

PUBLIC PRIVATE PARTNERSHIPS AND PUBLIC LAW
IN CHINA

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ABSTRACT

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Public Private Partnerships (PPPs) as one form of government contracts engaging the private sector in infrastructure development have been practised worldwide. Since 2014, PPPs were promoted by the Chinese Central Government with unprecedented strength, and booming PPP practice gives rise to a legal inquiry: how PPP contracts should be conceived in the current system of government contracts in China, which is characterised by a distinction between administrative contracts and private contracts? Contextualising PPPs in the landscape of China's political economy, investigating policy rationales, regulation and practice of PPPs as well as examining the existing legal debate over the nature of PPP contracts in China, this Thesis argues that PPPs should be classified as administrative contracts to enhance government accountability and better achieve the public interest.

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TABLE OF ABBREVIATIONS

ALL	Administrative Litigation Law
BOT	Build-Operate-Transfer
BT	Build-Transfer
DBFO	Design-Build-Finance-Operate
GSC	Government and Social Capital Cooperation
LGFV	Local Government Financing Vehicle
MOF	Ministry of Finance of the People's Republic of China
NDRC	National Development and Reform Commission of the People's Republic of China
NPM	New Public Management
PPP	Public Private Partnership
SOE	State Owned Enterprises
SPC	Supreme People's Court of the People's Republic of China
SPV	Special Purpose Vehicle

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INTRODUCTION

Public Private Partnerships (PPPs), loosely defined as long-term contracts that establish cooperative arrangements between a government and a private party with the latter responsible for bundled tasks such as financing, construction and operation of infrastructure projects and obtaining economic returns thereby, have been widely practised by governments worldwide for infrastructure development. In China, de facto PPP practice started in the 1980s when local governments used Build-Operate-Transfer (BOT) contracts for infrastructure financing, but it was since 2014 that PPPs have been unprecedentedly promoted by several departments under the Central Government such as the Ministry of Finance (MOF) and the National Development and Reform Commission (NDRC), and PPPs are used by local government in building roads, airports, urban public utilities, environmental protection projects and so forth.

Along with booming PPP practice in China since 2014, the debate over the legal nature of PPP contracts is heated. Influenced by the civilian legal tradition, the system of government contracts in China is characterised by a public/private distinction, which is captured by the notion of ‘administrative agreements’ as distinctive from private contracts in several aspects, notably including more public law regulation over government contracting and prioritised protection of the public interest. How PPPs should be classified under the current dichotomous system of government contracts is disputed, with three approaches developed that argue PPP contracts are administrative contracts, private contracts and mixed contracts respectively.

This Thesis is a modest endeavour to analyse the legal characterisation of PPP contracts in China, and I argue that PPP contracts should be classified as a special form of administrative contracts to enhance government accountability and better protect the public interest. The Thesis includes three Chapters. Chapters One and Two contextualise PPPs in China, and they explain what PPPs are, how they are regulated and practised by local governments. Revealing the definitional and normative complexity of PPPs in China as a transitional economy, the first two Chapters lay a foundation for the analysis about the legal nature of PPP contracts in Chapter Three. More detailed summaries are as follows.

Chapter One introduces what PPPs are in China. The paradigm case of PPPs is predicated on a cooperative contractual relationship between the public sector and the private sector under market economy, such that the financial resources and expertise of the latter are supposed to contribute to better delivery of infrastructure services. Depicting the transitional feature of the China's economy and the developing course of PPPs, this Chapter highlights two points. First, since 2014, 'Government and Social Capital Cooperation' as the Chinese version of PPPs were promoted with unprecedented strength by several departments under the Central Governments. Second, in the Chinese version of PPPs, certain state-owned enterprises (SOEs) are also qualified as 'private' partners. The peculiarities of definition of PPPs in China warrant the caution that normative assumptions commonly associated with PPPs may not hold valid in the Chinese context.

Chapter Two expounds the policy rationales, regulatory frameworks and government practice of PPPs in China since 2014. It highlights three points. First, the rationales for PPPs promotion are very much mixed. PPPs are expected to achieve multiple goals such as boosting high level of infrastructure investment and alleviating local government debts. It is not clear how competing policy objectives can be easily reconciled. Second, there is no special PPP legislation so far, and existing PPP regulation includes various policy documents issued mainly by the MOF and the NDRC. Third, most PPP projects are practised by subnational governments in China. Two features are particularly salient in local PPP practice. One is the continued dominance of SOEs; another is the tendency of local government to misuse PPPs as financing tools only, which gives rise to the concern with local government financial accountability. Since 2017, the regulatory focus of PPPs has shifted from encouraging PPP expansion to an emphasis on the quality of PPP projects, and the tension between attracting participation of true private enterprises and protection of the public interest lingers. The normative complexity of PPPs forms a background for the legal debates over the nature of PPP contracts.

Chapter Three examines the debate on legal characterisation of PPP contracts in China. PPP contracts have been deemed as private contracts since the 1980s. But since the 2014 Revision of the Administrative Litigation Law of PRC (the ALL 2014), which formally recognised the notion of administrative contracts as distinctive from civil law contracts and listed concession agreements as one typical kind of administrative

contracts, there are increasing controversies over how PPPs should be perceived against the dichotomy between ‘administrative contracts’ and ‘private contracts’. In this Chapter, I argue that PPP contracts should be classified as a special type of administrative contracts to better enhance government accountability and protect the public interest. The Chapter is divided into four sections.

In Section One, drawing on scholarly works and judicial practice, I explicate two key legal implications of administrative contracts. One is the role of courts in policing government contracting by referring to public law norms. Another is the prioritised protection of the public interest. In Section Two, I sketch three approaches to the characterisation of PPP contracts, which argue that PPP contracts are administrative contracts, private contracts and mixed contracts respectively. In Section Three, instead of directly evaluating the three approaches, I explore three questions which cut cross existing debates. First, have PPPs been expressly classified as administrative agreements under the ALL 2014? I argue that whilst concession agreements are listed as administrative contracts by the ALL 2014, PPPs are different from the simple form of concession in many aspects. As a matter of positive law, PPP project contracts have not been expressly classified as administrative contracts. Second, can PPP contracts be exclusively governed by private law norms? I argue that PPPs contracts are different from ordinary civil law contracts in many aspects, and public law cannot be excluded from governing PPP contracts. Not only is government PPP contracting subject to regulation of public law, but also governments enjoy several special powers under PPP

contracts to fulfil the public interest and these powers are founded on public law. Third, can we separate the public law elements from the private law elements under a PPP contract? I argue that it is hard to separate ‘public law elements’ from ‘private law’ elements under a PPP contract in an a priori manner. Various normative requirements such as legality, government accountability, protection of interests of different parties compete each other under PPP contracts. How norms in public law and private law shall govern an issue under a PPP contract is an end product of value judgement. Based on arguments in Section Three, in Section Four, I positively establish reasons in favour of classifying PPP contracts as administrative contracts. To classify PPP contracts as administrative contracts not only enables courts to play a role in policing government contracting, but also allows for flexible application of both public law and private law rules in disputes resolution. It is conducive to enhancing local government accountability and establishing good PPP practices.

CHAPTER ONE: CONCEPTUALISING PPPs IN CHINA

This Chapter provides a contextualised understanding of definitions of PPPs in China. Section One provides a definitional overview of PPPs internationally, revealing that archetype PPPs are centred after a cooperative relationship between the private sector and the public sector. Section Two provides background information about political economy in China. It is noteworthy that China is a transitional economy, which gives rise to the special status of SOEs that can hardly be classified either as the private sector or the public sector. Section Three views the developing course of modern PPPs in China. PPP practice started in China since the 1980s when local government used BOT contracts for infrastructure financing. Since 2013, an unprecedented wave of PPPs promotion was launched, and the term ‘Government and Social Capital Cooperation’ (GSC) was coined as the Chinese notion of PPPs. According to the definition of GSC, SOEs may be qualified as the ‘social capital entities’ to enter into PPP contracts with government. It is also noteworthy that concession is the most important form of PPPs in China.

1 Public Private Partnerships: An International Definitional Overview

Public Private Partnerships as an innovative means of public services delivery have usually been associated with the doctrine of ‘New Public Management’(NPM) as a philosophy of public sector reform popular among many OECD countries since the

1980s.¹ Manifest in measures such as cutting down public expenditure, delegating responsibilities to private entities and fostering their voluntary engagement to public goods, NPM is centred around the idea that ‘the only way to obtain better results from public-sector organisations is to adopt some sort of a market-based mechanism to replace the traditional bureaucracy’.² Under the influence of NPM, in 1992, the Private Finance Initiative was first introduced by the Conservative Government in the United Kingdom, which utilised Design-Build-Finance-Operate (DBFO) contracts to task infrastructure services to private entities, primarily to ‘get the infrastructure costs off the public balance sheet, keep investment levels up, cutting public spending and avoid the constraints of public sector borrowing limits’.³ This practice was believed to be the modern archetype of PPPs, a term later coined by the Labour Government in 1997 and defined by the UK Home Office as ‘long-term contracts where the private sector designs, builds, finances and operates an infrastructure project’⁴.

Current definitions of PPPs worldwide display great diversity. For example, according to the New Zealand Treasury, PPP is defined as ‘a long term contract for the

¹ Christopher Hood, ‘A Public Management for All Seasons?’ (1991) 69 *Public Administration* 3

² Joe Wallis, Brian Dollery, *Market failure, Government Failure, Leadership and Public Policy* (Macmillan Press, 1999) 87

³ Li Bing, A Akintoye, PJ Edwards and C Hardcastle, ‘The Allocation of Risk in PPP/PFI construction projects in the UK’ (2005) 23 *International Journal of Project Management* 25

⁴ UK Home Office, ‘Public Private Partnerships’ (30 May 2019) <<https://www.gov.uk/government/collections/public-private-partnerships>> accessed 26 July 2019

delivery of a service, where the provision of the service requires the construction of a new asset, or the enhancement of an existing asset, that is financed from external (private) sources on a non-recourse basis and where full legal ownership of the asset is retained by the Crown.’⁵ The OECD PPP Reference Guide defined PPP as ‘a long-term contract between a private party and a government entity, for providing a public asset or service, in which the private party bears significant risk and management responsibility and remuneration is linked to performance’.⁶ Apart from DBFO, operational modes such as Build-Operate-Transfer (BOT), Build-Operate-Own-Transfer, Renovate-Operate-Transfer are also used and conceptualised as PPPs. Despite the definitional and operational diversity, the essence of PPPs has been identified as combining distinctive resources of public and private sectors for better infrastructure development and public services delivery. At the macro level, the public sector faced with short-term fiscal shortage is facilitated by private financing to build infrastructures and thereby is released from the upfront investment through public expenditures.⁷ At the micro level, PPPs can generate efficiency gains in infrastructure delivery. Whilst under the conventional public provision of infrastructure services, the monopolising

⁵ The Treasury of New Zealand, ‘Public Private Partnerships’ (1 November 2018) <<https://treasury.govt.nz/information-and-services/nz-economy/infrastructure/nz-infrastructure-commission/infrastructure-transactions-unit/public-private-partnerships>> accessed 26 July 2019

⁶ The Organisation for Economic Co-operation and Development, ‘Public-Private-Partnerships Reference Guide Version 3’ < <https://library.pppknowledge.org/documents/4699>> accessed 26 July 2019

⁷ Darrin Grimsey and Mervyn K. Lewis, *Public Private Partnerships, The Worldwide Revolution in Infrastructure Provision and Project Finance* (Edward Elgar 2004) 28

public sector usually lacks incentives to innovate, PPPs open the infrastructure market to the private entities for competition, absorb private expertise and encourage managerial innovation.⁸ Because private entities usually discharge integrated tasks in construction, operation and maintenance of infrastructures, they are also incentivised to reduce the life-cycle costs of infrastructure services delivery.⁹ Moreover, as risks of an economic, political, financial or technical nature are shared by private enterprises and governments according to their comparative ability to control, the overall risks involved in infrastructure developments can be reduced, which also promotes efficiency. The efficiency gains and shift of upfront financing responsibilities to the private sector can possibly enable government to provide public services with lower costs and better quality. For private entities, investment and operation of infrastructures also generate profits, either in forms of government payment, subsidies or users' charges.

It may seem self-evident to note that the idea of PPPs is preconditioned on a dichotomy between the private and public sector as distinctive institutions subject to different normative ideals.¹⁰ The public sector, loosely used interchangeably with 'government', is a department populated by political institutions and bureaux, the

⁸ Engel, Eduardo, Ronald Fischer and Galetovic Alexander, *The Economics of Public-Private Partnerships: A Basic Guide* (CUP 2014) 12,13; Jean-Etienne de Bettignies and Thomas W Ross, 'The Economics of Public-Private Partnerships' (2014) 30 *Canadian Public Policy* 135

⁹ *ibid*

¹⁰ Corinna-Barbara Francis, 'Quasi-Public, Quasi-Private Trends in Emerging Market Economies: The Case of China' (2001) 33 *Comparative Politics* 275

operation of which is for fostering of the public interest.¹¹ In contrast, the private sector inhabited by market institutions is where individuals with private property voluntarily participate in various social and economic activities and actively seek for maximisation of self-interest. Subject to the discipline of competition, private players are strongly motivated to specialise, innovate and develop expertise. Such public-private divide is largely attributable to the liberal capitalist tradition, according to which the preservation of this dichotomy is crucial for the success of a market economy as well as a liberal polity.¹² Whilst the belief in market efficiency and individual freedom primarily limited government functions to rectifying market failures in providing public goods, ensuring fairness and equality, NPM and PPPs embody the reintroduction of the market mechanism to rectify several ‘government failures’, including inefficiency among others.¹³ This philosophy behind PPPs serves as a reminder that conceptions of PPPs must be contextualised in political economy. For the case of China, it is important to examine its political economy first.

2 China: Transitional Economy, SOEs and the Private Sector

China is a transitional economy. Prior to 1978, China practised socialist planned economy, and the State dominated every aspect of the social and economic life and

¹¹ Jan-Erik Lane, *The Public Sector: Concepts, Models and Approaches* (3rd edn, Sage Publication 2000) 15

¹² Francis (n 10)

¹³ Holley H Ulbrich, *Public Finance in Theory and Practice* (Routledge, 2011) 11

directed economic activities through SOEs and rural economic collectives.¹⁴ There was no public-private divide. When market reform was first launched in the 1980s and China adopted the ‘Opening-up and Reform’ policies, the only private enterprises were those foreign-invested. The fierce political debate on the compatibility of market reform with socialist ideology in the 1990s resulted in the establishment of ‘Socialist Market Economy’ in the Third Plenary Session of the 14th National Congress of China Communist Party,¹⁵ a concept later enshrined in constitutional amendment in 1993.¹⁶ Under the socialist market economy, a dual track system was practised, where planning and market means of resources allocation coexisted. The preservation of planning is to guarantee the attainment of important development priorities such as energy, infrastructure investment and social stability.¹⁷

The establishment of a domestic market started with the transformation of SOEs to modern enterprises. Along with the enactment of Company Law in 1994,¹⁸ large-sized SOEs were required to convert to companies with the governance structure composed of the shareholder’s committee, management board and supervisory board. The government shall only enjoy the status as the shareholder and shoulder financial

¹⁴ David Zweig, ‘China’s Political Economy’, in William Joseph, *Politics in China* (2nd edn, OUP 2014) 256

¹⁵ *ibid* 258

¹⁶ Constitution of the PRC 1993, art 15

¹⁷ Barry Naughton, *The Chinese Economy: Transitions and Growth* (MIT Press 2007) 92

¹⁸ Company Law of the PRC 1994 (《中华人民共和国公司法》1994 年)

liability limited to the invested capital.¹⁹ Such ownership rights of the government were supposed to be separated from the property rights to possess, utilise, transfer and dispose of property, which belonged to SOEs as independent legal entities. By distinguishing ownership enjoyed by the government and property rights enjoyed by the enterprise, large SOEs were supposed to unequivocally pursue profit-maximisation.²⁰ Most medium and small sized SOEs stayed affiliated with local governments and a small portion were privatised. The SOE reform was accelerated in 1997 under the policy of ‘grasping the large and releasing the small’.²¹ For large SOEs, especially those under the Central Government, the focus was placed on improving competitiveness and efficiency through restructuring and refinancing; at the same time, the Central Government preserved control over most large SOEs through shareholding. For small SOEs, local governments had more authority to restructure, privatise or close down.²²

¹⁹ ibid 301; Sujian Guo, ‘Designing Market Socialism: Trustees of State Property’ (2005) 8 *The Journal of Policy Reform* 207

²⁰ Kjeld Erik Brødsgaard and Koen Rutten, ‘The Emergence and Development of the Socialist Market Economy (1992–2003)’ in *Accelerated Accumulation to Socialist Market Economy in China: Economic Discourse and Development from 1953 to the Present* (Brill 2017) 94

²¹ Huang Qunhui, ‘How Are New State-Owned Enterprises Casted? A Review on 40 Years of SOE Reform’ (2018) 1 *China Economist* 58 (黄群慧:《‘新国企’是怎样炼成的——中国国有企业改革40年回顾, 载《中国经济学人》2018年第1期》)

²² Zweig (n 14)

The transitional nature of China's economy gives rise to the complicated nature of SOEs, which sit uneasily on the border between the 'public' and the 'private' as usually defined in a capitalist economy. SOEs are enterprises established under the Company Law and are supposed to pursue profit-maximisation, but at the same time, many of their tasks are extended functions of the government, such as providing public goods, facilitating the development strategy of the State, guaranteeing national security and stabilising the national economy.²³ Slowly though, SOEs reform in China is undergoing. In 2015, the Chinese Communist Party and the Central Government took an initiative to classify SOEs into two categories for commercial and public welfare purposes respectively.²⁴ Commercial SOEs shall operate according to market principles, enhancing the vitality of the state-owned economy and increasing the value of state-owned assets. SOEs for public welfare mainly serve to provide public goods and services. The two-way reform of SOEs governed by different normative values is supposed to delineate the border between markets and governments in China. SOEs for commercial purposes are analogous to private market players subject to profit

²³ Gu Gongyun, Hu Gairong, 'The Study on the Government Positioning and System Reconstruction in the Reform of State-owned Enterprises' (2014) 36 *Modern Law Science* 81 (顾功耘、胡改蓉：《国企改革的政府定位及制度重构》，载《现代法学》2014年第36卷第3期)

²⁴ Guiding Opinions of the Communist Party of China Central Commission and the State Council on Deepening the Reform of State-owned Enterprises, No 22 [2015] of the CCCPC (《中共中央国务院关于深化国有企业改革的指导意见》，中发[2015]22号)；Guiding Opinions on the Functional Definition and Classification of State-owned Enterprises (20 December 2015) State-owned Assets Supervision and Administration Commission of the State Council, MOF and NDRC (国资委、财政部、发展改革委《关于国有企业功能界定与分类的指导意见》，2015年12月30日)

management, whilst SOEs for public welfare purposes are more affiliated with the government and supposedly to supplement the role of market.

