

Research on the Remedy for Disputes of Legal Nature of PPP Agreement

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Abstract: The legal problems of PPP are caused by PPP mode. The PPP agreement in China leads to the following problems: the fuzzy understanding of the legal nature of public and private in theory and practice; Disputes over boundaries and remedies; Academic concept is not clear. Firstly, this paper focuses on clarifying the boundaries between public and private law in PPP legal issues. Secondly, by studying the cases of the supreme people's court, this paper analyzes the problems in the demarcation of the legal nature of PPP in China. Finally, by referring to relevant overseas experience, this paper puts forward suggestions on the construction of legal relief for PPP public-private cooperation in China.

1. Introduction

In the traditional administration, the administrative task is only completed by the public authority, forming a certain degree of administrative monopoly. Public-private partnership has led to two major changes: the transfer of some of the administrative tasks undertaken by administrative agencies to private hands; The subject and means of performing administrative tasks have changed. The subject, means and content of administrative activities have changed. Meanwhile, the content of public administration also changes accordingly. This undoubtedly brings unprecedented challenges to the administrative legal system.

Public-private Partnerships is a way for governments to partner with social capital to provide Public goods and services. PPP generally has three characteristics: equal cooperation, risk sharing and mutual benefit. There are many forms of PPP, but they can be roughly divided into two types: contract PPP (including BOT, TOT, BOO, franchise, etc.); And the PPP of the company model (that is, the public and private parties jointly establish a new PPP project company or the public party transfers shares of the company to the private party). As another reform and innovation mode of public administration and public goods supply mode after privatization, regulation relaxation and re-regulation, PPP was introduced in the field of public service supply by western developed countries in the 1990s and swept all countries in the world. PPP is not a new thing in China. In 1984, Shenzhen Shajiao B power plant BOT project was the first PPP project in China. PPP practice in China has gone through ups and downs, and has developed rapidly again since 2014. Under the background of PPP vigorously promoted by governments at all levels, some phenomena are worth thinking about.

2. Legal problems existing in PPP agreement

2.1 The public questions the legitimacy of administration

The supreme people's court issued a circular on a typical guiding case, "land expropriation within a specified period in Hunan province". Xiangxiang municipal government cooperates with Xinheng trading co., LTD to develop public projects. The project requires the requisition of the appellant song's house. Song thought that the collection violated its legitimate rights and interests and then filed an administrative lawsuit. One of the main points of dispute in the case is whether the land expropriation by the appellant is legal. According to documents provided by the appellant, the

land acquisition was financed by Xinheng trading co LTD, the appellant said. Therefore, land acquisition belongs to commercial purposes, not for the public interest. According to the relevant provisions of the property law and other laws, it is illegal for the state to forcibly expropriate individual citizens' land and houses for commercial purposes. The appellee argued that Xinheng trade co., ltd. had participated in the public service project with the approval of the Hunan provincial government in response to the national policy of vigorously promoting PPP mode, and that the land expropriation and development carried out by the city for this purpose was not for commercial interests but for the economic construction of Xiangxiang city, and the purpose was legitimate.

In view of the prior approval of the provincial government for the use of land for the project, the court of final appeal dismissed the appellant's claim, considering the clear legal nature and purpose of the land expropriation. The formal legitimacy of "approved and approved by the provincial government" and the argument of Xiangxiang municipal government that "even though Xinheng trading co., ltd. has its commercial side, it cannot overrule its expected contribution to the promotion of Xiangxiang's economy and public services" effectively support and demonstrate the legitimacy of the government's decision to make a deadline for land clearance. As the original assignor and future successor of the public interest, the public has the right to supervise the government's administrative actions, and also has the right to benefit from the PPP project after its completion. So the "Hunan land acquisition case within a time limit" further cause we have a configuration for the PPP agreement the two sides were done questioned the legitimacy of the rights and obligations of public-private partnership should stick to what interests, should satisfy the reflection of what the public can expect sex and "public-private partnership" reduced to "conspiracy", public or private, the public consumers as the rights of stakeholders concerns.

2.2 Investors are concerned about the good faith of the executive branch

The supreme people's court announced the typical guiding case "Chongqing Ronghao investment case". Chongqing Ronghao Investment Company sued the government for breach of contract. The case reflects widespread concern among investors. They fear that the government will default in the process. In this case, after the parties signed the agreement, the plaintiff invested hundreds of millions of yuan in development and construction according to the agreement, but the defendant failed to remove the house and provide land according to the agreement. Finally, the defendant unilaterally terminated the performance of the agreement on the grounds that the PPP agreement violated relevant national policies and the social capital party was in breach of contract.

