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Public-private partnership: problems of contractual settlement

Державно-приватне партнерство: проблеми договірного врегулювання

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Abstract

Given the benefits of public-private partnership (PPP), PPP relations, as well as the problems that arise in the contractual settlement of such relations are becoming increasingly important. Legislative requirements for the contractual form of partnership and an open list of contracts that can be concluded within the PPP do not differ in their clarity and clarity of interpretation, which results in the ambiguity of views on the rule of law when concluding agreements. Therefore, it is essential to analyze the problematic aspects of contractual regulation of relations in the field of PPP and suggest ways to solve them. The work aims to study the problems of contractual settlement of PPP. Research methodology such methods as the dialectical method, analysis and synthesis, induction and deduction, proof and refutation, comparison, generalization. As a result of the study, the problematic aspects of concluding agreements in the field of PPP were analyzed. In particular, it was concluded that today, despite the legal basis for the implementation of PPP, the implementation of such projects has some problems that are manifested in both legal and organizational areas. One of the problems is the greater role of the state partner in the implementation of PPP projects, which is manifested in the expanded

Анотація

З огляду на переваги державно-приватного партнерства (далі - ДПП), відносини у сфері ДПП, а також проблеми, що виникають при договірному врегулюванні таких відносин набувають все більшої актуальності. Законодавчі вимоги до договірної форми партнерства та відкритий перелік договорів, що можуть укладатися в рамках ДПП не відрізняються своєю чіткістю та зрозумілістю трактування, що має наслідком неоднозначність поглядів на норму закону при укладенні угод. Тому важливо проаналізувати проблемні аспекти договірного регулювання відносин у сфері ДПП та запропонувати шляхи їх вирішення. Метою роботи є дослідження проблем договірного врегулювання у сфері ДПП. Методологію дослідження такі методи, як: діалектичний метод, аналіз і синтез, індукція і дедукція, доказ і спростування, порівняння, узагальнення. В результаті проведеного дослідження проаналізовано проблемні аспекти укладення договорів у сфері ДПП. В тому числі зроблено висновки, що сьогодні, незважаючи на нормативно-правове закріплення засад здійснення ДПП, реалізація таких проєктів має низку проблем, що виявляються як у правовій, так і організаційних площинах. Однією із проблем є більш значна

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scope of rights compared to the private partner (ownership of facilities created in the implementation of PPP projects), and, accordingly, lack of business interest in participation in projects not on mutually beneficial terms.
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Keywords: public-private partnership, concession agreement, joint venture agreement, product sharing agreement, public procurement.

роль державного партнера в реалізації проектів ДПП, що виявляється у розширеному обсязі прав порівняно з приватним партнером (щодо права власності на об'єкти, створені в процесі реалізації проектів ДПП), та, відповідно, незацікавленості бізнесу, в участі в проєктах не на взаємовигідних умовах.

Ключові слова: державно-приватне партнерство, договір концесії, договір про спільну діяльність, договір про розподіл продукції, державні закупівлі.

Introduction

In modern conditions of development of public relations, PPP is a significant tool for modernization of the economy, solving socio-economic (including infrastructure) problems through the combination of forces and resources of public and private partners.

The effectiveness and ability of such a method of interaction as PPP is confirmed by the experience of various foreign countries. However, legal and contractual regulation plays an important role in the successful functioning of this institute.

In Ukraine, the main legal act in the field of PPP is the Law of Ukraine "On PPP" (Law No. 2404-VI, 2010). According to the provisions of this law, PPP means cooperation between the state of Ukraine, territorial communities represented by relevant public authorities and local governments (state partners), and legal entities other than state and municipal enterprises or individuals – entrepreneurs (private partners), carried out based on an agreement in the manner prescribed by this Law and other legislative acts.

Regarding the regulation of PPP relations, this law stipulates that concession agreements may be concluded within the framework of PPP implementation; property management (only if the PPP agreement stipulates the investment obligations of the private partner); joint activities; other agreements. This provision testifies to the dispositiveness of the legislator, which contradicts the principles according to which public authorities and local governments, their officials are obliged to act only on the basis, within the powers and in the manner prescribed by the Constitution and laws of Ukraine. Therefore, there are some inconsistencies regarding contractual regulation, which should be resolved at the legislative level.