Contrasted with the slow SOE reform is the rapid expansion of the private sector in China. In 1999, private-run or individual economy were recognised by the Constitution as an ‘important’ component of the socialist market economy, rather than a mere supplement to the state-run economy.²⁵ In 2004, the status of the private economy was further elevated, and the State was placed under the obligation to protect the private economy and encourage, support and guide its development. By 2017, there were over 27 million private enterprises in China and over 65 million individually owned business, accounting for over 90% of the total number of enterprises in China. The private economy currently contributes over 50% of tax revenue and over 60% of the GDP output, over 70% of the technological innovations and over 80% of the urban and rural employment.²⁶ It is projected that the role of the state-owned economy in China will continue to be less significant compared with that of the private sector, and the industrial outputs by SOEs are projected to be reduced to less than 10% by 2030.²⁷

²⁵ Zweig (n 14) 270; Constitution of the PRC 1999 (《中华人民共和国宪法》1999 年)

²⁶ Xinhua News, ‘Speech of Xi Jinping on the Conference Concerning Private Enterprises’ (1 November 2018) <<https://www.xuexi.cn/00ce73e28c458bbcc2e6f9077c4828cb/e43e220633a65f9b6d8b53712cba9caa.html>> accessed 24 September 2019 (新华社, “习近平在民营企业座谈会上的讲话”, 2018 年 11 月 1 日)

²⁷ World Bank, ‘China 2030’ (Report) <<https://www.worldbank.org/content/dam/Worldbank/document/China-2030-complete.pdf>> accessed 26 July 2019

Despite the growing importance of private enterprises in China, SOEs still remained dominant in sectors related to national security, natural monopoly, public services and goods and natural resources. ‘Backbone’ enterprises in pillar industries and high-tech sectors are also owned or controlled by the state.²⁸ The largest companies in sectors of strategic importance, (such as energy, petroleum, aviation, telecommunication and construction) are usually controlled by the Central Government. At the local level, SOEs participate in infrastructure development and industries such as automobile, steel, chemicals, telecommunications and clean energy.²⁹

With insights into China’s political economy, we now turn to examine the developing courses of modern PPPs in China.

3 The Developing Course of PPPs in China: From BOT, Franchise to Government and Social Capital Cooperation

This Section examines the development of modern PPPs in China from a historical perspective.³⁰ Roughly, the development of PPPs can be divided into three stages. The

²⁸ Margaret M. Pearson, ‘State-Owned Business and Party-State Regulation in China’s Modern Political Economy’ in Kellee S Tsai and Barry Naughton, eds, *State Capitalism, Institutional Adaptation, and the Chinese Miracle* (CUP 2015) 31

²⁹ *ibid*

³⁰ Jin Yongxiang, ‘The Prospect of PPPs in Light of Its Developing Course in China’ (*Caxinxin News*, 1 August 2014) <<http://opinion.caixin.com/2014-08-01/100712038.html>> accessed 24 September 2019 (金永祥, “从中国 PPP 发展历程看未来”, 财新网, 2014 年 8 月 1 日)

first stage is during the early 1980s, when foreign capital dominated PPP practices. The second stage is since the 2000s, when the domestic private sector started to rise and compete with foreign capital entities. The third stage is since 2013. PPPs are promoted unprecedentedly, and SOEs, foreign investors and domestic private enterprises compete with each other.

(a) Foreign Capital Dominated BOT Projects in the 1980s

De facto PPP practices in China can be traced back to the 1980s when China started to transform its highly concentrated planned economy towards a market economy under the ‘Opening-up and Reform’ policy. The major private economic entities then were mainly foreign companies. The first PPP project was the Shajiao B Power Plant built in Shenzhen in 1985, which was a cooperative venture between the Shenzhen Government (the local government of one of Special Economic Zones in China) with Hopewell Holdings Limited (a Hong Kong based infrastructure firm) with a BOT contract concluded. According to the BOT contract, the private investor was responsible for financing, construction and operation of the power plant, with the ownership of the power plant transferred back to the Shenzhen Government after the 15-year contractual term expired.³¹ In this project, the private investment was about 3.2 billion HKD. As a local experiment of financing, this BOT project was carried out without formal policy

³¹ Zhou Xiwu, ‘The Construction Mode of Shajiao B Power Plant’ (*Shenzhen Committee of the Chinese People's Political Consultative Conference*, 23 April 2013) <http://www1.szzx.gov.cn/content/2013-04/23/content_8987013.htm> accessed 12 March 2019 (周溪舞, “沙角 B 电厂的建厂模式”, 深圳政协网, 2014 年 4 月 23 日)

ground but under ad hoc guidance and was reviewed by the State Council (the Central Government). Along with more policies and laws issued in the 1980s to encourage foreign investment,³² similar BOT experiments were initiated by local governments. In 1995, two BOT central policies were enacted to regulate BOT practice.³³ One was the *Circular of the Ministry of Foreign Trade and Economic Cooperation Concerning Absorption of Foreign Investment by Means of BOT*, which formally recognised BOT as a means of foreign investment into infrastructure.³⁴ Another was the *Notice on Issues Concerning Approval Management of Pilot Foreign Invested Concession Projects* jointly issued by the National Planning Commission, the Ministry of Transport and the Ministry of Electricity, which launched pilot BOT projects in sectors such as transport and electricity.³⁵ Overall, PPP practice at this stage was characterised by foreign-capital dominated BOT projects.

³² Provisions on Encouraging Foreign Investment (11 October 1986) State Council (国务院《关于鼓励外商投资的规定》，1986年12月11日)

³³ Chen Zheng, Li Dan, 'The Policy Changes of PPP and the Learning Mode of Policy-making: A Textual Analysis on Central Policies from 1980 to 2015' (2017) 2 *Chinese Public Administration* 102 (陈琤、李丹：《PPP政策变迁与政策学习模式：1980至2015年PPP中央政策文本分析》，载《中国行政管理》2017年第2期)

³⁴ Circular of the Ministry of Foreign Trade and Economic Cooperation Concerning Absorption of Foreign Investment by Means of BOT, No 89 [1994] of the MFEC (对外贸易经济合作部《关于以BOT方式吸收外商投资有关问题的通知》，外经贸法函字[1994]第89号)

³⁵ Notice on Issues Concerning Approval Management of Pilot Foreign Invested Concession Projects (21 August 1995) National Planning Commission, Ministry of Electricity and Ministry of Transport (国家计委、电力部、交通部《关于试办外商投资特许权项目审批管理有关问题的通知》，1995年8月21日)

(b) Franchise and Engagement of Domestic Private Enterprises in the 2000s

With the rise of domestic private capital, a new reform was launched to broaden the market entry to infrastructure investment. From 2001 onwards, the State Council and the National Planning Commission issued several policies to encourage private enterprises to participate in profitable infrastructure and public utilities projects.³⁶ In 2004, ‘*Measures for the Administration on Franchise of Urban Public Utilities*’ were enacted by the Ministry of Construction.³⁷ Primarily applied to urban public utilities, this departmental rule was not intended to regulate PPP specifically, but rather to standardise the award of government franchise in general. Still, it provided strong policy support for the participation of domestic private capital into BOTs and other modes of PPPs in competition with foreign investors.

³⁶ Several Opinions on Encouraging and Guiding Civil Investment, No 2653 [2001] of the National Planning Commission (国家计委《促进和引导民间投资若干意见》, 计投资[2001] 2653 号); Decision of the State Council on Reforming the Investment System, No 20 [2004] of the State Council (《国务院关于投资体制改革的决定》, 国发[2004] 20 号); Several Opinions of the State Council on Encouraging, Supporting and Guiding the Development of Individual, Private and Other Non-public Sectors of the Economy, No 3 [2005] of the State Council (《国务院关于鼓励支持和引导个体私营等非公有制经济发展的若干意见》, 国发[2005]3 号)

³⁷ Measures for the Administration on the Franchise of Municipal Public Utilities, Order 126 of the Ministry of Construction (2004) (2004 年《市政公用事业特许经营管理办法》, 中华人民共和国建设部令第 126 号). The latest version of this departure rule is Measures for the Administration on the Franchise of Municipal Public Utilities (2015 Amendment) issued in April 2015. (《市政公用事业特许经营管理办法(2015 修正)》)

(c) Government and Social Capital Cooperation: the Chinese Notion of PPPs since 2014

Although from 2004 onwards de facto PPPs started to expand nationwide, it was since 2014 that the English abbreviation ‘PPP’ appeared in policy documents in China. The debut of ‘PPP’ was in the *Report on Draft Budgets of Central and Local Governments for the Year of 2014* issued by the Ministry of Finance (MOF),³⁸ followed by *Notice of the Ministry of Finance on Issues Concerning the Popularisation of the Utilisation of Public Private Partnership Mode* (No 76 of the MOF) in September 2014.³⁹ Whilst the term ‘Public Private Partnership’ is used in the Chinese policy documents as the official English translation, a more loyal translation to the original Chinese term is ‘*zhengfu he shehui ziben hezuo*’, which literally means ‘Government and Social Capital Cooperation’ (GSC). According to the MOF, PPP is defined as

‘[t]he long-term cooperative relationship established in infrastructure and public service fields. Under the general mode, the social capital entity assumes most parts of the work including infrastructure design, construction, operation and maintenance, and it obtains reasonable investment returns through users’ payment and necessary government payment; and the government department is

³⁸ Report on Draft Budgets of Central and Local Governments for the Year of 2014, Ministry of Finance (财政部, 2014 年中央和地方预算草案的报告); Huang Jingwen, Liu Xiaoping, ‘Taking History as a Guide—Developing Course of Domestic PPPs and the Prospect’ (*PPP Special Report of China Lianhe Credit Rating Co Ltd*, 16 March 2015) < <http://bond.hexun.com/upload/117.pdf> > accessed 25 September 2019 (黄静雯、刘小平:《以史为鉴——国内 PPP 发展历程及未来展望》, 联合资信评估有限公司 PPP 专题报告, 2015 年 3 月 16 日)

³⁹ Notice of the Ministry of Finance on Issues Concerning the Popularisation of the Utilisation of Public Private Partnership Mode, No 76 [2014] of the MOF (《财政部关于推广运用政府和社会资本合作模式有关问题的通知》, 财金[2014]76 号)

responsible for the supervision of infrastructure and public service price and quality, so as to ensure the maximisation of the public interest.’

Attendant to the advent of the concept of GSC was an unprecedented wave of PPP promotion and proliferation of PPP policies. Only three months later after the issuance of No 76 of the MOF, the National Development and Reform Commission (NDRC), issued another PPP promotional policy entitled ‘*Guiding Opinions on Carrying out Public Private Partnerships*’.⁴⁰ Sector-based PPP promotional policies were also enacted, covering fields such as traditional infrastructures, municipal public utilities, toll roads, public services, agriculture, tourism, culture and water conservation.⁴¹

⁴⁰ Guiding Opinions of the National Development and Reform Commission on Carrying out Public Private Partnerships, No 2724 [2014] of the NDRC (《国家发展和改革委员会关于开展政府和社会资本合作的指导意见》，发改投资[2014]2724 号)

⁴¹ Notice of the National Development and Reform Commission on Issuing the Guidelines for the Implementation of Public Private Partnership Projects in the Traditional Infrastructure Sector, No 2231 of the NDRC (《国家发展改革委关于印发<传统基础设施领域实施政府和社会资本合作项目工作导则>的通知》，发改投资[2016] 2231 号); Notice on Promoting PPP in the Fields of Public Utilities, No 29 [2015] of the MOF and Ministry of Housing and Urban& Rural Development (财政部、住房城乡建设部《关于市政公用领域开展政府和社会资本合作项目推介工作的通知》，财建[2015]29 号); Notice on the Unitisation of PPP in Toll Roads, No 111[2015] MOF and Ministry of Transport (财政部、交通运输部《关于在收费公路领域推广运用政府和社会资本合作模式的实施意见》，财建[2015]111 号); Notice of the General Office of the State Council on Forwarding the Guiding Opinions of the Ministry of Finance, the National Development and Reform Commission and the People’s Bank of China on Promoting the Public Private Partnership Mode in Public Service Field, No 42 [2015] of the General Office of the State Council (《国务院办公厅转发财政部发展改革委人民银行<关于在公共服务领域推广政府和社会资本合作模式指导意见的通知>》，国办发[2015] 42 号); Guiding Opinions on Advancing Public-Private Partnership in the Agricultural Field, No 2574 [2016] of the NDRC and the Ministry of Agriculture (国家发展改革委、农业部《关于推进农业领域政府和社会资本合作的指导意见》，发改农经[2016] 2574 号); Guiding Opinions on Promoting Public-Private Partnership in the Tourism Field, No 3 [2018] of the Ministry of Culture and Tourism and MOF (文化和旅游部、财政部《关于在旅游领域推广政府和社会资本合作模式的指导意见》，文旅旅发[2018] 3 号); Guiding Opinions on Promoting Public-Private Partnership in the Culture Field, No 96 [2018] of the Ministry of Culture and Tourism and MOF (文化和旅游部、财政部《关于在文化领域推广政府和社会资本合作模式的指导意见》，文旅产业发[2018]96 号); Notice of the National Development and Reform Commission and the Ministry of Water Resources on Issuing the Operating Guidelines

Empirically, booming PPP practice has been observable. Prior to 2014, the total number of PPP projects in China was about 1200,⁴² whilst by January 2019, the PPP database established by MOF showed that 8734 PPP projects were proposed involving 27 trillion RMB investment. About 39% of the projects are in the sector of municipal engineering, 14% in transportation, 10% in ecology construction and environmental protection, with other sectors such as urban comprehensive development, education, water resources construction, tourism, healthcare accounting for 17% collectively.⁴³

There are two important definitional issues about PPPs in China since 2014. First, a peculiar feature of GSC as the Chinese concept of PPPs lies in ‘social capital’ as the ‘private’ partner. ‘Social capital’ has much broader connotation than ‘private sector’ as defined in the capitalist economy. According to Article 2 of the *MOF Operational Guidelines for PPP Modes*,⁴⁴ social capital denotes ‘any enterprises legal persons, inside or outside the territory, with the modern enterprises system established, but excluding local government financing vehicles or other companies under the control of

for the Major Water Conservancy Projects Constructed via Public-Private Partnership (for Trial Implementation), No 2119 [2017] of the NDRC and the Ministry of Water Resources (《发展改革委、水利部关于印发<政府和社会资本合作建设重大水利工程操作指南(试行)>的通知》，发改农经[2017] 2119 号)

⁴² Huang, Liu (n 38)

⁴³ MOF, National PPP Comprehensive Information Platform about Project Management Base (财政部全国 PPP 综合信息平台项目管理库) accessed 27 September 2019 <<http://www.cpppc.org:8082/efmisweb/ppp/projectLibrary/toPPPMap.do>>

⁴⁴ Notice of the Ministry of Finance on Issuing the Operational Guidelines for Public Private Partnership Mode (for Trial Implementation), No 113[2014] of the MOF (《财政部关于印发政府和社会资本合作模式操作指南(试行)的通知》，财金[2014]113 号)

the local government contractor.’⁴⁵ According to this definition, SOEs financially detached from local governments may also qualified as ‘social capital entities’ to enter into PPP contracts with governments. Second, it is noteworthy that the devise of the concept of ‘GSC’ does not lead to an abandonment of use of concept of ‘concession’. Prior to 2015, the term ‘concession’, in Chinese ‘*texu jingying*’, had two meanings. It denoted both foreign-capital dominated BOTs during the 1980s and the simple form of franchise since 2004. Since 2015, the meaning of concession was further enriched, denoting concession-based PPPs in general. In April 2015, the *Measures for the Administration of Concession for Infrastructure and Public Utilities* were jointly issued by six departments under the State Council,⁴⁶ and Article 3 reads

⁴⁵ Local government financing vehicles (LGFV), sometimes also known as ‘urban development and investment companies’, are a special form of local SOEs in China. They usually discharge bundles tasks of financing, construction and operation of urban infrastructure projects. One important function of LGFV is to circumvent the legal prohibition on government borrowing imposed by the Budget Law 1994 and finance on behalf of local governments from capital market. Because borrowings of LGFV are usually supported by collaterals provided by governments and their obligations are not reflected on government balance sheets, LGFV financing incurred staggering hidden local government debts. Currently LGFVs are subject to a two-way reform. Some LGFVs are financially detached from local governments, operate on market principles and are liable to go bankrupt. Other LGFVs stay affiliated with local government, discharge public interest related projects only but no longer finance for governments.

See PPP Headlines, ‘The Developing Course of Local Government Financing Vehicles Transformation in China’ (June 2018) < http://www.sohu.com/a/234032191_532149 > accessed 25 September 2019 (PPP 头条, “中国地方政府融资平台转型发展历史”, 2018 年 6 月; Sina Finance, ‘A Memo of the Life and Death of Urban Development and Investment Companies: Birth in 1992, Death in 2018’ (March 2018) < <https://cj.sina.com.cn/articles/view/6162941440/16f570600019005anr?sudaref=www.google.com&display=0&retcode=0> > accessed 25 September 2019 (新浪财经, “城投公司生死备忘录: 生于 1992, 卒于 2018”, 2018 年 3 月)

⁴⁶ Measures for the Administration of Concession for Infrastructure and Public Utilities, Order No 25 of the NDRC, MOF, the Ministry of Housing and Urban-Rural Development, Ministry of Transport, Ministry of Water Resources, and the People’s Bank of China (《基础设施和公用事业特许经营

‘[F]or the purpose of the Measures, concession for infrastructure and public utilities means that to provide public goods or public services, the government, by competitive mode and according to the law, authorises a legal person or any other organisation from inside and outside the territory of the PRC, to engage in investment, construction, and operation of infrastructure and public utilities within a certain time limit and scope and earn profits as stipulated in an agreement that specifies the rights, obligations, and risk sharing.’

According to the clarification by the NDRC, concession is one method for PPP.⁴⁷

Currently, most PPP projects in China are operated through three methods, including equity cooperation, concession and government purchase of public services. For profitable or quasi-profitable projects in special fields such as energy, transportation water conservancy, environmental protection and public utilities, concession is used, and investors mainly gain revenues through charging users’ fees supplemented by government subsidies. Because concession-based PPPs have been practised since the 1980s and are currently the dominant form of PPPs in China, *Measures for the Administration of Concession for Infrastructure and Public Utilities*’ was enacted to regulate concession mode PPPs specifically.

管理办法》，国家发展和改革委员会、财政部、住房和城乡建设部、交通运输部、水利部、中国人民银行令 第 25 号) This department rule must be distinguished from Measures for the Administration on the Franchise of Municipal Public Utilities, Order 126 of the Ministry of Construction (2004) (2004 年《市政公用事业特许经营管理办法》，中华人民共和国建设部令 第 126 号) in note 37 despite their highly similar titles.

