Problems of legal regulation of concession agreements

L V Yatchenko and V Yu Lantseva*

Admiral Ushakov Maritime State University, 93 Lenin Ave., Novorossiysk, 353924, Russian Federation

Abstract. Investing in concession projects currently requires investors to be rather decisive. There are practically no effective mechanisms for protecting investors, despite the fact that concession agreements are most commonly used at emerging markets, which were previously the prerogative of the state. The proposals of state authorities today do not imply amendments to draft concession agreements. State authorities have no intention to enter into negotiations with the auction winners. Practically, concession agreements are used as accession agreements, any improvement in the terms of the concession agreement after the auction may lead to the refusal to sign. The main trend in the field of concessions is that concessionaires are not ready to participate in state and municipal concession projects, and the existing legal and other risks lead to negative consequences not only for stakeholders but also for the population as a whole. The research methodology is a combination of general scientific and particular scientific (logical-legal, comparative-legal, legal modeling) methods of cognition. The conclusions are of practical importance and can be used to develop methods for improving the legal regulation of concession agreements.

1 Introduction

The trend of attracting private investment in financing socially significant projects implies the possibility of their effective implementation even amid the budget funds shortage without increasing the debt burden in the current period. In addition, the state gets the opportunity to use various resources and competencies of the concessionaire to improve the quality of socially significant services and attract innovative technologies. Innovative trends are possible under conditions of management principles and systems modernization both in the sectoral and regional context [1, p. 823]. For example, transport should be digitized based on updated vehicles produced at domestic shipbuilding facilities [2, p. 197], which currently seems extremely difficult without the implementation of public private partnership institution.

Therefore, the fact that it receives additional guarantees and reduces the risks from investments, including such guarantees as achieving a minimum return is beneficial for the private side. For example, the construction of individual transport infrastructure facilities is blocked due to low return on investment, and their construction is appropriate only with clear long-term guarantees from cargo owners concerning the loading of terminal capacities and a stable financial and economic situation in Russia [3, p. 144]. Such guarantees can be given by the state.

There is no consensus among experts on what forms of cooperation and interaction between government and business refer to public private partnerships (hereinafter referred to as PPP). The PPP agreement is of a long-term nature; on average, according to statistics, a concession agreement (hereinafter referred to as the CA) is concluded for a period of at least 13 years. This is due to the fact that cooperation between the state and business aims to solve capital-intensive tasks with the complex nature of such projects. At the same time, businesses need investment return guarantees. The accuracy of measuring costs and profits when planning a project is affected by various risks that may adversely affect the performance of economic agents. It is vital to clarify that the risks are distributed between the state and the private investor not only in the process of creating an object, but also at the stage of its subsequent operation. Investors aim for risks minimization by delegating responsibility to the state, ignoring the balance of interests in the area under consideration, which will affect the project implementation in general. Accordingly, the concessionaire’s participation in project financing is a fundamental element of the PPP.

2 Materials and Methods

The effective way of concluding concession agreements does not provide effective institutional restrictions for counterparties: there is no clear procedure for selecting concessionaires and negotiating agreements, or there are only formal restrictions that officials and concessionaires can easily circumvent with the help of regulations, proposals for accelerated tracking or ignoring requirements.

* Corresponding author: lantseva.v@yandex.ru

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These gaps in the legal framework contribute to the officials’ corrupt behavior, which subsequently leads to inefficient policy in a particular sector.

In the course of the study, general scientific and special legal methods (comparative legal, formal legal) were used. An analysis of the legal framework governing the procedure for concluding and executing concession agreements enabled to apply a formal legal research method. The gaps in legislation and conflict points were identified by applying the comparative legal method of scientific knowledge.

The theoretical foundation of the study contains scientific journalistic sources, legal acts fixing the rules for the conclusion and execution of concession agreements in the Russian Federation.

3 Results and Discussion

Before moving into the analysis of the concession agreement itself, it is necessary to study the legal framework governing issues in the field of PPP. The legislation of the Russian Federation on PPP consists of federal laws and various regulatory legal acts of the Russian Federation, regulatory legal acts of the subjects of the state, in particular, the Law on PPP [4, p. 4350], the Law on Concession Agreements [5, p. 3126], etc.

The first normative act regulating relations in the field of PPP is the Federal Law “On Concession Agreements”. Based on the legal definition of the concession agreements, it can be concluded that the agreement under consideration enables to attract private capital to objects owned by the state without privatizing them.

