

Infrastructure a year on

Last year *Lawyer Monthly* took a look at the issues surrounding infrastructure in China. A year on we revisit this subject to see how things have progressed over the last 12 months. To this end, we speak to Wang Jihong, executive partner of Grandway Law Offices, who is a leading lawyer in the area of infrastructure, construction, and real estate.

Last year, the record number of funds currently on the table as well as the increasing need for developments in infrastructure globally, created a renewed optimism that the infrastructure market would continue to experience more growth in the coming year. Have these expectations been met?

China experienced a continuing development in the field of infrastructure last year. Some new policies appearing this year also aim to foster the government's purchase of public facilities and public services provided by the private sector and to enhance the construction of urban infrastructure, which should further stimulate the development in the area of infrastructure.

Last year, Chinese ministries and State commissions successively published rules for the implementation of the "State Council's Opinions on encouraging and guiding healthy development of private investment", and the National Development and Reform Commission approved a large number of major investment projects in rail transport, subway system, airports, road network, electricity, harbours, coal mines, etc. which provided considerable stimulation to the development of infrastructure. According to the current policies, the construction in infrastructure shall maintain its vigorous development this year; in particular, at the State Council's plenary meetings presided over by the Prime Minister Li Keqiang in July 2013, it was determined that the guidelines should aim to promote the government's purchase of public facilities and services invested by the private sector and to enhance the construction of urban

infrastructure. Therefore, in the coming year, opportunities for investment will be numerous in such infrastructure projects as construction of municipal underground pipeline networks, sewage and household garbage treatment facilities, public transport construction, and city environment construction, etc.

What are the main legal implications companies are facing in within the infrastructure industry at the moment?

Companies, which are involved in the infrastructure industry, may face the following issues:

1. Absence of the applicable law. In recent years, many infrastructure projects were developed under the concession model such as BT or BOT. However, there is no national act or administrative regulation which aims to regulate infrastructure concession activities. Existing legal provisions sit either in the ministerial rules and regulations or at a local level which do not apply when they conflict with laws. These conflicts are mainly reflected in areas such as tax, accounting, price adjustment, and land. Shortcomings in the law governing concessions have become the major impediment to the healthy development of infrastructure concession projects.

2. Lack of multi-channels for capital raising. Most of the local governments are relying mainly on the land finance schemes that provide land as pledge to raise capital. However, recently, the central government has paid much attention to the local authorities' increase use of debt

and the misuse of lands. Accordingly, several regulations were issued to limit the use of land as pledge in infrastructure projects. So, it is more difficult for the local governments to raise capital and lack of capital becomes the main issue most projects will face in the near future.

Particularly, in 2012, the Notice on Curbing Local Government's Violation in Financing (commonly known as Notice 463) was released by China's Ministry of Finance, NDRC, People's Bank, and Banking Regulation Committee to regulate local governments' financing acts. Local governments' violation acts are found in using BT and other means to build public projects, investing fund to local financing vehicles, providing guarantee, or borrowing money from financial companies, trust and financial leasing companies, etc. This Notice is intended to correct local governments' violation acts in financing, but consequently, financing channels for and to a further extent, the implementation for BT infrastructure projects are restricted. In fact, the issuance of the Notice led to stricter conditions for loans from banks and other financial agencies. Recently the international funds are withdrawing from new markets including China which also making it more difficult for the financing of infrastructure projects. For the Chinese local market, it has become a bottleneck in the way of exploring multi financing projects in the development of infrastructure projects.

What, if any, are the operational and compliance issues that have affecting the sector over the last year?

Last year, the Chinese government issued a series of implementation opinions on private capital entering into sectors such as municipal utilities, railways, water conservancy, road and waterway transportation, which encouraged private funds to enter into these sectors. Meanwhile, China central government issued the Notice on Prohibiting Local Governments' Illegal Financing, which prohibits local governments from absorbing money from the public for public interest projects. Chinese local governments take major responsibility for most of infrastructure projects; the Notice affects the methods that local governments may use in project financing. However, as mentioned earlier, Notice 463 sets certain obstacles for the development of infrastructure projects using the mode of BT. In the short term, the financing and construction of China's infrastructure will be restricted to a certain extent under current background where the central government is going to further regulate the local governments' indebtedness.

Is there anything else you would like to add?

Nowadays, the lack of legislation is the biggest obstacle for the development of China's infrastructure concession projects. Alternatively, in

order to regulate the infrastructure construction, the Chinese government has published a set of standard construction contracts. For example, in May 2012, the Development and Reform Commissions, Ministry of Finance and other administrative departments laid out the General Conditions of Standard Design-Construction Contract which will apply to infrastructure projects that fall within the scope of compulsory tendering. The General Conditions may be a signal of the government's view on infrastructure developing. However, those general conditions intend to keep balance between the employer and the contractor rather than between the local authorities and investors.

In such a situation, some prima issues on infrastructure financing still hang in the air. For instance, investors' concern about the project company financing guarantee, the conditions for termination of the concession agreement, the reasonableness of termination compensation and so on all need to have the corresponding legal protection, otherwise, it may negatively affect the investors' enthusiasm to participate in infrastructure projects. In addition, it is necessary that the laws are clear on authorized concession, safety operation procedures and compensation for the termination of the concession, all from the view of promoting basic facilities construction, regulating the infrastructure market and protecting the rights and interests of investors. **LM**

Grandway is a large scale comprehensive law firm with a leading position in the practice areas of infrastructure, construction, real estate, environment, resources and energy, securities, capital market, corporate governance, M&A, investment and financing.

Wang Jihong is currently executive partner at Grandway and has been practicing in the area of construction and infrastructure for twelve years, representing major landmark construction projects in China including Olympic stadiums, museums and in particular the CCTV new Site. Wang is also an arbitrator of China International Economic and Trade Arbitration Commission as well as the deputy director of the Environmental Resources and Energy Law Committee under All China Lawyers Association. Aside from construction, Wang also focuses on environment, resources and energy practice, representing foreign and domestic clients such as Chevron and China Gold Group in their inbound and outbound investments.