⁴⁷ China Net, ‘NDRC Held Conference on “Measures for the Administration of Concession for Infrastructure and Public Utilities”’ (5 May 2015) <http://www.china.com.cn/zhibo/2015-05/05/content_35481964.htm?show=t> accessed 24 September 2019 (中国网, “发改委就《基础设施和公用事业特许经营管理办法》有关情况举行发布会”, 2015 年 5 月 5 日)

4 Concluding Remarks

This Chapter provides a definitional overview of PPPs in China. Due to the transitional feature of the China's economy, SOEs are important market players and currently qualified as social capital entities to enter into PPP contracts with government for infrastructure development. The renewed promotion of PPPs since 2014 leads to proliferation of PPP practice and the rise of PPP regulation in China. The next Chapter takes a closer look at PPP (GSC) in China since 2014. By examining the policy rationales, regulatory frameworks and local government practice, it seeks to unpack the normative complexity of PPP which shall be kept in mind before we consider the legal issue.

CHAPTER TWO: POLICY RATIONALES, REGULATORY FRAMEWORKS AND LOCAL GOVERNMENT PPP PRACTICE

This Chapter has three parts. First, it explains that the promotion of PPPs since 2014 in China is not based on a single rationale, but has several policy goals. Second, it depicts the current regulatory frameworks of PPPs, which mainly consist in government guidance and policies. Third, it examines local government PPP practice and highlights two issues. One is the local government tendency to misuse PPPs as financing tools only. Another is the dominance of SOEs on the PPP market. The complicated goals and concerns contextualise the legal debate about PPP in China.

1 Policy Rationales of PPPs Promotion

Since 2014, policy statements about significance of PPP promotion in China are diverse. For example, in the *Notice of the Ministry of Finance on Issues Concerning the Popularisation of the Utilisation of Public Private Partnership Mode*⁴⁸, PPP promotion is regarded as ‘inevitable for economic upgradation and transformation and the new type of urbanisation development’ ‘facilitative of accelerating the transformation of government functions and enhancing the governance capacity of the state’ and ‘important for deepening the financial and taxation system reform and building the modern financial system’. Similarly, the *Guiding Opinions of the National*

⁴⁸ No 76 [2014] of the MOF

stated that,⁴⁹

‘[C]arrying out PPP is conducive to the innovation of the investment and financing mechanism, the broadening of social capital investment channels, and enhancement of endogenous economic growth power. It helps promote mutual integration of various types of capital and make their respective advantages complementary to each other, promote the diversification of investors, and develop mixed-ownership economy. It also helps delineate the relationship between the government and the market, accelerate the transformation of government functions, and maximise the decisive role of the market in allocation of resources.’

Similarly, in the State Council’s notice about the *Guiding Opinions on Promoting the Public Private Partnership Mode in the Public Service Field*⁵⁰, promotion of PPPs is regarded as of great significance in ‘transforming government functions’ ‘breaking the restraints imposed on the sectorial entry’ and ‘improving fiscal input and financial management’.

The diverse descriptions of purposes of PPPs are attributable to the fact that the promotion of PPPs in China is driven by several departments at the Central Government level, among which the roles of National Development and Reform Commission (NDRC) and Ministry of Finance (MOF) are particularly noteworthy. The complicated motivations underlying PPP promotion by these departments are opaque.

⁴⁹ No 2724 [2014] of the NDRC

⁵⁰ No 42 [2015] of the General Office of the State Council

Still, it is possible to discern several major policy goals pursued by NDRC and MOF respectively.⁵¹

(a) NDRC: Stabilising Infrastructure Investment and Economic Growth

As the successor of the National Planning Commission, the NDRC is the macro-planning department under the State Council. It has comprehensive functions such as formulating economic and social development policies, balancing the total amount of economy, guiding the reform of the overall economic system, managing fixed assets investment and planning major construction projects and production structures.⁵²

The promotion of PPPs by the NDRC was directly driven by the *Guiding Opinions of the State Council on Innovation of Investment and Financing Mechanisms in Key Fields to Encourage Social Investment*,⁵³ the gist of which is ‘to bring into full play the positive role of social capital, particularly non-governmental capital into key fields, as public services, resources, environment protection, ecological construction

⁵¹ Yu Wenguang, ‘Issues on Legislation in PPP Regulation—A Perspective on Law and Policy’ (2016) 2 Contemporary Law Review 77 (喻文光:《PPP 规制中的立法问题研究—基于法政策学的视角》, 载《当代法学》2016 年第 2 期)

⁵² National Development and Reform Commission of the PRC <<http://www.ndrc.gov.cn/>> accessed on 27 September 2019 (中华人民共和国国家发展和改革委员会网站)

⁵³ Guiding Opinions of the State Council on Innovation of Investment and Financing Mechanisms in Key Fields to Encourage Social Investment, No 60 [2014] of the State Council (《国务院关于创新重点领域投融资机制鼓励社会投资的指导意见》, 国发[2014] 60 号)

and infrastructure facilities’. According to the NDRC, promotion of PPPs is supposed to achieve several goals.⁵⁴ First, by broadening market entries and equalising investment opportunities, PPPs foster the development of non-state-owned capital vis-à-vis national owned economy. Second, as more capital flows into sectors of infrastructure and public services, the supply of public goods can be enhanced, which benefits the general public welfare. Third, infrastructure investment through PPPs can stabilise economy growth as a whole. In fact, infrastructure investment, paralleled with real estate and manufacturing, is one of the three pillars of fixed-asset investment in China.⁵⁵ Prior to 2012, infrastructure investment mainly served as the counter-cyclical tool,⁵⁶ and investment into real estate and manufacturing were key drivers to the economy. However, since 2014, as the general pace of economic growth slowed down, the significance of infrastructure investments became more salient. This is reflected in the *Guiding Opinions of the General Office of the State Council on Maintaining Efforts to Remedy Shortcomings in the Infrastructure Field* in 2018,⁵⁷ which showed a

⁵⁴ No 2724 [2014] of the NDRC

⁵⁵ Since 1978, fixed-assets investment has become an important driver of China’s economy. According to the data by the National Bureau of Statistics, from 1981 to 2017, the contribution of the investment to GDP growth has kept a high ratio from 38.9% to 44.4%. See Mu Xuequan, ‘China’s fixed-asset investment grows fast since 1978’(*Xinhua News*, 6 September 2018 <http://www.xinhuanet.com/english/2018-09/06/c_137450257.htm> accessed 24 September 2019).

⁵⁶ For example, during the 2009 financial crisis, the State Council implemented the four trillion stimulus programme to support the local finance of infrastructure for the purpose of stabilising economy.

⁵⁷ *Guiding Opinions of the General Office of the State Council on Maintaining Efforts to Remedy Shortcomings in Infrastructure Field*, No 101 [2018] of the General Office of the State Council (《国务院办公厅关于保持基础设施领域补短板力度的指导意见》，国办发[2018] 101 号)

concern for the slowed pace of fixed assets investment overall and a determination to encourage infrastructure investment.

(b) MOF: Regulating Local Government Debts and Controlling Fiscal Risks

For the MOF, promotion of PPPs was driven by regulation of local government debt in pursuance of the *Several Opinions of the State Council on Strengthening the Management of Local Government Debts* (No 43 [2014] of the State Council).⁵⁸ PPPs were regarded as important tools to alleviate local government debt, relieve local financial pressure and control fiscal and financial risks.

The problem of local government debt has been closely related to local infrastructure financing in China.⁵⁹ Before 1994, China implemented a fiscal contracting system, and the main funds of local infrastructure development came from local urban maintenance and construction tax and public utilities surcharges.⁶⁰

⁵⁸ Several Opinions of the State Council on Strengthening the Management of Local Government Debts, No 43 [2014] of the State Council (《国务院关于加强地方政府性债务管理的意见》，国发[2014] 43 号)

⁵⁹ The current government system in China is typically characterised as a five-layered hierarchy, including the Central Government (the State Council), provincial governments, municipal governments, county governments and township governments

⁶⁰ Work Bank, 'The Fiscal Framework and Urban Infrastructure Finance in China' (Policy Research Working Paper WPS4051, 2006) <<http://documents.worldbank.org/curated/en/656471468024300934/The-fiscal-framework-and-urban-infrastructure-finance-in-China>> accessed on 12 March 2019

However, since 1994, China implemented a tax-sharing system and fiscal resources available for local governments were significantly reduced.⁶¹ Faced with great fiscal shortage, local governments turned to extra-budgetary revenues for infrastructure financing. The major source of infrastructure financing was through raising debts. Under the Budget Law 1994, local governments were legally prohibited to borrow from the capital market, and only a small amount of local government bonds can be issued under tight control under the State Council.⁶² However, local governments devised several ways to circumvent this legal restriction. A frequent strategy was to change the identity of debtors, and LGFVs, SOEs or fiscally subsidised public institutions (such as public schools or hospitals) were directed to finance for local governments. These nominal debtors, as independent legal entities not subject to restrictions imposed by the Budget Law, can borrow from the capital market, and their borrowings were usually backed by local government resources such as lands or future fiscal revenues as collateral, notwithstanding that the Guarantee Law prohibits local governments from acting as guarantors.⁶³ Apart from bank loans by disguised debtors, Build-Transfer(BT)

⁶¹ Decision on Implementing Tax-Sharing Fiscal Management System, No 85 [1993] of the State Council (国务院《关于实行分税制财政管理体制的决定》，国发[1993]85号). Wang, Li Zhang, Zhao Zhang and Simon Xiaobin Zhao, 'Urban Infrastructure Financing in Reform-era China' (2011) 48 Urban Studies 2975

⁶² Article 28 of Budget Law of the PRC 1994 stipulates that 'The local governments cannot issue local government bonds, except as otherwise prescribed by laws or the State Council.' (《中华人民共和国预算法》1994年)

⁶³ MIT Centre for Finance and Policy, 'China's Growing Local Government Debt Levels' (Policy Brief, January 2016) <<http://gcfp.mit.edu/wp-content/uploads/2016/01/China-Local-Govt-Debt-CFP-policy-brief-final.pdf>> accessed on 26 September 2019

mode of construction, payables and trust companies were other financing channels.⁶⁴ Debts incurred in ways other than government bonds were neither reflected on the government balance sheet nor subject to size control, which inhibited the Central Government from effectively monitoring risks of local debts. As the large group of lenders were banks, defaults also risk the financial system.

Various opaque ways of local government financing led to the staggering scale of local government indebtedness. Statistics from National Audit Office showed that by 2014, the local indebtedness reached 24 trillion RMB (40% of GDP).⁶⁵ According to another report by MOF in 2014, 44.5% of the local debts were raised by governments at the city level, and 36.4% were at county level. 37.5% of the debts were used for urban construction, 16.7% for land storage, and 13.8% for transport construction.⁶⁶ As the accumulated financial and fiscal risks of local government debts started to be salient, regulation of local government debt became a central policy focus by the Chinese Communist Party since 2014. Apart from dealing with existing local government debts,⁶⁷ the major strategy is two-fold. One is to clear up the opaque ways of local

⁶⁴ ibid

⁶⁵ ibid

⁶⁶ Zeng Xiaolan, 'The Choice of Path of Using PPPs to Solve Local Government Debts' (2014) 662 *China State Finance* 25 (曾晓安, 《用 PPP 模式化解地方政府债务的路径选择》, 载《中国财政》2014 年 9 月半月刊, 总第 662 期); Zhang Yong, 'PPP and Regulation of Local Government Debts' (2015) 12 *Price: Theory and Practice* 136 (张勇: 《PPP 模式与地方债务治理》, 载《价格理论与实践》2015 年第 12 期)

⁶⁷ Notice of the Ministry of Finance on Issuing the Methods on Sorting Out and Discerning Residual Local Government Debts through Budget Management, No 351 [2014] of the MOF (《财政部关

financing. Another is to promote standard channels for local government financing, which not only relieves local government fiscal pressure, but also facilitates better monitoring and control by the Central Government over local indebtedness. The regulation of local government debt was preceded by the revision of the Budget Law in August 2014,⁶⁸ which formally relaxed the legal constraints on government bonds at the provincial level. Immediately following the revised Budget Law, the State Council issued *No 43 [2014]*,⁶⁹ which proposed that not only provincial governments but municipal and county governments may raise debts subject to the facilitation by the provincial governments.

Against the background of local debts regulation, PPPs were promoted as one standardised channel for local government financing in *No 43 [2014] of the State Council*. As an alternative to local governments bonds, PPPs are supposed to address local government indebtedness in several ways. First, PPPs can help to address the existing local government debts. For infrastructure projects originally financed by LGFVs, which still involve government liabilities of payment, transformation into PPP modes in forms of Renovate-Operate-Transfer or Transfer-Operate-Transfer can shift government repayment liabilities to social capital entities.⁷⁰ Second, for new

于印发<地方政府存量债务纳入预算管理清理甄别办法>的通知》，财预[2014]351号)

⁶⁸ Budget Law of the PRC 2014 (《中华人民共和国预算法》2014年) art 35

⁶⁹ n 58

⁷⁰ No 351 [2014] of the MOF. When residual infrastructure projects are transformed into PPPs mode, the involved debts will no longer be counted as governments debts. As 83.6% of the debts by local governments by 2014 were used for provision of quasi-public goods, the scope for PPP applications

infrastructure projects, PPPs shift financing responsibilities from the governments to social capital entities, address the local government short-term fiscal shortage and smoothen local fiscal expenditure curves.⁷¹ Under PPP mode, even if governments may need to make payment or provide subsidies, the payment periods are prolonged in a way analogous to buying a property through mortgage instead of paying the full-amount in cash at once. Third, at the micro level, PPPs encourage competition among LGFVs, other SOEs and private enterprises, which presumably fosters efficiency in infrastructure development and helps address local government indebtedness in the long run.

It is not clear how multiple goals attached to PPPs can be easily reconciled. On the one hand, the NDRC intended to use PPPs to boost infrastructure development and engage participation of private enterprises. On the other hand, the MOF wished to use PPPs to relieve local government financial pressure, emphasising transfer of risks from governments to enterprises.⁷² However, to attract private investment into infrastructure usually means that returns for investment must be appealing enough—profit-driven market players do not invest for nothing. High returns of infrastructure investments usually mean that either governments provide considerable subsidies, or that the charges for the delivered public services are high. This gives rise to a particular concern:

is considerable. See Zang, Zeng (n 66)

⁷¹ No 76 [2014] of the MOF; No 2724 [2014] of the NDRC

⁷² Yu (n 51)

PPPs are not inherently more efficient or less costly than conventional government provision of infrastructures. Misuses of PPPs incur high costs to tax-payers and public services users.⁷³ Apart from the economic dimension, there are other concerns. Under PPPs, usually a project company (also known as ‘special purpose vehicle’, SPV) is established directly responsible for delivery of infrastructure services such as water supply, electricity, toll roads and so forth. If these projects are not properly implemented, the public interest can be directly affected. Moreover, not different from other construction projects, PPPs project construction involves issues about public security, environmental protection, employment and so forth. These complexities highlight the importance of proper PPP regulation. The current regulatory frameworks of PPPs are explicated as follows.

2 Regulation of PPPs in China

There is no PPP legislation currently in effect in China. Existing regulation of PPPs consists in discrete policies and government guidance mainly issued by the MOF and the NDRC. Classified as ‘departmental rules’ and ‘normative documents’, these regulatory policies are primarily directed to corresponding departments at lower government levels such as local departments of finance and local departments of

⁷³ Mark Freedland, ‘Public Law and Private Finance - Placing the Private Finance Initiative in a Public Frame’ (1998) Public Law, Sum, 288

development and reform. The two departments have different approaches in regulating PPPs.

The NDRC has issued more than 20 pieces of policies concerning PPPs, including sector-based promotional policies, general PPP Project Guidelines and PPP Contract Guidelines and so forth. Driven by multiple social and economic goals, the NDRC emphasises that PPPs projects shall be used according to the government development plan and broad investment policies. Apart from general PPPs policies, the NDRC dominated the enactment of *Measures for the Administration of Concession for Infrastructure and Public Utilities*, which specifically regulates concession-based PPPs.⁷⁴

In contrast, the MOF has issued more than 30 pieces of general PPP policy covering general operational procedure,⁷⁵ project procurement,⁷⁶ financial management,⁷⁷ and regulation over PPP contracts.⁷⁸ It focuses more on the financial

⁷⁴ n 46

⁷⁵ n 44

⁷⁶ Notice of the Ministry of Finance on Issuing the Administrative Measures for Government Procurement of Public Private Partnership Project, No 251 [2014] of the MOF (财政部关于印发《政府和社会资本合作项目政府采购管理办法》的通知, 财库[2014] 251 号)

⁷⁷ Notice of the Ministry of Finance on Issuing the Interim Measures for the Financial Management of Public Private Partnership Projects, No 92 [2016] of the MOF (《财政部关于印发<政府和社会资本合作项目财政管理暂行办法>的通知》, 财金[2016]92 号)

⁷⁸ Notice on Regulating Management Work of Public-Private Partnership Contracts, No 156 of the MOF (财政部《关于规范政府和社会资本合作合同管理工作的通知》, 财金[2014] 156 号); MOF PPP Project Contract Guidelines (for Trial Implementation) (财政部《PPP 项目合同指南

dimension of PPPs. Particularly, two evaluations, Value-for-Money Evaluation and Fiscal Capacity Evaluation, are required both at the stages of project characterisation and after the project plan is formulated. Value-for-Money Evaluation is used to assess whether the PPP mode is more cost-saving and appropriate than conventional government procurement for a particular project.⁷⁹ Fiscal Capacity Evaluation is to ensure that the governmental payment responsibility is within its fiscal capacity throughout the period of a PPP project. According to *the MOF Guidelines on Financial Capacity Evaluation of PPP Projects*,⁸⁰ estimated annual PPP expenditures shall not exceed 10% of the total public budget expenditure of that year, and the cap set by the MOF is to prevent blind expansion of PPP projects. No PPP project failing the two evaluations are supposed to be conducted.

It is important to notice that polices issued by the departments under the State Council are low at the normative hierarchy in regulating government activities. In China, norms governing how the administration works are hierarchical. At the top of this hierarchy are laws (national legislation) enacted by the National People's Congress and its Standing Committee, immediately followed by administrative regulations enacted

(试行)》)

⁷⁹ Notice of the Ministry of Finance on Issuing the Guidelines for the Value for Money Evaluation of PPP (for Trial implementation), No 167 [2015] of the MOF (《财政部关于印发<PPP物有所值评价指引(试行)>的通知》, 财金[2015]167号)

⁸⁰ Notice of the Ministry of Finance on Issuing the Guidelines for the Financial Capacity Evaluation of Public Private Partnership Projects, No 21 [2015] of the MOF (《财政部关于印发<政府和社会资本合作项目财政承受能力论证指引>的通知》, 财金[2015]21号)

by the State Council. Other enactments such as regulations issued by departments under the State Council (departmental rules), local legislation enacted by local people's congresses and their standing committees, and regulations enacted by local governments are of lower status. At the bottom of this hierarchy are regulatory documents such as internal government guidance, notices, circulars and meeting minutes.⁸¹ Most PPP policies so far are department regulations or normative documents. Although not of 'hard law', they nonetheless provide an important basis for local government PPP practices.