The later Federal Law on Public-Private Partnership expanded the list of applicable models of the phenomenon under consideration. At the same time, the PPP Law provides for a mechanism to ensure the stability of the essential terms of the contract that were in force at the time of its conclusion. Only the terms of the project implementation and the redistribution of the volume of project financing by the state in the conditions of economic or legal transformations that directly affect the project being implemented are subject to revision.

These measures aim to create comfortable conditions that are attractive for private investment and reduce the possible risks that the parties may face during the project implementation. There are a number of key differences between PPPs and CAs:

- In CA, the public side always reserves the right to own the object.
- In CA, the concessionaire operates the facility.
- In PPP, the public partner can operate the facility.
- In PPP, a private party owns the object of the agreement.

Looking into the practice of using PPP for various projects, concession agreement can be singled out as the most common form of PPP. Thus, concession agreements in transport are of the greatest interest within the framework of our study. The legislation regulating these issues in relation to the transport industry imposes a number of features on the CA implementation. Agreements under this model are also long term (concluded for 20-30 years or more). In such projects, investments from construction and subsequent operation pay back on the fees at infrastructure facilities. In this case, the investor’s risk lies in the low level of demand for this object due to low passenger traffic and low solvency of the population. Therefore, at the stage preceding the project, it is crucial to assess the necessary level of traffic intensity by road transport, regard the dynamics of socio-economic development and other factors affecting the potential return on investment.

When carrying out forecasting activities, it is necessary to regard a possible error. The level of traffic intensity may turn out to be lower than expected; therefore, it is necessary to leave a margin of 20-30% of estimated revenue in the financing structure.

The CA should regard the specifics of the project implementation at the stage of construction and subsequent operation of motor roads on a reimbursable basis. In terms of risks distribution between the parties to the project, it is necessary to ensure their transfer to the party that can most effectively manage them. The form of risks distribution can be represented by a mechanism for ensuring the economic balance of the CA, the use of the mechanism of assurances about the circumstances (Article 431.2 of the Civil Code of the Russian Federation), and others.

The main types of concession agreements concluded in this area are as follows:

1) concession with direct fees collection;
2) concession with concession grantor fee.

A whole range of works on the construction of a CA provided by a private party facility with CA’s subsequent operation in whole or in part at the expense of its own or borrowed funds is the subject of a CA with direct fees collection. Additionally, this agreement enables the public party to participate in the costs of creating an infrastructure facility. Ownership of the infrastructure facility within the framework of the CA being created after construction arises from the public side, and the CA object itself is transferred to the concessionaire for temporary possession and use for profit making.

The concession agreement has a number of features that determine the long-term nature of the agreement under this model and are concluded, as a rule, for a period of 20 to 30 or more years.

The next type of CA with a concession grantor payment is the construction of an object by the private party and its operation in full or in part at the expense of personal funds or borrowed funds. The concessionaire collects fees for the use of the highway in favor of the public side. The source of compensation for the concessionaire’s investments at the stage of road operation is the maintenance fee paid by the concession provider. The private investments are returned stepwise within the period specified in the CA.

Additionally, the quality of the work performed by the concessionaire directly affects the profitability, which in turn should affect the correct motivation of the private investor. The agreement specifies target transport...
and operational indicators that characterize the quality of the road and the transport service as a whole. Agreements under this model are also concluded on a long term (20-30 years or more) basis.

The legal definition of a concession agreement is presented in Article 3 of the Federal Law “On Concession Agreements”. Accordingly, the essence of the CA is the obligation of the concessionaire to create and (or) reconstruct the real estate owned by the concession provider and established by the transaction at its own expense with subsequent profit through the operation of the concession agreement object within a certain period.

Of fundamental importance is the requirement for the reconstruction of the object of the agreement, which means measures for its reorganization based on the introduction of new technologies, mechanization and automation of production, modernization and replacement of obsolete and worn-out equipment with new more productive equipment, changing the technological or functional purpose of the object of the concession agreement or its individual parts, other measures to improve the characteristics and operational properties of the CA facility.

As can be seen from the definition, the current legislation contains a sign of the CA complexity, not specifying the list of types of contracts that make up its content, while establishing the nature of individual elements of the CA is not so much theoretical as practical at each stage of its conclusion, execution and termination. In particular, a correct assessment of potential risks is impossible without an accurate understanding of the essence of the proposed legal relationship. At each stage of CA implementation, the nature of the legal relations is different and the determination of the applicable legal norms is necessary for resolving the legal relations of the parties [6, p. 97].

