also makes clear that the transmitting party still bears statutory responsibility for the actions of such third party.</p>
Pledge of the Object of Agreement and (or) Rights of the Private Partner	<p>In accordance with Article 5.5 of the Concession Law it is prohibited to take a pledge over the concession facility itself, however, the concessionary may pledge its rights under the concession agreement, subject to the concessor's prior written consent (see Article 21.6 of the Concession Law).</p>	<p>Unlike the Concession Law, the PPP Law generally allows the pledge over the PPP facility.</p> <p>If in accordance with the PPP agreement the State covers the investment expenses compensation, however, the respective object of the public-private partnership cannot be pledged (see Article 12.4 of the PPP Law).</p> <p>A private partner may, generally, pledge its rights under the PPP agreement, subject to the public partner's prior written consent (see Article 51 of the PPP Law).</p> <p>As a distinctive feature of the PPP Law, that provides for possibility to implement a PPP project either on an institutional basis (with the creation of the PPP company as a joint venture) or a contractual one (without the creation of the PPP company), a disposal of or pledge or other collateral over the private partner's voting shares (participatory interests) of the PPP company to third parties, requires prior consent of the public partner and vice versa (see Article 54.2 of the PPP Law).</p>

**v Early termination**

Concession agreements of the ‘concession projects of special importance’ may (i.e., if parties agreed so) provide for contractual right to unilaterally terminate the concession agreement in case of:

- a* violation of essential terms of the concession agreement, as determined in the agreement, by the concessionary;
- b* violation of essential terms of the concession agreement, as determined in the agreement, by the conessor; or
- c* upon force majeure circumstances.

Procedure, time limits and terms of compensation of the costs and (or) expenses and (or) losses of the concessionary incurred because of early termination of the concession agreement upon above circumstances, shall be stipulated in the concession agreement (see Article 21.4-1 of the Concession Law).

According to Article 49.2 of the PPP Law, at the request of the public partner the PPP agreement can be terminated by the court’s order, only:

- a* in case of material breach of the PPP agreement by the private partner;
- b* if the private partner is not able to implement the PPP project in view of its insolvency (bankruptcy); and
- c* in the interests of society and the state, including where such actions are committed in order to ensure national security, public health and morality.

According to Article 49.3 of the PPP Law, at the request of the private partner the PPP agreement can be terminated by the court’s order only in case of material breach of the PPP agreement by the public partner or state body or both.

**VI FINANCE**

At least two concession projects (North Kazakhstan–Aktobe region power line and Shar–Ust-Kamenogorsk railway) managed to raise debt finance on local stock exchange by way of placement of infrastructure bonds secured by the state sureties. As Shar–Ust-Kamenogorsk railway declared default on its infrastructure bonds back in 2008 and many Kazakh pension funds got their fingers burnt on these bonds,<sup>13</sup> infrastructure bonds nowadays do not have positive image in Kazakhstan.

‘Project finance’ transactions that took place in Kazakhstan so far, in fact, were either conventional bank loans (mostly from international financial institutions such as the European Bank for Reconstruction and Development and International Finance Corporation) that have somehow benefited from corporate guarantees, security packages, direct budgetary investments or net private investments. The concept of a ‘project finance’, however, was introduced in 2012 into the legislation of Kazakhstan (see

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13 One of the lessons learnt is that enforceability of the state surety proved to be complicated and lengthy process, as surety under Kazakh law provides for subsidiary liability, whereas the guarantee provides for joint-and-several liability.

the Law ‘On Project Finance and Securitisation’) so we can say that, generally speaking, there is now a solid basis for the structuring of transactions on the principles of project finance in Kazakhstan.

## **VII RECENT DECISIONS**

To the best of our knowledge there is no court practice on PPP projects in Kazakhstan so far.

It worth mentioning that Kazakhstan is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention). Accordingly, a foreign arbitral award obtained in a state which is party to that Convention should be recognised and enforced by a state court of Kazakhstan, subject to the terms of the Convention and compliance with local procedural rules.

## **VIII OUTLOOK**

It is expected that proper PPPs and project finance deals will finally take off in Kazakhstan in the near future, firstly because proper legislation on PPPs has been put in place in 2015 and, secondly, after decades of neglect, the government of Kazakhstan has finally not only declared, but seems to confirm its readiness to improve the investment climate and to attract private investments through PPPs (including into the housing and utilities sector) and decided to invest at least part of the wealth from commodity exports in long-postponed infrastructure projects (e.g., the government of Kazakhstan is planning to launch major transport and infrastructure projects stipulated in the address of the President of Kazakhstan to the people of Kazakhstan dated 11 November 2014 (Nurly Zhol (Path to the Future)), as well as the State Programme of Industrial Innovative Development of the Republic of Kazakhstan for 2015–2019.

## Appendix 1

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# ABOUT THE AUTHORS

### **SHAIMERDEN CHIKANAYEV**

#### *GRATA Law Firm*

Shaimerden Chikanayev is a partner in GRATA's banking and finance group and head of the firm's Mongolia practice. Shaimerden received his LLM from Duke University School of Law (USA), his specialist degree (JD equivalent) in law from the Eurasian National University Faculty of Law (Kazakhstan), and completed a non-degree course of studies for foreign diplomats at the China Foreign Affairs University (PRC). He has been admitted to practise in Kazakhstan since 2003 and passed exams at the Ministry of Justice of Kazakhstan to be a notary (2003) and an advocate (2004).

Shaimerden Chikanayev has over 10 years of experience in the Kazakh legal services market as well as experience in matters dealing with the former Soviet Union and Mongolia. Prior to joining GRATA Law Firm, he worked as an associate in the Almaty and London offices of international law firm Dewey & Leboeuf and as associate of the Office of the General Counsel in the London office of the European Bank for Reconstruction and Development. Shaimerden focuses his practice on infrastructure and PPP (public-private partnership) projects, a wide range of finance and M&A transactions, including project finance and capital markets, workouts and restructurings in many industries.

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