Also, a special law in the field of PPP stipulates that relations related to initiating PPP, choosing a private partner, preparing for concluding, determining the content of the contract, concluding and executing contracts concluded in PPP are governed by this law, if another procedure for initiating the appropriate form of PPP, choosing a private partner, preparing for concluding, determining the content of the contract, concluding and executing such agreements is not defined by the law governing the relevant form of PPP. That is, in the absence of clear requirements for the PPP agreement, the legislator refers to the requirements established by special laws under each contractual form (including the provisions of the Civil Code of Ukraine (Law No. 435-IV, 2003) and the Commercial Code of Ukraine (Law No. 436-IV, 2003).

Therefore, as can be seen from the provisions of PPP legislation, the issue of contractual regulation in the study area has several problematic aspects that need to be analyzed and resolved. Given this, it is vital in this paper to pay attention to the problems of contractual settlement of relations of PPP, models of interaction, and features of agreements that are most often concluded in this sphere of regulation.

Theoretical Framework or Literature Review

At present, there is a small amount of theoretical research in Ukraine on the problematic issues of contractual settlement of relations in the field of PPP. And even though many articles and monographs mention the need for comprehensive research on this topic, such works are absent. At the same time, some aspects of contractual regulation in the field of PPP were studied by Albeda (1995), Bondarenko (2014), Vinnyk (2013), Kosach and Degtyarov (2020), Komarnytska (2019), Kulinych (2014), Mazalova (2019), Polyakov (2020), Protsak (2015), Selivanova (2019), Simak (2014), and Trinchuk (2010).

PPP as a special legal form of cooperation between the state and business in his work analyzed Aparov (2015). The author notes that the introduction of PPP in Ukraine is one of the main priorities of government development programs that promote cooperation between government and private business but now, there are objective circumstances to improve PPP mechanisms and form new structures in the economic system. In addition, Aparov (2015) highlighted the essence and importance of PPP, the peculiarities of business and government cooperation, explored the main regulations governing PPP in Ukraine, and identified the main problems hindering the development of PPP. According to the author, the solution to problematic issues can be the formation of a generally favorable legal and economic environment for business, which is based on improving the investment climate and regulatory environment.

Albeda (1995) examined the international experience of state and social partnership in his study. The author drew attention to the peculiarities of the partnership between government and business in the Netherlands.

The issue of administrative and legal regulation of PPP was the subject of research by Bondarenko (2014). In particular, the author notes that administrative and legal regulation forms the core of regulatory and legal regulation of PPP in Ukraine, which is complemented by civil, economic, and financial regulation. According to Bondarenko (2014), PPP can be defined as a comprehensive administrative and legal mechanism of cooperation of public administration entities (state bodies and local governments) with private partners (legal entities other than state and municipal enterprises, and individual entrepreneurs) in public interests, characterized by long-term, polystructural functional and targeted consolidation of financial, property, organizational and managerial and other tangible and intangible resources of public and private partners, separation of responsibilities between partners, including risk management, which aims to achieve cooperative, synergistic systemic socio-economic effect in the form of creation, modernization, maintenance, operation of public service and infrastructure facilities or provision of public services.

Vinnyk (2013) studied PPP agreements in more detail. In his work, the author drew attention to the most common agreements in the field of PPP, as well as analyzed the problems of legal regulation of individual agreements.

Kosach and Degtyarov (2020) analyzed the peculiarities of PPP development in the context of decentralization. In conclusion, the researchers summarized that the administrative reform in Ukraine and directions for improving the system of public administration in the context of decentralization determine the relevance of the implementation of promising investment projects on the terms of PPP. The implementation of such projects will increase the efficiency of public administration in such areas of public relations as housing and communal services, education, health care, construction, public administration in the field of transport infrastructure and is enshrined in several regulations and policy documents.

Domestic experience of PPP in the development of investment and innovation activities has been the subject of research Komarnytska (2019). Ways to improve the regulation of land and legal issues for the development of agricultural cooperation in Ukraine based on PPP examined Kulinych (2014).

Mazalov (2019) surveyed the contractual and legal support of PPP relations. According to the scientist, to use the potential of PPP and minimize the risks that arise due to the clarity and adequacy of PPP regulation. Also, Mazalova (2019) notes that it is necessary to: establish the limits of contractual freedom, taking into account the public importance of PPP projects by establishing an exhaustive list of contracts that can be concluded under the PPP, at the level of law; formulate and approve model PPP agreements for each individual species. Taking into account these features will allow you to more fully use the potential inherent in the cooperation of the state with private business because PPP is an effective tool for solving pressing problems of society.