3 Local PPP Practices

Following the promotional policies, PPP projects have grown rapidly in China, and over 95% of PPP projects are conducted by local government. By 2017, the amount of PPP investment reached RMB 11 trillion, and projects involving 2.2 trillion investment had been under construction.⁸² The expansion of local PPP projects is characterised by several features.

One salient feature is the tendency of local governments to use PPPs as financing tools only. One form of malpractice is to fix government expenditure responsibilities in order

⁸¹ Huang Jinrong, 'The Legal Definition and Effects of "Normative Documents"' (2014) 7 Law Science 10 (黄金荣: 《“规范性文件”的法律界定及其效力》, 载《法学》2014年第7期)

⁸² Economic Daily, 'Multipronged Measures to Regulate PPP Developments' (16 April 2018) <http://www.xinhuanet.com/info/2018-04/16/c_137113951.htm> accessed 24 September 2019 (经济日报, “多管齐下规范 PPP 发展”, 2018 年 4 月 16 日)

to attract social capital financing. For example, local governments promise social-capital entities repurchase of the invested equity, fixed-rate returns, minimum-profits guarantees or compensation of investment losses. These promises disconnect performance of infrastructure services delivery and remuneration, rendering governments ultimately liable for risks involved in the project investment, construction and operation.⁸³ Fiscal Capacity Evaluations sometimes are circumvented, and PPP projects are carried out by the local government despite the fact that government expenditures under PPP mode have already exceeded 10% of budget for that year and are beyond local fiscal capacity in the long term. A more concealed malpractice is to render PPPs as the extended Build-Transfer (BT) mode of financing. Under a BT contract, a project company is responsible for financing and construction of the project, and the government purchases the project back and pay for the total amount of investment into the project plus reasonable returns to the constructor. However, because the BT mode does not contain meaningful operational tasks, and the government payment responsibilities are mainly conditioned on the completion of the project, contractors are incentivised to increase the costs of construction to bargain higher prices for the government repurchase.⁸⁴ A typical BT contract usually lasts for three years,

⁸³ Notice on Regulating the Management of Government and Social Capital Cooperation (PPP) Integrated Information Platform Project Base, No 92 [2017] of the MOF (财政部《关于规范政府和社会资本合作(PPP)综合信息平台项目库管理的通知》，财办金[2017] 92 号)

⁸⁴ Notice on Stopping Local Governments Illegal or Deviant Financing Behaviours, No 463 [2012] of the MOF (财政部《关于制止地方政府违法违规融资行为的通知》，财预[2012] 463 号); China Construction News, ‘PPP or Extended Version of BT? These Ten differences Must Be Paid Attention’ (6 November 2017) <http://www.sohu.com/a/202921225_715755> accessed 24 September 2019 (中国建筑新闻网, “是 PPP 还是拉长版 BT? 这十大差异要走心”, 2017 年 11 月 6 日)

and it can increase the short-term government debt quickly. For these reasons, the BT mode was halted by the MOF in 2012, and most financial institutions stopped providing finance for BT projects since then. However, by packaging projects involving small operational tasks as PPP projects, BTs under the name of PPPs revived, and the only difference is the extended period of repayment of government debts.⁸⁵

The tendency of local governments to render PPPs as financing tools regardless of the actual operational efficiency is partly explained by shortage of local fiscal resources. It is also explained by the strong impulses of self-interested local government officials to expand infrastructure investment. Infrastructure development brings both economic and political benefits. Economically, infrastructure construction boosts land development and increases local government revenues such as urban land use taxes and land transfer income. Good infrastructures also attract more investors and boost local economy growth.⁸⁶ Politically, because GDP figures have been weighted highly in the political performance assessment system, using PPPs to drive up local investment level increases the chance of political promotion.⁸⁷ As one session of government lasts for

⁸⁵ Liaoning Tongge Law Firm, 'Why BT Modes Are Strictly Restricted in the New Round of PPP Practices' (30 May 2016) <<http://www.lntglaw.com/zyyj/display.php?aid=599>> accessed 24 September 2019 (辽宁同格律师事务所, "新一轮 PPP 项目为何要严格限制 BT 模式", 2016 年 5 月 30 日)

⁸⁶ Ge Yang, Cen Shutian, 'A Study on the Effect of Land Use Support on the Leading Development of Infrastructures in China' (2017) 2 Economic Research Journal 35 (葛杨、岑树田:《中国基础设施超常规发展的土地支持研究》, 载《经济研究》2017 年第 2 期第 35 页)

⁸⁷ Zhang Jun, Gao Yuan, Fu Yong and Zhang Hong, 'Why Does China Posses So Much Better Infrastructure?' (2007) 3 Economic Research Journal 4 (张军、高远、傅勇、张弘:《中国为什么拥有了良好的基础设施?》, 载《经济研究》2007 年第 3 期)

five years only, local government officials tend to develop infrastructure projects with short-term economic effects, with government expenditures incurred by PPPs passed on to future sessions of governments. The financial implications of these malpractices are salient: local government financial drains persist, and the concern with local government financial accountability remains acute. Under the current accounting rules, debts incurred through PPPs are not properly reflected on government balance sheets,⁸⁸ and it is hard for the Central Government to monitor scale of local debts.

Another feature in PPP practice is the continued dominance of SOEs as ‘social capital’. By June 2017, the total amount of PPP transactions reached 5.5 Trillion RMB, almost 52% of which was contributed by centrally administered SOEs and their subsidiary companies.⁸⁹ Another one quarter was contributed by local SOEs. Participation of true private enterprises was less than 25% of the market share. While the ‘crowding out’ effects of SOEs are partly explained by the rich experience and strong expertise of SOEs in infrastructure development, it is also attributable to several other reasons. First, as PPP contracts usually last for 10 to 30 years, SOEs are conceived

⁸⁸ Wu Jin, Tong Zaijun, ‘PPP and Local Government Debt Financing’ (2017) 12 China Circulation Economy 78 (伍进、童再军：《PPP 和地方政府的举债融资》，载《全国流通经济》2017 年第 12 期)

⁸⁹ China Economic Weekly, ‘Will the Control Over the Total Volume of Central SOEs Participation into PPPs Open the Market to Private Enterprises?’ (19 December 2017) <<http://finance.people.com.cn/n1/2017/1219/c1004-29715278.html>> accessed 24 September 2019 (中国经济周刊，“央企参与 PPP 实行“总量管控” 是否民企“开路”之日？”，2017 年 12 月 19 日)

by local governments as more reliable than private enterprises for long-term cooperation. Second, because PPP projects generate profits to enterprises, some local governments are more willing to cooperate with central SOEs to avoid the accusation of enriching the private enterprises and the suspicion of rent-seeking.⁹⁰ Moreover, local governments have the constant impulse to expand infrastructure construction, and the financing ability is usually prioritised over the consideration of expertise in project operation. Large SOEs do have certain advantages in financing compared with private enterprises. On the other hand, for the private enterprises that wish to participate in the practice, they have severe concerns with government credibility as well. As PPP projects involve long-term investment period during which the local government officials usually rotate for several sessions, the short-term government behaviour increases the chance of government defaults of contractual obligations and will cause significant losses to private enterprises.⁹¹

Prevalent local malpractices have led to abrupt clearing-up of PPP projects by the central ministries. In April 2017, six departments under the Central Government jointly issued the *Notice on Further Regulating Local Government Behaviours of Debt-*

⁹⁰ Southern Weekly, 'Why did Ten Trillion PPP become the feast of SOEs?' (30 June 2016) <<http://www.infzm.com/content/118041>> accessed 24 September 2019 (南方周末, “十万亿 PPP, 为何成了国企的盛宴?”, 2016 年 6 月 30 日)

⁹¹ Cui Xiaofu, Cui Kai, Xu Hongfen, et al 'Causes of Difficulties in Promoting PPPs and the Suggestions for Counter Measures' (2016) PBC Working Paper No 2016/2 8 March 2016 (崔晓芙、崔凯、徐红芬等:《PPP 模式推广困难原因探析及对策建议》, 中国人民银行工作论文 No 2016/02, 2016 年 3 月 8 日)

Financing,⁹² which iterated strict prohibition of government promises to repurchase equity invested by social capital, to compensate investment loss or to provide minimum returns in PPP contracts. In November 2017, the MOF issued the *Notice on the Regulation on the Management of PPP Comprehensive Information Platform on Projects Base*.⁹³ The Notice emphasised the importance of the appropriate scope of PPP application, compliance with the prescribed procedure, establishment of performance-based payment mechanism and information publicity. According to the data published by the MOF PPP Centre, from December 2017 to March 2018, 14% of the PPP projects were halted, with 1.2 trillion RMB investment reduced. A large number of projects were put into rectification, with another 0.5 trillion RMB investment affected.⁹⁴ In March 2019, the MOF issued *Implementation Opinions on Pushing the Normalised Development of PPPs*⁹⁵, which further tightened control over local PPP projects and stipulated that regions where government expenditures under PPP modes have already exceeded 5% of the annual budget shall not conduct any PPP project

⁹² Notice on Further Regulating Local Government's Debt Financing Behaviours, No 50 [2017] of the MOF, NDRC, Ministry of Justice, the People's Bank of China, China Banking Regulatory Commission, and China Securities Regulatory Commission (财政部、发展改革委、司法部、人民银行、银监会、证监会,《关于进一步规范地方政府举债融资行为的通知》,财预[2017]50号)

⁹³ n 83

⁹⁴ China Business Network, 'Results of the PPP Clean-up Storm are Stunning: 1.2 Trillion Fake PPP Projects were Cleared' (3 May 2018) PPP <<https://www.yicai.com/news/5420052.html>> accessed 24 September 2019 (第一财经,“清理风暴结果惊人: 1.2 万亿假 PPP 项目被退”, 2018 年 5 月 3 日)

⁹⁵ Implementation Opinions on Pushing the Normalised Development of PPP, No 10 [2019] of the MOF (财政部《关于推进政府和社会资本合作规范发展的实施意见》,财金[2019]10号)

involving full government payment. Additionally, more policies are enacted to cool down the participation of large SOEs and to ensure equal opportunities of true private enterprises.⁹⁶ It remains to be seen how effective these measures are. Overall, since 2017, the regulatory focus of PPPs has been gradually shifted from expansive promotion to control of local malpractices. More emphasis has been placed on the quality rather than quantity of PPP projects.⁹⁷

4 Concluding Remarks: Normative Complexity of PPPs

A view on policy rationales and local practices in China reveals the normative complexity of PPPs. To engage financial resources of the private sector, sufficient protection for economic interests of investors is a necessity, which may incur more costs for tax-payers and public service users; whilst marketisation of public services delivery seems laudable, it also brings about the challenge regarding how the public interest can be effectively protected. China may well continue to let SOEs dominate the PPP

⁹⁶ Notice on Enhancing Risks Management of Central SOEs' Participation into PPP, No 192 [2017] of the State-owned Assets Supervision and Administration Commission under the State Council (国务院国有资产监督管理委员会《关于加强中央企业 PPP 业务风险管控的通知》, 国资发财管[2017]192 号); Opinions of the National Development and Reform Commission on Encouraging Private Capital Participation in Government and Social Capital Cooperation (PPP) projects, No 2059 [2017] of the NDRC (《国家发展改革委关于鼓励民间资本参与政府和社会资本合作 (PPP) 项目的指导意见》, 发改投资[2017] 2059 号); Guiding Opinions of the General Office of the State Council on Further Stimulating the Effectiveness of Private Investment in Investment to Promote Sustainable and Healthy Economic Development, No 79 [2017] of the General Office of the State Council (《国务院办公厅关于进一步激发民间有效投资活力促进经济持续健康发展的指导意见》, 国办发[2017] 79 号)

⁹⁷ People's Daily, 'To Prevent Risks, PPPs Must Not be Expansively Used or Abused'(4 April 2018) <http://www.xinhuanet.com/info/2018-04/04/c_137087406.htm> accessed on 26 September 2019 (人民日报,“防风险, PPP 不能泛化滥用”, 2018 年 4 月 4 日)

markets and then these concerns can be more easily resolved. But if it wishes to embrace true PPPs and engage more private enterprises in infrastructure development, it needs to consider how to respond to these multiple normative requirements. The question is how governments can build long-term cooperative relationships with profit-oriented private parties, whilst at the same time staying accountable to tax-payers and the general public. This is crucial for PPP regulation. The complexity should also be borne in mind when we consider the legal debates over PPP contracts in China.

CHAPTER THREE: PPP CONTRACTS AND PUBLIC LAW

The stakes in a PPP project are high for both government and private parties. For private parties, PPP requires a large amount of capital input, and returns for investments involve great uncertainties. For the government party, once a PPP contract is concluded, bound by the contract, it cannot easily change the private partner. Because of the public interest involved, failures of PPP projects can damage public credibility and even incur political risks. The high reliance of the government on the private party for infrastructure services means that at the implementation stage the government party might be well in a position less advantageous than the private party which arguably has stronger bargaining powers.⁹⁸

In light of the stake in PPP projects, the importance of contracts for PPP practices is salient: contracts as legal tools define rights and duties and allocate risks between the two parties. To conduct a PPP project, social capital entities (or the established SPV) and the governments sign a group of contracts, which usually include PPP project contracts, shareholder agreements, performance contracts (such as engineering contracts, operation service contracts, raw material supply contracts, product or service purchase contracts), financing contracts, insurance contracts and so forth. Among various contracts, the PPP project contract forms the basis and core of the whole

⁹⁸ Hu Gairong, 'Conflicts and Reconciliation of the Public Interest and Private Interests in PPP Modes' (2015) 11 Law Science 30 (胡改蓉: 《PPP 模式中的公私利益的冲突与协调》, 载《法学》2015 年第 11 期)

contract system.⁹⁹ It provides the primary framework defining rights and duties of the government party and social capital entities.

This Chapter focuses on PPP project contracts. It considers how PPP project contracts should be perceived in the current system of government contracts in China, which is characterised by a dichotomy between administrative contracts and private contracts, given that the Administrative Litigation Law 2014 has already expressly classified concession agreements as administrative contracts and subjected related disputes to administrative litigation.

This Chapter is divided into four Sections. Section One introduces the distinction between administrative contracts and private contracts in China. Administrative contracts are treated differently from private contracts in at least two aspects. First, administrative contracts are more susceptible to public law regulation. Second, protection of the public interest is usually prioritised under administrative contracts, and government enjoys several administrative prerogatives to uphold the public interest. Section Two depicts three major approaches in scholarly debates and judicial practice over the characterisation of PPP project contracts, which respectively argue that PPP project contracts as administrative contracts, private contracts and mixed contracts where public law elements and private law elements can be separated. Instead

⁹⁹ MOF PPP Project Contract Guidelines (for Trial Implementation) (财政部《PPP项目合同指南(试行)》) 5

of directly evaluating the three approaches, Section Three explores three specific questions. First, as a matter of positive law, have PPPs been expressly classified as administrative agreements under the ALL 2014? Second, can PPP contracts be exclusively governed by private law norms? Third, can we separate the public law elements from the private law elements under a PPP contract? The answers to the three questions preclude acceptance of the private contract approach and the mixed contract approach. I argue that whilst PPPs have not been expressly recognised as administrative contracts in China, they have special features that distinguish them from ordinary civil law contracts, and therefore application of public law norms cannot be excluded. However, there is also an inherent difficulty in separating public law elements from private law elements. Section Four positively establishes the argument that PPP project contracts shall be regarded as a special type of administrative contracts in China. To classify PPP contracts as administrative contracts accommodates the need for protection of the public interest. It also opens the possibility that courts can play a role in policing local government PPP contracting, which is conducive to enhancing local government financial accountability and establishing good PPP practice.

1 Administrative Contracts and the 2014 Revision of the Administrative Litigation Law

Strongly influenced by the civilian legal tradition, the legal system in mainland China is characterised by a sharper distinction between public law and private law than that in many common law jurisdictions. Institutionally, civil cases and administrative cases

are heard by different divisions of the people's courts, and follow the Civil Procedure Law and Administrative Litigation Law respectively. Substantively, different rules, values and remedies govern administrative law cases and civil law cases.

Resonating the public/private distinction in the Chinese legal system is a long-existing debate about government contracts in China over the notion of 'administrative contracts' as distinctive from private contracts since the 1990s.¹⁰⁰ Unlike ordinary civil and commercial contracts, administrative contracts are entered by governments to fulfil objectives in administration. Also different from unilateral administrative acts such as command or compulsion, administrative agreements are concluded on the basis of voluntary negotiation and mutual content between a government organisation and a private party. As a matter of positive law, the concept of administrative contracts was firstly adopted in local government regulations. For example, the *Administrative Procedure Provisions of Hunan Province 2008* defines administrative contracts as '[a]greements concluded by administrative organs, in order to achieve their goals of administrative management, with citizens, legal persons and other organisations upon consensus by both parties', mainly used for matters such as concession, transfer of the right to use state-owned land, the contracting, sale or lease of state-owned assets, government procurement, scientific research and consultancy projects entrusted by the

¹⁰⁰ Gao Hong, 'A Discussion on Administrative Contracts' (1993) 4 *Administrative Law Review* 19 (高鸿:《行政合同刍议》,载《行政法学研究》1993年第4期); Liu Xin, 'A Discussion on Administrative Contracts' (1995) 5 *China Legal Science* 67 (刘莘:《行政合同刍议》,载《中国法学》1995年第5期); Yu Lingyun, 'On Connotations of Administrative Contracts—An Understanding Based on Comparative Law' (1997) 3 *Journal of Comparative Law* 325 (余凌云:《论行政契约的含义——一种比较法上的认识》,载《比较法研究》1997年第3期)

administrative organs and so forth.’¹⁰¹ Similarly, *the Administrative Procedure Provisions of Shandong Province 2011* define administrative contracts as ‘[a]greements entered by administrative organs with citizens, legal persons and other organisations based on mutual consent in order to safeguard the public interest and achieve purposes in administrative management’, mainly applied to matters such as government concession, the transfer of the right to utilise state-owned natural resources, the contracting, sale or lease of state-owned assets, government procurement of public services, birth planning management and so forth.¹⁰²

At the national level, the formal legal recognition of administrative contracts was in the Administrative Litigation Law of the PRC 2014 (therein after the ALL 2014).¹⁰³ According to Article 12(11) of the ALL 2014, courts shall accept cases about

‘[a] claim that an administrative organ has failed to perform according to the law or as agreed upon, or illegally modified or rescinded an agreement, such as a government concession agreement or a land and building expropriation compensation agreement’.

