

# GLOBAL PUBLIC - PRIVATE PARTNERSHIP (PPP) GUIDE

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2016



# **GLOBAL PUBLIC - PRIVATE PARTNERSHIP (PPP) GUIDE**

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## FOREWORD

ÇAKMAK PUBLISHING is pleased to publish the first edition of the *Global Public-Private Partnership (PPP) Guide*.

*Global PPP Guide* is designed to provide an overview of applicable legislation and available incentives to PPP projects worldwide. It will aid investors, lenders and government agencies in understanding and comparing relevant provisions from different jurisdictions.

The publication maintains a Q&A format with a common questionnaire set by the editors and answered by leading practitioners from 34 jurisdictions around the world.

The following are notable observations from this 2016 edition of the *Guide* regarding the regulatory regime and available incentives for PPP projects in the 34 jurisdictions explored:

- In most of the countries, 23 out of 34, PPP projects are commonly used or starting to gain popularity, while in the remaining 11 countries PPP projects are either non-existent or not commonly used.
- The sectors where PPP model is used the most are the transportation sector (28 out of 34 countries), healthcare sector (14 out of 34 countries) and the energy sector (10 out of 34 countries). PPP model is also used in other sectors such as education, agriculture, water, IT, tourism, urban development, public buildings and mining.
- Almost half of the countries, 16 out of 34, have a centralized and PPP-specific regulatory authority to supervise and regulate the PPP projects.
- 18 out of 34 countries have a PPP framework law, while the remaining 16 countries rely on their public procurement and concessions legislation or general legal principles.
- More than half of the countries involved, 19 out of 34, provide for some sort of tax advantages for PPP projects.
- 15 out of 34 countries provide for additional incentives for the domestic manufacturing of equipment and materials used in PPP projects.

We are grateful to all of the authors of this publication, who have been selected for their recognized expertise in the PPP field, and thank them for making this Guide a reality.

We also gratefully acknowledge the support of CCN Holding, Gama Holding, Garanti Bank, Mitsubishi UFJ Financial Group, PPP Investment and Management Association, Rönesans Sağlık Yatırım, Türkerler Holding and Türkiye İş Bankası the publication of this Guide.

Dr. Zeynep Çakmak  
Dr. Çağdaş Evrim Ergün  
Editors

Ankara, August 2016

# BELARUS



Aleksei Filonov

## VLASOVA MIKHEL & PARTNERS

### GENERAL

1. **Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

PPP model in Belarus is at the early stage of development and it has not been used for development of infrastructure projects yet, as there was no required legal framework for PPP. There is a list of potential PPP projects which are planned to be implemented between 2016 and 2030 due to entry into force of legislation in sphere of PPP (see Section 3 below); however, as of today there is no real practice of PPP projects in Belarus.

2. **Which sectors apply a PPP model to develop infrastructure projects?**

As stated above, there is no real practice of PPP in Belarus. However, the list of potential PPP projects (as referred in q.1 above) includes projects in energy and transportation infrastructure, social infrastructure and housing, and utilities infrastructure.

### LEGISLATION & REGULATION

3. **What are the principal laws and regulations? Is there a framework PPP Law?**

The Law of the Republic of Belarus of 30.12.2015 N 345-Z “On Public-Private Partnership” (the “PPP Law”) enters into force as of 02.07.2016. The PPP Law establishes general framework for PPP in Belarus. At the moment, the PPP Law is the only legal act governing PPP in Belarus. It should be noted that a number of norms of the PPP Law have reference nature and it is expected that relevant implementing regulations will be adopted before the entry into force of the PPP Law.

4. **What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

The centralized PPP authority is the National Centre of Public-Private Partnership which operates within the Ministry of Economy.

5. **Are there any restrictions for foreign investors to develop/operate PPP projects?**

There are no specific restrictions for foreign investors to develop/operate PPP projects.

At the same time, according to the PPP Law, there are general restrictions applied to all companies (both domestic and foreign ones). Thus, a company cannot participate in a tender for conclusion of a PPP agreement if:

- it is in liquidation or in reorganization, its property was arrested, its activity was frozen;
- it was a party to PPP agreements, investment agreements or concessionary agreements with Belarus which were terminated due to non-performance or improper performance of its obligations;
- it does not have the required amount of monetary assets as required in accordance with the tender documentation of the PPP project;
- it does not comply with other requirements established by the tender documentation of the PPP project (if any).

**6. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

According to the PPP Law, if the Public-Private Partnership Agreement (the “PPP Agreement”) stipulates design and construction of an infrastructure object and transfer of such object to the ownership of the Republic of Belarus, the PPP Agreement must stipulate the term of construction for the infrastructure object.

**7. How are force majeure events defined, and what are the consequences of their occurrence?**

The PPP Law does not define the force majeure events or the consequences of their occurrence. There is also no practice in this regard yet.

**8. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

The PPP Law includes provisions governing the consequences of change of law. Thus, if legislation is changed in such a way that the private partner is largely deprived of what it was entitled to expect at the conclusion of the PPP Agreement, the parties of the PPP Agreement must amend the PPP Agreement in order to ensure the rights of the private partner (i.e. legal entity or person which concluded the PPP Agreement with the state partner).

The PPP Law does not stipulate directly for political and legal risks (e.g. expropriation, adverse court decisions). However, according to the PPP Law, private partners have guaranteed rights stipulated for investors by Belarusian legislation as well as they have guaranteed protection of property and other rights, granted by the Belarusian legislation and the PPP Agreements.

**9. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

The PPP Law does not stipulate the concept of “reinstatement test”.

**10. Is the concept of ‘uninsurability’ recognized in the project agreements?**

The PPP Law does not stipulate the concept of “uninsurability”.

**11. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

The PPP Law stipulates that substitution of private partner is allowed only with the consent of the public partner, unless otherwise is stipulated in the PPP Agreement.

Thus, the substitution of private partner is allowed in the following cases:

- which are stipulated in the PPP Agreement;
- where it is required so for the purposes of national security (inter alia protection of environment and historical and cultural values), public order, protection of morality, health of population and/or rights of other persons;
- obtaining a court decision on the trigger of liquidation proceedings in respect of a private partner in accordance with the legislation of the Republic of Belarus on economic insolvency (bankruptcy).

**12. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

Yes, international arbitration is available for disputes with foreign private partners under the PPP Agreements. Unless otherwise is established under the PPP Agreement or an international treaty, the disputes can be resolved as follows:

- in ad hoc arbitration, established under the UNCITRAL Arbitration Rules;

- in ICSID – if foreign private partner is a legal entity or a citizen signatory to the Convention on The Settlement Of Investment Disputes Between States and Nationals of Other States (Washington Convention, 1965).

It is not possible to have foreign law as the governing law of a PPP agreement. PPP agreements must be governed by Belarusian law.

The PPP law does not stipulate whether international arbitration and foreign law is available for agreements to be executed with lenders. As there is no direct prohibition, we believe that such option is possible. However, there is no real practice in this respect yet.

**13. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

The PPP Law does not stipulate regular market testing procedure for PPP projects. At the same time, the PPP law envisages that private partner of the PPP project must be chosen upon the result of the tender.

There are some cases when tender procedure is not mandatory, as follows:

- if the need of PPP project in relation to the infrastructure objects is subject to force majeure or other extra-circumstances that determine the impossibility of tender;
- if PPP project is related to the provision of defence capability and national security of the Republic of Belarus.

**14. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

The PPP Law does not stipulate for an acceptance procedure. The implementing regulations have not been adopted yet.

**15. Are there any expected changes or reform to the existing legislation?**

It is expected that by the date when PPP Law enters into force (02.07.2016), implementing regulations governing the specific issues and procedures related to PPP projects will be adopted. Thus, at least the following implementing regulations are expected to be adopted:

- Regulations on the procedure on preparation, consideration and evaluation of proposals for implementation of PPP projects;
- Regulations on tender procedure for PPP projects; and
- Regulations on maintenance of a register of PPP Agreements.

## FINANCING & INCENTIVES

**16. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

The PPP Law does not stipulate specific payment mechanism provisions or provisions on inflation and/or foreign exchange protection. It is expected that relevant provisions will be included either in implementing regulations or in specific PPP Agreements.

However, in relation to the payment mechanism, the PPP Law stipulates that:

- public partner party to the PPP agreement can be subject to an obligation to provide monetary allocations in the state budget in accordance with legislation and PPP Agreement;
- private partner must ensure full or partial financing of its obligations in accordance with the terms of the PPP Agreement;
- financing of the PPP Agreement can be carried out at cost of owned and borrowed funds of the private partner; state budget assets of the Republic of Belarus and other resources which are not prohibited by Belarusian legislation.

**17. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

No, the PPP Law does not include provisions on rate of return or a cap on the rate of return for the project company or sponsors.

**18. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

The PPP Law does not include provisions on payment guarantee provided by the relevant public authority for PPP projects. The PPP Law stipulates that private investor has guaranteed protection of property rights in accordance with the PPP Agreement and the legislation of the Republic of Belarus.

**19. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

According to the PPP Law, public partner is the Republic of Belarus represented by its bodies. Based on such definition we believe that obligations of the public partner are qualified as obligations of the Republic of Belarus.

**20. Are deductions from the service and availability payments subject to a cap?**

The PPP Law does not stipulate such caps.

**21. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

The PPP Law does not stipulate such caps.

**22. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?**

The PPP Law does not stipulate such requirement.

**23. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

The PPP Law stipulates that public partners, private partners, lenders to the private partners and other entities are entitled to conclude cooperation agreements for the period of execution of the PPP Agreement. Such cooperation agreement can stipulate, *inter alia*, the following provisions:

- Obligation of the public partner to inform lenders to the private partner on non-performance of private partner's

obligations which may lead to termination of the PPP Agreement;

- Procedure on lien of infrastructure objects by lenders of private partner which was constructed without use of state budget assets;
- Right of lenders to request of change of the private partner in case of non-performance by private partner of its obligations.

**24. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

The PPP Law does not stipulate such mechanism.

**25. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

The PPP Law does not include provisions on such payment. It is possible that relevant provisions can be adopted in implementing regulations or specific PPP agreements.

**26. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

The PPP Law does not stipulate such kind of incentives for PPP projects.

**27. Are there tax advantages available to PPP projects?**

The PPP Law does not stipulate tax advantages for PPP projects.

**28. What are the other incentives available to PPP projects?**

The PPP Law does not stipulate other incentives for PPP projects.

**29. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2015?**

There were no PPP projects implemented in Belarus in 2015. As stated above, PPP is rather a new institution for the Republic of Belarus and the PPP Law entered into force on 2 July 2016.

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# BOSNIA & HERZEGOVINA



Nusmir Huskic

## HUSKIĆ LAW OFFICE

### GENERAL

1. **Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

The Financing needs in public infrastructure in developing countries such as Bosnia and Herzegovina (“BiH”) significantly exceeds the financial possibilities and requires considerable debt, and as a possible solution of the existing problems is the model of public private partnership.

Despite many advantages that are reflected in the application of PPP models, yet the level of private sector involvement in public infrastructure is very low. Currently, there is lack of investment plans and it is very unclear where the private sector can invest.

Therefore, the use of PPP model is limited. Despite the reasonable regulatory framework, there remain a number of problems such as lack of capacity in the public sector in furtherance of the implementation of public private partnership, as well as inconsistencies between laws in different levels of government.

2. **Which sectors apply a PPP model to develop infrastructure projects?**

In spite of a weak and slow development of the BiH economy and the fact that the application of the PPP model is at the initial stages, the PPP model is applied to the infrastructure facilities in BiH, in road infrastructure in most cases and partially in mining and mineral sector, energy industry and agriculture.

Also, we find the application of the PPP model in health care sector. Specifically, it was decided to improve the quality of available health services and provide a new level of service to patients, so that the system will include the private health institutions.

### LEGISLATION & REGULATION

3. **What are the principal laws and regulations? Is there a framework PPP Law?**

In matters that are expressly conferred to the entities for regulation, these entities adopt their own legislation. Even though the entities legislation is to a certain extent harmonized, some legal issues may be resolved differently. Therefore, the Bosnia and Herzegovina PPP legislation is a mixture set of state, entity and



local authority-pay PPP laws complemented by national, federal and local concession laws.

State level:

- Law on Concessions of Bosnia and Herzegovina (Official Gazette of BiH no. 32 of 7 November 2002)

Entity level:

Federation of Bosnia and Herzegovina ("FBiH"):

- Law on Concessions of FBiH (Official Gazette of the FBiH, number 40/02 and 61/06)

Republic of Srpska:

- Law on PPPs (Official Gazette of the Republic of Srpska number 59 of 2 July 2009)
- Law on Concession of Republic of Serbia (Official Gazette of the Republic of Srpska, number 59/13)

Local level:

- PPP Law of Sarajevo Canton from 2011
- PPP Law Unsko-Sanski Canton from 2012
- PPP Law Hercegovacko-Neretvanski Canton from 2013

#### **4. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

The institutional framework for PPP in BiH reflects the complex administrative system in the country with separate institutions at national and sub-national levels:

National level:

- Commission for Concessions of BiH

FBiH:

- Commission for Concessions of FBiH

Republic of Srpska:

- Department for Implementation of PPP Projects

#### **5. Are there any restrictions for foreign investors to develop/operate PPP projects?**

The aim of the Law on Public Private Partnership is to provide a transparent, non-discriminatory and clear legal framework for establishing the conditions under which local and foreign persons may implement PPP projects with public partners in Bosnia and Herzegovina.

When granting concessions, one of the general principles to be applied, is the principle of transparency and non-discrimination according to the Law on Concessions of Bosnia and Herzegovina, which will be concretely achieved by the availability of rules and information related to the process of awarding concessions to all interested participants, granting of concessions under the same conditions to domestic and foreign entities.

#### **6. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

Generally, Public Private Partnership is very poorly legally regulated in Bosnia and Herzegovina.

The legislation in our country does not stipulate a deadline by which construction must be completed. Neither the Law on Concession nor the Law on PPP regulate this area directly, but a long-stop date for the

completion of construction can be freely contracted between contractors. It must be emphasized that there are legal provisions related to the length of the contract between parties.

**7. How are force majeure events defined, and what are the consequences of their occurrence?**

Force majeure events are not directly defined in the laws regulating PPP projects. There is an article which states that to resolve disputes between the public and private partners, the legal regulations of Bosnia and Herzegovina will be applied or the applicable law will be chosen by the parties. In other BiH laws could be found the definition of force majeure events.

In the Law on Obligations, force majeure events are defined as unpredictable events which are not possible to eliminate, such as earthquakes and massive flooding and neither side is responsible for the consequences arising under the action of force.

According to Article 26 of the Law on Concessions of Bosnia and Herzegovina, the concession contract includes a description of events considered as force majeure.

**8. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

Strong reforms, adoption of strategic documents, laws and regulations significantly improve the business environment and create better conditions for foreign and domestic investment. BiH Constitution, the Constitutions of the RS and FBiH, as well as the Statute of Brčko District BiH, guarantee the protection of private capital and ownership, market economy and protection of foreign direct investment in terms of

revocation or limitation, the freedom to conduct economic and other activities, protection against any discrimination and other rights and freedoms, but the laws relating to PPPs does not regulate these questions directly.

**9. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

The legislation of PPP do not determine what kind of insurance proceeds would be applied to reinstate the facilities or to repay the debt to lenders, but the answers of those question could be find in project agreements, where the parties can freely regulate those questions.

**10. Is the concept of 'uninsurability' recognized in the project agreements?**

Project agreements represent the free will of contractors and it is to assume that uninsurability will be recognized there, but there are no direct law provisions to this term.

**11. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

The contract may be terminated if the concessionaire or grantor does not fulfil contractual obligations. In the period between applying for termination of the contract and resolving the dispute, public partner takes the project management in order to fulfil the obligations towards public needs.

- 12. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

Freedom of contract in the Law of Obligations BiH is accepted as one of the fundamental principles of contract law, and that also comes to the fore in the area of Public Private Partnership.

Therefore, it is possible to have foreign law as the governing law in settlement of disputes. International arbitration is available in a manner which the Law on Concession BiH envisages that the Concession Contract includes the way of resolving disputes, also including international arbitration to settle disputes if agreed by the parties.

- 13. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

All Concessions do not have the same economic importance in terms of economic weight and the effects for the Bosnia and Herzegovina, and therefore, in accordance with the importance and the size of the concession a pre-economic feasibility and/or feasibility study is envisaged.

The bodies in charge of activities and facilities owner make a study of the economic justification for any project that is intended to give the concession prior to public invitation of potential bidder. The feasibility study shall be submitted to the Commission for consideration and approval.

- 14. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

Manner and deadline handover of objects will be defined by the contract between parties. The obligations of the concessionaire is to build and equipment the object in which it is possible their uninterrupted use and operation.

- 15. Are there any expected changes or reform to the existing legislation?**

Since the PPP is not fully regulated by the laws in BH, this provides the adoption of the Law on Public Private Partnerships of BiH and the Federation of BiH. Also some three of BiH Cantons have (Sarajevo, Unsko-Sanski and Hercegovacko-Neretvanski Canton) brought their Laws on PPP, so it is to expect that other Cantons will do the same in the future.

PPP is yet in the beginning of his legal regulation, so it is safe to say that many legal changes are waiting in the future.

## FINANCING & INCENTIVES

- 16. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

The legal framework for PPP is inadequate to offer answer to many questions.

There is no legal provision, neither in the Law on Concession for BiH nor in the Law on PPP in Republic of Srpska, which regulates the payment mechanism for Public Private Partnership projects.

The relevant legislation does not provide inflation and foreign exchange protection, but

the legal situation for domestic and foreign parties is the same for the whole period of construction or execution of other works and in carrying out activities that are subject of the concession. Also the conditions for termination of the contract and the legal consequences in this case are same for domestic and foreign parties. Although the payment mechanism is not legally regulated for PPPs projects, it can be defined and regulated by the contract between parties.

**17. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

There is no guaranteed rate of return or a cap on the rate of return for the project company or sponsors directly in the legislation, but in the contract between parties will be defined penalties and fees for non-fulfilment of the obligation by the contracting parties.

**18. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

Unfortunately, there is no answer to this question that could be found in to the laws relating to Public Private Partnerships. Remind that Public Private Partnership is in their initial stages, and that we expect in the future some reforms. So, there is no payment guarantee provided by the relevant public authority for PPP projects.

**19. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

There is no legal provision in the PPP legislation in relation to this question. PPP in

simple terms is a joint cooperative action of the public sector with the private sector in the provision public services or construction or production of goods. Since the public sector is one of the contractors of concession, so the public sector will also be responsible for non-fulfilment of contracts but the Treasury do not provide separate guarantees to the concessionaire or to the lenders.

**20. Are deductions from the service and availability payments subject to a cap?**

Deduction from the service and availability payments can only be defined and regulated by the contract between Public Private Partnership parties, because the laws regulating concessions and Public Private Partnership do not have legal provisions to this question.

**21. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

The public authority as a contractor has the authority to conclude the contract under conditions they consider necessary. Therefore, the public authority may freely request any variations at the construction and operation stages.

**22. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?**

The laws do not stipulate any requirement to share any gains arising from refinancing of the PPP project with the public authority, but the parties may determine otherwise.

**23. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

The lenders sign a direct agreement with the relevant public authority. Article 26 on Law on Concessions of Bosnia and Herzegovina

stipulate that the Concession Agreement include all rights and obligations of the parties without defining specifically those rights and obligations

**24. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

There is no debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in case of termination of the project agreement. Article 26 of Law on Concessions of Bosnia and Herzegovina stipulate that the Concession Agreement include penalties and fees for non-fulfilment of obligations of the parties.

Therefore, the public authority is not obligated to assume the debts of the project company to the lenders. In those cases the project company stays obligated to the lenders.

**25. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

Questions about payments by administration in case of termination of project agreement depend by the concluded contract. Therefore, the contract will include the procedure in case of termination of the contract before the date of termination and all penalties and fees for non-fulfilment of obligations of the parties.

Payments to the sponsors, the project company and the lenders are not specifically defined by laws, and will accordingly apply as contracted.

**26. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

Law marked the system of concessions as a form of private, foreign or domestic investments and create an assumption that results in significantly positive effects for Bosnia and Herzegovina as a whole.

The most important objectives to be achieved by concessions are the placement of a domestic or foreign capital in investment projects, the involvement of local manufacturing and service capacity, reducing imports and increasing exports, increase the level of employment and increase fiscal and para-fiscal revenues. Incentives for domestic (local) manufacturing equipment or materials used in the construction of PPP projects reflects in the determinations of concession fees, where an additional criteria for the calculation of concession fees is representation of local products and services.

**27. Are there tax advantages available to PPP projects?**

Tax advantages are available to the PPP projects. When granting concessions in Bosnia and Herzegovina, there will be applied the general principle of giving support to concessional projects, and that is reflected in the support of the customs and tax benefits in accordance with the law.

**28. What are the other incentives available to PPP projects?**

One of the other incentives available to PPP projects is when it is estimated that the royalty fee is not of prime importance for a

concessional project that is of interest for Bosnia and Herzegovina, the amount of such compensation may be reduced or symbolic.

**29. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2015?**

There are no reliable reports of the number, investment amounts and sector of the PPP

projects developed in the jurisdiction of Bosnia and Herzegovina during 2015 yet, the only reliable data is that Law on Budget for Bosnia and Herzegovina separate for the Commission for Concessions 1.005.000 BAM.

Many contracts have been cancelled and many contracts are still waiting.

There are also no reliable data about contracts made in Cantons (of FBH).

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# BRAZIL



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## GENERAL

1. **Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

Public-private partnerships in Brazil are commonly used to develop infrastructure projects and are granted by way of a Concession, in which the private party is responsible not only for the operation and maintenance of the assets but also for financing and managing all required investment. PPPs are usually preceded by construction works or refurbishment of the asset, which is returned to the Granting Authority upon termination of the contract.

PPP arrangements in Brazil differ from common concessions – in those concessions, concessionaire receives concession revenues and tariffs solely from users, not the Government. In a PPP Contract, the Project Company receives all or a part of the revenues directly from the Government, through the Granting Authority.

Concessions in PPP arrangements may be (i) Sponsored Concession; or (ii) Administrative Concession. In a Sponsored Concession, the private party is remunerated by tariffs paid by the users, plus a payment from the Granting Authority. In an Administrative Concession, the private party receives its remuneration directly from the Granting Authority.

2. **Which sectors apply a PPP model to develop infrastructure projects?**

PPP arrangements can be used for a number of projects, in infrastructure and other sectors. PPPs have been typically used for transportation, toll roads, sanitation and sports arenas, but can be, and have been on occasion, used for health care, education, prisons and administrative centres. Services that are exclusive to the Public Administration, such as administrative police, regulation, and jurisdictional authority cannot be entrusted to the private parties in PPP arrangements.

## LEGISLATION & REGULATION

3. **What are the principal laws and regulations? Is there a framework PPP Law?**

PPPs can be regulated on a Federal, State and Municipal level. On a Federal Level, PPPs are

regulated by Law No. 11,079/2004 (the “PPP Law”). The following general rules also apply to the PPPs, when not conflicting with the PPP Law: (i) Law No. 8,666/93 (the “Bidding Law”), which sets out general rules for bidding procedures and procurements with the Public Administration; (ii) Law No. 8,987/95 (the “Public Concession Law”) which establishes the regulation of the concessions, permissions and authorizations for the performance of public services; and (iii) Law No. 9,074/95, which sets out rules for the granting and extension of the concessions for the performance of public services.

States and Municipalities can also enact their own specific PPP Laws, which have to follow the general rules and provisions of the Federal PPP Law.

**4. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

Federal Decree No. 8,385/05 created a Federal Public Private Partnership Managing Committee (the “PPP Managing Committee”). The PPP Managing Committee is comprised of the Minister of Planning, Finance and the Presidency’s Chief of Staff, and is responsible for defining which services should be prioritized and regulating the procedures for contracting under PPP arrangements.

PPPs are also regulated by the agency responsible for the sector in which the project is inserted, for instance, the inland transport sector is regulated by ANTT (Federal Law No. 10,233/01), the maritime transport (Federal Law No. 10,233/01) and civil aviation sectors are regulated by ANAC (Federal Law No. 11,182/05). States and Municipalities may also have their own agencies and/or departments in order to regulate sectors which are within their jurisdiction (e.g. sanitation is regulated by the Municipalities).

**5. Are there any restrictions for foreign investors to develop/operate PPP projects?**

The special purpose vehicle (the “SPV”) to be created for the purposes of developing a PPP should be Brazilian-based, but there are no general restrictions for foreign investors to hold control over the SPVs.

**6. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

Project agreements (Concession Contract) have long stop dates for completion of the construction, which vary depending on the Project.

**7. How are force majeure events defined, and what are the consequences of their occurrence?**

*Force majeure* is defined by law as the necessary event, which effects were not possible to prevent or avoid. Each PPP agreement should have an objective allocation of *force majeure* risks, as provided in Article 5, item III of PPP Law. In general, *force majeure* events, especially when such events are not insurable, are supported by the Granting Authority, and cause a rescheduling of the obligations of the Project Company and/or a rebalance of the economic financial conditions of the Concession Agreement.

**8. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

*Fait du prince*, such as change in law and court decisions should be objectively allocated between the parties in the PPP Agreement, per article 5, item III of the PPP Law. In general, such events are supported by the Granting Authority, and cause a rescheduling of the



obligations of the Project Company and/or a rebalance of the economic financial conditions of the Concession Agreement. Expropriation of the PPP Contract, whereby Granting Authority takes over the service and the Concession, without a default from the Project Company, may only occur with justified public interest and with prior indemnification to the Project Company.

**9. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

Such determination depends on the provisions of the loan documentation and the PPP Contract. As a general rule, insurance proceeds are given as a collateral as part of a loan security package. Up to a certain amount of insurance proceeds, the Project Company has the ability to use them to reinstate the facilities. Above a certain amount, lenders are usually consulted and decide if the facilities should be reinstated or debt should be repaid. PPP Contracts may also impose some restrictions on the proceeds being used to anything other than reinstating the facilities, especially if the service rendered by the Project Company has a public service nature.

**10. Is the concept of ‘uninsurability’ recognized in the project agreements?**

PPP Contracts usually require the Project Company to contract insurance concerning the potential risks to which the projects may be exposed. Uninsurable risks arising of events of *force majeure* are usually borne by the Granting Authority. There is no legal definition of “uninsurability” provided either under Brazilian law or as a recurrent practice under project agreements; “uninsurability” of a project would result from the actual

circumstances and market practice in the insurance sector.

**11. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

The PPP Law, under article 5-A and article 5, paragraph 2, item I, allows the funders and providers of guarantee (such as bank guarantees) to step-in the PPP Project Company by means of (i) assignment of the control of the company; or (ii) temporary administration of the Project Company in order to promote the necessary financial restructuring and to ensure the performance of the public services. The PPP agreements may provide for the requirements and provisions for the authorization of the step-in rights. Public Concessions Law authorizes the temporary intervention by the Granting Authority; as well as the termination of the PPP by forfeiture, in case of default by the Project Company under the PPP Contract. Forfeiture should be preceded by a due process of law and the Project Company will be entitled to indemnification for the non-amortized investments.

**12. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

The PPP agreement shall indicate a dispute resolution mechanism, which may include an arbitration procedure. The arbitration must take place in Brazil, and be conducted in Portuguese, according to article 11, item III of the PPP Law. The contracts are governed by Brazilian Law.

- 13. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

Brazilian Federal Decree No. 8,428/2001 foresees the possibility of a Procedure for an Expression of Interest (*Procedimento de Manifestação de Interesse – PMI*) which is the procedure in which the Public Administration requests for a project feasibility study, opinions, investigations, data and technical information in relation to upcoming PPP projects. The Public Administration publishes a request for project studies and interested parties from the private sector request for authorization to send the respective project study. The project study from the authorized parties of the private sector may be used, fully or partially, or not used by the Public Administration. Furthermore, interested parties of the private sector may also propose studies to the structuring of PPPs to the Public Administration as an initiative for future PPPs.

- 14. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

Acceptance of the facilities is made in accordance with the PPP project agreements, as the PPP Law does not provide any specific mechanism. The acceptance process is made by the Public Administration, which may hire a third party, if so agreed under the PPP agreement.

- 15. Are there any expected changes or reform to the existing legislation?**

No material reforms to the PPP Laws are envisaged at this point in time.

## FINANCING & INCENTIVES

- 16. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

As described above, Concessions in PPP arrangements may be (i) Sponsored Concession; or (ii) Administrative Concession. In a Sponsored Concession, the private party is remunerated by tariffs paid by the users, plus a payment from the Administration. In an Administrative Concession, the private party receives its remuneration directly from the Administration. Both tariffs and payments from the Administration are adjusted for inflation, usually on an annual basis, based on indexes and calculations provided for in the PPP Contract, as provided for in Article 9 of the Public Concessions Law. There is normally no foreign exchange protection provided for in the PPP Contract.

- 17. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

The law does not provide for guaranteed rates of return or a cap on returns of the Project Company; however, it is guaranteed under law the reestablishment of the financial economic balance in case of materialization of events allocated to the Granting Authority.

- 18. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

The pecuniary obligations undertaken by the Public Administration under the PPP agreement may be guaranteed by means of: (i) assignment of revenues, (ii) creation or use of special funds provided under law, (iii)

insurance with insurance companies which are not controlled by the Public Administration, (iv) guarantees granted by international bodies or financial institutions which are not controlled by the Public Administration, (v) guarantees granted by equity guarantor funds or state-owned companies created for such purpose and/or (vi) other mechanisms authorized under the PPP Law.

**19. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

The obligations under the PPP Contracts are solely of the Counterparty of the PPP Contract, which may be the Federal, State or Municipal Governments or State companies controlled by each of these entities. Treasury may provide guarantees to some of the PPP Contracts, by means of creation of special funds dedicated to backing up PPPs.

**20. Are deductions from the service and availability payments subject to a cap?**

Pursuant to article 6, paragraph 1 of the PPP Law, the project agreements may establish a variable payment in favour of the private partner according to its performance, completion of goals; quality and availability standards defined under the project agreements. Project Company is also liable for penalties in case of unavailability of services. There are no general limits or caps to the deductions.

**21. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

Pursuant to Article 65, paragraph 1 of the Public Concession Law, the variations requested by the public authority in relation to the quantifiable aspects of the PPP project are subject to a cap of 25% of the PPP Contract.

**22. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?**

Article 5, item IX of the PPP Law establishes that the private partner should share with the Public Administration its financial gains arising from the reduction of the credit risk contained under the financing contracted by the Project Company.

**23. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

Usually lenders do not sign direct agreements with the relevant Granting Authority. However, as the rights of the Project Company under the PPP Contract are granted as collateral to the lenders, it is common practice for the Granting Authority to receive and accept a notice from the Project Company, determining that any payments under the PPP Contracts have been assigned to the Lenders and should be deposited in special Project Company accounts or in accounts that the lenders may determine. The notice may also determine that lenders receive notice upon any request for forfeiture or intervention under the PPP Contract.

**24. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

Granting Authority does not undertake to assume the debts of the Project Company in the event of termination. It agrees, however, to make all payments related to compensation for termination of the PPP Contract to the

Lenders, as the credit under the PPP Contract are given as a collateral for the lenders.

**25. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

In an event of expropriation (taking without a default by the Project Company), the indemnification should be paid prior to the termination. Though this is not a rule, some PPP Contracts provide expressly that, in such case, indemnification should cover, at least, the outstanding amount of the Loan. In an event of forfeiture (termination due to a default of the Project Company), indemnification will be paid after the termination, upon a due administrative process, and penalties and losses will be deducted from such amount. In both cases, the Concession Law determines that the indemnification should cover investments not yet amortized.

**26. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

Private companies that use locally manufactured products or services may obtain an incentive composed by a percentage margin (up to 25%) which may be applied to increase its proposed remuneration. The percentage margin increase shall be based on the prices proposed by the other competing private companies which use foreign manufactured products or services. Such incentive is only obtained if the utilization of locally manufactured products or services is duly evidenced and fulfils the conditions outlined in the regulation.

**27. Are there tax advantages available to PPP projects?**

The project agreements may provide that the amounts to be paid directly by the Public Administration in favour of the Project Company for the construction and acquisition of reversible assets could benefit from the deferment of the payment of certain federal taxes, as set forth in article 6, paragraph 3 of the PPP Law. Such amounts paid directly by the Public Administration may be, when received, excluded from the calculation basis of the following taxes: Social Integration Program (*PIS/PASEP*), Tax for Social Security Financing (*Contribuição para o Financiamento da Seguridade Social – Cofins*), Social Contribution On Net Income (*Contribuição Social sobre o Lucro Líquido – CSLL*) and Social Security on Gross Revenue (*Contribuição Previdenciária sobre a Receita Bruta*), and thereafter added to the tax basis proportionally to the PPP project term. State or Municipalities may have their own tax advantages do PPP Projects.

Project Companies may also benefit from other general tax incentives available for investments in the infrastructure sector. There are some special tax regimes which may apply depending on the nature of the activities performed by the Project Companies, as well as the regions where the projects are implemented. For instance, there are fiscal incentives for the development of projects in the transportation, ports, energy, basic sanitation, irrigation, O&G exploration, development of nuclear power plants sectors, among others. Also, investments into certain areas of Brazil, such as the Amazon and Northeast regions, may also benefit from specific federal tax benefits.

**28. What are the other incentives available to PPP projects?**

Brazilian legislation provides incentives for the raising of funds through the issuance of

debentures, through a public offering, for the purpose of infrastructure financing (the “Long-Term Infrastructure Debentures”). Pursuant to Article 1 of Law 12,431, interest earned by non-Brazilian holders in connection with Long-Term Infrastructure Debentures could benefit from a zero withholding rate (as opposed to 15%/25% regular withholding rate). This benefit should apply only to those securities which have a maturity term of more than 4 years, among other conditions.

Pursuant to Law 12,431, Brazilian individuals and legal entities may also benefit from tax incentives granted in connection with debentures aimed at financing prioritized infrastructure projects as defined by the Brazilian government. Earnings paid to Brazilian individuals are tax exempt, and to Brazilian entities are subject to a 15% withholding rate. The earnings arising from investments funds that hold at least 85% of their assets invested into such debentures benefit from the same tax treatment.

**29. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2015?**

Information on PPPs developed in Brazil is not compiled in one database, as these Projects can be developed by Federal, State and Municipal Bodies across the country. According to a study published on December 15<sup>th</sup>, 2015 under the “Brazil Private Sector Participation Program”, coordinated by International Finance Corporation (IFC), Banco Nacional de Desenvolvimento Econômico e Social (BNDES) and Interamerican Development Bank (IADB), which relied on data collected by “Radar PPP” until March, 2015, a total of 73 PPP’s were developed since the promulgation of the PPP Law in Brazil and the sectors with most PPP’s developed are represented by basic sanitation (18), solid waste (12), health (9) and urban mobility (6).

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# CANADA



Paul D. Blundy

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## GENERAL

- 1. Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

PPP (or P3) structures have been widely adopted by all levels of government in Canada. While the first PPP transactions in Canada were *ad hoc* projects created through the combination of a variety of contract forms, coupling design contracts, construction contracts, land leases and operation and maintenance contracts, the more modern generation of Canadian PPP projects have been largely based on Canadian adaptations of the United Kingdom Private Finance Initiative (the “PFI”) model.

Canada is a federal country comprised of 10 provinces and 3 territories. The provinces carry the largest infrastructure burden. The Canadian Council for Public-Private Partnerships, a national industry group, reports that 237 PPP projects have been procured in Canada to date. Most of these projects were procured in the provinces of Ontario and British Columbia by provincial procurement agencies, Ontario Infrastructure and Lands

Corporation (Infrastructure Ontario) and Partnerships British Columbia (Partnerships BC), respectively.

Ontario has procured 118 PPP projects, and British Columbia, 43 PPP projects. The provinces of Alberta (20 projects), Quebec (18 projects) and New Brunswick (12 projects) are also active in PPP procurement. While the provinces have seen most activity, municipal governments have also used PPP structures for municipal infrastructure projects.

The structures used are typically finance-build-operate-maintain projects. Ontario has done a large number of build-finance transactions in which the proponent simply arranges financing and builds, being paid out completely at completion.

- 2. Which sectors apply a PPP model to develop infrastructure projects?**

PPP projects have been undertaken in a wide variety of sectors. Initially, hospitals and healthcare projects were the largest share of Canadian PPP projects, representing approximately 37% of the PPP projects procured in Canada to date. Transportation projects represent about 23% of the market. Other sectors include environmental, justice and correction facilities, recreation and culture facilities, social services and IT infrastructure. In healthcare, the projects have been traditional hospitals, some greenfield

expansions and some renovation projects. In transportation, projects have included highways, regional urban transit, bridges, tunnels and airports.

## LEGISLATION & REGULATION

### 3. What are the principle laws and regulations? Is there a framework PPP Law?

Canada has no legislation specific to PPP structures. Procurement in Canada generally is governed by common law principles and international treaties of general application. Canadian public procurement is carried out under the World Trade Organization's Agreement in Government Procurement, the North American Free Trade Agreement, the Agreement on Internal Trade (a domestic treaty between provinces and territories of Canada) and a number of regional treaties, including the Alberta Procurement Agreement on the opening of Public Procurement for Ontario and Quebec and the British Columbia-Alberta Trade, Investment and Labour Mobility Agreement.

### 4. What are the principle regulatory bodies for PPP? Is there a centralized PPP Authority?

There is no PPP regulatory body. The federal government established P3 Canada as a federal PPP procurement centre of expertise. P3 Canada has done limited PPP procurements on its own but participates in PPP transactions procured by provinces, territories and municipalities across the country in its role overseeing the distribution of federal infrastructure money through the P3 Canada Fund. The provinces of British Columbia, Ontario and Saskatchewan have set up provincial procurement agencies to standardize the provinces' approach to PPP procurement. In British Columbia, Partnerships BC is exclusively focused on procurement for major projects, although not exclusively using PPP

models. In Ontario, Infrastructure Ontario includes in its mandate a much broader array of procurement and real estate development activities. Saskatchewan has developed a pipeline of school and transportation projects. In Alberta, PPP procurement is left with the Ministry of Finance rather than it being the responsibility of a quasi-independent agency.

### 5. Are there any restrictions for foreign investors to develop/operate PPP projects?

Foreign contractors and equity participants have actively participated in the Canadian market. While some jurisdictions seek to ensure local participation for employment and local contractors, there have not been any significant barriers to foreign investment. Issues of foreign ownership of project agreement rights have not to date prevented foreign participants from investing in Canadian PPP projects and appear to be unlikely.

Many foreign construction contractors have started doing business in Canada in the PPP market. Numerous European contracting organizations have found considerable success in the Canadian market.

### 6. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?

Typically the Project Agreement will require construction to be completed by a set date. If the date is not achieved the proponent will suffer through reduction of operating term and the, loss of availability payments that might otherwise have been received until a "longstop date" after which the Project Agreement may be terminated by the Authority.

### 7. How are force majeure events defined, and what are the consequences of their occurrence?

Supervening Events are categorized into different groups, designated as "Compensation

Events”, “Relief Events” and “Excusing Events” and each group assigned a set of remedies, ranging from compensation for events for which the Authority retained risk, to extensions of time and waiver of performance penalties for other occurrences. As a result, many circumstances that might otherwise fall into a more traditional definition of “force majeure” are assigned specific combinations of relief and the remaining list of “force majeure” events is very limited. A true force majeure event will excuse performance any ultimately lead to a termination right if it continues for a long period.

**8. How are the political and legal risks (e.g., expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

Political and legal risks are allocated through the Supervening Events. The Authority generally retains the risk of political issues, the transfer of such risks to the private sector being seen as inefficient to transfer to the private sector. Changes in law are apportioned between the parties, typically giving the proponent liability for changes during construction but sharing responsibility later in the project life. Discriminatory changes in law and changes in tax laws are generally fully compensable.

**9. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

Project Agreements always require project insurance and ensure that insurance proceeds must be reinvested in the reinstatement of the Project. If the insurance proceeds are inadequate and the public Authority elects not to fund the deficiency the Authority may elect to terminate.

**10. Is the concept of “uninsurability” recognized in the project agreements?**

Uninsurability is generally recognized. The Authority may elect to self-insure an uninsurable risk or terminate in the event a risk becomes uninsurable. The private sector is not exposed to any uninsurability risk.

**11. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

Under the Project Agreements the Authority retains the right to “step in” on matters of public interest, subject to payment of compensation to the operator if such step in is not attributable to a default by the project company (the “Project Co”). On the occurrence of a Project Co default, the Authority can step in or terminate the Project Agreement. The Authority will enter into direct agreements with lenders to ensure that lenders have an opportunity to cure any Project Co default before termination of the Project Agreement.

**12. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

Dispute resolution is generally through optional domestic arbitration processes with resort to the Canadian courts ultimately available. Canadian public Authority’s would not entertain foreign law arrangements but the Canadian courts are well regarded and will be impartial in adjudicating disputes without regard to public vs. private or domestic vs. international identity.



- 13. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

Some project agreements resort to a market testing procedure for valuing services; however, this is not universally the case.

- 14. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

Acceptance of the infrastructure is generally in the hands of an independent third party technical advisor. Typically the lender's technical advisor will take on this role for all of the concerned parties.

- 15. Are there any expected changes or reform to the existing legislation?**

Canada has no PPP enabling legislation. None is expected.

## FINANCING & INCENTIVES

- 16. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

Most Canadian PPP projects are availability payment-based transactions. The public sector takes on the full liability for the payment of the availability payments over the term and does not attempt to transfer volume risk. The quality of the Authority covenant will vary with the specific counterparty. Each Canadian province supports its PPP program with the provincial covenant. Inflation protection is provided for operating and maintenance costs. Foreign exchange protection is not provided.

- 17. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

There is no guaranteed rate of return or cap on rate of return. The rate of return is only controlled through the competitive procurement process. Canada has a vibrant market and it would be rare that at least three bidding teams would not be competing. This competition keeps the rates of return in a competitive range.

- 18. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g., service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

The availability payment is generally backed by the full credit of the Authority. The provinces each have significant credit ratings. Some transactions are undertaken through other entities, such as public hospitals in Ontario, which have had lower credit capabilities but the proponent teams take comfort from support agreements between the hospital and the province and the perception that the province would not allow a public hospital to fail.

- 19. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

As noted above, the availability payment is an obligation of the Authority. Separate guarantees are not usually provided. The Authority is fully liable for the payment. The Authority must appropriate funds to honour its contractual commitment year after year. The legislature cannot bind future legislatures to continue the appropriation. Notwithstanding this risk, Canadian public authorities have always fully honoured their

PPP project agreement obligations and appropriation risk is not a significant consideration.

**20. Are deductions from the service and availability payments subject to a cap?**

Deductions from availability payments are usually not limited but practically, are set such that termination of the Project Agreement would arise before the penalties become economically crippling.

**21. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

Variations are limited to the extent that they may have a cumulative impact on the risk profile of the transaction. Otherwise the Authority has a broad right to require changes but must compensate the Project Co in accordance with the Project Agreement. Pricing for changes is frequently controlled through maximum mark-up provisions.

**22. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?**

Refinancing gains usually must be shared with the Authority.

**23. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights to the lenders typically have under such agreements?**

The Authority will enter into direct agreements with the lenders to give the lenders assurances about notices of Project Co default and opportunities to cure Project Co defaults and, if need be, step in to the position of Project Co and transfer the project to a new proponent team. The Authority usually will also require collateral agreements with the principal project contractors to provide the Authority with an option, in the event of Project Co default that is not remedied by the lenders, to step in and

directly demand performance from each project contractor.

**24. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

There is no debt assumption on termination. Project debt is prepaid on termination. If the termination the result of anything other than a Project Co default, the lenders are assured that their loans will be fully repaid with full breakage cost. If the termination is the result of a Project Co default the termination payment will be calculated based on the market value of the project concession, determined by a re-bidding process or a valuation process, and may not be sufficient to fully fund the repayment of the lenders and the lenders' breakage costs.

**25. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

On termination the Authority will pay a termination payment to the Project Co. If the termination is the result of the Authority's default or unilateral decision the termination payment will fully compensate the proponent team for all their resulting costs and loss of equity return based on the project's pro forma financial model. If the termination is the result of a Project Co default there is no guaranteed minimum amount of compensation. The Authority can apply a test based on the market

value of the project to a replacement Project Co.

**26. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

Many jurisdictions include incentives for local contracting and local employment opportunities. Canadian aboriginal population may also be afforded certain rights to priority consideration for employment and contracting opportunities.

**27. Are there tax advantages available to PPP projects?**

There are no incentives or tax advantages made available to specifically encourage PPP projects.

**28. What are the other incentives available to PPP projects?**

There are no other incentives that are generally available to P3 projects.

**29. What are the numbers, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2015?**

PPP procurement is well established in Canada. 237 PPP projects have been procured in Canada to date according to the Canadian Council for Public-Private Partnerships with 22 reaching Financial Close during 2015 in the following sectors:

Sector	Number of Projects Reaching Financial Close in 2015
Transportation	9
Health	6
Schools	3
Composting/biofuels	2
Municipal Infrastructure	1
Housing	1

P3 Canada, the federal PPP procurement authority, has invested C\$1.3 Billion in 20 projects since 2009 through its P3 Canada Fund, leveraging C\$6.9 Billion in public infrastructure investment in Canada. Canada has developed leading international expertise in procuring, structuring, financing and implementing public infrastructure projects with private sector leadership, attracting international construction, investment and financing organizations to the Canadian infrastructure market with a healthy pipeline of projects and stable financial markets. Canada has refined and further developed the United Kingdom's PFI model to create an adaptable model that has achieved consistent success.

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# CZECH REPUBLIC



Vít Stehlík



David Wilhelm

## WHITE & CASE (EUROPE) LLP, Prague

### GENERAL

- 1. Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

The PPP model is not commonly used on the national level in the Czech Republic. Despite several attempts, only a few large PPP projects were implemented. Currently, the Ministry of Transport attempts to use the PPP model in new road infrastructure projects. In any case, the PPP model is still largely untested on the national level. On the regional and municipal level, the use of the PPP model is not that uncommon and is sometimes used to develop local infrastructure such as leisure infrastructure, water management facilities and senior home facilities.

- 2. Which sectors apply a PPP model to develop infrastructure projects?**

In the Czech Republic, the PPP model has recently been chosen by the Ministry of Transport for significant road transportation projects, such as the construction of expressways. The Office for the Protection of Competition currently examines the public tender for the selection of the professional

advisors for this particular PPP project and as such, it remains to be seen if the expressway project will be developed under the PPP model or when. On the regional and municipal level, projects in the sectors concerning water management facilities, power and leisure infrastructure prevail.

### LEGISLATION & REGULATION

- 3. What are the principal laws and regulations? Is there a framework PPP Law?**

The preparation and realization of PPP projects is governed by Act No. 139/2006 Coll. On Concession Contracts and Concession Proceedings (the “Concession Act”), as well as by Act No. 137/2006 Coll. On Public Procurement, as amended (the “Public Procurement Act”). A new Act on the Public Procurement Process No. 134/2016 Coll. (the “Public Procurement Process Act”) was recently adopted by the Parliament folding the regulation of concessions and public procurement into one law. It will become effective as of October 1, 2016.

Besides these largely procedural acts, Act No. 89/2012 Coll., the Civil Code (the “Civil Code”) is the principal law regulating the underlying contracts. Finally, acts regulating the powers of local and regional authorities also apply.

We note that several non-binding manuals for PPP projects were issued by various public bodies.

**4. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

The Office for the Protection of Competition (the “Office”) is responsible for the enforcement of compliance with the Concession Act and the Public Procurement Act as well as for the newly adopted Public Procurement Process Act. Besides the Office, the Ministry of Finance has the authority to issue an opinion concerning the conclusion of a PPP contract by municipality, by an allowance organization under the control of a municipality, or by a private company established to fulfil public service obligations.

**5. Are there any restrictions for foreign investors to develop/operate PPP projects?**

Certain restrictions may apply to investors from third countries without an international treaty concluded with the EU. Moreover, specific restrictions could apply depending on the PPP project (e.g. in the energy sector). Apart from these, there are no general restrictions on foreign investors according to the Concession Act or Public Procurement Act or the Public Procurement Process Act.

**6. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

Neither the Concession Act nor the Public Procurement Act or the Public Procurement Process Act defines the long-stop date for the completion of construction. Such date could be defined by the contracting entity in the tender documents or the project agreement.

**7. How are force majeure events defined, and what are the consequences of their occurrence?**

Neither the Concession Act nor the Public Procurement Act or Public Procurement Process Act defines force majeure events or

the consequences thereof. Unless specifically agreed in the concession agreement otherwise, the subsidiary rules of the Civil Code apply. Under the Civil Code, the force majeure is defined as an “*extraordinary, unforeseeable and insurmountable obstacle created independently of party’s will*”. When these conditions are met, the party in breach is released from the duty to provide compensation for such breach. However, an obstacle arising from parties’ personal circumstances or arising when such party was in default in performing its contractual duty, or an obstacle which the party was contractually required to overcome, then such obstacle shall not release the party from its duty to provide compensation.

**8. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

Neither the Concession Act nor the Public Procurement Act or the Public Procurement Process Act regulates the allocation of political and legal risks, so that it is up to the concession agreement to allocate risks between the parties. According to the Concession Act, the selected tenderer (concessionaire) has to bear substantial risk associated with the enjoyment of benefits arising from the provision of services or the use of executed work.

Generally, the risks should be allocated to that party which is in the best position to mitigate them.

**9. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

None of the acts stated above provide for reinstatement and it would be up to the parties to include such provisions in the project agreement.

**10. Is the concept of ‘uninsurability’ recognized in the project agreements?**

Usually, the concept of ‘uninsurability’ should be included in the project agreements. It is, however, up to the parties to include such provision as none of the acts stated above requires such clause to be part of the project agreement.

**11. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

Czech legislation does not regulate step-in rights, so that it is up to the parties to the concession agreement to set the applicable rules. The step-in rights of lenders could be typically exercised within the framework of a direct agreement.

**12. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

Neither the Concession Act nor the Public Procurement Act prohibits the application of foreign law as the governing law of concession agreements. The same applies to the forthcoming Public Procurement Process Act, with the exception of cross-border joint procurement procedure, which is prohibited for awarding of concessions (therefore also for cross-border PPP projects). Further, the choice of non-domestic law as well as international arbitration instead of national courts is rather unusual for public contracts. It should be noted that the various public bodies which may enter into a PPP project may have internal guidelines which could prohibit the use of foreign law or international arbitration in the agreements concluded by such a body.

**13. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

Neither the applicable Concession Act nor the Public Procurement Act or the Public Procurement Process Act provides for a regular market testing procedure. Such market testing procedure could be, however, included in the project agreement.

**14. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

The process of acceptance of the facilities is not regulated by law and the acceptance is normally done by the public authority itself, or by the public authority in cooperation with an independent technical advisor.

**15. Are there any expected changes or reform to the existing legislation?**

As mentioned above, a new Act on Public Procurement Process was recently adopted and significant changes to the current regulation of PPP projects can be expected.

## FINANCING & INCENTIVES

**16. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

The legislation described above does not provide for an inflation and/or foreign exchange mechanism; this however does not preclude the parties from reaching their own agreement regarding such mechanisms. These mechanisms would be rather typical in more complex PPP projects.

**17. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

No, the legislation described above provides neither for any guarantee of return nor for any cap on the rate of return. This however does not preclude the parties from reaching their own understanding regarding this matter in the project agreement. We note, however that the Act on the Public Procurement Process considers a transfer of operational risk (incl. risk of loss) to the concessionaire as a core element of a concession. If a mechanism of guaranteed rate of return is inserted, such an agreement could not be considered as a concession agreement under the Act on the Public Procurement Process.

**18. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

The public authority may agree to provide a payment guarantee. Whether or not such guarantee would be provided primarily depends on the nature of the project and the payment mechanism (i.e., whether the public authority itself pays under the project agreement or whether the project company is entitled to earn income on the basis of agreement with the public authority).

**19. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

Whether or not an obligation of the public authority qualifies as a state obligation depends primarily on the character of the relevant public authority. If the public authority is a Ministry or other central governmental body, such obligations would be considered a state obligation. If, however, the PPP project is administered by a local (or regional) authority,

it would not be a state obligation but rather an obligation of that specific local (or regional) public authority.

**20. Are deductions from the service and availability payments subject to a cap?**

The deductions and cap (if any) would be subject to agreement in the relevant documentation. In more complex projects, caps on deductions would be negotiated.

**21. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

Generally, the PPP project has to be procured in accordance with the Concession Act and the Public Procurement Act which disallows substantial changes to the concluded agreement. Moreover, the Concession Act requires that any variation that would increase the expected income of the concessionaire by more than 20% or make it reach the statutory thresholds<sup>1</sup>, such variation would have to be approved by the relevant authority approving such PPP agreement in the first place. Under the Public Procurement Process Act, such limitations are also present, prohibiting variation higher than statutory limit<sup>2</sup> and would increase the expected value of the concession by more than 10%.

**22. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?**

No, there is no statutory requirement. This would be a matter reserved for the parties to agree on.

**23. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

The direct agreement would typically be signed among the public authority, senior lenders and

<sup>1</sup> The thresholds are stated in Section 20(2) of the Concession Act.

<sup>2</sup> The threshold is stated in Section 222(4) of the Public Procurement Process Act.

the project company. Among other rights and obligations, the senior lenders would typically have the right to step into the project under predefined circumstances, such as in cases of a substantial breach of the concession agreement by the project company or any of the financing documents so as to prevent the project from failure. The concept of direct agreement has never been, at least to our knowledge, tested before the Czech courts.

**24. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

No, there is no statutory debt assumption mechanism under the applicable legislation and any such right would have to be included in the project agreements.

**25. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios**

**including project company default terminations?**

The payments to be made are subject to the agreement of the parties.

**26. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

No, there are no incentives for local manufacturers available under the PPP projects.

**27. Are there tax advantages available to PPP projects?**

No, there are no tax advantages directly available for the PPP projects.

**28. What are the other incentives available to PPP projects?**

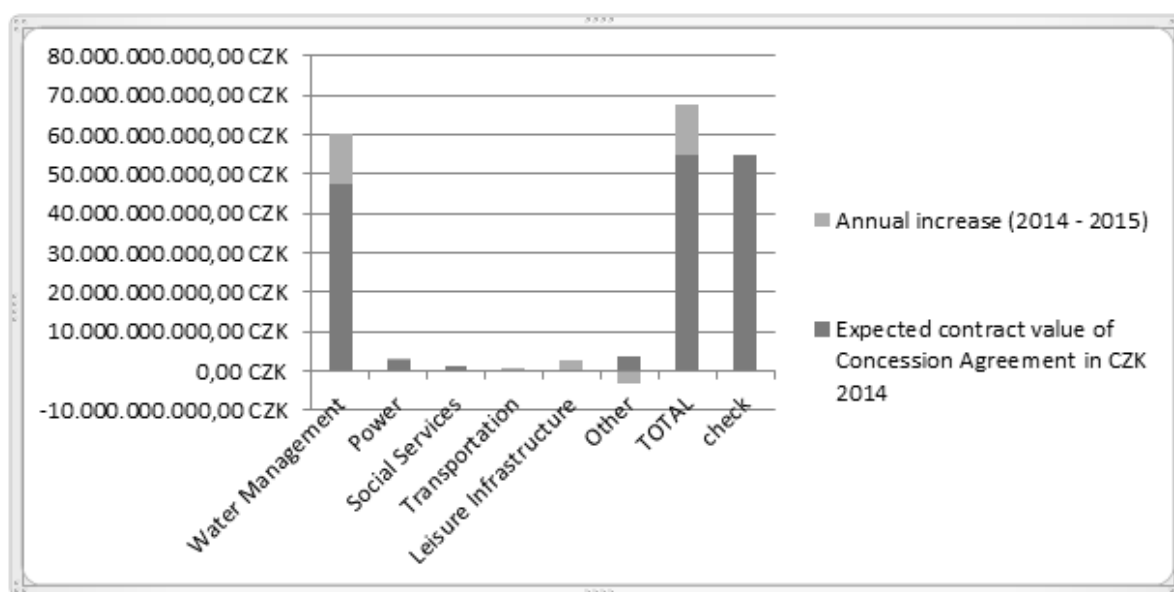
The PPP projects could be eligible to receive other incentives, such as those relating to the specific sector. In case an incentive in the form of a subsidy is available, the corresponding amount should be taken into consideration when discussing the financial terms of the project.

**29. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2015?**

CONCESSION AGREEMENTS IN PROGRESS TO WHICH LOCAL GOVERNMENT UNITS ARE A PARTY, WITH AN OPINION BY THE MINISTRY OF FINANCE ISSUED ON OR BEFORE 31 DECEMBER 2015		
Subject matter of Concession Agreement	Expected contract value of Concession Agreement in CZK	Contribution to overall value of concessionary projects
Water Management	60 212 500 725	88,83%
Power	2 957 796 000	4,36%
Social Services	1 065 377 110	1,57%
Transportation	850 328 153	1,26%
Leisure Infrastructure	2 544 039 057	3,75%
Other	155 730 000	0,23%
TOTAL	CZK 67 785 771 045	100,00%

Source (last access July 14, 2016): <http://www.mfcr.cz/cs/verejny-sektor/podpora-z-narodnich-zdroju/partnerstvi-verejneho-a-soukromeho-sektoru/hodnota-koncesnich-smluv-ppp/2015/aktualizovany-prehled-municipalnich-proj-23556>





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# DENMARK



Torben Brøgger



Frederik Østergaard  
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## BECH-BRUUN

### GENERAL

1. **Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

The PPP model has been used in Denmark since 2005 when the Municipality of Herning invited tenders for the school Vilbjerg Skole, which became the first Danish PPP project.

However, the introduction of PPP projects in Denmark has been relatively slow-moving, and the model is still only used to a limited extent.

At the time of writing this (April 2016), tenders have been invited for a total of approximately 35 PPP projects in Denmark.

A number of different PPP models are used, including PPP with private financing (Build-Operate-Transfer), including individual tender procedures where the right to exploit the asset is transferred (transfer of operation rights), PPP with public financing (Build-Operate), including various variations of how much of the liability is left with the private party, as well as models whereby public financing is obtained

via financial leasing (Build-Lease-Operate Transfer).