Although the defendant argued that the agreement could not be performed due to the plaintiff's breach of contract, it failed to provide evidence to prove this. In fact, the content of the agreement signed by the two parties does not violate the mandatory national laws and regulations, and also conforms to the relevant national policies. The defendant's prior breach of contract and unilateral breach of contract led to the plaintiff's subsequent failure to perform the contract and caused great losses to the plaintiff. The plaintiff's request for the defendant to continue to perform the agreement was finally upheld by the court. The traditional one-way administration concept is characterized by "command - obedience". The government easily ignores investors' legitimate rights and interests and appeals, and often infringes investors' rights and interests under the pretext of changing laws and policy documents. Unequal communication can easily lead to disputes. In order to provide efficient and high-quality public goods, the government should change its administrative concept and improve its administrative integrity. The government should establish a fair, open and win-win administrative system. This kind of administrative system not only respects the operation law of PPP mode, but also can protect the interests of investors and public interests.

2.3 The dispute settlement methods are chaotic

Taking "Henan Xinling case" as an example, the plaintiff Henan Xinling company filed a civil lawsuit with Henan higher people's court because the defendant Huixian municipal government failed to fulfill the PPP agreement as promised. The defendant, believing that the Henan provincial higher people's court does not have civil jurisdiction over the case, appealed to the supreme people's

court. Therefore, the main dispute in this case lies in how to determine the legal nature of the agreement signed by the two parties and whether Henan provincial higher people's court has jurisdiction. On this, both sides differ greatly. First instance plaintiff Xinling company thinks: the agreement signed is a civil contract, the case is a civil dispute, there is no objection to jurisdiction. The first-instance defendant Huixian municipal government's defense: the agreement signed by both parties is a franchise agreement in the form of BOT, and the nature of the agreement is an administrative contract. According to the newly revised "administrative procedure law", the people's court should accept it as an administrative case.

The law does not clearly stipulate how to initiate litigation procedures after PPP agreement disputes occur. Once a dispute occurs, the two parties often choose the most favorable litigation procedures. When the plaintiff brings a civil action, the defendant challenges jurisdiction. When the plaintiff files an administrative lawsuit, the defendant files another lawsuit as the plaintiff in the civil contract. The confusion of choosing litigation procedure can easily lead to two problems: on the one hand, litigation cost increases; On the other hand, the standards of judgment become inconsistent and affect judicial authority and formal justice. Although, in social life, occurrence contradiction dispute is very normal. However, under the background of increasingly fierce PPP agreement disputes, it is still unclear what litigation procedures should be adopted to solve PPP disputes, so that the supreme people's court can only solve this problem by final adjudication.

2.4 Disputes over the legal nature of PPP agreements

There are many theories about the legal nature of PPP agreement, which can be summarized into the following three theories: civil contract theory, administrative contract theory and mixed contract theory. Each theory has its internal reasons and logic behind it.

1) The civil contract and its reasons. PPP is essentially a civil contract between equal parties. The reasons include: (1) the PPP agreement has two basic characteristics, namely, the equality of civil contract subjects and the autonomy of will. From the perspective of form, one party of the PPP agreement is the administrative organ with executive power, and the other party is the administrative counterpart of the company, so the contract signed by the two parties should be an administrative contract. In essence, both parties have the freedom to decide whether to sign the contract and how to determine the rights and obligations in the contract signing process. This embodies the core principle of autonomy of will in civil contracts. (2) the rights and obligations of both parties in the PPP agreement are basically equal. Essentially, PPP agreement is a civil legal act in which the public sector transacts the operational usufruct or limited property right of PPP project with the private sector's capital, advanced technology and management experience. (3) defining the legal nature of the PPP agreement as a civil contract is more in line with the demands of the private sector and conducive to the development of the PPP model. The ultimate goal of any system design is to protect the legitimate rights and interests of relevant parties and promote the development of the system itself.

2) Administrative contract and its reasons. According to this theory, PPP agreement is essentially an administrative contract signed between the government as an administrative organ or the department authorized by the government and the private sector as an administrative counterpart. The reasons include: (1) the subject of the PPP agreement is the administrative subject, specifically the government or government authorized department as the administrative organ. "One of the parties to a contract must be the administrative subject" in conformity with the standard requirements for the form of an administrative contract. (2) the purpose of PPP agreement is public welfare. In essence, China theoretically adopts the theory of "administrative purpose" to the substantive standard of administrative contract, but the way of expression is different. PPP agreement is that the government USES social capital to carry out infrastructure and public utilities construction, and ultimately serves the public. At the same time, during the implementation of the agreement, the government needs to supervise the service quality, public quality and product price, so as to protect the social public interests and public security. The commonweal nature of PPP agreement determines that it is essentially an administrative contract. (3) both the signing and

performance of PPP agreements involve the use of administrative power. Firstly, in the contract signing stage, the government has the franchise right, which is essentially the administrative license right. Secondly, in the contract performance stage, the government is not only the subject of the contract, but also the supervisor of the contract performance, and has the right to unilaterally change, terminate the contract and other administrative advantages. It is obviously different from the signing and performance of civil contracts.