According to the 2015 *Interpretation on the Application of the Administrative Litigation Law of the PRC* issued by the Supreme People’s Court (hereinafter *the SPC*

¹⁰¹ Hunan Provincial Administrative Procedure Provisions 2008, art 110 (《湖南省行政程序规定》2008 年)

¹⁰² Shandong Provincial Administrative Procedure Provisions 2011, art 100 (《山东省行政程序规定》2011 年)

¹⁰³ Administrative Litigation Law of the PRC (2014) (中华人民共和国《行政诉讼法》2014 年修正) art 12

Judicial Interpretation 2015),¹⁰⁴ ‘administrative agreement’ under the ALL 2014 is defined as

[a]n agreement which provides for any rights and obligations in the administrative law as entered into by an administrative organ within the scope of its statutory duties and responsibilities with a citizen, a legal person, or any other organisation through consultation to achieve any public interest or administrative objectives.

Article 11 of the *SPC Judicial Interpretation 2015* further stipulated that,

[w]here a citizen, a legal person, or any other organisation files a complaint against any of the following administrative agreements, the people’s court shall accept it according to the law: (1) A concession agreement; (2) An agreement on compensation for the expropriation or requisition of land and buildings; (3) any other administrative agreements.

According to the clarification by Liang Fengyun,¹⁰⁵ the Presiding Judge at the Administrative Division of the Supreme People’s Court of PRC, administrative agreements defined by the SPC Judicial Interpretation 2015 contain five constituent elements. First, one contractual party shall be an administrative organ, and another shall be a private person or organisation. Second, the purpose of the contract shall be for achievement of the public interest or objectives in administrative management. Third, the agreement shall be based on the mutual intention of the signatories. Fourth,

¹⁰⁴ Interpretation of the Supreme People’s Court on Several Issues Concerning the Application of the Administrative Law of the PRC, No 9 [2015] Interpretation of SPC, art 11 (《最高人民法院关于适用〈中华人民共和国行政诉讼法〉若干问题的解释》，法释[2015] 9 号)

¹⁰⁵ Liang Fengyun, ‘The Public Law Nature of PPP Agreement and Its Legal Remedies’ (2018) 4 China Law Review 180 (梁凤云:《公私合作协议的公法属性及其法律救济》，载《中国法律评论》2018 年第 4 期)

the agreement shall contain rights and duties under administrative law. Fifth, the conclusion of the agreement shall be based on the administrative functions of the administrative organ as stipulated by law.

To fully investigate how administrative contracts are treated differently from private contracts is difficult. Although during the promulgation of the Contract Law in 1998, it was suggested by public lawyers that the Contract Law of the PRC should include a particular chapter about administrative contracts. This proposal was rejected because of the highly contested definition of administrative contracts then.¹⁰⁶ As a result, the Contract Law primarily applies to ‘an agreement among natural persons, legal persons or other organisations as equal parties for the establishment, modification, termination of a relationship involving the civil rights and obligations of such entities.’

¹⁰⁷ In other words, the Contract Law was not intended to apply to administrative contracts. No authoritative legal sources have provided systematic clarification about the scope, applicable rules and arrangements of rights and duties of administrative contracts in China. Quoting the words by Bixin Jiang, the Vice President of the Supreme People’s Court (the SPC), ‘a comprehensive system of administrative

¹⁰⁶ Ying Hongfei, ‘Administrative Agreements’, in Ying Songnian (ed) *Contemporary Chinese Administrative Law (Vol 5)* (People’s Publishing House 2018) 1654 (邢鸿飞：《行政契约》，载于应松年主编《当代中国行政法(第五卷)》，人民出版社 2018 年)；China Administrative Law Society, ‘Proposal to Include Administrative Contracts into Contract Law’ (1997) 7 *New Developments in Legal Research* 7 (中国法学会行政法学研究会：《建议把行政合同列入合同法》，载《法学研究动态》1997 年第 7 期)；Zhu Xinli, ‘Basic Characteristics of the Administrative Contract’ (2002) 2 *Journal of Zhejiang University (Humanities and Social Sciences)* 16 (朱新力：《行政合同的基本特性》，载《浙江大学学报(人文社会科学版)》2002 年第 2 期)

¹⁰⁷ Contract Law of the PRC 1999 (《中华人民共和国合同法》1999 年) art 2

contracts has yet to be established in China'.¹⁰⁸ Still, by drawing on existing scholarly debates and cases in judicial practice, it is possible to identify several legal implications of administrative contracts.

(a) Public Law Regulation over Government Contracting

The first implication for a government contract to be characterised as an administrative agreement is that public law plays a significant role in regulating government contracting. By public law norms in China, I refer to the whole normative hierarchy that governs how the administration works, which range from laws enacted by the National People's Congresses and its Standing Committee to government regulations and other normative documents.

Paradigm types of administrative agreements may be used by way of illustration to explain why government contracting is subject to public law regulation. According to definitions of administrative contracts provided by local government regulations and *the SPC Judicial Interpretation 2015*, one typical kind of government contract undisputedly regarded as an administrative agreement is that used directly for the discharge of administrative functions. For example, a price regulatory authority may enter into a contract with certain designated merchants to monitor prices of goods on

¹⁰⁸ Jiang Bixin, 'The Legal System of Administrative Contracts in China: Framework, Contents and Construction' (2012) 6 Peking University Law Journal 1159 (江必新:《中国行政合同法律制度体系、内容及其构建》,载《中外法学》2012年第6期)

the market, and such agreements are entered as one means to undertake price monitoring. Agreements for birth control, environmental regulation and land expropriation are also of this nature¹⁰⁹ These administrative functions could have been achieved through unilateral administrative acts,¹¹⁰ but the administrative body with statutory authorisation or in due exercise of their discretion, choose to use a contract because a unilateral measure is either unnecessary or inexpedient. In other words, contracting through administrative agreement is an alternative way of exercising administrative powers to achieve certain regulatory purposes.¹¹¹ Accordingly, the use of such contracts does not constitute any expansion or misuse of administrative powers authorised by law, and contracting should not be used as a means to evade public law requirements such as legality, procedural regularity, proper exercise of discretion and so forth.

Since the ALL 2014 recognised justiciability of administrative contracts, courts are empowered to police the government contracting through judicial review.

¹⁰⁹ Jiang Bixin, 'The Judicial Review of Administrative Agreements' (2016) 34 People's Judicature 8 (江必新:《行政协议的司法审查》,载《人民司法》2016年第34期)

¹¹⁰ Yu Lishen, 'The Core Standard of Judicial Judgment on Administrative Agreements: Effects of Public Power' (2017) 2 Administrative Law Review 36 (于立深:《行政协议司法判断的核心标准:公权力的作用》,载《行政法学研究》2017年第2期)

¹¹¹ This explanation of the paradigm case of 'administrative agreement' is both based on observation of the practices of administrative agreements in China and inspired by the concept of 'administrative contracts' under German law. See Mahendra P Singh, *German Administrative Law in Common Law Perspective* (Springer 1985) ch 4

According to Article 1 of the ALL 2014, one important function of administrative litigation is to oversee administrative organs' exercise of power according to the law. When a dispute arising from administrative contracts is raised before the administrative division of the court, judges shall not only review if the two parties perform their duties as agreed in the contract, but also review if the government contracting act has complied with requirements in public law. These questions may include whether the government has the administrative power and capacity to enter into a contract in question,¹¹² whether the government has followed legally prescribed procedures in contracting, and whether the content of the contracts conform to the requirement of legality.¹¹³

It is noteworthy that whilst governments usually enjoy great discretion in determining the content of administrative contracts, courts can review the legality of administrative contracts by referring to a wide range of public law norms. The case *Cui Haozhi v the Government of Haitang District* is an illustration.¹¹⁴ In that case, one

¹¹² Chen Wufeng, 'The Capability of Contracting Entities of Administrative Contract in Judicial Review' (2018) 2 China Legal Science 131 (陈无风:《司法审查图景中行政协议主体的适格》, 载《中国法学》2018年第2期)

¹¹³ Zhang Qingbo, 'Thoughts on Judicial Review of Administrative Agreement' (2019) 1 Administrative Law Review 50 (张青波:《行政协议司法审查的思路》, 载《行政法学研究》2019年第1期); He Xiaorong, 'The Creation of Administrative Agreements and the Transformation of State Governance' (2017) 1 China Law Review 31 (贺小荣:《行政协议的创设与国家治理方式的转型》, 载《中国法律评论》2017年第1期)

¹¹⁴ Cui Haozhi and others v Government of Haitang District on Default of Statutory Responsibilities of Relocation, No 5250 (2017) Administrative Review by the SPC (翟好志等人诉海棠区政府不履行安置法定职责案, 最高人民法院(2017)最高法行申 5250 号)

article in a ‘demolition and relocation’ agreement signed between the local government and a resident was held invalid by the SPC because this article violated stipulations in a normative document. The court’s reasoning was two folded. First, it clarified why valid normative documents should be the grounds for legality review in administrative litigation. It referred to Section1(3) of the *Minutes of the Meeting on Applicable Legal Norms in Adjudication of Administrative Cases*,¹¹⁵ which expressly stated that

‘[c]ourts in adjudicating administrative cases frequently confront policies for specific interpretation or other policies issued by the relevant departments to guide application of laws or implementation of administrative measures. These policy documents are not formal sources of law and do not have binding force on courts in the legal sense. However, if people’s courts believe that these normative documents as the grounds of the contested specific administrative acts are lawful, formally valid, reasonable and appropriate, the people’s courts shall recognise their binding force in reviewing the legality of the specific administrative acts.’

Second, the SPC clarified why administrative contracts should be subject to legality review. It stated that

‘[c]ases of administrative agreements involve the performance of administrative function and achievement of objectives in public management. When they are determined as administrative cases, the courts must conform to provisions in the Administrative Litigation Law and review the legality of the sued administrative contracting act. Any administrative contracting act that violates laws, administrative legislation, local legislation, valid government regulations or other normative documents below government regulations shall be deemed

¹¹⁵ Notice of the Supreme People’s Court on Issuing Minutes of the Symposium on the Application of Legal Norms in the Trial of Administrative Case, No 96 [2004] of the SPC (《最高人民法院关于印发<关于审理行政案件适用法律规范问题的座谈会纪要>的通知, 法[2004] 96 号》)

as unlawful administrative acts. In concluding administrative agreements, administrative organs shall act within their discretion and shall not violate the interests of the state, the public or any other parties, and the administrative organs shall not harm the interests of the other party of the administrative agreement either.’

It is noteworthy that while the court held that an administrative contract that violates a valid normative document was unlawful, it did not clarify why this unlawfulness leads to invalidation. Jiang Bixin, the Vice President at SPC, in one of his publications discussing judicial review over administrative contracts, provided a possible answer to this question.¹¹⁶ He argued that the conclusion of administrative agreements is to achieve objectives in the administration, which is systematically governed by the whole hierarchy of norms. If an administrative agreement contravenes valid local legislation, government regulations or regulatory documents and is still held valid, it may cause normative dissonance to the whole administration. He also noted that unlawfulness of an administrative contract would not automatically lead to invalidation. Whether violation of a particular norm in public law leads to invalidation of a contracting act is dependent on whether interests protected by this norm outweigh interests of permitting that contracting act. In other words, unlawfulness of an administrative contract does not automatically lead to invalidation. It may lead to voidability, or no effect at all. Courts should consider the specific circumstances in order to make the determination.¹¹⁷

¹¹⁶ Jiang (n 109)

¹¹⁷ *ibid*; Wang Zhongliang, ‘The Legal Application in Invalidation of Administrative Contracts’ (2017) 2 *Journal of Shanghai University of Political Science & Law (The Rule of Law Forum)* 109 (汪中良:《行政合同无效认定的法律适用》, 载《上海政法学院学报》2017年第2期)

By way of contrast, in determining whether a private contract is valid or not, courts can only refer to laws enacted by the National People's Congress and its standing committee or administrative regulations enacted by the State Council. The *Interpretation I of the SPC of Contract Law* expressly states that courts cannot refer to local legislation or other regulations in determining the validity of a private contract.¹¹⁸ Moreover, according to Contract Law, only under limited circumstances should a private contract be rendered void.¹¹⁹ This stipulation is to prevent autonomy in private contracting from being excessively interfered with the need to protect the public interest.¹²⁰

(b) Prioritised Protection of the Public Interest and Administrative Prerogatives

Though the rationales and values for administrative agreements are still developing, it has been commonly accepted that administrative agreements are characterised by the

¹¹⁸ Interpretation I of the Supreme People's Court of Several Issues concerning the Application of the Contract Law of the PRC, No 19 [1999] Judicial Interpretation of SPC (《最高人民法院关于适用〈中华人民共和国合同法〉若干问题的解释(一)》, 法释[一九九九]十九号) Article 4 reads '[A]fter the implementation of the Contract Law, the people's court shall, when confirming the invalidity of a contract, base it on the laws enacted by the National People's Congress and its Standing Committee and the administrative regulations formulated by the State Council, rather than local regulations or administrative rules.'

¹¹⁹ According to Article 52 of the Contract Law of PRC, under five circumstances a contract shall be void, which include '(1) a contract is concluded through the use of fraud or coercion by one party to damage the interests of the State; (2) malicious collusion is conducted to damage the interests of the State, a collective or a third party; (3) an illegitimate purpose is concealed under the guise of legitimate acts; (4) damaging the public interest; (5) violating the mandatory provisions of laws and administrative regulations.'

¹²⁰ Jiang (n 109)

prioritised protection of the public interest over party autonomy, and the government party enjoys certain administrative prerogatives in administrative agreements.¹²¹ The notion of administrative prerogatives was introduced by Chinese scholars in the 1980s in textbooks on French administrative law.¹²² Administrative prerogatives are conceived as advantages or prioritised conditions enjoyed by the administrative bodies for effective exercise of administrative functions and achievement of the public interest. As summarised by Chinese scholars, administrative prerogatives usually include several powers of the administrative bodies. First, the power to supervise and to direct the other party in the performance of the contracts. Second, the power to enforce the contract under special circumstances as required by the public interest. Third, the right to unilaterally modify or terminate the contracts as required by the public interest, without obtaining the consent from the other party. Fourth, the right to impose sanctions on the other contracting party if it is in breach or partly breach of the contract.¹²³ Administrative prerogatives are far from being alien to China but were

¹²¹ Zou Liqin, 'The Judicial Review and Control of Administrative Prerogatives in Administrative Contracts' (China Court, 19 August 2013) <<https://www.chinacourt.org/article/detail/2013/08/id/1054824.shtml>> (邹丽芹:《行政合同中行政优益权的司法审查及控制》, 中国法院网, 2013年8月29日)

¹²² Wang Mingyang, *French Administrative Law* (China University of Political Science and Law 1988) 195 (王名扬:《法国行政法》, 中国政法大学出版社 1988年版); Li Yingyi, 'Restatement of Prerogatives in French Administrative Contracts' (2015) 4 *Seeking Truth* 97 (李颖轶:《法国行政合同优益权重述》, 载《求是学刊》2015年第4期); Li Yingyi, 'The Origin of Administrative Contract Prerogatives in France' (2015) 6 *Fudan Journal (Social Science)* 157 (李颖轶:《论法国行政合同优益权的成因》, 载《复旦学报(社会科学版)》2015年第6期)

¹²³ Ma Di, 'On Administrative Prerogative and Its Legal Control in Administrative Contracts' (2008) 1 *Legal System and Society* 191 (马迪:《论行政合同中的行政优益权及其法律控制》, 载《法

manifest in discrete legal rules. For example, Article 20 of the Urban Real Estate Management Law stipulated that,¹²⁴

‘[W]hilst a contract might be entered by the administrative organ and a private party to award the later the land use right, under special circumstances, the State may take back the land in advance in accordance with legal procedures out of consideration for the public interest, and correspondingly compensation shall be given to the related land user in accordance with the actual period of time that the land had been used and the actual conditions of the land development’.

According to this provision, even if an agreement has been entered by governments to award the land use right, government may unilaterally terminate the contacts for the public interest. Based on statutory stipulations and mandatory in nature, administrative prerogatives should not be constrained or limited by contracts. It is within the discretion of the administration to decide when and how to exercise administrative prerogatives.¹²⁵

In judicial practice, the SPC also recognised the existence of ‘administrative prerogatives’ in administrative agreements. For example, in the case *He Shenggui v the People’s Government of Bijiang District* concerning land expropriation,¹²⁶ the

制与社会》2008 年 1 期)

¹²⁴ Urban Real Estate Management Law of the PRC 2009 (《中华人民共和国城市房地产管理法》2009 年)

¹²⁵ Zou (n 121)

¹²⁶ He Shenggui v Government of Bijiang District on Relocation Arrangement, No 4592 (2017) Administrative Review by the SPC (何胜贵诉碧江区人民政府搬迁安置案, 最高人民法院(2017)最高法申 4592 号)

government signed a House Relocation Compensation and Resettlement Agreement with the citizen but later unilaterally altered the previously agreed resettlement arrangement because of the changed urban planning. Administrative litigation was initiated, and the case was appealed to the SPC. The SPC affirmed the legality of government modification of the contracts and recognised that governments have certain administrative prerogatives. It held that,

‘[D]ifferent from the civil contracts signed for the sake of self-interest, the administrative organ signs an administrative agreement to achieve the public interest or administrative objectives. Not only the signing of the administrative agreement per se is the way to realise the public interest or administrative management objectives, but in the process of performing the agreement, the administrative organ may unilaterally change or terminate the agreement according to the need of public interest or administrative management objectives, and the administrative organ may even unilaterally make administrative enforcement or administrative penalties according to the law.’