The list of objects of the agreement is indicated in Article 4 of the Federal Law “On Concession Agreements”, and the list is open. The objects of the concession agreement in relation to the transport sector are shown in Figure 1.

![Objects of concession agreement in transport sector](https://example.com/image)

**Fig. 1.** Objects of concession agreement in transport sector.

It is noteworthy that it is the objects in the field of transport that prevail in the general list of CA objects, which is due to effective interaction between the federal executive authorities in the field of transport with interested organizations [7, p. 82].

It should be noted that a list of essential conditions for all CAs without exception, a list of essential conditions for CAs in relation to individual transport infrastructure facilities and an approximate list of optional CA conditions have been legally established.

Despite the fact that the list of essential conditions for all CAs finishes with the wording “other essential conditions provided for by federal laws”, the list cannot be considered open, because the norm is currently blanket to two normative legal acts being the Law on seaports [8, p. 5557] and the Law on Highways and Road Activities [9, p. 5553].

Refusal to conclude a CA is permitted in the case of:
• activity of persons who initiated the CA conclusion with the use (operation) of the CA object is not allowed by regulatory legal acts of all levels;
• CA object is withdrawn from circulation or limited in circulation;
• a public legal entity does not have ownership rights of the CA object;
• etc.

4 Conclusion

It should be noted that public-private partnership being a newly emerged phenomenon of modern legal reality in the Russian Federation has several shortcomings.

An analysis of the legal procedure for concluding a concession agreement and exemplary concession agreements in relation to transport infrastructure facilities enabled to emphasize the following problems of domestic legal regulation regarding the conclusion of concession agreements.

First, the ambiguity of the legal nature of the concession agreement and the absence of a fixed list of contracts types making up the CA content can be considered a conceptual flaw. As practice shows, the parties to the CA very rarely indicate the applicability of the rules of a certain type of agreement to certain relations in the text of a specific agreement. There is also no such indication in exemplary concession agreements for transport infrastructure facilities. At the same time, each new stage of CA conclusion and execution differs from the previous one by its legal nature. The result is systematic errors in determining the applicable law when resolving disputes both by the parties and by the courts.

Accordingly, it seems appropriate at the legislative level to oblige the parties to augment the contract with the legal norms to specific stages of CA implementation with a mandatory reference to a certain chapter of the Civil Code of the Russian Federation. Ultimately, a legal specification of this issue is required. Its lack impedes the achievement of a uniform practice of applying the CA.

Secondly, the lack of legislative fixing of the minimum term of the Constitutional Court seems to be a multifaceted problem. On the one hand, the concessionaire constructing transport infrastructure facilities has no motivation for the quality performance of its services without the prospect of long-term operation of the facility. According to analysts’ research, investment profit on concluded CAs can be received not less than 15 years after the facility starts operation. Accordingly, if CA is short term, the cheapest and fastest construction methods are used. On the other hand, the establishment of long-term obligations goes far beyond budget planning and the timing of the targeted government programs implementation.

Thus, we consider it appropriate to amend the Federal Law “On Concession Agreements” by rewriting Article 6 as follows: “The validity period of the concession agreement is established by the concession agreement, regarding the period of creation and (or) reconstruction of the object of the concession agreement, the volume of investments in the creation and (or) reconstruction of the object of the concession agreement, the payback period for such investments, the period for the concessionaire to receive the volume of gross revenues determined by the concession agreement, the period for fulfilling other obligations of the concessionaire and (or) the concession provider under the concession agreement but not less than fifteen years. At the same time, the budgetary legislation of the Russian Federation requires agreement with modern realities.

Thirdly, it is necessary to point out the defects in fixing the subject composition of the CA. In particular, the law on PPP excludes the possibility for foreign organizations to participate as investors. At the same time, foreign organizations may act as a concessionaire in accordance with Article 5 of the law on the CA. At the same time, if we take into account that the CA is one of the forms of PPP, then the legislation on the CA should specify the fundamental regulatory legal act in this area being the PPP law and cannot contradict it. In this case, it would be more correct to amend the law on PPP expanding the circle of potential investors.

Thus, the primary task on the way to the effective functioning and attractiveness of the CA for a wide range of investors in the Russian Federation is the elimination of the considered legal barriers.

References

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