

International Colloquium on Public-Private Partnerships (PPPs)
UNCITRAL- Vienna, 2-3 May 2013

Bruno de CAZALET

PFIP Historical background (1999-2000)
and PPP evolution (2000-2013)

The development of PPP legislative practice is **acknowledged by the various EBRD Assessments** of the legal framework for Concession and PPP that we have conducted together with Alexei Zverev since 2004 ¹over more than 30 different legal systems on each occasion².

These Assessments are **interesting with respect to recommendation to UNCITRAL on possible future work in the area of PPPs** as they were conducted taking as major **benchmarking instrument precisely the PFIP**.³

More specifically the selection of core areas⁴ and the drafting of questions for the initial Checklist as well as the evaluation method were accomplished on the basis of international standards developed in the concession field mainly by the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects which recoup to a large extent the UN-ECE member's countries.

The EBRD Assessment **evidence the trends** that have taken place during the last 10 years

The situation at the time FPIP was drafted and the trends observed through the Assessments

In the late 1990 at the time the FPIP was discussed such BOT type of project financing started to become very popular worldwide with first experiences in all continents like in China with Labin B BOT power plant project, in Northern Africa with the power plants of Jorf Lasfar in Morocco and of Rades in Tunisia, the Birecik Hydro project in Turkey was near to completion and the M1/M15 highway between Austria and Hungary which was just achieved and already facing its first difficulties. The Bible at the time for the drafting and negotiation of such contracts was the UNIDO BOT Guidelines of 1996.

The FPIP reflecting the current experience at the time of its inception is entirely devoted to the traditional form of concession and to its derived more recent forms of BOT (Build Operate Transfer) and other related expressions (BTO; BROT; BLOT...) to be used for project finance and exclusively related to commercial operations.

¹ 1st Assessment of 2004-2005 followed by an effectiveness assessment in 2006, then the first update in 2007-2008 and the latest Assessment of 2011-2012

² 29 countries in 2000 - 34 today- Some OECD countries were further assessed on each occasion for benchmarking purpose.

³ Other international standards used:

-UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects, 2003;

-Commission Interpretative Communication on Concessions Under Community Law, 2000;

-UNIDO BOT Guidelines, 1996;

⁴ (i) general policy framework, (ii) general concession legal framework, (iii) definitions and scope of the concession law, (iv) selection of the concessionaire, (v) project agreement, (vi) security and support issues and (vii) settlement of disputes and applicable law.

The successive Reports which were made for each EBRD Assessment show a considerable move concerning the evolution of the concession and PPP legislation since 2000 and in particular a trend toward **increased references to the "PFI" (Private Finance Initiative)** type of PPP project.

The trend toward PFI

PFI is defined in the EBRD Checklist used for the sake the latest 2011 Assessment as :
"a form of cooperation and partnership between public authorities and Private Parties which aim to ensure the funding, construction, renovation, management or maintenance of an infrastructure or the provision of service to the infrastructure without the delegation of the public service itself".

This definition of PFI will be used for the purpose of this presentation even though we understand that PFI is sometime used in a much larger sense .

The conclusions of the 2007 EBRD Assessment report and even more in the **2011 EBRD Assessment report** acknowledge this trend toward PFI:

"Within three or four years, if we take as a starting point 2008 since the last assessment, no less than seventeen EBRD countries, representing roughly half of the EBRD countries of operation, have enacted a new concession or PPP law⁵

It is further to be noted that the scope of the 2011- 2012 Assessment has extended to include a wider spectrum of PPP arrangements is the focus area compared to just Concessions in previous assessment to reflect the current trend toward diversification of Public Private Arrangement in addition to the traditional concession model as further described under Section IV "Evolution and trend".....

"Following this pragmatic trend many countries are now aware that they need to introduce the Private Finance Initiative model (PFI) of PPP contracts, in particular for relatively small projects in the non merchant sector. They are looking for a proper framework, not only to allow the traditional large concessions and BOT projects (where financing is based on the proceeds expected from the actual operation of the project) but also to acquire new legal instruments allowing the financing of non commercial projects, as achieved successfully in most western European countries."

PFI is now covered by most of the new Concession and PPP laws or are the subject of a specific new legislation which is even referred to in several countries as **the PPP law** or **the Partnership regulation** leaving all the other forms of PPP to the concession legislation. This has been the case in France in 2004 and in many other States where it is treated as a new legal instrument in between Concession and Public Procurement, but sometimes with no clear boundaries.