In addition, individual tender procedures have been conducted in which tenders have been invited for the responsibility for the public core service together with and as a part of the PPP project

2. **Which sectors apply a PPP model to develop infrastructure projects?**

The PPP model has been used in tender procedures in respect of schools, office buildings, courtrooms, parking garages, construction of hospitals, police stations, cleaning plants, swimming facilities, care facilities and a single stretch of motorway.

The tender procedures were conducted by the State (the Danish Property Agency), Regions and Municipalities, respectively

### LEGISLATION & REGULATION

3. **What are the principal laws and regulations? Is there a framework PPP Law?**

Danish legislation does not provide for any special regulation of PPP projects.

Consequently, PPP projects are governed by the rules generally applicable.

**4. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

PPP projects are entered into as contractual cooperation and are governed by the PPP contract.

As such, there is no centralised PPP authority in Denmark.

The Danish Competition and Consumer Authority renders general guidance on PPPs and has published a guideline, including relating standard contract for tender procedures in respect of PPP projects, comprising PPP with private financing and PPP with public financing of new constructions and renovation projects, respectively.

No PPP projects have yet been completed including renovation and operation of existing buildings.

**5. Are there any restrictions for foreign investors to develop/operate PPP projects?**

No, as a general rule no restrictions apply to foreign investors in respect of submitting tenders for and operating PPP projects in Denmark.

**6. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

Yes, this is often regulated by way of the PPP contract according to which repudiatory breach exists if commissioning of the asset is delayed by more than 4-6 months.

**7. How are force majeure events defined, and what are the consequences of their occurrence?**

Force majeure is usually defined as:

*“Extraordinary circumstances arising without the Party being at fault and of which the Party has no control and which the Party should not have foreseen. Force majeure exists in the event of for example war, unusual natural events, strikes, lock-out, sabotage or terrorism.”*

As a general rule, both parties are exempt from liability when proper performance of the Agreement is impossible as a consequence of force majeure, and each party must pay its own costs/bear its own loss as a consequence of a force majeure event.

In the event of long-term force majeure events (if performance of the Agreement has been rendered completely or substantially impossible due to force majeure for a consecutive period of more than six months), the general rule is usually that the PPP contract will terminate without the parties being entitled to raise claims against each other in that respect.

In the event of PPP with private financing (and private ownership in the operating phase), the PPP asset will also be transferred (if the asset has not been destroyed) from the PPP supplier to the public contracting party at the time of termination of the Agreement at a value fixed beforehand to be written down over the contract period.

**8. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

The PPP contract will include regulation of the most important risks of the project. It is usual practice that the public contracting authority

bears the political risk. As for change in law, the general rule is an apportionment of the risk to the effect that general legislative changes are the risk of the PPP supplier, whereas changes in project-specific legislation are the risk of the public contracting authority.

Risks to be borne by the public contracting authority are regulated by the contractual relationship between the public contracting authority and the PPP supplier.

**9. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

The PPP contract includes detailed regulation of which insurances must be taken out for the asset by the PPP supplier, and the contract also lays down that the insurance sum must be spent on reinstatement of the damage happening to the asset. The insurance sum is also assigned to the public contracting authority as security for the amount being spent on the reinstatement of the damage occurring.

In the event of damage above a fixed level, the public contracting authority is entitled to take part in discussions between the relevant insurance company and the PPP supplier concerning assessment of the insurance event as well as payment of the insurance sum.

**10. Is the concept of ‘uninsurability’ recognized in the project agreements?**

It has been scheduled for several dialogue meetings, and the PPP contracts are probably by now adapted accordingly to a certain extent.

**11. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

The PPP contract will generally contain a right on the part of the public contracting authority to intervene in whole or in part in the performance of the task and consequently exempt the PPP supplier from liability to perform certain services under the contract.

Intervention is, as a general rule, conditional upon the following:

- If considerable risk of personal injury or material damage to objects exists when continuing the contract
- If intervention is required in order for the public authority to make payments which the public authority must pay according to law
- If, despite orders and payment reductions, the PPP supplier does not make the asset available in the contractual condition.

In addition, the PPP contract will, generally, include a right on the part of the public contracting authority to acquire the asset at a price fixed beforehand at the time of termination of the PPP contract as a consequence of the PPP supplier’s material breach.

**12. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

It is possible to make the PPP contracts subject to such regulation.

As for previous PPP projects completed, it was, however, in all circumstances agreed/laid down that any disputes were to be settled according to Danish law before the Danish Institute of Arbitration or before the Danish Building and Construction Arbitration Board.

This also applies in respect of applicable law and jurisdiction of the direct agreement between the contracting authority, the PPP supplier and the lender/finance provider.

**13. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

As a general rule, PPP projects are considered a total service whereby new tenders must not be invited for the services subject to the PPP contract until ordinary termination of the agreement.

The PPP contract will, however, usually include a right on the part of the public contracting authority to demand that new tenders be invited for services in the operating phase if the procurement tender rules applicable from time to time dictate that tenders must be invited for such services or if, by referring to financial ratios or contracts for comparable works, the contracting authority is able to prove that the part of the payment pertaining to the relevant services considerably exceeds the market level (tender procedure following market test).

**14. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

Generally, an examination of the asset will be performed upon commissioning at which both

the PPP supplier and the public contracting authority will participate together with their technical advisers.

The examination procedure upon commissioning is regulated in detail in the PPP contract including appendices, and it largely corresponds to a usual handing-over procedure when handing over contract work.

**15. Are there any expected changes or reform to the existing legislation?**

Nothing suggests at the present time that legislative changes will be made in relation to PPP projects, neither any introduction of actual PPP regulation.

## FINANCING & INCENTIVES

**16. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

Generally, the payment mechanism includes regulation of payments in respect of:

- Inflation.
- Reduction as a consequence of errors and defects.
- Detailed regulation in respect of supplies – including as a general rule a baseline and incentives to continuous energy optimisation.
- Regulation (if any) of the public contracting authority's use of the asset.

In the event of PPP with private financing, financial closing is effected in connection with the conclusion of the contract whereby adjustments are made for developments in

interest as from submission of the tender and until conclusion of the contract.

No examples exist that foreign currency exposure is hedged, and it will as a general rule be up to the PPP supplier/tenderer to arrange for hedging, if needed.

**17. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

No guaranteed minimum earnings are laid down.

In return, the general rule is that the public contracting authority is entitled and obliged to acquire the PPP asset upon termination for breach and ordinary expiry of the contract at a price fixed beforehand. Consequently, the income side will be fixed (guaranteed), whereas the PPP supplier is itself responsible for the level of costs.

**18. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

See the answer to question 17.

**19. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

The payment obligation on the part of the public contracting authority (State, Region or Municipality) may be deemed as secure (without risk), but as such it is not a government bond or an instrument comparable thereto.

It is only a payment obligation which is generally combined with a right and obligation

to take over the PPP asset at a price fixed beforehand in the event of termination for breach or expiry, cf. the answer to question 17.

**20. Are deductions from the service and availability payments subject to a cap?**

This has varied from project to project.

In some PPP tender procedures, the total deductions in payments have been subject to a cap in the operating phase. Also the level of the cap being used has varied.

However, not in all PPP projects have deductions in payments been subject to such a cap.

**21. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

Yes, the public contracting authority's possibility of making variations in relation to the asset itself (the construction works) as well as in the operating phase will often be subject to a cap. The level has in practice been set so that the public contracting authority may demand variations of the construction works at a maximum of +/- 15% of the capital sum, whereas the level of any cap on variations in respect of operating services has varied.

In addition, the matter is regulated by the limitations following from the procurement tender rules, see, for example, Article 72 of the Public Procurement Directive (Directive 2014/24/EU) which has been implemented into Danish law by way of s. 180 of the Danish Public Procurement Act (*udbudsloven*).

**22. Is there a requirement to share any gains arising from refinancing of the PPP project-with the public authority?**

Such a requirement to share any gains arising from refinancing existed at the time of the first PPP tender procedures in Denmark. This

practice has, however, not been followed in the most recent tender procedures conducted.

**23. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

In PPP projects with private financing, a direct agreement is entered into by and between the public contracting authority, the PPP supplier and the lender/finance provider.

According to the direct agreement, the finance provider is given the option to prevent termination for breach of the PPP contract. This implies that the public contracting authority cannot terminate the PPP contract for breach until the finance provider has been given the opportunity to remedy the breach forming the basis of the contemplated termination for breach.

The finance provider may prevent breach by appointing a representative who will assume responsibility for a period of time for performance of the PPP contract with a view to remedying the breach and ensuring continued contractual performance as towards the public contracting authority. In addition, it will be possible for the finance provider to appoint a substitute who will assume the future responsibility for performance of the PPP contract also with a view to remedying the breach and ensuring continued contractual performance as towards the public contracting authority.

The direct agreement includes detailed regulation of the procedure for the finance provider's prevention of the PPP supplier's material breach.

If the finance provider does not succeed in preventing breach of the contract within a further defined period, the public contracting

authority is entitled to terminate the PPP contract for breach.

**24. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

The previous PPP projects in Denmark did not include any obligation to take over debts of the PPP company, but the public contracting authority has generally a right and obligation to take over the PPP asset at a price fixed beforehand upon termination for breach or expiry, cf. the answer to question 18.

**25. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

The usual aspects of termination for breach laid down in the PPP contract imply that the public contracting authority has a right as well as an obligation to take over the asset (subject-matter of the PPP contract) against payment of a fixed amount laid down in the PPP contract for the asset to the PPP supplier or the lender of the PPP supplier who will usually have been guaranteed assignment and thereby security for the payments from the public contracting authority to the PPP supplier.

The public contracting authority will, as the basic general rule, be able to set off any claims due and costs by bringing the asset in the condition agreed upon in the PPP contract as

well as any other claims originating from the PPP contract against the payment (purchase price) which the public contracting authority must pay to the PPP supplier or the lenders of the PPP supplier.

**26. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

No.

**27. Are there tax advantages available to PPP projects?**

For want of actual PPP legislation in Denmark, including special rules on the tax treatment of PPP projects, it has been necessary to incorporate the PPP projects under applicable tax law and case law.

As for PPPs with private financing, a fixed practice has gradually been established in order for the PPP supplier to be deemed owner of the PPP asset in the contract period also for tax purposes. Consequently, the PPP supplier is entitled to depreciate the asset for tax purposes.

The general rule is also that the PPP supplier is the owner of the asset in a VAT context. This is of material importance to the chance of being voluntarily registered as lessor of real estate which is generally the purpose of the far majority of PPP projects. If a PPP supplier, in its capacity as a “lessor” of real estate, may voluntarily register for VAT, the PPP supplier is entitled to deduct VAT from the expenses of designing and constructing the asset. In such event, the charging of VAT on the continuous payment (from leases registered for VAT) is required.

**28. What are the other incentives available to PPP projects?**

Only very limited regulatory incentives for PPP projects exist in Denmark.

In Denmark, it is a common financial principle of Municipalities that the Municipalities and Regions may, only to a limited extent, finance capital investments by the raising of loans.

PPP projects are treated as lease agreements which are considered to be loans provided that the conclusion of the agreement replaces a public investment. The purpose of treating the PPP projects as loans is to neutralize the liquidity gains achievable by the authority by entering into an agreement on the use of the fixed asset instead of buying the fixed asset. PPP organising of a project may therefore not give the Municipality or the Region an opportunity to increase liquidity as compared to constructing the asset itself.

This implies that, when concluding a PPP contract, Municipalities and Regions must deposit an amount equivalent to the purchase price of the PPP asset.

However, a special exemption pool is available to the Regions whereby the Regions may request an exemption from the obligation to make deposits upon conclusion of specific PPP projects. The pool for 2016 has been fixed at a total of DKK 400m.

Previously, a similar pool for deposit exemption existed for municipal PPP projects the annual amount of which was DKK 100m. The said pool, however, does no longer apply in 2016.

In addition, the State, the Regions and Municipalities are obliged to include overall economic assessments in the decision-making processes in the event of large construction projects, and “to a relevant degree include



considerations of Public Private Partnerships (PPPs) or similar set-up.”

**29. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2015?**

Six tender procedures for Danish PPP projects were completed in 2015, as follows:

Contracting entity	Facility	Contract price
Central Denmark Region	Parking garage and heliport	N/A – license
Municipality of Holbæk	Care facility	Approx. DKK 480m (NPV)
Municipality of Odder	School	Approx. DKK 250m (NPV)
Sealand Region	Hospital	Approx. DKK 520m
Municipality of Aarhus	Office building	Approx. DKK 680m (NPV)
The Danish Building & Property Agency	The High Court of Western Denmark	Approx. DKK 620m

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# FINLAND



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### GENERAL

1. **Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

The so-called traditional PPP model has to-date been applied in four projects in Finland, all of which related to the construction of a highway. The aforementioned PPP projects have all been based on the Design-Build-Finance-Operate (DBFO) model. Although the traditional PPP model has only been applied in a limited number of projects in Finland, variations thereof are quite commonly used to develop infrastructure projects. In fact, public-private partnerships are often referred to as “lifecycle projects” (Fi: *elinkaarihanke*) in Finland. The lifecycle project concept is, however, broader than that of the traditional PPP model and essentially includes all projects where a single entity, whether publicly or privately owned, completes a project from the planning phase through to the construction phase and provides maintenance services for an agreed period of time, using public or private financing. It should, however, be noted that private financing has rarely been used in connection with other PPP-type projects than

the above-mentioned traditional PPP projects due to tax reasons. In the following, we focus mainly on the traditional PPP model, with lifecycle projects specifically mentioned where relevant.

2. **Which sectors apply a PPP model to develop infrastructure projects?**

As noted in Section 1 above, the traditional PPP model has to-date only been applied in Finland in connection with the construction of highways. Application of the PPP model was also proposed in relation to the construction of a railway, but the project was terminated due to excessive tender cost. Lifecycle models, on the other hand, have been extensively used in connection with the construction of, *inter alia*, schools, sewage treatment centres and recreational facilities.

### LEGISLATION & REGULATION

3. **What are the principal laws and regulations? Is there a framework PPP Law?**

There are no specific regulations which govern only PPP projects, other than certain provisions in Finnish tax legislation. Most PPP projects are, however, governed by legislation regarding public procurement, including the Public Procurement Act (348/2007, as

amended), the Act on Procurement Procedures of Entities Operating in the Water, Energy, Transport and Postal Services Sectors (349/2007, as amended), and the Decree on Public Procurement (614/2007). In addition to the above, the Companies Act (624/2006, as amended) and the Securities Market Act (746/2012, as amended) as well as, for example, insurance laws, environmental regulations and the general principles of contract law and European Union regulations may also be applicable, depending on the project. To-date, most of the legislative changes in Finland relating to PPP projects have been of a technical nature in order to facilitate the implementation of PPP projects and make the PPP model an attractive alternative for investors and procuring entities. A major reform of existing public procurement legislation is, however, expected at the end of 2016, as described in Section 15 below.

**4. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

There is no centralized PPP Authority or dedicated regulatory body which deals with PPP projects. Currently, the Market Court (Fi: *markkinaoikeus*) is the court of first instance in respect of public procurement proceedings. In connection with the procurement legislation reform described in Section 15 below, numerous stakeholders have, however, advocated establishing a separate supervisory body or the allocation of such tasks to an existing entity. As a response to these comments, the Government Bill regarding the new procurement legislation published in June 2016 proposes that the supervisory role would be given to the Finnish Competition and Consumer Authority (FCCA) (Fi: *kilpailu- ja kuluttajavirasto*). According to the proposal, the FCCA would be given the duty and the power to oversee compliance with the procurement legislation. Any person would have the

possibility to report suspected non-compliance situations to the FCCA, and the FCCA could also initiate investigations on its own initiative. The FCCA would have the power to issue reprimands to contracting entities for discovered illegalities, prohibit implementation of procurement decisions and propose imposition of penalties in the Market Court.<sup>1</sup>

**5. Are there any restrictions for foreign investors to develop/operate PPP projects?**

There are no restrictions for foreign investors to develop or operate PPP projects in Finland. In fact, foreign investors have been actively involved in PPP infrastructure projects, working together with a local partner. Given the limited size of the Finnish market, the cooperation and participation of foreign investors and other contracting parties is a necessity for ensuring a competitive bidding and procurement process.

**6. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

As mentioned above, there is currently no specific legislation on public-private partnerships other than certain tax regulations. Thus, Finnish legislation does not stipulate a long-stop date for the completion of construction and such date may be freely agreed upon between the contracting parties.

**7. How are force majeure events defined, and what are the consequences of their occurrence?**

Finnish law does not provide for a uniform definition of “force majeure events”, although,

<sup>1</sup> Please see the Government Bill regarding the new procurement legislation (108/2016), p. 41. Please note that the Government Bill has not been passed by the Finnish Parliament at the time of writing this article and thus, the final legislation may differ from that set out in the Government Bill.

for example, the Finnish Sale of Goods Act (355/1987, as amended) sets out one definition of force majeure events in relation to payment delays. The contracting parties may freely agree upon how force majeure events are defined. Under project agreements, force majeure events are generally defined as events beyond the contracting parties' control, the results of which cannot reasonably be avoided or overcome, such as circumstances referred to in the Finnish State of Defence Act (1083/1991, as amended) or the Emergency Powers Act (1552/2011, as amended), including acts of war and revolts, and strikes, boycotts and natural disasters. Exceptional weather conditions have in some cases been explicitly excluded from force majeure events as the weather conditions in Finland are by definition harsh and extreme. The parties are likewise free to agree on the consequences of force majeure events. Project agreements usually stipulate that in case a delay is attributable to a force majeure event, the public authority will reimburse the project company necessary costs for maintenance or a certain percentage of the service payment which would have been paid had there been no delay. Generally, both parties have a right to terminate the agreement if a delay has continued for a certain predetermined period of time due to a force majeure event.

**8. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

Finnish law does not include any provisions on such risk allocation and it may be agreed upon between the contracting parties. Legal and political risks are usually shared between the parties during the investment phase but tend to shift towards the project company's responsibility during the maintenance phase. It is generally acknowledged that risks should be allocated to the party best positioned to

manage them. In project agreements, the contracting parties may agree upon certain relief events in the event of, for example, substantial changes of law in order to allocate such risk more evenly.

**9. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

As mentioned above, there is currently very limited PPP project specific legislation in Finland. Accordingly, Finnish legislation does not provide for a specific reinstatement test in respect of PPP projects and the contracting parties are free to agree on the use of insurance proceeds. The contracting parties generally agree on a graduated veto right for the lenders or an obligation to obtain consent from the lenders in respect of the use of insurance proceeds, the scope of such right or obligation to depend on the damage and the amount of insurance proceeds in question. In the event that the insurance pay-out is minor or medium-sized, the proceeds are primarily intended to be used to reinstate and repair the assets, whereas larger insurance proceeds arising from, for example, total destruction of the assets, are usually used for prepayment of debt.

**10. Is the concept of 'uninsurability' recognized in the project agreements?**

The concept of "uninsurability" is generally recognized in project agreements. In the context of PPP project agreements, a risk may, for example, be considered uninsurable if the project company or service provider cannot obtain insurance for such risk from a reliable and reputable insurance company with solid financial standing from the relevant insurance market on agreed terms or if the premium for such insurance is prohibitively high.

**11. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

As mentioned above, there is currently no PPP project specific legislation in Finland. Project agreements generally allow step-in by both the public authority, in the event of a breach of the project agreement by the project company, and the lenders, in the event of the public authority contemplating terminating the project agreement.

**12. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

The parties to project agreements and direct agreements may select international arbitration as the method of dispute resolution. Although there is no limitation on the application of foreign law as governing law in PPP project agreements, in practice public authorities generally only tend to enter into agreements governed by Finnish law.

**13. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

Although neither existing legislation nor the expected procurement law reform described in Section 15 below provides for a regular market testing procedure *per se*, in connection with the proposed reform it has been envisaged that before launching procurement proceedings, the public authority may conduct a market consultation or market study in preparation thereof and give general information on plans

and requirements regarding the proposed procurement proceedings, provided that such actions do not disturb competition or endanger the principles of non-discrimination and openness.<sup>2</sup>

**14. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

The contracting parties are largely free to agree on the terms and conditions of the acceptance procedure, including, for example, the appointment of an independent technical adviser for such task. Generally, however, at least the public authority and the project company take part in acceptance inspections after which minutes of such inspection are prepared and ultimately the public authority provides a certificate or other documentation declaring that the inspection has been passed satisfactorily or the parties undertake measures to remedy any shortcomings. The specific requirements for passing such inspections and for the acceptance of the facilities are determined based on project agreements.

**15. Are there any expected changes or reform to the existing legislation?**

The European Union directives on public procurement (2014/24/EU and 2014/25/EU) and concessions (2014/23/EU) are expected

<sup>2</sup> Please see Chapter 9, Section 65 (Fi: *Markkinakartoitus*) of the proposed Procurement Act (p. 322 of the Government Bill 108/2016), and Chapter 8, Section 69 (Fi: *Markkinakartoitus*) of the proposed Act on Procurement Procedures of Entities Operating in the Water, Energy, Transport and Postal Services Sectors (p. 407 of the Government Bill 108/2016). Please note that the Government Bill has not been passed by the Finnish Parliament at the time of writing this article and thus, the final legislation may differ from that set out in the Government Bill.

to be transposed into Finnish legislation by the end of 2016. Numerous provisions of the aforementioned directives, provided that they can be considered absolute and sufficiently clear and precise are, however, applicable already as of April 18, 2016, the original deadline for national implementation. The Finnish Ministry of Employment and the Economy has published general guidelines outlining such provisions.<sup>3</sup> The proposed key changes to existing Finnish public procurement legislation include, *inter alia*, raising national threshold levels for the application of public procurement legislation, facilitating and clarifying the use of negotiation in public procurement proceedings, clarifying the amendment of public procurement agreements during their term, clarifying the scope and definition of concessions and affirming that public contracts shall be awarded on the basis of the most economically advantageous tender.

In June 2016, the Finnish Government issued the Government Bill regarding the new procurement legislation (108/2016). Where relevant in this article, reference has been made to the Government Bill. However, it should be noted that at the time of writing this article, the Government Bill has not been passed by the Finnish Parliament, and therefore, the final legislation may differ from what has been set out in the Government Bill.

<sup>3</sup> Please see <http://tem.fi/documents/1410877/2132242/Hankintalain+kokonaisuudistus+-+siirtym%C3%A4vaiheen+toimenpiteet+ja+j%C3%A4rjestelyt/d42cc677-8dcd-4c8a-a6b1-6a7b93678273> for non-exhaustive guidelines compiled by the Ministry of Employment and the Economy listing the relevant provisions (only available in Finnish).

## FINANCING & INCENTIVES

### 16. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?

As noted above, there is currently no PPP project-specific legislation and the payment mechanism also remains unregulated. Two types of payment mechanisms have been used in the four above-mentioned traditional PPP infrastructure projects undertaken in Finland to-date: a shadow toll payment mechanism in the first project and an availability-based payment mechanism in the three subsequent projects. Under the shadow toll arrangement, payment is based on, for example, traffic volume, whereas availability-based payments are made for general availability as well as the availability of the road in question at an agreed service level. The parties generally agree on the specific terms and conditions of the applicable payment mechanism in a service agreement or other project document. Service and availability payments are generally tied to an index, such as the Cost Index of Civil Engineering Works. The contracting parties are generally also free to agree on further protection against inflation.

### 17. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?

As mentioned above, there is currently no PPP project specific legislation in Finland. Although the tender and the project documents usually set forth an expected rate of return, there is generally no guaranteed rate of return or cap on the rate of return. However, the tender documents may contain provisions on how the financial benefit arising from changes between the lenders' initial financing commitment and the final terms of financing is shared between

the public authority, the project company and the sponsors.

**18. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

In general, the State does not provide payment guarantees for PPP projects. See, however, Section 19 below for further discussion regarding the public authority's payment obligations. On the other hand, in projects implemented using the lifecycle model discussed in Section 1 above, wherein the municipality as public authority generally owns the project company, the contracting parties may agree that the municipality shall provide a payment guarantee.

**19. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

The State budget, decided on by the Finnish parliament for one budgetary year at a time, may include an authorization, limited in amount and purpose, for a given public authority to enter into agreements and incur expenses, the appropriations for such expenses to be taken from the State budgets for the following years. Although such appropriations may be carried over for use during the two subsequent budgetary years, the amount thereof may not be exceeded. However, according to Section 88 of the Constitution (731/1999, as amended), everyone has the right to collect their legitimate receivables from the State regardless of the State budget. Furthermore, legal scholars have been of the view that Section 88 of the Constitution would be applicable to contractual liabilities under agreements between State agencies and private

parties, although neither Finnish legislation nor legal literature provide further guidance on the application of Section 88 of the Constitution or on any procedures in relation to its application. Provided that the public authority belongs to the central administration of the State and essentially acts as an agency representing the State, it is thus likely that the State would stand behind the obligations of the public authority even if the State budget and specifically the amount of funds allocated to the project in question therein were to be exceeded.

**20. Are deductions from the service and availability payments subject to a cap?**

The contracting parties are largely free to agree on the specific terms and conditions applicable to deductions from service and availability payments. Deductions may be made from service and availability payments based on, for example, quantitative, temporal or qualitative defects in the agreed service. Usually, the contracting parties would also agree on a cap for such deductions.

**21. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

Pursuant to the proposed reform of national public procurement laws described in Section 15 above, detailed stipulations regarding the modification of procurement contracts during their term have also been proposed, including certain threshold limits for specific types of amendments. According to the proposed reform, the general rule would be that procurement contracts may not be significantly amended during their term. Significant amendments include changes which would, for example, materially change the nature of or extend the scope of the procurement contract.<sup>4</sup>

<sup>4</sup> Please see Chapter 14, Section 136 (Fi: *Hankintasopimuksen muuttaminen sopimuskauden aikana*) of the proposed Procurement Act (pp.

In addition, the project agreements may set forth restrictions regarding amendments thereto and the contracting parties generally also agree on cost compensation to be paid in the event that modifications are made to project documentation, the specific details thereof to be agreed on between the contracting parties.

**22. Is there a requirement to share any gains arising from refinancing of the PPP project-with the public authority?**

Even though there is no requirement *per se* to share gains arising from refinancing of the PPP project, sharing refinancing gains with the public authority is usually recognized in project agreements, which set forth the terms and conditions for doing so in further detail.

**23. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

Lenders usually sign a direct agreement or a tripartite agreement with the relevant public authority and the project company. The lenders generally have a step-in right if the public authority is contemplating terminating the project agreement for reasons attributable to the project company as well as a right to assign the relevant project agreement to a third party approved by the public authority.

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348–349 of the Government Bill 108/2016), and Chapter 12, Section 124 (Fi: *Hankintasopimuksen muuttaminen sopimuskauden aikana*) of the proposed Act on Procurement Procedures of Entities Operating in the Water, Energy, Transport and Postal Services Sectors (pp. 428–429 of the Government Bill 108/2016). Please note that the Government Bill has not been passed by the Finnish Parliament at the time of writing this article and thus, the final legislation may differ from that set out in the Government Bill.

**24. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

Finnish law does not provide for such a mechanism and to our knowledge, the project agreements to-date do not include any provisions whereby the public authority would undertake to assume the debts of the project company. See, however, Section 25 below for further discussion regarding compensation payable by the public authority upon termination of the project agreement.

**25. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

The parties to a project agreement are largely free to agree on the repercussions of termination thereof. Project agreements generally, for example, stipulate termination compensation payable by the public authority to the project company depending on whether termination or rescission of the agreement is due to reasons attributable to the public authority, the project company or without cause. Such compensation may include, for example, the aggregate of service payments due and payable at such time, outstanding debt to the lenders and related break costs as well as the market value of equity, less any termination compensation payable by the project company to the public authority and the fair net value of



the property remaining in the possession of the project company post-termination.

**26. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

To our knowledge, there are no general incentive schemes, which would apply to domestic manufacturing of equipment or materials for use in PPP projects specifically. See, however, Section 28 below for further discussion regarding incentives payable in relation to PPP projects.

**27. Are there tax advantages available to PPP projects?**

Although no specific tax advantages are available to PPP projects, some legislative changes have been undertaken to facilitate the implementation thereof. The specific provisions regarding PPP projects in the Business Tax Act (360/1968, as amended) and the Value Added Tax Act (1501/1993, as amended) only, however, apply to road and railway projects and only to projects undertaken by the State, thus excluding PPP projects implemented by municipalities. There is, however, ongoing discussion that the tax treatment of different types of PPP projects and lifecycle projects should be harmonized.

**28. What are the other incentives available to PPP projects?**

Although there are no PPP project specific incentives *per se*, PPP projects may be eligible for various types of governmental incentives, subsidies and aids, whether provided on a national or European Union level, such as funding from the European Union's Trans-European Transport Network.

**29. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2015?**

As noted above, although variations of the traditional PPP model are relatively commonly applied in Finland, only a few of the projects completed to-date can be considered PPP projects in the traditional meaning of the concept. In 2015, highway E18 Hamina-Vaalimaa was financed as a PPP project, with investment costs of approximately EUR 265 million and total costs (including planning, construction, maintenance and financing) of approximately EUR 378 million, being significantly less than originally budgeted.

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# FRANCE<sup>12</sup>



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## GENERAL

1. **Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

Two types of public-private partnerships (PPPs) are mainly used in France: (i) concession agreements, which have been used for decades, serve to implement major infrastructure projects such as canals, motorways, water distribution systems and toll bridges and (ii) partnership contracts, used since 2004, which are comparable to PFI contracts.

Usually, for new projects, when a public authority decides to assign the performance and the operation of a project to a private entity, Build-Operate-Transfer or Build-Operate-Own-Transfer models used.

However, if the public authority is assigning the management of a public service or infrastructure which has already been built then Transfer of Operation Rights type contracts are usually used.

2. **Which sectors apply a PPP model to develop infrastructure projects?**

In France, PPPs are used in various economic sectors (e.g., transport, health, justice, education, urban equipment, environment, energy efficiency, telecommunications and culture) and the PPP market generates billion worth of activity every year. For example, in 2015, some landmark projects were finalized in the education sphere<sup>3</sup> and with regards to concession agreements, a major agreement was executed in the transport sector.<sup>4</sup>

<sup>1</sup> The authors are French lawyers registered at the Paris bar. The answers to the questionnaires relating to Senegal, Morocco, Guinea and Ivory Coast are based on their knowledge of the applicable regulations and on their experience of PPPs projects implemented in these countries. The accuracy of these answers remains however subject to the confirmation by lawyers duly registered in the said countries

<sup>2</sup> The authors would like to thank Hugues Martin-Sisteron (member of the Paris Bar Association), Diane Houriez and Salimatou Kaba for their help in the preparation of this questionnaire.

<sup>3</sup> E.g. a 28-year partnership contract for the financing, design, construction, and maintenance of a new facility for the *Ecole Centrale Supélec* near Paris.

<sup>4</sup> The A355 Strasbourg bypass motorway concession.

## LEGISLATION & REGULATION

### 3. What are the principal laws and regulations? Is there a framework PPP Law?

The transposition of the European directives pertaining to concession agreements and public procurements<sup>5</sup> has substantially modified existing French PPP laws which included several distinct legal regimes (i.e., administrative long-term leases, temporary occupation permits, partnership contracts and concession agreements).

Today, there are two types of PPP agreements: (i) the agreements where the private party is directly paid by the public entity (e.g. partnerships contracts) and (ii) agreements where the private party is paid by the users (e.g. concession agreements).

French PPP legislation has been consolidated and is now categorized into:

- the ordinance No. 2015-899 dated 23 July 2015 (the “Public Procurement Ordinance”) and its implementing decrees No. 2016-360 and No. 2016-361 dated 25 March 2016 (the “Public Procurement Decree”) which transposed the 2014/24/EU and 2014/25/EU public procurement directives<sup>6</sup> and which regulates the partnership contracts; and
- the ordinance No. 2016-65 of 29 January 2016 (the “Concession Agreement Ordinance”) and its implementing decree No. 2016-86 dated 1 February 2016

(the “Concession Agreement Decree”)<sup>7</sup>, which transposed the 2014/23/EU directive pertaining to concession agreements and which regulates the concession agreements.

### 4. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?

One major actor in the PPP sector in France is the Infrastructure Finance Support Service (mission d’appui au financement des infrastructures) (the “Fin Infra”). The Fin Infra is a dedicated unit within the Ministry of the Economy that assists public bodies in the implementation of partnership contracts<sup>8</sup>. The Fin Infra, which assists and advises public authorities in the preparation and negotiation of partnership contracts, has to issue an opinion about the financial sustainability of each partnership contract.<sup>9</sup> This requirement seems to be an effective way of avoiding the financial difficulties which come about in the implementation of some partnership contracts in France.

### 5. Are there any restrictions for foreign investors to develop/operate PPP projects?

The legislative framework for PPPs does not place any restrictions on foreign investors. Moreover, direct or indirect discrimination regarding investors or operators coming from European Union member States, from third countries parties to the Government Procurement Agreement of the World Trade Organization<sup>9</sup> or to Free Trade Agreements to

<sup>5</sup> Directives No. 2014/23/EU, No.2014/24/EU and No.2014/25/EU.

<sup>6</sup> Directives 2014/24/EU and 2014/25/EU related to public procurement, which were approved by the European Parliament on 15 January 2014 and adopted by the Council on 11 February 2014.

<sup>7</sup> Ordinance n°2016-65 of 29 January 2016 about concession agreements.

<sup>8</sup> The Fin Infra was created by a Decree No. 2016-522 dated 27 April 2016 and replaced the “MAPPP”.

<sup>9</sup> [https://www.wto.org/english/docs\\_e/legal\\_e/rev-gpr-94\\_01\\_e.htm](https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm).

which the Union is party is strictly prohibited<sup>10</sup>.

Contracts have to be awarded on the basis of objective criteria that ensure compliance with the principles of transparency<sup>11</sup>, non-discrimination and equal treatment<sup>12</sup>, with a view to ensuring an objective comparison of the relative value of the tenders in order to determine, in conditions of effective competition, which tender is the most economically advantageous.

Therefore, in accordance with the European directives<sup>13</sup>, public authorities from all members States (including France) must ensure equal treatment and not commit direct or indirect discrimination against economic operators from other Member States.

#### **6. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

The Public Procurement Ordinance and the Concession Agreement Ordinance do not impose a long-stop date for the completion of construction.

However, it clearly provides that both partnership contracts<sup>14</sup> and concession agreements<sup>15</sup> are entered into for a period to be determined in light of the period needed to amortize the investments required.

<sup>10</sup> Subparagraph n°98 of the 2014/24/EU Directive regarding Public Procurement contracts opening statement.

<sup>11</sup> Article 18 of the 2014/24/EU Directive regarding Public Procurement contracts.

<sup>12</sup> Article 1 of the Public Procurement Ordinance and Article 1 of the Concession Agreement Ordinance.

<sup>13</sup> Directives No. 2014/23/EU, No. 2014/24/EU and No.2014/25/EU.

<sup>14</sup> Article 39 of Ordinance No. 2015-899 dated 23 July 2015 provides that the period of performance has to be determined in the contract.

<sup>15</sup> Article 34 of the Concession Agreement Ordinance.

Regarding the duration of the construction works the most common practice is that the parties determine specific clauses pertaining to the maximum duration of such works in the contracts.

#### **7. How are force majeure events defined, and what are the consequences of their occurrence?**

Under French case law, force majeure events are defined as an event beyond a party's control which the party could not reasonably have provided against before entering into the contract and which the party could not reasonably have avoided or overcome provided that the event is not substantially attributable to the other party. For example, natural disasters, wars or strikes can be categorized as force majeure events.

French law does not expressly provide for the consequences of a force majeure event occurring. To get a sense of the potential consequences it is necessary to consider French case-law and French administrative law principles.

Usually, when this event is temporary, the private entity cannot be held responsible if it does not fulfil its contractual obligations during the duration of the force majeure event. However, when the event is not temporary, the agreement can be terminated by the judge<sup>16</sup>. In both cases, the public authority can unilaterally decide to terminate the contract.

When the contract is terminated as provided for in the contract, the private entity will be indemnified on the basis of the 'useful expenses' theory developed by the Supreme Administrative Court<sup>17</sup>.

<sup>16</sup> « *Synthèse - Délégations de service public* » Stéphane Braconnier, Emmanuel Kalnins, LexisNexis, date of update 27 July 2015.

<sup>17</sup> Supreme Administrative Court, 19 April 1974, *Société Entreprise Louis Segrette*, No. 82518.

In practice, the parties would define the consequences of force majeure events occurring under the contract.

**8. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

Article 70 of the Public Procurement Ordinance provides that the parties have to include a specific clause in the partnership contract pertaining to the allocation of risks between the parties. This is modelled on the contractual practice of optimal risk sharing.

As regards concession agreements, French legislation does not impose any obligations. Pursuant to the freedom of contract principle, parties can agree on the consequences of political and legal risks occurring. Nevertheless, it should be noted that the risk regarding the operation of the works (which implies, among other things, real exposure to market fluctuation) are always borne by the private entity (the concessionaire)<sup>18</sup>. However, for most of the potential political and legal risks, French administrative case-law already defines the consequences of their occurrence.

For example, if the public authority, using the public power (*puissance publique*), enacts an administrative measure which makes performance of the agreement more difficult or expensive for the private entity, the latter can obtain full financial compensation<sup>19</sup>.

Finally, as regards potential cancellation or termination of concession agreements by a

judge following a third party challenge, both PPP Agreement Ordinance<sup>20</sup> and Concession Agreement Ordinance<sup>21</sup> define the quantum of financial indemnification applicable. In such cases, the concessionaire may request to be indemnified for the expenses incurred under the concession agreement which have been benefitted the public authority, including financing costs.

From a project finance perspective, this express reference to the theory of “useful expenses” (*dépenses utiles*) should be reassuring for both sponsors and lenders.

**9. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

Under French law the reinstatement test is not envisaged. Pursuant to the freedom of contract principle, such a test may be included in a PPP agreement.

**10. Is the concept of ‘uninsurability’ recognized in the project agreements?**

The concept of “uninsurability” is not specially defined or provided for under French legislation. However, the parties can freely stipulate that risk above a certain threshold will no longer be insured provided that such article does not conflict with any mandatory provisions under French law.

**11. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

French PPP legislation does not expressly

<sup>18</sup> It should be bear in mind that this risk is the main feature of concession agreements and is the main criteria to distinguish concession agreements and partnerships contracts.

<sup>19</sup> For example, French Administrative Supreme Court, 28 April. 1939, *Cie des chemins de fer de l'Ouest*, Rec. CE 1939, p. 275, RDP 1940, p. 58, concl. Josse (see: *Le Lamy Droit Public des Affaires* 2015, No. 2845)

<sup>20</sup> Article 89.

<sup>21</sup> Article 56.

provide that step-in clause or substitution mechanisms have to be included into PPP agreements.

However, in practice, substitution mechanisms are provided by the direct agreements usually entered into force between the lenders and the public authority. Indeed, in this type of agreement, it is often provided that lenders are allowed to request, under certain circumstances and with prior approval of the public authority, the private entity's substitution.

As regards concession agreements, pursuant to French administrative case law, in cases of early termination, the public authority substitutes the private entity to ensure that the public service is still provided to users (in compliance with the public service continuity principle)<sup>22</sup>.

**12. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

Under French Administrative law, arbitration procedures are not authorized for public authorities. This prohibition is a general principle of French public law<sup>23</sup>, but there are some legal exceptions<sup>24</sup>.

As regards concession agreements, according to a decision from the French Administrative Supreme Court dating back from 1966, the parties are not allowed to set arbitration provisions in the concession agreements<sup>25</sup>.

<sup>22</sup> Conseil d'Etat 19 décembre 2014, No. 368294, AJDA 2014. 2503.

<sup>23</sup> French Administrative Supreme Court, Opinion, 6 March 1986 No. 339710.

<sup>24</sup> Exceptions are listed in Article L. 311-6 of French Code of Administrative Justice.

<sup>25</sup> French Administrative Supreme Court, 20 May 1966, *Sieur Meunier*, No. 58839, Rec. CE 1966, p. 343.

However, regarding to the recent evolution in the legislation<sup>26</sup> it is not certain that such prohibition is still effective.

Partnership contracts are one of the legal exceptions given that arbitration procedure can be provided for by the agreement. Under Article 90 of the Public Procurement Ordinance, arbitration procedure can be used to settle disputes arising during the performance of the partnership contract. However, it is specified that only French law can apply to the arbitration procedure and, when the public authority is the French State Article 90 states that the arbitration procedure has to be authorized by decree.

PPP agreements are always governed by French law and parties cannot agree otherwise<sup>27</sup>.

**13. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

French legislation does not provide for regular market testing procedure. However, according to the freedom of contract principle, such test may probably be included in a PPP agreement.

**14. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

The acceptance procedure is ruled by the

<sup>26</sup> As regards specifically the French legislation regarding the partnership contracts (i.e. Article 9 of the Public Procurement Ordinance).

<sup>27</sup> Article 9 of the Public Procurement Ordinance and Article 8 of the Concession Agreement Ordinance provide that the listed public authorities are subjected to the Ordinances provisions when they use PPP agreements.

provisions of the French civil code<sup>28</sup>.

Under these provisions, the acceptance of the work (*réception*) is the act by which the owner of the work declares that he accepts the work with or without reservation.

The acceptance occurs at the demand of the more diligent party, if not amicably, then judicially. In any case, it is a unilateral act of the owner which shall be pronounced adversarial.

The perfect completion period (*garantie de parfait achèvement*) is a period of one year, after the acceptance of the works.

#### **15. Are there any expected changes or reform to the existing legislation?**

The transposition of the European directives pertaining to concession agreements and public procurements has substantially modified the existing French PPP laws which that included several distinct legal regimes with strong specificities (i.e., administrative long-term leases, temporary occupation permits, partnership contracts and concession agreements).

While preserving certain specificities of French law, the new provisions, aim to simplify, clarify and unify the existing legal framework governing the award and implementation of concession and partnership contracts in accordance with recent French and European case law.

As regards the recent and major reform of the French PPP legal framework, no substantial changes are expected in the near future.

However, it should be noted that to further clarify the legal regime which applies to public law contracts, the French Economy Ministry decided to seize the opportunity provided for

by the 2014 European directives transposition to simplify the French Public Procurement Code and to prepare a new code encompassing all public law contracts (including partnership and concession agreements) that should be published in the next few months<sup>29</sup>.

### **FINANCING & INCENTIVES**

#### **16. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

Under a concession agreement, the operating risk is transferred to the concessionaire and this transfer necessarily implies a real exposure to market fluctuations. As such, the compensation of the concessionaire is linked to the results of such operation. Therefore, the concessionaire's compensation mainly arises from service users<sup>30</sup>.

However, this requirement does not prevent the payment of subsidies by the procuring authority. Given the requirements that could be imposed by the concession agreement, maintaining the financial viability and economical balance of the concession agreement is necessary so that the concessionaire does not apply higher rates to service users. For example, significant financial contributions are paid in concession projects related to rail infrastructure such as high-speed rail and motorways. Local authorities usually subsidize public transport or school catering concessions.

Apart from the revenue collected from service users and subsidies granted by public authorities, the concessionaire may also earn

<sup>28</sup> Article 1792-6 of the French Civil Code.

<sup>29</sup> <http://www.boamp.fr/Espaceacheteurs/Actualites/Calendrier-de-la-reforme-des-marches-publics-2016>.

<sup>30</sup> Article 32 of the Concession Agreement Ordinance.

additional revenues (e.g., proceeds from side activities such as advertising and fines).

As regards partnership contracts, they are characterized by the payment of rents by the public authority to the private partner<sup>31</sup> throughout the term of the contract. This remuneration is determined for the services provided by the private entity (works, intangible investments, supplies and services) and is divided into several parts. One part represents the compensation of the private entity for the supply of equipment and the cover costs for servicing the loans contracted to carry out the investment, financing costs, taxes and fees that the private entity pays on its investments. The compensation also takes into account the services provided by the private partner. Finally, the compensation of the private entity must cover the maintenance costs and expenses for major maintenance and the renewal of certain infrastructures.

Partnership contracts should define the terms of the rents calculation and disbursement of the payment, which may be monthly, quarterly or half-yearly.

Under partnership contracts, the compensation is not necessarily fixed as it can take into account:

- (a) the completion of performance objectives – the compensation of the private entity may depend on performance targets set in the partnership contract. Premiums or bonuses may be paid (e.g., if the works are completed before the date specified in the contract). Likewise, penalties (e.g., in case of a delay in completion) may reduce the amount of the rent to be paid by the public authority; and
- (b) the collection of ancillary revenues – French law allows the private entity to

develop structures and equipment in order to benefit from complementary incomes.

Finally, the Public Procurement Ordinance specifies that should a partnership contract include the transfer of a public service management, the contractor could receive direct payments from service users on behalf of the public authority responsible for this public service. As such, the cash flows of each party will have to be clearly distinguished in order to avoid any confusion with the legal framework applicable to concessions.

**17. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

There is no guaranteed rate of return or a cap on the rate of return for the project company or sponsors under French law. However, pursuant to the freedom of contract principle, such a mechanism may be included in PPP agreements.

**18. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

There are no state guarantees per se issued for PPPs in France.

However, in early 2009, the State established a guarantee system for priority PPP projects in response to the financial crisis, which was affecting a number of very large PPPs. The Fin Infra examined four projects worth a total of over €13 billion, but only one project – under a concession agreement scheme – was selected to benefit from the guarantee: the high-speed railway – *Sud Europe Atlantique* – which was the biggest rail PPP ever launched in Europe (with total financing of €7.8 billion). This concession agreement was granted by

<sup>31</sup> Article 83 of the Public Procurement Ordinance.



*Réseau Ferré de France* to a consortium led by VINCI and the State guaranteed a €1.06 billion senior secured debt to the lenders.

Unlike the State, local authorities may guarantee loans assumed by the project company under a concession agreement or a partnership contract.

**19. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

The obligations of the administration are not qualified as Treasury obligations. Furthermore, French law does not provide for separate guarantees to be granted by the Treasury to the concessionaire or the lenders. It should be noted that such guarantees are not usually provided in partnership or concession agreements. The guarantees issued to the benefit of the private partner are most of the time issued by financial institutions.

**20. Are deductions from the service and availability payments subject to a cap?**

Under the Public Procurement Decree, partnership contracts may include variation of the terms of the private entity's payment<sup>32</sup>. Furthermore, as outlined in question 16, under partnership contracts, the payment of the private entity is linked to performance objectives and therefore penalties may reduce the amount of the rent to be paid by the public authority.

It should be noted that the rent paid by the public authority may be reduced depending on the amount of ancillary revenues collected by the private entity.

**21. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

Being long-term agreements, PPP agreements often include specific clauses for the review of contractual terms, such as tariff-variation clauses, indexation clauses and meeting clauses.

Amendments can also be entered into, but only if the overall structure of the contract is not materially altered.<sup>33</sup> Administrative case law protects the co-contracting party of the administration. In fact, the economic balance of the contract must be maintained and the private co-contractor must be adequately compensated for the damages suffered.

The Concession Agreement Decree clarifies the legal framework applicable to concession agreements' amendments by setting out six circumstances in which valid modification of the concession agreement is permitted<sup>34</sup>.

For example, the Concession Agreement Decree provide that concession agreements may be amended provided that the amendment amount is less than (i) the European threshold published in the Official Journal of the French Republic and (ii) 10% of the original concession agreement<sup>35</sup>.

**22. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?**

Under French law, there is no requirement to share any gains from refinancing of the PPP project with the public authority. However, it is a common practice to include in PPP agreements refinancing gains sharing clauses. Generally, the refinancing gains sharing takes

<sup>32</sup> Article 161 of the Public Procurement Decree.

<sup>33</sup> Article 65 of the Public Procurement Ordinance.

<sup>34</sup> Article 36 of the Concession Agreement Decree.

<sup>35</sup> Paragraph 6 of the Article 36 of the Concession Agreement Decree.

account of the rate of return (*taux de rentabilité interne*) and the term of the contract<sup>36</sup>.

**23. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

The public authority (including the State) may enter into direct agreements with the private party and its lenders to cover specific issues (cancellation or nullity of the concession agreement or the partnership contract) and preserve the lenders' interests.

**24. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

Both the Concession Agreement Ordinance<sup>37</sup> and the Public Procurement Ordinance<sup>38</sup> provides that the public authority may assume the useful financial expenses incurred by the private entity in case of judicial termination or the cancellation of the contract subsequent to a third party claim. However the legislation does not specify whether the payable financial expenses cover the debts of the project and in particular the full amount of equity. In any case, the parties shall agree on such a mechanism.

<sup>36</sup> Decree No. 2011-85 of 21 January 2011 approving the concession agreement entered into for the operation of the motorway A 63.

<sup>37</sup> Article 56 of the Concession Agreement Ordinance

<sup>38</sup> Article 89 of the Public Procurement Ordinance.

**25. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

The provisions for early terminations are the same for partnership contracts and concession agreements.

**(a) Termination on the grounds of general interest**

Should the public authority be a public entity, it cannot waive its unilateral right to terminate a public law contract on the grounds of general interest<sup>39</sup>. The quantum of the indemnity owed to the private entity is the highest of all termination cases.

**(b) Termination for contractual breach by the public authority**

To terminate a concession agreement on the basis of a contractual breach by the public authority, the concessionaire must request such termination before the relevant administrative jurisdiction. The concessionaire would then be entitled to be indemnified in accordance with the principles established by administrative case law, namely, to be indemnified in respect of losses suffered, as well as in respect of the loss of profits. Recent case law confirmed the possibility to include in a contract, not related to the performance of the public service, a provision allowing the private entity to terminate the contract for a contractual breach by the public authority.<sup>40</sup> Consequently, certain partnership contracts not related to the performance of the public service could potentially include such contractual provision.

<sup>39</sup> Supreme Administrative Court, 2 May 1958, Distillerie de Magnac-Laval, Rec. p. 246.

<sup>40</sup> Supreme Administrative Court, 8 October 2014, Société Grenke Location, No. 370644.

Except for these types of termination, the terms and conditions of other forms of termination can be freely negotiated by the parties.

(c) Termination for force majeure

If a force majeure event or an unforeseen event occurs, the PPP agreements may be terminated and the contract will usually provide that the private entity will be indemnified on the basis of the “useful expenses” (*dépenses utiles*) theory developed by the Supreme Administrative Court. As it is a jurisprudential theory, it is still difficult to determine which costs are deemed to be useful expenses and consequently are to be indemnified. However, financial expenses should be indemnified.<sup>41</sup>

In any case of termination, it is preferable to contractually provide the financial consequences and terms of payment of owed indemnities in the contract.

One of the major points of both the Public Procurement Ordinance<sup>42</sup> and the Concession Agreement Ordinance,<sup>43</sup> is the enshrinement of the principle of indemnification of financial expenses incurred under the partnership or the concession agreement in case of judicial cancellation following a third-party challenge.

**26. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

The Public Procurement Decree provides that

<sup>41</sup> The Supreme Administrative Court has recently held that financial expenses can be considered as useful expenses (Supreme Administrative Court, 7 December 2012, Commune de Castres, No. 351752). However, it must be specified that in this case, the concession agreement was not terminated on the grounds of a force majeure.

<sup>42</sup> Article 89 of the Public Procurement Ordinance.

<sup>43</sup> Article 56 of the Concession Agreement Ordinance.

during the awarding procedure, the public entity can introduce criteria or restrictions based on (i) the origin of all or part of the works, supplies or services offered in the tenders or (ii) on the nationality of the bidders<sup>44</sup>.

**27. Are there tax advantages available to PPP projects?**

There are no specific tax advantages available to the PPP projects provided for in the Public Procurement Ordinance and the Concession Agreement Ordinance.

**28. What are the other incentives available to PPP projects?**

There are no other incentives for the PPP projects provided for in the Public Procurement Ordinance and the Concession Agreement Ordinance.

**29. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2015?**

In France, public-private partnerships (PPPs) are implemented in many economic sectors (e.g., transport, health, justice, education, urban equipment, environment, energy efficiency, telecommunications and culture) for more than €100 billion of activity each year.

Despite a climate of ideological distrust, financial difficulties faced by some local authorities and the decreasing number of executed agreements due to the weak economic climate, a closer look at 2015 activity seems to indicate a possible renewal of confidence in PPPs for the coming year.

Indeed, even though few partnership contracts were executed in France in 2015, it should still be noted that some landmark projects were

<sup>44</sup> Article 3 of the Public Procurement Decree.

finalized that year in the education sphere: a 28-year partnership contract<sup>49</sup> for the financing, design, construction, and maintenance of a new facility for the *Ecole Centrale Supélec* near Paris and a 25-year partnership contract for the financing, design, construction, operation and maintenance of two University of Lorraine's buildings.<sup>50</sup>

With regards to concession agreements, one major agreement was executed in the transport sector: the A355 Strasbourg bypass motorway concession, consisting of approximately 24 kilometres, entered into between the State and a consortium formed by VINCI Concessions and SOC 44 on 2 February 2016. Furthermore, the new French Ministry of Defence located in Paris (whose costs reached approximately €4.2 billion)<sup>51</sup> was inaugurated in November 2015.

<sup>49</sup> [www.partnershipsbulletin.com/news/view/86417](http://www.partnershipsbulletin.com/news/view/86417).

<sup>50</sup> [www.partnershipsbulletin.com/projects/view/8875](http://www.partnershipsbulletin.com/projects/view/8875).

<sup>51</sup> [www.wsws.org/en/articles/2015/11/12/hexa-n12.html](http://www.wsws.org/en/articles/2015/11/12/hexa-n12.html)

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# GEORGIA



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### GENERAL

1. Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?

Despite having no PPP law or comprehensive Concession law, PPP model is still quite frequently used to develop infrastructure projects in Georgia.

As the practice shows, Build Operate Transfer and Build Own Operate types of PPP model are the most commonly applied ones. In sport infrastructure development Build Transfer Operate scheme is also applicable.

2. Which sectors apply a PPP model to develop infrastructure projects?

So far BOT agreements have been used for development of transport infrastructure (such as sea ports and airports); BOO is mainly used for power generation (mainly including HPPs) while BTO is considered to be applied for development/rehabilitation of sport infrastructure. In addition to transport, energy and sport infrastructure, PPP model has recently been applied for the development of

healthcare infrastructure; however, the project is on an early stage at the moment.

### LEGISLATION & REGULATION

3. What are the principal laws and regulations? Is there a framework PPP Law?

There is no framework PPP law however such law is in drafting process. Law of Georgia on the Procedure for Granting Concessions to Foreign Countries and Companies which was adopted in 1994 is less operative and is not usually applied for PPP projects as described above. The law defines concessions as “long-term lease agreements” and seems to be limited to natural resources and activities related thereto. Moreover, the law contains very few provisions regarding the selection of the concessionaire and provides for the adoption of regulations in this respect. Despite this, no regulations can be identified. Despite the existence of certain positive elements, the law does not constitute a sufficiently solid legal ground for the development of PPP.

Due to this, almost all PPP projects implemented or initiated so far are regulated by the resolutions of the government of Georgia adopted mainly on case-by-case basis. Despite this, for certain fields where number

of PPP projects has been implemented, the government has adopted framework resolutions providing rules applying to PPP projects in those particular fields only. For example, resolution N 214 of the Government of Georgia dated August 21, 2013 approved the rules for expression of interest in technical-economical examination, building, owning and operation of electric plants in Georgia.

Power of the government to take decision on disposal of state-owned property for the means of implementing PPP projects is derived from the Law of Georgia on State Property.

Recently the government repeatedly expressed its willingness of development of PPP in Georgia by adopting PPP Policy Document on June 6, 2016. The Policy Document explains the background of application of PPP concept in Georgia and need of further development of thereof. The Document provides the models of public-private partnership, the main principles of such cooperation and the means of state support of such projects. According to the Policy Document, PPP projects will be implemented according to the predefined procedures, including the stage of project initiation, preparation of project, bidding procedures or making direct agreements.

**4. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

There is no principle regulatory body for PPP however in practice it is the government of Georgia in cooperation with the respective ministries (agencies) which regulates PPP matters and designates bodies (or special commissions) for the particular large PPP projects.

According to the recently adopted Policy Document, there shall be developed institutional system for the purpose of

identification, forming, assessment, approval, financing and monitoring of PPP projects. The new centralized authority will be accountable to the government and will have a leading role in management of PPP projects.

**5. Are there any restrictions for foreign investors to develop/operate PPP projects?**

There are no such restrictions.

**6. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

Usually dates for the completion of construction are prescribed in the project agreements. Moreover, in most cases the long-stop dates are envisaged in the requests of expression of interest on the particular project.

**7. How are force majeure events defined, and what are the consequences of their occurrence?**

There is no pre-defined or model force majeure clause. Thus, there is no uniform definition of force majeure events.

Rather standard clause envisaged in one of PPP project agreements reads as follows:

*“Party shall be deemed not to be in default or in breach of any obligation under this Agreement if and to the extent that such failure is caused by any Force Majeure Event. ... The affected Party shall use all reasonable efforts to mitigate and minimize the effects of any occurrence or re-occurrence of any Force Majeure Event on the performance of its obligations under this Agreement... The effected Party shall promptly notify the other Party of any Force Majeure Event and any relief from performance claimed by the affected Party. The affected Party shall promptly notify the other Party of the end of any Force Majeure Event and the effects thereof upon the performance of the affected Party, and of the steps taken in accordance with Clause XXX and progress with those steps. If it is agreed or*

*determined that a Force Majeure Event has occurred and that Force Majeure Event (or the consequences thereof) has existed for a continuous period in excess of eighteen (18) months, and is still continuing then either Party may, for as long as the circumstances referred to in Clause XXX continue, terminate this Agreement by notice to the other and such termination shall take effect on a date one (1) month thereafter unless during that one (1) month notice period the circumstances referred to in Clause XXX cease to apply (in which case the notice shall be treated as null and void). ..."*

**8. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

As mentioned, until the adoption of PPP law, there is no comprehensive legal framework for most of the matters particularly for PPP projects. Thus, allocation of risks is either provided in the project agreements or they are regulated according to the general rules applicable to protection of ownership (Constitution and Civil Code of Georgia) as well as by the Law of Georgia on Promotion and Guarantees of Investments.