It has been argued that because administrative prerogatives are inherent to the administrative agreements, it is easier for an administrative organ to unilaterally change or terminate a contract, and the contractual rights of the other party can thereby be easily infringed.¹²⁷ This worry has factual basis, as administrative organs sometimes use changed requirements concerning the public interest as an excuse to escape from their contractual obligations. However, it is also important to notice that

¹²⁷ Cui Jianyuan, ‘The Boundary of the Family of Administrative Contracts and the Basis for Its Determination’ (2017) 4 Global Law Review 21 (崔建远:《行政合同族的边界及其确定根据》载《环球法律评论》2017年第4期)

there are certain mechanisms to balance protection of private interests. For one thing, although exercise of administrative prerogatives is largely a matter of administrative discretion, it is not unconstrained, but must conform to requirements such as due process, protection of legitimate expectation, legitimate purposes and necessity.¹²⁸ Courts can oversee whether administrative prerogatives have been exercised appropriately through judicial review. For example, in the case *Zhang Shuliao v Cangnan People's Government*,¹²⁹ the unilateral termination of a relocation agreement by the government was held to be unlawful by the court, on the basis that prior to giving to the notice of termination, the government did not inform Zhang Shuliao of the right to state and argue her case, and the termination significantly impacted the interests of Zhang Shuliao in relocation compensation; this exercise of administrative prerogative manifestly violated due process. For another thing, if citizens, legal persons or other organisations suffer loss in their legitimate rights and interests due to the exercises of administrative prerogatives, they shall be compensated by

¹²⁸ Zhang (n 113); Yu Lingyun, 'On Judicial Review of Administrative Agreements' (2006) 1 Zhejiang Academic Journal 139 (余凌云:《论对行政契约的司法审查》,载《浙江学刊》2006年第1期)

¹²⁹ Zhang Shuliao v People's Government of Cangnan County Appeal Case, No 1495 (2017) Administrative Review of High People's Court of Zhejiang Province (苍南县人民政府与张淑廖行政补偿案,浙江省高级人民法院(2017)浙行终1495号); Li Jiying, 'A Preliminary Investigation on the Limits of Administrative Prerogatives from the Perspective of Judicial Review' (2019) 17 Journal of Northeast Agricultural University (Social Science Edition) 41 (李吉映:《司法审查视角下的行政优益权限度初探》,载《东北农业大学学报(社会科学版)》第17卷第2期)

governments according to the law. The government obligation to compensate balances protection of private interests economically.¹³⁰

To sum up, under administrative contracts, government contracting is more susceptible of public law regulation implemented by courts as compared with private contracts. Whilst the protection of the public interest is usually prioritised and governments enjoy several administrative prerogatives to uphold the public interest, their administrative prerogatives are not unlimited, and the interest of the other private party is accorded some balanced protection through economic compensation.

2 PPP Project Contracts: The Debate over Legal Characterisation

Debates over the nature of PPP project contracts in China has been closely related to the emerging distinction between administrative contracts and private contracts and the changing PPP practice in China particularly since 2014. When foreign capital dominated-BOT contracts were first adopted by local governments in the 1980s and expanded in the 1990s, there was little dispute that BOT contracts were private contracts.¹³¹ To attract infrastructure investment, BOT agreements were governed by

¹³⁰ Geng Baojian, Yinqin, 'The Characterisation of Administrative Agreements and Ideals in Adjudicating Administrative Cases about Agreements' (2018) 17 Journal of Law Application 124 (耿宝建, 殷勤: 《行政协议的判定与协议类行政案件的审理理念》, 载《法律适用》2018年第17期)

¹³¹ Yu An, 'On Government Concession Agreement' (2017) 6 Administrative Law Review 3 (于安: 《论政府特许经营协议》, 载《行政法学研究》2017年第6期)

rules in civil and commercial law, and arbitration was recognised as the major mode of dispute resolution for better protection of the interests of foreign investors. After the system of government franchise was established in the early 2000s and more private enterprises engaged in marketisation of public utilities, the legal nature of government contracts for public services delivery started to be more debated.¹³² The ALL 2014 affirmed the notion of administrative contracts at the national level and almost at the same period of time ‘Government and Social Capital Cooperation’ as the distinctive Chinese notion of PPPs was devised by central ministries which signalled a new stage of development of PPPs in China. Debates over questions such as how PPP project contracts should fit in the current dichotomous system of government contracts, what rules should govern PPP contracts and how disputes of PPPs should be resolved become heated than ever. This was particularly so, given that concession agreements have been expressly classified as a typical kind of administrative contracts by the ALL 2014, which raises the question whether PPPs contracts should still be conceived as private contracts and governed by rules in civil and commercial law. Existing scholarly debates and judicial practices suggest three approaches, which can be described as follows.

¹³² Zhan Zhongle, Liu Shuran, ‘The Public Law and Private Law Relations in PPP Agreements and the Choice of Systems’ (2007) 4 Research on Rule of Law 3 (湛中乐, 刘书燃:《PPP 协议中的公私法律关系及其制度选择》, 载《法治研究》2007 年第 4 期)

(a) Administrative Contracts

The first approach argues that PPP project contracts are typical administrative agreements. Liang Fengyun, the Presiding Judge of the Administrative Division of the SPC, is one proponent of this approach.¹³³ Liang argued that PPP contracts satisfy the five definitional elements of administrative agreements under the ALL 2014 and the *SPC Judicial Interpretation 2015*. In particular, the purpose of the PPP project contract is not to promote profit-making of private investors but rather to provide infrastructures. The ultimate goal is to achieve the public interest, and the partnership and contractual dimension of PPPs were simply instrumental to this goal. Moreover, concession agreements have been listed as a typical kind of administrative contracts by the ALL 2014, which manifests the legislative intention to subject PPPs to public law regulation with prioritised protection for the public interest. As PPP contracts engage private entities to discharge the public functions, government supervision and management over social capital entities are present throughout the contractual performance. To emphasise the administrative feature of PPP contracts is to ensure that government fulfil their statutory responsibilities of effective public services provision.

¹³³ Liang Fengyun, 'The Public Law Nature of PPP Agreement and Its Legal Remedies' (2018) 4 China Law Review 180 (梁风云:《公私合作协议的公法属性及其法律救济》, 载《中国法律评论》2018年第4期); Yang Kexiong, 'On Criteria for Legal Characterisation of Administrative Agreements' (2017) 1 China Law Review 61 (杨科雄:《试论行政协议的识别标准》, 载《中国法律评论》2017年第1期)

A case exemplifying the administrative contract approach is the *Hetian Natural Gas* case,¹³⁴ which was concluded by the SPC before the ALL 2014 took effect. In that case, the Hetian Municipal Government entered into a BOT agreement with a natural gas company for gas supply, and the government terminated the agreement and took over the project after the gas company failed to finance the project in time, defaulted duties to pay salaries to workers, suspended gas supply to the public due to disputes with a subcontractor and transferred the franchise right to a third party without government authorisation. When the gas company sued the government before the civil division of the High People's Court of Xinjiang Province, arguing that the government's termination of the contract was legally invalid according to the contract and the takeover violated its franchise right, the government rebutted that the gas supply agreement as a concession agreement was entered by the government for administration of social public affairs. As the agreement is an administrative contract rather than ordinary civil law contract, the government decision of terminating the contract is valid (according to public law norms). In the first instance, the High People's Court of Xinjiang Province held that the contract is a civil law contract. This judgement was reversed by the SPC, which held that the claim should be resolved through administrative litigation. Opinions of the SPC in this case were three folded. First, it recognised that the conclusion of the contract is based on the public powers by the administrative organ to award a concession. Although the project company entered

¹³⁴ Hetian People's Government v Xingyuan Construction Limited Liability Company and Hetian Tianrui Natural Gas Limited Liability Company on other Contractual Disputes No 12 (2014) Final Ruling of the Civil Division of the SPC (和田市人民政府与和田市瑞然气有限责任公司、新疆兴源建设集团有限公司其他合同纠纷案，最高人民法院（2014）民二终字第12号)

into the contract for economic interests, the contract was primarily for the exploitation of natural gas as a public resource and provision of public goods and services to satisfy the need of the public interest. Second, although certain rights and duties of the contract were based on the agreement of the two parties and demonstrated mutual consent reached by negotiation, there was also content concerning award of concession, regulation over the subject matter, scope and time period of business, determination of services charges, property rights and appropriation of equipment and government supervision over the projects. These elements in the contract all manifest the special status of the government in the contract. The nature of concession as a form of administrative license does not change simply because it was awarded through a contract. Third, termination of contracts and takeover are in essence administrative acts, the legal basis of challenging which should be Article 11 of the 1989 Administrative Litigation Law.¹³⁵ Accordingly, this case was out of the jurisdiction of the civil branch of the people's court and should be resolved through a separate administrative litigation.

(b) Private Contracts

The second approach argues that a project contract is essentially a civil legal act in which the government trades the operating income rights and limited property rights

¹³⁵ Article 11 of the 1989 Administrative Litigation Law stipulated that 'if a citizen, legal person or other organisation believe that a specific administrative act of violates their autonomous operational rights prescribed by law, their complaints shall be accepted by the people's courts.' (中华人民共和国《行政诉讼法》1989年)

of a particular infrastructure project with social capital entities' funds, advanced technology and management experience for a certain period of time.¹³⁶ The two parties have the autonomy to determine whether to enter into a PPP project contract; their legal statuses are equal, and their rights and duties are roughly equal as well.¹³⁷ Social capital entities responsible for delivery of public services obtain returns through users' charges, government payment or government subsidies. Governments may also give promises under the contracts to assist the projects with acquisition of the related land rights, provide relevant facilities or equipment, obtain related government approvals or prevent unnecessary competition during the project implementation to ensure investors' economic interests.¹³⁸ They both have the right to terminate the contract if the other party breaches its contractual duties. The emphasis on the equal statuses of two parties is also recognised in the official PPP policy document. For example, Article 1 of 'general formulating principles' of *General Guide for PPP Contract* issued by the NDRC stated that '[A]ll parties to the contract are equal entities,

¹³⁶ Research Group of the First Civil Division under High People's Court of Jiangsu Province, 'Study on the Hard Legal Issues in PPP' (2017) 17 *Law Application* 73 (江苏省高级人民法院民一庭课题组：《政府与社会资本合作（PPP）的法律疑难问题研究》，载《法律适用》2017年17期)

¹³⁷ Yin Shaocheng, 'The Legal Nature and Relief of PPP Agreement: From the Perspective of the German Two-Stage Theory' (2019) 37 *Tribunal of Political Science and Law* 85 (尹少成：《PPP协议的法律性质及其救济——以德国双阶理论为视角》，载《政法论坛》2019年第37卷第1期)

¹³⁸ Chen Zhenxiang, Chen Naixin, 'The Legal Nature of PPP Concession Agreements' (2015) 11 *Law Science* 24 (陈阵香、陈乃新：《PPP特许经营协议的法律性质》，载《法学》2015年第11期)

establish mutually beneficial cooperative relations based on the market mechanism, and stipulate and guarantee rights and obligations through terms in contracts.’¹³⁹

The stance that PPPs are private contracts finds support in judicial practice, and one case is the *Henan Toll Road* case decided by the SPC,¹⁴⁰ which was concerned with a BOT contract for construction of a toll road. The private company had completed the construction of the road, but due to the government contractor’s failure in coordination, the road was not connected with the regional transportation network, which rendered the private company unable to operate and levy charges. The private company sued the government before the civil division of the people’s court and claimed for government repurchase of the project and compensation for economic losses. The government contractor argued that the concession agreement is an administrative contract and related disputes should be resolved through administrative litigation instead. The SPC, as the court of appeal, held that the BOT concession agreement should be characterised as a civil law contract. It stated that

‘[T]he major purpose of the contract is to develop the toll road, which is a profitable project rather than one delivering services to the public for free. Though one party of the contract is the government, the private company

¹³⁹ NDRC General Guidelines for PPP Project Contract, attached to No 2724 [2014] of the NDRC (国家发展和改革委员会《政府和社会资本合作项目通用合同指南》); Liu Fei, ‘Legal Nature of the PPP Agreement and the Integrated Construction of Its Dispute Resolutions’ (2019) 4 Journal of National Prosecutors College 93 (刘飞:《PPP 协议的法律性质及其争议解决途径的一体化》, 载《国家检察官学院学报》2019 年第 4 期)

¹⁴⁰ Henan Xinling Highway Construction Investment Co Ltd v Huixian County People's Government over Jurisdiction, No 244 (2015) Final Ruling of the Civil Division of the SPC (河南新陵公路建设投资有限公司与辉县市人民政府管辖纠纷案, 最高人民法院 (2015) 民一终字第 244 号)

still enjoys a great degree of autonomy in the conclusion of the contract and the determination of the contractual content, and the private company is not subject to unilateral administrative compulsion. The content of the contract includes specific rights, obligations and liabilities for breach of contract, which reflects the equality, consensus and consent by both parties. The contract is not exclusively about administrative approval or administrative license. Though matters related to administrative license are integral to this contract, they cannot solely determine the nature of the contract. Viewed from its purpose, subjects and content, the contract manifests obvious civil and commercial legal relations and should be characterised as a civil contract, and it does not fall with administrative contracts as defined by the Article 12(11) of the ALL 2014 and 11(2) of the SPC Judicial Interpretation 2015. The government's argument that the current contract is an administrative contract and cannot be adjudicated as a civil case is legally ungrounded'.

Another case is *Sichuan Highway* case decided by the Beijing No 2 Intermediate People's Court, which addressed the validity of an arbitration clause in a PPP project contract.¹⁴¹ In November 2013, the Bazhong Municipal Government and the Dazhou Municipal Government of Sichuan Province jointly signed a concession agreement with the Bawan Highway Company, which stipulated that if the dispute could not be settled through friendly negotiation or mediation either party may apply to the China International Economic and Trade Arbitration Commission for arbitration and the arbitral award should be final and binding on both parties. In 2016, the two sides had

¹⁴¹ Bazhong Municipal Government and Dazhou Municipal Government v Bawan Highway Co Ltd on Concession Agreement, No 11 (2017) Special Civil Ruling of Beijing No 2 Intermediate People's Court (巴中市政府和达州市政府与巴万高速路公司特许权协议案, 北京市第二中级人民法院 (2017) 京 02 民特 11 号民事裁定); Lu Tao, 'Are Arbitration Clauses in PPP Project Agreements Valid' (Mianyang Arbitration Commission) <<http://www.myac.org.cn/index.asp?channelID=314&contentID=2290>> accessed on 26 September 2019 (陆涛:《政府和社会资本合作 (PPP) 项目协议约定的仲裁条款是否有效》, 绵阳仲裁委员会)

a dispute regarding the performance of the agreement, and the Bazhong Municipal Government sent a letter requesting the termination of the agreement. The Bawan Highway Company applied to the China International Economic and Trade Arbitration Commission for arbitration, claiming that the Bazhong Municipal Government's unilateral termination of the concession agreement was invalid. Bazhong Municipal Government filed a lawsuit to the Beijing No 2 Intermediate People's Court and claimed that the arbitration clause agreed in the concession agreement was invalid. The government's claim was rejected by the Beijing No 2 Intermediate People's Court. In the judgement, the court first noted the dual purposes of the contract, it held that,

‘[T]he concession agreement signed by the two parties is a typical BOT agreement, which on the one hand has the purpose of providing public facilities to the public, and on the other hand has the purpose of generating certain economic benefits for the contracting parties. It is not a contract through which Bazhong Municipal Government and the Dazhou Municipal Government provide services to the public completely free.’

The court proceeded to examine the content of the contract. It noted that the main content of the concession agreement was that the governments authorised the Bawan Highway Company to invest, construct, operate, maintain and transfer the project, with the right to charge fees during the operation period. Then, it examined whether the identity of one party as administrative organs shall affect the nature of the contracts. It stated that

‘[A]lthough one party of the agreement are administrative organs, the Bawan Highway Company, as the other party of the agreement, still enjoys full autonomy in contracting and deciding the contents of the contract, and

its autonomy is not restricted by the unilateral administrative acts of the Bazhong Municipal Government and the Dazhou Municipal Government.

At the same time, the agreement also stipulates that the Bazhong Municipal Government and the Dazhou Municipal Government will provide necessary policy support and assistance for the implementation of the project construction by the Bawan Highway Company in accordance with the agreement. The agreement also specifies rights and obligations of the two parties and liability for breach of contract, which reflect equality and mutual consensus of the parties. Agreed matters in the concession agreement are not exclusively about administrative approval or administrative license, and administrative approval and administrative licenses are acts integral to the performance of the agreement, which cannot solely determine the substantive nature of the agreement.

Based on analysis of the purpose, subject, functions, rights and obligations of the parties involved in the concession agreement, the court held that the agreement does not fall within Article 12(11) of the ALL 2014 and Article 11 of the *SPC Judicial Interpretation 2014*. The contract has obvious characteristics of civil and commercial legal relations and should be recognised as a civil/ commercial contract. Affirming the civil nature of the contract, the Court held that the arbitration clause was valid.

(c) Mixed Contracts

The third approach argues that there are both public law elements and private law elements in the contracts, and it is not necessary to engage in legal characterisation of the contract as a whole. On the one hand, when exercising administrative functions to procure projects, award concession, supervise and intervene in PPP projects, the government contractor forms an administrative legal relation with the project company. On the other hand, when acting as purchaser of public goods and services, the

government forms a civil legal relation with the project company through the PPP contract.¹⁴² Based on this distinction between the administrative dimension and the civil dimension in a PPP contract, different elements in a PPP contract should be subject to different legal norms respectively.¹⁴³

The recognition of coexistence of administrative relations and civil relations in PPP project contracts leads to a separatist approach of dispute resolution in judicial practice. Predicated on the assumption that the two types of legal relationships can be separated from each other, this approach focuses on the specific nature of the dispute arising from the PPP project contract and examine whether a particular dispute falls within the scope of administrative litigation.¹⁴⁴ A case representative of this approach is the stance of the SPC in the case *Beifang Company v Transportation Bureau of Urumqi*,¹⁴⁵ in which the transportation authority entered into a BOT contract with Beifang company for construction of a toll road. The transportation authority decided

¹⁴² The dual identities of governments under the PPP contracts are expressly articulated by MOF PPP Project Contract Guidelines. (n 99) However, *MOF PPP Project Contract Guidelines* also stated that ‘it is particularly important to note that disputes arising from PPP project contracts are civil disputes between equal civil subjects and civil procedures.’ It is not clear how exactly those conflicting statements can be reconciled.

¹⁴³ Su Hui, ‘PPP Contracts are Civil Law Contracts with Administrative Elements’ (2018) 7 *Shandong Social Science* 179 (宿辉:《PPP 合同是具有行政性因素的民事合同》, 载《山东社会科学》2018 年 7 期)

¹⁴⁴ Yu An, ‘Several Major Issues in PPP Contracts in China’ (2017) 1 *China Law Review* 42 (于安:《我国 PPP 合同的几个主要问题》, 载《中国法律评论》2017 年第 1 期)

¹⁴⁵ *Beifang Dianlian Power Engineering Co Ltd v Urumqi Transportation Bureau*, No 40 (2014) Final Ruling of the Civil Division of the SPC (北京北方电联电力工程有限责任公司与乌鲁木齐市交通运输局案, 最高人民法院(2014) 民二终字第 40 号)

to terminate the BOT contract and repurchased the project, and the two parties, after negotiation, agreed the termination of the contract but disputed concerning the basis for determining the repurchase payment. Beifang company claimed that the determination of repurchase should be based on the result of forensic appraisal, whilst the transportation bureau argued that the repurchase payment should be based on the report of an appraisal institute. When the case was brought by Beifang company before the civil division of the High People's Court of Xinjiang Province, the transportation authority argued that the BOT agreement is an administrative agreement, lawsuits over BOT agreements fall within the scope of administrative litigation, and the civil court did not have the jurisdiction to hear the case. In the first instance, the transportation authority's argument was supported by the High People's Court of Xinjiang Province. The court's reasoning shows similarity to that of the SPC in the previous *Hetian* case. It held that

‘[I]n this case, one contractual party of the BOT Agreement and its supplementary agreement is the administrative organ. The purpose of the contract is to achieve the administrative function of the administrative organ and realise the public interest. As a signatory of the contract, the administrative organ enjoys the unilateral superiority and dominant position in the process of contracting, supervising and directing the performance of the contract and in changing or terminating the contract. Moreover, the performance of the contract is closely related to the administrative licensing act. Therefore, the transportation bureau and the Beifang Company did not sign these agreements as equal civil subjects. The above two agreements are not civil law contracts. Claims arising from the above two agreements shall be administrative lawsuits instead of civil lawsuits. Therefore, this case does not fall within the scope of civil litigation.’