⁵ The Act of Public Private Partnership in Croatia (2008); the Law regulating Partnership in Egypt (2010); the Regulation for implementing Privatization transaction (including PPP) in Jordan (2008); the amendment of Concession law in Kazakhstan creating a PPP Center (2008); the law on PPP and Concession in Kosovo already replaced by a new PPP law (2011); the PPP law of the Kyrgyz Republic (2009); the Latvia law on PPP (2009); the Macedonian law on Concession and other type of PPP (2008); the Moldova Concession and PPP law (2008); the Mongolian law on Concession (2010); the law on Concession of Montenegro(2009); the Polish act on PPP (2008) and the Polish law on Concession of Works and Services (2009); the Romanian PPP act dealing with IPPP (2010); numerous regional Russian PPP laws; The Serbian Law on PPP (2011); the Tajikistan Concession law (2011); the Tunisian Concession law (2008) and the Ukraine law on State Private Partnership (2010).

PFI Specificities

PFI is not just another acronym used to highlight the particular ownership regime or the particularity of a derived form of the classical BOT such as BOO, BTO, BOOT, DBFO as described in the FPIP.

PFI is another specific variety of PPP of a different nature from concessions and BOT arrangements, responding to different objectives, for different purpose, with different share of risk, different payment obligations, really another category of PPP.

PFI as defined does not include the delegation of management of the public services and provides for the construction or the rehabilitation of a facility or the provision of a service to be used by the public authority for its own performance of the public service. In that sense PFI is close to a lease back type of contract and differs from concessions and BOT type of projects.

What makes the difference with the leasing is that following the financing and construction of the facilities by the private sector it will provide assistance to the operation and maintenance of the facilities (and not of the public service itself as it is the case for concession) against payment of an availability fee or a sort of rent to be paid as from the starting date of operation of the building (and not before) together with the remuneration of the services rendered, all on a performance basis and not just the remittance of the facility against payment of interest for a certain period of time like in the case of leasing.

As such the PFI does not include a commercial or traffic risk for the private party and the sponsors and lenders shall rely on the creditworthiness of its sole user, the granting authority and the sole fact that the sponsors will support no such risk will render PFI projects not eligible to concession and usually not covered by concession law and therefore subject to public procurement in the absence of a PFI/PPP law.

As the reimbursement of the investment does not rely on commercially volatile proceeds but on regular State or local government payment this type of PPP can be used in the non merchant sector for much needed projects such as school, hospital, prisons, other public buildings, or for non profitable projects such as some stadium, concert hall, library where at least a significant subvention is required for the economic balance of the project.

Presently we are facing some difficulties with drafts PPP law which provide like in the French legislation that commercial proceeds from third parties should remain "accessory" or "subsidiary"⁶ to the main remuneration to be paid by the granting authority in order not to be legally considered as a concession which deprives such new laws from the possibility to be used for profitable projects or at least where a substantial part of the cost can be supported by the users.

Such **PFI** type of PPP which cover a major part of the present PPP market is **not defined** and **not even referred to in the FPIP** and therefore there is a **significant gap** at least of proper information in the Guide on this new generation of PPP which needs to be filled even if it may be argued that the provisions of the FPIP might enable the drafting of laws integrating PFI type of PPP. As an example of the necessity to fill this gap we have had to insert a definition of PFI in the last EBRD 2011 Assessment Checklist and to add some questions to be able to evaluate the capacity of the assessed legislative frameworks to enable the PFI form of PPP and their ability to cover the non merchant sector.

⁶ Draft Moroccan and Tunisian PPP law presently under discussion in respective parliaments

This alone will justify the necessary updating the FPIP which is undoubtedly the most significant and comprehensive instrument available to legislators in charge of drafting PPP laws but unfortunately this instrument after 10 years of the lack of PFI orientation is a problem.

The IPPP approach

IPPP which is the new concept of Institutional PPP through joint venture or corporate form of mix company which is not yet taken into account by most PPP regulations needs specific consideration in the revised FPIP along the road already taken by the UE Commission Interpretative Communication of 2008⁷ on the application of Community law on Public Procurement, and Concessions to Institutionalized Public-Private Partnerships (IPPP);

IPPP particularly within countries with long tradition of dominant public sector raises serious issues as to the involvement of major state companies in the PPP development and the correlative legal issues of the **selection process of the private partner** and also as far as **transparency and competition** rules are concerned in case of involvement of an IPPP in competitive bidding for a PPP.

Bruno de Cazalet

Docteur en droit
Avocat Honoraire au Barreau de Paris
+ 33(0)6 08 74 02 26
cazaletconsult@gmail.com

⁷ Interpretative Communication , Brussels, 05.02.2008 -C(2007) 6661)