The law provides that "during implementation of investment and entrepreneurial activities, rights and guarantees of foreign investors may not be less than rights and guarantees enjoyed by natural and legal persons of Georgia". The law further provides:

*"1. Investments shall be fully and unconditionally protected by the legislation of Georgia*

*2. Deprivation of an investment may take place only in cases directly determined by law, by court decision and upon urgency determined by the organic law and only with appropriate compensation.*

*3. Decision on deprivation of investments as well as terms of compensation may be appealed to the courts of Georgia unless otherwise provided in the agreement between the parties or in the international agreements of*

*Georgia."*

In practice as well, PPP project agreements provide for compensation in case of expropriation.

As concerns the change in law, one of PPP project agreements provides the following:

*"if [investor] suffers damages, losses or cost overruns that are directly attributable to a Change in Law, [investor] shall be entitled to payment of such damages, costs or losses, or [public body] avails to [investor] such other protection that leaves [investor] in no better and no worse a position following such Change in Law, at [public body's] sole discretion. [Investor] shall notify [public body] of its right to claim pursuant to this Clause promptly and, in any event, within 6 months of becoming aware of the act, omission or circumstance that gives right to make such Claims."*

As concerns the adverse court decisions, both the law and project agreements are usually silent on this.

**9. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

The law is silent on this. This matter is regulated by project agreements to certain extent. For example, one of the project agreements reads as follows:

*"[Investor] shall procure that any Lenders shall agree not to prevent the utilisation of Insurance Proceeds in reinstatement and/or replacement, subject only as provided in the Lender Direct Agreement. If any Lenders exercise their rights under the Lender Direct Agreement to use the Insurance Proceeds in discharge of any indebtedness under the any other funding document approved by [public body] for the purposes of this Agreement, [public body] shall have the right to terminate this Agreement by notice with immediate*

*effect to enable it to comply with its obligations to reinstate in accordance with paragraph XXX.”*

**10. Is the concept of ‘uninsurability’ recognized in the project agreements?**

Yes. Usually uninsurable risks are defined as the Insured Risks in respect of which insurance cover is no longer available in the worldwide market.

**11. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

Yes, such option is prescribed by the law. Project agreements also provide for the right of step-in.

**12. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

Yes, international arbitration is available for the settlement of disputes under the project agreements and direct agreements with lenders. Most frequently ICC option is applied.

As concerns the application of foreign law as the governing law, it is negotiable on case-by-case basis; however, to our best knowledge Georgian law is a governing law for most of the agreements.

**13. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

The law does not envisage the procedure of market testing and we are not aware of any

project agreement providing for it.

**14. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

As the law does not provide general framework for this, method of acceptance of the facilities is worked out on case-by-case basis; however, in practice independent technical advisers as well as project companies are involved in the acceptance process and it is not performed only by the public authority.

**15. Are there any expected changes or reform to the existing legislation?**

Yes. As mentioned above, the government of Georgia in cooperation with EBRD and other international financial institutions is currently working on draft PPP law which is expected to provide comprehensive legal framework for PPP projects.

## FINANCING & INCENTIVES

**16. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

While the law is silent on payment mechanisms, inflation and/or foreign exchange, these matters are regulated on case-by-cases through the project agreements.

**17. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

There is no guaranteed rate of return or a cap on the rate of return, as far as we are aware.



**18. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

There is no such payment guarantees prescribed by the law; however, payment options may vary on case-by-case basis through the project agreements.

**19. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

It much depends on the structure of the project and which public sector representative (public authority/public company/fund) is the party to the project agreement. There is no unified approach towards the matter.

**20. Are deductions from the service and availability payments subject to a cap?**

They may be; however again, it is agreed on case-by-case basis, depending on the nature of project and the sector in which the project is implemented.

**21. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

Yes.

**22. Is there a requirement to share any gains arising from refinancing of the PPP project-with the public authority?**

There is no fixed requirement; however, it may be in specific projects.

**23. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

We are not aware of a project where the lenders signed a direct agreement with the relevant public authority. One of the project agreements provided for the following: “[public body] will enter into a Direct Agreement with Lenders (if any) for the purpose of financing the relevant part of the Works if reasonably required by the Lenders” however to our best knowledge, no such agreement has been signed.

**24. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

The law does not provide such mechanism. As concerns the practice, we are not aware of a case when the public authority undertook to assume the debts of the project company to the lenders.

**25. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

Again, there are no unified rules for such occurrences however in one of PPP project agreements it is provided as follows:

*"If the agreement is terminated due to the breach by the public authority, the private investor will be entitled to terminate the agreement and will receive the payment the Debt Amount; Hedging Amount; the Adjusted Equity Amount; and Termination Liabilities less the Termination Deductions.*

*If the agreement is terminated due to the force majeure, termination payment will be the Debt Amount + the Hedging Amount + ((Existing Equity Amount + the Initial Works CAPEX) \* XXX% - Termination Deductions - any Rectification Costs).*

*If the agreement is terminated due to the breach by private party, the Termination Payment shall be a positive amount equal to the aggregate of the Debt Amount and the Hedging Amount less the Termination Deductions."*

**26. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

Generally, there are no rules regulating this matter at this stage of development of PPP laws in Georgia; however, such specific terms may be prescribed for particular projects and be envisaged in government resolutions and/or in EOI document.

**27. Are there tax advantages available to PPP projects?**

At this stage no tax advantages are available; however, as per our knowledge, tax advantages may be prescribed by the PPP law which is to be adopted.

**28. What are the other incentives available to PPP projects?**

At this stage no particular incentives are available; however, as per our knowledge, certain incentives may be prescribed by the PPP law which is to be adopted.

You can also find various incentives for the development of particular projects on case-by-case basis according to the government resolutions.

**29. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2015?**

There is no official statistics separately for PPP projects. As noted, the most frequent PPP projects are implemented in sphere of energy and infrastructure. Total amount of investments for the ongoing and already implemented projects is more than USD 1 billion.

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# GUINEA<sup>1 2</sup>



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## GENERAL

1. **Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

In order to support sufficient economic growth and reduce poverty, the Republic of Guinea uses PPP agreements to address the country's substantial needs and to develop major new infrastructure and rebuild existing ones, especially in the sectors of mining, agriculture and services.

Since 1998<sup>3</sup>, a specific legal framework has been implemented for build-operate-transfer

(the “BOT”) agreements, which are types of PPP agreements. Agreements pertaining to the “Financing, Building, Operating, Maintenance and Transfer” of infrastructure<sup>4</sup> can be entered into by public authorities and private parties.

In a BOT project, a public entity authorizes to a private company the right to develop and operate a facility for a limited period. This company finances, owns and constructs the facility and operates it commercially for the project period. Usually, this type of agreement is used for building new infrastructures.

2. **Which sectors apply a PPP model to develop infrastructure projects?**

The PPP model is used in all economic sectors for the development of infrastructure and the management of public services. This includes among other things: hydro power infrastructure (dams and plants), mining infrastructure, transport infrastructure (roads, harbours, railways, and airports), telecommunication infrastructure, agricultural facilities, public facilities, tourist infrastructure and social infrastructure such as education and health.

<sup>1</sup> The authors are French lawyers registered at the Paris bar. The answers to the questionnaires relating to Senegal, Morocco, Guinea and Ivory Coast are based on their knowledge of the applicable regulations and on their experience of PPPs projects implemented in these countries. The accuracy of these answers remains however subject to the confirmation by lawyers duly registered in the said countries

<sup>2</sup> The authors would like to thank Hugues Martin-Sisteron (member of the Paris Bar Association), Diane Houriez and Salimatou Kaba for their help in the preparation of this questionnaire.

<sup>3</sup> Law No. 97/012/AN dated 1 June 1998.

<sup>4</sup> Article 1.1 of Law No. 97/012/AN.

Pursuant to the Guinean Public Procurement Code, public service delegation agreements can be entered into in all sectors where public services are, or are supposed to be, managed.

Since 1990, private sector participation in infrastructure, totalling US\$ 1.3 billion, has been concentrated in the telecoms sector through divestitures and new projects implementation<sup>5</sup>. However, major PPP transactions have also taken place in the transport<sup>6</sup>, mining, water and electricity sectors.

## LEGISLATION & REGULATION

### 3. What are the principal laws and regulations? Is there a framework PPP Law?

In order to facilitate the development of infrastructure projects, the Republic of Guinea enacted Law No. 97/012/AN dated 1 June 1998 (the “BOT Law”) authorizing the private sector to finance, build, operate, maintain and transfer infrastructure. Indeed, public authorities can enter into different types of BOT agreements, such as build-and-transfer agreements (BT), develop-operate-and-transfer agreements (DOT) and rehabilitate-own-operate agreements (ROO).<sup>7</sup>

The PPP legal framework is complemented by the Guinean Public Procurement Code (the “Public Procurement Code”) enacted by Decree 2012/128/PRG/SGG dated 3 December 2012. This Code regulates public procurement contracts, including a specific type of PPP agreement, the “public service delegation agreements” (a type of concession agreement).

This type of agreement, usually authorized in relation to existing assets or an existing utility, gives a concessionaire a long term right to use all utility assets conferred, including responsibility for operations and some investment. The concessionaire bears the risk for the condition of the assets and for investment.

### 4. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?

Except for public service delegation agreements, there is no dedicated regulatory body for PPP agreements.

As regards public service delegation agreements, the regulatory body is the Regulatory Authority of Public Procurement Contracts (“*l’Autorité de Régulation des Marchés Publics*”).<sup>8</sup>

This body is responsible for, among other things, ensuring regular application of the Public Procurement Code provisions, drafting and updating methodological handbooks for potential bidders and public authorities, setting up a data bank of public procurement contracts and controlling company certification procedures.

In addition to this regulatory body, there exists:

- The National Public Procurement Contracts Directorate. Its main mission is to implement the contract awarding process. It is exclusively responsible for receiving and opening the bids, evaluating them, selecting a temporary private entity and sending its choice to the Ministry of Finances for approval.<sup>9</sup>

<sup>5</sup> <http://ppi.worldbank.org/snapshots/country/guinea>.

<sup>6</sup> Such as a 25-year port concession agreement for the Conakry container terminal.

<sup>7</sup> Article 1 of the BOT Law.

<sup>8</sup> Chapter 3 of the Public Procurement Code.

<sup>9</sup> Article 9 of the Public Procurement Code.

- The Public Procurement Contracts and Major Projects Administration (*“Administration et Contrôle des Grands Projets et des Marchés Publics”*), an entity directly under the control of the Guinean President<sup>10</sup>. It is in charge of controlling the regular application of the public procurement laws and the public procurement contracts awarding procedure and performance.<sup>11</sup>

**5. Are there any restrictions for foreign investors to develop/operate PPP projects?**

The legislative framework for PPPs does not place any restrictions on foreign investors.

Nevertheless, it should be noted that in relation to public service delegation agreements, a criteria of national preference can be taken into account in the selection of the tenders in order to support the domestic Guinean economy.<sup>12</sup>

For example, during the bid evaluation phase the public authority can decide to apply an increasing percentage on the price of tenders by foreign bidders.

**6. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

Guinean PPP legislation does not impose a long-stop date for the completion of construction in BOT agreements.

However, the BOT Law does provide that BOT agreements are entered into for a period determined by the depreciation period of the selected investments, financing terms and the type of construction and services to be

performed.<sup>13</sup> The period must also be determined in accordance with a feasibility study.

It is common practice that the parties would determine specific clauses pertaining to a maximum duration for the construction in the contracts.

As regards public service delegation agreements, the period of the contract as well as the schedule for the completion of each step must be defined under contractual provisions.<sup>14</sup>

**7. How are force majeure events defined, and what are the consequences of their occurrence?**

Guinean PPP legislation does not especially provide for the consequences of a force majeure event occurring during the performance of BOT agreements. It only states that contract duration can be modified in case of a force majeure event<sup>15</sup>.

In relation to public service delegation agreements, the Public Procurement Code<sup>16</sup> defines a force majeure event and the consequences of its occurrence. It states that a force majeure event occurs when: there is a practical difficulty which is due to causes outside of the private entity's control and which hinders the private entity in fulfilling its contractual obligations

As the Guinean PPP legislation does not provide for all the potential consequences of a force majeure event occurring, the parties are free to agree on the consequences of this type of event in respect of the other provisions of the agreement (i.e. early termination, etc.)

<sup>10</sup> Article 10 of the Public Procurement Code.

<sup>11</sup> Articles 11 and 12 of the Public Procurement Code.

<sup>12</sup> Articles 65 and 66 of the Public Procurement Code.

<sup>13</sup> Article 12 of the BOT Law.

<sup>14</sup> Article 85 of the Public Procurement Code.

<sup>15</sup> Article 12.2 of the BOT Law.

<sup>16</sup> Article 109 of the Public Procurement Code.

**8. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

The Guinean State provides that a list of guarantees<sup>17</sup> may be awarded to private party to limit the consequences of political and legal changes which could directly impact upon the PPP agreement's performance and economic rationale.

For example, the State ensures unrestricted importation of equipment and supplies<sup>18</sup>, free movement of capital necessary for the project implementation<sup>19</sup> and subsidies if the services to be provided under the BOT agreement cannot be sold at the price defined in the agreement.<sup>20</sup>

In relation to public service delegation agreements, the legislation does not provide any specific political and legal risk allocation.

In any case, parties can agree on the consequences of certain risks occurring as long as it complies with the BOT Law's provisions pertaining to risk guarantees.

**9. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

Under Guinean legislation no reinstatement test is provided. Pursuant to the freedom of contract principle such a test may be included in BOT agreements. However in practice, public entities are keen to reinstate the facilities rather to repay debt to the lenders.

<sup>17</sup> Article 7 of the BOT Law.

<sup>18</sup> Article 7.2.1 of the BOT Law.

<sup>19</sup> Article 7.2.4 of the BOT Law.

<sup>20</sup> Article 7.2.13 of the BOT Law.

**10. Is the concept of 'uninsurability' recognized in the project agreements?**

The concept of "uninsurability" is not specifically defined or provided for under Guinean legislation. However, the parties can freely stipulate that risk above a certain threshold will no longer be insured provided that such article does not conflict with any mandatory provisions under Guinean law.

**11. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

In cases of early termination, the lenders can ask the public authority to substitute the private entity for a third party if such a party is able to ensure proper performance of the contract and is qualified enough to carry out the PPP project.<sup>21</sup>

**12. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

Guinean PPP legislation allows BOT agreements to stipulate that disputes can be settled through international arbitration<sup>22</sup>. Arbitration clauses in BOT agreements will need to set out this procedure (e.g. seat of arbitration, language of the arbitration, procedural law applicable).

Parties can choose the law that governs the contract. If no specific governing law is chosen by the parties then Guinean law applies automatically.

In relation to public service delegation agreements, the Public Procurement Code

<sup>21</sup> Article 12.6 of the BOT Law.

<sup>22</sup> Article 13 of the BOT Law.

does not expressly specify that arbitration procedure can be used to settle disputes. However, in the case of a dispute arising during the contract's performance, prior to any judicial or arbitral remedy, the private entity has to first seek remedy from the public authority or a higher administrative authority<sup>23</sup>. Therefore, we can assume that it is possible for parties to public service delegation agreements to choose an international arbitration procedure to settle potential disputes.

Finally, the Public Procurement Code does not expressly provide that foreign laws can govern contracts.

**13. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

The Guinean PPP legal framework does not provide for a regular market testing procedure to procure the services to be provided by the private entity.

Such a test is also not provided for in public service delegation agreements or BOT agreements.

However, in accordance with the freedom of contract principle, such a test may be included in the contracts entered into between the private entity and its subcontractors (i.e. with the contractor and/or the operator).

**14. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

Guinean PPP legislation does not provide a specific acceptance procedure once the construction works of the infrastructure is

completed. However, parties can freely include a particular procedure under the PPP agreement provisions.

Under the Guinean Building and Housing Code (*Code de la Construction et de l'Habitat Guinéen*), a technical control has to be done<sup>24</sup> and an acceptance procedure has to be performed<sup>25</sup>. The acceptance phase consists in a contradictory procedure involving the construction contractor (*entrepreneur*) and the project owner (*maître d'ouvrage*).<sup>26</sup>

**15. Are there any expected changes or reform to the existing legislation?**

Although Guinea has a framework PPP law (the BOT Law), the use of PPP agreements is not widespread among public authorities. This may be due to the lack of guidelines, the absence of a strategic framework with clear political support and sufficient expertise for the technical structuring of such agreements and projects.

The solution to this problem would be to strengthen the capacity of public authorities to plan, coordinate and implement projects.

It should be pointed out that, pursuant to Decree dated 17 October 2014 and following a formal request from the Guinean President, Alpha Condé, the Presidential Council about Investments and Public Private Partnership ("*Conseil Présidentiel des Investissements et des partenariats publics et privés*")<sup>27</sup> has been implemented.

This new entity, acting under the President authority, is supposed to promote a direct dialogue between the State, the private sector and the civil society to identify and remove

<sup>23</sup> Articles 133 and 134 of the Public Procurement Code.

<sup>24</sup> Articles 43 to 45 of the Guinean Building and Housing Code.

<sup>25</sup> Articles 46 to 48 of the Guinean Building and Housing Code.

<sup>26</sup> Article 46 of the Guinean Building and Housing Code.

<sup>27</sup> Article 1 of Decree dated 17 October 2014.

barriers to investment in the country.<sup>28</sup> In light of this we can expect future changes to the Guinean PPP legal framework based on the work and recommendations of the Presidential Council about Investments and Public Private Partnership.

## FINANCING & INCENTIVES

### 16. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?

Under BOT Law<sup>29</sup>, the payment of the private entity is provided either by the public authority or by the users (royalties, fees and other cost under the usage tariffs).

In respect of public service delegation agreements, the Public Procurement Code provides that payment of the private entity comes from the revenues generated from operating the project.<sup>30</sup>

Finally, as regards inflation and/or foreign exchange protection and pursuant to the BOT Law<sup>31</sup>, the public authority guarantees to foreign investors the free transfer of (i) the income generated by their investments; (ii) the dividends due to foreign shareholders; and (iii) the liquidation proceeds of such investments.

### 17. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?

The BOT Law refers to a rate of return (*taux de rentabilité raisonnable*) for BOT agreements that shall not exceed 12% unless otherwise agreed<sup>32</sup>. There is no similar provision in the Procurement Code. However, in accordance

with the freedom of contract principle, such a mechanism may be included in public service delegation agreements.

### 18. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?

Under the BOT Law<sup>33</sup>, the public authority undertakes to provide a payment guarantee (*subvention d'équilibre*) to the private entity in the event that the services under BOT agreements are sold locally at lower prices than those provided for in the PPP agreement.

### 19. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?

The obligations of the administration are not qualified as Treasury obligations. Furthermore, Guinean law does not provide for separate guarantees to be granted by the Treasury to private entities. It should be noted that such guarantees are not usually provided for in BOT agreements. The guarantees provided for the benefit of the private partner are mainly given by financial institutions.

### 20. Are deductions from the service and availability payments subject to a cap?

Deductions from the service and availability payments are not specifically provided for under the BOT Law. However, such clauses can be included in BOT agreements in accordance with the freedom of contract principle.

In respect of public service delegation agreements, the Public Procurement Code<sup>34</sup>

<sup>28</sup> Article 2 of Decree dated 17 October 2014.

<sup>29</sup> Article 1.3 of the BOT Law.

<sup>30</sup> Article 1 of the Public Procurement Code.

<sup>31</sup> Article 7.2.4 of the BOT Law.

<sup>32</sup> Article 1.23 of the BOT Law.

<sup>33</sup> Article 7.2.13 of the BOT Law.

<sup>34</sup> Article 1 of the Public Procurement Code.



provides the private entity' payment is substantially provided by the revenue generated by operation of the service but neither specifies whether deductions from service payments can be provided. In practice, such clauses are included by the parties in public service delegation agreements.

**21. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

Guinean law is silent on the question of whether variations may be subject to a cap. However, in accordance with the freedom of contract principle, the parties may agree to such a cap.

**22. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?**

There is no requirement to share any gains arising from refinancing of the PPP project with the public authority under Guinean law. However, in accordance with the freedom of contract principle, gains sharing clauses may be agreed by the parties.

**23. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

There is no requirement to enter into direct agreements under Guinean law. However, as outlined in question 11, the BOT Law<sup>35</sup> authorizes lenders substitution rights in case of termination of BOT agreements.

It should be noted that in general under direct agreements, the lenders will be entitled to intervene or "step-in" the shoes of the project company or the contractors in respect of the key project agreements. The step-in rights are usually triggered when either the project

company or the contractors have defaulted or there is reasonable belief that they will default in the near future. Step-in-clauses allow the lenders to take over the project company, the project itself or to obtain control rights to make decisions on behalf of the project company. Thereafter, the lenders may take over the project or appoint a professional third party to take over the project.

**24. Is there a debt assumption mechanism whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

Neither the BOT Law, nor the Public Procurement Code provide for a debt assumption mechanism whereby the public authority undertakes to reimburse the debt of the project company to the lenders. However, in accordance with the freedom of contract principle, such a mechanism may be included in BOT agreements.

**25. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

The BOT Law<sup>36</sup> only provides for payments to be made by the public entity to the project company in case of termination for a reason of national defence. However, in accordance with the freedom of contract principle, other cases of termination may triggers payments to be discharged by the administration to the private entity.

<sup>35</sup> Article 12.6 of the BOT Law.

<sup>36</sup> Article 12.5.2 of the BOT Law.

Besides, it should be also noted under the BOT Law<sup>37</sup>, the public authority guarantees a proper compensation to the private entity in case of early handover.

**26. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

There is no incentive for domestic manufacturing of equipment or materials used in the construction of PPP projects under the BOT Law.

However, in respect of public service delegation agreements and as outlined in question 5 above, a “national preference” percentage can be applied during the selection of the tenders which takes account of domestic manufacturing of equipment.<sup>38</sup>

**27. Are there tax advantages available to PPP projects?**

The BOT Law<sup>39</sup> provides that the private entity is exempted from any tax or customs royalties and guarantees a stable tax regime. There is no similar provision in the Public Procurement Code.

**28. What are the other incentives available to PPP projects?**

The BOT Law<sup>40</sup> guarantees to the private entity the benefit of all incentives granted under the Guinean Investment Code.

Furthermore, in respect of large investments implemented in sectors of particular importance to the national economy and public interest, the BOT Law<sup>41</sup> provides full

exemption from taxes, a reduced VAT as well as pricing structure similar to the one applicable to oil products.

Finally, in addition to financial incentives, the BOT Law<sup>42</sup> provides to the private entity a full range of incentives, including the freedom to choose subcontractors, freedom to import goods, materials, equipment, machinery, equipment, spare parts and consumables and all the necessary public permits and authorizations required to implement the PPP project.

**29. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2015?**

Although infrastructures development is one of the key priorities of the Guinean State, it should be noted that investments in PPP projects have been relatively minor up to 2012. However, since then a number of major projects have been developed in Guinea. For example, the rehabilitation and the extension of electricity network of Conakry<sup>43</sup>. A major PPP project, namely the 240 MW Kaleta hydro power plant was also inaugurated in 2015.

<sup>37</sup> Article 7.2.12 of the BOT Law.

<sup>38</sup> Articles 65 and 66 of the Public Procurement Code.

<sup>39</sup> Article 10 of the BOT Law.

<sup>40</sup> Article 9.3 of the BOT Law.

<sup>41</sup> Article 9.6 of the BOT Law.

<sup>42</sup> Article 7.2 of the BOT Law.

<sup>43</sup> [http://www.africaneconomicoutlook.org/fileadmin/uploads/aeo/2015/CN\\_data/Cn\\_Long\\_FR/Guinee\\_2015.pdf](http://www.africaneconomicoutlook.org/fileadmin/uploads/aeo/2015/CN_data/Cn_Long_FR/Guinee_2015.pdf).

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# HUNGARY



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## LAKATOS, KÖVES AND PARTNERS

### GENERAL

- 1. Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

PPP model is currently not a model favoured or used for new projects in Hungary. In the mid-2000s the Build-Operate and the Build-Operate-Transfer models were the most frequently used models. When the financial-crisis hit Hungary, the government announced a moratorium on PPP projects and initiated a review of the existing PPP contracts.

Considering that the PPP model is currently not used for new projects in Hungary, our answers relate to existing PPP agreements entered into several years ago.

- 2. Which sectors apply a PPP model to develop infrastructure projects?**

In the early-mid 2000s Hungary applied the PPP model most notably in highway construction, for example in the constructions and refinancing of the M5 and M6 motorways.

The PPP model was also used in other infrastructure projects, such as the building and operation of prisons. Between 2002 and the beginning of the financial crisis the development of transport, educational, sports and social infrastructure became a main policy goal, as the state lacked the necessary resources needed for the implementation, it was decided to use the PPP model to implement these projects. With the benefit of hindsight it can be seen that some of these projects were successful, such as the motorways, and some others, such as the recreational and educational facilities, have proven to be too expensive for the State.

### LEGISLATION & REGULATION

- 3. What are the principal laws and regulations? Is there a framework PPP Law?**

As there is no official definition of PPP in Hungarian law, no clear distinctions can be made when categorising a project as a PPP project. Hungary does not have a separate PPP law establishing the framework for PPP projects. The following key legal acts may be relevant depending on the characteristics of the project.

- Act CXLI of 2015 on Public Procurement;
- Act XVI of 1991 on Concessions; and
- Act V of 2013 on the Civil Code.

**4. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

In contrast to some other European countries, there is no centralized PPP authority in Hungary. The PPP projects were usually ordered and supervised by the relevant ministries, most frequently by the Ministry of National Economy.

**5. Are there any restrictions for foreign investors to develop/operate PPP projects?**

Hungary, being a member of the EU, has no general restrictions applying only to foreign investors. In the projects initiated in the 2000s a wide range of foreign players participated (e.g. Strabag, Mota-Engil, Hochtief, etc.). Since the changes of government in 2010 the environment has been generally negative towards PPP structures. To the extent that infrastructure projects have been effected the contractors have more frequently been local players.

The only real limitation is that under the Hungarian Fundamental Law (i.e. constitution) and under the Act CXCVI of 2011 on the national properties of Hungary, no company may receive funds from the public budget or be granted with the right to utilize national assets which does not qualify as a "transparent company". A "transparent company" is generally a company, (i) whose beneficial owner is identifiable, (ii) whose tax residency is in the EEA, or in a country with which Hungary has a bilateral treaty on the elimination of double taxation, (iii) which is not a controlled foreign entity under the law

on corporate tax and (iv) whose shareholder with a stake of more than 25% do fall under points (i) - (iii) above. Any company whose shares are traded on an EEA countries' stock exchange is also deemed to be a "transparent company". Accordingly, if a foreign investor fails to meet the above criteria, it is questionable whether the State would be in a position to conclude a PPP agreement with it, as any PPP agreement, *per se*, may qualify as an agreement under which funds are received from the public budget and/or the right to utilize national assets is granted.

Notwithstanding, there may be certain sectoral laws/regulations which may limit foreign investors to participate in the PPP projects in certain sectors (e.g. requesting local presence, local licenses, etc.), however, these are general and common restrictions applying to everyone in the given sector.

**6. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

The PPP agreements usually contain strict deadlines requiring the investor to complete the construction within a certain period of time (combined with penalty payment obligations in case of any delay and/or a termination right to the State in case of material delay). These long-stop dates, however, are individual contractual obligations and do not derive from the legislation.

**7. How are force majeure events defined, and what are the consequences of their occurrence?**

Force majeure events are usually defined as the occurrence of the following events or circumstances:

- a. act of war (whether declared or undeclared), invasion, armed conflict, or act of foreign enemy in each case arising

- or imminently threatened or directly affecting Hungary, and deferring or hindering the construction and/or operation of the PPP project;
- b. revolution, riot, insurrection, civil commotion, sabotage or terrorism in each case arising or imminently threatened within and affecting Hungary, and deferring or hindering the construction and/or operation of the PPP project;
  - c. strikes;
  - d. nuclear explosion, radioactive or chemical contamination or ionising radiation or biological contamination of the project sites
  - e. fire; explosion; lightning; severe storm, tempest, snow storm, snow, hail or freezing rain; flood, earthquakes; landslide; but only where it causes any material and unavoidable damage to the PPP project and/or it damages all or any material part of the project site, except if any of the above is attributed to the investor/operator;
  - f. a legally imposed quarantine, which could not be anticipated by the affected party, and therefore the affected party could not take precautions, and which prevents or delays the construction and/or operation of the PPP project;
  - g. embargo or trade sanctions having an adverse effect on the performance of the PPP agreement;

The consequence of a force majeure event, if it occurs during the construction period, is either the extension of the time available to complete the project or, if the force majeure event is continuing for more than an agreed time period (e.g. 30-60 days), either party has the right to terminate the PPP agreement (and the parties are not entitled to compensation for

any loss of income or consequential damages). If the force majeure event occurs during the operation period, the consequence is usually the termination of the agreement, however, if not terminated, the availability fee usually remains payable.

**8. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

It is usual for the investors to require the State to provide a covenant/undertaking that during the term of the PPP agreement the State will not intervene in or interrupt the project (except in extraordinary circumstances, e.g. in the event of war, riot, revolution, embargo, etc.). The breach of this obligation is considered as a 'relief event'.

Expropriation or direct change in law (adversely affecting the investment environment) is usually considered as an event of default by the State enabling the investor to terminate the agreement and claim full compensation. There are also examples when the change of law provides a right to either of the parties to request the amendment of the project agreement, the failure to agree on such amendment which enables any of the parties to terminate the relevant agreement.

In addition, Hungary is party to several bilateral investment treaties, providing additional comfort to foreign investors. In case the investor may rely on a BIT, note that the BITs usually provide protection against expropriation. In one way or another, almost all of the BITs prescribe, that Hungary may not expropriate or nationalise or adopt any other measures having equivalent effect to expropriation and nationalisation, the investment of the other contracting country's investors, unless the following circumstances are met:

- a. the expropriation, nationalisation (or any other measure having equivalent effect) is for public purpose relating to the internal needs of that contractual party;
- b. the expropriation, nationalisation (or any other measure having equivalent effect) is subject to due process of law;
- c. the expropriation, nationalisation (or any other measure having equivalent effect) is non-discriminatory; and
- d. the expropriation, nationalisation (or any other measure having equivalent effect) is followed by the payment of prompt, adequate and effective compensation.

**9. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

It is market practice to require the investor to have sufficient insurance policies in place covering both the construction and the operation risks. It is also common practice to stipulate that insurance proceeds are applied for the restitution (reinstatement) of the PPP project (unless the insurance proceeds cover consequential damages and the reimbursement of third party liability claims).

This requirement, however, is not a statutory requirement, only a common market practice.

**10. Is the concept of ‘uninsurability’ recognized in the project agreements?**

The investor shall take out and maintain insurance during the whole period, covering each phase of the PPP project. The concept of ‘uninsurability’ is not recognized in the Hungarian market as not only one particular asset but the construction and operation in its entirety is insured. The failure to maintain the

insurance is usually considered as an event of default.

**11. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

The Concession Act stipulates, as a general rule, that the concessionaire may not be substituted without the consent of the State. However, the parties may agree in the project agreement that if the concession company becomes insolvent, the funders may substitute the concession company with another concession company which becomes the legal successor of the original concession company for the purpose of the PPP project.

As mentioned above, the State’s intervention in the PPP project is generally restricted and considered as an event of default by the State. Notwithstanding, in case of default by the authorized company, the State may (depending on the subject of the project) have certain contractual rights to take over the project and substitute the authorized company with another state owned entity.

**12. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

Yes, it is possible to have any foreign law as the governing law of the PPP agreements and the parties are free to opt for any international arbitration forum as their dispute resolution forum under the PPP agreements.

Please note however that under Act CXCVI of 2011 on national properties there is general limitation regarding the State’s dealings with

any assets forming part of national property. If the subject matter of the PPP agreement would form part of the national property (whose definition is vague and subject to a case-by-case interpretation and most importantly the question what are the requirements of an agreement to relate to national property and thus to fall under the scope of this provisions remains open), there would be a risk that the following restriction would apply: in respect of an agreement relating to national property situated within the borders of Hungary, only Hungarian language, Hungarian governing law and the jurisdiction of Hungarian courts (including arbitration) could be stipulated.

Subject to these specific restrictions relating to 'national property', which are likely to be relevant for many PPP projects, there is general freedom on choice of law and jurisdiction. The reason for this is that Law Decree 13 of 1979 on Private International Law (the "Conflicts Law") and Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (the "Rome I Regulation") confer on the parties to an international contractual transaction almost total autonomy in choosing the law which is to govern such a contract, provided that the presence of a "foreign" (i.e. non-Hungarian) element in the transaction can be proven. The fact that one of the parties to the PPP agreement is a non-Hungarian resident satisfies the above requirement. Therefore, the parties to the PPP agreements may validly enter into contracts governed by, and interpreted in accordance with, any foreign law.

The same applies to the selection of an international arbitration forum as the dispute resolution forum. Considering that the parties are generally free to determine the contents of their agreements, they may also opt for international arbitration. In addition, Hungary

has also ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), therefore, as a general rule, any arbitration award granted in other member states will be recognized and enforced by the courts of Hungary (subject to the qualifications set out in the Convention), provided it is enforced in compliance with applicable Hungarian civil procedure laws and the procedures established by the Hungarian legislation on commercial arbitration for the enforcement of arbitration decisions, insofar as such award is not contrary to public policy in Hungary.

**13. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

The concession right is granted to the authorized company for a fixed period of time. During this time the authorized company enjoys an exclusive right and obligation to perform the concession related activity.

Although market testing may not be statutorily prohibited, it would most probably be considered as a breach under the relevant project agreement if not specifically envisaged in these agreements.

**14. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

The acceptance of the facilities is usually documented in an acceptance certificate. The handover procedure usually involves various technical experts, engineers and advisers. The handover procedure is organised by the project company where the representatives (and advisors) of both side are invited. During the



handover a handover protocol is recorded in which each party may make its comments and reservations. It is also common that the handover of the project occurs in different phases and thus the State has time to comment on the acceptance of the facilities performed and determine whether the project company has complied with all the requirements for the completion. In case of dispute, the parties generally refer the question to an independent expert or arbitration.

**15. Are there any expected changes or reform to the existing legislation?**

We do not foresee any changes in the foreseeable future.

## FINANCING & INCENTIVES

**16. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

All payments under the PPP projects are subject to the issuance of a written invoice and the issuance of a certificate of performance. The payment deadline for the invoice is usually 15-45 days. The operation and availability fees are usually due and payable on a monthly basis, the concession fee annually. Set-off is usually permitted.

In case of dispute, the disputing party should usually challenge the invoice with a written letter explaining the reason of the non-payment. If the parties cannot settle their dispute amicably, the dispute may be referred to an expert/arbitration by any of the parties.

No exchange control applies in Hungary. Since the Act XCIII of 2001 on Lifting Foreign Exchange Controls entered into force in June 2001 and the trade in Hungarian Forints is completely liberalised, there are no (central

bank or other) exchange controls or prohibitions on remitting or repatriation of proceeds in force in Hungary, therefore, no Hungarian regulatory approval or other consent is required for any payments to be made in either Hungarian Forints or a foreign currency.

**17. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

There are no such statutory caps. The project agreements, on a case-by-case basis, may provide for certain guaranteed return on the investment, but this is unusual.

**18. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

It is not common that the State provides any payment guarantee to the investor.

**19. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

No, obligations of administration do not qualify as State obligations. Under Hungarian laws, the PPP projects are not accounted as state deficits. In the mid-2000s this circumstance made the PPP projects popular in Hungary. Since the State budgets were already in a large deficit and the EU, IMF and other multinational institutions did not allow further deficit to be created in the State budget levels. As PPP projects were allowed to be accounted outside of the State budget deficit the State became keen to support the private sponsors in the PPP projects.

It is not common that the State provides a separate guarantee to the concessionaire or the lenders.

**20. Are deductions from the service and availability payments subject to a cap?**

There are no statutory limitations. The relevant agreements sometimes provide that the deduction cannot result in the payments made to the project company being less than the amount of a minimum fixed fee.

**21. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

The only statutory limitation is that the variation request cannot result in the realization of a different project and in case the variations are material, there may be a need to comply with certain administrative procedures under the Public Procurement Act – and in the worst case scenario the State may be obliged to issue a new tender due to the material changes compared to the original tender.

As far as the realization of the variation requests is concerned, it is generally agreed that any increase in the costs due to a variation request shall be borne by the State. The project company is generally obliged to comply with these requests, however, if the request would result in a significant increase of the project costs (usually set around 15-30%) or the variation request is not in line with the best practices, the project company has the right to request the opinion of an independent technical expert.

**22. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?**

There is no legislative requirement.

**23. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

It is not market practice that lenders also sign the project agreement with the State. The project agreement is concluded only between the State and the project company. We are not aware of any practice that the lenders sign a separate direct agreement with the State.

**24. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

There are no such debt assumption mechanisms.

**25. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

It depends on a case-by-case basis.

In the most common build-operate structure the State pays a fixed service fee (availability fee and operation fee) and receives a concession fee.

The amounts payable upon termination of the project agreement depends principally on the reasons for the termination. If the termination is a result of an event of default by the State, it must compensate the investor for its full damage, including loss of profits and

consequential damages. If the termination is due to the project company's default, the State is usually obliged to pay a compensation, the level of which is set out in a matrix and depending on the date of the termination and the result of the termination.

**26. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

No specific incentives are available, however, in the form of development tax allowance (see below), new developments of a certain present value or serving the creation of new jobs are supported.

**27. Are there tax advantages available to PPP projects?**

There are no specific tax advantages aimed at supporting PPP projects.

However, various tax allowances are available – in the form of reduction of the payable corporate income tax (levied at the rate of 10% up to HUF 500m of the positive tax base and at 19% on the excess amount) for development projects in certain industries/undeveloped areas of Hungary. By

such tax allowance, the developer may reduce its payable corporate income tax by 80% at maximum. The amount of the tax allowance is related to the costs of the development and can be applied during ten years.

**28. What are the other incentives available to PPP projects?**

Depending on the terms of the tender, the PPP project may receive governmental grants (e.g. from European funds).

**29. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2015?**

As far as we are aware the PPP activity in Hungary is very limited. We are not aware of any major classic PPP projects that occurred in 2015 in Hungary.

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# IRELAND



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## ARTHUR COX

### GENERAL

1. **Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

The structure of the PPPs in recent times has been the same across all sectors being availability based payment mechanisms where the PPP company receives a monthly “unitary charge” for ensuring the facilities or roads are open and available. They are all design, build, finance and operate/maintain. Some of the early roads PPP projects were structured on a demand based model where the PPP company took traffic risk.

2. **Which sectors apply a PPP model to develop infrastructure projects?**

PPPs have been used most successfully in the transport and education sectors. In transport there are more than a dozen roads projects that have been procured through PPP. In education there have been second and third level institutions procured through PPP. The justice sector has had two PPP projects and the health sector will close its first PPP project in Q2 2016.

### LEGISLATION & REGULATION

3. **What are the principal laws and regulations? Is there a framework PPP Law?**

There is no specific legislation generally governing the conduct of PPPs in Ireland. The State (Public Private Partnerships Arrangements) Act 2002 (as amended) sets out which bodies can undertake PPPs.

4. **What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

Transport Infrastructure Ireland (roads and heavy rail) and the National Development Finance Agency (accommodation PPPs) are the two principal regulatory bodies which undertake PPPs.

5. **Are there any restrictions for foreign investors to develop/operate PPP projects?**

No. There is often a requirement that the PPP company is a company incorporated in Ireland. This does not affect structures which allow foreign investors to invest in PPPs in Ireland.

**6. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

Yes the Project Agreement often includes a long-stop date. Failure to achieve the long-stop date can result in termination of the project agreement.

**7. How are force majeure events defined, and what are the consequences of their occurrence?**

“Force Majeure” means: Eligible Force Majeure; pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds; or any act of terrorism causing physical damage to the Service Areas,

but in any such case excluding any act by or damage by or caused by any Protestor or Trespasser or by the presence on or around or entry onto or around any Site of, or any other interference with or affecting any Site or the vicinity of them or the Operations by or caused by, any Protestor or Trespasser.

“Eligible Force Majeure” means:

- 1.1 war, hostilities (whether declared or undeclared), invasion, armed conflict or act of foreign enemy (but for the avoidance of doubt not including terrorism) in each case within and involving the Republic of Ireland;
- 1.2 rebellion, revolution, riot, or insurrection (but for the avoidance of doubt not including terrorism) which causes physical damage and long term disruption to the Service Area[s], in each case within the Republic of Ireland; or
- 1.3 nuclear explosion, combustion of nuclear fuel, radioactive or chemical contamination or ionising radiation, which event is not caused or contributed to by an act, omission or default of the PPP Co,

its servants, agents or contractors, biological contamination arising from war or terrorism;

but in any such case excluding any act by or damage by or caused by any Protestor or Trespasser or by the presence on or around or entry onto or around the Site of, or any other interference with or affecting the Site or the vicinity of them or the Operations by or caused by, any Protestor or Trespasser.

Force majeure results in relief from performance of obligations and varying periods of time to remedy. In the event there is no remediation the Project Agreement can be terminated with compensation on termination payable.

**8. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

Expropriation is an event of default allowing the PPP company to terminate in which case compensation on termination is payable to PPP Co and which keeps the PPP company whole. In certain circumstances change in law risk is shared above certain thresholds above which PPP Co is entitled to be paid for the consequences of the change in law. If the change in law renders PPP Co’s obligations impossible the Project Agreement can be terminated.

**9. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

There is an obligation in the Project Agreement requiring insurance proceeds to be applied towards reinstatement. Sometimes

there is a reinstatement test whereby the insurance proceeds are not required to be put to reinstatement if the Project is effectively not recoverable.

**10. Is the concept of ‘uninsurability’ recognized in the project agreements?**

Yes. There is contractual relief for uninsurability and ultimately termination for uninsurability.

**11. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

This is captured contractually through direct agreements, not through legislation.

**12. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

N/A

**13. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

This is captured contractually, not through legislation. Market testing and/or benchmarking occur generally every 5 years.

**14. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

Yes there is an independent tester appointed to certify completion/operation readiness on PPPs.

**15. Are there any expected changes or reform to the existing legislation?**

No.

**FINANCING & INCENTIVES**

**16. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

This is captured contractually, not through legislation. The payment mechanism takes account of inflation. There are no contractual or legislative protections for foreign exchange risk.

**17. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

There are examples of capped returns but generally no. There are no guarantee rates of return.

**18. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

There are examples of letters of support from Central Government but generally no there are no specific payment guarantees.

**19. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

Recourse is generally to the procuring entity but the projects receive their funding from the sponsoring department and so the investments are generally considered to be “State backed”

or sovereign risk. There are no payment guarantees from the State

Equity is only repaid in voluntary or public authority termination scenarios.

**20. Are deductions from the service and availability payments subject to a cap?**

Yes there is a cap on deductions in the payment mechanism.

**21. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

No.

**22. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?**

Yes, there is currently a 50/50 gain share mechanism although this is currently under review.

**23. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

Yes. The lenders will have first right of step in to rescue a project in the event of a default by the PPP company. This includes a period of time for the lenders to due diligence the then current state of the project prior to deciding whether to step in.

**24. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

In a termination scenario the public authority will pay different compensation on termination depending on the reasons for the default.

**25. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

On termination for project company default there is no payment to sponsors. For no fault termination such as force majeure there is a limited return for equity based on returns due at termination. For authority default or voluntary termination the sponsors are kept whole and paid out in full (discounted back to the date of termination).

**26. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

No.

**27. Are there tax advantages available to PPP projects?**

No.

**28. What are the other incentives available to PPP projects?**

None.

**29. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2015?**

In 2015 the M11 Roads PPP, N25 Roads PPP and Courts PPP Projects achieved financial close accounting for approximately €700 million in investment.

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# IVORY COAST<sup>1 2</sup>



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### GENERAL

1. **Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

The PPP contract model is commonly used in Ivory Coast to develop major infrastructure projects. The first Ivorian PPP agreement (which was a concession agreement) entered into force in 1960 in the water sector between the national water utility of Ivory Coast and

the Ivorian company SODECI.<sup>3</sup>

From 2012, with the adoption of a new decree pertaining to partnership agreements, Ivorian law recognizes two categories of contracts for the financing, construction, operation, servicing and maintenance of infrastructure and public assets. These are: (i) public service delegation agreements, where the contract holder generates revenue through the commercial operation of a project (in particular the fees paid by users); and (ii) partnership agreements where a private sector entity is paid rents by a public entity for building and operating infrastructure.

As such, the public authority has to determine the exact nature of the contract that is agreed, taking into account the services to be performed and the payment conditions of the private entity.

In both public service delegation agreements and partnership agreements, the public authority can assign the design, build and operation of a project to a private entity (i.e. Build-Operate-Transfer or Build-Operate-

<sup>1</sup> The authors are French lawyers registered at the Paris bar. The answers to the questionnaires relating to Senegal, Morocco, Guinea and Ivory Coast are based on their knowledge of the applicable regulations and on their experience of PPPs projects implemented in these countries. The accuracy of these answers remains however subject to the confirmation by lawyers duly registered in the said countries

<sup>2</sup> The authors would like to thank Hugues Martin-Sisteron (member of the Paris Bar Association), Diane Houriez and Salimatou Kaba for their help in the preparation of this questionnaire.

<sup>3</sup> <https://library.pppknowledge.org/PPIAF/documents/1694>. The operation of urban public distribution of drinking water in Ivory Coast and in Abidjan was delegated to SODECI under concession agreements (*affermage*).

Own-Transfer agreements). However, under a particular type of contract known as a *contrat d'affermage*, the public authority can only assign rights to the management of a public project that has already been built (i.e. Transfer of Operation Rights contracts).

Given the needs of the Ivory Coast in terms of infrastructure, we note that the Ivorian State launched reforms in 2016 in order to modernize the PPP legal framework.<sup>4</sup>

## 2. Which sectors apply a PPP model to develop infrastructure projects?

PPP agreements are commonly used in Ivory Coast for the development of infrastructure and the management of public services in the following sectors: water, education, health and transport<sup>5</sup>.

Since 1990, ten PPP projects, totalling US\$ 1,618 million<sup>6</sup>, have reached financial close mainly in the water and the transport sectors. This includes the Henri Konan Bédié bridge (the first public-private partnership scheme of its kind in West Africa<sup>7</sup>).

## LEGISLATION & REGULATION

## 3. What are the principal laws and regulations? Is there a framework PPP Law?

The Ivorian PPP legal framework is characterized by its dualism.

In order to facilitate the development of infrastructure projects, Ivory Coast recently created a new category of contracts called

partnership agreements and implemented this through Decree No.2012-1151 dated 19 December 2012 (the “PPP Decree”). Moreover, the institutional framework pertaining to partnership agreements is set up by Decree No.2012-1152 dated 19 December 2012 as modified by Decree No. 2014-246 dated 8 May 2014 (the “PPP Institutions Decree”).

Public service delegation agreements used for decades in Ivory Coast (i.e. concession agreements and *contrats d'affermage*) are today governed (by the Ivorian Public Procurement Code enacted by Decree No. 2009-259 dated 6 August 2009 and modified by Decree No. 2013-308 dated 8 May 2013, Decree No. 2014-306 dated 27 May 2014 and Decree No. 2015-525 dated 15 July 2015 (the “Public Procurement Code”).

## 4. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?

At present, pursuant to the PPP institutions Decree<sup>8</sup>, there are three bodies which regulate partnerships agreements in the Ivory Coast.

The most important body is the *Comité National de Pilotage des PPP* (the “CNP-PPP”). Its main mission is to, among other things; devise strategies to develop PPP agreements, submit new drafts of new rules to the government in order to upgrade the PPP legal framework, give its approval regarding infrastructure projects using PPP agreements and give approval to awarding procedure documents and evaluation criteria etc.<sup>9</sup>

The other regulatory bodies are the *Secrétariat Exécutif des PPP* (the “SE-PPP”) and the *Cellule d'Appui des PPP* (the “CA-PPP”), which have been created to provide support to the CNP-PPP.

<sup>4</sup> See question 15 of the questionnaire.

<sup>5</sup> Article 4 of Decree No. 2012-1151.

<sup>6</sup> <https://pppknowledgelab.org/countries/c%C3%B4te-d%E2%80%99ivoire>

<sup>7</sup> <http://www.globalconstructionreview.com/news/ivory-coast-g4et4s-n8e8w-p0p0p-br4id4ge/>

<sup>8</sup> Article 3 of the PPP Institutions Decree.

<sup>9</sup> Article 4 of the PPP Institutions Decree.

With regard to public service delegation agreements, none of the regulatory bodies detailed above is involved in implementation and performance. Article 2 of Decree No. 2009-260 dated 6 August 2009 established the regulatory body known as the *Autorité Nationale de Régulation des Marchés publics*. This institution regulates the public procurement sector<sup>10</sup>; among other things, it provides support to government in defining new rules, assists in developing strategies regarding the implementation of public procurement contracts, conducts independent audits of public procurement contracts in force, and settles disputes related to awarding procedures and contract performance.

#### **5. Are there any restrictions for foreign investors to develop/operate PPP projects?**

The legislative framework for PPPs does not place any restrictions on foreign investors.

However, it should be noted that in any awarding procedure for public service delegation agreements, a criteria of national preference can be taken into account in the selection of the tenders in order to support the domestic Ivorian economy.

During the bids evaluation phase, the public authority can decide to apply a margin of preference ("*marge de préférence*") from 1% to 15% to the tenders of bidders from the Economic Community of West African States ("ECOWAS").

#### **6. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

Ivorian PPP legislation does not impose a long-stop date for the completion of construction in PPP agreements.

However, the PPP legislation does provide that PPP agreements must define the performance period and the terms and conditions of any potential extension<sup>11</sup>.

Moreover, it is common practice for parties to determine specific clauses pertaining to a maximum duration for the completion of construction in contracts.

#### **7. How are force majeure events defined, and what are the consequences of their occurrence?**

As in other civil law countries, force majeure events are described in Ivorian case law as an "*unforeseeable and irresistible event, including external causes*". Therefore force majeure is defined as an event beyond a party's control which the party could not reasonably have foreseen before entering into the contract or which the party could not reasonably have avoided or overcome provided that the event is not substantially attributable to the other party.

The events that could be defined as force majeure events in the context of PPPs include natural disasters, war, hostilities (whether war be declared or not), invasion, act of foreign enemies, rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war, riot, commotion, disorder, strike or lockout by persons other than the parties' personnel.

Moreover, the PPP Decree<sup>12</sup> provides that direct negotiation procedure can be used by the public authority to enter into PPP agreements (rather than using the normal public tender procedure) in case of a force majeure event.

As regards public service delegation agreements, the Public Procurement Code<sup>13</sup> provides that in case of force majeure,

<sup>10</sup> Article 3 of Decree No. 2009-260 dated 6 August 2009.

<sup>11</sup> Article 22 of the PPP Decree.

<sup>12</sup> Article 17 of the PPP Decree.

<sup>13</sup> Article 96.2 of the Public Procurement Code.

mutually agreed contracts (“*contrats de gré-à-gré*”) can be used and late penalties can be partially or totally waived<sup>14</sup>.

Although Ivorian PPP legislation largely does not cover the consequences of a force majeure event occurring during the term of a PPP agreement, parties are still free to agree on the consequences of this type of event for other elements of the agreement (i.e. early termination etc.).

**8. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

The PPP Decree<sup>15</sup> provides that partnership agreements have to include a specific clause pertaining to the allocation of risks between the parties. This is modelled on the contractual practice of optimal risk sharing.

Under the PPP Decree<sup>16</sup>, the State ensures that tax legislation, customs procedures and financial regimes during the entire period of the PPP agreement’s performance remain stable. In addition, it ensures that when the authorized company cannot use adjustment clauses under the agreement, modifications regarding tax laws and financial regulations do not affect the financial model and the financial and economic balance of PPP agreements already in force.

**9. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

Under Ivorian law, no reinstatement test is provided. Pursuant to the freedom of contract

principle, such a test may however be included in PPP agreements.

**10. Is the concept of ‘uninsurability’ recognized in the project agreements?**

The concept of “uninsurability” is not specifically defined or provided for under Ivorian legislation. However, the parties can freely stipulate that risk above a certain threshold will no longer be insured provided that such article does not conflict with any mandatory provisions under Ivorian law.

**11. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

Ivorian PPP legislation is silent as to whether or not substitution clauses or step-in clause have to be included in PPP agreements. Therefore, it seems that the parties can freely stipulate such clause to be included.

**12. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

Pursuant to the PPP Decree,<sup>17</sup> only Ivorian law can govern project agreements and direct agreements with lenders.

It provides<sup>18</sup> that disputes between a public authority and a private entity shall be settled according to the procedure the parties agreed on under the agreement. Therefore, if the parties agree on an international arbitration clause, this procedure can be used if a dispute arises.

<sup>14</sup> Article 109.3 of the Public Procurement Code.

<sup>15</sup> Article 22 of the PPP Decree.

<sup>16</sup> Article 23 of the PPP Decree.

<sup>17</sup> Article 29 of the PPP Decree.

<sup>18</sup> Article 30 of the PPP Decree.

However, disputes regarding awarding procedure cannot be settled through arbitration procedure given that only the *Autorité Nationale de Régulation des Marchés Publics* has jurisdiction over this matter<sup>19</sup>.

**13. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

The Ivorian PPP legislation does not provide for a regular market testing procedure to procure the services to be provided by the authorized company.

Such a test is also not provided for in public service delegation agreements or partnership agreements.

However, in accordance with the freedom of contract principle, such a test may be included in the contracts entered into between the private entity and its subcontractors (i.e. with the contractor and/or the operator).

**14. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

Ivorian PPP legislation does not provide for a specific acceptance procedure once the construction works of infrastructure is completed.

In practice, the procedure of acceptance is defined by the parties in the contractual provisions. It is usually provided that acceptance procedure is divided into two phases.

Firstly, once the construction works are completed, a “temporary acceptance” phase takes place. During this phase, the public authority controls the compliance of the works with the laws and the contractual and technical specifications. After this period, the private party can be asked to undertake complementary works. Once the latter are performed, a “definitive acceptance” phase can take place.

**15. Are there any expected changes or reform to the existing legislation?**

The Ivorian government recently decided to reform existing PPP legislation.

The aim is to unify the current legal framework which is divided into the Public Procurement Code and the PPP Decree in order to take into account the goals pursued by the 2005 WAEMU’s directives on public procurement contracts awarding procedure and performance<sup>20</sup>.

It should be noted that changes in the legislation could help the country meet the government’s 2020 deadline for reaching emerging economy status. Among Ivory Coast’s planned projects, there are 94 PPP agreements, offering several opportunities for foreign investors to participate in the development of the country<sup>21</sup>.

## FINANCING & INCENTIVES

**16. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

Under the PPP Decree, the payment of the private entity is provided either by the public

<sup>19</sup> Article 30 of the PPP Decree.

<sup>20</sup> Newsletter “Objectif Afrique”, n° 19 dated 5 February 2016, page n°11.

<sup>21</sup> <http://www.oxfordbusinessgroup.com/news/la-c%C3%B4te-d'Ivoire-multiplie-les-projets-d'infrastructures-de-grande-envergure>.

authority or by the users<sup>22</sup>. Generally, the payment provided by the public authority is linked to performance objectives.

As regards public service delegation agreements, the private entity is compensated from income derived from service users and such payment is substantially linked to service operation outcomes.

In addition, as regards inflation and/or foreign exchange protection, the PPP Decree<sup>23</sup> provides that Ivorian State guarantees to the operators a stable financial system for the duration of the PPP agreements. It is also specified that change in law in respect of financial matters shall not result in changes to the economic balance of partnership agreements.

Furthermore, in respect of public service delegation agreements, the Public Procurement Code<sup>24</sup> provides that public service delegation agreements must guarantee a legal, financial and accounting framework for the benefit of both parties.

The “Franc Zone” is an economic and monetary union whose members include France, Ivory Coast and fourteen other African States. Its core principles are laid down in the Monetary Cooperation Agreement of 1972 between the Bank of Central African States (BCAS) and France, and the Cooperation Agreement of 1973 between the West African Monetary Union (WAMU) and France. These principles revolve around an unlimited convertibility guarantee whereby the French Treasury guarantees without any limits the conversion of CFA francs to euros, and a fixed exchange rate between the CFA franc and the euro. In exchange for pegging the CFA franc to the euro and for the unlimited convertibility guarantee, BCAS and WAMU undertake to deposit some of their foreign

exchange reserve with the French Treasury on an operational account whose mechanism is governed by the aforementioned cooperation agreements.

In Ivory Coast and more generally in the entire Franc Zone, key hedging related issues are quite typical for this type of transaction. These include, in respect of the borrower, establishing capacity and authority, and in respect of the jurisdiction, confirming enforceability of the hedging documentation and foreign judgments, as well as determining whether any licensing and/or consent requirements exist. ISDA Master Agreements have been used in the past by Ivorian borrowers with foreign entities.

**17. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

There is no guaranteed rate of return or a cap on the rate of return for the project company or sponsors under Ivorian law. However, pursuant to the freedom of contract principle, such a mechanism may be included in partnership agreements and public service delegation agreements.

**18. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

Neither the PPP Decree, nor the Public Procurement Code provides for a specific payment guarantee provided by the relevant public authority for PPP projects. However, pursuant to the freedom of contract principle, such a mechanism may be included in both partnership agreements and public service delegation agreements.

<sup>22</sup> Article 1 of the PPP Decree.

<sup>23</sup> Article 23 of the PPP Decree.

<sup>24</sup> Article 181 of the Public Procurement Code.

**19. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

The obligations of the administration are not qualified as Treasury obligations. Furthermore, Ivorian law does not provide for separate guarantees to be granted by the Treasury to the concessionaire or the lenders. It should be noted that such guarantees are not usually provided in partnership agreements and public service delegation agreement. The guarantees issued to the benefit of the private partner are usually issued by financial institutions.

**20. Are deductions from the service and availability payments subject to a cap?**

Deductions from the service and availability payments are not specifically provided under the PPP Decree. However, such clauses can be included in Partnership agreements pursuant to the freedom of contract principle.

In respect of public service delegation agreements, the Public Procurement Code<sup>25</sup> provides that the private entity's payment is substantially provided by the service operation incomes but does not specify whether deductions from service payments can be provided. In practice, such clauses are provided by the parties under public service delegation agreements.

**21. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

The PPP Decree<sup>26</sup> provides for the conditions of variations and amendments to Partnership agreements but there is no reference to a cap.