3) Mixed contract and its reasons. PPP agreement is a mixed contract with the nature of both public law and private law, and both parties should be bound by the principles of both public law and private law. (1) PPP agreement is a civil transaction between the public sector and the private sector for public services. For the purpose of making profits, the private sector obtains the franchise of the public sector to engage in specific infrastructure or public utilities on the condition of its own capital, advanced technology and management experience. The two parties' agreement on rights and obligations in the PPP agreement is the product of the consensus reached by both parties, which is no different from the ordinary civil contract. (2) the PPP agreement also reflects the relationship between the public sector as the regulator and the private sector as the regulated. At present, PPP mainly exists in the field of infrastructure and public utilities in China. Traditionally, this area has been considered a government responsibility. However, in view of the government's insufficient funds, technology and management, if the government is fully responsible, it will often lead to a serious lag in the construction of infrastructure and public utilities. The introduction of social capital can solve the above problems to a great extent. There is a huge controversy over the legal nature of PPP agreement, which is not only a theoretical disagreement, but also a huge practical interest problem hidden behind it. In other words, the definition of the legal nature of the agreement will largely determine the way of subsequent dispute settlement. This is the focus of attention of both parties to the contract, especially the private sector, because different legal remedy approaches will have a significant impact on the protection of their interests.

3. New ways of legal remedy for PPP agreements in China

The agreement has the dual nature of public law and private law. It is obviously not objective to define PPP agreement as civil contract or administrative contract. The determination of the legal nature of PPP agreement needs to take into full consideration both the self-consistency of theoretical logic and the practical needs of society. Otherwise, definitions are either despised by theorists or rejected by practitioners. Redefining the legal nature of PPP protocol by using two-order theory can achieve a better balance between the two.

3.1 Refer to two-order theory.

The legal nature of PPP agreement can be divided into two stages according to the "signing time of PPP agreement".

1) The first stage is before the signing of the PPP agreement, which shall be an administrative action. Its main performance is administrative licensing, applying the rules of public law. At present, PPP mode in China is mainly applicable to infrastructure and public utilities. According to the provisions of article 12, paragraph 1, paragraph 2, of the administrative licensing law, "matters requiring specific rights, such as the development and utilization of limited natural resources, allocation of public resources and market access of specific industries directly related to public interests", can be set up as administrative licensing. At present, the PPP legislation with the highest rank is "measures for the management of infrastructure and public utilities franchising". Regardless of the name or specific content of the regulations, the "measures for the management of infrastructure and public utilities franchising" actually limits the scope of application of PPP mode to the field of infrastructure and public utilities. Therefore, this stage is mainly manifested as an administrative licensing behavior, and is a concession. The administrative organ for licensing matters shall make decisions through fair competition such as bidding and auction, and the disputes arising therefrom shall be settled by applying the rules of public law.

2) The second stage is after the PPP agreement is signed. In principle, it should be a civil

contract and apply the rules of private law. The rules of public law may be applied in special circumstances. In conclusion, according to the revised two-stage theory, the legal nature of PPP agreements can be simply summarized as "administrative treatment + civil contract" and "administrative treatment + administrative contract" modes. That is, the first stage belongs to the typical administrative action, which is usually manifested as administrative licensing; The second stage is a civil contract in principle, but if there is an obvious use of administrative rights by the public sector, it can be regarded as an administrative contract and should be dealt with by applying the rules of public law. The definition of the legal nature of PPP protocol under the guidance of two-order theory can achieve self-consistent logic in theory. However, in view of the inherent relationship between the legal nature of PPP agreement and legal remedy, whether the definition of the legal nature of PPP agreement is scientific still needs to be tested by practice.