When the case was appealed to the SPC, Beifang company argued that the major dispute of the case was not over the government decision to repurchase the project, but on the determination of repurchase payment. As the claim was not against any specific administrative act, it did not fall within the scope of accepted cases under the ALL 2014 and should be heard in accordance with the Civil Procedure Law. The argument of Beifang company was supported by the SPC. In its decision, the SPC noted that in the BOT agreement, the transportation bureau and the Beifang Company are both in a civil contractual relation and in administrative legal relations. In the performance of the BOT agreement, administrative acts such as administrative approval or licensing are grounded on public law norms. The existence of these administrative acts, though affecting the cooperation of the two parties, does not negate the independent existence of the civil contractual relation between the two parties. The SPC further noted that according to the provisions of Article 12(11) of the ALL 2014, whether a dispute arising from the performance of a contract falls within the scope of administrative litigation is dependent on whether the dispute is against a specific administrative act. In the present case, Beifang Company had no objection to the government decision to repurchase the project or to any administrative acts prior to the termination of the BOT Agreement. Therefore, their dispute did not fall within the scope of administrative litigation. On the matter of the repurchase payment, the two parties are in equal legal positions, and the application of civil law norms cannot be excluded.

3 Three Questions

The three approaches only roughly depict the contour of debates associated with PPPs contracts in China. The current elusive discourses associated with the nature PPP contracts as illustrated above is attributable to the fact that several important questions remain adequately answered. In this Section, I will explore three questions. First, have PPPs been expressly classified as administrative agreements under the ALL 2014? Second, can PPP contracts be exclusively governed by private law norms? Third, can we separate the public law elements from the private law elements under a PPP contract? The three questions serve to facilitate my argument that PPP contracts should be classified as a special type of administrative contracts, an argument that will be developed more fully in the next section.

(a) Have PPPs Been Expressly Classified as Administrative Agreements under the ALL 2014?

The ALL 2014 listed concession agreements as a typical kind of administrative agreements. This has led to the impression that PPP contracts have already been classified as administrative agreements by positive law. This argument, however, does not withstand examination. We need to be reminded of different usages of the term ‘concession’ in the Chinese context to understand the meaning of ‘concession agreement’ under the ALL 2014 specifically. As mentioned in Chapter One, the term ‘concession agreements’ has three different but related meanings in different stages of

infrastructure development in China. The first meaning is in the 1980s, after foreign capital was first introduced to the infrastructure market in China through the BOT mode, the *Circular Concerning the Approval Management of Pilot Foreign-Invested Concession Projects* jointly issued by the National Planning Commission, the Ministry of Transport and the Ministry of Electricity in 1995 for the first time used the term ‘concession agreement’ (*texu quan xieyi*) referring to contracts for BOT projects.¹⁴⁶ The second meaning is in the 2004 ‘*Measures for the Administration on the Franchise of Urban Public Utilities*’ (hereinafter the *Franchise Measures 2004*) enacted by the Ministry of Construction.¹⁴⁷ Article 2 of this Measures stipulated that

‘[T]he “concession (franchise) of municipal public utilities” as mentioned in the present Measures shall refer to the system that the government chooses the investors or managers for municipal public utilities through market competition mechanism in accordance with the relevant laws and regulations, clarifying that they may deal in certain products of municipal public utilities or provide certain services within a certain period of time and scope.’

Therefore, ‘concession agreements’ (*texu jingying xieyi*) in this department rule refer to contracts signed between the government and the bid-winning enterprise to award the latter the concession. In other words, it refers to a simple form of franchise. The third meaning of ‘concession agreements’ is found in the ‘*Measures for the Administration of Concession for Infrastructure and Public Utilities*’ issued in April

¹⁴⁶ n 35

¹⁴⁷ n 37

2015,¹⁴⁸ which were intended to regulate PPPs in sectors such as energy, transport, public utilities, environmental protection, water conservation and other infrastructures that require the award of concession. Concession agreements (*texu jingying xieyi*) defined in this document are synonymous to concession-based PPP project contracts.¹⁴⁹

I argue that when the Administrative Litigation Law was amended in November 2014, ‘concession agreements’ listed as one typical form of administrative agreements primarily referred to concession in its narrowest sense, namely, the simplest form of government franchise as established in the *Franchise Measures 2004*. I will first examine features of the simple form of concession (government franchise) as administrative contracts, and then explain how PPPs, including concession-based PPPs, are different from the simple form of government franchise.

Different from commercial franchise which transfers economic rights, a government franchise is a special administrative license.¹⁵⁰ According to Article 12 of the Administrative License Law of the PRC,¹⁵¹ a special administrative license can be established over the development and utilisation of limited natural resources,

¹⁴⁸ n 46

¹⁴⁹ For definition of ‘concession’ in *Measures for the Administration of Concession for Infrastructure and Public Utilities* (2015) please refer to page 33

¹⁵⁰ Yu (n 131)

¹⁵¹ Administrative License Law of the PRC 2013 《中华人民共和国行政许可法》2013 年)

allocation of public resources and market entry of special trades that directly concern the public interest.¹⁵² As many projects in fields of public utilities or infrastructures are directly related to the public interest and require professional skills, concession is established for social and economic regulation, and it manifests several administrative features. First, because the award of concession authorises economic rights to operate limited infrastructure projects as public owned properties and to gain profits thereby, the award of concession allocates economic resources among candidate bidders, and principles of openness, equality and fairness must be followed.¹⁵³ Second, as private parties directly involved in operating infrastructures and public services delivery, the government enjoy several special statutory powers and are responsibilities to guarantee the public interest involved. According to the *Franchise Measures 2004*, the government department shall regulate prices and charges, supervise the project implementation, handle public complaints and may terminate the concession agreement and temporarily take over projects under certain circumstance. When the franchise right is altered or terminated, the supervisory departments shall take effective measures to ensure the continuity and stability of supply of public goods or services. Correspondingly, enterprises that have obtained the franchise right shall perform agreements to provide sufficient and qualified products and services and accept

¹⁵² *ibid*, art 12(3)

¹⁵³ n 37. Article 5 of the *Franchise Measures 2004* reads '[T]he principles of openness, fairness, justness and priority of the public interest shall be followed for implementing franchising of municipal public utilities.'

supervisions and inspection of the relevant government department.¹⁵⁴ Without approval from the government department, the franchisee shall not stop or suspend the production activities. Even if the franchisee wishes to terminate the concession agreement before the agreement expires, the franchisee shall make an application to the government department first and shall guarantee normal project operation and provision of services before the government department agrees to terminate the contract.¹⁵⁵

Whilst concession agreements in the simplest franchise sense are statutory administrative contracts recognised by the ALL 2014, PPPs are distinguished from simple government franchise in several aspects. First, not all PPP projects require the award of concession. For many non-profitable PPP projects of pure public nature such as hospital, schools and prisons where no revenues can be generated through users' charges, social capital entities that provide the related services usually gain returns from government payments. This mode is more analogous to government procurement of services, although PPPs are different from the conventional mode of government procurement of services in the sense that the government does not procure services or goods as end products but rather purchase the whole process of services production and delivery.¹⁵⁶ Second, even if concession is required under a PPP project, PPPs are

¹⁵⁴ *ibid*, art 10, 11

¹⁵⁵ *ibid*, art 17, 23

¹⁵⁶ Yu (n 144);

much more complicated than mere concession, because the social capital entities under a PPP project usually discharge bundled tasks from financing, construction to operation and maintenance, and the participation of financial resources and expertise of the social capital entities is much deeper than that in simple form of concession. The element of partnership is crucial for PPPs. Unlike government franchise more emphasis of which is placed on the unilateral government authorisation, under PPPs, the cooperative relation is supposed to benefit both social capital entities and the government body, and government in fact rely on social capital entities for infrastructure development. The emphasis on the cooperative nature of PPPs is manifest in the general principles articulated in ‘*Measures for the Administration of Concession for Infrastructure and Public Utilities 2015*’. Article 4 emphasised that the reliance interests of all parties shall be protected’ and it laid out four specific principles including ¹⁵⁷

‘(a) utilising financing, professional, technical and managerial advantages of social investors to improve quality and efficiency of public services; (b) transforming government function and enhancing cooperation between the government and social investors; (c) protecting lawful rights and interests of social investors and ensuring continuity and stability of concession; (d) balancing the profitable dimension and public welfare dimension (of a project) and safeguarding the public interest.’

These statements are different from those in the *Franchise Measures 2004* which expressly articulated ‘prioritised protection of the public interest’ as the principle governing government franchise. ¹⁵⁸

¹⁵⁷ n 46

¹⁵⁸ n 153

Given these notable differences between the simple form of concession and concession-based PPPs, it is not safe to assume that legislators have expressly classified the project contracts of concession-based PPPs as ‘administrative agreements’ under the ALL 2014.

(b) Can PPP Contracts be Exclusively Governed by Private Law Norms?

The cooperative nature of PPPs that distinguishes them from simple concession agreements provides a basis for the argument that PPP contracts are private law contracts. It is true that governments have the general capacity to conclude private law contracts to discharge their public functions. According to Article 97 of *the General Provisions of the Civil Law of the PRC*, administrative organs, as ‘state organ legal persons’,¹⁵⁹ may ‘conduct civil activities necessary for performing its functions’. But the claim that PPP contracts are private contracts has a legal implication which is problematic. The claim is that PPP contracts should be exclusively governed by private law norms.

¹⁵⁹ General Provisions of the Civil Law of the PRC 2017 (《中华人民共和国民法总则》2017 年) Under Chinese civil law, there are three types of legal persons, for-profit legal persons, non-profit legal persons and special legal persons. State organ persons are one type of special legal persons. Article 97 stipulated that ‘[A]n independently funded state organ or a statutory institution assuming administrative functions shall have the status of a state organ legal person from the date of its formation, and may conduct civil activities necessary for performing its functions.’

In this Section, I argue that PPP contracts cannot be exclusively governed by private law norms. As noted by Davies,¹⁶⁰ governments have several distinctive features: governments act on behalf of the public interest rather than their own; they perform tasks of providing certain goods and services of a public nature; they have special powers to raise taxes, monopolise uses and allocation of public resources and regulate many aspects in life. As demonstrated in the analysis below, when government enter into PPP contracts, these ‘governmental features’ do not cease to exist, and public law norms have an important role to play in regulating PPP contracts. I will analyse the relevance of public law at both early contracting stage and performance stage.

i. The early stage of government contracting

It is clear that a government party does not enjoy the same freedom as a private entity usually does in contracting. Public law norms play an important role in governing PPP contracting at least in three aspects.

First, the government capacity to enter into PPP contracts and the decision to use a PPP contract for a particular project are governed by public law norms. Whilst *the General Provisions of the Civil Law of the PRC* affirms the general capacity of an administrative organ as a ‘state organ legal person’ to enter into contract, its contracting activities shall be limited to those ‘necessary for performing its functions’ only.¹⁶¹

¹⁶⁰ ACL Davies, *The Public Law of Government Contracts* (OUP 2008) ch 3

¹⁶¹ n 159

Public law norms, therefore, play a primary role in defining the scope of functions and powers of administrative organs and regulate how their functions can be performed. For PPP contracts specifically, policy documents issued by ministries such as the MOF and the NDRC govern questions such as which governments can enter into a PPP contract, how to decide whether to use a PPP contract, and what procedures shall be complied with before concluding a contract. The requirement of Value for Money Evaluation is an example, without the passage of which no PPP contract is supposed to be concluded. Though procedural requirements laid down by central ministries are mainly controls internal to the administration, it is expected that future PPP legislation can play a greater role in delineating the scope of powers of governments in entering into PPP contracts.¹⁶²

Second, public law is generally relevant in regulating government financial activities. When entering into a PPP contract, governments forfeit their future revenues from infrastructure operation to the social capital entities, or place themselves under financial responsibilities to make payments or provide subsidies for 10 to 30 years. These significant financial activities are governed by the Budget Law. According to *MOF Guidelines on Financial Management of PPPs*,¹⁶³ at the subnational level, all government expenditures and revenues under PPP contracts shall be included in the

¹⁶² Yu An, 'The Future Direction of PPP Law in China and New Administrative Law' (2018) 4 China Law Review 174 (于安:《我国 PPP 的法治走向与新行政法》, 载《中国法律评论》2018 年第 4 期)

¹⁶³ n 77

government medium-term budget planning and subject to review by the local people's congresses (local legislatures). According to the Budget Law 2014, no government expenditures can be made without budget approval by people's congresses.¹⁶⁴ Though currently the role of legislatures in reviewing specific government decisions to use a PPP contract is limited, they may exert general financial control over governments. Moreover, the participation of standing committee of local peoples' congresses in the early stage of government budget formulation started to emerge in local practice, and the enhanced role of local legislatures in supervising government financial activities implies that there is a possibility for legislatures to review government decision to use PPP contracts for large infrastructure projects in the future.¹⁶⁵

Third, PPP procurement is also a matter governed by public law. According to *MOF Regulation on PPP Procurement*,¹⁶⁶ Government Procurement Law shall apply¹⁶⁷, and the procurement method shall be chosen from public tendering, invited tendering, competitive negotiation, competitive consultation and sole-sourced

¹⁶⁴ Budget Law of the PRC (2014) (《中华人民共和国预算法》2014 年) art 13

¹⁶⁵ For example, in Wenling City of Zhejiang Province, since 2009, any government project involving more than 30 million RMB investment shall be reviewed by the Standing Committee of the People's Congresses first before being included into the government budget. The Standing Committee of the People's Congress can refer proposal of the project back to the government for revaluation and adjustment if it considers the project plan is not appropriate. See, Lin Yingrong 'The Sunshine Practice of "Wenling's Participatory Budgeting"' (*Chinese People's Congresses*, 2014) <http://www.npc.gov.cn/zgrdw/npc/zgrdzz/2014-10/21/content_1881760.htm> accessed on 16 September 2019 (林应荣, "温岭"参与式预算的阳关实践", 载《中国人大杂志》2014 年第 18 期)

¹⁶⁶ n 76

¹⁶⁷ Government Procurement Law of the PRC 2014 (《中华人民共和国政府采购法》2014 年)

procurement according to the nature of a particular project.¹⁶⁸ There is an increasing consensus that to ensure equal opportunities for participation of enterprises of all types and to counter corruption, candidate PPP partners shall be accorded the opportunity to challenge the government decision to award a PPP contracts. The mechanism of challenging a government decision to award a contract is already envisaged in Article 58 of the Government Procurement Law, according to which candidate providers may raise doubts over any matters regarding government procurement and may apply for administrative reconsideration or file administrative litigation if they are not satisfied with the reply by the government.

ii. Performance stage

Those claiming PPP contracts are private contracts never expressly denied that throughout the performance stage of the contract, there are certain special rights enjoyed by the government parties not usually seen in ordinary private contracts. According to the *PPP Project Contract Guidelines* issued by the Ministry of Finance, the government contractor has special rights to supervise, intervene in the projects as well as the right to terminate the contracts unilaterally. The content of these rights is as follows.

Rights to supervise the project are to enable the government party to better monitor the progress of the project and oversee the performance of the contracts. These

¹⁶⁸ *ibid* ch 3

rights usually include rights to know, to inspect and test on the project site, to oversee the selection of the contractor and subcontractor of the project. The exercise of such rights is not unlimited.¹⁶⁹ When government inspects or tests on the project site, prior notice shall be given according to the procedures agreed in the contract, and these activities shall not affect the normal construction or operation of the project. When the government contractor wishes to exert certain control over selection of subcontractors, the control shall be primarily based on the reasonable need for ensuring the quality of the project and shall not constitute inappropriate restrictions on the autonomy of the social capital entities to choose subcontractors.¹⁷⁰

The government party also has the right to intervene in the project. If the government party finds that the project company has defaulted contractual obligations and it is necessary to intervene, it shall first notify the project company to rectify within a specific time period as set in the contract. If the project company is unable to remedy defaults within the prescribed time, the government party may intervene by designating a third party to remedy the breaches. When the project company does not default their contractual obligations, governments can also exercise the right to intervene, but only under special circumstances. The *MOF PPP Project Contract Guidelines* listed three circumstances. First, it may intervene to fulfil the requirements of law. For example, the government may intervene if the social capital entities in operating the projects

¹⁶⁹ n 99, Section 17

¹⁷⁰ *ibid*

violated mandatory provisions in laws, administrative regulations or mandatory technical standards. It may also intervene and revoke the project company's rights to construct or operate the project if it was later found out that the award of operational rights involved legal defects.¹⁷¹ Second, the government party may intervene if there are risks that jeopardise human health or safety, property or environment. Third, the government party may intervene when an emergency occurs that might lead to casualties, serious damage to property or cause environmental pollution. By exercising the rights to intervene, the government party may require the social capital entity to temporarily suspend the construction or operation of the PPP project and it may temporarily take over the project. If a temporary takeover cannot eliminate the serious risks or emergency, the government may terminate the contract and implement a forced takeover.