**22. Is there a requirement to share gains any arising from refinancing of the PPP project with the public authority?**

There is no requirement to share gains arising from refinancing of the PPP project with the public authority under the PPP Decree. However, the parties are free to agree such a mechanism.

**23. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

Although Ivorian PPP law does not specifically refer to direct agreements, it is common practice that the lenders and the relevant public authority will sign direct agreements.

Under direct agreements, the lenders will be entitled to intervene or "step-in" the shoes of the project company or the contractors in respect of key project agreements. The step-in rights are usually triggered when either the project company or the contractors have defaulted or there is a reasonable belief that they will default in the near future. Step-in-clauses allow the lenders to take over either the project company or the project itself, or to obtain control rights to make decisions on behalf of the project company. Thereafter, the lenders may take over the project or appoint a professional third party to take over the project.

**24. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

<sup>25</sup> Article 3 of the Public Procurement Code.

<sup>26</sup> Section III of Chapter V of the PPP Decree.

The PPP Decree<sup>27</sup> provides that the parties must provide for indemnification clauses but doesn't specifically refer to any debt assumption mechanism. Therefore, the parties can freely agree on mechanism for the benefit of the lenders.

**25. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

Although it does not regulate the payments to be made by the administration in cases of termination, the PPP Decree requires, as outlined in question 24, that the parties agree on indemnification clauses under partnership agreements.

In respect of public service delegation agreements, payments are to be made by the administration in cases of termination except in case of contractual breach by the private entity.<sup>28</sup> This compensation is strictly linked to the expected loss of profit and calculated at the termination date unless otherwise provided for in public service delegation agreements.

**26. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

Although there is no clear incentive for domestic manufacturing of equipment used in the construction of PPP projects, it should be noted that it follows from the PPP Decree<sup>29</sup> that one of the main principles that governs partnership agreements is the promotion of such agreements as a source of (i) development of Ivorian companies, in particular small and

medium-sized businesses; (ii) growth and employment, especially through professional development opportunities for young people and upskilling of the local workforce.

**27. Are there tax advantages available to PPP projects?**

There are no specific tax advantages under the PPP Decree other than, as the case may be, those referred to in the Investment Code dated 7 June 2012. For instance, this code provides for a range of tax exemptions<sup>30</sup> and customs charges reductions<sup>31</sup> available to projects implemented in the eligible sectors.

**28. What are the other incentives available to PPP projects?**

There are incentives available to PPP projects, other than those referred to in the Investment Code dated 7 June 2012. For instance, some incentives are available to small and medium-sized companies such as exemption from registration fees for all documents subject to registration and the provision by the Ivorian State of the lands necessary for the implementation of the projects.<sup>32</sup>

**29. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2015?**

In connection with the National Development Plan (*Plan National de Développement*) for 2012-2015, US\$ 22 billion was expected to be invested in several projects, with almost half of this amount to be provided by the private sector in infrastructure, agriculture and security. A part of this amount is aimed at developing PPP projects<sup>33</sup>.

<sup>27</sup> Article 28 of the PPP Decree.

<sup>28</sup> Article 144 of the Public Procurement Code.

<sup>29</sup> Article 6 of the PPP Decree.

<sup>30</sup> Article 37 of the Investment Code.

<sup>31</sup> Article 45 of the Investment Code.

<sup>32</sup> Article 49 of the Investment Code.

<sup>33</sup> <http://www.globalbusiness.uk.com/pdfs/2014/2014-09-ivorycoast.pdf>



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# JAPAN



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### GENERAL

1. **Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

Since the Act on Promotion of Private Finance Initiatives (the “Act”) was enacted in 1999, more than 500 Private Finance Initiative (the “PFI”) projects have been implemented in Japan. From 2002 to 2007, there were more than 40 PFI projects implemented per year. Although the number decreased during the 2010 to 2012 period to 20 per year, it recovered in 2013 and 2014 to 32 and 43 per year, respectively.

Considering the fact that municipalities which are active in implementing PFI projects are mainly large scale municipalities with good financial fundamentals, and that 90% of municipalities have never performed PFIs before, it is difficult to say that the PFI model is commonly used to develop infrastructure projects in Japan.

The Build-Transfer-Operate (the “BTO”) type PPP model is the most popular type of project (314 projects (71.4%)), followed by Build-

Operate-Transfer (the “BOT”) type (54 projects (12.3%)) and Rehabilitate-Operate type, etc. (22 projects (5.0%)).

2. **Which sectors apply a PPP model to develop infrastructure projects?**

The main sectors that apply a PFI model to develop infrastructure projects are education and culture, such as schools and libraries, which have the largest number (150 projects (34.1%)), followed by health and environment, such as hospitals and septic tanks (78 projects (17.7%)) and urban development, such as parks and public housing (56 projects (12.7%)).

### LEGISLATION & REGULATION

3. **What are the principal laws and regulations? Is there a framework PPP Law?**

The Act was enacted in 1999 and the Basic Policy to Promote the Act (the “Basic Policy”) was enacted in the following year. An amendment to the Act in 2011 introduced concessions as a new type of PFI project in order to promote “user-pay” type projects in which an authorized company operates and maintains existing infrastructure in exchange for user fees.

In addition to establishing the Organization for the Promotion of the Private Finance Initiative, the Act sets out the purpose of PFI projects and certain basic principles, including the procedure for implementing PFI projects. While the Basic Policy explains the purpose and the policy of PFI projects in more detail, guidelines were established to provide practical guidance on how to proceed with PFI projects. The guidelines that currently exist are as follows: the PFI Project Implementation Process Guideline, Risk Sharing Guideline, VFM (Value For Money) Guideline, Contract Guideline, Monitoring Guideline and Concession Right and Operation of Public Facilities Guideline (hereinafter, collectively referred to as the “Guidelines”, and together with the Act and the Basic Policy, collectively the “Act and the Guidelines”). None of the Guidelines has legally binding power.

**4. What are the principal regulatory bodies for PPP? Is there a centralized PPP authority?**

The policy framework and the Guidelines are regulated by the Cabinet Office of Japan. The PFI Promotion Office, which is part of the Cabinet Office, is in charge of the promotion of PFI. The PFI Promotion Office is composed of staff from national and local governments and the private sector. The regulatory bodies involved in a specific project depends on the nature of the project; for example, the Ministry of Justice is responsible for projects relating to the improvement and operation of prisons, while the Ministry of Land, Infrastructure, Transport and Tourism is responsible for projects relating to the management of airports.

**5. Are there any restrictions for foreign investors to develop/operate PPP projects?**

The Act and the Guidelines do not restrict foreign investors from developing/operating

PFI projects in Japan. At the information session held by the PFI Promotion Office in 2011, it was explained that whether or not restrictions will apply in respect of foreign investors developing/operating PFI projects depends on the nature of each individual project.

**6. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

Project agreements generally define the important dates for performing the project, including, amongst others, a date to start the design of the building, a date to start the construction and a date to complete the construction, and oblige the authorized company to follow this schedule. It is common that certain extensions of time are provided for in the agreement.

Pursuant to the Public Accounting Act, the performance period must be included in a written contract signed by the Heads of Ministries and Agencies or an officer who was given authority to sign the contract. Additionally, pursuant to the Act on Prevention of Delay in Payment under Government Contracts, the payment date must be included in contracts signed by the government.

**7. How are force majeure events defined, and what are the consequences of their occurrence?**

The Contract Guideline refers to a force majeure event as an event which occurs externally and independently of the contracting parties’ acts and which could not have been prevented by their usually required attention. However, the Contract Guideline recognizes that the definition in any given case is left to the agreement between the parties.

The Risk Sharing Guideline provides the basic concept of risk sharing as: “the one who can control the risk most effectively shall be responsible for the risk”. The Research Report regarding the Issues of the PFI Project suggests that it is typical for an authorized company and the government to agree that the authorized company will be responsible for 1/100th of the damages or cost increase caused by a force majeure event and that the government will be responsible for the rest on the basis that neither the government nor the authorized company is able to control the force majeure event.

In the case where the parties do provide for the consequences of the occurrence of a force majeure event in their agreement, as a matter of Japanese civil law, the authorized company will lose its right to obtain the payments from the government when its obligation becomes impossible to perform.

**8. How are the political and legal risks (e.g. Expropriation, change in law, adverse court decisions, etc.) Allocated between the parties, and what are the consequences of their occurrence?**

It is recommended that the parties decide in the agreement of the party that will be responsible for the political and legal risks.

As mentioned above, the basic concept of risk sharing is that the one who can control the risk most effectively shall be responsible for the risk. On the assumption that the authorized company is not able to control the legal risk, the government would be responsible for the legal risk in general. Indeed, most PFI agreements designate the government as responsible for legal risks.

Regarding political risks, it is advisable to specify the existing legal framework, e.g. particular laws and regulations, which the project is subject to as well as which party will

be responsible for the risk that such framework changes. It is common for the government to bear certain uncontrollable risks in connection with changes in policy or approvals of governmental budgets.

**9. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

Generally, a person who enters into a contract with the national government is required to provide a deposit of ten percent (10%) or more of the contract price. This obligation may be substituted by submitting a guarantee from the lenders, etc., or a bond, or by obtaining performance guarantee insurance.

Generally, the project agreement will oblige the authorized company to take out performance guarantee insurance, contractor's all risks insurance, and third party liability insurance during construction in BTO type and BOT type projects. In the case of BOT type projects, fire insurance will generally be required after the completion of construction.

**10. Is the concept of ‘uninsurability’ recognized in the project agreements?**

The Steering Committee for Ensuring the Safety of Public Service by PFI has recognized the importance of deciding risk sharing in advance in an agreement in order to prepare for accidents which are not covered by insurance, or damages which exceed the amount of compensation. The Committee has also recommended building in a mechanism to prevent events that are controllable. If an event is uncontrollable, it is recommended to provide a method to minimize the damages of such event in the agreement.

**11. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

It is common for funders to have the right to take control of a PFI project before the government terminates the project agreement due to the default of the authorized company. In order to avoid the default, the funders will conduct the daily supervision of the business conditions of the authorized company. If the business conditions have deteriorated and there is a risk of termination of the project agreement, the funders will select a third party to assume the authorized company and conduct the project. A direct agreement generally requires approval from the government in respect of the selection of the third party.

If the authorized company has a right to operate the project, the government may order a termination or abatement of the operation in the case of default.

**12. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

The Act and the Guidelines is silent on this point and we are not aware of any project that provided for international arbitration as a dispute resolution mechanism or non-Japanese law as governing law. However, considering the fact that there is no express prohibition on the use of international arbitration or foreign law as the governing law, as well as the general principle of freedom of contract, we assume that it is possible to have international arbitration and/or foreign law as the governing law of the project agreement unless it is restricted in any other laws.

**13. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

The Act of the Civil Service Reform by Introducing the Competition was enacted to select private businesses which are expected to add originality and ingenuity, and to conduct public-private competitive bidding or private competitive bidding in order to maintain the quality of the public service and reduce costs.

**14. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

The government confirms whether or not the performance of the facilities meets certain quality requirements of the business. If it does not meet the requirements, the government will typically point out this fact and indicate the necessary remedial measures, such as repair or reduction of payments, according to the agreement. Moreover, when a Contract Officer concludes a contract for work involving construction, manufacturing or another type of work, the Contract Officer is required, pursuant to the provisions of the Cabinet Order, either personally or by assigning an assistant, to undertake necessary supervision measures in order to ensure appropriate performance of the contract.

**15. Are there any expected changes or reform to the existing legislation?**

We are not aware of any expected changes or reforms of the existing legislation. Please note that the most recent amendment to the Act and the Basic Policy were made in 2015.

## FINANCING & INCENTIVES

### 16. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?

In general, payment mechanisms can be classified as follows: (i) the authorized company operates and maintains existing infrastructure in exchange for user fees, (ii) the authorized company relies on payments of service fees or availability payments from the government, or (iii) a combination of (i) and (ii). If the project is operated on the basis of either (ii) or (iii), then the government is required to make payments to the authorized company. Therefore, the obligation for the payment will be stated in the project agreement.

Generally, the payment of service fees is set by a formula. Moreover, the project agreement will provide for a reduction or suspension of the service fee payment in the case where the authorized company fails to fulfil its obligations and breaches the project agreement.

The relevant legislation does not address inflation and/or foreign exchange protection. The Risk Sharing Guideline recommends deciding how to allocate such risks in the agreement beforehand by considering the impact of inflation and/or foreign exchange on the project since such matters may result in an increase in costs for the authorized company or a decrease in profits. In practice, many agreements do not take inflation into account during the construction period.

### 17. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?

The Act and the Guidelines do not provide for

a guarantee or a cap in respect of the rate of return for a project company or sponsors.

### 18. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. Service payment guarantee, availability payment guarantee, treasury guarantee etc.)?

The Act and the Guidelines do not provide for a guarantee of the payment by the relevant public authority. However, with company's guarantee as a precondition, the authorized company may receive an advance payment (capped at 40% of the service payment) for the project from the government.

### 19. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?

The Act and the Guidelines are silent on whether or not the obligations of the administration qualify as State obligations. Generally, the treasury will not provide separate guarantees to the concessionaire or the lenders. Please note that, in Japan, it is difficult to think of a case where the administration goes into default.

### 20. Are deductions from the service and availability payments subject to a cap?

There is no provision in the Act and the Guidelines which provides a cap on the reductions from service and availability payments. However, according to the Monitoring Guideline, in order to avoid adverse effects on the service offered by the authorized company as a result of a rapid fall in its financial condition, when considering reductions, a balance should be sought among other methods which could be taken against the authorized company and potential reductions.

**21. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

Although the Act and the Guidelines do not provide specific caps on the variations that the public authority may request at the construction and operation stages, in principle, variations need to be in line with the purpose of the project agreement.

**22. Is there a requirement to share any gains arising from refinancing of the ppp project with the public authority?**

The Act and the Guidelines do not require gains arising from refinancing to be shared. It has been suggested by certain commentators in Japan that discussions regarding such matters are required in the future.

**23. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

The lenders sign a direct agreement with the relevant public authority in order to step-in to the project and provide for the continued development of the project.

The following are the primary rights generally given to the lenders in direct agreements: (i) the right to request the government to sign a new project agreement with a third party selected by the lenders instead of the authorized company, and (ii) the right to receive notification and necessary information from the government without delay if certain events occur such as the breach of the project agreement by the authorized company.

**24. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

The Act and the Guidelines do not provide for these matters. The lenders and the government need to enter into discussions in order to avoid the termination of the project agreement leading to a situation where the receivables become uncollectible.

**25. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

Payments to be made in case of termination of the project agreement are typically indicated in the project agreement. It is desirable to indicate these matters in the project agreement in detail. It is common to provide for the authorized company's obligation to pay a penalty to the government if the agreement is terminated due to a breach by the authorized company. In the case where the government is responsible for the termination, the government is normally responsible to reimburse the costs of construction with interest, together with certain other costs incurred by the authorized company as a result of the termination.

It is common for lenders to take security over the authorized company's right to receive the service fee from the government. In such case, it will be difficult for the government to claim

set-off or termination of the agreement against the lenders.

**26. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

The Act and the Guidelines do not provide an incentive for domestic manufacturing of equipment or materials used in the construction of PPP projects.

**27. Are there tax advantages available to PPP projects?**

In BTO type projects, the authorized company does not have to pay real estate acquisition tax, real estate tax or city planning tax since the government will obtain the ownership immediately after the completion of the construction. In other types of projects, the authorized company's obligation to pay tax will be reduced by fifty percent (50%) if the company fulfils certain requirements.

After amendments of the Act in 2011 introduced concessions as a new type of PFI project, an exemption from corporate tax was provided. By this exemption, the operation

right of the authorized company is treated as a depreciable asset, which allows the authorized company to include this in its expenses, leading to a reduction of corporate tax payable by the authorized company during the concession period.

**28. What are the other incentives available to PPP projects?**

Subsidies from the government are possible and other assistance measures such as arrangements of loans with lower than usual interest rates by the Development Bank of Japan are also available.

**29. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2015?**

The number of PFI projects from January to September 2015 was 22, and the total investment amount was 45,833 billion yen. The major sectors of the projects developed were construction relating to education and culture, such as schools and libraries, health and environment, such as hospitals and septic tanks and urban development, such as parks and public housing.

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# JORDAN



Enad Khirfan



Layan Khrais



Bashar Amosh

## ALI SHARIF ZU'BI ADVOCATES & LEGAL CONSULTANTS

### GENERAL

1. **Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

Yes. However, the type of PPP models that may be implemented vary depending on the nature of the project.

2. **Which sectors apply a PPP model to develop infrastructure projects?**

Generally, PPP models in Jordan apply to all kinds of sectors that aim to yield a positive impact on the Jordanian economy, including the services offered in Jordan.

### LEGISLATION & REGULATION

3. **What are the principal laws and regulations? Is there a framework PPP Law?**

The principle laws and regulations that govern PPP projects in Jordan are (i) The Public-Private Partnership Law No. 31 of 2014 (the “PPP Law”), the Regulation for Public-Private

Partnership Projects No. 98 of 2015 (the “PPP Regulation”) and the Policy for Public-Private Partnership Projects.

4. **What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

By virtue of the PPP Law, a PPP Board chaired by the Prime Minister (the “Board”) and a PPP Unit (the “Unit”) were established as the principal regulatory bodies for PPP in Jordan. Each of the Board and the Unit enjoy a distinct function in relation to regulating and facilitating the works of PPP in Jordan. For instance, the Board is entitled to issue the final approval on the PPP, after it is recommended by the Unit.

5. **Are there any restrictions for foreign investors to develop/operate PPP projects?**

There are no restrictions under the PPP Law or the PPP Regulation prohibiting foreign investors from participating in PPP projects in Jordan. However, pursuant to the Regulation of Foreign Investments and its amendments No. 54 of 2000, a foreign investor may not own more than (50%) of the share capital for any project relating to, among other things, architecture, construction and brokerage.

**6. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

There are no laws or regulations stipulating a long-stop date for the completion of construction. Long-stop dates are to be agreed upon by the parties under the PPP agreement.

**7. How are force majeure events defined, and what are the consequences of their occurrence?**

Article (247) of the Jordanian Civil Law No. 43 of 1976 defines a force majeure event as, 'an event (not caused by the parties to the contract), which makes the performance of the contract impossible, and thus results in the automatic termination of the contract. If the performance of the contract is rendered partially impossible by virtue of the force majeure event, then the contract shall only automatically terminate with regards to the part that is impossible to perform.

Article 37(j) of the PPP Regulation, stipulates that a PPP agreement must expressly include provisions governing a force majeure event, the consequences of such event, and the mechanism of indemnification in the occurrence of such an event.

**8. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

Article 37 (j) of the PPP Regulation, stipulates that the political and legal risks will be allocated between the parties in accordance with the terms of the PPP agreement unless such political and legal risks contravene with Jordanian Public Policy.

**9. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

Article 37 (h) of the PPP Regulation, stipulates that the PPP agreement should include a provision governing the instance policies required to cover the risks which may be associated with the project. Therefore, the reinstatement is left to be governed by the PPP agreement as agreed upon by the parties.

**10. Is the concept of 'uninsurability' recognized in the project agreements?**

There are no provisions in the PPP Law and PPP Regulation to this effect.

**11. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

Article 37 (k) and (l) of PPP Regulation stipulates that the agreement should contain provisions governing step in, take over and early termination and the rights and obligations of each party in such cases.

**12. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

Article 16 of the PPP Law, stipulates that Jordanian law shall be the governing law of PPP agreements. However, Article 16 of the PPP Law stipulates that the parties are entitled to agree to settle their disputes through alternative dispute resolutions, which include arbitration.

**13. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

Yes. Article 7 (10) of the PPP Law provides that the PPP Unit shall be responsible for the review and documentation of the feasibility studies and technical reports. Furthermore, Article 11 of the PPP Law, stipulates that the Unit shall prepare a survey and a continuity report to be submitted to the PPP Board for approval.

**14. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

There are no express provisions governing the acceptance of the facilities performed, therefore the issue is left for the contracting parties in the PPP agreement. However, Article 5 (b/3) and Article 37 (e) of the PPP Regulation, stipulates that the competent governmental bodies mentioned in the PPP agreement shall exercise the power to follow up and monitor the parties' performance of their obligations under the PPP agreements.

**15. Are there any expected changes or reform to the existing legislation?**

There are currently no pending bills or reforms that will amend or replace the existing legislation governing PPP's in Jordan.

## FINANCING & INCENTIVES

**16. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

There are no express provisions regulating the payment mechanism or inflation and/or

foreign exchange protection in the relevant legislation. These matters are to be agreed upon by the parties in the PPP agreement.

**17. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

The PPP Law and the PPP Regulation, do not provide express provisions regulating the guaranteed rate of return or a cap on the rate of return.

**18. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

No.

**19. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

No.

**20. Are deductions from the service and availability payments subject to a cap?**

There are no express provisions in the PPP Law and PPP Regulation governing the service and availability payments.

**21. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

Article 14 of the PPP Law, stipulates that the cost of the variations shall not exceed twenty percent (20%) of the total cost of the project. However, the Council of Ministers is entitled to approve the variations so long as the cost of which does not exceed fifty percent (50%) of the total cost of the project.

**22. Is there a requirement to share any gains arising from refinancing of the PPP project-with the public authority?**

No.

**23. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

No.

**24. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

No.

**25. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

There are no express provisions in the PPP Law and PPP Regulation governing the

payments made by the administration to the sponsors, the project company and the lenders.

**26. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

No.

**27. Are there tax advantages available to PPP projects?**

No.

**28. What are the other incentives available to PPP projects?**

In practice, PPP projects provides private sectors with additional investments required for the project from Jordanian authorities and the opportunity to contribute in international projects with the government of Jordan. Furthermore, PPP projects enable the efficient allocation of the risks arising out of the project onto the party that can bear the risk the most.

**29. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2015?**

Information relating to the number, investment amounts and sectors of the PPP projects developed in Jordan is not accessible to the public.

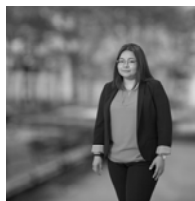
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# KAZAKHSTAN



Arman Bigazin



Zarina Baikenzhina

## WHITE & CASE KAZAKHSTAN LLP

### GENERAL

1. Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?

PPP model has just started to be applied in the infrastructure projects. There were a number of smaller concession (BOT type) based projects in 2005-2014 (construction of regional power line and railway line, reconstruction of Aktau International Airport). The first of a kind significant PPP based (BTO type concession) infrastructure project is the construction and operation of 66 km motor road “Big Almaty Ring Road (the “BAKAD”)", which is currently at the beginning stage (the successful bidder and the Grantor are negotiating the terms of the concession agreement).

2. Which sectors apply a PPP model to develop infrastructure projects?

PPP model is allowed for any sectors of economy, at the same time certain types of property may not be PPP/concession objects, such as land, water, property of national security bodies, military equipment, backbone

railway network etc. (defined by the Order of President).

### LEGISLATION & REGULATION

3. What are the principal laws and regulations? Is there a framework PPP Law?

Law No. 379-V ZRK On Public-Private Partnership, dated 31 October 2015 (the “PPP Law”), and Law No. 167-III ZRK On Concessions (the “Concessions Law”) are the principle laws pertaining to PPP and concession projects.

The PPP Law, being recently adopted, remains untested and there is currently no assurance as to how its provisions will be implemented in practice. To the best of our knowledge, to date, no project has been completed in accordance with the Concessions Law or PPP Law (earlier PPP projects were implemented in the absence of definitive statutory regulation).

4. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?

The Ministry of National Economy is primarily responsible for the state policy and framework for implementation of PPP projects and coordination of the PPP activities within the

country, while each central government authority (ministry) is responsible for country-scale PPP projects within its sectors of responsibility and local governors (*akims*) are responsible for smaller-scale regional PPP projects in their respective regions.

In addition, state-owned institutions, such as Kazakhstan Public-Private Partnership Centre (<http://kzppp.kz/>) and Public-Private Partnership Advisory Center ([http://pppac.kz/?page\\_id=1045&lang=en](http://pppac.kz/?page_id=1045&lang=en)), are active players in relation to preparation and development of PPP projects.

**5. Are there any restrictions for foreign investors to develop/operate PPP projects?**

There are no restrictions for foreign investors to develop/operate PPP projects. There is, however, general restriction for foreign entities/persons to directly manage and operate telecom trunk network (management and operation through a Kazakhstan based subsidiary is allowed) and the general limitation for foreign entities/persons to own or operate more than 49% stake in a legal entity carrying out certain activities in telecom industry, unless approved by the Government.

**6. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

Long-stop date concept is not mentioned in the legislation, but it may be regulated in a PPP/concession agreement. Recently, we have seen a long-stop date clause in the draft concession agreement for the BAKAD project.

**7. How are force majeure events defined, and what are the consequences of their occurrence?**

The PPP Law does not define force majeure events nor does it regulate the consequences of

their occurrence. The Concessions Law provides that, with respect to concession projects “of significant importance” (to be defined by the Government), occurrence of force majeure events is a ground for early unilateral termination of a concession agreement by either party with compensation to be made in accordance with the provisions of the concession agreement.

**8. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

The PPP Law requires the risks to be allocated in a PPP agreement in such a manner that would allow a risk to be borne by a party who is best placed to manage such risk.

**9. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

The legislation does not envisage a reinstatement test. A recent draft concession agreement for the BAKAD Project provides that all insurance proceeds shall be used for reinstatement works.

**10. Is the concept of ‘uninsurability’ recognized in the project agreements?**

In our recent experience, a project agreement did recognize the concept of uninsurability.

**11. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

Both the PPP Law and the Concessions Law allow lenders to substitute a private partner/concessionaire in case of default, but only with respect to the projects “of significant importance” as determined by the Government.

**12. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

In case of PPP/concession projects “of significant importance”, if a private partner or at least one of the shareholders of a concessionaire is a Kazakhstan non-resident, international arbitration is available with forum to be determined in the respective agreement. Also, according to the recently adopted Arbitration Law, any civil disputes irrespective of whether or not there is a foreign element can be referred to arbitration, although certain exemptions exist.

**13. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

No.

**14. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

As a general rule, acceptance of a constructed object is performed by the employer (i.e. project company) itself together with the contractor, an independent technical adviser (Technical Consultant) and the author of the project (Author).

**15. Are there any expected changes or reform to the existing legislation?**

Given that the PPP Law has only been adopted half a year ago and its aim was to enhance the framework for PPPs, currently no reform or major changes are expected, except for subsidiary legislation in furtherance of the PPP Law.

## FINANCING & INCENTIVES

**16. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

Both the PPP Law and the Concessions Law envisage possibility for a private partner to receive compensation of its investment and/or operation costs, management fee and/or availability payments. The Concessions Law allows for a concession agreement governing the project “of significant importance” to establish a mechanism of exchange rate risk mitigation, while the PPP Law, as mentioned above, requires a PPP agreement to allocate risks to the party which can best control them, which, in respect of inflation and foreign exchange risk, presumably, shall be the public partner.

**17. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

In general, there is no cap on the rate of return nor is there a guaranteed rate of return provided for in the legislation. At the same time, a rate of return is determined by the project developing authority and is set out in the project concept or the tender documentation for the project or feasibility study.

**18. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

The state may provide state guarantee for loans attracted by a private partner/concessionaire to finance the project or state suretyship for revenue-yielding bonds issuance, provided that, with respect to concessions, the facility will subsequently be transferred into state ownership. Availability payment is also possible, as mentioned above.

**19. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

With respect to the republican-scale PPP/concession projects, the obligations of a public partner/grantor are the obligations of the State and not the obligations of a particular ministry or other authority, while in relation to regional PPP/concession projects, the obligations of a public partner/grantor are the obligations of the local executive bodies (governors) which are separated from the obligations of the central (republican) Treasury. The republican Treasury is not responsible for the obligations of regional authorities and does not provide guarantees in relation thereto.

**20. Are deductions from the service and availability payments subject to a cap?**

A cap on deductions from the availability payments may be set out in a project agreement.

**21. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

At the legislation level – no, but a cap may be negotiated in a project agreement.

**22. Is there a requirement to share any gains arising from refinancing of the PPP project-with the public authority?**

There is no explicit legal requirement to share gains from refinancing with the state; however, we have seen such a requirement in a concession agreement.

**23. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

The PPP Law and the Concessions Law allow for a direct agreement to be signed between the lender and public authorities. While as of today there was not any direct agreement concluded in Kazakhstan, according to the mentioned laws, the lenders in a concession project shall have the following rights:

- a) to request substitution of the concessionaire and to propose a new concessionaire candidacy in case of material violation by the concessionaire of its obligations under the concession agreement triggering termination thereof;
- b) to request substitution of the concessionaire and to propose a new concessionaire candidacy in case of material violation by the concessionaire of its obligations under the agreements with the lenders resulting in acceleration of obligations; and
- c) to appoint a temporary manager in case of concessionaire's substitution, to determine the procedure for such appointment, the



authority and the term of office of the temporary manager.

The lenders in a PPP project would have the right provided for in subparagraph a) above *mutatis mutandis*.

**24. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

Not regulated on the statutory level.

**25. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

The general rule is that in case of unilateral premature termination of a PPP agreement (irrespective of the grounds and the party who initiates the termination), the private partner would be entitled to demand compensation of payments and damages as set out in the respective project agreement.

With respect to concession projects, in case of unilateral premature termination of a concession agreement by the concessionaire due to the grantor's default, the concessionaire partner would be entitled to compensation of damages arising as a result of such default. The public authority is entitled to unilaterally terminate a concession agreement in the interests of the public and the state (the grounds to be defined in the concession

agreement), and in this case the grantor must compensate the damages arising as a result of such termination.

As concerns the concession projects "of significant importance", the concessionaire would be entitled to compensation of its costs and damages in case of termination due to Grantor's default, Concessionaire's default or force majeure; the exact scope of such compensation shall be set out in the respective project agreement.

**26. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

No.

**27. Are there tax advantages available to PPP projects?**

No tax advantages are granted specifically for PPP projects, although certain tax advantages can be granted separately based on an investment contract under the Law on Investments or otherwise (e.g. for project implemented in special economic zones).

**28. What are the other incentives available to PPP projects?**

The PPP Law and the Concessions Law provide for several types of state support available to private partners/concessionaires:

- a) transfer of exclusive IP rights owned by the state;
- b) provision of state in-kind grants (land, equipment, machinery etc.);
- c) project co-financing by the state; and
- d) state's consumption guarantee in respect of the output produced by the project.

**29. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2015?**

In 2015 there were no PPP projects developed in Kazakhstan. A number of PPP projects are currently in pre-tendering stage and only one project (BAKAD) is currently at the tendering stage.

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# KINGDOM OF MOROCCO<sup>12</sup>



Paule Biensan



François-Guilhem  
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## GENERAL

1. Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?

Until 2015, infrastructure projects were implemented in Morocco only under the model of concession agreement and delegated management agreement (*gestion déléguée*) that can be classified in the same category of contracts as the private partner is compensated by third party revenues.

Since 2015, PPPs can also be implemented under the model of partnership contract (*contrat de partenariat public-privé*).

As such, Moroccan law establishes two categories of global contracts for the financing, construction, operation, servicing and maintenance of structures, facilities and public assets: (i) concession agreements and delegated management agreements whereby the contract holder is mainly remunerated by the commercial operation of the work (in particular by fees paid by users) and (ii) partnership contracts whereby the contract holder is mainly remunerated by public entity payments from the commissioning date of the work until the end of such agreement.

Based on the envisaged project, the grantor will determine the type of contract to be concluded. He will take into consideration the services to be performed and the payment conditions of the private entity.

For concession agreements, delegated management agreement and partnership contracts, the grantor can assign the design, build, and operation of a project to a private entity (*i.e.* Build-Operate-Transfer or Build-Operate-Own-Transfer agreements).

However, under a particular type of contract known as *contrat d'affermage*, the grantor can

<sup>1</sup> The authors are French lawyers registered at the Paris bar. The answers to the questionnaires relating to Senegal, Morocco, Guinea and Ivory Coast are based on their knowledge of the applicable regulations and on their experience of PPPs projects implemented in these countries. The accuracy of these answers remains however subject to the confirmation by lawyers duly registered in the said countries

<sup>2</sup> The authors would like to thank Hugues Martin-Sisteron (member of the Paris Bar Association), Diane Houriez and Salimatou Kaba for their help in the preparation of this questionnaire.

only assign rights to the management of a public project that has already been built (i.e. Transfer of Operation Rights contracts).

## 2. Which sectors apply a PPP model to develop infrastructure projects?

The PPP model is used in all economic sectors for the development of infrastructure and the management of public services.

Major areas in which PPPs are implemented include transport (in particular motorways and ports) higher education and agriculture<sup>3</sup>.

A major project in Morocco is the port development at Tanger-Med, scheduled for completion by 2016.

For the year 2016, the Ministry of Equipment intends to continue to develop the PPP model for the construction and operation of motorways<sup>4</sup>, ports and airports.

## LEGISLATION & REGULATION

### 3. What are the principal laws and regulations? Is there a framework PPP Law?

The legal framework applicable to concession agreements was established by several sector specific laws<sup>5</sup> but the main framework

pertaining to the concession schema is the Law No. 54-05 dated 14 February 2006 on delegated management agreements<sup>6</sup> (the “Delegated Management Law”).

However, through Law No. 86-12 of 24 December 2014<sup>7</sup> (the “PPP Law”) and its implementing decree (the “PPP Decree”)<sup>8</sup>, Morocco recently introduced the partnership contract, a new category of BOT.

According to the PPP Law, the partnership contract is a contract whereby a grantor (i.e. the State and its public institutions) entrusts a private partner with a comprehensive project relating to the design, construction, conversion, maintenance, operation or management of works, as well as the financing of the latter.

The PPP Law was introduced in order to create a unified and incentivizing framework conducive to the development of infrastructure projects in Morocco and to increased visibility for both foreign and local investors. In consideration of the best international practice, the PPP Law was drafted, after analysing the legal frameworks applicable to public-private partnership contracts in various countries, such as France, Spain and Egypt.

The main difference between a concession based schema and a partnership contract is that the private partner is remunerated -in its entirety or partially- by the public authority.

<sup>3</sup> <http://www.oxfordbusinessgroup.com/analysis/morocco-increases-role-private-sector-0>

<sup>4</sup> <http://www.moroccoworldnews.com/2015/12/176337/moroccos-three-largest-highway-projects-for-2016/>

<sup>5</sup> Law n°4-89 relating to motorways (dated 6 August 1992); Law n°15-02 relating to ports and creating the Ports National Agency (*Agence Nationale des Ports*) and the Ports Operating Company (*Société d'Exploitation des Ports*) (dated 23 November 2005); Law n°52-02 relating to the organization and the operation of the national railway network (dated 7 January 2005); and Law n°25-79 creating the Airports National Office (*Office National des*

*Aéroports*) as amended by Law n°14-89 and Law n°1-93-140.

<sup>6</sup> Law No. 54-05 dated 14 February 2006 (Official Bulletin No. 5404 dated 16 March 2006) and Decree No. 2-06-362 dated 9 August 2006 (Official Bulletin No. 5454 dated 7 September 2006)

<sup>7</sup> The PPP Law was published in the Official Bulletin No. 6332 of 5 February 2015).

<sup>8</sup> The implementing decree No. 2-15-45 dated 13 May 2015 was published in the Official Bulletin No. 6365 dated 1 October 2015.

#### **4. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

The PPP Decree created a commission, mainly composed of representatives of various Moroccan ministries, set up under the aegis of the Ministry of Economy and Finance in order to identify a list of projects to be carried out as PPPs and validate preliminary assessments prepared by grantors before launching tenders.

This commission will also provide support for grantors through issuing opinions on partnership contracts implementation (e.g. during the award of the partnership contract or for amendments projects).

The underlying goal of this commission is to ensure the financial sustainability of each partnership contracts in order to avoid financial difficulties for Moroccan public entities.

In respect of delegated management agreements, there is no specific regulatory body.

#### **5. Are there any restrictions for foreign investors to develop/operate PPP projects?**

Neither the PPP Law, nor the Delegated Management Law places any restrictions on foreign investors.

Nevertheless, it should be noted that the PPP Decree<sup>9</sup> specifies that in any awarding procedure, criteria of national preference can be taken into account in the selection of the tenders in order to support the domestic Moroccan economy.

For example, the grantor can decide to apply a percentage increase on the price of tenders presented by foreign bidders.

<sup>9</sup> Article 35 of the PPP Decree.

In addition, the grantor can also provide in the tender documentation for awarding criteria linked for example to the part of national companies, goods and services coming from Morocco which are involved or used to perform the future contractual obligations.

#### **6. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

The PPP Law and the Delegated Management Law do not impose a long-stop date for the completion of construction.

However, the PPP Law does provide that partnership contracts are entered into for a maximum duration of thirty years that can be extended to fifty years depending on the complexity and the technical, economic and financial features of the project.<sup>10</sup> The duration is determined by the depreciation period of the selected investments, financing terms and the type of construction and services to be performed.

The Delegated Management also provides that concession agreements are entered into for a limited period of time that cannot exceed the depreciation period of the selected investments.<sup>11</sup>

As such, the most common practice is that the parties determine specific clauses pertaining to a maximum duration for the construction in the contracts.

#### **7. How are force majeure events defined, and what are the consequences of their occurrence?**

As in other civil law countries, force majeure events are described in the Moroccan law<sup>12</sup> as

<sup>10</sup> Article 13 of the PPP Law.

<sup>11</sup> Article 13 of the Delegated Management Law.

<sup>12</sup> Article 268. of the Code of Obligations and Contracts (as promulgated by Dahir 9 Ramadan 1331).

an “unforeseeable event” for the parties. Therefore force majeure events are defined as (i) an event beyond a party's control, (ii) which the party could not reasonably have provided against before entering into the contract and (iii) the party could not reasonably have avoided or overcome provided that the event is not substantially attributable to the other party.

More particularly, the Moroccan law<sup>13</sup> specifies certain force majeure events: natural disasters (flood, drought, fire, storms, invasion of grasshoppers), invasion and the “*fait du prince*”.

The PPP Law<sup>14</sup> provides that force majeure events have to be defined in the contract.

Moreover, the PPP Law provides that the parties have to define precisely the consequences of a force majeure event occurrence to preserve the economical balance of the agreement events given that the partnership contract can be terminated in case of force majeure.<sup>15</sup>

The Delegated Management Law<sup>16</sup> only specifies that contractual provisions have to provide for termination in case of force majeure events.

**8. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

The PPP Law provides<sup>17</sup> that partnership contracts have to include a specific clause in the PPP contract pertaining to the allocation of risks between the parties. This is modelled

on the contractual practice of optimal risk sharing. Indeed, the PPP Law specifies that the risks linked to the different phases of the project must be identified and detailed.

Moreover it is specified that each type of risk has to be borne by the party who can bear them in the most efficient way, in order to minimize potential costs, and in consideration of public interest and the project specificities.

The Delegated Management Law does not provide for such obligation.

In general, in PPP contracts, the risks linked to the expropriation and the changes in law are assumed by the public entity.

In relation to adverse court decisions pertaining to the validity of the agreement, the allocation of risks is often provided for in direct agreements.

It is common practice that for court decisions pertaining to the early cancellation of the PPP, the risk is borne by the public entity. However, a private entity would bear such risk in case of breach of its contractual obligations.

**9. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

Under Moroccan law, the reinstatement test is not envisaged<sup>18</sup>. Pursuant to the freedom of contract principle, such a test may be included in a PPP agreement.

However, based on our experience of PPP projects in Morocco, public entities are keen to reinstate the facilities rather to repay debt to the lenders.

<sup>13</sup> Article 269 of the Code of Obligations and Contracts (as promulgated by Dahir 9 Ramadan 1331).

<sup>14</sup> Article 26 of the PPP Law.

<sup>15</sup> Article 17 of the PPP Law.

<sup>16</sup> Article 10 of the Delegated Management Law.

<sup>17</sup> Article 16 of the PPP Law.

<sup>18</sup> No laws or regulations seem to prohibit such test.

**10. Is the concept of ‘uninsurability’ recognized in the project agreements?**

The concept of “uninsurability” is not specially defined or provided for under Moroccan legislation. However, the parties can freely stipulate that risk above a certain threshold will no longer be insured provided that such article does not conflict with any mandatory provisions under Moroccan law.

**11. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

The PPP Law recognizes a substitution right, whereby the public authority can replace the private partner with a substituted entity in order to ensure the continuity of the public service, notably in the event of a serious breach of its contractual obligations.<sup>19</sup> The terms and conditions of such substitution have to be determined in the partnership contract.

The PPP Law also provides that the lenders can ask the public authority to substitute the private partner with a new entity, in case of serious breach of its contractual obligations.

By contrast, the Delegated Management Law does not provide for such rights. Nevertheless, delegated management agreements and concession agreements can provide for step-in rights for the grantors or the lenders in accordance with project finance practice.

It is interesting to note that the PPP Law provides for rights for lenders. Indeed, the step-in right for lenders in international project finance projects is always requested by the lenders despite the fact that it is rarely implemented in practice.

<sup>19</sup> Article 21 of the PPP Law.

**12. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

The PPP Law provides that the project agreement can provide for disputes to be settled through an international arbitration procedure under the partnership contract<sup>20</sup>. In such case, the agreement must specify the competent international arbitration procedures. Moreover, next to arbitration procedure, parties can agree on conciliation proceedings or mediation process under contractual clauses.

Arbitration procedures can also be used to settle disputes in respect of delegated management agreement performance<sup>21</sup>.

Then, as is required by international law, the arbitration clauses of all the PPP agreements must define conditions of the arbitration procedure (*i.e.* seat of arbitration, language of the arbitration, procedural law applicable).

In addition, even if arbitration procedures are permitted, Moroccan legislation in respect of PPP agreements does not expressly provide for the possibility of project agreements and direct agreements to be governed by foreign laws.

**13. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

The Moroccan legislation does not provide for a regular market testing procedure. However, according to the freedom of contract principle, such a test may probably be included in a PPP agreement.

<sup>20</sup> Article 27 of the PPP Law.

<sup>21</sup> Article 9 of the Delegated Management Law.

Such a test is also not provided for in concession or partnership agreements.

**14. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

Both the PPP Law and the Delegated Management Law do not provide for a special procedure for the acceptance of the facilities built (*procédure de réception*).

The acceptance procedure is not clearly defined for PPPs under Moroccan law<sup>22</sup>. Only, Article 769 of the Code of Obligations and Contracts<sup>23</sup>, provides that during a ten year period, the private partner will be presumed liable to the grantor (or to the person acquiring the work) for latent defects and damages, including damages resulting from sub-soil conditions, which either impair the strength of the work.

As in other civil law countries, the acceptance is pronounced by the owner once the work is suitable for its purpose (*réception provisoire*). If reparations and adjustments on the work are needed, the owner can establish punch list items (*liste des réserves*) that have to be confirmed by the contractor. It contains a list of items or tasks that need to be repaired or completed prior a determined date. After the complete reparation, the final acceptance of the work is pronounced by the owner.

The final acceptance by the owner of the facilities (*i.e.* the grantor, the public entity) is a crucial event as upon acceptance, the owner takes control and ownership of the project and

the risk of loss passes from the private entity to the owner.

**15. Are there any expected changes or reform to the existing legislation?**

Given the changes recently introduced by the PPP Law, no major reform of existing legislation is expected.

## FINANCING & INCENTIVES

**16. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

***In respect of partnership contracts:***

Under the PPP Law<sup>24</sup>, the payment of the private entity shall be paid, in its entirety or partially, by the public authority. In the event where the public authority fails to pay entirely the private entity's payment, the latter may be remunerated by the users and/or the cash flow generated by the project. In any case, the remuneration is linked to performance objectives, guaranteeing the fulfilment of partnership contracts.

Neither the PPP Law nor the Delegated Management Law specifically provide for inflation and/or foreign exchange protection for PPP projects.

***In respect of delegated management agreements:***

Under the Delegated Management Law<sup>25</sup>, the private entity receives payments from the users. This law<sup>26</sup> also specifies that delegated management agreements may authorize the private entity to collect, on behalf of the public authority, state taxes, royalties, funds or investments.

<sup>22</sup> However, for public procurements, articles 65 and seq. of the "CCAG-T" (approved by Decree No. 2-99-1087 dated 29 moharrem 1421) provide for a specific acceptance procedure of the work.

<sup>23</sup> As promulgated by Dahir 9 Ramadan 1331.

<sup>24</sup> Article 15 of the PPP Law.

<sup>25</sup> Article 2 of the Delegated Management Law.

<sup>26</sup> Article 29 of the Delegated Management Law.



Delegated management agreements must specify, as applicable, the calculation methods of the entrance fees and the royalties paid by the private entity, as well as the contributions or interest in the financing of the public service that could be discharged by the public authority to the private entity.

It is also provided that delegated management agreements set out the principles and the pricing terms of the delegated service and the conditions and rules of adjustment and amendment or revision of the pricing or the remuneration.

Furthermore, the Delegated Management Law provides that such pricing or remuneration clauses must take into account not only the financial balance of delegated management agreements, but also the productivity gains, cost savings from improved management and delegated management agreements performance.

Consequently, in respect of inflation and/or foreign exchange protection, it should be noted that neither the PPP Law nor the Delegated Management Agreement Law provide for such protection. However, it should be noted that, in the Kingdom of Morocco, foreign investors benefit from a convertibility system that guarantees complete freedom to transfer the income generated by these investments and the retransfer of the liquidation proceeds or the investments sale.

**17. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

There is no guaranteed rate of return or a cap on the rate of return for the project company or the sponsors under Moroccan law. However, pursuant to the freedom of contract principle, such a mechanism may be included in both partnership contracts and delegated management agreements.

**18. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

Neither the PPP Law nor the Delegated Management Law provides for a specific payment guarantee provided by the relevant public authority for PPP projects. However, it is common practice in PPP agreements that a public entity (which is not necessarily the contracting authority) provides first-demand bank guarantee to cover certain of its obligations.

**19. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

The obligations of the administration are not qualified as Treasury obligations. Furthermore, Moroccan law does not provide for separate guarantees to be granted by the Treasury to the concessionaire or the lenders. It should be noted that usually such guarantees are neither provided in partnership contracts nor in delegated management agreements.

**20. Are deductions from the service and availability payments subject to a cap?**

The PPP Law<sup>27</sup> provides that, in case of contractual breach by the private entity, partnership contracts must determine the conditions whereby penalties shall be deducted from the private entity's remuneration, but such deduction is not subject to a cap. There is no similar provision under the Delegated Management Law.

As such, pursuant to the freedom of contract principle, the cap mechanism may be included

<sup>27</sup> Article 19 of the PPP Law.

in both partnership contracts and delegated management agreements.

**21. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

*In respect of partnership contracts:*

Although the variations requested by the public authority are not subject to a specific cap, the PPP Law<sup>28</sup> provides that any amendment to partnership contracts must not alter the balance of such contracts.

*In respect of delegated management agreements:*

Pursuant to the Delegated Management Law<sup>29</sup>, delegated management agreements may allow the parties to reconsider the delegated management operation conditions in accordance with the principle of public service adjustment and with the financial balance of delegated management agreements. However, no cap is set in the Delegated Management Law.

**22. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?**

Under Moroccan law, there is no requirement to share any gains from refinancing of the PPP project with the public authority. However, according to the freedom of contract principle, gain sharing provisions may be included in a PPP agreement.

**23. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

There is no requirement to enter into direct agreements under Moroccan law. However as

outlined in question 11, PPP Law specifies that step-in clauses can be provided in partnership contracts. For instance, the PPP Law grants to the lenders substitution rights notably in the event of a serious breach of its contractual obligations. Such step-in rights are usually provided for under direct agreements.

**24. Is there a debt assumption whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

Moroccan law does not have debt assumption mechanism, whereby the public authority undertakes to reimburse the debt of the project company to the lenders. However, pursuant to the freedom of contract principle, such a mechanism may be included in both partnership contracts and delegated management agreements in some circumstances.

**25. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

*In respect of partnership contracts:*

Pursuant to the PPP Law<sup>30</sup>, the project company can be indemnified only in case of force majeure or disruption of the financial balance of partnership contracts.

<sup>28</sup> Article 23 of the PPP Law.

<sup>29</sup> Article 19 of the Delegated Management Agreement.

<sup>30</sup> Article 26 of the PPP Law.

***In respect of delegated management agreements:***

The Delegated Management Law<sup>31</sup> specifies that delegated management agreements may provide for the indemnification principles and terms of the private entity only in case of termination for contractual breach by the public entity.

Pursuant to the freedom of contract principle, the termination conditions are agreed by the parties.

**26. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

Pursuant to the PPP Law<sup>32</sup> and the PPP Decree<sup>33</sup>, the assessment criteria of the bids include the measures taken for the preference for national companies and in particular, the share of the services the private entity undertakes to subcontract to Moroccan companies as well as the utilization of domestic inputs. Unlike the PPP Law, the Delegated Management Law does not specifically include such provisions.

**27. Are there tax advantages available to PPP projects?**

There are no specific tax advantages to PPP projects except for, as the case may be, those referred to in Law No. 18-95 relating to the Investment Charter dated 3 October 1995. For instance, pursuant to this law<sup>34</sup>, advantageous customs duties can apply when equipment, materials and goods are imported for the needs of a project.

**28. What are the other incentives available to PPP projects?**

There are no other incentives available to PPP projects, except for, as the case may be, those referred to in Law No. 18-95 relating to the Investment Charter dated 3 October 1995. For example, under this law<sup>35</sup>, a private entity can enter into a contract with the Kingdom of Morocco in order to obtain financial compensation for the acquisition of lands, for external infrastructure expenses or for professional training expenses.

**29. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2015?**

According to the World Bank, between 2014 and 2015, four PPP projects have reached financial closure and US\$ 6 billion were invested in PPP projects, mainly in electricity and telecom sectors<sup>36</sup>. In the next years, according to the Ministry of Equipment and Transport, PPP agreements will be used to develop transport infrastructures<sup>37</sup> (ports, airports, motorways etc.)

<sup>31</sup> Article 32 of the Delegated Management Law.

<sup>32</sup> Article 8 of the PPP Law.

<sup>33</sup> Article 35 of the PPP Decree.

<sup>34</sup> Article 3 of Law No. 18-95 relating to the Investment Charter dated 3 October 1995.

<sup>35</sup> Article 17 of Law No. 18-95 relating to the Investment Charter dated 3 October 1995.

<sup>36</sup> <http://ppi.worldbank.org/snapshots/country/morocco>.

<sup>37</sup> <http://www.equipement.gov.ma/Investisseurs/Documents/Projets%20PPP%20version%20anglaise.pdf>.

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# KYRGYZSTAN



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## KALIKOVA & ASSOCIATES

### GENERAL

1. Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?

Currently there is no PPP model commonly used in the Kyrgyz Republic as the country has not yet implemented any PPP project. In the meantime, all the mentioned PPP models may be applicable under the legislation of the Kyrgyz Republic (the “Kyrgyz Law”).

2. Which sectors apply a PPP model to develop infrastructure projects?

Article 3 of the Law of the Kyrgyz Republic #7 “On Public-Private Partnership in the Kyrgyz Republic” dated February 22, 2012 (the “PPP Law”) provides that PPP may be applied to certain infrastructure facilities and/or infrastructure services in different sectors, including transportation industry, electricity production, oil and gas refining, public utilities, medical services in healthcare sector, education, telecommunications, tourism, water resources, etc.

Currently there is only one PPP project in the healthcare sector in the Kyrgyz Republic that is under preparation.

### LEGISLATION & REGULATION

3. What are the principal laws and regulations? Is there a framework PPP Law?

The main law in PPP sphere is the PPP Law. The legal framework on PPP also includes certain provisions in other laws (the Tax Code of the Kyrgyz Republic dated October 17, 2008, the Law #184 “On Customs Regulation in the Kyrgyz Republic” dated December 31, 2014) and subordinate acts (resolutions of the Government, regulations, etc.). The main subordinate acts in the PPP sphere are as follows:

- Resolution of the Government #616 “On Determination of Authorized Bodies in PPP sphere” dated September 14, 2012;
- Resolution of the Government #147 “On Financing of the PPP Projects Preparation”;
- Regulation on the Fund for Financing of PPP Projects Preparation (approved by the Resolution of the Government #147 dated March 17, 2014);

- Regulation on Tender Commission for Selection of Private Partners for PPP Projects (approved by the Resolution of the Government #39 dated January 28, 2013);
- Order for Preparation of the Rules for Tendering Process and Tender Documentation on PPP Projects in the Kyrgyz Republic (approved by the Resolution of the Government #39 dated January 28, 2013);
- Rules for Maintenance of the Register of the PPP Projects in the Kyrgyz Republic (approved by the Resolution of the Government #307 dated June 4, 2014), etc.

**4. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

The Kyrgyz Law does not stipulate a centralized PPP authority. In the meantime, in accordance with the Article 7 of the PPP Law and the Resolution of the Government #616 dated September 14, 2012 the authorized bodies that regulate PPP sphere are as follows: Government; Ministry of Economy (the authorized body in the PPP sphere); Ministry of Finance (the state body for risk management); public partners.

**5. Are there any restrictions for foreign investors to develop/operate PPP projects?**

No, there are no restrictions for foreign investors to develop/operate PPP projects in the Kyrgyz Republic.

**6. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

The PPP legislation of the Kyrgyz Republic does not envisage a long-stop date for the

completion of construction. However such long-stop date may be specified by the public and private partners in the project agreements.

**7. How are force majeure events defined, and what are the consequences of their occurrence?**

Article 356 of the Civil Code of the Kyrgyz Republic determines force majeure events as irresistible force i.e. extraordinary and unavoidable circumstances under given conditions. If a party proves that he/she failed to perform his/her obligations as a result of force majeure events, he/she may be exempt from liability.

Please note that according to the Kyrgyz Law force majeure events only exempt parties from liability but do not exempt them from performance of obligations.

Article 22 of the PPP Law provides that the PPP agreement shall contain mandatory provisions on the actions of the parties to the PPP agreement in case of force majeure events. Anyway, provisions of Article 356 of the Civil Code regarding exemption of the parties from liability in case of force majeure shall apply.

**8. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

Article 14 of the PPP Law provides for a number of guarantees to the private partner and the project company which among others include protection of property of the private partner and the project company from nationalization and other measures, freedom of national currency conversion, etc. Moreover, the same article provides for:

- compensation of losses incurred as a result of illegal actions of government

bodies and their officials that caused damage to private partner or project company in accordance with conditions of PPP agreement;

- redetermination of conditions of PPP agreement or early termination of PPP agreement and receiving of compensation for damage in case of adoption of laws worsening conditions of realization of PPP project for private partner or/and project company in comparison with conditions provided by PPP agreement.

**9. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

The Kyrgyz Law does not envisage reinstatement test however this issue may be regulated by the PPP agreement.

**10. Is the concept of ‘uninsurability’ recognized in the project agreements?**

According to Article 22 of the PPP Law requirements on insuring the PPP project is one of the mandatory provisions of the PPP agreement.

**11. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

The Kyrgyz Law does not clearly provide cases and methods when government or funders can take control of the PPP projects; however, these provisions may be defined in the PPP agreement upon consent of the parties. Also, according to the PPP Law, in certain cases, rights and obligations of the private partner

and the project company may be assigned to financial institutions that provide financing for the implementation of the PPP project, however in this case a preliminary written consent of the state partner is required.

**12. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

In accordance with Article 34 of the PPP Law, all disputes arising out of or in connection with the procedure of selection of private partners shall be settled in the courts of the Kyrgyz Republic.

All disputes arising out of or in connection with the execution, performance and termination of the PPP agreement shall be settled by negotiation in accordance with provisions of the PPP agreement. The parties to the PPP agreement may determine the courts of the Kyrgyz Republic or arbitral tribunals of the Kyrgyz Republic or international commercial arbitration institutions as the venue for dispute resolution.

All disputes arising out of or in connection with the provision by the private partner or the project company of services to beneficiaries in the course of implementation of the PPP project shall be settled in the courts of the Kyrgyz Republic. When executing the PPP agreement, the public partner may demand that the private partner or the project company establish easy and efficient mechanisms to resolve such disputes as a method of pre-trial dispute resolution.

Pursuant to Article 21 of the PPP Law, PPP agreements shall be governed by the Kyrgyz Law.

**13. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

The PPP legislation of the Kyrgyz Republic does not contain any provisions regarding regular market testing procedure.

**14. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

In general, the acceptance of the facilities is performed by the relevant public authority. The Kyrgyz Law is silent about the possibility of involvement of an independent technical adviser in the acceptance process. Therefore, it is not prohibited under the Kyrgyz Law and the public and private partners are not prohibited from stipulating such matters in the PPP agreement. The project company may be involved, if it exists, as formation of the latter is not mandatory but voluntarily for the private partner to implement a PPP project (private partner can implement the project directly without a separate project company).

According to Article 28 of the PPP Law, if the PPP agreement is terminated, the private partner and/or the project company must do the following, unless otherwise provided in the PPP agreement:

- (i) transfer to the public partner the infrastructure facility and other assets received from the public partner free and clear of any encumbrances of third parties as required by the agreement;
- (ii) train personnel of the public partner in the matters of operation and maintenance of the infrastructure facility;

- (iii) ensure the nonstop rendering of ancillary services and supply of resources including spare parts, if required, within reasonable time after transfer of the infrastructure facility and other assets to the public partner.

**15. Are there any expected changes or reform to the existing legislation?**

In November 2015, the Government of the Kyrgyz Republic submitted to the Parliament of the Kyrgyz Republic the bill proposing amendments to the current PPP Law. The amendment bill (the “Bill”) passed its first reading on January 13, 2016. In order to enter into force, the Bill must pass the second and third readings in the Parliament and then be signed by the President of the Kyrgyz Republic. The Bill proposes to introduce execution of the direct agreement by financial institutions and public authority.

## FINANCING & INCENTIVES

**16. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

The PPP Law does not regulate the payment mechanism; according to Article 22 of the PPP Law, the payment mechanism for PPP project shall be regulated by the PPP agreement.

The PPP Law does not specifically provide inflation and/or foreign exchange protection, in the meantime the public and private partners are not prohibited from stipulating such protection measures in the PPP agreement (e.g. as an economic support of the public partner).



**17. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

The PPP Law does not provide a guarantee rate of return or a cap on the rate of return for the project company or the sponsors. The public and private partners are not prohibited from stipulating such provisions in the PPP agreement.