Therefore, whether the definition of the legal nature of PPP under the guidance of two-stage theory is scientific and reasonable still needs to be examined from the perspective of legal relief. (1) selection of relief channels. The most controversial problem in the legal remedy of PPP agreement dispute is how to choose the remedy way: civil remedy or administrative remedy? Different definitions of the legal nature of PPP agreements lead to different ways of remedy. If PPP is defined as a civil contract, civil remedy should be adopted. If PPP is defined as an administrative contract, it should adopt the way of administrative remedy. If PPP is defined as a mixed contract, civil or administrative remedies shall be chosen as the case may be. As for how to distinguish between choices, the theory does not seem to give a clear definition. Then, how should choose the law to use arbitration as the basic way of dispute settlement under the guidance of two-order theory. In France, the application of arbitration has experienced the development process of "international first, then domestic", and has been gradually recognized by the court cases. According to the system design above, if we can give the private sector the option of remedy, the legal nature of PPP agreement will be solved. As for legislation, if we want to make arbitration more justified in applying PPP agreement disputes, we can completely amend the law or legislate. There are two options for incorporating PPP agreement disputes into arbitration from the legislative level. First, the arbitration law should be amended to add that PPP agreement disputes can be arbitrated. Under the background that the arbitration law has been implemented for more than 20 years since 1995 and there is a strong demand for amendment from the academic circle, this option is relatively direct and feasible, but it may take a long time due to the influence of the legislative process. Second, the basic law on PPP stipulates that arbitration can be applied. The law on cooperation between government and social capital (draft for consultation) at the beginning of 2016 clearly stipulates that PPP disputes can be arbitrated. If the law can be passed, it will be a better choice, but from the current legislative process, the resistance is greater. Finally, how should arbitration become the main channel for PPP dispute settlement? The author thinks it can be started from three aspects: first, PPP related legislation should encourage the parties to give priority to arbitration to solve PPP disputes in the spirit of legislation; Secondly, compulsory arbitration system is stipulated by law, that is, any party in a PPP agreement dispute can apply for arbitration, and the application for arbitration is no longer based on the arbitration agreement signed by both parties. Third, the government should support and help arbitration institutions to establish specialized PPP agreement dispute arbitration centers and improve the professional level of PPP dispute arbitration.

3.2 Mechanism level: design of necessary clauses of the agreement

There are two main precautions to prevent and reduce PPP agreement disputes: first, the government abandons public welfare; second, the government infringes upon private interests. In order to solve the absence and offside of administrative responsibility, we should improve administrative legal system and introduce PPP special law. In addition, the author suggests that both parties should discuss and agree on specific contents such as "ownership clause", "underwritten clause" and "dispute settlement clause" before signing the agreement, so as to reduce the conflict of rights and obligations of both parties and establish dispute prevention and treatment mechanism.

1) Title clause. In the PPP agreement, the legitimate reason for the government to exercise the

right of administrative priority is to safeguard the public interests of social members. If the government needs to exercise the privilege, it should specify it in the agreement with the investors in the case of consensus. PPP projects involve citizens' education, medical care, housing, pension and other aspects, and concern citizens' vital interests. Precisely because of the basic and private nature of PPP projects, if the completed PPP projects are not owned by the state, the significance of launching PPP model will cease to exist." Ownership clause" refers to the provisions on ownership, management right and other rights and interests in the PPP agreement signed by the government and social capital. Ownership clauses ensure that the state retains control over public projects. This will give the public welfare of PPP project construction and the legitimacy of agreement signing, and help to avoid the recurrence of "land expropriation within a certain period in Hunan". The government and investor establish long-term and effective working assessment mechanism and cooperative governance system. This will transform the concept of cooperative administration into specific behavior system norms, establish the PPP agreement dispute prevention mechanism, and ultimately improve the government's administrative integrity and quality. The government is no longer solely responsible for public goods and services, but "dynamic supervision", "consultation supervision" and "institutional supervision" of public affairs.

2) Cover clause. Non-competitive and exclusive terms agreed in advance for the change of circumstances in the agreement are called "guarantee clause". For investors, once appear, government policy law adjustment, major natural disasters, social force majeure factors such as abnormal events or approval as specified in the both sides talks things over consistent, the situation changes as agreement cannot perform or not perform right when necessary, the existence of "out" before will make the cooperation risk in the project construction, to effectively control protocol negotiation phase, expected benefits to obtain the guarantee of "visible". The "commonweal" of PPP projects cannot be denied. The private sector should anticipate and tolerate the restriction of "public interest" when deciding to invest in such projects, but the interests of the private sector should also be respected and guaranteed. It is biased if the value orientation of PPP agreement is completely in favor of public interest. Respecting the pursuit of interests of social capital, emphasizing the right of social capital to obtain reasonable returns, and "giving consideration to the interests of public interests and social capital based on the agreement" are the contracting orientation of the agreement that the government under the rule of law should choose. The PPP mode is still in the practice stage of "crossing the river by feeling the stones", and the reserved "guarantee clause" in the agreement will become an effective means for social capital to realize self-interest protection with low implementation cost and strong constraint effect. California 91 express way "take the bottom clause" the right safeguard practice has given our country the great enlightenment and the reference significance.

4. Conclusion

Based on the analysis of the mechanical theory as the foundation, designed the soccer robot pick the ball institutions optimal design process, found aim function, select design variables and the corresponding optimization algorithm to optimize a complete set of institutions. At last through the test to get the final performance parameters of the institution. Experiments show that the system has higher accuracy and stability, the new optimize pick the ball have design basic requirements, and achieved good ideal control effect.

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