

# UNECE Project Team on Model Law for PPP/Concessions

## Team meeting, discussion and action items

Thursday 19<sup>th</sup> April 2018, Conference call session 14:00-15:00 CET

| Participants             |   |
|--------------------------|---|
| <b>Attendees</b>         | Christopher Clement-Davies (Team Leader), Wilfried Bassale, Alexander Dolgov, Rufin Serge Wilfrid Itoba, Tomasz Jedwabny, Vladimir Kilinkarov, David Joachim Lubbertus van Ee, Veronica Lupu, Svetlana Maslova, Ian McGrath, Rafael Pérez Feito, Manuel Protásio, George Smyrnioudis, Irina Zapatrina |
| <b>Invited</b>           | Team  |
| <b>Apologies</b>         | Rubayet Choudhury, Predrag Cvetkovic, Bruno Decazalet, Bill Halkias, Sulaiman Hallal, Carla Hancock, Tham Lai Leng, Jörg Nowak, Marius van Aardt, Marianne Viola, Lars Wellejus   |
| <b>UNECE Secretariat</b> | Claudio Meza, Scott Walchak   |

The UN Secretariat and Team Leader welcomed the participants on the call, and asked if there were any comments on the minutes of the previous meeting. One member referred to the formation of the various sub-groups mentioned in the minutes, and asked what exactly had been decided about their composition? The Team Leader explained that, at the moment, there only seemed to be a clear need for one sub-group, namely the legal drafting one. That was now in an advanced state of formation. Other sub-groups may be formed in time, as the Groups' workload and needs evolved, but there was not a clear rationale for having others quite yet. We would keep an eye on the question, however.

The Group then discussed the compilation of the library of precedent PPP/ Concessions laws. This, too, was making progress. A first set of such laws had now been put together. (See Appendix A to these minutes). These had been contributed by the EBRD, Bruno Decazalet and the Team Leader. The Team Leader was particularly grateful to Bruno for being so helpful and responsive in this context, mentioning that Bruno maintains a data base of close to 100 laws of this kind on his computer, and is a well-known expert in this field.

All or many of the documents listed in Appendix A are considered first-rate examples of this type of law. (To be confirmed). The Team Leader again invited members of the Group to send in any other examples of PPP/ Concessions Laws that they thought we should be examining and discussing in drawing up the Model Law. Scott Walchak explained that all of them could eventually be made available on the UN's web-site, and suggested that it may also be helpful to send in copies of poor or sub-standard laws, as examples of provisions to be avoided. The Team Leader agreed with this in principle, but reminded the participants of the importance of making steady and rapid progress, and using the Group's resources efficiently. One could spend months or even years discussing and comparing optimal or deficient provisions at an abstract level; in some respects this had already been done in other fora and publications. We had all come across examples of highly deficient laws in our respective practices, and it would be counter-productive to spend too long considering their drawbacks. We need to make rapid headway in drafting the new Model Law, and that is where our

(necessarily limited) should be concentrated. The Group now includes several of the world's leading experts in this field, and between us we know where the pitfalls lie and how to avoid them. The priority should be to narrow down our library of precedents to a small number (perhaps 3-5) which we should and keep in mind and focus on closely as we draft.

Scott Walchak accepted this and applauded the emphasis on making rapid progress. He suggested that we give ourselves a deadline for completing the compilation of the precedent library and its discussion and review. This was agreed. A call would be held to discuss the library when it was ready. The Team leader then asked for any thoughts about the specific criteria we should be applying to the analysis and use of these precedents as the Model Law is drafted. For example, he felt that, whilst it was important to produce a document that appropriately reflected different approaches and methodologies from around the world, and which would therefore have wide-ranging appeal and relevance, it had to be helpful, precise and 'user-friendly' at the same time. There was no point in drafting a Model Law which represented a consensual patchwork of different sorts of provision but which did not hang together effectively. It had to be coherent and usable. There are some outstanding precedents now in existence, and by focusing on a small number of pre-eminent examples of laws of this kind, it should be possible without too much difficulty to craft something clear, concise, up-to-date and readily usable by governments. (This was the assumption made when the Group was first conceived).

One member (Alexander Dolgov) also mentioned that, in a few cases, advanced drafts of these laws might actually be more helpful as precedents than the finalised laws themselves. The final documents sometimes contained provisions which were the product of painful compromises on difficult issues between different government departments and their advisers, and which were not necessarily ideal clauses of their kind in final form. The Team Leader agreed with this.