**18. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

The PPP Law does not provide any payment guarantee by the public partner, in the meantime, the public and private partners are not prohibited from stipulating payment guarantees in the PPP agreement (e.g. as an economic support of the public partner). In order to secure and guarantee the public partner's obligations related to payment, the Government of the Kyrgyz Republic may establish a special fund.

**19. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

The PPP Law does not qualify the public partner's obligations as State (Treasury) obligations. In accordance with Article 12 of the PPP Law, the public partner may provide or facilitate provision of the state financial support to the private partner / project company, including securing the public partner's obligations by the state guarantee. The state guarantee may be provided under the decision of the Government of the Kyrgyz Republic.

**20. Are deductions from the service and availability payments subject to a cap?**

The PPP Law does not provide deductions from the service and availability payments are not subject to a cap. The public and private partners are not prohibited from stipulating such provisions in the PPP agreement.

**21. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

The PPP Law does not provide variations that the public authority may request at the construction and operation stages subject to a cap. The public and private partners are not prohibited from stipulating such provisions in the PPP agreement.

**22. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?**

The PPP Law does not set up a requirement to share any gains arising from refinancing of the PPP project with the public authority. The parties may regulate this provision by mutual consent in the PPP agreement.

**23. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

As mentioned above, in November 2015, the Government of the Kyrgyz Republic submitted to the Parliament the Bill proposing amendments to the current PPP Law. The Bill passed its first reading on January 13, 2016 and the second reading on April 14, 2016. In order to enter into force, the Bill must pass the third reading in the Parliament and then signed by the President of the Kyrgyz Republic. The Bill proposes to introduce execution of the direct agreement by financial institutions and public authority. The Bill is silent regarding specific rights of the lenders under the direct

agreements. In general, the direct agreements regulate the lenders' step-in rights, identification of risks and their allocation between the parties of the agreement, the process of terminating the agreement and receiving compensation, etc.

**24. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

Under Article 12 of the PPP Law, the public partner may provide or assist in providing governmental financial support to the private partner and/or the project company. One of the financial supports is the provision of bank guarantees by the public partner. Under Article 349 of the Civil Code, the bank guarantee may be issued by a bank, by other credit institution or by an insurance company, i.e., the bank guarantee cannot be issued by the public partner. The Bill introduces amendments to the PPP Law pursuant to which the public partner may issue credit guarantees, not bank guarantees. Credit guarantees of the public partner can cover the failure of the private partner/project company to meet specific obligations within the PPP project. By mitigating performance risks, for private investors and financial institutions, credit guarantees are useful tools to enhance the bankability of the PPP projects.

Neither the PPP Law nor the Bill regulates provisions on covering the full amount of the equity and its payment in all termination scenarios.

**25. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

The PPP Law does not regulate payments to be made by the administration to the sponsors, to the project company and to the lenders in case of termination of the project agreement. This can be regulated by the PPP Agreement and direct agreements.

**26. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

Pursuant to Kyrgyz law, there is no domestic equipment incentive provided for PPP projects.

**27. Are there tax advantages available to PPP projects?**

Under Article 256-1 of the Tax Code, supplies of goods, works, services made by the private partners and/or by the project company in the process of implementing the PPP agreements to be approved by the Government are exempt from VAT during the period stated in the PPP agreement. It follows from Article 256-1 that to be qualified for exemption from VAT, the PPP agreement should be approved by the Government.

**28. What are the other incentives available to PPP projects?**

Under the PPP Law, the public partner may provide or assist in providing either government financial and/or government economic support to the private partner and/or to the project company.

- i.* The government financial support<sup>1</sup> may be provided in the following forms:
- loans on preferential terms necessary for the implementation of a PPP project;
  - bank guarantees;
  - guarantees securing the performance of the public partner's obligations;
  - tariff subsidies;
  - partial financing of costs incurred in the course of the implementation of the PPP project;
  - customs duties exemptions and/or deferments and/or instalments.
- ii.* The government economic support may be provided in the following forms:
- provision of the rights to movable or immovable property in addition to the rights to an infrastructure facility;
  - assistance in obtaining licenses, permits, authorizations;
  - provision of easements in respect of publicly and/or municipally owned movable or immovable property;
  - provision of the right to generate revenues from other types of activities not directly associated with the implementation of the PPP project;
  - setting discounted lease payments for use of the publicly and/or municipally owned property;
- provision of exclusive right to engage in the activity to the extent permitted by the executed PPP agreement;
  - provision of other kinds of support to the extent not contradicting with Kyrgyz legislation.
- Additionally to protect private investments made into the PPP project, the private partner and the project company are guaranteed the following<sup>2</sup>:
- non-interference by the public partner with the business of the private partner and project company;
  - protection from nationalization or any other measures of similar effect;
  - the right to freely possess, use and dispose investments made into the PPP project and returns on investments for the purposes not prohibited by Kyrgyz legislation;
  - the right to freely convert the national currency of the Kyrgyz Republic into any other foreign currency and freely repatriate profits received;
  - the right to reimbursement of losses incurred as a result of illegal action (inaction) of public and/or municipal authorities or their officials, who caused damages to private investor and/or project company on the terms prescribed by the PPP agreement;
  - the right to revision of the terms and conditions of the PPP agreement or early termination of the PPP agreement; and
  - the right to reimbursement for damages caused by the adoption of certain legal

<sup>1</sup> Article 12 of the PPP Law.

<sup>2</sup> Article 14 of the PPP Law.

acts entailing worse conditions for the private partner and/or project company to implement their PPP project in comparison to agreed conditions in the PPP agreement.

**29. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2015?**

Since the adoption of the PPP Law in 2012, there have been no PPP projects developed in the Kyrgyz Republic. Currently, the Ministry of Health is carrying out the Feasibility Study of the potential PPP project(s) on providing dialysis facilities and services and creating a centralized laboratory in the Kyrgyz Republic under the PPP mechanism

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# LATVIA



Maris Brizgo

KLAVINS ELLEX

## GENERAL

1. Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?

PPP model is not commonly used in Latvia for infrastructure projects, still classic public tenders are mainly applied. Concession dominates greatly among PPP projects applied.

According to public information of the Register of Enterprises, from 1 April 2003 up to date of this publication, 62 (sixty-two) concession contracts and 3 (three) PPP contracts were registered.

2. Which sectors apply a PPP model to develop infrastructure projects?

- Transport and communication sector;
- Public utilities sector (mainly heat supply);
- Education sector; and
- Healthcare sector.

## LEGISLATION & REGULATION

3. What are the principal laws and regulations? Is there a framework PPP Law?

The framework PPP law in Latvia is the Public and Private Partnership Law, which is effective since 1 October 2009.<sup>1</sup>

Subordinated applicable governmental regulations are as follows (translations to English are not available):

- a. Cabinet of Ministers Regulations No. 904 of 28 September 2010 “Regulations regarding Contents of Concession Procedure Notifications, Procedure for Submission Thereof and Sample Notification Forms”;
- b. Cabinet of Ministers Regulations No. 1216 of 20 October 2009 “Regulations regarding Operations of Supervisory Authorities and Submission of a Report

<sup>1</sup> Translation in English of the law is available in the following link:  
[http://www.vvc.gov.lv/advantagecms/LV/tulkojumi/meklet\\_dokumentus.html?query=%22publisk%C4%81s+un+priv%C4%81t%C4%81s+partner%C4%ABbas+likums%22&Submit=Mekl%C4%93t&resultsPerPage=10](http://www.vvc.gov.lv/advantagecms/LV/tulkojumi/meklet_dokumentus.html?query=%22publisk%C4%81s+un+priv%C4%81t%C4%81s+partner%C4%ABbas+likums%22&Submit=Mekl%C4%93t&resultsPerPage=10)

on Performance of the Contract of the Public Partner or its Representative”;

- c. Cabinet of Ministers Regulations No. 1184 of 13 October 2009 “Registration and Accounting Procedure for Public and Private Partnership Contracts”;
- d. Cabinet of Ministers Regulations No. 1152 of 6 October 2009 “Procedure for Performance of Financial and Economic Calculations, Determination of the Type of Public and Private Partnership Contract and Rendering of Opinion on Financial and Economic Calculations”;
- e. Cabinet of Ministers Regulations No. 1068 of 22 September 2009 “Regulations regarding Value Limits in respect of Concession Agreements for Construction”.

**4. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

The Ministry of Finance ([www.fm.gov.lv](http://www.fm.gov.lv)) is main state authority responsible for PPP policy in Latvia. Besides this, the Ministry of Finance shall evaluate the expected impact of the conditions referred to in the financial and economic calculations on the amount of the long-term liabilities of the state budget and the government debt and shall give opinion thereof.

The Procurement Monitoring Bureau ([www.iub.gov.lv](http://www.iub.gov.lv)) is the responsible body for review of applications regarding alleged violations in procedures applied under the Public and Private Partnership Law, as well as it acts as the body responsible for application of administrative penalties.

The Central Finance and Contracting Agency ([www.cfla.gov.lv](http://www.cfla.gov.lv)) is the monitoring institution as determined by the Government of Latvia

and acts within authority specified by the Public and Private Partnership Law. The Central Finance and Contracting Agency could be regarded as centralized PPP body in Latvia which also acts as a competence centre for PPP.

The Register of Enterprises ([www.ur.gov.lv](http://www.ur.gov.lv)) is a body responsible for maintenance and administration of the registry of PPP contracts.

**5. Are there any restrictions for foreign investors to develop/operate PPP projects?**

Neither the Public and Private Partnership Law nor any other law or regulations apply any restrictions for foreign investors/companies to have access to PPP projects.

**6. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

In general, both concession and PPP contracts are limited to a lifetime of 30 (thirty) years. As an exception, it is permitted to have a contract duration exceeding 30 (thirty) years if it is necessary for the purpose of the contract and the results to be achieved that are substantiated by financial and economic calculations.

**7. How are force majeure events defined, and what are the consequences of their occurrence?**

The Public and Private Partnership Law prescribes that a PPP contract should have provisions on force majeure events and the rights and obligations of parties in such events. It is permitted to terminate a PPP contract in force majeure events. It is specified that in case of PPP laws and regulations adopted during the validity of the PPP contract, action of the public administration institutions and the documents adopted thereby should not be considered as force majeure events. According to the Civil Law, neither party shall

compensate any losses caused due to force majeure event.

Latvian law does not specify *express verbis* what is meant by force majeure event. The content of this term is given by the court. According to court case-law, force majeure conditions are as follows:

- 1) which were unknown to parties at the moment of execution of a contract;
- 2) which render the completion of the contract impossible at all;
- 3) which did not occur due to fault of the party;
- 4) which are not possible to prevent with any efforts of the party.

**8. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

The Public and Private Partnership Law does not prescribe how risks should be allocated between public and private party. Risks are allocated individually on case-to-case basis. It is mandatory that risk allocation is explicitly specified in PPP contract.

It is specified that the Central Finance and Contracting Agency should review the risk allocation between parties and should provide opinion hereof. In case of construction concession, a risk of demand from end-users should be transferred to private partner.

**9. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

The Public and Private Partnership Law does not provide for such reinstatement test.

However, it is permitted to specify such reinstatement test in PPP contract.

**10. Is the concept of ‘uninsurability’ recognized in the project agreements?**

The Public and Private Partnership Law does not provide for the concept of “uninsurability”.

**11. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

The Public and Private Partnership Law entitles funders to step-in if a PPP contract is unilaterally terminated by public partner in any of the following cases:

- a) According to the PPP contract provisions;
- b) Private partner had submitted application on termination of its business activities;
- c) Bankruptcy procedure of the private partner had been started.

In case of step-in, the funder is entitled to propose to public partner a new private partner. The funder should notify on exercise of the step-in rights within 1 (one) month of receipt of a notice from the public partner. The exercise of the step-in rights is limited to time-period of 6 (six) months.

**12. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

According to the Law on Arbitration Courts, arbitration court does not have authority over disputes where one of the dispute parties is either state or municipal body or if arbitration award may have impact on the rights of state or municipal bodies. Since public partners are

state or municipal bodies, disputes may not be referred to arbitration.

According to the Civil Law, contracts entered into by state or municipal bodies shall be adjudged, in respect of their substance and consequences, in accordance with Latvian law, provided it is not otherwise stipulated in the contract itself. Provided that a contract in question is regarded as a private law contract, parties are free to agree on foreign law as the governing law of the contract.

**13. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

The Public and Private Partnership Law does not provide for such regular market testing on mandatory basis. However, it is permitted to provide for similar procedure in the PPP contract in order to reconsider payment amounts.

**14. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

After completion of construction works the building (object) shall be accepted for exploitation performing commissioning. Commissioning is executed by the competent local government or state institution (depending from the type of the object and construction works) by signing the statement on acceptance of the object for the exploitation. Before commissioning the person who proposed construction shall have to submit to the competent institution all the necessary documents regarding completion of the construction works, including cadastral survey documents and resolutions of the institutions which have issued technical and special construction regulations. After receipt

of all necessary documents for acceptance of the object for exploitation, the competent institution shall inspect the object and verify whether the object is acceptable for exploitation within 14 days. In the commissioning process shall participate (i) the competent institution, (ii) the person who proposed construction, (iii) the performer of construction works, (iv) building supervisor and (v) designer (author supervisor), if author supervision is not performed or resolution is not provided by him/her.

**15. Are there any expected changes or reform to the existing legislation?**

Since PPP is inactive in Latvia, it is not envisaged to adopt any changes to existing PPP legislation.

## FINANCING & INCENTIVES

**16. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

The Public and Private Partnership Law does not provide for any detailed provisions on how the payment mechanism should be regulated for PPP projects. The law provides that payments could be received either from public partner or from end-users. It is mandatory to specify payments in a PPP contract.

In general, a public partner is not restricted to specify what payment mechanism would be applied in a particular PPP project. However, the public partner should justify the proposed payment mechanism and it should be supported by the Ministry of Finance and the Central Finance and Contracting Agency in their opinions.

The Public and Private Partnership Law does not directly address such issues as inflation and/or foreign exchange protection and leaves these issues to be specified by the public



partner in the PPP contract. It is mandatory to cover conditions for reassessment of payment in the PPP contract. Therefore, public partners are free to provide provisions addressing inflation and/or foreign exchange protection.

**17. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

Latvian law does not set any guaranteed rates and does not set any caps.

**18. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

According to the Law on Budget and Financial Management, Latvian State may provide payment guarantee for liabilities, which are undertaken for the performance of investments by a capital company, in which the State or local government share in the equity capital individually or in total exceeds 50 per cent, and by a capital company established by several local governments, in which the local government share in the equity capital exceeds 65 per cent and which is included in the sector of non-financial merchants according to the classification of institutional sectors.

**19. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

According to the State Administration Structure Law, the state of Latvia is liable for actions of institutions of direct administration. Therefore, if a PPP contract is concluded with a state institution, then obligations under such contract are obligations of the state. In general, the state is not liable for obligations undertaken by municipalities or state-owned companies. Guarantees are not provided

automatically and it depends on each particular PPP project whether state provides guarantees or not.

**20. Are deductions from the service and availability payments subject to a cap?**

Latvian law does not set any caps and it depends on each particular PPP project whether such caps are applied or not.

**21. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

Latvian law does not set any caps and it depends on each particular PPP project whether such caps are applied or not.

**22. Is there a requirement to share any gains arising from refinancing of the PPP project-with the public authority?**

There is no such requirement provided under the Public and Private Partnership Law.

**23. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

The Public and Private Partnership Law does not address such issue and it is left to the discretion of public partners to decide whether lenders should sign direct agreement with public partner or not.

**24. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

The Public and Private Partnership Law does not specify a debt assumption mechanism or anything similar.

**25. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

The Public and Private Partnership Law does not address such issue and it is left to the discretion of public partners to regulate these issues in draft PPP contract.

**26. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

It is prohibited under Latvian and EU law to discriminate equipment or materials produced in other EU Member states and all equipment and materials should be treated equally

**27. Are there tax advantages available to PPP projects?**

According to the Corporate Income Tax Law, private partner may amortise long-term investments in assets of public partner according to the PPP contract throughout contractual term.

According to the Real Estate Tax Law, the real property created in a PPP project and used for needs of municipality is exempted from real estate tax.

According to the Value Added Tax Law, value added tax for construction services provided to public partner which is registered as VAT payer is paid by the public partner (and not by the private partner).

**28. What are the other incentives available to PPP projects?**

Co-financing for implementation of PPP projects from EU structural funds is available in some instances.

**29. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2015?**

During 2015 there were no PPP contracts concluded in Latvia.

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# LITHUANIA



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## VALIUNAS ELLEX

### GENERAL

1. Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?

Currently Lithuania has 38 on-going or completed PPP projects, however, only several of them are of high-value and should be considered as “real” PPPs. However, PPP model is currently being promoted for development of infrastructure projects and several high-value PPP projects is under the procurement phase or under final steps of their commencement. Most common method used in PPPs is Build-Lease-Operate-Transfer.

2. Which sectors apply a PPP model to develop infrastructure projects?

Until now, PPP model was mostly applied by road infrastructure and public buildings. Projects such as construction and reconstruction of roads, development of sports and entertainment arenas, as well as development of law enforcement infrastructure has been among the most popular PPP projects. However, it is anticipated that in the future, PPP model will

be applied to a significant number of energy efficiency projects (street lighting, etc.).

### LEGISLATION & REGULATION

3. What are the principal laws and regulations? Is there a framework PPP Law?

Lithuania does not have a framework PPP Law. Instead, PPPs are covered by several laws and regulations. The following acts adopted by the Parliament do form a core legal background for PPP projects in Lithuania:

- Law on Investments establishes legal background for the implementation of the PPP projects. Law on Investments introduced definitions of the PPP and the general government and private entities’ partnership (similar to PFI model used in United Kingdom, the “GGPEP”). It sets the concepts, principles and peculiarities of GGPEP project agreement, as well as its contents and defines who can be the general government entities. The Law on Investments also introduced that the GGPEP agreement shall be concluded in accordance with the Law on Public Procurement and the duration of the agreement shall be more than 3 but not more than 25 years. In addition to all that, the Law on Investments sets the legal base

to establish Central PPP Unit, which is responsible for the methodological aid and consultations regarding preparation and implementation.

- The Law on Public Procurement sets a legal framework for the selection of private party in GGPEP projects.
- Law on Concessions establishes basic rules for the granting of concessions. The Law provides a list of activities that shall be carried out according to concession agreements. The list includes economic and commercial activities related to infrastructure and public services with operations in specified areas (in case a project consist operation in other areas, specific Government's resolution shall be adopted). The Law also specifies main rules on the award and cancellation of the concession, which are mostly based on general public procurement rules.
- The Law on Use, Ownership and Disposal of State and Municipalities' Property sets a legal framework for institutional PPPs. It provides that a private investor to a legal entity co-owned by state or by a municipality and entitled to perform a PPP project shall be selected by conducting a contest for granting a concession or conducting a public procurement for the implementation of a GGPEP project, and requirement that the State would maintain the majority votes in such co-owned entity. Due to this requirement, this model in practice is essentially not employed.
- The Rules on Preparation and Implementation of the Public – Private Partnerships, adopted by the Government's resolution, set the definition of partnership agreement and specifies the process of preparation, approval and implementation of PPP

projects. The Rules clarified which institutions are responsible for preparation, approval, implementation and control of PPP projects, as well as procedures thereof. Furthermore, the Rules defined the main risks of the PPP projects and principles of allocation of the risk between public and private parties and its impact to the ratios of public sector's deficit and debt.

#### **4. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

In Lithuania, there is no regulatory body devoted specifically for PPPs – the Parliament and the Government set the main laws and regulations applicable to PPPs. However, there are some bodies which plays active role in PPPs.

One of them, Central Project Management Agency (the "CPMA"), performs the functions of providing the methodological aid to the public sector regarding PPPs and seeks to assist in creating legal, administrative and institutional conditions in Lithuania, necessary for development of effective partnership. CPMA provides methodological support and consults regarding preparation and implementation of partnership projects, also organizes trainings in this field for public administration institutions, initiating and implementing the PPP projects, issues methodological guidance, etc.

Another body – agency Invest Lithuania – seeks to develop Lithuanian PPP market and make sure that it is attractive to foreign investors. To this aim, Invest Lithuania helps public institutions to prepare feasibility studies (investment projects) for PPP projects, tenders for selection of private partner, finding competent advisors, structuring the PPP project, etc.

**5. Are there any restrictions for foreign investors to develop/operate PPP projects?**

Equality for tenderers is guaranteed by local and European Union legislation. However, Law on Investments provides that foreign investments shall be prohibited in the activities guaranteeing state security and defence (except for investments by the economic entities meeting the criteria of European and Transatlantic integration which Lithuania has opted for, provided that this is approved by the State Defence Council).

**6. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

The legislation does not envisage a long-stop date. However, it is possible to specify it in the project agreement.

**7. How are force majeure events defined, and what are the consequences of their occurrence?**

Force majeure events and their consequences are defined in standard PPP documents which are prepared with assistance of Ministry of Economy and Invest Lithuania, and are published by CPMA.

Force majeure circumstances shall be understood as occurrence of any circumstances (e.g. war, riot, civil strike or unrest, embargo, fire, earthquake, hurricane, volcanic eruption and other natural disasters), which the party that has to perform a specific undertaking cannot reasonably control, which could not be foreseen or avoided, and which completely or partially prevents the party from the performance of the said undertaking.

If an event of force majeure occurs and further performance of the agreement is impossible thereof, it shall not be deemed to be a

violation of the project agreement or the failure to perform undertakings and no sanctions shall be applied towards affected party.

Upon the expiration of force majeure circumstances, the performance of contractual undertakings will be resumed as of the specified date. However, generally, there is a possibility to terminate the project agreement if force majeure takes longer than some pre-defined time (usually – 180 consequent days) stipulated in the project agreement.

**8. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

Political and legal risks are usually assumed by the public party. However, the partnership agreement always includes a matrix of risk allocation between the parties, which can specify a different allocation or some variations thereof. Consequences of occurrence of political and legal risk depend largely on a specific situation but generally it is treated as Compensation Event.

**9. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

Reinstatement test is not envisaged under the legislation. But it is usually stipulated in the project agreement. Project agreements usually specify that in case of an insured event during which assets are damaged or lost, the funds received as insurance benefits for the loss or damage of assets shall be used for the reinstatement of such assets or their replacement with equivalent assets.

**10. Is the concept of ‘uninsurability’ recognized in the project agreements?**

The concept of ‘uninsurability’ is generally recognized in the project agreements. Project agreements usually specify that the obligation to conclude insurance contracts will not apply only in case and only for the period when respective insurance contracts cannot be concluded as a result of the situation in the insurance market or if the costs of such insurance contract would exceed a certain threshold.

**11. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

The legislation for concessions clearly allows such a provision to be stipulated in the project agreement (in case of funders – to award the current concession agreement for the new entity found by the funders without new tender procedures for completion of the same project). Furthermore, standard project agreements provide both for Authority Step-In (in limited cases and for limited duration) and Funders’ Step-In (allowing to replace the failing private partner with a new one).

**12. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

It is possible to choose arbitration for dispute resolution; however, in practice, it is unusual. As for the foreign law, there are no legal acts that preclude choosing foreign law as the governing law; however, to our knowledge, it has never been selected.

**13. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

The legislation and the standard project agreements do not envisage such market testing procedure. It is possible to include such procedures in project agreements. We are aware only of one such attempt – however, it was ceased during the tender procedures.

**14. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

Generally, having completed all the works which are approved and accepted by the governmental construction completion commission (whether it complies with legal requirements, technical design, etc.) and being ready to transfer thereof to the public party under the transfer-acceptance act, the private party shall notify in writing the public party and the independent technical adviser thereabout. After having received the private party’s notice about its preparation to transfer the facility and to conclude the transfer-acceptance act, the public party and/or the independent technical adviser shall, no later than within a certain time-limit of receipt of the notice, agree to accept or refuse to accept the facility. In case of refusal, the public party shall notify the private party in writing giving reasons of the refusal.

**15. Are there any expected changes or reform to the existing legislation?**

Yes. Until 18 April 2016 Lithuania have to transfer into national law the new directive 2014/23/EU on the award of concession contracts adopted by the European Union on

26 February 2014. Furthermore, the new Public Procurement Directives shall also be transferred into the national law, thus changing some requirements and procedures applicable for selection of private partners in GGPEP projects.

## FINANCING & INCENTIVES

### **16. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

The payment mechanism is not regulated by legislation. However, the mechanism is always stipulated in the project agreement. Generally, inflation is dealt with stipulating an indexation mechanism for Annual Payment in accordance with some predefined indexes. Foreign exchange risk is generally assumed by the private partner by employing hedging.

### **17. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

Project agreements generally guarantees for sponsors a rate of return specified in the final and binding proposal of the selected private partner, if it successfully performs the project agreement (i.e. subject to fines, penalty mechanism, etc.).

### **18. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

Generally no such guarantees are provided by the relevant public authority for PPP projects due to the aim to off-balance PPP projects. However, under the current regulations, some payment guarantees may be provided in city

street lightning modernization projects. These guarantees are financed by Energy Efficiency Fund (ENEF), which was established on 18th of February 2015 by the Ministry of Finance, the Ministry of Energy and the Public Investment Development Agency (VIPA). VIPA is acting as an ENEF manager and the Fund is funded by European Regional Development Funds.

VIPA guarantee covers debtor's (municipality's) outstanding obligations to creditor (private partner or funder, depending on the specific structure of the PPP project).

### **19. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

The law does not directly provide that the obligations of the administration should qualify as direct State (Treasury) obligations. The Treasury generally does not provide any separate guarantees to the private partner or to the lenders.

### **20. Are deductions from the service and availability payments subject to a cap?**

Due to the aim to off-balance projects, generally, deductions from the service and availability payments are not subject to a cap (principle "no service-no payment" is sought to be complied with).

### **21. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

Generally, such variations are subject to a cap (due to the general principles of equality and non-discrimination) and shall be paid by the public authority on top of the Annual Payments (either as a lump sum or amending the Annual Payment accordingly).

**22. Is there a requirement to share any gains arising from refinancing of the PPP project-with the public authority?**

Usually, project agreements stipulate that the refinancing gains are shared on 50/50 basis.

**23. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

Generally, lenders do sign a direct agreement with the relevant public authority and the private partner. According to this agreement, lenders have the right to receive a notification from the public authority in case public authority is considering a termination of the project agreement with the private partner, and execute their step-in rights (and the procedure thereof).

**24. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

In accordance with the practice up to date, such debt assumption mechanism is not included into the project agreements. However, generally the public authority undertakes to repay at least the pre-defined percentage (usually – 90%) of the debt to the lender even in a case of early termination due to the fault of the private partner, and full outstanding debt in case of termination due to other causes.

**25. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

Generally, in case of early termination on any ground, the administration (public authority) pays the project company compensation amount calculated in accordance with formulas provided in the project agreement. In case of early termination due to private partner's fault, it is generally sought that the compensation amount would reflect project value minus rectification costs (often including some fine). If early termination is due to public authority's fault, it is sought that the compensation would be equal to what the private partner would have earned if it carried the project agreement up to its expiration. And in case of termination due to force majeure or without fault of parties, it is sought to compensate the private partner's costs of implementation of the project up to date plus some reimbursement for lost opportunity to carry on the project agreement until its expiry.

**26. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

In accordance with practice up to date, such incentives are not employed.

**27. Are there tax advantages available to PPP projects?**

No. According to Lithuanian law framework, no specific tax advantages are available to PPP projects.



**28. What are the other incentives available to PPP projects?**

No other specific incentives are available to PPP projects.

**29. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2015?**

During 2015, only 1 large PPP project has been successfully completed (reached financial close). The value of this transport sector project is approx. 35.8 million EUR. Nevertheless, there are a number of infrastructure PPP projects conducted at the

moment: Vilnius police and custody stations, Medical campus parking of Santariškės Clinics, and Vilnius courthouse infrastructure development projects (total anticipated values of the projects exceed 200 million EUR). Moreover, airport expansion, major road Vilnius-Utena reconstruction, Vilnius multifunctional centre, Vilnius street lighting, New detention facility in Vilnius projects are currently in preparatory stages and in some of them tender stage is about to be launched (the total anticipated values of these projects exceed 500 million EUR).

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# MACEDONIA



Dori Kimova

## KIMOVA LAW OFFICE

### GENERAL

1. Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?

The PPP model to develop infrastructure projects in the Republic of Macedonia is still not commonly used, but is in the process of development. The Build-Operate-Transfer model is the most common.

2. Which sectors apply a PPP model to develop infrastructure projects?

Infrastructure projects through public-private partnership are most frequently developed in the Transport and Energy sector.

### LEGISLATION & REGULATION

3. What are the principal laws and regulations? Is there a framework PPP Law?

The principle law which regulates the issue of public-private partnership is the Law on concessions and public-private partnership.

The Public Procurements Law and Law on obligations also apply.

4. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?

Ministry for Economy is the competent body for public private partnership with following competencies:

- developing and implementing measures and activities aimed at achievement and maintenance of completely transparent and efficient system for public private partnership,
- keeping and maintaining the Register of Awarded Contracts for Establishment of a Public Private Partnership, - preparing and drafting amendments to the regulations in the field of public private partnership and giving instructions for implementation of the Law,
- organizing and delivering education and training in the field of public private partnership for all the participants in the process,
- to monitor, analyse and provide professional assistance and opinion with regard to conducting the procedures,

- to monitor, analyse and study the current European and world tendencies, know-how and experiences in the field of public private partnership, and
- to carry out other activities and tasks related to the public private partnership.

The Government of the Republic of Macedonia establishes also a Public Private Partnership Council which has an advisory role for the Government in the field of public private partnership. It promotes the public private partnership, propose projects, as well as raises initiatives with draft amendments to the regulations in this field. There is also a Committee for granting concession and PPPs.

**5. Are there any restrictions for foreign investors to develop/operate PPP projects?**

There are no restrictions for foreign investors to develop/operate PPP projects.

**6. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

The project agreements may contain a long-stop date for the completion of construction.

**7. How are force majeure events defined, and what are the consequences of their occurrence?**

Force majeure is defined as an extraordinary event which happened after the conclusion of the agreement, but before the obligation is due, and which could not be predicted, prevented or avoided by the contracting parties. In case of force majeure, the obligations of the parties cease to exist, and the contracting parties are not responsible for damages suffered by the other party.

**8. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

All risks are subject to regulation by the project agreement.

**9. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

The legislation does not envisage a reinstatement test; it could be subject to the project agreement.

**10. Is the concept of 'uninsurability' recognized in the project agreements?**

The uninsurability clause could be included in the project agreements.

**11. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

The public partner is authorized to unilaterally terminate the agreement in case the authorized company is in breach of contract. Also, PPP projects could be transferred to the funders if that is stipulated in the project agreement.

**12. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

Settling the disputes and governing law are subject to determination by the project agreement.

- 13. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

The legislation does not envisage a regular market testing procedure. Quality standards for public services are subject to determination by the project agreement.

- 14. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

The manner of the acceptance of the facilities is regulated by project agreement.

- 15. Are there any expected changes or reform to the existing legislation?**

The legislation in our country in general is subject to frequent changes, and the relevant Law is not an exception. It was enacted in 2012 and has been amended four times so far; once in 2014 and three times in 2015.

## FINANCING & INCENTIVES

- 16. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

The payment mechanism is subject to project agreements. The payment is always determined in foreign currency, most commonly in euros or US dollars.

- 17. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

There is no guaranteed rate of return or a cap on the rate of return.

- 18. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

There is no payment guarantee provided by the relevant public authority.

- 19. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

The obligations are the responsibility of the public partner and are not guaranteed by the Treasury.

- 20. Are deductions from the service and availability payments subject to a cap?**

The deductions from the service and availability payments are not subject to a cap.

- 21. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

The variations that the public authority may request at the construction and operation stages may not exceed 50% of the value of the primary contract.

- 22. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?**

There is no requirement to share the gains arising from refinancing of the PPP project with the public authority.

- 23. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

The lenders do not sign direct agreements with the relevant public authority.

- 24. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

The debts of the project company to the lenders in the event of termination of the project agreement are subject to regulations by the project agreement.

- 25. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

The payments in case of termination of the project agreement are stipulated in the project

agreements.

- 26. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

The legislation does not provide incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects.

- 27. Are there tax advantages available to PPP projects?**

The legislation does not prescribe tax advantages regarding PPP projects.

- 28. What are the other incentives available to PPP projects?**

Other incentives for PPP projects could be stipulated in the project agreements.

- 29. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2015?**

There is no complete data available regarding the number, investment amounts and sectors of the PPP projects developed in the Republic of Macedonia in 2015.

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# MONTENEGRO



Sasa Vujacic

## LAW OFFICE VUJACIC

### GENERAL

1. Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?

Yes, the PPP model (Build-Operate-Transfer) is commonly used to develop infrastructure projects in Montenegro.

2. Which sectors apply a PPP model to develop infrastructure projects?

Sectors, which apply a PPP model to develop infrastructure projects, are the following:

Energy, Highway, Railway and Ports.

### LEGISLATION & REGULATION

3. What are the principal laws and regulations? Is there a framework PPP Law?

The principle laws are the following:

- Law on Concessions (“Official Gazette of Montenegro”, 08/09);

- Law on Private Sector Participation in Performance of Public Services (Official Gazette of Montenegro, No. 030/02 to 073/10);
- Public Procurement Law (“Official Gazette of Montenegro”, No. 42/11, 45/2014);
- Law on Foreign Investments (“Official gazette of Montenegro”, No. 8/11);
- Law on Spatial Development and Construction of Structures (“Official Gazette of Montenegro”, No. 051/08 to 033/14); and
- Law on State Administration (Official Gazette of Montenegro”, No. 038/03 to 042/11).

The existing Law on Concessions and Law on Private Sector Participation in Performance of Public Services, as well as several sectorial laws, currently make up the legal framework for the implementation of PPP projects.

As none of these laws are specific to PPPs, the PPP legal framework is generally considered to have gaps. To fill these gaps, Montenegro is in the process of preparing a law on PPPs.

This new law should replace the Law on Concessions as far as concessions of public

services or works are concerned and a number of sectorial laws.

**4. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

The principle regulatory bodies for the PPP are the Parliament, the Government and the Municipalities

The Concession Commission is in charge of monitoring the concession award process, dealing with bidders and keeping official records of all granted concessions and Concession Contracts.

**5. Are there any restrictions for foreign investors to develop/operate PPP projects?**

The law does not impose any restrictions for foreign investors to develop/operate PPP projects in Montenegro.

**6. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

A long-stop date for the completion of construction should be determined by project agreements.

**7. How are force majeure events defined, and what are the consequences of their occurrence?**

Montenegrin law defines Force majeure as : any material and adverse event occurring after the date that is not directly or indirectly imputable to a Party that invokes it, was unforeseen at the time of the execution of the Project Agreement and whose occurrence and effects are not controllable by such Party and are beyond its reasonable control, could not be avoided or prevented by the affected Party, and which prevents such Party from fulfilling its contractual obligations under the Project Agreement.

Force Majeure Events include, but are not limited to, the following: (i) earthquakes, (ii) volcanic eruptions, (iii) waterspouts, (iv) tornados, (v) acts of war, (vi) acts of terrorism, (vii) acts of sabotage, or (viii) national or local industrial labour strikes, each having a significant impact on the performance of one or more of the obligations set forth in the project agreement.

In principle, the consequences of the force majeure occurrence depend on the specific type of force majeure event. Therefore, the parties to the project agreement endeavour to foresee such situations and define their mutual obligations accordingly.

**8. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

In accordance with the Montenegrin Law on Foreign Investments, assets of foreign investors cannot be expropriated, except when the public interest is determined by law or on the basis of the law, with an adequate reimbursement in favour of foreign investors.

The existing Law on Private Sector Participation in Performance of Public Services stipulates that the rules and regulations adopted on the basis of this law, which may affect or harm the granted or acquired rights in accordance with the repealed legislation, shall have no retroactive effect.

**9. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

N/A

**10. Is the concept of ‘uninsurability’ recognized in the project agreements?**

N/A

**11. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

The possibility to take control of the PPP projects is usually envisaged in project agreements in accordance with the “call-option” principle.

**12. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

For all disputes in relation to foreign investments, dispute resolution can be referred to foreign arbitration under UNCITRAL rules, but not to a foreign court. Moreover, if the Government of Montenegro is a contractual party, then only ICSID Arbitration is permissible. Furthermore, for certain issues, Montenegrin laws provide for the exclusive competence of the Montenegrin courts and the applicability of Montenegrin laws (e.g. real estate).

**13. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

N/A

**14. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

The law prescribes that the Investor and the project company, which built the structure or performed specific works on it, must, within 60 days from the day of receipt of the usage permit, hand over the structure on a preliminary basis and make the final calculation of the value of performed works, unless otherwise provided in the project agreement.

The investor and project company shall perform the final handover of the structure within 30 days from the expiry of the guarantee period, unless otherwise provided in the contract

Before the handover and prior to start utilizing the structure, the investor is obliged to submit the application for issuance of a usage permit. The usage permit for the structure is to be issued after the performance of technical inspection by a competent business organization, a legal entity or an entrepreneur.

**15. Are there any expected changes or reform to the existing legislation?**

The PPP Law has been initiated and is currently in a preparation phase.

## FINANCING & INCENTIVES

**16. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

The relevant legislation does not expressly provide inflation and/or foreign exchange protection.



- 17. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

The relevant legislation does not specifically stipulate it, but a guaranteed rate of return or a cap on the rate of return for the project company or sponsors may be defined under the terms and conditions of project agreements.

- 18. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

N/A

- 19. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

The obligations of the administration are qualified as State obligations. Furthermore, the law cites that the “state of Montenegro is liable for the damages caused by unlawful or irregular work of the state administration”.

- 20. Are deductions from the service and availability payments subject to a cap?**

In accordance with the law and the project agreements, deductions from the service and the availability payments are not subject to a cap.

- 21. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

N/A

- 22. Is there a requirement to share any gains arising from refinancing of the PPP project-with the public authority?**

N/A

- 23. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

Lenders sign a direct agreement with the State of Montenegro.

- 24. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

N/A

- 25. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

N/A

- 26. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

The law does not prescribe such incentive for domestic (local) manufacturing of equipment or materials used in the construction of the PPP projects.

**27. Are there tax advantages available to PPP projects?**

In accordance with the Government's Incentive Program for Business Development, the following tax incentives have been provided for investments in underdeveloped parts of the country:

**Profit Tax Exemption**

Newly established legal entities in economically underdeveloped municipalities conducting a production activity shall have the assessed profit tax for the period of the first eight years reduced by 100%.

**Tax on personal income Exemption**

Taxpayer who commences production activities in economically underdeveloped municipalities shall have the assessed personal income tax for the period of the first eight years reduced by 100%.

The tax relief does not apply to a taxpayer operating in the sector of primary production of agricultural products, transport or shipbuilding, fisheries and steel.

**28. What are the other incentives available to PPP projects?**

There are no other incentives available to PPP projects.

**29. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2015?**

Taking into account the fact that the Montenegrin Law mandates for the Concession Commission to submit an Annual Report on its operations for the previous year, no later than 31 March of a current year. At this point of time, there is no official data on the number, investment amounts and sectors of the PPP projects developed in Montenegro during the 2015.

In accordance with the official and public Concession Commission Report, from March 2014, a total of 183 Concession Contracts have been concluded in Montenegro from 1999 to 2013.

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# POLAND



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## GENERAL

1. **Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

The market for PPP projects in Poland is an emerging market. Most investments are still developed in traditional procurement proceedings (contracts for construction or design and construction).

The PPPs developed in Poland so far have usually been based on the DBFO model, where the private partner is responsible for arranging the financing of the project.

2. **Which sectors apply a PPP model to develop infrastructure projects?**

The first sector in which the PPP model (concessions) was used was the motorway sector. The PPP model has since been used (or contemplated for use) to develop large infrastructure projects in the following sectors: waste treatment (incineration plants), public health (hospitals), social housing (student housing), public administration buildings

(court building), public roads (regional roads), and telecommunication (broadband networks). A number of pilot, or smaller, PPP projects have also been carried out in other sectors, such as: water and sewage management, sports and leisure, energy efficiency and public parking.

## LEGISLATION & REGULATION

3. **What are the principal laws and regulations? Is there a framework PPP Law?**

PPP projects are governed by two regulatory acts: the PPP Act of 2008 (the “PPP Act”) and the Civil Works and Services Concession Act of 2009 (the “Concession Act”).

The Concession Act establishes its own procedure for the choice of a private partner, while the PPP Act states that the choice of a private partner in PPP projects other than concessions should be made pursuant to general provisions of the Public Procurement Law (the “PPL”).

Concessions under Polish law are PPP contracts in which the private partner bears the economic risk of carrying out the project and payments from the public authority to the private partner (if any) do not cover all the

private partner's expenditures under the project.

While the PPP Act has on several occasions been used to structure major PPP projects, the Concession Act has rarely been applied for major PPP projects (there are four motorway concession projects in Poland currently at the stage of operation, but they all were awarded before the Concession Act entered into force based on a special regime for motorway concessions which is no longer in force).

**4. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

There is no supervisory or overseeing body established especially for PPP projects in Poland. PPP projects may be carried out by different governmental units both at the central administration level and by regional authorities, as well as different public utilities.

In 2011, the "PPP Platform" was established to promote and support the development of the PPP market in Poland. The PPP Platform is not a government entity, but a cooperation platform for PPPs established on the initiative of the Ministry of Development. It is supposed to bridge a gap regarding assistance to government administration in PPP project preparation and implementation and to act as a forum for exchanging information, experience and best practices between local governments through the implementation of specific projects.

**5. Are there any restrictions for foreign investors to develop/operate PPP projects?**

No. Private partners in all PPP projects (including concessions) have to be appointed in competitive and transparent proceedings. No discrimination of bidders established in the EU/EEE Member States is permitted.

**6. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

This issue is not regulated by law. Typically, the private partner assumes the construction risk in a PPP project to the extent a delay in construction does not result from certain exhaustively listed events which relieve the private partner from its obligations under the PPP agreement (including force majeure).

The PPP agreement should specify remedies which the public authority may exercise if the private partner is in delay in the completion of construction. The ultimate remedy in such case would be the right to terminate the agreement due to circumstances attributable to the private partner if the delay in construction exceeds a certain maximum period. The right to terminate the agreement in such case will be subject to the lenders' application of the relevant remedy procedures established in an agreement between the public authority, the private partner and the lenders (the "Direct Agreement").

**7. How are force majeure events defined, and what are the consequences of their occurrence?**

PPP agreements contain a fairly standard definition of force majeure events where a force majeure event is an external event which is beyond the reasonable control of either of the parties to a PPP agreement, against which neither party could have protected itself before the execution of the PPP agreement and which neither party could have avoided or prevented.

Typically, a party affected by the occurrence of a force majeure event will be relieved from liability for the performance of its obligations under the PPP agreement to the extent such non-performance or improper performance was caused by such event. The parties' rights and obligations in connection with curing the consequences of force majeure events are

regulated in different ways in different PPP agreements (there is no established standard).

Usually, if a force majeure event lasts for a significant amount of time (several months), either party can terminate the PPP agreement.

**8. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

Typically, political and legal risks which are outside the private partner's reasonable control should be the public authority's risks. Usually, however, the PPP agreement exhaustively lists the risks to be borne by the public authority.

The occurrence of such risks should usually trigger a special compensation procedure (in which a third party, such as an independent expert/engineer, is often involved), in which the project schedule and/or the remuneration of the private partner can be adjusted in order to put the private partner in the economic position in which it would have been, had such risk not occurred.

**9. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

This issue is not regulated by law. Also, there is no established standard on how the matters connected with the reinstatement of assets should be regulated in PPP agreements. If PPP agreements do not provide detailed rules on utilization of insurance proceeds, the relevant provisions determining who can utilize insurance proceeds, as well as when and how, are likely to be included in Direct Agreements. Lenders are likely to insist it to be up to them how insurance proceeds are used.

**10. Is the concept of 'uninsurability' recognized in the project agreements?**

Yes, although no standardized approach has been established. As it is the private partner who typically would be obligated to provide adequate insurance coverage, the concept of uninsurability is used to shift the insurance risk to the public authority. It usually encompasses both events where no insurance is available and where such insurance is not available on financially acceptable terms (the PPP agreement may specify a maximum insurance premium beyond which insuring a given risk may be deemed financially unacceptable). In certain projects, the uninsurability concept is limited to uninsurable force majeure events, while in other projects it has a broader, more general scope of application.

**11. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

Under Polish law, the effectiveness of a classic step-in clause, whereby lenders appoint another entity to take over the private partner's rights and obligations under the PPP agreement, can be questioned given the prevailing interpretation of Article 7.3 of the PPL, according to which it is not possible to transfer the private partner's rights and obligations under a PPP contract to another entity. That is why in most PPP agreements (or Direct Agreements accompanying them) under Polish law, lenders are entitled to appoint another entity to become jointly and severally responsible with the private partner for the performance of the PPP contract rather than to replace the private partner in the performance of the PPP contract.

No step-in or substitution rights are set forth for governmental entities.

**12. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

Yes, international arbitration is available to settle disputes under PPP agreements and Direct Agreements and in most PPP agreements pertaining to large PPP projects, disputes are to be resolved by arbitration rather than in common court.

A PPP agreement for a project awarded by a Polish public authority will have to be governed by Polish law. A Direct Agreement would also be expected to be governed by Polish law, while facility agreements and other financial documentation may be governed by foreign laws (except for some security instruments, for example pledge, which must be governed by Polish law).

**13. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

This issue is not regulated by law. A market testing procedure (or other types of feasibility studies) should normally be carried out by the public authority before the procurement process is launched.

**14. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

In certain PPP projects, there is an independent engineer appointed for such time as the project is supposed to last and whose role is to determine various technical matters connected with the performance of the PPP

agreement, including the acceptance procedures, directly by virtue of the provisions of the PPP agreement.

In other projects, the acceptance procedure (and other technical matters) should first be resolved between the parties and only when the parties fail to agree on such matter should the matter be presented to an independent technical expert who is appointed on a case-by-case basis.

**15. Are there any expected changes or reform to the existing legislation?**

The PPL is expected to be amended soon with the draft amendment currently being debated in parliament. The main purpose of the amendment is to implement the new EU public procurement directives (Directive 2014/24 and Directive 2014/25). The changes proposed in the draft amendment should, among others, simplify the procurement process (which under the current legislation is very formalistic) and provide for more flexibility as regards permitted changes to PPP agreements, including in particular changes connected with the application of step-in clauses.

Changes in the Concession Act should be introduced in the near future as well. The government recently published a new Concession Act which is supposed to implement the provisions of EU Directive 2014/23.

## FINANCING & INCENTIVES

**16. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

This issue is not regulated in detail in the law, although the remuneration mechanism is described in the PPP Act as one of key factors

that distinguishes concessions from other PPP projects.

Namely, if the private partner is given an exclusive right to collect proceeds from the operation of an asset (or the private partner's remuneration is predominantly composed of such right), the agreement may be treated as a concession agreement and governed by the Concession Act.

In availability-based projects (where the remuneration of the private partner does not depend on the actual demand for the services provided with the use of the asset but on the availability of the asset), the private partner is usually remunerated periodically, from the completion of the construction phase, throughout the entire maintenance/operation phase.

Availability fees are usually indexed. PPP agreements may require that interest rates and/or foreign exchange risk are hedged.

**17. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

The assumed rate of return is usually specified in the financial model forming a part of the private partner's bid in the procurement proceedings. The general principle is that the private partner should both bear the risk of underestimating the costs (and expected proceeds) generated by the project and be entitled to benefit from the fact that the remuneration proposed in its bid permits a higher rate of return than assumed in the financial model.

However, if the project costs increase (or proceeds decrease) due to the occurrence of certain events outside the private partner's reasonable control and for which the public authority agreed to bear the risk under the PPP agreement, the private partner will usually be

entitled to compensation aimed at restoring the rate of return to that assumed in the financial model provided in the bid.

**18. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

Currently, securing the public authorities' (minimum) financial obligations with the issuance of guarantees is not a market practice. This is usually not considered as a bankability issue and is, to a certain extent, justified by the Eurostat requirements regarding on/off balance treatment of PPP projects.

**19. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

Obligations of public authorities in projects developed by central administration bodies which do not have a separate legal personality from the State will be considered as the State's obligations. Obligations of public authorities in PPP projects developed by other entities (such as public utility companies or local governments) are not State obligations and the State does not normally assume any liability connected with the performance of such PPP projects.

Currently, securing obligations of public authorities under PPP agreements with State guarantees issued for the benefit of the private partner or the lenders is not a market practice; this is, to a certain extent, justified by the Eurostat requirements regarding on/off balance treatment of PPP projects. Lenders (and sponsors) usually have to rely just on the long-term financial standing and credit rating

of the public authority carrying out the PPP project.

**20. Are deductions from the service and availability payments subject to a cap?**

There is no established standard as to whether deductions from the private partner's remuneration should be capped. Public authorities often refuse to limit the amount of deductions in order to ensure that the private partner can be adequately penalized if it fails to ensure the availability of the asset for a significant amount of time. This approach can be also justified by Eurostat guidelines on on/off balance treatment of PPPs. Reaching a certain level of deductions is usually a termination event.

**21. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

The right of the public authority to initiate change order proceedings is usually not subject to a cap. Usually, the private partner will not be obligated to implement such change order unless the parties agree on terms and conditions (including additional remuneration and/or extension of the project schedule) under which such change order is to be performed.

**22. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?**

This issue is not regulated by law. PPP agreements often contain gain-sharing mechanisms.

**23. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

Yes, public authorities are expected to sign a Direct Agreement with the lenders. The Direct

Agreement usually includes the following elements: (i) the public authority's obligation to notify the lenders of any events constituting non-performance or improper performance of the PPP agreement, (ii) the public authority's obligation to refrain from terminating the PPP agreement or pursuing any legal remedies against the private partner prior to the end of cure periods specified in the Direct Agreement; (iii) the lenders' right to cure any breach of the PPP agreement by the private partner in the cure period specified in the Direct Agreement; (iv) the lenders' right to designate another entity to complete the project who may become a party to the PPP agreement jointly and severally with the private partner; (v) rules on utilization of insurance proceeds; and (vi) acknowledgment of the public authority that the private partner's rights under the PPP agreement are assigned for the benefit of the lenders.

**24. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

If the PPP agreement is terminated due to reasons attributable to the public authority, or in the event of force majeure, the public authority assumes the responsibility to repay, as part of termination settlements, the senior debt financing arranged by the private partner for the project as well as the sponsor's equity contributions and/or financing (although in case of termination due to a force majeure, the repayment of the latter may be subject to certain limitations).

In case of the private partner's default, the public authority's payment upon the



termination would normally be expected to cover the repayment of the senior debt financing, but not the equity. Furthermore, in line with the Eurostat guidelines on on/off balance treatment of PPPs, settlements upon termination due to the private partner's default may also refer just to the repayment of the market value of an asset at the time of termination, irrespectively of whether such value allows for the repayment of the outstanding senior debt.

The public authority's obligation to repay the outstanding senior debt is often accompanied by the private partner's commitment to ensure that such repayment can be made through the public authority's assumption of the private partner's obligations under the facilities agreement(s).

**25. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

In addition to those mentioned in point 24 above, in case of termination due to reasons attributable to the public authority, the termination settlement amount paid by the public authority may also include employee lay-off costs and cost of termination of subcontracts. Settlements upon termination due to force majeure may also encompass such payments, but they are likely to be subject to certain limitations.

**26. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

N/A

**27. Are there tax advantages available to PPP projects?**

N/A

**28. What are the other incentives available to PPP projects?**

N/A

**29. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2015?**

Data for 2015 is not yet available. As per the report on the Polish PPP market in 2014, published by the Ministry of Economy<sup>1</sup>, 45 proceedings for the award of PPP projects (including concessions) were launched in 2014 and 16 PPP agreements were signed. However, only ten of the launched proceedings and only four of the PPP agreements signed in 2014 pertained to projects with an estimated value exceeding PLN 50 million (approx. EUR 11.5 million). Most of the initiated proceedings and executed contracts regarded relatively small pilot projects with an estimated value below PLN 20 million (approx. EUR 4.5 million). In 2014, most PPP projects were carried out in the sports and leisure, energy efficiency, water and sewage management and municipality infrastructure sectors.

No official information is available on how many projects actually reached financial close, but it must be underlined that apart from the toll motorway projects closed some years ago, there have been very few major PPPs happening to date.

<sup>1</sup> [https://www.ppp.gov.pl/Publikacje/E\\_przewodnik/Documents/Raport\\_rynek\\_PPP\\_2014.pdf](https://www.ppp.gov.pl/Publikacje/E_przewodnik/Documents/Raport_rynek_PPP_2014.pdf)

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# RUSSIA



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### GENERAL

1. **Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

PPP model (in various forms) is quite often used to develop infrastructure projects of different scale in Russia.

Until recently, federally-regulated PPP projects could only be implemented on the basis of concession legislation that limits the structuring of PPP projects to the Build-Operate-Transfer model. Under this scheme the right of ownership to the relevant project facility remains with the public authority. At the same time, a number of constituent entities (regions) of the Russian Federation set forth their own legal framework that envisages other PPP models, including those that are based on the principle of transferring the ownership title to the created facility to an investor (e.g., Build-Own-Operate).

The recently adopted PPP Law (in effect from 1 January 2016), sets forth legal framework for structuring projects using a variety of models that are internationally recognised for

implementing PPP projects, including Build-Own-Operate, Design-Build-Own-Operate, Build-Own-Operate-Transfer and Design-Build-Own-Operate-Transfer.

2. **Which sectors apply a PPP model to develop infrastructure projects?**

Russian PPP legislation applies to all forms of public sector PPP arrangements setting forth a broad but exhaustive list of property that may be considered a PPP facility, including in particular: highways/railways and related infrastructure facilities, pipelines, ports, airports, public utilities and social infrastructure facilities.

As a matter of practice, PPP projects are so far mainly implemented in the transportation sector (road construction, public transport, toll systems), public utilities sector (water supply/disposal, waste disposal) and social infrastructure sector.

### LEGISLATION & REGULATION

3. **What are the principal laws and regulations? Is there a framework PPP Law?**

Until recently Federal Law No. 115-FZ “On Concession Agreements”, dated 21 July 2005 (the “Concession Law”) was the principal federal legislative act in Russia governing the

procedure for the implementation of concession-based PPP projects.

However, a number of Russian regions have also adopted regional PPP laws that provided for greater flexibility for investors and lenders in developing PPP projects (e.g., by allowing transferring the ownership over a created facility to an investor). A well-known example (and one of the actively used) is Law of St. Petersburg No. 627-100 "On Participation of St. Petersburg in Public-Private Partnerships", dated 25 December 2006.

New Federal Law No. 224-FZ "On Public-Private Partnership, Municipal-Private Partnership and Amending Certain Legislative Acts of the Russian Federation" dated 13 July 2015 (the "PPP Law") entered into force on 1 January 2016.

More detailed procedural rules addressed in the Concession Law and the PPP Law are contained in resolutions of the Russian Government and the Ministry of Economic Development and Trade.

Apart from this specific legislation, there are other principal laws and regulations concerning PPP projects, including: (i) the Civil Code of the Russian Federation; (ii) the Budgetary Code of the Russian Federation; (iii) the Urban-Planning Code of the Russian Federation; (iv) Federal Law No. 223-FZ "On Procurement of Goods, Works, Services by Certain Types of the Legal Entities", dated 18 July 2011; (v) Federal Law No. 225-FZ "On Production Sharing Agreements", dated 30 December 1995; and (vi) Federal Law No. 39-FZ "On Capital Investments in the Russian Federation", dated 25 February 1999.

#### **4. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

There is no single designated PPP authority. At

the federal level the Ministry of Economic Development of the Russian Federation is the key federal authority involved in development of PPP and investment policy and legislation. The Ministry also maintains a register of PPP projects in Russia. Certain other sector-specific ministries also play an important role (e.g., the Ministry of Transportation of the Russian Federation, the Ministry of Construction and Housing of the Russian Federation). At the regional level, the relevant regional governments are authorized to develop national policy and the regulatory framework for PPP.

In addition, a group of expertise centers and organizations (e.g., a PPP Development Center) were established in Russia to, among other things, provide essential support to regulatory authorities in improving the existing regulatory framework on PPP.

#### **5. Are there any restrictions for foreign investors to develop/operate PPP projects?**

The Concession Law explicitly provides that a foreign legal entity may be an investor in a PPP project. Unlike the Concession Law, the PPP Law establishes more stringent requirements in relation to participants of PPP projects. Under the PPP Law, an investor must be a Russian legal entity only. However, foreign legal entities may participate in PPP projects indirectly (e.g., as part of a consortium with Russian companies or through Russian legal entities).

#### **6. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

The Russian PPP legislation does not envisage a long-stop date for the completion of construction. Such term is to be agreed by the parties and fixed in the relevant project agreements.

**7. How are force majeure events defined, and what are the consequences of their occurrence?**

Russian legislation does not contain a definition of force majeure, preferring instead to "circumstances having an extraordinary nature, i.e. extraordinary and inevitable circumstances". While the Civil Code precisely specifies the type of circumstances that may be deemed to be extraordinary and inevitable, it does enumerate circumstances that are expressly excluded from this clause. These circumstances include: (i) failure to perform on the part of a defaulting party's counterparty; (ii) absence of goods required for performing obligations in the market; and (iii) lack of monetary funds. The list is apparently non-exhaustive and is subject to court interpretation.

The Regulation on Certification of Force Majeure Events approved by Russian Government Resolution No. 173-14 on 23 December 2015 refers to such force majeure events as fire, flood, earthquake, hurricane, epidemics, military acts, strikes, prohibition of export and import of goods, and other events. It should be noted that Russian courts have a degree of discretion as to whether to recognize a particular event as constituting force majeure.

**8. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence**

Generally, Russian PPP legislation is fairly flexible in terms of risk allocation between the parties to a PPP project. The parties usually allocate risks among themselves in the concession or partnership agreement.

However, some of the risks are allocated by imperative legal provisions. For example, both the PPP Law and the Concession Law provide

for guarantees to be granted to the project company in the event of an adverse change of law directly affecting a PPP project or overall change of macroeconomic conditions. In addition, the public authority must consider the project company's requests to amend the key terms of the agreement if, under court or federal antimonopoly authority decisions in force, the project company is not able to perform obligations under the agreement as a result of decisions, actions (omissions) of the state or local authorities and (or) their officials.