The concept and functions of PPP in his work explored Polyakov (2020). The author also comments on the contractual regulation of PPPs and considers that the best example for PPPs is a joint venture agreement or property management agreement (but only if the private partner has investment obligations). In the first example, the PPP will resemble a corporate one, but no legal entity will be created. In the second – the individual will be a manager, and therefore will receive the right of trust property, following the provisions of the Civil Code of Ukraine, will not

have the right to profit, although he will have the right to own, use and dispose of the property.

Protsak (2015) also drew attention to the contractual regulation of PPP projects. The researcher draws attention to the fact that, although the requirements for agreements (contracts) in scientific and methodological terms are developed in sufficient detail and even specified in legislative regulations, the practice of their conclusion, especially in the field of PPP, is far from perfect, since the legal framework in the field of PPP in Ukraine is very complex, multilevel and bureaucratic. According to the author, to change the current situation, the contractual program of PPP projects in Ukraine should allow PPP project parties to make necessary changes during the project life cycle, thus providing more flexible regulation of relations between its participants, and it is necessary to develop certain common standards for the development of PPP agreements, which will significantly reduce project risks and increase the chances of successful implementation of the PPP project.

Peculiarities of the concession agreement as a method of resuscitation of PPP in her study considered Selivanova (2019). Simak (2014) and Trinchuk (2010) became the subject of world experience in organizing PPP. The authors researched the examples of a public and private interconnection and highlighted the problematic issues of such regulation.

Methodology

The methodological basis of the study is such methods as the dialectical method, analysis and synthesis, induction and deduction, proof and refutation, comparison, generalization.

The methodological significance of the dialectical method in the study of PPP is that it serves as a means of finding new results, a method of moving from the already known to the unknown, new. That is, there is not only the transformation of the previously created theory of PPP but also the formation of its latest modification by systematically adding the latest theoretical positions. Laws of dialectics – the law of unity and the struggle of opposites; the law of transition of quantitative changes to qualitative and vice versa; law of negation – negation allows us to explore the transformation of the essence and content, categorical definitions, structure, and hidden mechanisms of PPP. In particular, the first law of dialectics (the law of unity and struggle of opposites), which is fundamental in dialectics, plays a crucial role in revealing the content of the PPP phenomenon and the peculiarities of its regulation. The unity of the constituent elements of the PPP lies in their unifying affiliation to the essence of the partnership itself, the close relationship (including contractual), and the interdependence between its elements.

The rest of the methods mentioned above made it possible to explore the specifics of contractual regulation of PPP, problematic issues of this interaction, as well as identify causes and consequences of inconsistencies in regulating relations. The application of the complex of these methods helped to reveal the relationship between the elements of the institutional mechanism and the rule of law in legal reality; to consider PPP as a value, a system that has a complex structure, each element of which has a specific purpose and performs specific functions aimed at meeting the relevant needs of the system; allowed to compare the development of PPP in Ukraine and the world, to understand the features of contractual regulation, as well as to correspond and contrast the role of different agreements in the regulation of PPP.

Results and Discussion

Contractual regulation in the field of PPP has several features. Before analyzing the problematic issues of settlement of relations in the field of PPP, we will analyze the main models of interaction between public and private partners (Table 1).

Table 1.
The main models of interaction between public and private partners. Data provided by Kosach and Degtyarov (2020)

Model type	Main characteristics	Property	Management	Financing
Operator	A clear division of responsibilities between the partners, the control function is performed by the state	Private / Public	Private	Private
Cooperation	Implemented through a joint venture between public and private partners	Private / Public	Private / Public	Private / Public
Concession	Used for long-term projects	Public	Private / Public	Private / Public
Negotiable	Used in areas where investment is aimed at reducing current costs	Private / Public	Private	Private
Leasing	Used by local authorities with private partners	Private	Private / Public	Private / Public

It should be remarked that the role of both public and private partners in the implementation of joint projects is significant, and, therefore, the opinion that PPP projects can be implemented almost exclusively at the expense of private partner resources is wrong, because even in developed countries public investment in such projects is mandatory.

Consider in more detail the problematic aspects of contractual regulation of PPP.

Problematic issues of contractual regulation of relations in the field of PPP arise primarily due to the lack of an appropriate legal framework that will interpret the controversial issues of concluding agreements. For example, the Law refers to the requirements established by special laws following each contractual form when concluding certain agreements.