Another special mechanism under the PPP contract is voluntary termination, which intends to liberate government from its contractual obligations and to better satisfy the changing needs of the public interest. The government may choose to terminate the contract at any time within the contractual period even if the project company does not default its obligation. For example, if the public services or products are no long appropriate or needed, or the continued provision may adversely impact

¹⁷¹ Xing Gang, 'A Study on Legal Issues of Government Intervention Rights in PPP Projects' (2018) 2 *Journal of Comparative Law* 173 (邢钢:《PPP 项目中政府介入权法律问题研究》, 载《比较法研究》2018 第 2 期)

the public interest, the government may terminate the contract earlier than the contractual period, and the early termination is usually followed by government repurchase of the project.¹⁷²

All of the three approaches admit that governments have such special rights under PPP contracts for protection of the public interest. The major discrepancy between private law approaches and the other two approaches is over the foundation of such rights.¹⁷³ For the private contract approach, those special rights enjoyed by governments are derived from mutual agreement of the two parties. Not only is their exercise defined by the contract, but also agreed terms between the two parties are the primary basis for determining whether such rights have been exercised properly. Taking voluntary termination as an example, MOF PPP Project Guidelines stated that exercises of such government rights should be clearly stipulated in contractual terms to prevent government abuses. For those claiming that PPP contracts are mixed contracts or administrative contracts, such rights, though framed in contractual terms, are in essence administrative powers—they are manifestations of ‘administrative prerogatives’.¹⁷⁴ They exist in parallel with, rather than stem from the contracts.¹⁷⁵ In exercising these powers, the government party is not acting as a civil contractual

¹⁷² n 99, Section 17; Xing Gang, ‘Research on Convenient Termination Clause in PPP Project Contracts’ (2018) 1 Law Science 77 (邢钢:《PPP 项目合同中的便利终止条款研究》, 载《法学杂志》2018 年第 1 期)

¹⁷³ Hu (n 98)

¹⁷⁴ Su (n 143)

¹⁷⁵ Yu (n 144)

party but rather as the public administrator. If any disputes regarding whether governments have exercised these powers appropriately arise, they shall be determined by referring to public law standards such as legality, due process and reasonable exercise of discretion. Governed by public law norms, disputes regarding exercise of these special powers can only be resolved through administrative reconsideration or administrative litigation. This understanding of the nature of special rights of governments seem to be confirmed in the *Measures for the Administration of Concession for Infrastructure and Public Utilities 2015*,¹⁷⁶ which, though primarily intended to regulate concession-based PPPs, can shed light on unilateral exercises of government powers under PPPs in general. Article 51 stipulated that

‘[A] concessionaire who considers that a specific administrative act of an administrative organ infringes upon its lawful rights and interests shall be entitled to make statements, defend itself, and file an administrative reconsideration or administrative litigation according to the law’.

Perhaps the disagreement over the foundation of special government rights under the contracts can be tested by answering another question: can government forfeit exercises of these rights in PPP contracts? The answer to this normative inquiry is essentially dependent on the foundation of the government power to enter into PPP contracts. According to Article 2 of the Constitution of the PRC, ‘[A]ll powers in the

¹⁷⁶ n 46

People's Republic of China belong to the people'.¹⁷⁷ Governments do not have inherent powers of their own, and exercise of government powers shall be based on the purpose for which those powers are delegated by the people—namely, the statutory functions of governments. It is admitted that governments have been accorded with broad powers and functions for administration by the Constitution and the organisation laws. Taking local government as the example, Article 107 of the Constitution stipulates that:

‘[W]ithin their authority as prescribed by the law, local people's governments at or above the county level manage affairs on economy, education, science, culture, public health, physical culture, urban and rural development and conduct administrative works in finance, civil affairs, public security, nationalities affairs, justice administration, and family planning, among others, in their respective administrative areas. They may issue decisions and orders, and appoint or remove, train, evaluate, and reward or punish administrative functionaries’.

Article 59 of the Organisation Law of the PRC for Local People's Congresses at All Levels and Local People's Governments at All Levels further elaborates upon Article 107 of the Constitution and lists functions and powers of local government.

¹⁷⁸ Among various powers, local government enjoys broad powers

‘[t]o implement the plan for national economic and social development and the budget, manage the economy, education, science, culture, public health, physical culture, protection of the environment and natural resources, urban and rural development and conduct administrative work on finance, civil

¹⁷⁷ The Constitution of the PRC 2018(《中华人民共和国宪法》2018 年)

¹⁷⁸ Organisation Law of the PRC for Local People's Congresses at All Levels and Local People's Governments at All Levels 2015 (《中华人民共和国地方各级人民代表大会和地方各级人民政府组织法》2015 年)

affairs, public security, nationality affairs, judicial administration, supervision and family planning within its administrative area.’

As demonstrated in the analysis in Chapter Two, policy rationales driving PPP promotion in China are very much mixed. What PPPs are supposed to achieve in China as transitional economy are elusive. In particular, the NDRC intended to promote PPPs as financing tools to achieve national macroeconomic strategy of infrastructure investment and to boost growth of private economy, whilst the MOF intended to use PPPs to address local debt. But clearly PPPs cannot serve whatever administrative objectives governments want to pursue.¹⁷⁹ Viewed from the idea of PPPs internationally as examined in Chapter One, modern PPPs are primarily predicated on the government function of providing public goods and services. Under the condition of market economy, behaviours of *homo economicus* on the private market give rise to failures in public goods provision. For pure public goods such as national defence and lighthouse, because of the nonrival and nonexcludable nature of consumption, private firms usually lack the incentives to provide. For quasi-public goods which are partially excludable or rivalrous such as transport or public utilities, problems such as free-riding and natural monopoly renders competitive market provision inefficient.¹⁸⁰ Market inefficiency provides a primary economic justification for government provision of public goods, and PPP as part of New Public Management is a further step

¹⁷⁹ Yu (no51)

¹⁸⁰ Wallis, Dollery (n 2) ch 2

to reengage the market mechanism to rectify government inefficiency.¹⁸¹ But apart from this economic justification, a more fundamental reason establishing positive responsibility of governments to provide public goods or services lies in an ethical dimension—public services are socially desirable, and the involved public interest should be actively pursued.¹⁸² Equitable access of social members to basic social services such as education and healthcare is regarded as a requirement of social justice, and other public goods such as public utilities or transport are closely related to daily livelihood of the people. Governments, as organs of the political state as opposed to *homo economicus* on the private market, have the inherent responsibility to achieve the public interest. To protect the public interest, core government functions should not be delegated to the private sector. Even if governments may delegate certain tasks to private parties through contracts, they retain the responsibility to guarantee achievement of the public interest and should take actions to fulfil this responsibility.¹⁸³ Government exercise of special ‘rights’ under PPP contracts, therefore, are requirements inherent in their statutory responsibility to achieve the public interest,

¹⁸¹ *ibid* ch 4

¹⁸² This ethical dimension of market failure is well noted by economists. For example, Wolf noted that ‘market may fail to produce either economically optimal (efficient) or socially desirable (equitable) outcomes’ See Charles Wolf Jr, *Markets or Governments: Choosing Between Imperfect Alternatives* (MIT Press 1989) 19 ; See also Wallis, Dollery (n 2) 21

¹⁸³ Li Xia, ‘PPP Contracts: the Legal Nature and Arrangement of Powers and Responsibilities: An Analysis Centred after Sectors of Infrastructures and Public Utilities’ (2015) 3 East China University of Political Science and Law Journal 139 (李霞：《公私合作合同：法律性质与权责配置——以基础设施和公用事业领域为中心》，载《华东政法大学学报》2015年第3期)；Yang Binqian, Wang Zhouhu, ‘On the Construction of PPP Administrative Legal Regulation Framework in China’ (2018) 3 Hebei Law Science 98 (杨彬权、王周户：《论我国 PPP 行政法规制框架之构建》，载《河北法学》2018年第3期)

which, similar to those under franchise agreements, are founded on public law norms and cannot be evaded in contracts. Disputes related to exercise of special government rights under PPP project contracts should be resolved through administrative litigation.

(c) Can We Separate the Public Law Elements from the Private Law Elements under a PPP Contract?

PPP contracts are not exclusively about special rights of governments that manifest administrative nature; there are also rights and obligations based on transactional relation between the government party and the project company, which typically include those about private financing responsibilities, government promises of payments, prevention of competitive provision and so forth. The ‘separatist approach’, as illustrated in the case *Beifang Company v Transportation Bureau of Urumqi* mentioned above,¹⁸⁴ is based on the perception of mixed nature of PPP contracts. It argues that we can subject issues manifesting administrative nature to the regulation of public law, with related disputes submitted to administrative litigation, whilst those of civil law nature should be allowed to be resolved through civil litigation or arbitration.

The problem with the separatist approach consists in its prematurity: it presumes that the distinction between public law and private law elements under PPP contracts is already clear cut, according to which we can delineate jurisdictions between civil

¹⁸⁴ page 82

division of courts (or arbitration) and administrative division of courts. However, the private/public distinction under a PPP contract is not as straightforward as it first appears. A more fundamental difficulty in drawing the line between ‘public’ and ‘private’ is this: arguably, there is hardly an a priori answer to the question about whether certain issues should be governed by public law or private law; it is essentially a matter of normative choice. In the context of government contracts, interests of taxpayers, public services users or local residents are in constant tension with interests of private investors.¹⁸⁵ In PPP contracts regulation, multiple considerations are in play. How to weigh competing requirements such as protection of the public interest versus protection of the private interest, the requirement of legality versus the respect for contracting autonomy necessitates value judgement. One specific example is about government promises of high fixed rate returns. These government promises have been frequently used by local governments to attract PPP investors but also have been expressly forbidden by policies by the MOF and department rule of the NDRC for several times.¹⁸⁶ Such promises incur the concern with local government financial accountability. But there seem to be countervailing reasons to argue that governments should be bound by such promises despite the fact that they do not conform to the requirement of legality in a substantive sense—private parties enter into PPP contracts

¹⁸⁵ Liu (n 139); Hu (n 98)

¹⁸⁶ For example, Article 21 of the *Measures for the Administration of Concession for Infrastructure and Public Utilities 2015* stipulated that ‘[T]he government may, in a concession agreement, make a commitment on preventing construction of unnecessary similar competitive projects, provision of necessary and reasonable financial subsidies, relevant supporting public services, and infrastructure, and other contents. The government shall not make commitment on fixed return on investment and other items prohibited by laws and administrative regulations’

exactly because of the existence of these promises, and they have reliance interests in government performance of these promises.¹⁸⁷ Whether a contractual clause prescribing the government obligations for fixed rate returns should be held as valid or not may require ad hoc decision in light of multiple interests involved the case under specific circumstances. It is hard to determine whether rules in Contract Law or public law norms shall exclusively govern in a manner divorced from context. Perhaps a metaphor borrowed from Peter Cane can vividly capture the relation between public law dimension and private law dimension under PPP contracts: it is ‘better analogised to the scrambling of an egg than to the weaving of a two-stranded rope’.¹⁸⁸ The indeterminacy between the public law and private law elements casts doubts to the over simplistic separatist view of PPP contracts.

4 PPP Contracts as Administrative Contracts

Although PPP contracts as distinguished from simple form of concession are not expressly classified by the ALL 2014 as administrative contracts, they do manifest certain similarities with concession agreements, particularly with respect to statutory government responsibilities to uphold the public interest. The analysis above shows that PPP contracts cannot be exclusively governed by private law norms, and how rules

¹⁸⁷ Li Xiangfeng, ‘A Study on the Validity of Fixed Return Clause under PPP Project Contracts’ (2017) 1 Legal System and Society 92 (李香峰：《PPP 项目合同中规定回报条款效力的研究》，载《法制与社会》2017 年第 1 期) In this paper, applying rules in Contract Law to PPP project contracts, Li argued that the fixed return clause should be held as legally valid.

¹⁸⁸ Peter Cane, ‘Accountability and the Public/Private Distinction’ in Nicholas Bamforth, Peter Layland (ed) *Public Law in A Multi-Layered Constitution* (Hart 2003) 248

in public law or private law shall govern PPPs essentially involves weighing of competing normative concerns. A tentative proposal here is to classify PPP contracts as a special type of administrative contract. There are two positive reasons in favour of this approach.

First, to classify PPP contracts as administrative contracts can better police local government PPP contracting and protect the public interest. The tendency of local governments to distort PPPs as a financing tool only is an exact manifestation of self-interested behaviours of local government officials, which exacerbates the problem of local debts. In fact, regulating PPP malpractices has been regarded as an important task for controlling financial risks. Due to difficulties in government accounting and the long-term nature of PPP contracts, there have not been effective measures to hold local government accountable for their PPP contracting. Despite the fact that both the MOF and the NDRC have laid down elaborated procedures to exert *ex ante* control over use of PPPs, local malpractices persist. If PPP contracts are classified as administrative contracts, through judicial review, the courts can refer to valid PPP policies and play a role in overseeing whether PPP contracts are used properly by local governments.

Second, to classify PPP project contracts as administrative law contracts and subject related disputes to administrative litigation allows for flexible applications of both public law and private law rules, and it can better entertain the multiple interests involved. In fact, the integral approach of dispute resolution has been envisaged by the

ALL 2014. According to 12(11) of the ALL 2014, any complaint claiming that an administrative agency has failed to perform ‘*according to the law or as agreed upon*’, or illegally modified or rescinded an administrative agreement shall be accepted by the courts.¹⁸⁹ Even if the dispute is not about unilateral exercise of government powers but over agreement between the two parties, it can be resolved through administrative litigation. It is also important to notice that in adjudicating cases on administrative contracts, courts do not exclude application of private law rules. Article 14 of the SPC *Judicial Interpretation 2015* stipulated that

‘[W]hen examining whether an administrative organ has performed an agreement according to the law or as agreed upon or whether an administrative organ’s unilateral modification or rescission of an agreement is legal, the people’s court may, while applying norms in administrative law, also apply civil law norms provided that the compulsory provisions in administrative law and the Administrative Litigation Law are not violated.’

Given that PPPs are different from typical administrative contracts because of their emphasis on the reciprocal and cooperative relation between the two parties, administrative law judges in hearing PPP related cases may pay more attention to the protection of reliance interests of investors and respect for party autonomy than in adjudicating ordinary cases of administrative agreements.

It must be admitted that my proposal to classify PPP contracts as a special type of administrative contracts has not become the dominant position in China. Statistically

¹⁸⁹ n 103

it is difficult to know the exact percentages of cases adopting the three approaches in judicial practice, but secondary literature suggests that practitioners tend to emphasize the private law nature of PPP contracts and courts tend to recognise a separatist approach for dispute resolution. Their positions are based on pragmatic concerns. A major one is that empirically, winning rates of administrative litigation are low. Private investors do not trust that Chinese courts lacking independence from local governments can accord effective protection for their interests, and they prefer arbitration to ensure that governments are held liable for their breaches. It has been argued that if PPP contracts are classified as administrative contracts, arbitration is no longer available. According to Articles 2 and 3 of Arbitration Law,¹⁹⁰ arbitration can only apply to contractual disputes or other property related disputes arising between citizens, legal persons or other organisations as equal legal subjects, and any administrative disputes that shall be resolved by administrative organs according to the law cannot be subject to arbitration. This concern is clearly demonstrated in the case *Sichuan Highway* examined above,¹⁹¹ where the courts classify the BOT agreement as a civil law contract to validate the arbitration clause.

Several responses are offered here to this concern.

¹⁹⁰ Arbitration Law of the PRC 2017 (《中华人民共和国仲裁法》2017 年)

¹⁹¹ page 79

First, admittedly, there is no easy solution. Even if arbitration or other mechanisms are adopted to resolve PPP related disputes, we must think about how public law norms can be effectively applied to accommodate the requirements of legality and protection of the public interest.

Second, advocacy for the private contract approach or the separatist approach is premised on the assumption that attracting private investment is the predominant policy consideration for PPP practice in China. Admittedly this rationale once dominated in the 1980s, when China was in the pressing need of foreign investment and expertise for infrastructure development. However, it is doubtful if attracting participation of private enterprises should be the top priority at the new stage of PPP development in China. For one thing, private investment through PPPs is only one means rather than the only means for infrastructure development. Local governments are accorded with increasing legal powers to raise debts, and the Central Government has taken several measures to financially support local infrastructure development.¹⁹² For another thing, compared with rich experiences of SOEs in infrastructure

¹⁹² For example, in June 2019, the General Office of the CPC Central Committee and the General Office of the State Council issued *Notice on Effectively Conducting the Issuance of Special Bonds for Local Governments and Ancillary Financing of Projects* to support infrastructure financing. (中共中央办公厅、国务院办公厅印发《关于做好地方政府专项债券发行及项目配套融资工作的通知》, 2019年6月10日); China Business Network, ‘New Regulations on Special Bonds Release 100 Billion Yuan as Infrastructure Funds to Facilitate Urban Development Platform Financing’ (12 June 2019) <<https://baijiahao.baidu.com/s?id=1636105941964777451&wfr=spider&for=pc>> accessed on 27 September 2019 (第一财经, “专项债新规释放千亿级基建资金, 改善城投平台公司融资”, 2019年6月12日)

development, the expertise of many private enterprises is still developing. The gradual retreat of SOEs from the PPP market and a turn to PPP in its true sense may take a long period of time. At the current transitional period, the regulatory focus of PPPs should not be placed on blind promotion of private participation, but rather on enhancing fair competition and establishing good PPP practices. Particularly since 2017, more regulatory focus is placed on quality rather than quantity of PPP projects. As noted by the Deputy Minister of the MOF in 2017, the prospect is to use PPPs for better delivery of services only.¹⁹³ It is not clear why attracting participation of private enterprises should be the top priority if it does not improve public services delivery. After all, there is not any inherent normative reason favouring the use of PPPs—they are only means rather than ends.

Third, it might be true that in terms of overseeing government exercises of administrative prerogatives and protecting the economic interest of private parties, administrative litigation is currently not as effective as it ought to be. But in the long run, to enhance powers of the judiciary in overseeing government performance of public functions is an indispensable step towards good administration. It is the impotence of courts, rather than the notion of administrative contracts which empowers courts, that shall be discarded.

¹⁹³ MOF, ‘Shi Yaobin: Speech on the Working Conference on Advancing Standardised Development of PPP’ (1 August 2017) <http://jrs.mof.gov.cn/ppp/ldjhppp/201708/t20170801_2663646.html> (财政部网站, “史耀斌: 在进一步推进 PPP 规范发展工作座谈会上的讲话”, 2017 年 8 月 1 日)

5 Concluding Remarks

The complicated nature of PPP contracts which are different from both ordinary private law contracts and typical administrative agreements gives rise to difficulties regarding their legal classification in China. There is no easy solution. Core to the choice of rules applicable to PPP contracts is a proper balance between competing requirements such as legality, achievement of the public interest and protection of private interests. In this Chapter, I explained that whilst PPPs have not been expressly recognised as administrative contracts in China, given special features that distinguish them from ordinary civil law contracts and the inherent difficulty in separating public law elements from private law elements, to classify PPP contracts as a special type of administrative agreements in China is favourable. More importantly, to classify PPP contracts as administrative contracts opens the possibility for courts to police local government PPP contracting, which is conducive to enhancing government accountability and establishing good PPP practice.

CONCLUSION

How to legally govern PPP contracts is essentially a matter of normative choice that should be made on the basis of both positive law rules and empirical investigations. Elucidating definitions, developing course, policy rationales, regulatory frameworks and practices of PPPs in China, this Thesis reveals complexities of PPPs and argues that PPP contracts should be classified as a special type of administrative contracts to better enhance local government accountability and protect the public interest.

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