**9. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

The PPP legislation does not specifically regulate the procedure for conducting a reinstatement test (or cases when it must be performed). Both the Concession Law and the PPP Law provide that the concession or partnership agreement may regulate the project company's obligation to insure the PPP facility from the risk of loss or damage and risk of liability of the project company for a breach of its obligations under the agreement.

**10. Is the concept of 'uninsurability' recognized in the project agreements?**

As mentioned above, the project company would typically be required to provide necessary insurance coverage against certain risks. There is little specific regulatory guidance (in the context of PPP transactions) with respect to the concept of "uninsurability". Most likely, these aspects would need to be addressed in the concession or partnership agreement subject to certain conditions.

If the risk insured is rendered as an uninsurable risk and such risk is not caused by any actions or omissions by the project

company, the parties would usually discuss ways of managing or transferring the risk. For example, some agreements provide that the project company shall take reasonable measures to insure relevant risks. However, if obtaining of insurance is impossible in relation to such risks, public authority shall compensate the project company for additional expenses incurred due to occurrence of such uninsured risks.

**11. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

Under the PPP legislation, a new tender would typically be required to substitute the project company that has been awarded the right to implement the PPP project. The project company may be replaced without a tender in the event of a material breach of the concession or partnership agreement and/or harm (or threat to cause harm) to human life or health and/or the initiation of bankruptcy proceedings with respect to the project company. Such cases require a decision of the public authority that awarded the project, taking into account the opinion of the lender.

**12. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

The Concession Law provides that all disputes between the investor and the public authority should be resolved by state courts, state commercial courts or Russian arbitration tribunals. Unlike the Concession Law, the PPP Law does not contain any special provisions in relation to dispute resolution. However, in light of Federal Law No. 382-FZ on Domestic

Arbitration, dated 29 December 2015, Russian courts may potentially narrowly interpret the notion of a “court” applied by the PPP Law as a “state court”. Russian courts also sometimes tend to consider the disputes involving public authorities as non-arbitrable.

As a general rule, a foreign governing law may be chosen by the parties, provided that the agreement involves a “foreign element” (e.g., a foreign party). In some cases the choice of foreign law is not allowed. In particular, the concession or partnership agreement in relation to a PPP facility located in Russia is to be governed by Russian law only. A foreign law may potentially be considered in relation to direct agreements. Although certain mandatory rules of Russian law would apply irrespective of choice of foreign law.

**13. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

No regular market testing procedure is envisaged under the Russian PPP legislation. The public authority might in certain cases carry out market testing to use the assembled data for bids evaluation at the stage of the PPP tender. Once the concession or partnership agreement is signed, the Concession Law and the PPP Law set forth an exhaustive list of grounds when the project company may be replaced, such as undue performance by the project company of its obligations, bankruptcy proceedings, etc.

**14. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

Acceptance is carried out in accordance with

the procedure specified by relevant legislation (i.e., the Russian Urban Planning Code) and as further detailed in the concession or partnership agreement. By way of example, some agreements provide for establishment of the relevant acceptance commission comprised of representatives from public authority and the project company to verify the completed construction works and accept the PPP facility. The parties may also engage an independent engineer (technical expert) to monitor the compliance of the PPP project to the approved technical parameters, participate in acceptance of the construction works and perform other functions as agreed by the parties.

After the act of acceptance is signed, the project company must undertake certain measures to ensure that the PPP facility is commissioned.

**15. Are there any expected changes or reform to the existing legislation?**

Russian PPP legislation has been continuously evolving. Most of the amendments are aimed to bring PPP structures into better consistency with the internationally recognized approaches. As mentioned above, the new PPP Law was adopted and the concession legislation was significantly amended to remove some of the legal obstacles, affecting, among other things, the bankability of PPP projects.

Further legislative changes have been made just recently to meet the current needs of the PPP projects. In particular, on 3 July 2016 the President signed Federal Law No. 360-FZ amending, among other laws, the PPP Law (in effect from 15 July 2016 save for certain provisions). In particular, the adopted changes: (i) expand the list of PPP facilities, (ii) liberalize special requirements applicable to the private partner in relation to possession of certain licenses/permits for implementing the PPP project; (iii) specify the procedure for granting land plots to the project company for

implementing a PPP project; (iv) allow concluding a direct agreement with a number of lenders.

Due to the adoption of the PPP Law, all regional PPP laws are to be brought into compliance with the provisions of the PPP Law by 1 July 2016, which would unify the terminology and establish uniform rules for implementing PPP projects in Russia. Though we note that these July 2016 legislative changes extended this term until 1 January 2025.

In addition, legislative changes have been made recently in relation to concession agreements. In particular, on 3 July 2016 the President signed Federal Law No. 275-FZ amending the Concession Law to specify the procedure for entering into and terminating concession agreements in relation to public utilities sector. The changes will enter into force on 1 January 2017.

## FINANCING & INCENTIVES

**16. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

The payment mechanism will depend on the sector and the way the project company receives revenue. For example, in relation to transport infrastructure projects in Russia, there are two types of payment mechanisms that are mainly used: (i) toll payment with minimum revenue guarantee and (ii) availability payment (when a project company receives fixed periodic payments from the public authority as long as a PPP facility (e.g., a road) is available for use). Even if the availability payment scheme applies the project company may be allowed to charge third parties for using the PPP facility.

Federal PPP legislation does not directly address inflation and/or foreign exchange protection. Such risk mitigating mechanisms are either provided by the relevant subordinated regulations or regulated through a concession or partnership agreement. For example, in relation to toll road concession projects, the Government determines the maximum amount of payment the concessionaire may charge the users of the toll road whereas such payment is subject to annual inflation adjustment.

**17. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

Depending on the structure of the PPP project, there will generally be mechanisms regulating the project company's rate of return on the project, however, there is usually no set cap on return.

In addition, the public authority must in certain cases (e.g., adverse change of law) take measures to guarantee a return on the project company's investment and to enable the project company to obtain gross earnings at least in the amount not less than initially provided in the agreement. Such measures may include, for example, (i) an increase of the financial security for the obligations of the public authority; (ii) an increase of the expenses assumed by the public authority in order to create and/or provide technical maintenance and/or operate the PPP facility under the agreement or (iii) extension of the term of the agreement.

In addition, the project company may request changes to the project agreement if, during the term of the agreement under which the project company sells its products to customers, performs work or renders services at regulated prices (tariffs) or prices subject to regulated increases, such regulated prices or rates were revised and, therefore, failed to conform to the

parameters initially provided for under the agreement.

**18. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

There is a number of ways in which the public authority may provide payment assurance in the context of a PPP project. For example, this may be provided in the form of state or municipal guarantees to the lenders as security for the obligations of the project company to repay the attracted financing.

In relation to road infrastructure projects, the public authority may also guarantee that the project company receives certain minimum level of revenue from the project regardless of the road traffic. If collected toll payments during a particular period are below certain minimum level, the public authority will provide compensation to the project company so that it receives the minimum guaranteed amount from operation of the road.

Availability payment may apply in relation to concession-based PPP projects if this is determined among the tender criteria.

**19. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

In PPP relations, the state is represented by governmental or municipal bodies which act on behalf of the Russian Federation, the constituent entities of the Russian Federation or the municipal units respectively. Accordingly, their obligations qualify as the obligations of the Russian Federation, constituent or municipal entity, respectively.



In case the relevant public authority is not a governmental or municipal body, then the relevant governmental body may provide a separate guarantee to the concessionaire or the lenders under the project.

**20. Are deductions from the service and availability payments subject to a cap?**

The size of availability payment may be reduced for the amount of penalties imposed on the project company. For example, in road projects, such penalties may be imposed for non-compliance with the requirements established by the public authority in relation to road accessibility parameters for vehicles, transport and operating indicators of the road or its maintenance and operation requirements. The maximum deduction is to be determined in the concession agreement.

**21. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

As a general rule, variations of the agreed terms of the relevant concession or partnership agreement are allowed on the basis of mutual consent of the parties or if there are material changes of circumstances on the basis of which the parties have entered into the relevant agreement. Accordingly, there are no legislative requirements as to a cap for the variations of the projects. However, the parties may potentially agree on the procedure for variation of the PPP project and the applicable cap in the relevant agreement.

If a project agreement was executed upon results of a tender envisaged by the Concession Law, the following project agreement's terms cannot deviate from those which were adopted as tender's conditions: (i) obligations of the concessionaire relating to construction and operation of the facility, (ii) the concession's period, purpose and payment conditions, and (iii) other conditions which are

envisaged by other federal laws. The PPP Law allows changes to the partnership agreements executed as the result of a tender procedure on the basis of the parties' mutual consent and the decision of the public authority initiated the tender.

**22. Is there a requirement to share any gains arising from refinancing of the PPP project-with the public authority?**

There is no statutory requirement that refinancing savings to be shared with the public authority. However, as a matter of practice, the parties have sometimes contractually agreed on the procedure for sharing the gains that result from refinancing.

**23. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

As a general point, the concept of a "direct agreement" is fairly novel in the context of Russian federal PPP legislation.

While direct agreements have been long used in practice for implementing PPP projects under regional legislation (mostly under the St. Petersburg PPP Law), the Concession Law does not envisage the term "direct agreements" as such. The newly adopted PPP Law defines a "direct agreement" as a civil law contract among the public authority, the project company and the lender governing the manner of the parties' interaction during the term of the partnership agreement and in the event of modification or termination of the agreement.

Generally, a direct agreement specifies the scope of lender's rights to influence the implementation of the PPP project in the event of default by the project company under the financing documents. In particular, a direct agreement may address the procedure for replacement of the project company (including

without holding a tender) or provisions concerning pledge of the PPP facility.

**24. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

Under the federal PPP legislation, the public authority does not assume the debts of the project company to the lender in the event of termination of the project agreement. However, there is a number of ways in which the public authority may provide the lender with certain comfort in respect of the availability of funds to ensure the debt service by the project company (e.g., state or municipal guarantees, minimum revenue guarantees, availability payment).

Moreover, under the PPP Law the lender may enforce the pledge over the PPP facility. Although, a pledge of the PPP facility can only be enforced if, for at least 180 days from the date on which grounds for enforcement occurred, the project company has not been replaced or if the partnership agreement has not been terminated early under a court ruling. The state has a preemptive right to purchase the pledged facility at a price equal to the indebtedness owed to the lender. If the PPP facility hasn't been sold, it should be transferred to the public authority with compensation of costs to the project company and (or) the lender minus the expenses the public partner suffered in connection with the project company's failure to perform its obligations.

At the same time, such debt assumption mechanism may be envisaged in direct

agreements with the lenders. There is a number of precedents of direct agreements in relation to PPP projects implemented on the basis of the regional PPP legislation (e.g. the St. Petersburg PPP Law), that envisage provisions on repayment by the public authority of the principal amount of debt of the project company to the lenders upon termination of the agreement.

**25. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

The Concession Law provides that in the event of early termination of the concession agreement, the project company may claim compensation for the expenses incurred by it in respect of (re)construction of the PPP facility in accordance with the terms of the agreement. Based on a number of precedents of concession agreements such compensation should typically be paid in all termination scenarios. However, the amount of such compensation would differ depending on whether the agreement is terminated as the result of the project company's default or the public side's default.

The PPP Law provides that the procedure for compensation of parties' expenses as a result of early termination of the partnership agreement is to be detailed in the partnership agreement. In addition, under the PPP Law (e.g., when the partnership agreement envisages either "BOO" or "DBOO" models), in case of early termination of the partnership agreement requiring the project company to return the PPP facility to the public authority, the project company should receive compensation from the public authority for the amount of project company's expenses

reduced by the amount of losses caused to the public partner and third parties by the early termination. In the event of early termination of the partnership agreement based on a court decision due to the project company's breach of its obligations, the PPP facility should be transferred to the public authority without compensation.

Losses may typically be claimed in the event of material violation by one of the parties of the concession or partnership agreement's provisions.

## **26. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

Although there is no domestic equipment incentive addressed in PPP legislation, some precedent agreements explicitly provide for construction of facilities giving priority, where appropriate, to Russian components.

Projects related to construction of power plants based on renewable energy resources should meet certain requirements regarding localization of production of generation equipment in Russia.

In addition, if a project company is subject to procurement law and meets certain criteria in relation to its annual revenue, special requirements for procurement of domestic materials and services from small and medium enterprises may apply.

## **27. Are there tax advantages available to PPP projects?**

The Russian Tax Code does not provide for any tax advantages for PPP projects. The general taxation regime shall apply, though with a few special rules with regard to concession agreements. Though "concession agreements" are not defined in the Tax Code, this term is most likely to be understood as

referring to PPP projects implemented on the basis of the Concession Law only.

The respective special rules, in their substance, focus on the Build-Operate-Transfer model (that is the only PPP model under the Concession Law) and provide for the following:

- With regard to transfer of property and property rights by the grantor (that is, under the Concession Law, a public authority) to the concessionaire – such transfer is tax neutral. In particular, the transfer of property or property rights under concession agreements is generally defined as not constituting a "disposal" (in Russian terminology: "*realization*"), and therefore is not subject to VAT. Furthermore, receipt of property or property rights under concession agreements is defined as not giving rise to taxable income;
- With regard to the concessionaire's holding and operating the property received from the grantor and/or newly built – the concessionaire is treated in a similar way as if it owns the relevant property. In particular, the concessionaire is
  - allowed, over the concession term, to depreciate the relevant property for profit tax purposes;
  - liable for property tax; and
  - treated as a VAT-payer with regard to realization of goods or services under the concession agreement and, if such realization is subject to VAT, is eligible to input VAT offset with regard to goods or services purchased, including with regard to property (fixed assets) purchased/built.

- With regard to transfer of property and property rights by the concessionaire to the grantor – such transfer benefits from the same tax neutrality as applies to the transfer by the grantor to the concessionaire (see above). It should be noted that generally where the fixed assets were purchased for conduct of VAT-able activity and the relevant input VAT was claimed for offset, but where later on the fixed assets are used for a non-VATable transaction/transfer, the Tax Code requires the taxpayer to "restore" a portion of the input VAT to the state budget. However, the Tax Code is silent on whether the "restoration" obligation applies to the concessionaire; this issue has neither been clarified by tax authorities nor considered by courts, and therefore remains a matter of uncertainty.

In addition, the special rules for concession agreements explicitly allow the concessionaire to deduct, for its profit tax purposes, concession fees payable to the grantor.

It is unclear (and rather unlikely) whether these special rules apply to PPP projects that envisage the ownership right held by the public authority, but are implemented based on the PPP Law. On the other hand, since the PPP Law entered into force very recently (as of 1 January 2016) and is still new, one may expect the extension of the special tax rules to any relevant PPP projects (whether based on the Concession Law or the PPP Law).

## **28. What are the other incentives available to PPP projects?**

Certain incentives and state support measures are envisaged by a number of various regulations and legislative acts. While they may not necessarily directly apply to PPP transactions only, they may still be relevant for implementation of project financing and infrastructure sector transactions.

For example, in 2014 the Russian government introduced support measures for investment projects implemented on the basis of the project finance in priority sectors of Russian economy. Such projects upon their selection by the governmental commission may obtain loans in the Russian rubles (with additional mechanisms put in place to allow more attractive interest rate) together with the state guarantees to secure a part of the loan amount.

In addition, Russian legislation provides for various incentives through establishment of special economic zones, priority development areas and "free port" regimes. The residents of such zones, provided that they are incorporated in the zone and have obtained the resident status, are entitled to tax benefits, free customs zone, access to infrastructure, special procedure for acquisition of land plots and simplified conditions in attracting the labor force and limitation on the amount and duration of state inspections conducted with respect to activities of residents.

## **29. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2015?**

The number of PPP and infrastructure projects continues to increase. According to the Report of the Ministry of Economic Development of the Russian Federation on the Development of the Public Private Partnership in Russia, 873 PPP projects passed the stage of commercial closing in 2015. The estimated total private investment amount is RUB 640,3 bln (approx. USD 9,3 bln). The significant number of projects is in the transportation sector (e.g., road construction, toll systems), social infrastructure sector (e.g., hospitals and schools) and public utility infrastructure sector (e.g., water supply and disposal and waste processing).<sup>1</sup>

<sup>1</sup> [http://pppcenter.ru/assets/docs/rayingREG2016\\_B5\\_Block\\_04-04-2016.pdf](http://pppcenter.ru/assets/docs/rayingREG2016_B5_Block_04-04-2016.pdf)

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# SAUDI ARABIA<sup>1</sup>



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## GENERAL

1. **Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

The PPP model<sup>2</sup> is not at present commonly used by government entities to develop

infrastructure projects in the Kingdom of Saudi Arabia (the “Kingdom”). To date, the majority of the Kingdom’s publically procured infrastructure has been directly funded by the Government under separate construction contracts (with operations and maintenance agreements as required). This is subject to certain exceptions. For example, PPP has been widely used as a procurement model in the power and water sector by directly or indirectly state-owned companies under the direction of Saudi Arabia’s former Ministry of Water and Electricity. These projects were structured on a build-own-operate-transfer (the “BOOT”) or build-own-operate (the “BOO”) basis. However, at the time of writing, the Hajj Terminal Project at King Abdulaziz International Airport in Jeddah (which achieved financial close in December 2007) and the Medina Airport Expansion Project (which achieved financial close in June 2012) have been the only directly Government procured projects to be successfully structured and procured on a privately financed PPP basis.<sup>3</sup> Both were structured under the Build-

<sup>1</sup> An acknowledgement goes to my partners Doug Peel and Antoine Cousin for their valuable review and comments and to associates James Rimmer, Bandar Altunisi and AlJouhara AlBakr for their research and assistance in the production of this article.

<sup>2</sup> When we refer to the “PPP” model in this article, we are generally referring to a single capital asset (or set of assets), procured by a government entity through a concession agreement under which private sector sponsors with the relevant expertise are required to finance (through a combination of project finance debt and sponsor equity and potentially other forms of third party financing), design, build, operate and maintain the asset(s) for a period of years (typically 20-25 years, equivalent to the tenor of the project finance debt) in exchange for the collection of payments from third party users of the asset or the payment of an availability (or operational services) tariff by the Government.

<sup>3</sup> The Taif airport development project was also intended to be structured as a privately financed PPP, but the tender process appears to have been suspended at the time this article was written. The Saudi Landbridge Project, which was originally tendered as a PPP project in 2008, but the project did not reach financial close and it was decided to

Transfer-Operate (the “BTO”) model to ensure that assets remain under state ownership. We are also aware of hybrid BTO projects<sup>4</sup> that were publically funded, as well as assets being procured under publically funded construction contracts with separately procured concessions for the operational period.<sup>5</sup>

PPP may well become in the short term a preferred model for future projects in the Kingdom. PPP is specifically referred to as one of the models to promote foreign investment and improve the efficiency of the Kingdom’s services in the recent announcement of the strategic Vision 2030 initiative by the Kingdom’s Council of Economic and Development Affairs, which is the Kingdom’s plan to diversify its economy to be less dependent on oil while moving from being the nineteenth largest economy in the world into the top 15 world economies by 2030.<sup>6</sup> PPPs were also the subject of this year’s Jeddah Economic Forum, which took place on 2 and

3 March 2016 and focused on PPPs in general and on airports, infrastructure, seaports and water desalination PPPs in particular<sup>7</sup> and are being widely discussed in the industry and project finance press as potentially on the upsurge.

The reasons for this renewed focus on PPPs include the success of the Medina Airport Expansion Project, which became operational in June 2015, the need for continued development of the Kingdom’s infrastructure and other assets to meet its changing demographic profile<sup>8</sup> and the development of alternative funding models that do not rely so heavily on Government funding, especially in light of recent global oil price softness (at the time of this publication).

## 2. Which sectors apply a PPP model to develop infrastructure projects?

The Kingdom has implemented or attempted to implement privately financed PPP projects in the following sectors:

proceed with the project as a state-funded project in 2011.

<sup>4</sup> Haramain High Speed Railway, the railway being constructed between Mecca and Medina was procured in three publically-funded packages between 2009 and 2011, the third of which was a hybrid BTO: (1) Phase 1 Package 1 consisted of the design and construction of route civil works; (2) Phase 1 Package 2 consisted of the construction of stations; (3) Phase 2 consisted of the construction of track and systems, the procurement of rolling stock and the operation and maintenance of the whole railway. All packages were tendered on a publically funded basis, with the Phase 2 contractor also sharing in ticket sales revenues.

<sup>5</sup> At the time of writing, the General Authority of Civil Aviation is in the process of tendering an operation and maintenance contract for the new terminal that is under construction at King Abdulaziz International Airport in Jeddah.

<sup>6</sup> The full text of the 2030 Vision as presented by Deputy Crown Prince Mohammed bin Salman Al Saud on 25 April 2016 is available at: [http://www.spa.gov.sa/galupload/ads/Saudi\\_Vision2030\\_EN.pdf](http://www.spa.gov.sa/galupload/ads/Saudi_Vision2030_EN.pdf)

- *Airport expansion projects* - with the Hajj Terminal Expansion Project in Jeddah and the Medina Airport Expansion Project being the principal examples of privately financed PPPs in the Kingdom; the Taif Airport Development Project was also intended to be structured as a privately financed PPP, but the tender process appears to have been suspended (at the time of writing);

- *Transportation projects* - such as the Saudi Landbridge Project, the railway project to connect some of Saudi Arabia’s major cities, which was originally tendered as a

<sup>7</sup> See <http://www.jef.org.sa/>

<sup>8</sup> At the time of writing, it is widely estimated that Saudi Arabia has a population of 31 million people with over 50% of the population under 25 and a population growth rate of approximately 1.5% per annum.

PPP project in 2008, but did not reach financial close and it was decided to proceed with the project as a state-funded project in 2011;

- *Water desalination wastewater and power projects* – the PPP model has been widely used in this sector, although the projects have been procured by directly or indirectly state-owned companies, not by the Government directly.<sup>9</sup>

## LEGISLATION & REGULATION

### 3. What are the principal laws and regulations? Is there a framework PPP Law?

There is no comprehensive framework for PPPs in the Kingdom.

PPP projects are however affected by a range of legislation that is general in nature, including, for example, the Companies Law<sup>10</sup>, the Foreign Investment Regulations<sup>11</sup> and

sector specific laws such as the Civil Aviation Law 2009.

Whilst there is no comprehensive framework legislation, the now abolished Supreme Economic Council (the “SEC”) issued guidelines in the form of its Privatization Strategy for the Kingdom of Saudi Arabia in 2002 (the “Privatization Strategy”). This included the policies designed to achieve the Government’s privatization goals and set out privatization models and controls, including management agreements, leases, build-operate-transfer models and other types of private sector participation in large-scale projects. Under the Privatization Strategy for example, a tender process requires a constant dialogue between the relevant tendering authority and the SEC, with the tendering authority taking the lead. However, it is unclear whether the Privatization Strategy still applies, given that the SEC was dissolved last year (see section 4 below).

Although the Kingdom has a Procurement Law<sup>12</sup> for publically procured and funded projects, which is fairly stringent and not well suited to PPPs, the SEC has provided project-specific approvals allowing for PPP procurements *not* to be treated as traditional procurements subject to the Procurement Law.

### 4. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?

There is no centralized PPP unit in the Kingdom.

However the Government directed the SEC pursuant to the Decision of the Council of

<sup>9</sup> Since the early 2000s, state-owned or indirectly state-owned companies, (such as the Saline Water Conversion Company (SWCC), the Water and Electricity Company (WEC), the Power and Water Electricity Company for Jubail and Yanbu (Marafiq) and the Saudi Electricity Company (SEC)) have procured a program of independent water and power projects (IWPPs), independent water, steam and power projects (IWSPPs) and independent power projects (IPPs) on a privately financed BOT (build-own-operate-transfer basis) or BOO (build-own-operate) basis. These are not strictly speaking PPPs but show that there has historically been bank and market appetite for local and international banks and investors to invest in Saudi Arabian infrastructure projects. Local bank appetite is increasingly thought to be moving towards shorter tenor loans.

<sup>10</sup> The new Companies Law was published under Royal Decree M/3 dated 10 November 2015.

<sup>11</sup> The Foreign Investment Law was published under Royal Decree M/1 dated 10 April 2000.

<sup>12</sup> The Government Tenders and Procurement Law issued pursuant to Royal Decree No. M/58 dated 27 September 2006 and the Implementing Regulations of the Government Tenders and Procurement Law issued pursuant to Minister of Finance Resolution No. 362 dated 10 March 2007.



Ministers No. 257 dated 5 February 2001<sup>13</sup> to supervise privatization and monitor implementation of PPPs and other structures involving private sector investments. Pursuant to that decision, the SEC (1) approved a nationwide Privatization Strategy (discussed above); and (2) authorized a list of sectors and industries to be targeted as part of a privatization program, including telecommunications, power, water, industrial parks, postal services, education, airport/seaport and the rail transportation sectors. Under this mandate, PPPs have been implemented in the airport, transportation, power and water desalination sectors, with one of the most widely used PPP models in Saudi Arabia being the power and water model, albeit contracted with directly or indirectly state-owned entities. However, a broader PPP program with comprehensive framework legislation has not as yet been launched.

In 2015 it was announced that the SEC would be dissolved by King Salman bin Abdul-Aziz and replaced with the Council of Economic and Development Affairs (the “CEDA”). CEDA would have authority to manage every aspect of Saudi domestic affairs and would be headed by Deputy Crown Prince Mohammed bin Salman al Saud.

CEDA is expected to assume SEC’s prior responsibilities including monitoring implementation of PPPs and other structures involving private sector investments.

<sup>13</sup> The Council of Ministers decision required the SEC to:

- recommend a privatization strategy to be approved by the Supreme Economic Council;
- recommend the public enterprises, projects, and services to be privatized and set the priorities;
- define the regulatory and implementation framework for the privatization process; and
- monitor and supervise the implementation of privatization activities.

In the case of airport projects, GACA is the competent authority under the Civil Aviation Law to “*determine the services and infrastructure that can be privatized or opened for private sector participation and approval thereof by the competent authority*”.<sup>14</sup> However, like other projects, airport development or expansion projects have required a royal approval for private sector participation (in addition to any prior approval by GACA) and the approval of the SEC, and there is no official model form contract or risk allocation set forth in legislation.

The Ministry of Water and Electricity, which was previously responsible for procuring water and power PPPs, was announced on 7 May 2016 as being replaced by the Ministry of Agricultural, Water and Environment and the Ministry of Power, Industry and Minerals. So it remains to be seen which ministry will procure any future IWPPs.

## **5. Are there any restrictions for foreign investors to develop/operate PPP projects?**

Yes, there are restrictions on investment in the Kingdom that are generally applied to all foreign investors (including PPP projects).

It is necessary to describe what constitutes a “foreign” investment under Saudi Arabian law. In principle, non-Saudi foreign entities which are entirely owned by citizens of the Gulf Cooperation Council countries (the “GCC”) are permitted access to the Saudi market on an equal footing with Saudi nationals and entities owned by Saudi nationals pursuant to a number of regional treaties. There are exceptions to this rule. For example, non-Saudi GCC entities may not invest in Saudi health clinics.

<sup>14</sup> Article 16(5) of the Civil Aviation Law 2009.

Entities that are not ultimately wholly owned by GCC citizens (a non-GCC entity) are treated as “foreign” by the Saudi Arabian General Investment Authority (SAGIA). Before a non-GCC entity to establish a permanent place of business in the Kingdom, it is necessary to obtain a foreign investment license from SAGIA (in addition to any sector specific licenses which may be required) and then to register with the Ministry of Commerce and Investment (MOCI). SAGIA adopts a progressive attitude and the long term trend is towards liberalizing the market to facilitate greater levels of foreign investment. A new more liberalized foreign investment license application scheme has been implemented and is in the process of being assessed. Currently, the Kingdom’s foreign investment law permits direct investment by non-GCC entities in most areas although the process for obtaining the initial license can be onerous. Certain sectors, such as trading, require a Saudi partner with a minimum level of ownership.

Also note that non-GCC entities are prohibited from directly investing in a number of specific areas<sup>15</sup>, including oil exploration, drilling and production. Other key prohibited sectors on the negative list include security, real estate in Mecca and Medina, real estate brokerage, religious tourism, employee recruitment services, news, media and public transport systems (except in-city metro systems). The prohibition on transport systems has not prevented airports from being procured on a PPP basis, provided that the Government continues to own the assets for the duration of the concession.

It is unclear whether foreign investors will be allowed to own real estate for PPP activities. To date, PPPs directly procured by

Government have been procured with the Government continuing to own the land. This may of course depend on the perception of the strategic value of the assets to be developed on that land. Foreign investors may transfer cash outside the Kingdom and can sponsor foreign employees, although the Government has a program known as *Saudization* pursuant to which all entities operating in the Kingdom are required to employ certain percentages of Saudi employees.<sup>16</sup>

## **6. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

Long-stop dates are typical in PPP project agreements and project finance concessions in Saudi Arabia for the construction works. Typically delay liquidated damages may be applied between scheduled completion and the long-stop date. However, there have not been enough Saudi PPP projects to draw general conclusions.

## **7. How are force majeure events defined, and what are the consequences of their occurrence?**

Force-majeure events are typically defined under the categories of political and non-political (natural) force majeure in PPP project agreements and project finance concessions in Saudi Arabia, which correspond to matters that are typically uninsurable or insurable respectively and therefore typically attract different levels of compensation (though both would usually result in relief from directly affected obligations). However, there have not been enough Saudi PPP projects to draw general conclusions.

<sup>15</sup> See: [http://www.sagia.gov.sa/en/InvestorServices/InvestorLibrary/SubCategory\\_Library/Business\\_not\\_permitted.pdf](http://www.sagia.gov.sa/en/InvestorServices/InvestorLibrary/SubCategory_Library/Business_not_permitted.pdf)

<sup>16</sup> The requirements for Saudization and the traffic light reward and penalty system for Saudization percentages is set forth in the Council of Ministers Resolution no. 50 dated 26 September 1994 and the Minister of Labor Resolution no. 4040 dated 11 September 2011 pursuant to Council of Ministers Resolution no. 260 dated 27 July 2009.

**8. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

Some relief and compensation is typically offered for defined political force majeure events and restricted changes in law in PPP project agreements and project finance concessions in Saudi Arabia. However, there have not been enough PPP projects to draw general conclusions.

**9. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

PPP Law does not stipulate the concept of “reinstatement test”.

**10. Is the concept of ‘uninsurability’ recognized in the project agreements?**

Uninsurability is typically addressed in PPP project agreements and project finance concessions in Saudi Arabia through the political force majeure regime and the reinstatement regime in the event of total loss where the insurance proceeds are not adequate to cover reinstatement and the procuring authority requires the assets to be reinstated. However, there have not been enough Saudi PPP projects to draw general conclusions.

**11. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

Procuring authority step-in is common e.g. in the case of certain emergency, health and safety or environmental events in regional

project finance agreements. Clearly in BOT projects, the asset would also revert to the public authority following termination and that would likely be a requirement with strategic or significant government assets. Lender step-in is also common through lenders’ direct agreements in Saudi project finance transactions in the event of project company default that could lead to termination, though it is not always available and once again its availability might depend on the nature of the assets being procured. However, there have not been enough Saudi PPP projects to draw general conclusions.

**12. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

The way in which disputes are governed is often an area of concern for participants in PPP projects. One area of particular concern to private investors is the enforceability of contracts against Government authorities and the finality of judgements handed down by courts or arbitral tribunals outside the Kingdom. Investors tend to desire some degree of certainty in this respect.

The Kingdom recently enacted a new Arbitration Law<sup>17</sup> that provides for greater certainty and more clearly defined arbitration procedures, which for example reduces the role of the Saudi courts in any appeals process and allows for the possibility of incorporating the rules of international arbitration bodies into the arbitration agreement. This was

<sup>17</sup> The new Arbitration Law was issued pursuant to Royal Decree No. M/34 dated 16 April 2012 and replaced the then existing Arbitration Law issued by Royal Decree No. M/46 of 24 April 1983.

enacted alongside the new Enforcement Law<sup>18</sup>, which is designed to facilitate the enforcement of local and foreign judgments and awards and created specialized forums for enforcement.

However, under current law, Government authorities are prohibited from entering into contracts that are not governed by Saudi Arabian law and from entering into arbitration agreements (unless an official exemption is obtained).<sup>19</sup> In addition, the Enforcement Law<sup>20</sup> and the Administrative Enforcement High Order<sup>21</sup> that preceded it prohibit enforcement judges from issuing enforcement actions against Government entities and Government-owned assets although at the same time the Administrative Enforcement High Order instructs Government entities to comply with and execute final judicial awards.

Compliance with foreign arbitral awards would be more problematic as these may not be considered to be final until attested by a Saudi Arabian adjudicatory body, for which there is no established procedure when it comes to government entities, which may result in the courts refusing to attest them. The majority of directly Government procured PPP contracts to date have required Saudi courts as the ultimate forum for dispute resolution (subject often to an intermediate expert process).

**13. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

There is no such legislation and this has not typically been provided for in project agreements. However, there have not been enough Saudi PPP projects to draw general conclusions.

**14. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

In regional project finance concession agreements, acceptance tests are typically performed by the project company according to certain set criteria and witnessed by the procuring authority and potentially an independent third party engineer. How these tests are performed may depend on the type of assets being procured. However, there have not been enough Saudi PPP projects to draw general conclusions.

**15. Are there any expected changes or reform to the existing legislation?**

On Rajab 18, 1437H, (corresponding to 25 April 2016) the Kingdom announced its “Vision 2030” initiative, which laid out a general framework for the modernization of the Saudi economy. This announcement made several references to PPP projects being a key component of the Kingdom’s economic development strategy, in particular through a planned privatization initiative in which the private sector will be expected to assume a much greater role in developing the Kingdom. At the time of writing this article, no new legislation has been enacted relating to PPP projects pursuant to the Vision 2030.

<sup>18</sup> The new Enforcement Law was issued pursuant to Royal Decree No. M/53 dated 13/08/1433 H (corresponding to 14 July 2012).

<sup>19</sup> Council of Ministers Resolution No. 58 dated 25 June 1963.

<sup>20</sup> See Article 21(1) of the Enforcement Law.

<sup>21</sup> Administrative Enforcement High Order refers to High Order number (9624/M B) dated 22/11/1430H (corresponding to 10 November 2009) which (a) prohibits taking enforcement actions against a government entity; and (b) instructs all government entities to take all necessary and immediate steps to execute any final judicial award issued against it.

## FINANCING &amp; INCENTIVES

**16. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

At present, PPP payment mechanisms are not directly regulated through any legislation but have been addressed on a deal by deal basis. For example, the Medina Airport Expansion PPP project derived its payments from usage and traffic charges, with the project company accepting demand and volume risk.<sup>22</sup> This was similarly the case for the Hajj Terminal Expansion Project in Jeddah. An availability based project, such as the power and water projects discussed above, would require availability payments directly from the Government to cover senior debt, fixed and variable operations and maintenance costs and a return on equity invested. That is consistent with project finance practice in the Kingdom. A hospital or school project would likely require the same under the guise of services payments. Accommodation projects could require a slightly different structure, depending on the market for long term operation and maintenance contracts to match the term of the concession agreement. We would usually expect inflation to be protected against either through increases to availability payments or through the right to increase charges or ticket prices in the case of a demand-based PPP (in both cases based on an indexation mechanism). Based on Saudi project finance and IWSP/IPP precedents, we would expect foreign exchange protection for availability-based projects.

<sup>22</sup> 'PPPs for Infrastructure development & financing in MENA Region', International Finance Corporation Webinar, 6 October 2015 (<https://olc.worldbank.org/content/infrastructure-financing-through-ppps-middle-east-and-north-africa-region>)

**17. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

There is no rate of return guarantee or cap for PPP projects in the Kingdom under current law. However, based on Middle-Eastern project finance precedents, we would expect a steady rate of return for availability-based projects, subject to deductions for unavailability or other performance defects.

**18. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

Such guarantees for PPP projects are not provided by law and it is difficult to determine what kind of guarantees the Government might be prepared to give. Partial traffic guarantees were provided for the Hajj Terminal Expansion Project, but the private sector investors otherwise assumed the demand and volume risk for the collection of airport revenues. In the case of the Medina Airport Expansion Project, the private sector participant assumed the demand and volume risk for airport revenue collection (subject to a revenue-sharing arrangement with the Government), although the Ministry of Finance guaranteed the usage-based payment obligations of Saudi Arabian Airlines and provided a termination payment guarantee.<sup>23</sup> In the case of power and water projects, we are not aware of guarantees having been given. Whether additional guarantees would be offered for Government sponsored availability-based projects remains to be seen.

<sup>23</sup> *ibid.*

**19. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

This is not directly addressed by the laws of the Kingdom. However, limited Ministry of Finance guarantees have been provided on previous airport PPP projects (see question 11 above).

**20. Are deductions from the service and availability payments subject to a cap?**

No cap is currently required by law.

**21. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

The Procurement Law imposes a cap on increases to the contract price at 10% of the contract price and of decreases to the contract price at minus 20%. However, historically under privately financed PPP structures, the Supreme Economic Council (as further detailed in Section 4 above) has provided project-specific approvals allowing for PPP procurements not to be treated as traditional procurements subject to the Procurement Law.

**22. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?**

No requirement currently exists in law for PPP projects. In certain precedent PPP transactions, 50% of the gains from any refinancing were required to be passed on to the Government.

**23. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

Lenders usually sign direct agreements with the relevant public authorities in most project

financed procurement projects in Saudi Arabia, including PPP projects. The rights of lenders may vary depending on the complexity of the assets in the project, the sensitivity of the subject of procurement, and other relevant factors. There have been too few PPP projects in the Kingdom to infer the general trends in this regard.

**24. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

There is no debt assumption mechanism for PPP transactions as a matter of Saudi law at present. However, in certain precedent PPP transactions, the procuring authority has had the option to assume the senior debt or, in the event that terms cannot be agreed with the lenders, to repay the senior debt through a termination payment.

**25. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

There are no statutory obligations to make payments in the event of termination. However, in precedent PPP transactions and other project finance transactions in the Kingdom, it is common for the grantor to repay the senior debt in termination scenarios, subject to certain exceptions in contractor default scenarios, including in one case a percentage reduction to the termination

payment in contractor-default scenarios that occur prior to the commercial operation date, as an incentive to achieve commercial operation; and, in other cases, the option but not the obligation to purchase the project (in part as incentive to encourage the lenders to step-in and rescue the project). In project company default scenarios (in both general project finance and PPP projects), sponsors would typically expect to lose their equity. In grantor default scenarios in Saudi project finance transactions, the sponsors would typically be expected to have their equity returned and be paid a rate of return on that equity; though this has not necessarily been the case for PPP transactions and it is difficult to say what the position is likely to be if a PPP framework is introduced by the Government.

**26. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

There is no such incentive in law for PPP projects. Existing PPPs require the project company to use domestic products and services as required by applicable laws, regulations and decrees.

**27. Are there tax advantages available to PPP projects?**

Law firms are prohibited from giving tax advice in the Kingdom. However, based on publically available information, the Kingdom imposes five<sup>24</sup> primary taxes which may be relevant to PPP projects.<sup>25</sup>

<sup>24</sup> Note also that on 8 June 2016, the Kingdom confirmed a new annual tax of 2.5% on the value of undeveloped urban commercial and residential land. The implementing regulations have not yet been issued and it remains to be seen to what extent this will affect industrial projects in the Kingdom.

<sup>25</sup> Deloitte's tax advice 2016. <http://www2.deloitte.com/content/dam/>

- i. a corporate income tax (paid by non-GCC entities on their Kingdom-derived income at a rate of 20%, except in the natural gas sector (30%) and oil and hydrocarbon production (85%));
- ii. *zakat* (a wealth tax paid by GCC entities at a rate of 2.5% on their assets in the Kingdom);<sup>26</sup>
- iii. withholding tax (generally paid at a rate between 5% to 20%) on certain services, royalties, dividends, payment of interest and other payments overseas;
- iv. a 20% capital gains tax on the disposal of shares in an unlisted company; and
- v. for Saudi employees, a social security contribution of 9% of that Saudi employee's salary (to which the employee must also contribute 9%) and a 1% unemployment insurance contribution (to which the employee must also pay 1%). For both Saudi and non-Saudi employees, a 2% mandatory accident insurance policy contribution also applies

The Kingdom does not at present impose personal income tax on employees.

**28. What are the other incentives available to PPP projects?**

There are no other specific incentives in law for PPP projects in the Kingdom at present, that we are aware of.

Deloitte/global/Documents/Tax/dttl-tax-saudiArabiahighlights-2016.pdf

<sup>26</sup> The treatment of concession projects as operation or finance leases and the possible deduction of lease receivables from the Zakat base is a matter that requires specialist tax advice.

**29. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2015?**

The Medina Airport Expansion became operational in the first half of 2015. No projects were procured on a PPP basis in 2015, although the Taif Airport Development

Project was initially expected to be tendered on a PPP basis at the end of 2015 but the tender was delayed and at the time of writing this article, appears to have been suspended, though this is rumoured to be because of project-specific reasons, rather than a matter of general Government policy.

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# SENEGAL<sup>12</sup>



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## GENERAL

1. **Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

The PPP model has a long history of use in Senegal as the first concession agreement in the country was entered into on 21 May 1888 for a boat transport service<sup>3</sup>. PPP models are now commonly used in order to develop major infrastructure projects.

<sup>1</sup> The authors are French lawyers registered at the Paris bar. The answers to the questionnaires relating to Senegal, Morocco, Guinea and Ivory Coast are based on their knowledge of the applicable regulations and on their experience of PPPs projects implemented in these countries. The accuracy of these answers remains however subject to the confirmation by lawyers duly registered in the said countries

<sup>2</sup> The authors would like to thank Hugues Martin-Sisteron (member of the Paris Bar Association), Diane Houriez and Salimatou Kaba for their help in the preparation of this questionnaire.

<sup>3</sup> <http://terangaweb.com/cadre-juridique-des-partenariats-public-privé-au-senegal-une-reforme-incomplete>.

From 2004 to 2014, a specific legal framework was implemented for build-operate-transfer contracts (*contrat de construction-exploitation-transfert d'infrastructures*); an arrangement whereby a public entity would pay rents to a private sector entity for building and operating infrastructure.

The adoption of a new law pertaining to partnership agreements and repeal of the law relating to build-operate-transfer contracts has meant that since 2014 Senegalese law only recognises two categories of contracts for the financing, construction, operation, servicing and maintenance of infrastructure and public assets. These are: (i) concession agreements where the contract holder generates revenue through the commercial operation of a project (in particular the fees paid by users); and (ii) partnership agreements where the contract holder is paid by public entities from when the project is commissioned until the end of the relevant agreement.

As such, the grantor has to determine the exact nature of the contract to be agreed, taking into account the services to be performed and the payment conditions of the private entity.

In both concession agreements and partnership agreements, the grantor can assign the design, build and operation of a project to

a private entity (i.e. Build-Operate-Transfer or Build-Operate-Own-Transfer agreements). However, under a particular type of contract known as *contrat d'affermage*, the grantor can only assign rights to the management of a public project that has already been built (i.e. Transfer of Operation Rights contracts).

It is envisaged that PPPs will play an important role for the implementation of the “*Plan Sénégal Emergent*” (Emerging Senegal Plan), the country’s long-term strategic plan for development and economic growth over the next decade<sup>4</sup>.

## 2. Which sectors apply a PPP model to develop infrastructure projects?

The PPP model is used in all economic sectors for the development of infrastructure and the management of public services.

Since 1990, fourteen PPP projects totalling US\$ 1,219 million have reached financial close mainly in the transport sector. This includes the Dakar-Diamniado motorway project (the first greenfield road PPP project in sub-Saharan Africa<sup>5</sup>) and Blaise Diagne international airport. PPP models have also been used in other sectors such as water. For example, an affermage contract (*contrat d'affermage*) for the production and the distribution of drinking water was entered into between a Senegalese water company - *Sénégalaise des Eaux* - and the Senegalese state in 1996<sup>6</sup>.

The Emerging Senegal Plan also sees PPPs as playing a key role in reinforcing the position of Senegal as an economic and infrastructure hub for West Africa in sectors as diverse as agro-

industry, construction, logistics, road and rail-road transportation and tourism<sup>7</sup>.

## LEGISLATION & REGULATION

### 3. What are the principal laws and regulations? Is there a framework PPP Law?

In order to facilitate the development of infrastructure projects, Senegal recently created a new category of contracts called partnership agreements and implemented this through the enactment of the law No. 2014-09 dated 20 February 2014<sup>8</sup> (the “PPP Law”) and of the decree No. 2015-386 dated 20 March 2015 (the “PPP Decree”).

The PPP law also repealed Law No. 2004-13 dated 1 March 2004 pertaining to build operate transfer agreements (the “BOT Law”).

The PPP Law was aimed at consolidating existing laws on PPPs and providing a framework conducive to the development of infrastructure in Senegal. It is hoped that the new law will act to stimulate foreign and domestic investment in sectors such as agriculture, education and health.

In accordance with article 2 of the PPP Law, the partnership agreements could be implemented in all economic sectors, with the exception of the sectors governed by a specific legislation, among which the energy, mining and telecoms sectors.

The concessions agreements are regulated by the new Senegalese public procurement code enacted in 2012 through Decree No. 2014-

<sup>4</sup> <https://pppknowledgelab.org/countries/senegal>.

<sup>5</sup> <http://blogs.worldbank.org/ppps/taxonomy/term/11800>.

<sup>6</sup> <http://blogs.worldbank.org/ppps/senegal-shifts-its-thinking-rural-water-delivery-moves-private-operators>.

<sup>7</sup> <http://www.iflr1000.com/NewsAndAnalysis/10-Things-to-know-about-PPPs-in-Senegal/Index/2563>.

<sup>8</sup> The PPP Law was that modified by Law No. 2015-03 dated 12 February 2015 (only article 31 of the PPP Law has been modified).

1212 dated 22 September 2014 (the “Senegalese Procurement Code”).

**4. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

At present, there are two bodies which regulate partnership agreements in Senegal.

A dedicated unit within the Ministry of Finance known as the PPP Committee (*Comité national d’Appui aux Partenariats Public-Privé*) (the “PPP Committee”) validates partnership agreements drafted by potential grantors and assists grantors to implement agreements. The committee also promotes the standardisation of PPP agreements through periodic controls and assessments.<sup>9</sup>

The Infrastructure Council (*Conseil des Infrastructures*) composed of twelve members comprising three magistrates, three private sector representatives, three civil society and consumer associations’ representatives, and three members of Parliament<sup>10</sup> also acts as a regulatory body for PPPs.

The Infrastructure Council is responsible for dispute resolution, procedure, and auditing of all partnership agreements. This regulatory body must issue a favourable opinion regarding a draft partnership agreement before a partnership agreement is concluded (note: a favourable opinion must also be issued by the Minister of Finance).

The Infrastructure Council opinion must also specify if the project complies with the Senegalese infrastructure development strategy and environmental standards.

As regards concession agreements, none of the regulatory bodies detailed above is involved in their implementation and performance. The

specific entities tasked with public procurement procedures are responsible for concession agreements.

**5. Are there any restrictions for foreign investors to develop/operate PPP projects?**

The legislative framework for PPPs does not place any restrictions on foreign investors.

Nevertheless, it should be noted that the PPP Law<sup>11</sup> specifies that in any awarding procedure, a criteria of national preference can be taken into account in the selection of the tenders in order to support the domestic Senegalese economy.

During the bids evaluation phase, the grantor applies a margin of preference (“*marge de préférence*”) from 5% to 10% to the tenders of bidders from the Economic Community of West African States (the “ECOWAS”), to the tenders of a consortium of bidders including at least one company from ECOWAS or to bidders who promise to subcontract at least 30% of global value of the supply and works agreement necessary to perform the PPP agreement to companies from ECOWAS. A preference margin (of 2%) also applies to bidders who promise to enter into contracts with small and medium-sized companies from ECOWAS<sup>12</sup>.

In addition, if the estimated global cost of the project is under 5 billion FCFA, the tendering can only be opened to bidders from ECOWAS<sup>13</sup>.

In relation to concessions agreements, preference principles can apply to offers from bidders from Senegal and ECOWAS or to

<sup>9</sup> Article 3 and 38 of the PPP Law.

<sup>10</sup> Article 1,10 and 39 of the PPP Law.

<sup>11</sup> Article 13 of the PPP Law.

<sup>12</sup> Article 21 of the PPP Law.

<sup>13</sup> Article 5 of the PPP Decree.

offers involving products originating in Senegal and ECOWAS<sup>14</sup>.

## **6. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

Senegalese PPP legislation does not impose a long-stop date for the completion of construction in PPP agreements.

However, the PPP Law does provide that PPP agreements are entered into for a period determined by the depreciation period of the selected investments, financing terms and the type of construction and services to be performed<sup>15</sup>.

In respect of concession agreements, the Senegalese Procurement Code does not provide a long-stop date for the completion of construction. It only imposes that the duration of the concession and the starting date of the concession agreement has to be defined under the contract<sup>16</sup>.

It is common practice that the parties would determine specific clauses pertaining to a maximum duration for the construction in the contracts.

## **7. How are force majeure events defined, and what are the consequences of their occurrence?**

As in other civil law countries, force majeure events are described in the Senegalese case law as an “*unforeseeable and irresistible event, including external causes*”. Therefore, force majeure is defined as an event beyond a party's control which the party could not reasonably have provided against before entering into the contract or which the party could not reasonably have avoided or overcome

provided that the event is not substantially attributable to the other party.

The events that could be defined as force majeure events in the context of PPPs include natural disasters, war, hostilities (whether war be declared or not), invasion, act of foreign enemies, rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war, riot, commotion, disorder, strike or lockout by persons other than the parties' personnel.

The PPP Law only provides that parties can agree on the possibility to terminate the contract in case of force majeure event. In this case, the PPP Law provides that the contractual provisions can set the possibility for all parties to initiate the termination procedure when a force majeure event occurs<sup>17</sup>.

## **8. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions etc.) allocated between the parties, and what are the consequences of their occurrence?**

The PPP Law provides<sup>18</sup> that partnership agreements have to include a specific clause pertaining to the allocation of risks between the parties. This is modelled on the contractual practice of optimal risk sharing.

The PPP Law also specifies that the risks linked to the different phases of the project must be identified and set out in detail.

It should be noted that during its preliminary assessments, the PPP Committee has to analyse the risk allocation set out in any draft PPP agreement<sup>19</sup>.

In general, the risks linked to the expropriation and changes in law are assumed by the public

<sup>14</sup> Article 50 of the Senegalese Procurement Code.

<sup>15</sup> Article 1 of the PPP Law.

<sup>16</sup> Article 13 of the Senegalese Procurement Code.

<sup>17</sup> Article 35 of the PPP Law.

<sup>18</sup> Article 7 of the PPP Law.

<sup>19</sup> Article 8 of the PPP Law.

entity. In relation to adverse court decisions pertaining to the validity of the agreement, the allocation of risks is often provided for in direct agreements.

It is common practice that for court decisions pertaining to the early cancellation of the PPP, the risk is borne by the public entity. However, a private entity would bear such risk in case of breach of its contractual obligations.

**9. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

Under Senegalese law, no reinstatement test is provided. Pursuant to the freedom of contract principle, such a test may be included in partnership agreements.

However, based on our experience of PPP projects in Senegal, public entities are keen to reinstate the facilities rather to repay debt to the lenders.

**10. Is the concept of ‘uninsurability’ recognized in the project agreements?**

The concept of “uninsurability” is not specifically defined or provided for under Senegalese legislation. However, the parties can freely stipulate that risk above a certain threshold will no longer be insured provided that such article does not conflict with any mandatory provisions under Senegalese law.

**11. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

The PPP Law provides that the public entity can establish direct contractual relationships with the lenders that financed, in full or in

part, a project. This empowers a contracting public authority to enter into direct agreements (i.e. a tripartite agreement or letter of intent) with the lenders of a project<sup>20</sup>. This implicit reference to direct agreements is welcome; however it would have been preferable if the PPP Law had explicitly acknowledged the independence between such agreements and the relevant partnership agreement.

The PPP Law provides for the transfer of partnership agreements during their performance. An authorized company can transfer the PPP agreement to a third party with the prior approval of the grantor and according to the terms and conditions set out in the relevant agreement. The PPP agreement can also be directly transferred to the lenders or someone appointed by them<sup>21</sup>.

In such cases, the new party will need to provide sufficient financial, technical and legal guarantees and be able to ensure public service continuity.

In relation to concession agreements, a substitution mechanism can be used by the grantor if a breach of contract by the private partner threatens public service continuity.

**12. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

The PPP Law allows partnership agreements to state that disputes would be settled through an international arbitration procedure<sup>22</sup>. Arbitration clauses in partnership agreement will need to set out this procedure (e.g. seat of arbitration, language of the arbitration, procedural law applicable).

<sup>20</sup> Article 33 of the PPP Law.

<sup>21</sup> Article 34 of the PPP Law.

<sup>22</sup> Articles 7 and 37 of the PPP Law.

However, even if arbitration procedures are chosen to settle disputes, the PPP Law provides that only the Senegalese Law can be applied during arbitration<sup>23</sup>.

Concession agreements can also be settled through an arbitration procedure<sup>24</sup>.

**13. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

The Senegalese PPP legal framework does not provide for a regular market testing procedure to procure the services to be provided by the authorized company.

Such a test is also not provided for in concession or partnership agreements.

However, in accordance with the freedom of contract principle, such a test may be included in the contracts entered into between the private entity and its subcontractors (i.e. with the contractor and/or the operator).

**14. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

The Senegalese Construction Code<sup>25</sup> sets the rules pertaining to the acceptance process for the work performed (*réception de l'ouvrage*).

Prior to the acceptance of the work, a technical assessment has to be performed for all construction works which are open to public

or which could threaten the safety of persons because of the size or nature of the building<sup>26</sup>.

This technical assessment in relation to the feasibility, design, performance and maintenance of the infrastructure is to be only performed by an authorized and independent technical controller.

Once acceptance of the work is pronounced by the owner, the work is deemed suitable for its intended purpose, the private partner is bound to repair any defects at its own cost pursuant to a “guarantee of perfect completion” for a period of one year following the acceptance of the facilities.

In addition, during a ten year period, the private partner will be presumed liable to the grantor (or to the person acquiring the facilities) for any latent defects and damage, including damages resulting from sub-soil conditions which impair the strength of the facilities<sup>27</sup>.

The acceptance by the owner of the work (i.e. the grantor, the public entity) is a crucial event as upon acceptance the owner takes control and ownership of the project and risk of loss passes from the private entity to the owner.

**15. Are there any expected changes or reform to the existing legislation?**

As the Senegalese legislation has been recently modified by the PPP Law, no deep changes or landmark reforms are expected from now.

Indeed, the existing legislation already provides a clarified and unified legal conducive to the development of infrastructures in Senegal and to the increase of visibility of foreign and local investors.

Indeed, as the existing legislation takes into consideration standard market practices which

<sup>23</sup> Article 7.14 of the PPP Law.

<sup>24</sup> Article 139 of the Senegalese Procurement Code refers to the arbitration procedure defined in the OHADA's Uniform Act on Arbitration dated 11 March 1999.

<sup>25</sup> As enacted by Law No. 2009-23 dated 8 July 2009.

<sup>26</sup> Article 27 of the Senegalese Construction Code.

<sup>27</sup> Article 19 of the Senegalese Construction Code.

are implemented in international project finance, it should permit to avoid the main pitfalls observed in countries with similar frameworks.

## FINANCING & INCENTIVES

### 16. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?

Under the PPP Law<sup>28</sup>, payment of the private entity is provided by the public authority for the duration of the agreement. It should be noted that the private entity's payment is linked to performance objectives (e.g. those relating to sustainable development) and service availability. The partnership agreement may also allow the authorized company to receive additional revenues for related activities.

Furthermore, the public authority may empower the authorized company to collect on its behalf, the service payments of the users due to the public authority.

In respect of concession agreements, the Senegalese Procurement Code provides that the concessionaire's compensation is mainly derived from service users and such payment is substantially linked to service operation outcomes.

Finally, the PPP Law does not specifically provide for inflation and/or foreign exchange protection for PPP projects except for the protection provided for in Law No. 2004-06 dated 6 February 2004 on the Senegalese Investment Code.<sup>29</sup>

The "Franc Zone" is an economic and monetary union whose members include France, Senegal and fourteen other African states. Its core principles are laid down in the Monetary Cooperation Agreement of 1972 between the Bank of Central African States (BCAS) and France, and the Cooperation Agreement of 1973 between the West African Monetary Union (WAMU) and France. These principles revolve around an unlimited convertibility guarantee whereby the French Treasury guarantees without any limits the conversion of CFA francs to euros, and a fixed exchange rate between the CFA franc and the euro. In exchange for pegging the CFA franc to the euro and for the unlimited convertibility guarantee, BCAS and WAMU undertake to deposit some of their foreign exchange reserve with the French Treasury on an operational account whose mechanism is governed by the aforementioned cooperation agreements.

In Senegal and more generally in the entire Franc Zone, key hedging related issues are quite typical for this type of transaction. These include in respect of the borrower, establishing capacity and authority, and in respect of the jurisdiction, confirming enforceability of the hedging documentation and foreign judgments, as well as determining whether any licensing and/or consent requirements exist. ISDA Master Agreements have been used in the past by Senegalese borrowers with foreign entities.

### 17. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?

There is no guaranteed rate of return or a cap on the rate of return for the project company or the sponsors under Senegalese law. However, pursuant to the freedom of contract principle, such a mechanism may be included in partnership agreements.

<sup>28</sup> Article 6 of the PPP Law.

<sup>29</sup> Articles 5 to 7 of Law No. 2004-06 dated 6 February 2004 on the Senegalese Investment Code.

**18. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

Neither the PPP Law nor the Senegalese Procurement Code provide for a specific payment guarantee provided by the relevant public authority for PPP projects. However, pursuant to the freedom of contract principle, such a mechanism may be included in both partnership agreements and concession agreements.

**19. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

The obligations of the administration are not qualified as Treasury obligations. Furthermore, Senegalese law does not provide for separate guarantees to be granted by the Treasury to the concessionaire or the lenders. It should be noted that such guarantees are not usually provided in partnership or concession agreements. The guarantees issued to the benefit of the private partner are most of the time issued by financial institutions.