Thus, an example of the lack of proper regulation of relations in the field of PPP is the lack of a special law that would regulate the relations that arise when agreeing on joint activities. The Law of Ukraine “On Joint Investment Institutions” (Law No. 5080-VI, 2012) defines that a collective investment institution is a corporate or mutual fund. At the same time, according to the Law of Ukraine "On PPP" a state enterprise, utility company, enterprise of the Autonomous Republic of Crimea or a company whose 100% authorized capital belongs to the state, territorial community or the Autonomous Republic of Crimea may participate in an agreement concluded within the framework of a PPP on the part of the relevant public partner. Therefore, the corporate fund for PPP investment cannot be used due to non-compliance with the requirements of the law, and the mutual fund can only act as a special structure for direct investment activities. Therefore, to regulate joint activities it is necessary to refer to the Civil Code of Ukraine. According to Art. 1130 of the Civil Code of Ukraine (Law No. 435-IV, 2003) under the agreement on joint activities of the parties (participants), undertake to act jointly without the creation of a legal entity to achieve a specific goal that does not contradict the law. Joint activities may be carried out on the basis of pooling of participants 'contributions (simple partnership) or without pooling of participants' deposits. This indicates that the joint venture agreement, which is intended for use by public and private partners to regulate relations, provides only a general idea of the agreement.

Problematic issues arise when concluding a property management agreement. According to Art. 1029 of the Ukrainian Civil Code (Law No. 435-IV, 2003) under the contract of property management one party (founder of management) transfers to the other party (manager) for a certain period property in management, and the other party undertakes for payment on its behalf to manage this property on behalf of the founder beneficiary). This agreement provides for clear identification from the business, which is quite difficult. It is more expedient to use a trust management agreement to regulate such relations, under which the manager has the right of trust ownership of the property received in

management. In this case, although there is no clearly defined content of the powers of one of the counterparties – the trustee, the parties are still open and seek to achieve the best possible result. Although even in this case, trust management by its legal nature is more like a service contract than a partnership agreement.

The conclusion of a concession agreement is no less problematic for PPPs. Unlike the previous ones, this agreement is regulated by special laws "On Concessions" (Law No. 997-XIV, 1999) and "On Peculiarities of Lease or Concession of State-Owned Fuel and Energy Complex Facilities" (Law No. 3687-VI, 2011).

In international-legal practice there are different types of concession agreements, the most common of which are:

1. BOT (Build – Operate – Transfer). The concessionaire carries out the construction and operation of a certain facility for a specified period, after which the facility is transferred to state ownership (e.g. Italy, Spain, South Korea, Germany, Turkey, India, Thailand, Egypt, Greece, Canada, France).
2. WTO (Build – Transfer – Operate). The Concessionaire builds the facility, which is transferred to the state immediately after the completion of construction, after which it is transferred to the Concessionaire under certain conditions.
3. SBI (Build – Own – Operate). The concessionaire builds the facility and carries out its subsequent operation, owning it on the right of ownership, the validity of which is not limited.
4. VOT (Build – Own – Operate – Transfer). The concessionaire builds the facility, carries out its operation, owns this facility for a certain period, after which the facility becomes the property of the state.
5. ROT (Rehabilitate – Operate – Transfer). This legal structure is similar to the BOT, only instead of building a new facility, this agreement provides for the reconstruction of the existing one.
6. DBFO (Design – Build – Finance – Operate). All authority and responsibility for design, construction, financing, and operation are combined and transferred to a private partner.

However, as practice shows, these legal constructions of concessions are unstable and often intertwine, creating new types of concessions (Selivanova, 2019).

In Ukraine, a PPP concession agreement can only take place for those objects that coincide with the Law on PP and the Law on Concessions, which narrows the scope of this type of agreement.

Simultaneously, all the above agreements do not have a basic structure that includes requirements for the subject composition and legal personality of the participants, conditions of conclusion that determine the public interest, the need to use state aid as a separate condition of the contract, control the effectiveness of such assistance and project implementation, liability for misuse of state aid, etc. This indicates the need to refine the legislation governing contractual relations in the field of PPP, taking into account the specifics of such relations.

Conclusions

Summing up the research made above, the following conclusions were made.

There is currently no clear regulation of contractual relations of PPP. The authors suggest the following ways to solve the problem:

1) Establishment of an exhaustive list of agreements that may be concluded within the PPP, at the level of law;
2) Approval of standard PPP agreements for each individual species, and;
3) Adoption of effective and detailed legislative regulation, adapted directly to the PPP relations.

In addition, it is equally important, along with the purely legal mechanisms to improve the PPP, to pay considerable attention to the institutional support of this activity, which is a clear delineation of powers and responsibilities of government agencies and other participants in the PPP.

Regarding further directions of research, it is important to analyze the state of fulfillment of contractual obligations in the field of PPP and the peculiarities of judicial appeal of contracts in the field of PPP.

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