Scott Walchak also brought up the subject of the different types of PPP and Concession structure. He and Bruno Decazalet had carried out a wide-ranging assessment a few years ago of about 70 or 80 laws of this kind, and it was striking how many relied on UNCITRAL's PFI resources, while others did not distinguish clearly between PPPs and Concessions in the way the French tradition does, so many approaches needed to be considered. This subject would need to be addressed carefully and convincingly as the Model Law is drafted. The Team Leader agreed, pointing out that it had already been raised in discussion, together with the related question of whether we should be drawing up a single model law or separate laws for each type of structure. Alexander Dolgov said that his strongly held view was that we should only be thinking in terms of a single law. The Team Leader agreed, but said that others within the Group may hold a different view (including perhaps Bruno Decazalet?) and that we therefore needed to schedule a detailed discussion of the question on one of our calls.

The question was asked whether members should send in laws in their original languages or simply in English. The answer was to do both if possible, but Claudio Meza also pointed out that the laws compiled would eventually be made available on the UN's web-site and would therefore anyway need to be translated into the UN's official languages. The precedents should please be sent to him. Lists of them would be revised and circulated from time to time.

The UN secretariat then provided some further explanation of how its SDG web-site is structured and operates. The members of the Group were again invited to explore it and to feed in any suggestions for its refinement that they thought would be helpful. These would always be considered sympathetically. Members should scroll down to and focus on the PPP section of the site.

The Team Leader mentioned that the EBRD was just completing one of its periodic assessments of PPP/ Concessions legislation in its countries of operation. This is an invaluable, comprehensive and

meticulous survey of laws of this kind in place in (or absent from) the Bank's operational jurisdictions. A further review is carried out every few years, led by Alexei Zverev, with the involvement of Bruno Decazalet. The findings of the latest survey were going to be presented by the Bank at its offices the day after the call. They would represent an extremely helpful source of data and opinions for our own work. The Team Leader was planning to ask Alexei and Bruno to summarise those findings briefly at one of the Group's future calls.

The Group then discussed the concept of preparing a Heads of Terms for the Model Law, before starting work on the draft itself. This was accepted as a constructive step. It would act as a skeleton or outline of the main document, summarising the substance of the main provisions to be included in each section. The Team Leader argued that it would help to focus minds on central issues and allow the Group members to put forward their views about appropriate provisions at a generalised, abstract level, which would help steer the work in the right direction and to build a genuine consensus. He suspected that, if we went straight to a draft law, the busier members might not have sufficient time for the detail and would leave much of the real work to the draftsman. Scott Walchak made the point that the contents of these laws tended to fall into two broad categories; core provisions, on the one hand, dealing with fundamental powers and critical processes, which recur prominently in these documents all over the world, and more ancillary or subsidiary clauses, on the other, which were more a matter of detail and usually jurisdiction-specific. Using a Heads of Terms should help us to focus on the former more confidently, perhaps leaving the latter to be addressed in supporting guidance notes. The point was also made that the Heads of Terms could to some extent be developed in parallel with the draft Model Law.

There was then a further brief discussion of the formation of the drafting sub-group. The Team leader explained that he was trying to limit it to about 10-12 members. Any more risked impeding efficiency and progress. Eight members had already joined, all of them with voluminous experience of working in this area. He said we would be delighted and honoured to include anyone else who was keen to participate, but did request that members please only put themselves forward if they had real depth of experience in drafting laws of this kind. Applications should be accompanied by CVs bringing out their relevant experience. The Team Leader asked if the Secretariat was aware of any active members of the Group from China, who might be prepared to join the drafting sub-group (given China's huge PPP industry and the need for us to take a balanced global approach to our work). Claudio Meza offered to look into this. The Team Leader also asked if we could approach the law firm Nossaman in the USA about their involvement, as it has a formidable track record of advising US governmental entities on 'P3s', and would be very familiar with the relevant state jurisdiction requirements. Scott Walchak offered to speak to them.

Ian McGrath of Dentons asked if the Group was aware of any clear regional gaps in its composition and said that Dentons would be happy to help fill them. The Team Leader thanked him, but said that he was not aware of any at present, except perhaps in Latin America, but that we would keep an eye on the question. The Group's composition already represents a very diverse range of jurisdictions.

Scott Walchak on behalf of the Secretariat then said that he expected the UN's Member States and governments to take keen interest in the work of the Group and the Model Law, as it would represent a valuable set of up-to-date materials in this area, which had often been lacking in the past. Extensive use was likely to be made of it, he thought. It was agreed that it was gratifying to think that our work would have real practical value!

The next meeting of the Group was expected to be scheduled for the end of June. There being no further business, the meeting was concluded. Time engaged: 1 hour.

## Appendix A. Library of PPP/Concessions Law Precedents

1. Mongolia
2. Serbia
3. CIS Model Law
4. Egypt
5. Croatia
6. Lithuania
7. Georgia
8. Belarus
9. Lebanon
10. Tunisia
11. Jordan
12. Kyrgyz Republic
13. Cambodia
14. Greece
15. Latvia