**20. Are deductions from the service and availability payments subject to a cap?**

As the compensation of the private partner is linked to performance targets set out in partnership agreements, penalties (e.g., in case of a delay in completion or contractual breach) may reduce the amount of rent paid by the grantor.

In respect of concession agreements, financial penalties could be deducted from payments due to the concessionaire in cases of contractual breach. However, under Senegalese law such deductions are not subject to a cap but the parties are free to agree such a cap.

**21. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

The PPP Law<sup>30</sup> provides that partnership agreements must set out the conditions in which the partnership agreement may vary at the request of the public authority. The PPP law does not, however, refer to a specific cap.

**22. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?**

There is no requirement to share any gains arising from refinancing of the PPP project with the public authority under Senegalese law.

**23. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

As outlined in question 11, under the PPP Law<sup>31</sup>, the public authority may enter into direct agreements with the private entity and its lenders to cover specific issues (i.e. contractual breach) and protect the lenders. Under direct agreements, the lenders will be entitled to intervene or “step-in” the shoes of the project company or the contractors in respect of the key project agreements. The step-in rights are usually triggered when either the project company or the contractors have defaulted or there is reasonable belief that they will default in the near future. Step-in-clauses allow the lenders to take over the project company, the project itself or to obtain control rights to make decisions on behalf of the project company. Thereafter, the lenders may take over the project or appoint a professional third party to take over the project.

<sup>30</sup> Paragraph 10 of Article 7 of the PPP Law.

<sup>31</sup> Article 33 of the PPP Law.



The PPP Law<sup>32</sup> also provides that partnership agreements can be transferred to the lenders or to any third party chosen by the lenders.

In respect of concession agreements, a substitution mechanism could also be provided in direct agreements where the grantor substitutes the private entity with a third party in case of serious breach of contract by the private partner which threatens public service continuity. Consequently, entry into direct agreements is common practice in international project finance.

**24. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

Senegalese law does not provide for a debt assumption mechanism, whereby the public authority undertakes to reimburse the debt of the project company to the lenders. It should be noted that the PPP Law<sup>33</sup> contemplates that, in cases of termination due to a reason of public interest, compensation is to be paid by the public authority to cover expenses incurred by the project company and for lost earnings.

**25. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

In relation to partnership agreements, the PPP Law<sup>34</sup> provides for payments to be made by

the public authority to the project company if a partnership agreement is terminated except when such termination is due to a force majeure event. The PPP Law also provides that the project company can claim damages in case of (i) material breach by the public authority; or (ii) adverse financial changes due to the actions of the public authority.

Furthermore, as mentioned above, in cases of termination due to a reason of public interest, the project company is entitled to seek compensation for the expenses incurred by it and for lost earnings.

Finally, in cases of project company default termination, financial compensation may be provided by the public authority if it is specifically provided for in the partnership agreement.

In relation to concession agreements, the Senegalese Procurement Code<sup>35</sup> sets out the termination provisions for concession agreements and also provisions relating to the possible deferment (*ajournement*) of the concession agreement's performance.

For example, the project company can seek compensation when the deferment period is less than three (3) months. In such cases, the indemnity cannot exceed the amount of expenses incurred by such deferment.

In case of termination for contractual breach by the public authority, the authorized company may, in addition to the repayments of expenses incurred by a possible prior deferment, request the payment of an indemnity corresponding to the damage suffered. However, such indemnity shall not exceed the profit loss of the authorized company whose contract is terminated.

To conclude, payments to be made by the administration to the concessionaire are not payable in all termination scenarios. On the

<sup>32</sup> Article 34 of the PPP Law.

<sup>33</sup> Article 35 of the PPP Law.

<sup>34</sup> Article 35 of the PPP Law.

<sup>35</sup> Article 128 of the Senegalese Procurement Code.

contrary, in the event of termination for material contractual breach of the project company, the latter shall bear the costs arising from the termination<sup>36</sup>.

**26. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

As outlined in the PPP Law<sup>37</sup>, there is a clear incentive for local manufacturing of equipment or materials used in the construction of PPP projects. For example, the assessment criteria of the bids takes account of (i) the portion of the agreement performance that the candidate undertakes to entrust to local companies; (ii) the level of use of locally produced materials; and (iii) the level of employment of the local workforce.

In addition, the PPP Law<sup>38</sup> provides that the bidder must undertake to reserve a significant part in local workforce employment, promote technology transfer and subcontract to domestic economic operators.

**27. Are there tax advantages available to PPP projects?**

There are no specific tax advantages to PPP projects except for, as the case may be, those granted under Law No. 2004-06 dated 6 February 2004 in the Senegalese Investment Code. For example, under this law<sup>39</sup>, customs advantages can be available for a three years period when specific materials are imported.

**28. What are the other incentives available to PPP projects?**

There are no other advantages to PPP projects except for, as the case may be, those granted

under Law No. 2004-06 dated 6 February 2004 in the Senegalese Investment Code. For example, pursuant to this law<sup>40</sup>, during the operation phase, advantageous employment rules can apply to the additional workers employed by the private entity.

**29. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2015?**

To our best knowledge, the only PPP project developed in Senegal in 2015 was the International Airport of Diass<sup>41</sup>. Furthermore, under the Priority Action Plan (*Plan d'actions prioritaires*), a five-year plan implemented to achieve the “*Plan Sénégal Emergent*” (Emerging Senegal Plan) from 2014 to 2018<sup>42</sup>, more than 18 key PPP projects will be developed in sectors such as agriculture, health, education, mining and tourism with investments ranging between US\$ 16 million up to US\$ 734 million.<sup>43</sup>

<sup>36</sup> Article 88 of the Administration Contract Code (*Code des obligations de l'administration*).

<sup>37</sup> Article 20 of the PPP Law.

<sup>38</sup> Article 25 of the PPP Law.

<sup>39</sup> Article 18 of Law No. 2004-06 dated 6 February 2004 on the Senegalese Investment Code.

<sup>40</sup> Article 19 of Law No. 2004-06 dated 6 February 2004 on the Senegalese Investment Code.

<sup>41</sup> [www.initiative-ppp-afrique.com](http://www.initiative-ppp-afrique.com).

<sup>42</sup> [www.initiative-ppp-afrique.com](http://www.initiative-ppp-afrique.com).

<sup>43</sup> <http://senpppfinance.com/overview/ppp-projects-in-senegal/>.

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# SLOVAKIA



Peter Hodal

## WHITE & CASE S.R.O., BRATISLAVA

### GENERAL

1. **Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

The PPP model is not commonly used in the Slovak Republic. In the past, only a few PPP infrastructure projects were proposed and completed. The main PPP model that was used is Design-Build-Finance-Operate.

2. **Which sectors apply a PPP model to develop infrastructure projects?**

PPP model was used in road infrastructure projects and in hospital infrastructure projects (in this sector only at the level of feasibility study, not actual execution).

### LEGISLATION & REGULATION

3. **What are the principal laws and regulations? Is there a framework PPP Law?**

There is no specific PPP law. The main regulation represents the new procurement

legislation, Act No. 343/2015 Coll., on public procurement (the “Public Procurement Act”), which incorporates new EU public procurement and concessions directives.

The main contractual regulation stems from the Commercial Code (Act No. 513/1991 Coll., as amended) and the Civil Code (Act No. 40/1964 Coll., as amended).

4. **What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

The Public Procurement Authority (the “Authority”) is responsible for ensuring compliance with the procurement rules. An important role is also played by the Ministry of Finance which issues methodological guidelines for PPP feasibility studies, and its statement is also required for assessing the impact of a concession agreement on the off-balance treatment of payment obligations under EUROSTAT rules.

5. **Are there any restrictions for foreign investors to develop/operate PPP projects?**

There are no restrictions on foreign investors according to the Public Procurement Act. Specific restrictions could apply depending on a particular PPP project.

**6. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

The Public Procurement Act does not envisage a long-stop date for the completion of construction. Such date could be defined by the contracting entity in the tender documents, building permits or project agreements.

**7. How are force majeure events defined, and what are the consequences of their occurrence?**

The Public Procurement Act does not define force majeure events. Under the project agreements, standard force majeure events are usually defined as events beyond the parties' control which cause either party to be unable to comply with all or a material part of its obligations under the agreement. Depending on when the force majeure event occurs, it may result in the postponement of the scheduled date, the payment of a particular debt service amount and associated unavoidable fixed costs by the public authority or the inability of the public authority to terminate the agreement.

**8. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

Qualifying change in law is usually under the responsibility of the public authority. Consequences of qualifying change in law may result in the postponement of the programmed date, keeping the concessionaires in a situation that is "neither better nor worse", inability of the public authority to terminate the agreement and exemption from the obligations related to the qualifying change in law.

**9. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

The legislation does not deal with reinstatement. Under the project agreements, the insurance proceeds are typically used for reinstatement of the facilities.

**10. Is the concept of 'uninsurability' recognized in the project agreements?**

The concept of "uninsurability" is recognized in the project agreements.

**11. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

The legislation does not allow for step-in or substitution rights. However, the effects of these are to a certain extent mitigated by the right of the security agent on behalf of the lenders to enforce a security transfer and take ownership of the shares in the authorized company.

**12. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

International arbitration is available to settle disputes under the project agreements and direct agreements with the lenders. While it is possible to stipulate a foreign law as the governing law of the project agreements and direct agreements with lenders, the public authorities have a strong preference for Slovak law.

- 13. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

No, market testing procedure is not envisaged under the legislation or the project agreements.

- 14. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

The acceptance of the facilities (hand-over) is performed under the supervision of an independent technical adviser, with the public authority's right to comment on the process.

- 15. Are there any expected changes or reform to the existing legislation**

The criteria and conditions for feasibility studies for PPP projects are being discussed. As the new public procurement law entered into force only in April 2016, it may be expected that new methodical statements will be provided by the Authority.

## FINANCING & INCENTIVES

- 16. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

The payment mechanism is regulated by the project agreement; the legislation does not step in.

- 17. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

No, there is no guaranteed rate of return or cap on the rate of return for the project

company or sponsors under the applicable legislation.

- 18. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

No, the public authority does not provide any payment guarantee for PPP projects.

- 19. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

In practice, all major concession agreements are approved by the Slovak government. Therefore, if a ministry or state authority is a party to the concession agreement, its obligations to provide payments qualify as State obligations.

- 20. Are deductions from the service and availability payments subject to a cap?**

Deductions from the availability payment are subject to a cap in the amount of the yearly availability payment.

- 21. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

The public authority may request variations of the construction or operation stages – so called “public authority changes.” The change process provides the project company with the right to be compensated for extra costs incurred as a result of a variation request.

**22. Is there a requirement to share any gains arising from refinancing of the PPP project-with the public authority?**

The requirement to share refinancing gains was previously part of PPP projects. However, due to expected changes in EUROSTAT rules that may attribute projects to a state's balance sheet if a requirement on the sharing of refinancing gains is stipulated in the agreement, this requirement was omitted in recent transaction.

**23. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

The lenders sign a direct agreement with the public authority. Typical rights under this agreement include the following:

- the public authority may not terminate the project agreement and must consult with the lenders to agree on a rectification plan;
- the lenders shall retain all of their rights under the security; however any exercise of their security will automatically end the standstill period;
- where a rectification plan is agreed and is being complied with and following its successful implementation, any grounds for termination of the project agreement subsisting at the commencement of the notice period shall be deemed to have no effect and any performance points awarded shall be reset to zero;
- the security agent may enforce a security transfer and take ownership of the shares in the concessionaire, thereby gaining effective control over the management and day to day decisions of the project company.

**24. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

If the project agreement is terminated, the project company is entitled to receive a termination sum from the public authority. In the event of a termination without reason or termination due to public authority default, the termination sum covers the full equity. In the event of termination due to project company default, the termination amount is either determined through a retendering of the project (existence of liquid market) or the market value is set by expert determination. The evaluation does not always result in a termination sum that covers the equity.

**25. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

In the event that the project agreement is terminated, the public authority pays the termination sum in all termination scenarios to the project company. The termination sum may be due by a specific date or payable in instalments (in specific circumstances). The payments depend on the definition of the termination sum which varies depending on the termination scenarios. These provisions are frequently subject to negotiation prior to the conclusion of the project agreement in the procurement process.

**26. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

No, we are not aware of any incentives for the domestic (local) manufacturing of equipment or materials used in the construction of PPP projects.

**27. Are there tax advantages available to PPP projects?**

No, tax advantages are not available to PPP projects.

**28. What are the other incentives available to PPP projects?**

We are not aware of any incentives specific to PPP projects.

**29. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2015?**

A road infrastructure project, with a winning bid in the amount of EUR 1.8 billion was developed in our jurisdiction in 2015.

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# SOUTH AFRICA



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## WHITE & CASE LLP, JOHANNESBURG

### GENERAL

1. **Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

The following models are commonly applied to projects in South Africa:

- build-operate-transfer;
- build-own-operate;
- build-own-operate-transfer;
- concession arrangements;
- design-build-finance-operate;
- design-build-operate;
- design-build-operate-maintain; and
- design-build-operate-transfer.

Concession arrangements are usually long-term arrangements in terms of which the public authority transfers to the project company the right to provide services to the public through the use of an asset and the project company assumes the obligation of providing the services required. Well-known examples of

concession arrangements include the Bombela Concession Company in respect of the Gautrain and the South African National Roads Agency SOC Limited (SANRAL) in respect of toll roads.

According to the DTI, the Special Economic Zones Act, 2014 (the “SEZ Act”) (as discussed under Question 28 below) offers the potential for a number of models in respect of PPPs, including:

- land parcels with secure title and development rights by the government for lease to private zone development groups;
- build-operate-transfer approaches to onsite zone infrastructure and facilities with government guarantees and/or financial support; and
- contracting private management for government-owned zones or lease of government-owned assets by a private operator.

2. **Which sectors apply a PPP model to develop infrastructure projects?**

Currently, PPP projects are in progress in several sectors including:

- accommodation;

- education;
- energy, including independent power producers (the “IPPs”);
- fleet;
- health;
- housing;
- information technology;
- rail;
- tourism;
- water; and
- waste.

## LEGISLATION & REGULATION

### 3. What are the principal laws and regulations? Is there a framework PPP Law?

A firm regulatory framework has been established in South Africa allowing provincial and national government institutions, including government departments, constitutional institutions and specified public entities as well as municipalities (public authorities) to enter into PPP projects (project agreements) with private parties (usually special purpose vehicles) (project companies) that generally require the project companies to provide public infrastructure and related services.

The principal legislation and policy documents regulating PPPs in South Africa (regulatory framework) are:

- in respect of provincial and national public authorities:
  - the Public Finance Management Act, 1999 (“PFMA”);

- regulation 16 of the Amendment of Treasury Regulations in terms of Section 76 promulgated in 2005 (the “Treasury Regulations”);
- the PPP Practice Notes, comprising each module of the Public Private Partnership Manual together with the Standardised PPP Provisions (the “Standardised Provisions”), issued by National Treasury in terms of section 76 of the PFMA, which constitute instructions aimed at facilitating the application of the PFMA and its regulations;
- in respect of municipalities:
  - the Local Government: Municipal Finance Management Act, 2003 (the “MFMA”);
  - the Municipal Public Private Partnership Regulations promulgated in 2005; and
  - the Municipal Service Delivery and PPP Guidelines issued by National Treasury, which constitute guidance in terms of section 168 of the MFMA.

The rules under the Constitution of the Republic of South Africa, 1996 (the “Constitution”) and the Preferential Procurement Policy Framework Act, 2000 (the “PPPFA”) regulating public procurement in general are also applicable to PPPs.

### 4. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?

PPPs are regulated generally by the National Treasury and where the National Treasury delegates this responsibility or in the case of a municipality in terms of the MFMA, the provincial treasuries.

**5. Are there any restrictions for foreign investors to develop/operate PPP projects?**

While the regulatory framework does not exclude, or restrict, the participation of foreign investors in PPP projects, preferential public procurement legislation and policies and/or the requirements of any particular tender may limit the extent of equity in a project company that is available to foreign investors.

In particular, the objectives of the Code of Good Practice for Black Economic Empowerment in Public Private Partnerships, 2004 (issued under the Broad-based Black Economic Empowerment, 2003) and the Preferential Procurement Regulations, 2011 (promulgated under the PPPFA) require public authorities to allocate a minimum percentage of voting equity in the project company for direct beneficial ownership by certain South African citizens. Compliance by the project company with these requirements is taken into account in the evaluation of PPP bids and failure to meet and maintain its commitments in this regard will result in penalties under the payment mechanism and/or termination of the project agreement.

**6. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

The Standardised Provisions include a long stop date, which if not achieved provides the public authority with the right to terminate the project agreement. Appropriate use of the long stop date depends on the sector and the specific requirements of a project.

**7. How are force majeure events defined, and what are the consequences of their occurrence?**

The scope of force majeure events is limited only to uninsurable events, whether natural or

man-made, that are beyond the control of the parties to the project agreement and affect the construction or operation of the project. Force majeure events include only those events that directly cause either party to be unable to comply with all or a material part of its obligations under the project agreement.

The standard definition of force majeure events under the Standardised Provisions includes (i) war, civil war, armed conflicts or terrorism, (ii) nuclear contamination not caused by the project company and/or any subcontractor, or (iii) chemical or biological contamination of the works and/or the facilities and/or project site from any such event.

A party is excused from performance under the project agreement pursuant to an event of force majeure only to the extent that it is unable to comply with all or a material portion of its obligations. The public authority is only liable to pay the project company for services actually made available during the force majeure event and payment should take into account any reduction in operating costs attributable to limited performance.

In terms of the Standardised Provisions, either party is entitled to terminate the project agreement as a result of an event of force majeure which subsists for an extended period of time if the parties are unable to agree on a mutually acceptable solution to continue the project, such as (i) reinstating the facilities (namely, the buildings and supporting infrastructure), (ii) adjusting the requirements under the services and output specifications, (iii) amending the payment mechanism and/or (iv) extending the term of the project. The Standardised Provisions suggest that it is generally agreed that a party may terminate the project agreement if the force majeure event continues for a period of six months, but this will depend on the project.

The project company is entitled to limited compensation in the event of force majeure on the basis that the consequences of an event of force majeure are shared between the parties.

**8. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

Unforeseeable government conduct is broadly described in the Standardised Provisions as (i) changes in law and (ii) acts or omissions by the public authority or any other government authority, the effect of which is borne by the project company.

Such unforeseeable conduct is treated as being at the risk of the project company in projects where the costs of unforeseeable conduct can be passed on to the users of the project. However, where the risks cannot be quantified or it is not possible for users to assume the increase in costs, the risk may be shared by the public authority. The regulatory framework contemplates in this regard that the public authority will generally bear the risk of unforeseeable conduct that materially and adversely affects the general economic position of the project company directly or as a member of a group of entities and the project company bears the risk in other instances. If unforeseeable conduct financially and materially serves to the benefit of the project company, the project company is required to pay the value of such benefit to the public authority.

**9. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

The project company will be obliged under the project agreement to reinstate project assets

damaged by an insured event. However, the lenders may require an economic test (comparing the amount of the debt with the amount of project revenues forecast to be earned following reinstatement) to be imposed to determine whether the reinstatement will enable them to recover the debt in full. The approach prescribed by the Standardised Provisions is that the economic test should only be applicable in the event of a high risk of total destruction of the project assets and a lengthy reinstatement period.

In the event that the economic test determines that the full debt will not be recoverable after reinstatement and the lenders require the insurance proceeds to be applied to repay the debt, the project company will remain obliged to reinstate the project assets. The parties will in practice negotiate whether and how to reinstate the project assets following the occurrence of an insured event.

**10. Is the concept of ‘uninsurability’ recognized in the project agreements?**

Yes, the project agreement is required to address the scenario where risk that is required to be insured against, subsequently becomes uninsurable.

**11. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

The prescribed approach under the regulatory framework allows both the lenders and the public authority to step-in. As more fully described below, the step-in rights afforded to lenders apply in circumstances where the public authority wishes to terminate the project agreement and the lenders are also allowed to substitute the project company pursuant to exercising their rights. More limited step-in rights are available to the public

authority. It is envisaged that public authorities may step-in only for a short period of time to resolve an urgent problem. Indefinite step-in rights are not granted to public authorities for the reason that termination will be a more appropriate remedy in instances where this may be required. The regulatory framework suggests that step-in rights of public authorities are only appropriate in projects relating to core public services and should be limited to the extent that a failure to step-in may threaten an essential public concern. The prescribed approach also requires public authorities to exercise step-in rights in their sole and absolute discretion.

**12. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

The prescribed approach under the regulatory framework is for the disputes arising in connection with the project agreement to be settled through the courts, except in limited instances where expert adjudication is required to resolve matters without delay, in which case fast-track dispute resolution by independent experts is the recommended method. However, the parties are not prohibited from agreeing on arbitration as the method of dispute resolution. The Standardised Provisions also contemplates that the agreement itself may apply some or all of the provisions of the Arbitration Act, 1965 – this would suggest, then, that at least in principle, international arbitration would be possible. However, PPP agreements in the last few years almost always provide for resolution of disputes in accordance with the guidelines in the Standardised Provisions (i.e. by way of domestic courts with fast-track expert dispute resolution in limited circumstances).

On the question of choice of law, the regulatory framework does not prohibit the

parties from choosing foreign law to govern the terms of the project agreement. However, the Standardised Provisions, which constitutes instructions from National Treasury to the institutions to which the PFMA applies, provides for South African law to govern PPP agreements.

**13. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

If it is considered appropriate for a proposed project, an expression of interest may be conducted as a form of market testing to establish the level and type of interest in the project of the relevant market sector. Since an expression of interest inevitably creates an expectation of the proposed project in the market, the regulatory framework contemplates that it should be used restrictively on particular projects. An expression of interest is most often used in revenue-generating projects (such as developing tourism in a conservation area). If it is required, the expression of interest may be performed before or as part of the analysis of potential options to meet the public authority's need to deliver a service, which is undertaken as part of a feasibility study. The expression of interest requires an advertisement together with a document setting out, among others, (i) the background and aims of the public authority and the project, (ii) a brief summary of similar South African PPPs and (iii) the expertise sought from the private sector.

**14. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

For purposes of acceptance of the facilities by the public authority, the project company is

required to demonstrate that the facilities (including, as far as possible, existing infrastructure) will meet required output specifications. This requires performance tests such as inspections, demonstrations and acceptance or commissioning trials to be conducted to the satisfaction of an independent certifier. The independent certifier is appointed by the project company, subject to the prior approval of the public authority, to inspect and monitor the works and to assess the success or failure of the performance tests. The independent certifier has a duty of care to both parties. If it considers the results of the performance tests to be satisfactory, the independent certifier will issue a completion certificate declaring that the design, construction, fitting, installation and/or commissioning of the works undertaken by the project company have been completed in accordance with the project agreement. Once the completion certificate has been issued, the public authority may accept the commencement of services and the project company will issue the availability certificate.

**15. Are there any expected changes or reform to the existing legislation?**

There were no expected changes to, or reform of, the existing legislation at the date of writing this article.

## FINANCING & INCENTIVES

**16. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

The definition of ‘public-private partnership’ in the Treasury Regulations distinguishes between PPPs that involve the project company (i) performing an institutional function or (ii) using state property for its own commercial purposes. Depending on the PPP

model used in the project agreement, the payment mechanism will generally involve the public authority paying the project company for the delivery of the service, or the project company collecting fees or charges from users of the service. Therefore, a variety of payment mechanism structures, including availability-based, service-based and usage-based mechanisms, have been used across sectors and project types.

In service delivery projects, the public authority sets service delivery objectives and the project company is either paid by (i) the public authority for the service (for example, for serviced office accommodation), or (ii) the users (such as for use of a toll road). Under the Standardised Provisions, the prescribed approach in the former instance is that the project company will receive a unitary payment for delivering in full to the public authority the public infrastructure and related services procured through the tender, as opposed to payment of separate amounts for each project deliverable. Accordingly, payment is payable only when services are deemed to be available, which occurs when the availability certificate is issued by the project company. Please refer to Question 14 above.

In PPPs involving the use of state property, assets of the public authority are used to generate revenue for the public authority in return for a share of the revenues (such as in the case of land concessions granted to private eco-tourism operators).

The project company is only entitled to payment to the extent that it has satisfied the objective, measurable and reasonable conditions set out in the project agreement to make the procured services available. The prescribed approach to payment under the regulatory framework is for the payment mechanism to reflect, as penalty deductions, any losses that the public authority will incur as

a result of poor or non-performance of the services.

While payment is fixed over the lifetime of the project, it is subject to permitted inflationary increases. The inflation risk is considered on a project-by-project basis in accordance with the following general principles:

- the risk is shared between the public authority and the project company;
- an inflation-indexation mechanism will avoid the possibility of a contingency being incorporated in the price and, therefore, give the public authority value for money; and
- CPIX, as the mechanism on which the annual increases in the budgetary allocations for governmental institutions are based, is recommended, although other indices may be agreed provided they are easy to calculate and published in South Africa.

The prescribed position under the regulatory framework is that all interest rate or currency risk is borne by the project company. In particular, provincial authorities are prohibited under the PFMA from assuming hedging liabilities during the term of the project or in the event of early termination of the project agreement, and national authorities require the permission of the Minister of Finance to incur such financial commitments. However, (i) the public authority is required to compensate the project company for costs and penalties associated with terminating hedging arrangements if the project agreement is terminated as a result of default by the public authority and (ii) under the IPP procurement programme, public authorities may provide limited exchange rate protection in respect of the period between bid submission achievement of financial close of and the project in question.

**17. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

There is no guaranteed rate of return. Rates of return are not capped.

**18. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

Under the PFMA, certain public authorities (including national or provincial departments and public entities), may issue guarantees, indemnities or security, while others (such as constitutional institutions) may not bind themselves to such future financial commitments. Under the MFMA, municipalities may provide security for any of their debt or contractual obligations.

The approach prescribed by the Standardised Provisions is that the public authority or any other organ of state should not give any security (whether over the assets of the public authority made available for use by the project company or in the form of a guarantee or suretyship) in respect of any payment obligations under a project agreement, including in respect of payment on availability of the services, indemnified claims or termination compensation.

**19. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

The obligations of any department in the national, provincial, or local sphere of government are treasury obligations. However, public entities are state-owned profit

companies and accordingly, their obligations are not assumed by the State.

**20. Are deductions from the service and availability payments subject to a cap?**

Payment is subject to penalty deductions in respect of unavailability of specified critical aspects of the services and other smaller failures in the performance of the project company. Such penalty deductions are not required to be capped under the regulatory framework.

**21. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

Variations proposed by the public authority which impact on affordability or result in an increase in the payment, require written approval from the relevant treasury. The regulatory framework also contemplates that the project company should be granted the right to veto a variation proposed by the public authority that would adversely affect its risk profile or be fully protected against the consequences of, and payment for, a variation proposed by the public authority. A cap on variations proposed by the public authority is not expressly required.

**22. Is there a requirement to share any gains arising from refinancing of the PPP project-with the public authority?**

The approach to refinancing prescribed by the Standardised Provisions is underlined by the following principles:

- the benefit of refinancing should be shared between the public authority and the project company;
- the public authority should have the right to be informed of, and pre-approve, proposed refinancing;

- increases in returns derived from changes in the nature of or the terms governing the funding structure of the project should be shared between the public authority and the project company, although increased returns due to improved performance should benefit the investors;
- better funding terms arising from the PPP market in South Africa maturing and stabilizing should be for the benefit of both the public authority and the project company; and
- a 50:50 sharing of the refinancing gains between the public authority and the project company provides a fair balance.

**23. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

Generally, the lenders sign a direct agreement with the public authority. Under the direct agreement, the lenders are granted a voluntary right to step-in and assume the project company's rights to perform the project deliverables in the event that the public authority wishes to terminate the project agreement as a result of a default by the project company. The lenders are informed before electing to step-in, of the outstanding liabilities due and payable by the project company to the public authority which they are required to assume. During the step-in period, the lenders incur no liability and the public authority may not terminate the project agreement on the grounds that, among others, the lenders have enforced the security granted to them by the project company. If the default that triggered the step-in is remedied within the agreed timeline, the lenders have the option either (i) to step-out and allow the project company to resume full performance of the project deliverables, or (ii) to substitute



the project company with another entity that is approved by the public authority.

**24. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

The public authority is not required to assume the debts of the project company to the lenders on termination of the project agreement and would not typically cover project company debt in full on termination in the event of the project company's default. The debt owed to the lenders would typically be settled in other default scenarios. Please refer to Question 25 below.

**25. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

The project company is entitled to compensation from the public authority in any instance of early termination of the project agreement, but the value of the compensation payable will differ depending on the reason for the termination. The amount of compensation will be higher in the event of termination as a result of default by the public authority or force majeure than in the event of default by the project company.

In the event of termination as a result of default by the public authority, the amount of compensation will include:

- the total amount outstanding in respect of the debt to the lenders, including any breakage costs and penalties;
- all amounts due by the project company to third parties in relation to the project, such as subcontractor costs, which may include limited compensation for loss of profit; and
- shareholder loans and return on equity.

In the event of termination as a result of default by the project company, the current position under the regulatory framework is that failure to pay compensation to the project company could unfairly serve to the benefit of the public authority. The amount of compensation is prescribed as the greater of the pre-agreed percentage of the debt due to the lenders and either (i) the highest tender price that is received pursuant to the project being retendered, or (ii) an adjusted estimated project value in the case where the project is not re-tendered. Simply put, the compensation amount will be based on the market value of the unexpired portion of the term of the project or the agreed percentage of the debt owed to the lenders.

The approach prescribed by the Standardised Provisions is that the amount of compensation in the event of termination as a result of force majeure should be determined on the basis of the no-fault principle and should reflect a value somewhere between the amounts that would be payable in the case of each party's default.

In terms of the Standardised Provisions, the public authority is required to pay compensation in the amount of the debt owing to the lenders if the public authority exercises its right to terminate the project agreement as a result of the project company or a subcontractor, or a shareholder or director of either of them, committing a corrupted act, including bribery, corruption and fraud against

it in connection with the procurement of the tender or ongoing performance under the project agreement.

However, under the IPP procurement programme, the public authority is generally not liable to pay compensation in the event of default by the project company or corrupted acts.

**26. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

The regulatory framework specific to PPPs does not require or incentivise the use of locally manufactured materials in the project. However, the Preferential Procurement Regulations, 2011 (promulgated in terms of the PPPFA) generally requires public authorities in certain sectors (such as Eskom when procuring transformers) designated by the Department of Trade and Industry (the “DTI”), and allows public authorities in other sectors, to advertise, as a condition of a tender in which local production and content is of critical importance, that only a stipulated minimum threshold for locally produced goods, services or works or locally manufactured goods will be considered in the award. According to the DTI, the following industries, sectors and sub-sectors have been designated for local production with minimum local content thresholds:

- buses (bus body) - 80%
- textile, clothing, leather and footwear - 100%
- steel power pylons, monopole pylons, steel substation structures, powerline hardware, street light steel poles, steel lattice towers - 100%
- canned/processed vegetables - 80%

- pharmaceutical products:
  - OSD tender - 70% (volumes)
  - family planning tender - 50% value
- rail rolling stock - 65%
- set top boxes - 30%
- furniture products:
  - office furniture - 85%
  - school furniture - 100%
  - base and mattress - 90%
- solar water heater components - 70%
- electrical and telecom cables - 90%
- valves products and actuators - 70%
- residential electricity meter :
  - prepaid electricity meters - 70%
  - post-paid electricity meters - 70%
  - SMART meters - 50%
- working vessels/boats (all types): - 60%
  - components - 10% - 100%
- conveyance pipes - 80% - 100%
- transformers and shunt reactors:
  - class 0 - 90%
  - class 1 - 70%
  - class 4 - 10%
  - components and conversion activities - 50% - 100%

In addition to the designated sectors listed above, the Minister of Trade and Industry confirmed, in reply to a question from the National Assembly, published on 10 September 2015, that yellow metals, two way radios, construction materials and steel substructures have been designated and are awaiting the issuance of instruction notes from the National Treasury.

However, it is possible in terms of the PPPFA for public authorities to apply to the Minister of Finance for an exemption from the application of the PPPFA or the regulations.

## **27. Are there tax advantages available to PPP projects?**

In addition to the general tax benefits and/or deductions permitted under the Income Tax Act, 1962 (the “ITA”) and other tax incentives that may be permitted by the DTI from time to time (including those described in question 28 below), the ITA provides for certain tax benefits and/or deductions that are particular to PPPs.

Section 12N and section 12NA of the ITA allow project companies in a PPP to claim a capital allowance in respect of improvements effected on land or to a building provided by the public authority, in terms of an obligation under a PPP to effect those improvements. Section 12N grants the capital allowance to a project company when it holds the right of use or occupation of the land or building and section 12NA grants the allowance to a project company in the circumstance where the public authority holds the right of use or occupation of the land or building.

In projects that require the construction of infrastructure, the public authority will generally make immovable property available to the project company for the operation and maintenance of the project asset for the term of the project. The project company is entitled to claim a capital allowance in respect of expenditure it has incurred to effect improvements on such immovable property.

Section 12P(2A) of the ITA also exempts any amount granted to a public authority in respect of improvements required in terms of a PPP on government immovable property. Under section 12P(2A), amounts received by or accrued to any person from the government in

the national, provincial or local sphere are exempt from income tax where such amounts are granted for the performance of that person’s obligations pursuant to a PPP to the extent that such person is required to spend an amount at least equal to that amount in respect of any improvements on land or to buildings owned by any sphere of government or over which any sphere of government holds a servitude.

## **28. What are the other incentives available to PPP projects?**

The regulatory framework contemplates that the payment mechanism can incentivize the project company in certain ways. Under the Standardised Provisions, a public authority is not obliged to accept early commencement of service. Accordingly, making it possible for the project company to receive payment early under the project agreement may encourage efficiency. Similarly, payment of a fixed payment can also incentivise the project company to increase profit by improving efficiency.

Under the SEZ Act, PPPs may apply to the Minister of Trade and Industry for a specified geographical area to be designated a special economic zone set aside for targeted economic activities and supported through special arrangements. As holder of a permit in respect of a special economic zone, a PPP may be entitled to support measures, including:

- tax relief applicable to a business in terms of the Value-Added Tax Act, 1991, Customs and Excise Act, 1964 and the Customs Duty Act, 2014;
- employment tax incentives subject to the requirements under the Employment Tax Incentive Act, 2013; and
- tax allowance incentives in terms of section 12I of the ITA to support

greenfield investments and brownfield investments in manufacturing assets. This incentive offers support for capital investment and training.

**29. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2015?**

In terms of the annual report 2014/2015 of the Government Technical Advisory Centre and National Treasury Programme 8: Technical Support and Development Finance, two PPP projects were completed in 2014/2015. The total project cost of each project was as follows:

- R 2.5 billion in the accommodation sector in respect of the offices of Statistics South Africa; and

- R 1.2 billion in the accommodation sector in respect of the headquarters for the City of Tshwane municipality.

The IPP procurement programme has also contracted a total of 92 renewable energy projects with a total investment value of ZAR 192.6 billion. Although the total value of the projects allocated in 2015 is unclear, roughly 2205 MW out of a total allocation to the programmes of 6327 MW (approximately 35%) was approved.

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# SOUTH KOREA



**Steve Sunghwa  
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## KIM & CHANG

### GENERAL

- 1. Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

Yes. Under the Act on Public-Private Partnerships in Infrastructure (the “PPI Act”), there are two procedures for implementing infrastructure projects: solicited (i.e., government initiated) projects and unsolicited (i.e., sponsor initiated) projects. Infrastructure projects may be implemented in the forms below or such other forms as designated by the competent authority or proposed by the private sector (and accepted by the competent authority).

- BTO (Build-Transfer-Operate)
- BTL (Build-Transfer-Lease)
- BOT (Build-Operate-Transfer)
- BOO (Build-Own-Operate)
- BLT (Build-Lease-Transfer)
- ROT (Rehabilitate-Operate-Transfer)
- ROO (Rehabilitate-Own-Operate)
- RTL (Rehabilitate Transfer-Lease)

The BTL method is permitted for solicited projects only. Additionally, the PPI Act permits the government and sponsors to adopt certain other project structures. Among the foregoing, BTO and BTL are the two most common forms of PPP projects used in Korea.

- 2. Which sectors apply a PPP model to develop infrastructure projects?**

Applicable infrastructure facilities under the PPI Act include various infrastructure facilities, such as roads, railroads, urban railroads, harbours, airports, multi-purpose dams, sewage treatment facilities, schools, etc.

### LEGISLATION & REGULATION

- 3. What are the principal laws and regulations? Is there a framework PPP Law?**

The PPI Act is the principal component of the legal framework for PPI. In addition, separate laws may regulate the development of certain infrastructure. For example, the Road Traffic Act will regulate road development projects, while the Port Act will regulate the harbour development projects.

**4. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

The Ministry of Strategy and Finance is the government department which is responsible for the policy making and coordination among the infrastructure sector. The Public and Private Infrastructure Investment Management Centre (PIMAC) under the umbrella of the Ministry of Strategy and Finance is the organization coordinating domestic infrastructure projects. Local governments also have certain authority over the projects which are implemented within its jurisdiction. Also, other departments within the central government have certain regulatory powers including the designation of project concessionaires within the relevant sector as shown below:

**Power:** Ministry of Trade, Industry and Energy

**Transport:** Ministry of Land, Infrastructure and Transport

**Harbours:** Ministry of Oceans and Fisheries

**Telecommunications:** Ministry of Science, ICT and Future Planning; Korea Communications Commission

**Oil and gas and minerals extraction:** Ministry of Trade, Industry and Energy

**5. Are there any restrictions for foreign investors to develop/operate PPP projects?**

There are generally no restrictions on foreign ownership of a Korean company, except in the case of certain "strategic" industries, such as broadcasting, telecommunications, and defence. Although there are no restrictions on foreign ownership, a foreign investor investing in a Korean company will need to comply with certain reporting requirements on an ongoing

basis as provided under the Foreign Investment Promotion Law (FIPL).

**6. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

According to the PPI Act, if a concessionaire fails to commence construction work within the period determined by the implementation plan without any justifiable ground, or it is deemed that the project cannot be properly carried out due to the concessionaire delaying or avoiding project implementation after the commencement of construction, then the concessionaire may be subject to certain measures, including revocation or change to certain dispositions made pursuant to the PPI Act (including revoking concessionaire designation), suspension of or change to the construction of infrastructure facilities, etc.

In addition, generally, a project agreement includes a provision under which the competent authority may terminate the project agreement and revoke concessionaire designation under the PPI Act if the concessionaire fails to commence the construction work without any justifiable ground after a certain period has lapsed from the date the project agreement was executed.

**7. How are force majeure events defined, and what are the consequences of their occurrence?**

Under the standard project agreement form provided by PIMAC, a force majeure event is an event or circumstance (or a combination thereof) which renders it impossible for a party to the project agreement to perform its obligation under the project agreement, or adversely affects the performance of such obligation but is not attributable to either party's fault, and is impossible for the parties to foresee. Force majeure events are categorized into non-political force majeure

events and political force majeure events. A non-political force majeure event refers to a national disaster, including any earthquake, flood, tidal wave and fire, or a drastic change in economic environment, including any change in national credit rating, interest rate and foreign exchange, or any other event equivalent thereto, and a political force majeure event refers to any war, riot, terrorist act, nationwide strike or site contamination caused by nuclear waste or chemical or radioactive materials, or control of foreign exchange and overseas wire transfers or any other event equivalent thereto.

Under the Basic Plan for PPI, any of the following measures may be taken upon the occurrence of a force majeure event:

- The construction commencement date may be postponed or construction period may be extended.
- Any increase in the total private investment costs due to a force majeure event shall initially be covered by the relevant insurance, and in case the insurance is insufficient to cover such cost increase, the competent authority shall compensate for 80% of the outstanding cost increase due to a non-political force majeure event, and 90% of the outstanding cost increase due to a political force majeure event.
- If the repayment due date of the principal amount of loans and interest thereon occurs while there is a delay in the project due to a force majeure event, the competent authority may provide public financing or cooperate with the concessionaire to obtain a short-term loan.
- If the concessionaire and the competent authority fail to agree on how to address the force majeure event within a certain

period of time after the occurrence thereof, the project agreement may be terminated, in which case the competent authority shall make termination payment to the concessionaire.

- If it is impossible to construct or operate the contemplated project facility due to a force majeure event, the concessionaire may request the competent authority to purchase the project.

**8. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

**Expropriation:** Under the PPI Act, the competent authority may take certain actions, including revocation of or change to the disposition regarding the concessionaire under the PPI Act or suspension of or change to the construction of infrastructure facilities, etc., if such action is necessary from the perspective of public interest such as changes in circumstances involving infrastructure facilities or the efficient operation of such facilities. If the concessionaire suffers any loss arising from the competent authority's action as set forth above, the competent authority shall provide just compensation for the loss. In such case, the compensation for such loss shall be discussed between the competent authority and the concessionaire, and if the parties fail to reach an agreement or it becomes impossible to reach an agreement, an application for reconsideration may be filed with the competent land expropriation committee.

**Change of law:** The project agreement provides that if the total project costs increase due to enactment/amendment of any relevant law which directly affects the construction costs, the total project costs may be adjusted. In addition, if any law or system relating to PPP projects is amended and the amendment

to facilitate the operation of the project or improve its profitability, etc., the project agreement may be adjusted or changed through consultation between the parties.

**Political force majeure:** As discussed above, any war, riot, terrorist act, nationwide strike or site contamination caused by nuclear waste or chemical or radioactive materials, or control of foreign exchange and overseas wire transfers or any other event equivalent thereto is deemed to be a political force majeure event, and a variety of measures can be taken upon the occurrence of such event.

**9. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

A reinstatement test is not envisaged separately under the legislation or the project agreement.

**10. Is the concept of ‘insurability’ recognized in the project agreements?**

Under the Basic Plan for PPI, any predictable and insurable risk should be covered by insurance to the fullest extent possible, and any loss or additional costs which are not covered by insurance should be allocated between the parties to the project agreement.

In principle, in the case of a project under which the ownership of facilities is held by the central government or local government, any risk which occurs due to a cause attributable to the government or the concessionaire during the project period should be borne by the responsible party. However, for any risk caused by a force majeure event, the competent authority should, in principle, pay 80/100 of any cost increase caused by a non-political force majeure event and 90/100 of

any cost increase caused by a political force majeure event.

**11. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

Under the PPI Act, where the concessionaire fails to commence construction work within the period determined by the implementation plan without any justifiable ground, or where it is deemed that the project cannot be properly carried out due to the concessionaire delaying or avoiding project implementation after the commencement of construction,<sup>1</sup> the competent authority may order the construction to be suspended or amended, or the facilities or objects to be re-constructed, changed, transferred, removed or restored to its original state, or render any other measure.

Project agreements also provide that in case a fault attributable to the concessionaire occurs, the project agreement shall be terminated and necessary measures, including revocation of concessionaire designation or cancellation of the concessionaire’s management and operation right, may be rendered.

**12. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

Korean law does not expressly prohibit dispute resolution through international arbitration regarding PPP projects. For projects with high proportion of foreign investment, the Basic Plan for PPI states that the competent authority should respect the foreign investors’

<sup>1</sup> Article 46, Item 3 of the PPI Act



position regarding provisions on dispute resolution, etc. Therefore, a project agreement may include provisions under which the parties agree to settle any dispute relating to the relevant project by international arbitration.

Korean law generally respects the parties' agreement on a foreign law as the governing law, except in certain limited circumstances. More specifically, the choice of a foreign law to govern an agreement would be recognized by the Korean courts insofar as the choice of law provisions thereof are valid under such foreign law; *provided* that in the event of any legal proceeding brought in a Korean court, the Korean court would apply: (i) the mandatory laws of Korea which should be applied by their nature irrespective of the governing law; (ii) the laws of the jurisdiction of a party's incorporation bearing upon the capacity of such party to enter into contracts; and (iii) if all elements of the case relate to a jurisdiction (related jurisdiction) other than the relevant jurisdiction, the mandatory laws of the related jurisdiction.

Further, although the formation and the substantial validity of such agreement are in principle to be governed by foreign law, the Korean courts would allow a party to establish that it did not consent to enter into the contract (including the agreement on the choice of law) or to challenge the validity of the agreement on the choice of law. The lack of consent or challenge to validity would be decided in reliance of the laws of the jurisdiction of residency of such party if it is manifestly unfair under the relevant circumstances to apply the foreign law to determine the effect of such party's conduct.

Specifically, with respect to the law governing security interests, the Korean Private International Law provides (i) that in *rem* or other registrable rights (such as the title to or mortgage over real estate) should be governed by the law of the location of the relevant

property and (ii) that security interest in claims and receivables should be governed by the law governing the relevant claims and receivables.

Also, according to the PPI Act, a concessionaire's right to operate and manage its project pursuant to the project agreement is a registrable property right, which is registered with the registry maintained and administered by the competent authority and over which a mortgage may be established. Accordingly, collateral over a concessionaire's right to operate and manage its project is governed by Korean law.

**13. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

For BTL projects, performance is evaluated according to the performance requirements prepared at the time the project agreement was executed, and lease payments, etc. shall be made based on performance evaluation.

For BTO projects, evaluation is based on any performance requirements, but if the concessionaire is deemed to be negligent in maintaining project facilities in a way that may seriously undermine user convenience, then certain measures, including revocation of concessionaire designation, may be rendered.

**14. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

Upon completion of the project, the project company should file a construction completion report, along with the completion inspection report prepared by the construction

supervisor, with the competent authority for confirmation of construction completion.

The competent authority which receives an application for confirmation of construction completion should conduct a completion inspection and then issue a certificate of completion to the applicant. When the certificate of completion is issued, the completion of the relevant project should be deemed to have been inspected or approved<sup>2</sup>.

**15. Are there any expected changes or reform of the existing legislation?**

The PPI Act has recently been amended so that the construction of the central administration building or complex can be carried out as a PPP project.

In the past, the PPP project model did not allow private companies to make a project proposal to the government based on a BTL model. However, an amendment to the PPI Act allows private companies to make a project proposal under the BTL model.

## FINANCING & INCENTIVES

**16. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

Under a PPP project, the concessionaire collects its investment principal plus an amount reflecting a pre-determined rate of return agreed upon with the competent authority through toll fees (in case of BTO projects) or facility lease (in case of BTL projects). The toll fees and facility lease are indexed to a pre-determined annual consumer price inflation rate.

<sup>2</sup> See Article 22, Paragraphs 1 through 3 of the PPI Act

Meanwhile, if the concessionaire raises foreign currency funding, the concessionaire should include foreign exchange hedging costs in the total project costs when submitting the project proposal. Meanwhile, any substantial change in foreign exchange rates having a material adverse effect on the concessionaire's profitability may constitute a non-political force majeure event.

**17. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

Although the rate of return is not guaranteed, the project company's expected rate of return is reflected into the facility lease (in case of a BTL project) or toll fees (in case of a BTO project).

**18. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

Until recently, a substantial number of the concession companies under the PPI Act benefited from some form of revenue guarantee from the competent authority under their respective project agreements. These revenue guarantees have effectively ensured that the concessionaires receive a minimum level of revenue for an agreed period of time. However, this minimum revenue guarantee was abolished in 2006 (for unsolicited project) and 2009 (for solicited projects), although the minimum revenue guarantee for the PPP projects that existed before such abolition are still valid and effective.

To facilitate PPP projects, the BTO-risk sharing (the "BTO-rs") model and the BTO-adjusted (the "BTO-a") model have been introduced since 2015. Under the BTO-rs model, the competent authority and the concessionaire share operating profits and

losses, and under the BTO-a model, if the operating profits fall below a certain threshold, the competent authority will partially bear the losses but will also share the excess profits.

**19. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

If the competent authority is the head of the central administration, its obligations are acknowledged as State obligations, and if the competent authority is the head of any local government, the obligations are acknowledged as obligations of the relevant local government.

**20. Are deductions from the service and availability payments subject to a cap?**

The government payments may be reduced depending on concessionaire's performance. However, the concessionaire will receive some amount depending on the performance rating, so it appears that a cap exists.

**21. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

Variations that the competent authority may request at the construction and operation stages are not subject to a cap, but if such variation causes an increase in construction costs or operating costs, the total project costs or construction subsidies, toll fees, period of the management and operation right, etc. shall be adjusted.

**22. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?**

Under the Basic Plan for PPI, any additional benefit gained by the concessionaire as a result of refinancing of the project or change in its shareholder (e.g., increase in net income due to

lower interest rate after refinancing, etc.) must be shared with the relevant competent authority. However, if there is no minimum revenue guarantee provided by the competent authority, then the concessionaire is not required to share with the competent authority any benefit resulting from a change in its shareholder. For any existing project with a minimum revenue guarantee, the relevant concessionaire must report to the competent authority on a quarterly basis whether any circumstance warranting refinancing has occurred. Subsequently, if the competent authority determines that it is possible to refinance the project at the terms and conditions that are more favourable than those of the original financing, then the competent authority may request the concessionaire to refinance the project. Further, the competent authority may conduct a feasibility study to determine the appropriate level of minimum revenue guarantee and a reduction in the relevant tariffs, as the case may be.

**23. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

In conducting the PPI project, the lenders do not enter into a direct agreement with the competent authority.

**24. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

Upon termination of the project agreement, the competent authority is only obligated to make termination payments to the

concessionaire, and does not assume the concessionaire's debt obligations against the lenders. The termination payment amount varies depending on whether the termination is attributable to either party. The termination payment is based on the existing private investment amount during the construction period (interests payable during the construction period are deducted from the total private investment costs), and the level of compensation for opportunity costs regarding the investment amounts differs based on whether termination is attributable to either party. During the operation period, termination payment is based on the amortized investment amount already made and the present value of expected revenues, but the payment amount shall vary depending on whether termination is attributable to either party. In other words, if the project agreement is terminated due to a cause attributable to the concessionaire, the termination payment shall be insufficient to recover the investors' equity investment.

**25. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

Generally, under the project agreement for a PPP project, if the project agreement is terminated early, the competent authority shall make termination payments to the concessionaire pursuant to the project agreement. In addition, if the concessionaire owes any debt to lenders, the project agreement allows the competent authority to directly pay the termination payment to the lenders. In addition, the lenders shall have separately established security interest over the concessionaire's right to claim termination payments.

The basic principles of calculating termination payments are as follows:

- During the construction period, termination payment shall be based on the private investment amount (total private investment costs – interest payable during the construction period), but the level of compensation for opportunity costs of the investment amount differs based on whether termination is attributable to either party.
- During the operation period, termination payment shall be based on the amortized investment amount already made and the present value of the expected revenues, but the payment amount shall vary depending on whether termination is attributable to either party. Therefore, upon termination of the project agreement due to a cause attributable to the concessionaire, the termination payment shall be insufficient to recover the investors' equity investment.

**26. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

Under the Basic Plan for PPI, the competent authority may grant the following preferential measures when evaluating the project plan for designating the concessionaire.

- For a project where a local government becomes the competent authority, preferential treatment may be given based on the investment proportion of the regional companies, the number of investors, and the participation ratio of local small-and-medium sized companies during the construction stage, etc.
- Hiring local residents, use of technological products developed by small-and-medium

sized companies, etc. are evaluated in a preferential manner to support the local economy and participation of small-and-medium sized companies, etc.

**27. Are there tax advantages available to PPP projects?**

The Korean government provides various tax benefits to the concessionaire. For BOT projects, acquisition of real estate is exempt from acquisition tax and registration tax. For BTO and BOT projects, the zero-rate VAT will apply to transfer of the project facilities to the competent authority. Also, under the PPI Act, many government clearance and approval procedures are either simplified or exempted and the concessionaire is permitted to use certain public lands for construction of project facilities. The concessionaire has the right to expropriate land under the PPI Act, and alternatively, the concessionaire may request the government to expropriate land on behalf of the concessionaire.

**28. What are the other incentives available to PPP projects?**

Large conglomerates that acquire at least 30% shareholding in a project company carrying out a PPP project may enjoy a certain grace period with respect to recognizing the project company as its affiliate if certain requirements are satisfied. Because the project company will

not be recognized as an affiliate, a large conglomerate may not be subject to certain regulations under Korea's Monopoly Regulation and Fair Trade Act even if it invests in the project company.

**29. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2015?**

Materials regarding the status of the PPP projects (including number of projects and investment amounts) implemented in 2015 are not yet available.

Under the 2015 Basic Plan for PPI, PPP projects worth a total of 6.7 trillion Korean Won (approximately 5.8 billion US Dollars, based on private investment cost, 86 projects in total) are scheduled for implementation. More specifically, road projects worth of 3.6 trillion Korean Won (23 projects), railroad projects worth 1.8 trillion Korean Won (8 projects), a harbour project worth 0.04 trillion Korean Won (1 project), environmental projects worth 0.6 trillion Korean Won (27 projects), education-related projects worth 0.2 trillion Korean Won (11 projects), national defence related projects worth 0.4 trillion Korean Won (9 projects), and social welfare related projects worth 0.1 trillion Korean Won (7 projects) are scheduled for implementation.

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## ÇAKMAK AVUKATLIK BÜROSU

### GENERAL

1. Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?

Turkey is one the top countries using the PPP model in the infrastructure sector and has a large PPP project portfolio set to be realized in the near future.

Build-operate-transfer (“BOT”) was the first PPP model used in Turkey in early 1980’s in the energy sector. It was followed by build-operate (“BO”) and transfer of operational rights (“TOR”) projects. Build-lease-transfer (“BLT”) model also started to be used in late 2000’s mainly in the healthcare sector. All of these models have been used for a significant number of projects in various sectors. In accordance with the Report of the Ministry of Development Concerning the Developments on the Implementations of the Public-Private Partnership<sup>1</sup> (the “PPP Report”) and in accordance with the information provided on

the website of the Ministry of Health, the numbers of projects undertaken based on various models are, as of January 2016, as follows:

Model	Number of the Projects	Model Percentage
BOT	98	49%
BO	5	3%
BLT	18	9%
TOR	78	39%
Total	198	100%

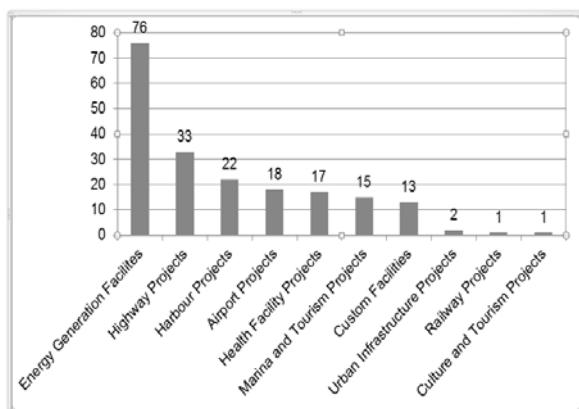
34 of those projects are at the construction stage and 164 of them are at the operation stage.

2. Which sectors apply a PPP model to develop infrastructure projects?

PPP has been used mainly in the energy, transportation and healthcare sectors. It is also expected to be used in the education, municipal waste disposal, water management (irrigation, water treatment, waste water management etc.) and railway sectors in the near future. In accordance with the PPP

<sup>1</sup> <http://www.kalkinma.gov.tr>

Report, the number of projects by sectors was as follows as of January 2016:



## LEGISLATION & REGULATION

### 3. What are the principal laws and regulations? Is there a framework PPP Law?

Under Turkish law there is no framework PPP Law, although there is a draft law in circulation based on the UK model, but its destiny is uncertain. There are, however, specific pieces of legislation covering each type of PPP model. The main legislation regarding the PPP projects are as follows:

- Law No. 3096 on the Authorization of Enterprises other than Turkish Electricity Authority for Power Generation, Transmission, Distribution and Trading;
- Law No. 4283 on the Construction and Operation of Electrical Power Plants and Purchasing of Electricity through Build-Operate Model;
- Law No. 3996 on the Realization of Certain Investments and Services through Build-Operate-Transfer Model;
- Law on Privatization No. 4046;
- Law No. 6461 on the Liberalization of Railway Transportation;

- Law No. 3465 on the Authorization of Enterprises other than the General Directorate of Highways for Construction, Management and Operation of Access Controlled Highways;
- Law No. 6428 on the Construction of Facilities, Renovation of Existing Facilities and Purchasing of Services by the Ministry of Health through Public-Private Partnership Model (the “Health PPP Law”) and its Implementing Regulation; and
- Decree No. 652 on the Establishment and Duties of the Ministry of National Education.

### 4. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?

There is no centralized PPP authority in Turkey. The principle regulatory bodies are as follows:

- The Ministry of Energy and Natural Resources;
- The Ministry of Health;
- The Ministry of National Education;
- The Ministry of Transportation, Maritime and Communication;
- The Privatization Administration;
- General Directorate of State Airports;
- General Directorate of Highways; and
- General Directorate of State Railways.

### 5. Are there any restrictions for foreign investors to develop/operate PPP projects?

The legislation does not restrict the rights of foreign investors to develop or operate PPP projects in Turkey. On the contrary, foreign investment is promoted with various

incentives provided under the Foreign Investment Law No. 4875 and its secondary legislation. The Foreign Investments Law provides a broad definition of foreign investment, which covers funds in convertible currency, corporate securities, machinery and equipment or industrial and intellectual property rights. In addition, *“any rights generated in Turkey and relating to dividends, sales proceeds, receivables or other investment rights with monetary value, as well as assets with an economical value such as rights relating to exploration and extraction of natural resources”* are included within the definition of foreign investment. The Foreign Investments Law repeats the well-established principle that foreign investors are to be granted equal treatment with local i

nvestors.

Foreign investors can also benefit from the incentives provided as specific to a certain type of projects or sectors such as the tax incentives in place for health PPP projects during their construction term. Furthermore, immovable property rights on Turkish lands including the superficies rights can be obtained by foreign investors. The rights of foreign investors are also protected by bilateral investment treaties. Currently, there are 77 bilateral investment treaties in effect to which Turkey is party.

#### **6. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

The legislation for PPP projects does not envisage a long-stop date for the completion of construction, but does not prohibit the inclusion of such a provision in the project agreements either. A long-stop date is generally regulated under the project agreements for PPP projects based on the freedom of contracts principle, which is envisaged by the Turkish Code of Obligations.

In the recent PPP projects, the long-stop period was usually provided as 12 months

following the expiration of the scheduled construction term. Failure to achieve the completion within this period gives the relevant public authority the right to implement certain sanctions against the project company including termination of the project agreement.

#### **7. How are force majeure events defined, and what are the consequences of their occurrence?**

Although force majeure events are defined under some of the above-mentioned PPP laws and regulations, the general tendency is to define them in the project agreements. Definitions under both the legislation and the project agreements are generally non-exhaustive and cover events which occur due to a natural cause or human act or omission beyond the control of the parties.

As a result of the occurrence of a force majeure event, the construction and operation terms may be extended to remedy the damages of the project companies; or if it is decided by the parties that the extension will not remedy the damages and it is impossible to continue to implement the project agreement, the project agreement may be terminated. In case of a termination, damages of the project company including the sponsors' equity and debts to the lenders are usually payable by the relevant public authority. The amount to be paid to the project companies also includes loss of profit in some of the PPP projects.

#### **8. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

The purpose of PPP projects is to realize projects through the partnership of public and private entities and to allocate the risk to the party that can best handle it. Since the risks regarding expropriation, change in law and



adverse court decisions are more likely to be under the control of or attributable to the public authorities, these risks are generally undertaken by the relevant public authority. Upon occurrence of any such event, payments to be made to the project company may be adjusted and/or the term of the agreement may be extended to remedy the negative effects of such events. If the implementation of the project agreement becomes impossible, the parties may terminate the project agreement and in such a case, similarly to the force majeure event termination, damages of the project company including the equity and debts to the lenders are paid by the relevant authority.

On the other hand, the risks related to the long-term operation of the PPP projects are generally undertaken by the private sector. However, a certain part of these risks may be undertaken by the public authorities through minimum payment guarantees regarding, for example, the volume services, and passenger or occupancy guarantees, in order to promote the PPP investments.

**9. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

Reinstatement test is not a concept which is specifically regulated under the legislation. However, in practice, it is usually provided under the project agreements based on the freedom of contracts principle. It is generally agreed by the parties that a reinstatement test will be conducted to understand whether the insurance proceeds received for occurrence of an insured risk is sufficient to enable the project company to repair and reinstate the facilities and to comply with its payment obligations under the funding agreements during the period commencing from the date of the event of loss until the final payment

date under the funding agreements. In case the insurance payment is not found sufficient to do so, the insurance payment shall be used to make repayments to the lenders instead of being used to repair and reinstate the facilities.

**10. Is the concept of ‘uninsurability’ recognized in the project agreements?**

Customarily, the project agreements of PPP projects require the project company to obtain insurance for the potential risks to which the project may be exposed. However, the concept of uninsurable risks is also recognized in some of the PPP projects subject to certain conditions such as non-availability of insurance at all or its non-availability on commercially reasonable terms in the local or international insurance markets. In such cases, the relevant public authority undertakes the liability for uninsurable risks.

**11. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

The legislation does not restrict the step-in or substitution rights of the lenders. On the contrary, lenders’ step-in right is a concept which is clearly regulated under the legislation for certain PPP projects. In practice, most of the PPP project agreements (or direct agreements signed between the public authority, the project company and the lenders) provide step-in and substitution rights of the lenders. The step-in right permits the lenders to take control of the management of the project by taking measures such as changing the members of the board of directors of the project company. In case such measures are not sufficient to rectify the situation, the substitution mechanism, consisting of the transfer of the project agreement or the shares of the project

company to another investor, may also be initiated.

Public authorities may also have step-in rights in cases where the project company infringes the laws and regulations to a degree that will result in non-performance of the public services. Step-in right of the public authorities mainly consists of the assumption of the project company's duties and is generally conducted in coordination with the lenders.

**12. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

The legislation allows international arbitration both for the project agreements between the project company and the public authority, and for the direct agreements between the lenders, the project company and the public authority. In practice, most of the PPP project agreements and direct agreements provide for international arbitration. Furthermore, it is possible to choose a foreign law as the governing law of these agreements, except for certain sectors for which the legislation requires the use of Turkish law, such as the healthcare sector. In practice, public entities in Turkey generally tend to have Turkish law as the governing law of the project agreements.

**13. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

Market testing procedure is a concept which is used for health PPP projects in Turkey, both under the relevant legislation and in the project agreements. Accordingly, a market testing procedure shall be performed every 5 years in order to determine the supplier who will provide the services in the most favorable manner. The project company has a right of

preemption if it agrees to provide the services in the same conditions and price provided by the bidder who submitted the most favorable bid.

**14. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

As a general rule, the acceptance is done by the relevant public authority. However, in some projects, including health PPPs, an independent technical adviser is also involved in the acceptance process. The duty of the independent technical adviser is to draft a report determining whether the construction is completed or not. Although such reports are not binding for the parties, the public authorities are required to take such reports into account in their decision making process.

**15. Are there any expected changes or reform to the existing legislation?**

In accordance with the PPP Report, a general PPP law is planned to be enacted within the scope of the 10<sup>th</sup> Development Plan of Turkey in September 2016. In addition, certain changes are expected to be made to the current Health PPP Law to enable the Ministry of Health to procure services from outside consultants for auditing of the projects. Certain tax incentives (mainly stamp tax exemptions) are also expected to be provided through change in legislation within 2016.

## FINANCING & INCENTIVES

**16. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

PPP projects may include a fixed payment mechanism or adjusted payment mechanism in

accordance with the type of the projects. For example, for health PPP projects which include two types of payment as the availability payments alongside the service payments, availability payments are protected against both inflation and foreign exchange risks, while the service payments are protected only against the inflation.

**17. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

There is no rate of return guarantee or cap for the PPP projects in Turkey.

**18. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

Payment guarantee can be provided for PPP projects by (i) a payment guarantee mechanism provided under the project agreement (for example, in health PPP projects a guarantee is provided to project companies for a certain rate of annual occupancy for volume services), (ii) a debt assumption agreement (whereby the public authority undertakes to assume the debt to lenders upon termination of the project agreement), and (iii) a Treasury guarantee depending on the type of the project. In practice, public authorities usually tend to use one or more of these mechanisms to attract the foreign investors and lenders.

**19. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

As a matter of Turkish aw, ministries do not have a legal personality separate from the personality of the State, and they sign and implement the project agreements on behalf of the State. Consequently, the obligations of the

Ministries qualify as State obligations. In case the relevant public authority is not a Ministry, then the Treasury can also provide separate guarantees for the projects. These guarantees can be provided as contractual guarantees or in the form of debt assumption, which is regulated by a special legislation as explained in Answer 24 below, or in the form of a Treasury guarantee, which is available in some types of PPP models.

**20. Are deductions from the service and availability payments subject to a cap?**

Deductions to be made from the payments to the project companies are usually subject to a cap in order to provide a guaranteed cash flow for continuity of the project. In most of the recent PPPs, deductions to be made from the availability payments are limited to 10% of the relevant availability payment, and deductions to be made from the service payments are limited to 20% of the relevant service payment.

**21. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

As a general principle, the legislation allows variations for PPP projects due to the changing economic conditions and the needs of the public. The variation amount is generally limited with a cap under the legislation or the project agreements. In most of the recent PPPs, variations in the construction works are limited to 20% of the total investment amount during the construction period and variations in the services are limited to 10% of the service payments during the operation period.

**22. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?**

In general, the gains arising from refinancing of the PPP projects are required to be shared with the relevant public authority. For

example, in the health PPP projects, the legislation provides that the gains arising from a refinancing and/or debt restructuring shall be equally shared by the project company and the administration through adjustment of the availability payments.

**23. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

In most of the recent PPPs, the lenders signed a direct agreement to have direct interface with the relevant public authority. In so doing, the public authority undertakes some obligations directly vis-à-vis the lenders under a separate agreement and lenders get control over some actions that may affect the continuity of the projects. Direct agreements mainly regulate the lenders' step-in rights; the process that the relevant public authority is obliged to pursue when it has the right to terminate the project agreement; and the right of lenders to receive the termination compensation directly.

**24. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

Law No. 4749 Concerning Public Financing and Debt Management provides the possibility of debt assumption by the Treasury for BOT projects with a minimum investment amount of TL 1 billion; and health PPP projects and education PPP projects realized by BLT model with a minimum investment amount of TL 500 million. According to the Regulation on Assumption of Debts by the Undersecretariat

of Treasury<sup>2</sup>, the limit of the debt assumed by the Treasury shall not exceed 85% of the principal debt amount if the implementation agreement is terminated due to the project company's fault; whereas the Treasury will assume the entire debt if no such fault is attributable to the project company. Treasury may also assume the financial costs arising as a result of the termination of any derivative transactions that are concluded in connection with the loan agreement, up to 10% of the principle debt amount.

**25. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

The termination compensation to be paid in case of termination of the PPP project agreements usually consist of the equity of the project company, the costs of financing (loan payments, interests etc.) and the loss of profit of the project company. If the termination is caused by a default of the project company, loss of profit is not compensated by the administration.

If it is envisaged under the direct agreement or the project agreement, termination payments may also be made directly to the lenders.

**26. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

There is no general domestic equipment incentive provided for all PPP projects. However, there are such incentives in some sectors. For example, the Renewable Energy

<sup>2</sup> Published in the Official Gazette No. 28977 dated 19 April 2014.

Law No. 5346 provides for a domestic equipment incentive for projects commissioned by 31 December 2020 for five years from the date of the commencement of operation.

**27. Are there tax advantages available to PPP projects?**

In accordance with the legislation, most of the PPP projects are exempt from value added tax, stamp-tax and legal fees for certain transactions during their investment periods. These incentives are usually not provided for the operation term.

**28. What are the other incentives available to PPP projects?**

In accordance with Decree No. 2012/3305 Concerning State Aid for Investments and the Communiqué No. 2012/1, certain incentives, such as customs duty exemption, tax reduction, social security premium support, interest rate support, income tax withholding allowance and land allocation are provided for investments in Turkey based on region, scale, sector and type of investments. These investments are available subject to certain conditions, such as the location and amount of the investment.

**29. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2015?**

As explained in Answer 1 above, according to the PPP Report, there are 164 PPP projects currently in operation and 34 PPP projects at the construction stage. The total investment amount of the PPP projects in operation is approximately USD 36 billion and total investment amount of the PPP projects which are at the construction stage is approximately USD 11 billion. Therefore, the total investment amount of the PPP projects is approximately USD 47 billion as of January 2016.

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# TURKMENISTAN



Kamilla Khamraeva



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## CENTIL LAW FIRM

### GENERAL

1. Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?

No, PPP model is not commonly used in Turkmenistan to develop infrastructure or any other projects.

2. Which sectors apply a PPP model to develop infrastructure projects?

N/A

### LEGISLATION & REGULATION

3. What are the principal laws and regulations? Is there a framework PPP Law?

There is no framework PPP law in Turkmenistan. There are no by-laws regarding the PPP model either. Laws and by-laws of general application will be used to govern any PPP project in Turkmenistan.

4. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?

There is no special regulatory body for PPP projects. In the absence of special regulation relating to PPP, PPP regarded an investment project. Investment projects are vested to the authority of the Ministry of Economy.

5. Are there any restrictions for foreign investors to develop/operate PPP projects?

There are no specific restrictions for foreign investors to develop / operate PPP projects. However, the absence of legal framework, little knowledge and lack of familiarity of state authority with the PPP mode will make it impossible for foreign investors to implement a project in accordance with internationally recognized models of PPP.

6. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?

Yes, it is a common practice to include a long-stop date for the completion of construction into project agreements. There is no specific indication or restriction regarding a long-stop date in Turkmen legislation.

**7. How are force majeure events defined, and what are the consequences of their occurrence?**

There is no force majeure event definition in Turkmen law. The occurrence of force majeure event shall be confirmed by a certificate issued by the Ministry of Economy of Turkmenistan upon the request.

**8. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

Under the provisions of general laws, expropriation of private property for the purpose of state needs is allowed under Turkmen laws but compensation mechanism is not specified. Any change in law as a rule becomes effective from the moment of publication in official newspaper and does not have retroactive effect.

**9. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

Not regulated under Turkmen laws.

**10. Is the concept of 'uninsurability' recognized in the project agreements?**

Not regulated under Turkmen laws.

**11. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

PPP projects are not governed by Turkmen laws. Under the provisions of general laws,

step-in and/or substitution mechanisms do not exist. Contractually such mechanisms can be created by the agreement of the parties and by inclusion of the relevant provisions into contracts.

**12. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

As of today, Turkmenistan is not a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"). Accordingly, a foreign arbitral award obtained in a state which is a party to that Convention shall not be recognized automatically and shall be enforceable by virtue of written motion submitted to the Arbitration Court of Turkmenistan.

There are no restrictions in Turkmen laws to choose neutral law as a governing law of contract.

**13. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

PPP projects are not regulated by Turkmen law. Turkmen laws of general application envisage testing procedure to procure services to be provided by the state company.

**14. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

Turkmen laws of general application provide that the acceptance of the facilities performed

shall be done solely by the public authority which is the state commission of acceptance. This commission includes the representatives of various relevant ministries and committees of the Government. As a result of testing and acceptance, the state commission issues an act of state acceptance which is a valid and sufficient evidence of the successful acceptance of the facilities. The title to these facilities shall be issued and registered on the basis of this state act of acceptance.

**15. Are there any expected changes or reform to the existing legislation?**

We are not aware of any possible changes in existing legislation or proposed reforms.

**FINANCING & INCENTIVES**

**16. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

PPP projects are not regulated by Turkmen law. All benefits and protective measures granted to foreign investor shall be specified in Presidential Decree.

**17. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

There is no regulation of PPP projects under Turkmen laws. The issue of guaranteed rate of return or a cap on the rate of return is not regulated by the laws of general application. In the absence of specific laws, it is unlikely that the Government will agree to accommodate any guaranteed rate of return or a cap of return for the project company or sponsor under the PPP project.

**18. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

Since there is no special regulation of PPP projects, no payment guarantee is provided under PPP or similar projects. All guarantees (if any) and incentives are limited to those that could be negotiated and granted by the Government via specific Presidential Resolution.

**19. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

Since there is no PPP regulation in Turkmenistan, the functions of the administration does not qualify as state obligations unless such obligations are undertaken by the Government.

**20. Are deductions from the service and availability payments subject to a cap?**

Since there is no PPP regulation in Turkmenistan, this matter is not addressed in Turkmen laws.

**21. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

Since there is no PPP regulation in Turkmenistan, this matter is not addressed in Turkmen laws.



**22. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?**

Since there is no PPP regulation in Turkmenistan, this matter is not addressed in Turkmen laws.

**23. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

The lenders may enter into a direct agreement with the Ministry of Economy which is authorized to act on behalf of the Government of Turkmenistan. There is no standard set of rights that the lenders usually acquire under a direct agreement. The set of rights may vary depending on the project and on the agreement reached between a foreign investor and the Government and included into the agreement.

**24. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

This matter is not addressed in Turkmen laws.

**25. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

This matter is not addressed in Turkmen laws.

**26. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

No incentives for domestic (local) manufacturing of equipment or materials are provided in Turkmen laws. However, general rules applied to investment projects require to employ at least 70% of local workers.

**27. Are there tax advantages available to PPP projects?**

This matter is not addressed in Turkmen laws.

**28. What are the other incentives available to PPP projects?**

This matter is not addressed in Turkmen laws.

**29. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2015?**

We are not aware of any PPP projects developed in 2015.

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# UNITED KINGDOM



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## GENERAL

1. **Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

Yes. Projects procured on a design-build-operate-transfer model with the principal contractor/project company (the “Project Company”) sub-contracting, construction, maintenance and service functions.

2. **Which sectors apply a PPP model to develop infrastructure projects?**

The PPP model has been applied to a wide range of sectors in the UK, including education, accommodation, waste and healthcare.

## LEGISLATION & REGULATION

3. **What are the principal laws and regulations? Is there a framework PPP Law?**

There is no specific PPP framework law but the UK is subject to EU procurement rules

and has enacted legislation which implements these rules (e.g. the Public Project Agreements Regulations 2015) and also legislation which includes provisions to assist with the enabling of PPP projects in certain sectors (such as the Infrastructure Act (2015)).

Although there is no framework PPP law, the Government has published detailed guidance in the form of the SOPC4 guidance under the PFI regime and now the PF2 guidance under the PF2 regime. These include detailed instructions and benchmarking on structuring PF2 projects, the allocation of risk, as well as specific template contractual terms. The Project Agreement terms set out in the PF2 guidance are those used to answer the relevant questions below, although it should be noted that there is scope to derogate from this benchmark position, albeit an Authority is unlikely to stray too far from the government’s established position and there are certain fundamental principles which will restrict the extent of such derogation.

4. **What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

There is no single UK PPP authority. The Infrastructure and Projects Authority has been established to support major infrastructure projects involving public sector capital and

assist with Private Finance 2 (the “PF2”) implementation. In addition, the National Infrastructure Commission was set up on 5 October 2015 as an independent body tasked with enabling long-term strategic decision making “to build effective and efficient infrastructure for the UK”.

In terms of procurement of PPP projects, this was previously split between central and national-level procurement by particular government departments and local level procurement by local authority bodies such as Local Education Authorities or regionally/sector focussed public corporations such as NHS Trusts. Further to the implementation of PF2 in 2012/13, the government has sought to centralise PPP procurement with national level procurement agencies being established for applicable sectors, such as the Education Funding Agency.

**5. Are there any restrictions for foreign investors to develop/operate PPP projects?**

There are no legal restrictions per se and PS2 does not contain any such restrictions, however, the Authority can object to unsuitable shareholders and participants.

**6. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

PF2 guidelines recommends that the handover or service commencement should not generally be allowed to be delayed indefinitely and a long stop date is therefore generally included after which the Authority which the Project Agreement may be terminated by the Authority.

The long-stop date should be reasonable, taking into account the nature of the project and the length of time the Project Company and its lenders should reasonably be allowed to

remedy the situation and should be extended to account for relief events, force majeure etc.

**7. How are force majeure events defined, and what are the consequences of their occurrence?**

Under the PF2 model “Supervening Events” are divided into three categories:

Compensation Events: i.e. events which are clearly at the Authority’s risk and in respect of which the Project Company should be compensated - “time and money relief”.

Relief Events: i.e. events which are best managed by the Project Company (although not necessarily in its control) and for which the Project Company bears the financial risk, but in respect of which no rights of termination should arise - “time-only relief”; and

Force Majeure Events: a limited set of events which arise through no fault of either party, which are best managed by the Project Company (although not in its control) and in respect of which rights of termination can arise.

“Force Majeure Event” is defined as the occurrence after the date of Project Agreement of:

- (a) war, civil war, armed conflict or terrorism;
- (b) nuclear, chemical or biological contamination unless the source or the cause of the contamination is the result of the actions of or breach by the Project Company or its sub-contractor; or
- (c) pressure waves caused by devices travelling at supersonic speeds, which directly causes either party to be unable to comply with all or a material part of its obligations under this Project Agreement.

On the occurrence of a Force Majeure Event, the parties should consult to find a way to

continue the Project although there may be no obligation to do this. Either party should be able to terminate for prolonged force majeure (typically 6 months). On termination for prolonged force majeure, the Project Company is entitled to a termination amount from the Authority which is determined on the basis that force majeure is outside the control of both parties and so the risk of occurrence should be shared. It therefore typically does not include loss of profits (see Section 25 below for further details).

**8. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

Expropriation, sequestration or requisition of a material part of the project assets and/or shares of the Project Company is an Authority risk, giving the Project Company the right to terminate for ‘Authority Default’.

Where not covered under the expropriation scenarios, changes in law, tend to be dealt with through a reimbursement of costs, rather than giving a termination right. Costs arising from discriminatory and specific changes in law (i.e. only impacting the Project Company/project or similar projects) which were not foreseeable at the time of the signing of the Project Agreement, and whether involving capital expenditure or not, should be borne by the Authority during both the construction and the service phases of the Project Agreement.

Costs arising from non-discriminatory/non-specific changes in law should, during the construction phase, be a Project Company risk, whether or not the Project Company was or should have been aware of the Change in Law at the time of the signing of the Project Agreement. General changes non-discriminatory law which come into effect during the service/operation phase and which were not foreseeable at the date of the Project

Agreement should be an Authority risk if they involve capital expenditure and a Project Company risk if they do not.

**9. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

An economic reinstatement test above which the lenders are entitled to appropriate the insurance proceeds in the place of applying them to reinstatement of the damage is envisaged in the PF2 guidance as a “last resort” of the lenders although it is generally considered not to be appropriate where there is a low risk of total destruction of the asset (such as with a road or rail project, or a project that has a number of geographically diverse sites). In practice however in many projects lenders will insist on an economic reinstatement test which will be set out in the lenders direct agreement. The test may be determined by reference to a financial threshold or by reference to the ability of the project company to satisfy financial ratios.

If the result of the project economic test allows the Lenders to appropriate the insurance proceeds, the Project Company remains under an obligation to reinstate the asset. In practice the Project Company will rarely have the financial means to do so and the result will be a Project Company default allowing the Authority to terminate the Project Agreement and to rebuild the project through a retendering process.

**10. Is the concept of ‘uninsurability’ recognized in the project agreements?**

The UK regime recognises the concept of ‘uninsurable risks’, which includes both unavailability of insurance for a particular risk, or premiums for a particular risk being charged at a level which is not commercially viable.

The PF2 guidance makes it clear that there should be no protection provided by the Authority to the Project Company for a specific term or condition of a policy (including deductibles at a specific level) becoming unavailable.

Where a risk is determined to have become uninsurable the Authority will assume the risk through self-insurance and the Project Company will be excused from the obligation to insure such risk, with a reduction made to the unitary charge corresponding to the premiums the Project Company is no longer paying.

If the uninsurable risk materialises, the Authority can choose either to pay an amount equal to the insurance proceeds that would have been payable had the insurances been available or to terminate the Project Agreement. If the Project Agreement is not terminated the Project Company is generally required to approach the insurance market at regular intervals to determine whether the risk has become insurable again.

**11. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

PF2 contains a right of step in for the Authority in certain emergency type circumstances or where the Project Company is in breach of its obligations (after a remedy period).

If the step is not the consequence of a Project Company breach then the Authority should indemnify the Project Company for direct losses suffered as the circumstances would be outside the scope of the obligations of the Project Company. If the step in occurs a result of the Project Company's breach the

Project Company will continue to be paid the unitary charge less an amount equal to all the Authority's Lenders step in rights are also included in the direct agreement (see point 23 below).

**12. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

PS2 guidelines contemplate the use of enforcement either through the courts or through arbitration.

Although from a legal standpoint it is possible for the parties to select the governing law, it would be highly unusual that the Project Agreement would be under a foreign law and extremely unlikely that the Authority would accept this.

**13. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

Yes. PF2 guidance suggests that "soft" services (e.g. catering) to be provided by the Project Company should be value tested at five year intervals. In general, however, PF2 envisages that such services will now be provided or procured by the Authority rather than the Project Company.

**14. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

The PF2 guidance recommends that acceptance testing should, in most cases, be done by way of a joint assessment by the

Authority and Project Company or by an independent third party, although there will be cases where both parties may accept that the Authority is the best judge (e.g. a defence equipment project). It is made clear that the Authority should in no circumstances rely on any technical or other adviser appointed solely on behalf of the Senior Lenders, but may accept an adviser that has been jointly appointed and owes duties to all sets of interested parties.

At the time of acceptance, there should be no “approval” of the means of delivery of the Service by the Authority, as this would involve the Authority assuming the Project Company’s delivery risk. Instead, acceptance should be based as far as possible on satisfaction by the Project Company of objective acceptance tests. Similarly milestone acceptance by the Authority is not deemed appropriate as, again, it dilutes the Project Company’s delivery risk.

**15. Are there any expected changes or reform to the existing legislation?**

No changes are expected imminently to the existing PF2 approach.

## FINANCING & INCENTIVES

**16. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

The payment mechanism is included as a schedule to the Project Agreement and operates by way of a unitary charge with non-performance/non-availability deductions as appropriate. The payment mechanism should be drafted in a way so as to enable the Authority to monitor the Project Company’s performance. It typically does not include a fixed portion.

Unless indexation is accounted for in the Project Company’s bid (which is not the preferred approach), the payment mechanism should include arrangements for indexing the unitary charge so as to allow the Project Company to protect itself against inflation over the course of the Project Agreement. The UK regime does not specifically contemplate FX protection and this is likely to be built into the Project Company’s contingency if required.

**17. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

The Project Agreement does not provide a capped or guaranteed equity IRR for sponsors except in the termination compensation payable for Authority default or Authority voluntary termination (see point 25 below).

**18. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

No.

During the financial crisis a State guarantee (or direct lending) was provided in a small number of projects but this was on an exceptional basis to address the lack of liquidity in the credit markets. This practice has been stopped.

**19. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

Where the authority is a government department, then the obligations are those of the State.

Where, as in many projects, the project is concluded with local authority bodies such as

Local Education Authorities or regionally/sector focussed public corporations such as NHS Trusts, there is no recourse either by law or through issue of a guarantee to the State. However, these are becoming less common and the government is seeking to centralise PPP procurement with national level procurement agencies.

**20. Are deductions from the service and availability payments subject to a cap?**

In many payment mechanisms there are typically no caps on deductions except at the level of zero meaning that where deductions exceed the amount of a unitary charge, the excess will be carried forward against future unitary charges, but may not result in a negative unitary charge.

Care is taken however when setting the level of deductions. PF2 guidance makes clear, however, that the deductions regime should take account of the commercial structure used by the Project Company to provide the services. Even for poor performance, the level of deduction should allow for the reality that the Project Company still needs to pay staff and sub-contractors. If the deduction exceeds the Project Company's profit, then the viability of performance may be threatened and performance may actually get worse rather than better.

**21. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

No. There is generally no cap on the amount or cost of Authority requested variations. However, the Authority will be liable for the cost of changes requested by it through either a lump sum payment or an adjustment to the unitary charge (usually at the Authority's option). Variations during the service period will often require a lump sum payment to be made to cover any capital expenditure involved

and a unitary charge adjustment to cover changes in services.

**22. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?**

Yes. It is quite typical for the Authority to insist on including a requirement that any refinancing gains are shared with it.

**23. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

Yes. The Agent (on behalf of the lenders), Authority and Project Company are all parties to the lenders' direct agreement. The lenders have the right to be informed by the Authority prior to any termination of the Project Agreement following which a termination standstill period will be applied. Lenders will also have the right to appoint a temporary step in entity and ultimately to novate the Project Agreement to a suitable substitute contractor. An undertaking of the Authority to make payments under the Project Agreement directly to the lenders following a Project Company default is sometimes included.

**24. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

No. There is no debt-assumption mechanism contemplated in PF2.

**25. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

See various termination scenarios below and relevant compensation payments:

Termination for Authority default or voluntary termination by Authority: Authority is obliged to compensate (i) the senior debt (including hedging) liabilities; (ii) Project Company redundancy payments and sub-Project Company breakage costs; and (iii) the loss of future IRR of the Project Company's shareholders, usually determined by reference to the base case IRR after taking account of the amounts previously paid by way of distributions and/or under shareholder loans.

Termination for Project Company default: The PF2 model has adopted a market value approach to compensation for Project Company default. If the lenders choose not step-in under the direct agreement and sell the project themselves, the project shall be retendered and the compensation shall be the resale value. If there is no liquid market i.e. there is an insufficient number of contractors in the prevailing relevant markets to ensure a fair resale value, the compensation will be based on a NPV calculation taking account essentially of the net present value of all future unitary charges (ignoring deductions) less the net present value of all costs required to carry out the Project Company obligations.

Termination for prolonged Force Majeure: The Authority must compensate the Project Company for (i) senior debt (including hedging) liabilities; (ii) Project Company redundancy payments and sub-Project Company breakage costs; and (iii) equity

contributions less amounts previously paid by way of distributions and/or under shareholder loans. Compensation for loss of profit is not included.

Termination for Project Company corruption or breach of refinancing provisions: Only senior debt (including hedging) liabilities are compensated where the Authority terminates due to a corrupt act by the Project Company or where the Project Company breaches refinancing provisions on the basis that sponsors should be responsible for the actions of the Project Company in these circumstances.

**26. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

Certain local requirements may be included in sub-Project Agreements for the provision of goods and soft-services, although there is no fundamental local content requirement.

**27. Are there tax advantages available to PPP projects?**

There is no specific tax relief for PPP projects although PF2 projects are now commonly structured by way of license (enabling the Project Company to do no more than go on to the land to perform the construction works and Services) rather than lease and lease back. The Project Company may therefore be eligible for composite trade tax treatment, under which all Project Company expenditure on the Project may be treated as being trading expenditure and thereby, in principle, wholly eligible for tax relief as an allowable trade deduction. This may give tax relief to design and construction expenditure that would not otherwise qualify.



**28. What are the other incentives available to PPP projects?**

Government participation in equity is an increasingly common feature which is aimed at reducing the long-term borrowing costs for the Project Company and thus help make PF2 projects attractive to long-term institutional investors looking for relatively low-risk, long-term stable returns for large infrastructure projects.

**29. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2015?**

According to a report prepared by HM Treasury (available at [http://webarchive.nationalarchives.gov.uk/20130129110402/http://www.hm-treasury.gov.uk/ppp\\_pfi\\_stats.htm](http://webarchive.nationalarchives.gov.uk/20130129110402/http://www.hm-treasury.gov.uk/ppp_pfi_stats.htm)), as of March 2012, there were 717 current projects of which 648 were operational, and the total capital costs of the existing PFI projects was £54.7 billion.

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# URUGUAY



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## FERRERE

### GENERAL

1. **Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

In Uruguay traditional public works concessions have been the predominant model used. Notwithstanding, in recent years due to a growing need to access private sector resources and experience to improve provision of public services and goods, it became necessary to have a specific legal framework regulating PPP models, using the latest solutions on the subject, applied in those countries where they have evolved most.

Since 2011 Uruguay has had new PPP rules, which do not repeal the public concession system but stand alongside it.

Considering the rather recent approval of PPP rules and the market's size in terms of investment, it can be concluded that the PPP system is becoming increasingly relevant in Uruguay.

The PPP model used is BOT (Build-Operate-Transfer) where the Public Administration entrusts to a private party, for a fixed period, the design, construction and operation of infrastructure or of one of those activities, in addition to financing. At the end of the PPP

contract term, the private party transfers the PPP project to the Public Administration.

As of March 2016, experience with PPPs has been limited to two projects awarded (one for prisons and the other for highway infrastructure), along with two projects about to be tendered involving highway infrastructure, and other projects in the works on railway infrastructure, education and health.

2. **Which sectors apply a PPP model to develop infrastructure projects?**

PPP contracts can be executed only in the following areas: infrastructure (such as highways, ports, airports and railways); energy infrastructure, waste treatment; prisons; health care centres, social housing, sports complexes, urban development and land settlement works. Certain related services can also be contracted.

In no case may PPP contracts involve: educational services at learning centres, health services in the case of health centres or security, sanitary or inmate retraining services in the case of prisons.

### LEGISLATION & REGULATION

3. **What are the principal laws and regulations? Is there a framework PPP Law?**

Uruguay's PPP regulatory framework was outlined by Law No. 18,786, passed in August 2011, for contracts involving development of

infrastructure works and provision of services related thereto.

Regulatory Decree No. 17/012 was signed in January 2012 to regulate diverse aspects facilitating implementation and execution of PPP agreements entered into by the pertinent Public Administration and the private sector.

Regulatory Decree No. 280/012 was approved in August 2012 to amend certain articles of the previous decree based on experience garnered in the initial stage of the system's application.

Regulatory Decree No. 251/015, approved in September 2015, introduces certain changes in PPP system operation, which reflect the experience of the two PPP projects awarded through that date. This decree seeks to more precisely define the competencies of the different agencies involved and the timeframes for action, in an effort to achieve a more expeditious process.

Additionally, other laws and regulations on PPPs are:

- Decree No. 45/013, issued in February 2013, establishes that the tax benefits included in the provisions of articles 11 et seq. of Law No. 16,906, passed in January 1998, in the context of Public Works Concessions and PPP Contracts, can be granted by the Executive Branch provided they are set forth in the bidding conditions for the pertinent tender prior to submission of bids.
- Recommended Best Practices Guides prepared by the National Development Corporation, for entities participating in PPP contract formalization processes.
- Law No. 17,555 (articles 19 and 20), passed in September 2002, and Decree No. 442/002, issued in November 2002, regarding Private Initiatives which at the proponent's option do not follow the process indicated in the PPP rules.

#### **4. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

There is no centralized authority for assessing advisability, structuring, development and implementation of PPP projects, but instead there are various bodies that participate in the different stages of the process. Following are the main bodies involved:

The contracting Public Administration, which in a particular PPP project within its competence will be responsible for the design, structuring and execution of the PPP contract. The concept of Public Administration comprises the Branches of Government, the Court of Auditors, the Electoral Court, the Administrative Claims Court, Autonomous Entities, Decentralized Services, and Departmental Governments.

The Technical Commission is appointed by the contracting Public Administration for each PPP project and advises the Public Administration on all stages of the contracting procedure.

The National Development Corporation (CND) is responsible for fostering PPP projects and preparing the applicable technical guidelines. It also advises on identification, design, study, promotion, selection and contracting of same.

The PPP Projects Unit operates within the Ministry of Economy and Finance (MEF). It is responsible for tracking economic and financial aspects related to initial studies for PPP projects. Similarly, it verifies compliance with budget aspects, evaluates associated risks, reviews bidding conditions, appropriateness of bids received, and provisional award in relation to the previously defined project model.

The Office of Planning and Budget (OPP) is the executive unit of the Office of the President of Uruguay. It is responsible for

ensuring appropriate development of each project in line with the fundamental conditions and features of the PPP contracting model.

The Ministry of Economy and Finance (MEF) jointly with the OPP reports on the prior assessments and contracting bases for PPP projects, taking into consideration the project's social and economic impact, budget aspects, economic-financial viability, and the benefits of adopting this contracting mode.

Creation of an Assessment Coordinating Committee for PPP projects is at the discretion of the OPP and MEF, for purposes of achieving coordinated actions by the two bodies.

The Project Registry centralizes contracts signed for development of PPP projects, calls for bidders and private initiatives, etc.

The Court of Auditors has competence regarding adjudication of contracts in competitive PPP project processes. It also is involved in the event of amendment of PPP contracts.

The National General Accounting Office (CGN) is responsible for keeping an identifiable record of firm and contingent liabilities under PPP contracts; reporting the amounts thereof, separate from Public Debt, for use in preparation of each budget law and subsequent laws for rendering of accounts; and reporting on the investment made per tax year and by budget item.

**5. Are there any restrictions for foreign investors to develop/operate PPP projects?**

There are no restrictions on participation of foreign investors in development and operation of PPP projects in Uruguay.

The PPP experience in Uruguay has included international public tenders, in which foreign investors have participated under the same conditions as local investors.

**6. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

Yes. PPP rules set a time limit of 35 years for PPP agreements, including extensions.

As of March 2016, PPP projects tendered in Uruguay have established contracting terms ranging between 20 and 22.5 years.

**7. How are force majeure events defined, and what are the consequences of their occurrence?**

PPP rules include as grounds for contract termination the impossibility of the contractor's compliance as a consequence of a force majeure or unforeseeable event.

If the unforeseeable or force majeure event was to affect compliance solely of certain contract obligations, or of those related to part of the agreed investment, and to the extent that the other obligations can be fulfilled separately, the parties (the contracting Public Administration and the contractor) must agree, in line with the bidding conditions, as to adjustment of the legal, technical and economic stipulations of the agreement, to adapt it to fulfilment of the subsisting obligations.

PPP projects include references to damage indemnifiable by the contracting Public Administration to the contractor, in the event of extinguishment of the agreement due to a force majeure or unforeseeable event. This aspect is covered further in the response to question No. 28 below.

In turn, the general civil liability system, provided for in articles 1343 and 1549 of the Uruguayan Civil Code, eliminates all hypotheses of liability for any obligation under a contract if the nonfulfilment is due to a force majeure event. The said articles define force majeure as any event beyond the parties' control and that is both unforeseeable and irresistible.

**8. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

For each PPP project, in order to quantify its cost, prior to and as part of the project

assessment documents, risks are identified and it is determined whether they will be allocated to the private sector or rest with the contracting Public Administration.

Experience with PPP projects in Uruguay in general shows the following allocation of the principal risks:

Risk category	Administration	Contractor	Risk description
Risks of implementation	X		Difficulty in delivery of land in line with a previously defined schedule, causing delays in the construction process. Risks of expropriation.
Risks of operation and maintenance-availability		X	Level of service and quality of project in line with specifications cannot be achieved.
Risks of construction – delays		X	Engineering design established by contractor for project may be insufficient, which may give rise to additional works and/or complementary investments. Risks of increased costs due to delays in execution of activities and programs.
Risks of construction- cost overruns	X	X	Increase in costs due to increases in volumes of materials, inputs, labour and design specifications.
Geological risks		X	Geological risks of existing emplacements.
Archeological risks	X		Archeological remains are found during execution of work that interfere with normal development of the construction project.
Environmental risks	X		Changes in environmental rules that affect project execution.
Environmental risks		X	Damages for unforeseeable environmental losses.
Technological risks		X	Equipment and technology necessary for operation reach end of useful life and become obsolete, or are not operational to satisfy project requirements, leading to cost increases.
Financial risks - financing		X	Non-obtainment of appropriate financing. Project is unable to raise sufficient funds to be materialized, which causes delays.
Financial risks – interest rate		X	Interest rates fluctuate unfavourably, increasing financial costs.
Financial risks – exchange rate	X	X	Exchange rate fluctuates unfavourably, affecting financing and cost of imported inputs.

Risks of force majeure	X		Natural events, conflicts of war, terrorism or other uninsurable risks preventing project development, increasing costs, interrupting service so as to not permit appropriate operation.
Political risks – changes in legislation	X		Change in law and/or regulations of standards (technical, environmental, economic, etc.) affecting costs, income and investments, impacting project viability.
Political risks – contract termination	X		Due to political reasons project development ceases and generates early termination, requiring payment of compensation and/or taking legal action.
Political risks – macroeconomic situation		X	Risks deriving from national and international macroeconomic situation.
Social risks – conflicts alien to project	X		Protests, work stoppages, strikes and/or cultural issues that interfere with normal development of project, lengthening timeframes and increasing costs beyond initial estimates.
Labour risks		X	Labour conflicts.

**9. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

PPP rules establish oversight powers for the contracting Public Administration. In the event of the contractor's noncompliance of its obligations under the PPP agreement, the contracting Public Administration may apply monetary penalties to be deducted from payments it is required to make and/or from the contract performance bond to be provided by the contractor.

In relation to protection of lender credits, PPP rules establish that the contractor may establish, to the benefit of its creditors and by virtue of execution of a PPP agreement, pledges on future fund flows to be generated by the project, as well as guarantee trusts and all other types of personal or real guarantees and current or future rights.

Specifically, PPP rules regulate assignment of the PPP contract to the benefit of the project's creditors, for purposes of having such creditors assume performance of the contract by means of assignment thereof to a third party. The contract will define the compliance risks that will authorize the creditor to demand performance of the contract assignment obligations by the contractor. For this to occur the contract must have the prior authorization of the contracting Public Administration, which must verify that the proposed assignee meets the requirements and conditions necessary to continue performance of the contract. Once the assignment has taken place, assignee will subrogate the assignor in its rights and obligations.

Another guarantee regulation under PPP rules is the pledge of rights deriving from PPP contracts and on the assets included in its execution, exclusively to guarantee fulfilment of the obligations with the financiers of the work, its operation or maintenance. Creation of this right requires notification to the contracting Public Administration. The pledge

creditor shall have the right to enforce the pledge either because the guaranteed obligation is not totally or partially met at its due date, or when the contract is terminated due to the contractor's non-performance. In both cases the pledge creditor must notify the contracting Public Administration of its intention to enforce the pledge. When enforcement derives from contract termination due to the contractor's non-performance, such notice of intention to enforce the pledge must be given within ten days following notice to the creditor of the decision to terminate the contract.

**10. Is the concept of 'uninsurability' recognized in the project agreements?**

Yes. The PPP projects published provide for the contractor's liability for damages caused to the works being performed or to infrastructure in general, to persons working at same and to third parties, as well as public or private property, regardless of whether such damages derive from manoeuvres at the premises or other reasons attributable to same, its representatives, employees, subordinates and subcontractors, during the term of effectiveness of the contract.

The projects have provided that the contractor must obtain, prior to commencement of contract performance and up to approximately four years following its termination, all-risk insurance for an amount similar to that of the contract. Policies must be approved by the contracting Public Administration.

**11. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

Yes. PPP rules establish as cause for contract extinguishment, among others, the impossibility of performance due to insolvency proceedings with respect to the contractor, and the occurrence of any grounds disqualifying

the contractor from performing the contract. In such cases the contracting Public Administration may take over the purpose of the PP contract.

For such purposes the contracting Public Administration shall appoint an intervener, who shall have the powers necessary to ensure contract performance. The intervener shall be civilly, criminally and administratively liable for the intentional or negligent actions or omissions it incurs in the exercise of such capacity.

Intervention cannot continue for a period exceeding twenty-four months. In such period the Administration must resolve on whether to continue or cease the activities subject of the contract.

**12. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

PPP rules establish that arbitration shall be applicable for resolution of disputes deriving from application, interpretation, execution, performance and extinguishment of contracts entered into in the context of said rules. The arbitrators shall be appointed by mutual agreement of the parties or, in the absence thereof, in accordance with the provisions of article 480 of the General Code of Procedure, and shall decide under law. The arbitral tribunal's award shall be unappeasable.

The contract relationship that may arise between the contractor and those financing the project (while it must be authorized by the contracting Public Administration) is not part of the PPP contract, and hence is not subject to the aforesaid rule. The contractor and its lenders may turn to international arbitration and foreign law to govern their relationship.

If the guarantees established by the contractor in favour of lenders are as provided in PPP rules, such guarantees must be subject to local law and to arbitration as indicated in the first paragraph of this response.

**13. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

Yes. While the criteria for evaluating bids in tender processes must be stipulated in the pertinent bidding conditions, PPP rules require bids to be judged on the basis of, among other aspects, the bidder's background and experience in the subject of the PPP contract, its technical and economic solvency, the quality of the services to be provided, and the value and technical appropriateness of the bid.

**14. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

One of the guiding principles of the PPP system is the principle of "control," whereby the contracting Public Administration must establish in PPP agreements adequate control mechanisms for effective protection of user rights and the continuity and efficiency of the provision of the pertinent services.

The contracting Public Administration shall be competent to control contract performance, and must inform the PPP Projects Unit, semi-annually, on the status of compliance with same. It must likewise inform the said Unit of any material change or noncompliance within ten business days of verification of such change or noncompliance.

The controls to be exercised by the contracting Public Administration shall cover technical,

operating, legal, economic, financial, accounting and environmental aspects.

The contracting Public Administration shall have broad powers of control and may use different instruments to exercise its functions such as requirements for information, external audits, performance evaluations, inspections, and expert reports. For such purposes the contractors shall be obliged to provide, at the request of the contracting Public Administration, all information and documentation related to compliance with the contract that the latter requires, without the possibility of alleging trade secrets regarding same.

In the five PPP projects published, the choice has been for a control body appointed by the contracting Public Administration, consisting of technical experts, who exercise their functions with technical independence.

**15. Are there any expected changes or reform to the existing legislation?**

No substantial changes in the current PPP system are expected in the short term.

## FINANCING & INCENTIVES

**16. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

PPP rules indicate that as consideration for the activities assumed, depending on the type and features of each project, the contractor may receive different types of income, on an exclusive or combined basis, paid by users or the contracting Public Administration, among others. Depending on each project's features and structure, the agreement may provide for the contracting Public Administration to collect income consisting of payments by the



contractor, users or others who may be stipulated depending on the case.

Experience with PPPs shows that the contracting Public Administration has applied terms of payment for availability, linked to meeting certain indicators, in Uruguayan legal currency at the quotation of the Indexed Unit (UI) on the payment date.

The UI has been included in PPP projects as the currency in which the bidders must submit their bids. The UI is a unit of value that is readjusted based on Uruguay inflation, measured by the Consumer Price Index (IPC), expressed in pesos. The authority that sets and publishes the value of the UI is the National Statistics Institute (INE). This unit is published at the start of each month.

While the rules do not provide as to the impact of inflation or exchange rate fluctuations, PPP projects underway in Uruguay have regulated the subject by assigning the risk to the contractor.

**17. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

No. PPP rules establish that the contracting Public Administration does not guarantee a minimum level of income, or minimum profitability to the contractor for performance of the PPP agreement.

**18. Is any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

No. No guarantee is provided by the contracting Public Administration for the payments for which it is liable under PPP agreements.

**19. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

Payment obligations of the contracting Public Administration qualify as State guarantees or risks, provided the definition of the contracting Public Administration includes one of the Branches of Government.

**20. Are deductions from the service and availability payments subject to a cap?**

This issue is not regulated by PPP rules.

In the published projects the contracting Public Administration did not limit deductions that could be made on payments to the contractor.

**21. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

The PPP contract may recognize the power of the contracting Public Administration to modify the contract, stipulating the specific aspects of the contract susceptible to such modification, the consideration applicable in such cases, as well as the maximum amount of the additional investments that modifications may require and the term within which the power may be exercised.

In this hypothesis, the contract shall be entitled to economic compensation pertaining to the additional net costs it incurs for same. The maximum amount of new investments or of spending for the service may not exceed 20% (twenty percent) of the budget for the work or the expense in operation agreed to in the original contract.

Similarly, the PPP contract may establish conditions, upon compliance with which the parties may agree to revision. In all cases the

maximum amount of these new investments cannot exceed 50% (fifty percent) of the budget for the work or the expense in operation pursuant to the original contract, and in the construction phase said percentage cannot exceed 30% (thirty percent).

**22. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?**

No. The rules do not establish any obligation for the contractor to share gains obtained by performance of a PPP project.

**23. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

No. The lenders (while they must be authorized by the contracting Public Administration) regulate their relationship directly with the contractor.

**24. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

This aspect is not governed by PPP rules.

The published PPP projects include provisions on the contracting Public Administration obligations vis-à-vis the contractor's lenders, in the event that extinguishment of the PPP contract is due to a cause attributable to it. The PPP projects have provided that payment to financial creditors will be made in the order of preference of their credits, up to the limit of same, and up to the total amount of indemnification to be paid to the contractor as

a consequence of extinguishment of the PPP contract, and, as applicable, on a pro rata basis in accordance with their credits.

**25. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

PPP rules do not provide for this aspect.

Published PPP projects include provisions on the contracting Public Administration's obligations in the event that the PPP contract extinguishment is due to a cause attributable to same. Only in such case will the contractor be indemnified for damages it may suffer, along with payment for all investments made, less those already amortized.

Grounds for contract extinguishment attributable to the contracting Public Administration have been understood to include, among others, withdrawal due to reasons of public interest, impossibility of performance due to actions taken by the State, contract non-performance due to non-payment by the contracting Public Administration for a period of time, unforeseeable events and force majeure.

PPP project provisions have included in the concept of damages loss of profits, financing costs and derivative contract termination costs, if any, in addition to all other present or future damages, be they as compensation, indemnification or differential, for any reason of an administrative, civil, labour, tax and/or criminal nature.

In general it is provided that in the event of contractor debts, the contracting Public Administration, upon notice to the contractor for a certain term, shall first apply deduction of

the contractor's debts to the contracting Public Administration, in second place it shall deduct and pay the debts to the contractor's personnel, and in the third place shall deduct and pay financial creditors their credits pending payment.

Payment to financial creditors is to be made in the order of preference of their credits up to the limit of same and up to the total amount of the indemnification to be paid to the contractor, as a consequence of extinguishment of the PPP agreement, and on a pro rata basis depending on their credits, if applicable. If there is any remainder it shall be paid to the contractor.

The order of preference established in the case of debts shall be applied both to the damages component and to payment of reimbursement of investments.

For the case of PPP contract extinguishment by mutual agreement of the contractor and the contracting Public Administration, published PPP projects have provided for the need to obtain prior written consent of the creditors holding a pledge on the rights deriving from the contract, and/or assignment of same. The payment to be made by the contracting Public Administration to the contractor shall follow the guidelines indicated above in this questionnaire.

**26. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

Pursuant to the provisions of Decree No. 181/015, issued in July 2015, contractors on PPP projects may amortize the right they hold over a period of ten years, provided that it is so established in the bidding conditions. This provision is applicable to final awards issued as of July 1, 2015.

Since the date of approval of the decree PPP projects have included this incentive.

**27. Are there tax advantages available to PPP projects?**

For PPP projects the Executive Branch may grant tax exemptions and tax benefits including: i) exemption from all taxes and assessments paid upon importation of equipment, machinery and material provided they are not declared competitive with national industry, ii) credit for VAT included on acquisitions of goods and services that are part of the cost of equipment, machinery, materials and services for the promoted activity, and (iii) exemption from Net Worth Tax (IP) on intangible and fixed assets for use in the investment project for the entire term of the contract.

As of March 2016, the five published PPP projects included such an exemption by the Executive.

**28. What are the other incentives available to PPP projects?**

No additional incentives are available beyond those indicated in Sections 26 and 27 above.

**29. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2015?**

In the 2014-2015 period the Government invested US\$ 300,000,000 through PPP projects. This has been the first experience with PPP projects in Uruguay, focusing on prison and highway infrastructure areas.

In August 2015, the President of Uruguay announced the investments planned for the 2015-2019 period, noting that priority would be given to investments in infrastructure, to ensure sustainability of growth and the levels of production of the Uruguayan economy.

The investment in infrastructure through PPP projects includes: i) a package of seven projects for rehabilitation of national highways, with an estimated investment of US\$800,000,000, two of which have been launched in 2016; and ii) investment in the railway sector through a PPP

project also already launched in 2016, with an investment of approximately US\$90,000,000.

Following is the investment plan announced by the Government for the 2015-2019 period:

Sector	Estimated investment in US dollars (US\$) millions
<b>Energy.</b> Regas plant; Electrical transmission network; Wind, solar and biomass generation	4,230
<b>Highways.</b> Reconstruction, rehabilitation and improvement of national highway routes	2,360
<b>Social infrastructure.</b> Early Childhood Centres, Educational Centres, Improvement of Hospital and Prison Infrastructure	1,870
<b>Housing.</b> Social housing	1,320
<b>Communications.</b> Communications network	750
<b>Water and Sewage.</b> Sewage network, drinking water, waste water treatment	550
<b>Ports.</b> Wharfs, Dredging, Port Terminals	550
<b>Railways.</b> Track and rolling stock	360
<b>Other.</b> Routes and rolling stock	380
<b>Total</b>	<b>12,370</b>

It is estimated that 1/3 of these investments will be made through PPP contracts. The remaining 2/3 may involve contracting with private sector through other systems.

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# UZBEKISTAN



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## CENTIL LAW FIRM

### GENERAL

1. **Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

No, PPP model is not commonly used in Uzbekistan to develop infrastructure or any other projects.

2. **Which sectors apply a PPP model to develop infrastructure projects?**

N/A

### LEGISLATION & REGULATION

3. **What are the principal laws and regulations? Is there a framework PPP Law?**

There is no framework PPP law in Uzbekistan. There are no by-laws regarding the PPP model either. Laws and by-laws of general application will be used to govern any PPP project in Uzbekistan.

4. **What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

There is no special regulatory body for PPP projects. In the absence of special regulation relating to PPP, PPP regarded an investment project. Investment projects are vested to the authority of the Ministry of Foreign Economic Affairs, Investments and Trade (MFEAIT).

5. **Are there any restrictions for foreign investors to develop/operate PPP projects?**

There are no specific restrictions for foreign investors to develop/operate PPP projects. However, the absence of legal framework and little knowledge and familiarity of state authority with the PPP mode will make it impossible for foreign investors to implement a project in accordance with internationally recognised models of PPP. There has been an attempt to carry out one PPP project in Uzbekistan. The project had stalled at the stage of negotiation and has been cancelled eventually.

6. **Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

Yes, it is a common practice to include a long-stop date for the completion of construction into project agreements. There is no specific

indication or restriction regarding a long-stop date in Uzbek legislation.

**7. How are force majeure events defined, and what are the consequences of their occurrence?**

Since PPP is not regulated in Uzbekistan, we reply to this question on the basis of laws of general application. There is no force majeure definition in Uzbek laws. In an investment agreement, a force majeure clause is discussed, negotiated and finalized in an Investment Agreement between the major investors (sponsors) of the project and the government represented by MFEAIT. Therefore, what events to include into force majeure and what are the consequences of force majeure occurrences are subject to negotiation between the parties.

**8. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

Since PPP is not regulated in Uzbekistan, we reply to this question on the basis of laws of general application.

As a general rule, foreign investments and foreign investors' assets located in Uzbekistan are not subject to nationalisation. However, in limited situations such as during natural disasters, accidents, epidemics etc. nationalisation (requisition) of property is permitted, provided adequate compensation is made by the Government. The quantum of such compensations is not clearly determined by the legislation other than stating that it must be "adequate and proportionate" to the property nationalised. If the foreign investor/owner of the nationalised property does not find compensation commensurate to the loss, he may bring a claim in an Uzbek court, so the court may assess the "adequacy"

of the compensation. In practice, however, courts tend to agree with state-assigned compensations and reject such claims.

The major political risk is the change of political will in the country and, as a consequence, the breach or repudiation of the Investment Agreement by the Government, violation of or annulment or revocation of Governmental and Presidential Decrees issued with respect to the specific investment project.

The independence of the judicial system and its immunity from political and nationalistic influences in Uzbekistan is not yet well established. Enforcement of court judgments can sometimes be time consuming because of a large number of outstanding court judgments. Uzbek laws, regulations and court practice are subject to frequent change, varying interpretations and inconsistent and selective enforcement.

**9. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

Not regulated under Uzbek laws.

**10. Is the concept of 'uninsurability' recognized in the project agreements?**

Not regulated under Uzbek laws.

**11. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

Not relevant. PPP projects are not governed by Uzbek laws. Under the provisions of general laws, step-in and/or substitution mechanisms do not exist. Contractually such

mechanisms can be created by the agreement of the parties and by inclusion of the relevant provisions into contracts. However, their implementation should be made in compliance with Uzbekistan mandatory laws.

**12. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

The choice of arbitration as the form of dispute resolution and any centre of good international arbitration practice as the seat of arbitration is valid and binding under the Laws of the Republic of Uzbekistan. The Republic of Uzbekistan is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “Convention”). Accordingly, a foreign arbitral award obtained in a state which is party to that Convention should be recognised and enforced by an Uzbek court, subject to the qualifications in the Convention and compliance with Uzbek civil procedure and the procedures established by the Laws of the Republic of Uzbekistan on commercial arbitration for the enforcement of arbitration decisions.

There are no restrictions in Uzbek laws to choose foreign law as a governing law of project agreements and direct agreements with lenders.

**13. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

PPP projects are not regulated by Uzbek law. Uzbek laws of general application envisage testing procedure to procure services to be provided by the state company.

**14. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

Uzbek laws of general application provide that the acceptance of the facilities performed shall be done solely by the public authority which is the state commission of acceptance. This commission includes the representatives of various relevant ministries and committees of the Government.

As a result of testing and acceptance, the state commission issues an act of state acceptance which is a valid and sufficient evidence of the successful acceptance of the facilities. The title to these facilities shall be issued and registered on the basis of this state act of acceptance.

**15. Are there any expected changes or reform to the existing legislation?**

We are not aware of any changes or reforms of the existing legislation that would promote PPP in Uzbekistan.

## FINANCING & INCENTIVES

**16. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

No payment mechanism for PPP projects exists. Foreign investors receive incentives and protection via a Cabinet of Ministers’ Decree and a President’s Resolution, as well as bilateral investment agreements to be entered with the Government of Uzbekistan represented by MFEAIT. These documents establish a special tax, investment, payment, convertibility, and other regimes granted to

specific investors in connection with certain project developed in Uzbekistan.

**17. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

There is no regulation of PPP projects under Uzbek laws. The issue of guaranteed rate of return or a cap on the rate of return is not regulated by the laws of general application.

**18. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

Since there is no special regulation of PPP projects, no payment guarantee is provided under PPP or similar projects. All guarantees (if any) and incentives are limited to those that could be negotiated and granted by the Government via an Investment Agreement and the specific Cabinet of Ministers' Decree and specific Presidential Resolution.

**19. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

Since there is no PPP regulation in Uzbekistan, the functions of the administration does not qualify as state obligations unless such obligations are undertaken by the Government via entering into an Investment Agreement or a payment demand guarantee.

**20. Are deductions from the service and availability payments subject to a cap?**

Since there is no PPP regulation in Uzbekistan, this matter is not addressed in Uzbek laws.

**21. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

Since there is no PPP regulation in Uzbekistan, this matter is not addressed in Uzbek laws.

**22. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?**

Since there is no PPP regulation in Uzbekistan, this matter is not addressed in Uzbek laws.

**23. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

There are no limitations of Uzbek laws that would prevent the lenders from signing a direct agreement. A direct agreement must be signed with the MFEAIT that is the only state authority that is authorised to act on behalf of the Government of Uzbekistan with foreign investors. There is no standard set of rights that the lenders usually acquire under a direct agreement. The set of rights may vary depending on the project and on the agreement reached between a foreign investor and the Government and included into the Investment Agreement.

**24. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

There are no statutory provisions addressing this issue. PPP projects are not regulated by specific laws in Uzbekistan. From our experience, under projects other than PPP, the



obligations of the state authorised authority (which is MFEAIT) are specified in an Investment Agreement. They may include, among other things, the assumption of the debt of the project company.

**25. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

There are no statutory provisions addressing this issue. PPP projects are not regulated by specific laws in Uzbekistan. From our experience, under projects other than PPP, this matter has been reached contractually by the parties and included into the Investment Agreement and other project agreements.

**26. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

No, there is no incentive for local manufacturing of equipment or materials used

in the construction of PPP projects under Uzbek law.

The most often ratio of local employees to foreign staff in a joint ventures is 80-20%.

**27. Are there tax advantages available to PPP projects?**

There are no tax advantages available to PPP projects.

**28. What are the other incentives available to PPP projects?**

There are none incentives specified by Uzbek law available for PPP projects.

**29. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2015?**

As far as we are aware, only one PPP project had been started but never finished due to the absence of legal framework and failure of the parties to reach an agreement of various matters of the project.

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